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Title: Does Scottish law and policy currently provide adequate protection to South-Asian female victims of domestic violence?

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Word Count: 14998

To all the women and children whom slept with tears in their eyes and hope in their heart.

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Abstract

For many women throughout the globe, domestic violence is part of their everyday life.

Although international law instruments have set standards against this violence, centuries of sub-ordination of women in gender roles has resulted in an acceptance by many cultures and countries of domestic violence. Thus, adequate protection is required for these women. This dissertation will assess the protections arising from Scottish law and policy and examine the extent to which they protect South-Asian women (SAW) victims of domestic violence living in Scotland. In doing so, it will examine the status of domestic violence under international law, outlining a norm against domestic violence. Part two will then outline the experiences of these women, highlighting the intersectional understanding to their experiences. Finally, Part three will focus on current Scottish law and policy in relation to domestic violence and conclude that SAW victims of domestic violence are not adequately protected by current Scottish law and policy. Instead wider consideration of an intersectional approach must be adopted through both law and policy, which can be shown through the provisions of the Istanbul Convention.

Introduction

“From her, kings are born. From woman, woman is born; without woman, there would be no one at all.” – Guru Granth Sahib Ji – Religious scripture of the Sikh Religion.

Unfortunately, the view of the Guru Granth Sahib Ji has not been sustained throughout history. Instead the plight of women’s rights in international law, particularly in relation to violence against women, has been fraught with difficulty with early international instruments outlining a cautious approach to bringing violence against women into the international limelight.¹

Despite this initial reluctance, international law has now sought to draw a line on domestic violence against women. Using the Convention on the Elimination of Discrimination Against Women² international legal instruments look to eradicate the issue through the lens of inequality. Yet what happens when the gender of the victim is not the only major reason behind the rate of domestic violence that they face? The experience of the South-Asian Women (SAW)³ provides one of the major examples which portrays that not only gender but a multitude of factors, including cultural, play a strong role in domestic violence. This intersectional approach has been adopted by various authors, including Thiara and Gill who in highlighting the experiences of SAW in England and Wales, argue the importance of placing emphasis on the structures of power and domination as well as cultural.⁴

¹ It was not until the third World Conference in Nairobi 1985, that violence against women became more prominent and emerged as a ‘serious international human rights concern’.

² Convention on the Elimination of All Forms of Discrimination against Women 1979, GA res. 34/180, 18 December 1979, 1249 UNTS 13; entered into force 3 September 1981 (hereinafter CEDAW).

³ SAW refers to women who are of South-Asian ethnicity.

⁴ R.K.Thiara and A.K.Gill, ‘Violence against Women in South Asian Communities : Issues for Policy and Practice’ (Jessica Kingsley Publishers, 2009) 18

However, whilst much research has been conducted in England and Wales⁵, little regard has been taken about the experiences of SAW living in Scotland. In doing so, Scottish legal and policy instruments drawn to provide protection to domestic violence victims remain unanalysed in this context. Though Mirza⁶ outlines the experiences of SAW victims of domestic violence in Scotland, she does not relate this to the application of policies and laws.

This dissertation will therefore add to existing literature on SAW victims of domestic violence by assessing Scottish legal and policy frameworks to evaluate whether they provide adequate protection to SAW victims of domestic violence living in Scotland. This will be achieved through an analysis of three parts. Firstly, we will assess the international law relating to domestic violence, highlighting the emergence of a customary international norm against domestic violence. We will then highlight the real experiences of SAW victims of domestic violence and argue to achieve protection to SAW victims of domestic violence, an intersectional approach must be adopted. Finally, we will analyse the Scottish legal and policy framework in relation to the domestic violence standard outlined in international law and whether this provides adequate protection to SAW victims of domestic violence in Scotland. Considering its recent adoption, we will focus on the Domestic Abuse (Scotland) Act 2018 and Joint protocol, and the Equally Safe Strategy and National Advisory Council on Women and Girls Reports. It is during this final stage that we will consider whether the ratification of the Istanbul Convention could provide the necessary protection to SAW

⁵ S.Anitha, 'No Recourse, No Support: State Policy and Practice towards South Asian Women Facing Domestic Violence in the UK', [2010] 40(2) The British journal of social work 462- 479

⁶ N.Mirza, 'South Asian women's experiences of family abuse: the role of the husband's mother' [2016] Briefing 80 Centre for Research on Families and Relationships, Available at <<https://www.era.lib.ed.ac.uk/bitstream/handle/1842/14199/CRFR%20briefing%2080.pdf?sequence=1&isAllowed=y>> last accessed 18 August 2019

victims of domestic violence where the current Scottish approach does not. If adopted, Scotland will be implementing a true intersectional gold standard approach which protects all women victims of domestic violence. This dissertation aims to ensure that SAW victims of domestic violence in Scotland are given the protection that they are entitled to under international law. No more should these women suffer in silence with the mistaken belief that the law of their land is not for them.

Chapter One – Domestic Violence on an International Platform

“The twentieth century will be remembered as a century marked by violence. It burdens us with its legacy of mass destruction, of violence inflicted on a scale never seen and never possible before in human history.

Less visible, but even more widespread, is the legacy of day-to-day, individual suffering. It is the pain of children who are abused by people who should protect them, women injured or humiliated by violent partners... This suffering... is a legacy that reproduces itself, as new generations learn from the violence of generations past, as victims learn from victimizers, and as the social conditions that nurture violence are allowed to continue. No country, no city, no community is immune.

But neither are we powerless against it.”

Nelson Mandela⁷

Domestic violence against women is one of the most serious causes of illness, poverty, homelessness and disability in women around the world.⁸ It is far from a new phenomenon and has been used against women in all walks of life as a form of control and submission. It is therefore surprising to note that international law does not contain a specific treaty provision that prohibits domestic violence against women. Instead a norm within international law can be shown to have developed. This chapter will assess the international law on domestic violence through the dichotomy of the public/private division, right of non-

⁷ Nelson Mandela, ‘Foreword’ in Etienne G Krug, *World Report on Violence and Health* (World Health Organisation, 2002) ix

⁸ B.Meyersfeld, ‘*Domestic Violence and International Law*’ (Oxford, Hart, 2010) 1

discrimination and the prohibition of torture and other cruel, inhumane or degrading treatment or punishment, to outline that such a norm now exists.

Domestic Violence through International Law

The most explicit reference to Women's rights on an international level was framed through the UN Convention on the Elimination of Discrimination Against Women (CEDAW).⁹ Often referred to as the Bill of Rights for women¹⁰, it was unanimously adopted by the UN General Assembly in 1979. It places an international obligation on state parties to eradicate discrimination against women in all its forms.¹¹ Yet, as a reference for women's rights regarding violence against women, the convention very surprisingly falls short. The only provision that relates to violence against women is regarding trafficking and prostitution.¹² This is particularly problematic for domestic violence as the Convention only relates violence against women to that of non-family violence. However, one could infer violence against women from other provisions such as Article 1 in its definition of discrimination against women.¹³

Furthermore, CEDAW exists as a lax legal instrument impeding the ability of the Convention to make a significant contribution to women's rights. The Convention lacks enforcement power. The Committee¹⁴, established to monitor the implementation and Optional Protocol to the Convention¹⁵ which created an individual communications mechanism, only contain

⁹ CEDAW (n.2)

¹⁰ UN Women <<https://asiapacific.unwomen.org/en/countries/india/cedaw>> last accessed 18 August 2019

¹¹ CEDAW (n.2) Art.2

¹² CEDAW (n.2) Art.6

¹³ More will be discussed regarding the link between domestic violence and the right of non-discrimination further in the chapter.

¹⁴ Ibid Art.17

¹⁵ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Optional Protocol), UNGA Res 54/4, Annex (22 December 2000) UN Doc A/Res/54/4

investigatory powers.¹⁶ Additionally, the large number of reservations to the Convention¹⁷ is problematic as the number of reservations increases, the benefits that individuals' gain from the treaty decreases. The personalisation of CEDAW by States to accommodate their own interests, limits the extent to which a legal norm could be said to have developed,¹⁸ as the number of reservations only highlights the fact that this convention is regarded as flexible, and not a fixed norm. For example, several states have entered reservations on key provisions such as Article 2, which is central to the object and purpose of the convention. Reasons include its incompatibility with domestic law systems.¹⁹ Thus this shows that many states take their domestic law system as precedence to the Convention, when in fact the latter should override the former.

The grave omission of violence against women in CEDAW, was however remedied by the introduction of various recommendations, clarifying the link between the Convention and violence against women, and outlining an international norm against domestic violence. In General Recommendation No. 12 on violence against women²⁰, it stated that Article 2,5,11,12 and 16 of the Convention obliged State parties to protect women from violence and asked states to gather statistics on gender-based violence.²¹ This was then followed by a more comprehensive General Recommendation No.19²², which expressly states that the definition

¹⁶ The communication process is confidential, which takes away from the naming and shaming element that so many international instruments rely upon.

¹⁷ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> last accessed 18 August 2019

¹⁸ Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands (North Sea Continental Shelf case)[1969] ICJ Rep 3, paras 70-71

¹⁹ For example, Bangladesh and Egypt both state that Article 2 must not conflict with their sharia law systems.<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> last accessed 18 August 2019

²⁰ UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General Recommendation 12: Violence against Women’ (1990) UN Doc A/44/38 (hereinafter General Recommendation No.12)

²¹ ibid

²² UN Committee to the Elimination of All Forms of Discrimination against Women, General Recommendation 19: Violence against Women, (1992) UN Doc A/47/38 (hereinafter General Recommendation No.19)

of discrimination within the convention includes gender-based violence.²³ It defined gender-based violence as ‘[a] form of discrimination which seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and any other deprivations of liberty.’²⁴ This was particularly important as the Committee recognised the impact of gender-based violence on the life of women. This view was also recognised by the first U.N. Special Rapporteur on Violence against Women, Radhika Coomaraswamy, who described violence against women as a significant obstacle to women’s fulfilment and enjoyment of human rights around the world, such as their participation in social and public life, which prevents the exercise of their democratic rights.²⁵

Building upon Recommendation No.19, General Recommendation No. 35²⁶ also calls on states to implement measures to help female complainants of gender-based violence through the legal process, including by providing access to legal aid, health and counselling services.²⁷ Thus in ensuring victims of gender-based violence are given full access to the legal system, on par to other acts of criminality, this highlights the serious nature of which this recommendation requires gender-based violence to be regarded as.

Following General Recommendation No.19, the Declaration on the Elimination of Violence Against Women²⁸ was then introduced in 1994. The declaration includes family violence as a form of violence²⁹, meaning that for the first time, domestic violence was held as a type of

²³ ibid Art.6

²⁴ ibid

²⁵ R. Coomaraswamy & L. Kois, ‘Women and International Human Rights Law’, in K. Askin & D. Koenig (eds.), *Women and International Human Rights Law* (Ardsley, NY: Transnational Publishers, 1999), at 178.

²⁶ UN Communication on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, T 24, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) (herein Gen.Recomm.No.35)

²⁷ Ibid para.40

²⁸ UN Declaration on the Elimination of Violence Against Women (DEVAW), UN GA Res 48/104 (20 December 1993) UN Doc A/RES/48/104

²⁹ Ibid Art.2

violence that constituted a violation of a human right. In doing so, the DEVAW provides international precedent that such violence is objectionable. It could therefore be argued that in setting up a precedent, this means that a norm of international law has also been established.

More recently, the ILO adopted a Convention Concerning the Elimination of violence and harassment in the world of work³⁰. This convention portrays an evident step toward the existence of an international norm on the prohibition of domestic violence against women. The Convention expressly mentions gender-based violence in not only its preamble, but also in its definition of violence and harassment³¹.

Although the international instruments mentioned above play an important role in bringing domestic violence into the international spotlight, their significance is limited. The number of reservations against the legal binding women's rights instruments and the soft law status against the remainder convey a reluctance to hold states to account. However, the very fact that the spotlight remains on domestic violence in international law, could be an enforcement mechanism in itself. As domestic violence becomes more visible so does the obligation on states to ensure that they take measures to prevent it. Additionally, States use the recommendations as aides for interpretation of the provisions of the treaties that they sign up to. The recommendations ensure that contracting parties keep to the spirit and objective of the convention as it develops through time. States who do not uphold the spirit/principles or provisions of the conventions would be shamed within the international community. Thus, the significance attached to acts in violation of the above, outlines an international norm prohibiting domestic violence.

³⁰ ILO Convention concerning the elimination of violence and harassment in the world of work, (No.190), Geneva, 108th ILC session (21 Jun 2019)

³¹ Ibid Art.1

Public/Private Dichotomy – Infringement of private life?

As noted above, the CEDAW was a remarkable international instrument for its time. Not only because of its devotion solely to the rights of women but also because it stood to break the public/private divide.

The public/private dichotomy plays a crucial role in our society by separating what should be regulated and what should not be regulated by the state.³² The public realm relating to governments, work, politics etc is subject to state interference, whereas the private relates to home and family life, where state interference is null.³³ However this division is problematic particularly in the case of domestic violence where the locus of harm is from within the private sphere; the family. This divide has therefore led to state failure to intervene and prevent cases of domestic violence as the violence was carried out by private actor acting in their own capacity, in an area that was traditionally very intimate and outside the realm of state involvement.³⁴

Yet, taken in its original form, the public/private dichotomy does not allow for impunity of domestic violence in the private sphere. The public/private concept was partially based on the works of John Stuart Mill who argued state intervention restricting individual freedom in the private sphere should be minimalist *save for the prevention of harm to others*.³⁵ Thus according to the origins of the concept, states really have no place to hide.

Fortunately, the development of international human rights law has strengthened the position that states can be held responsible for acts of private actors and in doing so adds to the

³² N.Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy in Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford, Hart, 1998)

³³ C.Moore, ‘Women and domestic violence: the public/private dichotomy in international law’[2003] 7(4) The International Journal of Human Rights, 93, 93

³⁴ Ibid Pg.95

³⁵ J.S.Mill, ‘On Liberty’ (first published 1859, edition published Aziloth Books, 2011)

existence of an international norm on the prohibition of domestic violence. Reading under CEDAW, women suffering from domestic abuse are entitled to legal redress in accordance with Article 15 which states that “parties shall accord to women equality with men before the law”. Article 15(2) is particularly significant for domestic violence as women must be given equal opportunity to exercise their legal capacity and be treated equally in “all stages of procedure in courts and tribunals”, thus claims of domestic violence to officials can no longer be regarded as a private dispute out with the boundaries of state interference and must be treated with the same level of severity as any other crime that is reported. Similarly, Article 2(d) evokes state responsibility to ensure that women receive effective protection from and redress for acts of domestic violence perpetrated against them through the police and institutions of the justice system, similar to any other crime that they report. Therefore, under CEDAW, States have an international obligation with regards to acts of private individuals to ensure that where it does protect peoples’ lives, liberty and security against private depredations, it must do so without discrimination on prohibited grounds.³⁶ However due to the lack of enforcement mechanism³⁷, many states have not implemented the provisions of CEDAW into practice, and in many countries the view of domestic violence as a private matter remains unchanged.³⁸ For example, in a report by the Human Rights Co-ordination centre it stated that although domestic violence was criminalised in the Federation of Bosnia and Herzegovina, local authorities generally continue to treat such cases as domestic disputes rather than crimes³⁹.

³⁶ D.Q.Thomas; M.E. Beasley, ‘*Domestic Violence as a Human Rights Issue*’ [1995] 58 ALB. L. REV. 1119,1126

³⁷ Article 29 contains the mechanism for compliance although suffers from many reservations

³⁸ S.Hossain, ‘*Equality in the Home: Women’s Rights and Personal Laws in South Asia*’ in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 465, 465

³⁹ Human Rights Co-Ordination Centre (HRCC) Quarterly Report, HRCC Human Rights Report: 15 May- 31 August 2000, accessed <http://www.ohr.int/?ohr_archive=hrcc-human-rights-quarterly-report-may-15-august-31-2000> last accessed 18 August 2019

However, the obligation of the state to protect citizens from acts of private actors, is not exclusively reliant on CEDAW. It was solidified into a norm of international law in the landmark Inter-American case of Velasquez Rodriguez v. Honduras⁴⁰, through the concept of due diligence. In this case the court held that an act of a private person can lead to international responsibility of the state, because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁴¹ The Court characterised the duty on states to exercise ‘due diligence’ as including obligations to prevent, investigate, and punish violations of human rights and to ensure that victims have access to adequate compensation.⁴² More powerfully, this case was decided in the absence of a gender analysis. The case was in relation to a man accused of political crimes and then subjected to torture. This shows the universality of the ‘due diligence’ concept, thus strengthening its application under international law.

Further international activity also conveys the concept of due diligence a general principle of international law. The CEDAW Committee in its General Recommendation No.19, references state responsibility under due diligence.⁴³ In explicit reference to gender-based violence towards women, the updated General Comment No.35⁴⁴ reiterated ‘due diligence’ as a vital component of state responsibility.⁴⁵ In the 2006 Report, the Special Rapporteur concluded that there is a rule of customary international law that obliges states to prevent and respond to acts of violence against women with due diligence.⁴⁶

⁴⁰ InterAm. C.H.R. ser. C, No. 4 (1988), 28 I.L.M. 291 (1989).

⁴¹ Ibid para.291

⁴² ibid paras.173–174.

⁴³ Gen.Recom.No.19 (n.22) para.9

⁴⁴ Gen.Recom.No.35 (n.26)

⁴⁵ Gen.Recom.No.19 (n.22) para.24

⁴⁶ UNCHR, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women—Report of the Special Rapporteur on violence against women, its causes and consequences*, Yakin Ertürk (30 January 2006) UN Doc E/CN.4/2006/61, para 29, accessed <<https://undocs.org/E/CN.4/2006/61>> last accessed 18 August 2019

Therefore, as demonstrated, the smoke screen of the private acts argument used by states in the past, and even now, can no longer apply. States have a legally binding duty, through the concept of due diligence, to prevent and protect women from acts of domestic violence as committed in the private sphere. Thus, it is through this principle of due diligence that we see a norm against domestic violence as an act of a private individual.

Protection from Domestic violence as a right of non-discrimination

The existence of an international norm is further portrayed through the origins of violence against women in the international legal field, which lie in the right of non-discrimination. When CEDAW was introduced, it did not contain an express provision on violence against women. Instead violence against women is inferred through the right of non-discrimination contained in Article 1 of the Convention. Under the definition, the state's failure to protect women from violence constitutes a 'restriction made on the basis of sex, which has the effect of nullifying or impairing women's enjoyment of human rights and fundamental freedoms'.⁴⁷ This view is confirmed through Recommendation no.19⁴⁸ which highlights the link between discrimination and violence against women – that violence against women is a direct result of discrimination of women.⁴⁹ The obligation to end discrimination against women must include the duty to prevent violence against women , if violence against women is a manifestation of discrimination.⁵⁰ For example, gender-based violence is based on the fact that it predominately occurs to women due to their subordinate status in society as women.⁵¹

⁴⁷ More will be discussed regarding the link between domestic violence and the right of non-discrimination further in the chapter.

⁴⁸ Gen.Recom.No.19 (n.22)

⁴⁹ Ibid Para.11

⁵⁰ Ibid Para.4

⁵¹ DEVAW (n.28)

This creates, as Kenneth Roth describes it, a ‘discrimination-based theory of state responsibility’⁵². Roth argues that the convention portrays a discrimination-based theory of liability where “whatever efforts a state makes to combat private violence, it must proceed in a non-discriminatory way”⁵³. Thus, the standards that states hold themselves to in terms of other forms of violence must be replicated in violence against women. This is advantageous if a state is doing the bare minimum to combat domestic violence as a method of avoiding charges of complicity, under the discrimination theory, one could insist on greater diligence as a matter of international human rights law.⁵⁴ With regards to the public/private dichotomy linked to domestic violence, a discriminatory approach also helps to avoid any potential arguments that the provisions do not apply to the private sphere. Through the application of Article 26 of the Convention, which states that women should have equal protection of the law in *all* respects, the protection of law is not attached to any particular provision but rather to all aspects of law including criminal law. Thus, discriminatory enforcement of laws applicable to domestic violence would amount to a human rights violation, even if domestic violence, in itself, is deemed not to violate the physical-integrity guarantees of the Covenant.⁵⁵

However, such an approach can be practically problematic, especially within the field of domestic violence. The failure of the state to prosecute human rights abusers, including state and private actors, is not-in and of itself a human rights violation. The violation is the pattern which can be shown that reveals the failure is of a gender discriminatory nature and thus a violation of the internationally guaranteed right to equal protection of the law.⁵⁶ This can be

⁵² K.Roth, ‘*Domestic Violence as an International Human Rights Issue*’, in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 326,334

⁵³ ibid

⁵⁴ ibid

⁵⁵ Ibid 335

⁵⁶ Thomas (n.36) 1130

very problematic for claimants as in order to show a certain pattern of behaviour, one must collate information which conveys this. In many countries where domestic violence is rife, information on human rights abuses against women is at best slim and inadequate.⁵⁷ Additionally, CEDAW adopts a very gender-neutral approach to affording protection to women. The standard of a women's protection is measured against the standard afforded to men. What the CEDAW fails to acknowledge is that women are different to men. Critics highlighting this point have argued that "CEDAW is unable to deal with situations where men and women are not similarly situated".⁵⁸ Instead of expanding the law to apply equally to women, it should be recreated to address the very specific needs that women have as a result of centuries of sub-ordination. In drafting CEDAW no attention was paid to the fact that women face many difficulties, solely based on their gender. This includes equal pay, and inequalities which prevent domestic violence victims from leaving their male partners and living on their own. This view was highlighted by the previous U.N. Special Rapporteur on Violence against Women, Rashida Manjoo, who argued that gender-based violence is a reflection of the fact that women do not share equal social and economic rights with men or have equal access to productive resources.⁵⁹ In ignoring this glaring observation, CEDAW may only at best be a tool for eliminating some forms of discrimination against women. To eliminate all forms of discrimination requires a much more nuanced approach.

Protection from Domestic Violence as a right to be free from torture

The international community has also recognised the relationship between the right to be free from torture and domestic violence. In doing so this strengthens the argument of the existence

⁵⁷ Ibid 1141

⁵⁸ J.L.Southard, 'Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women' [1996] 8 Pace International Law Review, 1, 5-6

⁵⁹ R.Manjoo, Report of the Special Rapporteur on violence against Women, its Causes and Consequences, A/HRC/20/16, Human Rights Council, 23 May 2012, accessed <

https://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16_En.pdf

of a legal norm. CEDAW Recommendation No. 19⁶⁰ states that violence against women is a violation of the right not to be subject to torture or to cruel, inhumane or degrading treatment or punishment as protected under Article 5 of the Universal Declaration of Human Rights (UDHR)⁶¹ and Article 7 of the International Convention on Civil and Political Rights (ICCPR)⁶². This has been affirmed by the Committee Against Torture⁶³ (monitoring body of the UN Convention Against Torture) which strictly prohibits torture of any kind, and defines torture as “any act by which severe pain or suffering, whether physical or mental is intentionally inflicted” for purposes such as obtaining information, punishment, intimidation or coercion, or any reason based on discrimination.⁶⁴

Furthermore, calling on treaty bodies to investigate domestic violence within their mandate, Former Special Rapporteur Radhika Coomaraswamy extracted elements of domestic violence equating them to torture focusing on pain, intimidation and control and state involvement⁶⁵. Recognising the methods of violence which are common in domestic violence cases, The Human Rights Committee, ruling on several cases under the Optional Protocol to the ICCPR has treated threats of death or grave physical harm as torture.⁶⁶

⁶⁰ Gen.Recom.No.19 (n.22)

⁶¹ G.A.res.217A (III), U.N. Doc A/810 at 71 (1948)

⁶² G.A.res.2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976

⁶³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, G.A.res.39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987

⁶⁴ Ibid Art.1

⁶⁵ UNCHR, *Report of the Special Rapporteur on violence against women, its causes, consequences*, (6 February 1996) UN Doc E/CN.4/1996/53, para 43, accessed <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/105/09/PDF/G9610509.pdf?OpenElement>> last accessed 18 August 2019

⁶⁶ Estrella v Uruguay, Merits, Communication No 74/1980, UN Doc CCPR/C/18/D/74/1980, IHRL 2557 (UNHRC 1983), 29th March 1983 para 1.6

Academics have also equated domestic violence with torture. In 1994, Rhonda Copelon framed the comparison between intimate violence and torture as defined by the Convention against Torture.⁶⁷

However, a major sticking point with the analogy of domestic violence and torture is the issue of state responsibility. As outlined above, the problematic setting of domestic violence in the private sphere, means that it could be precluded from coming under the definition of torture as defined in the UNCAT. However in clarifying state responsibility for torture, the Committee on Torture specifically cited “state parties failure to prevent and protect victims from gender-based violence such as rape, domestic violence, female genital mutilation, and trafficking” as a violation of the CAT.⁶⁸ The concept of due diligence again plays a significant role in ensuring the rights of women to be free from domestic violence.

Yet, there are certain issues with labelling violence against women as a form of torture. Although the UNCAT provides a definition of torture, Nigel Rodley, former UN Special Rapporteur on Torture, has stated that it is ‘virtually impossible’ to sum up the issue of how severe or aggravated specific treatment has to be for it to amount to torture’.⁶⁹ The lack of clarity is further exasperated by the fact that it has proven difficult for the treaty bodies, as it has for other human rights courts to navigate the boundaries between torture on the one hand and other forms of ill-treatment on the other.⁷⁰ Given the ‘persistent trivialisation of violence against women, even to the point of not seeing or recognising domestic (or other forms of)

⁶⁷ R.Copelon, ‘Intimate Terror: Understanding Domestic Violence as Torture’ in Cook, R. J. (Ed.). *Human rights of women : National and international perspectives*, (Philadelphia: University of Pennsylvania Press, 1994) at 117

⁶⁸ Committee against Torture, General Comment No. 2, 18, UN Doc. CAT/C/GC/2 (Jan.24, 2008)

⁶⁹ N.S.Rodley, ‘The Treatment of Prisoners Under International Law’ (2nd edn, Oxford, Clarendon Press, 1999) 98

⁷⁰ A.Edwards, ‘Violence against women under international human rights law’ (Cambridge, Cambridge University Press, 2011) 208

violence against women as a form of violence'⁷¹, as described by Copelon, this only increases the barriers that victims and survivors of domestic abuse have to face in order to hold the state accountable.

The formula of torture is also subject to the political environment in which it is suggested. The VAW (violence against women) =T (Torture) formula gained acceptance in a time where the international community had moved its attention away from the autocratic regimes of the 1970s and 1980s to the wars in the former Yugoslavia and Rwanda, which were believed to be fought ‘on and through women’s bodies’.⁷² Therefore the boundaries on which torture is placed have settled on the “traditional canon of acts perpetrated by government (and in particular military) agents within custodial settings”⁷³. Thus the notion of domestic violence is very far removed from this “traditional” concept of torture as the violence is perpetrated by a private actor. This creates difficulties as torture of women sets off from a very different place than domestic violence. Domestic violence victims seem to be clawing back from this perceived concept of torture to prove that the domestic violence they have suffered equates to the one suffered in the traditional concept. Yet, there may be no exact equivalent. Furthermore, fitting violence against women within the criteria of the torture prohibition subjects women and their advocates to an additional layer of analysis: they must first substantiate that they have been raped and then that that rape amounts to torture, or alternatively that any distinctions in their treatment compared to the norm (read: male) justifies the creation of an exception to the rule.⁷⁴

⁷¹ R. Copelon, ‘Recognizing the Egregious in the Everyday: Domestic violence as torture’ [1994] 25(2) Columbia Human Rights Law Review, 291, 295–296

⁷² See C. Bunch, ‘Transforming Human Rights from a Feminist Perspective’, in J. Peters and A. Wolper (eds.), Women’s Rights, Human Rights: International Feminist Perspectives (New York: Routledge, 1995) 11, at 15.

⁷³ Edwards (n.70) 215

⁷⁴ Ibid 198

Summary

In conclusion, the development of international law relating to the violence against women, has resulted in the observance of an international norm on the prohibition of violence against women. The emergence of various instruments highlighting the importance of domestic violence eradication and state involvement and the development of the due diligence concept, means that states must act to protect women suffering from domestic violence. Furthermore, the equation of domestic violence to torture also highlights the seriousness in which the international community must regard domestic violence. However, in reality, problems exist. The non-discriminatory approach outlined in CEDAW fails to recognise the unique experiences of women, and instead equates this to the experiences of men. Similarly, recognition of domestic violence as a form of torture prohibits the full development of women in society. Torture is based on the male perception of torture and this only makes it harder for domestic violence (predominately experienced by women) to be given the same level of seriousness when applied within states. It is from this international standard that we will assess the level of protection afforded to SAW victims of domestic violence as portrayed in Scottish law and policy.

Chapter Two – The Experiences of South Asian Women in the UK

Previously, main stream feminism tended to acknowledge the experiences of white woman but failed to recognise the unique experiences of SAW.⁷⁵ In looking at only gender differences, it did not consider the different social divisions and sources of oppression that play a crucial role in understanding the experiences of battered SAW. Thus to better understand gendered violence, account must be taken of ‘difference’ (in terms of structure and culture), which is explained in ways that do not reproduce stereotypical representations of SAW’s subjectivity or their everyday experiences of cultures and communities.⁷⁶ Termed ‘intersectionality’, this refers to a metaphorical and conceptual tool that is used to explain different experiences based on intersecting social divisions and multiple systems of oppression.⁷⁷ Such an approach is pivotal in describing the experiences of SAW victims of domestic violence as it allows us to encapsulate the full spectrum of abuse and violence that some SAW face. This chapter therefore looks at the unique experiences of SAW victims of domestic violence in order to illustrate the origins of violence/abuse. In doing so, we will firstly illustrate the cultural factors that underline the unique setting and then outline the types of violence, both of which demonstrate the necessity of an intersectional approach. Lastly, we will look at the impact of the violence on SAW.

Cultural Factors

Cultural factors relating to SAW outline a strong narrative focused on controlling the behaviour of the SAW through the sub-ordination of the female.

⁷⁵ Thiara and Gill (n.4)

⁷⁶ Ibid 36

⁷⁷ Ibid 37

Growing up in a traditional south-Asian family in the UK, the sub-ordination of the female within the family begins at a very early age. Traditionally, females are regarded as the ‘undesired sex’, a burden on their family, with the costly implication of marriage, where traditionally the girl’s family are expected to pay for the wedding costs.⁷⁸ Instances of “its ok, you will have better luck and god will bless you with a boy next time” are common to mothers who have given birth to a girl.⁷⁹ The sub-ordination of females continues into adulthood. Young SAW are socialised with the sole intention of finding a suitable husband.⁸⁰ In many cases the motivation of education lies in the status that this will provide for parents and the image and material well-being that education will bring to in-laws.⁸¹ Even though many SAW achieve higher education including university degrees and beyond, their worth in society seems to be based solely on their marital status.

Following marriage, the power status of the woman in her new family does not change. The woman is placed under the authority of the family, and is often regarded as the lowest in the line of power.⁸² Relationships with the mother-in-law and sisters-in-law are more authoritarian rather than as a consolers or allies.⁸³ Within the marriage it is traditionally accepted that men have the right to control their wives’ movements and behaviour.⁸⁴ Very traditionally, the wife was regarded as the property of the man whom she marries.⁸⁵ She is expected to accept her circumstances as fate and part of her *kismet (destiny)*.⁸⁶ Thus moving

⁷⁸ L.R.Bennett and L.Manderson, ‘Violence Against Women in Asian Societies : Gender Inequality and Technologies of Violence’ (Routledge, 2003). 63

⁷⁹ Pink Ladoo Project – Women’s empowerment campaign <https://www.pinkladoo.org/home>, last accessed 18 August 2019

⁸⁰ S.D.Dasgupta, ‘*Body Evidence : Intimate Violence Against South Asian Women in America*’ (Rutgers University Press, 2007). 15

⁸¹ R.Ayyub, ‘*Domestic violence in the South Asian Muslim immigrant population in the United States.*’ [2000] 9 Journal of Social Distress and the Homeless 237, 237ff

⁸² Dasgupta (n.80) 15

⁸³ Bennett (n.78) 67

⁸⁴ Ibid 64

⁸⁵ ibid 65

⁸⁶ Ayyub (n.81)

from her childhood home to her marital home, does not provide any degree of rest bite from an already constrained existence.

The cultural silence surrounding the issue of domestic violence also plays an important role. Leaders within the South Asian community maintain a model minority façade, upholding an image of a community void of social problems, including sexual assault, mental illness, homelessness and domestic violence.⁸⁷ However the pressure of being a successful “model minority” and portraying the community in a positive light comes at the cost of oppressing some segments, including women, by denying the violence committed against them.⁸⁸ Therefore any victims within the community experiencing such problems are encouraged to suppress any evidence of such acts.⁸⁹

The notion of shame and dishonour on the family unit is another significant cultural factor, which feeds the private nature of domestic violence experienced by SAW. In a society where family honour overrides personal freedom, prohibitions against exposing private violence are strong.⁹⁰ Shame is used a societal control mechanism, creating a stigma of public humiliation preventing families and communities from discussing personal issues.⁹¹ Many SAW face extreme pressure from members of the family to reunite with their abusive husbands in order to avoid the notions of family dishonour or shame.⁹² The ‘model minority’ façade means that instances of requests for help from abused SAW are normally meet with advice of encouragement to return to the abusive home.⁹³ Women are thus suppressed on both levels,

⁸⁷ Dasgupta (n.80) 14

⁸⁸ Ibid 67

⁸⁹ Ibid 14

⁹⁰ S.Prasad, ‘*Medicolegal response to violence against women in India*’ [1999] 5(5) Violence Against Women 478, 483

⁹¹ V.Kanuha, ‘Sexual assault in southeast Asian communities: Issues in intervention’ in Dasgupta, S.D (eds). (n.80)

⁹² Thiara and Gill (n.4) 109

⁹³ Dasgupta (n.80) 14

within their own family, and the wider community. This is particularly detrimental for SAW, many of whom have come from abroad, as the community leaders are regarded as a source of familiarity and trust in a society foreign to them. Within South-Asian communities, social control of intimate violence is considered as an intrusion into the private realm of the family, an area controlled by the “domestic patriarchy”.⁹⁴ Therefore the stigma of revealing problems within the family unit, and the fear of losing face in one’s community, all contribute to the silence behind victimization.⁹⁵

Types of abuse faced by SAW

The types of abuse also demonstrate the necessity of adopting an intersectional approach to understanding domestic violence affecting SAW.

It is well known that domestic violence against women includes a range of abuses such as physical, sexual, emotional and economic abuse.⁹⁶ Although the same is true for SAW, additional forms of abuse factor into their everyday torture.

The first form of abuse relates to the perception of the role of the married woman. Very traditional views of women in charge of domestic jobs within the household are apparent in some South-Asian households. Here women are treated as domestic servants, expected to clean, cook and look after the aging parents and young children.⁹⁷ They are often forbidden from leaving the family home without permission from elders or her husband.⁹⁸ In these situations, women suffer extreme forms of isolation. The source of physical and emotional abuse within married life that SAW face is also unique. In the South-Asian culture some

⁹⁴ M.Abraham, ‘Isolation as a form of marital violence: The South Asian immigrant experience’. [2000] 9 Journal of Social Distress and the Homeless 221, 221ff

⁹⁵ Dasgupta (n.80) 65

⁹⁶R.E.Dobash & R.P.Dobash,‘Women, violence and social change’, (London, Routledge, 1992)

⁹⁷ Abraham (n.94)

⁹⁸ Dasgupta (n.80) 13

women are subjected to abuse from both their husbands and their husband's families. The unique position of the daughter-in-law within some South-Asian families means that they are very vulnerable to abuse and oppression within the family.⁹⁹ Thus they are subjected to a joint-system of family abuse which includes physical abuse, as well as humiliation, intimidation and constant belittling.¹⁰⁰ The type of abuse perpetrated by the in-law family includes both indirect abuse, such as domestic despotism, where the daughter-in-law is routinely used as a domestic servant, control of marital relations and constant complaining of the daughter-in-law, and direct abuse such as physical abuse, verbal abuse and isolation.¹⁰¹

SAW who come from abroad, also face extreme physical and emotional abuse due to the exploitation of their circumstances by their husbands.¹⁰² Language barriers, cultural differences, lack of knowledge about their rights all contribute to the exploitation preventing SAW from seeking help from shelters or other social services.¹⁰³

The presence of financial dependency also outlines the economic abuse that SAW face. Although the SAW may earn her own income, she is typically not the controller of that income. Men usually control the family income regardless of its origins.¹⁰⁴ Living with in-laws, SAW are expected to contribute their income to the family pot¹⁰⁵. Women are not able to enjoy the independence and sense of identity that comes with receiving money that they have earned. Instead they become totally financially reliant on their spouses and as a result are made to feel accountable to them.

⁹⁹N. Mirza (n.6)

¹⁰⁰ Bennet (n.78) 63

¹⁰¹ ibid

¹⁰² Ibid 14

¹⁰³ ibid

¹⁰⁴ Dasgupta (n.80) 16

¹⁰⁵ P.Hines et al, '*Intergenerational relationship across cultures*' [1992] 73(6) Families in Society 323, 323ff

Post-separation violence is also another type of abuse that is common to the experience of SAW victims of domestic violence. Even after they have escaped, many SAW face a barrage of abuse towards them and members of their family, especially when children are involved.

Many SAW are prevented from moving away from the abuser due to child contact arrangements.¹⁰⁶ Men use this as a method of controlling and harassing the mother¹⁰⁷, emphasising that even though she has left the home, her life remains under his control.

Thus, all types of abuse outlined demonstrate the concept of control and the strong need of husbands and marital families to control the SAW. Based on this, it is pivotal that legal and policy mechanisms adopted to combat domestic violence are aimed at curtailing this level of control.

Impact of domestic violence

The impact of domestic violence on SAW is very severe. Prolonged domestic violence leads to depression, low self-esteem, physical and mental exhaustion and anxiety.¹⁰⁸ Studies have shown that this is so common that between 38 and 83 per cent of abused women reported depression.¹⁰⁹ In a study by Bhurga et al., young Asian women under 30 had rates of self-harm 2.5 times those of white women and 7 times those of Asian men.¹¹⁰

The loss of self-esteem and identity is perhaps one of the most harrowing impacts of domestic violence. The loss of financial control, the unfamiliarity of new surroundings and the demining role of servant all contribute to this loss. With enough abuse, the woman's sense of identity becomes distorted, as she starts to believe that her role and life as a married

¹⁰⁶ Thiara and Gill (n.4) 172

¹⁰⁷ Ibid 176

¹⁰⁸ Mirza (n.6) 2

¹⁰⁹ Dasgupta (n.80) 19

¹¹⁰ Bhugra, D., et al. 'Attempted suicide in West London, rates across ethnic communities.' (1999) 29 Psychological Medicine 1125–1130.

woman is as her husband dictates it to be. This is no more shown than in the case where the SAW who was originally from India, was burnt with hot oil by her husband. Although she was a physician in India, her husband was able to convince her that the policeman at the door was an immigration security guard.¹¹¹ Thus her ability to perceive reality was so distorted by her husband's actions of abuse and control that she could no longer see what was true and not. The distortion of reality continues as many SAW start blaming themselves for the abuse. They try to win the affection of their abusers, often apologizing for making their husband's angry and violent.¹¹² The abused SAW becomes so reliant on the control, that it makes her question her ability to live life without her husband. This creates a circle of abuse, where the SAW becomes increasingly reliant on the abuser for self-validation and decision making, thus granting more power to the abuser, resulting in their own increased vulnerability.¹¹³

No route of escape

For those women who do manage to escape their abusive relationships or seek help, their options are often very limited.

Due to the sub-ordination of women within the community, community leaders are predominately male. This is problematic for SAW victims as women are less reluctant to disclose details of their abuse to the same sex that has perpetrated this abuse. Many SAW may feel that the men elected into these positions have the same view of women as their husbands. Therefore, Community leaders are an extension of the family in this respect, rather than a neutral platform.

¹¹¹ Dasgupta (n.80) 18

¹¹² Ibid 19

¹¹³ M.Mehrotra, ‘*The social construction of wife abuse: Experience of Asian Indian women in the United States.*’ [1999] 5 Violence against Women 619, 619ff

Many SAW are also unable to escape their abuse due to the very fact that they do not regard their torturous treatment as abnormal. Controlling treatment is regarded as acceptable in the eyes of some SAW who are socialised to expect violence in their relationships.¹¹⁴ The silence surrounding this issue, also adds to this view. In one example describing this norm, a survivor of domestic violence, stated that “I thought it might change. Probably it won’t get to a point where I have to tell them. Qnukay (because) there’s norm like all the husbands beat their wives, not in my family, but ..”¹¹⁵

Summary

Intersectionality is therefore critical in understanding the true experiences of domestic violence in SAW. Domestic violence against SAW is not just a matter of gender, but an intersection of systems of domination based on ‘race’, ethnicity, class, culture and nationality. In order to fully recognise the experience of SAW suffering from domestic violence, as well as the cultural differences, one must look to the structures of power that are placed on SAW. The types of violence outline above, highlight the various sources that the dominance of power originates from. The reasoning behind such dominance is placed on the shoulders of culture, class and nationality. A gendered approach is not enough to protect these women. A deeper understanding is required, and an intersectional approach is crucial in achieving this.

¹¹⁴ ibid

¹¹⁵ Ibid

Chapter Three – Scotland’s Forgotten Women

Domestic abuse¹¹⁶ remains a significant problem in Scotland. In 2017-18, Police Scotland recorded 59,541 incidents of domestic abuse, an increase of 1% compared to the previous year.¹¹⁷ Four out of five incidents were reported with a female victim and a male perpetrator.¹¹⁸ To tackle these worrying statistics, Scotland has introduced various policies and laws. This chapter will analyse the laws and policies adopted by the Scottish Government to assess the extent to which they provide protection to South Asian women (SAW) victims¹¹⁹ of domestic abuse. As outlined in chapter one, international legal instruments exhibit a customary norm prohibiting domestic violence. This chapter will therefore focus on whether Scottish laws and policies relating to domestic abuse uphold Scotland’s international obligation in ensuring SAW are protected from this form of gender-based violence. This will be achieved by firstly looking at criminal justice response, which will focus on the Domestic Abuse (Scotland) Act 2018 and Joint Protocol adopted by the Scottish Government and then secondly through policies such as the Equally Safe Strategy adopted by the Scottish Government. As outlined in chapter two, SAW born abroad whom marry UK citizens, often face concerns with immigration issues. However, since immigration remains a devolved¹²⁰ power, reserved to the UK parliament, this will not be assessed in this chapter as the policies

¹¹⁶ Throughout this chapter we will refer to domestic abuse as opposed to domestic violence, in line with Scottish Policies and legislation. Where ‘abuse’ has been adopted instead of the word ‘violence’ to encompass a wide range of behaviours. Both violence and abuse are used synonymously with each other throughout this dissertation.

¹¹⁷ Scottish Government, ‘*Domestic abuse in Scotland: 2017 - 2018 statistics*’, Safer Communities Directorate, 27 November 2018, available at <https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2017-18/>, last accessed 18 August 2019

¹¹⁸ *ibid*

¹¹⁹ The use of the word ‘victim’ is not associated with the imagery of weak or defenceless, rather the opposite.

¹²⁰ Matters devolved to the Scottish Parliament include health and social work, education, income tax, justice and policing, local government and housing. See <https://www.gov.uk/guidance/devolution-settlement-scotland> for further information.

and laws relating to immigration are decided by the UK government and not the Scottish Government.

Criminal Justice Response to Domestic Abuse in Scotland

To tackle domestic abuse in Scotland, the Scottish Government adopts a criminal justice response, highlighting the serious nature in which it regards domestic abuse.

Domestic Abuse (Scotland) Act 2018

Coming into force on the 1st April 2019, The Domestic Abuse (Scotland) Act 2018, for the first time, created a criminal offence of domestic abuse. It states that “a person will be guilty of an offence if they engage in a course of behaviour which is abusive of their partner or ex-partner and is likely to cause that person to suffer from physical or psychological harm.”¹²¹

Although the 2018 Act certainly moves domestic abuse along, with the criminalisation of domestic abuse reflecting the serious nature adopted in international instruments¹²², the extent to which the Act protects South Asian women who are victims of domestic abuse is debatable and in some areas, falls behind the perceived hard approach that the 2018 Act portrays.

The 2018 Act contains some promising provisions which help to protect SAW experiencing domestic abuse. The aggravation of the offence if a child is involved¹²³ is a welcome addition for SAW. As previously shown in chapter 2, once SAW leave their partners, the partners tend to use the children as a weapon and method of continuing to control their ex-wife or ex-partner. The extra-judicial application of the offence¹²⁴ also resonates with the experiences of some SAW suffering from domestic abuse.

¹²¹ Section 1 of the Domestic Abuse (Scotland) Act 2018 (asp 18) (hereinafter DA(S)A 2018)

¹²² A serious criminal approach is also adopted in Gen.Recomm.No.35

¹²³ DA(S)A 2018 Sec.5

¹²⁴ ibid Sec.3

Prima facie, the range of behaviours covered under the 2018 Act can also be shown to protect SAW victims of domestic abuse. The act prides itself on the range of behaviours that it covers. In defining abusive behaviour, the Act adopts a coercive control plus model of physical and psychological/emotional abuse as it includes behaviour that is violent, threatening or intimidating.¹²⁵ This model follows the types of violence covered in General Recommendation No.19, which in defining gender-based violence, includes “physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”¹²⁶. Central to coercive control is the focus on the controlling impacts of the behaviours rather than the individual acts or behaviours per se.¹²⁷ Thus, the Act outlines that any behaviour deemed to have the ‘relevant effects’ such as dependency, isolation, control, deprivation of freedom and humiliation or punishment¹²⁸ would constitute an offence of domestic abuse. Based on the ‘relevant effects’ alone, the experiences of SAW are akin to the type of behaviour that the 2018 Act seeks to protect. As outlined in chapter 2, many SAW are constantly belittled and controlled by their partners, with their money and movements under intense scrutiny.¹²⁹ This results in the SAW becoming solely dependent on the partner. However, the list constituting abusive behaviour as outlined in the Act, only provides guidance in addressing the complexities of the abuse. It is ultimately for the court to determine whether an alleged perpetrator’s behaviour falls within the scope of the offence.¹³⁰ This discretion may fall foul of interpreting the behaviour of the perpetrator as a cultural norm. Therefore, to ensure the level of protection which the 2018 Act affords to SAW is not

¹²⁵ DA(S)A 2018 Sec.2

¹²⁶ Gen.Recom.No.19 (n.22) para.6

¹²⁷ Stark.E, ‘*Coercive Control: How Men Entrap Women in Personal Life*’ (Oxford University Press, 2007) 309

¹²⁸ DA(S)A 2018 Sec.2(3)

¹²⁹ See chapter 2 which outlines the types of abuse SAW are subjected to.

¹³⁰ Burman, M., & Brooks-Hay, O. ‘*Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control.*’[2018] 18(1) Criminology & Criminal Justice, 67,73

<https://doi.org/10.1177/1748895817752223>, last accessed 18 August 2019

diminished, courts must be adequately trained on the impacts on SAW of the behaviour that is portrayed by their partner, irrespective of whether the partner deems the behaviour to be normal or not. By training the judiciary to recognise the consequences of the behaviour portrayed by the partner, whether through cultural norms or not, this will decrease the level of discretion and uncertainty which may inhibit SAW from using this Act. The wide range of behaviours included to reflect the real everyday experiences of domestic abuse victims must also include those of SAW.

However, the most glaring omission from the 2018 Act for SAW is the relationship of the perpetrators covered under the Act. Whilst international law relating to violence against women, adopts family violence as the reference to domestic violence¹³¹, the Scottish approach taken in the 2018 Act adopts a very different narrative. According to the Act, the offence of domestic abuse only applies where the behaviour is perpetrated by the person's partner or ex-partner.¹³² In defining partner, this is referred to as "a spouse or civil partner, people living together as if spouses of each other, or people in an intimate relationship with each other".¹³³ The court retains discretion as to determining a person's ex-partner.¹³⁴ The navigation from international law is particularly problematic for SAW suffering from domestic abuse. In many situations, SAW live in joint family systems, where they share the same household as their in-laws.¹³⁵ Abuse towards the battered SAW often comes from a wide range of perpetrators within that family system.¹³⁶ This includes mothers-in-law, sisters-in-law as well as the husband or partner/ex-partner. However, this experience is not reflected within the Act. Instead, the Act entirely ignores the family aspect of violence that SAW face

¹³¹ DEVAW (n.28) and Gen.Recom.No.19 (n.22)

¹³² DA(S)A 2018 Sec.11

¹³³ DA(S)A 2018 Sec.11(2)

¹³⁴ ibid Sec.11(3)

¹³⁵ Interview with Shakti Women's Aid, 24th July 2019

¹³⁶ ibid

as part of their domestic abuse. In the consultation on the 2018 Act, concern was raised as to why the behaviour that is controlling and/or physically or psychologically harmful is criminal when perpetrated by a partner or ex-partner, but not criminal when engaged in by an adult towards another adult within the same household.¹³⁷ In response, the Scottish Government stated that the narrow application of the types of relationships covered by the 2018 Act reflected the “particular dynamic that differs from violence or abuse that...may occur within a family...”¹³⁸ It added that extending the legislation to cover other familial relationship could lead to a “dilution and diminution of the understanding of and response to domestic abuse”.¹³⁹ Within SAW experiences, the abuse from family members actually *forms part* (emphasis added) of the domestic abuse that they experience overall. In not recognising the range of perpetrators unique to SAW, the 2018 Act *actually* (emphasis added) dilutes and diminishes the understanding of and response to domestic abuse affecting SAW. At the expense of being targeted and focused¹⁴⁰ on one aspect, it fails to grasp an important factor in domestic abuse cases affecting SAW. This results in a very unrelatable and unattainable piece of legislation for SAW experiencing domestic abuse. In doing so, the legislation does not protect SAW whom are suffering from domestic abuse at the hands of others in the family. As shown through this provision, the 2018 Act does not recognise the intersectionality of violence against women outlined in chapter two. The non-discrimination standards set out in CEDAW are not met, as the experiences that the 2018 Act relates to does not include the experiences of SAW, but predominately white woman suffering from domestic abuse. To

¹³⁷ The Law Society of Scotland, *Response to a criminal offence of domestic abuse Scottish Government Consultation Paper*, March 2016, 5 available at <https://consult.gov.scot/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse/consultation/view_respondent?uuld=127407018> last accessed 18 August 2019

¹³⁸ Scottish Government, *Domestic Abuse (Scotland) Bill: Policy Memorandum Session 5* (2017). SP Bill 8-PM. Edinburgh: Scottish Parliament para 65-66 <https://www.parliament.scot/S5_Bills/Domestic%20Abuse%20Scotland%20Bill/SPBill08PMS052017.pdf> last accessed 18 August 2019

¹³⁹ ibid

¹⁴⁰ Interview with Scottish Government, 23/07/2019

resolve this matter, the range of perpetrators must be widened to include the unique experiences of SAW.

The defence provided for in the 2018 Act also offers limited protection to SAW victims of domestic abuse. Based on the grounds of reasonableness, the Act states that it is a defence for the accused to show that the course of behaviour was reasonable in the particular circumstances.¹⁴¹ As shown in the previous chapter, culture plays a significant role in the domestic abuse that SAW face to the extent that many women suffering from the abuse classify it as a cultural issue that they are “unlucky enough” to have been a part of. The perpetrators then monopolise on this lack of awareness and use this as a justifiable excuse, outlining their behaviour as reasonable in the circumstances since they believe that they had the right to act toward the SAW in this way because they have grown up in a culture which enforces this.¹⁴² Community leaders, which tend to be predominantly male within South-Asian communities also reinforce this view through their reluctance to protect SAW whom come to them for their advice, though their reasoning is based on notions of shame and family dishonour. Even though the Courts have the ultimate discretion, Community leaders may influence their decision by providing advice/counsel on issues relating to the south Asian community, which the predominately white judges are unfamiliar with. This would have a detrimental impact on the use of the defence for SAW due to the views held by the Community Leaders. To ensure that this defence is not used as a barrier to SAW seeking justice against their perpetrators, members of the Judiciary must be adequately trained from a

¹⁴¹ DA(S)A 2018 Sec.6

¹⁴² McCallum, F, *Domestic Abuse (Scotland) Bill*. SPICe Briefing 17/42 (2017, June 13) 17 <[https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/6/13/Domestic-Abuse-Scotland-Bill/Domestic%20Abuse%20\(Scotland\)%20Bill.pdf](https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/6/13/Domestic-Abuse-Scotland-Bill/Domestic%20Abuse%20(Scotland)%20Bill.pdf)> last accessed 18 August 2019

variety for sources, such as women's rights organisations that deal specifically with SAW, to guarantee a true representation of the cultural issues that SAW face.

The non-gendered approach to the issue of domestic abuse portrayed in the 2018 Act further dilutes the level of protection needed for SAW. Although various State policies¹⁴³ refer to domestic abuse as a form of gender-based violence (unique to women), the 2018 Act applies the criminalisation of domestic abuse to both women and men. Thus domestic abuse is considered throughout the 2018 Act in gender-neutral terms, meaning there is no acknowledgement that the majority of victims are women¹⁴⁴, leaving the gendered nature of the phenomenon unaddressed.¹⁴⁵ The gendered analysis of domestic abuse adopted in Scottish Government policies was not reflected in the Bill due to the concerns expressed regarding the consequences of a public narrative of domestic abuse as mainly something that men do to women.¹⁴⁶ However as suggested by Bishop, adopting a gender-neutral approach only points towards the male-dominated and patriarchal nature of the legal system which continues to fail to challenge gendered assumptions.¹⁴⁷ This approach does not assist in protecting SAW as in taking a non-gendered approach, it does not recognise that domestic abuse for women is entirely different to domestic abuse to men. The high level of statistics shown in favour of women and not men only furthers this point. *Prima facie*, adopting a non-gendered approach to the offence may be on par with the literal provision of CEDAW, which

¹⁴³ These will be discussed in detail further in the chapter.

¹⁴⁴ In 2017-18, 82% of the victims of domestic abuse were female,

<<https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2017-18/pages/23/>> last accessed 18 August 2019

¹⁴⁵ Choudhry, Shazia, 'Towards a Transformative Conceptualisation of Violence Against Women - A Critical Frame Analysis of Council of Europe Discourse on Violence Against Women' [2016] 79(3) Modern law review 406, 423

¹⁴⁶ Justice Committee, *Stage 1 Report on the Domestic Abuse (Scotland) Bill*, 16th Report 2017 (Session 5), para 105, available at <[https://sp-bpr-en-prod-cdneb.azureedge.net/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland-Bill/Stage%20Report%20on%20the%20Domestic%20Abuse%20\(Scotland\)%20Bill.pdf](https://sp-bpr-en-prod-cdneb.azureedge.net/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland-Bill/Stage%20Report%20on%20the%20Domestic%20Abuse%20(Scotland)%20Bill.pdf)> last accessed 18 August 2019

¹⁴⁷ C.Bishop, 'Domestic violence: The limitations of a legal response' in Hilder S and Bettinson V (eds) 'Domestic Violence' (Basingstoke, Palgrave Macmillan UK, 2016)

states that the law should apply equally to both women and men.¹⁴⁸ Yet this is not the case. In order to be equal to men, women must be given greater protection than that given to men. Centuries of sub-ordination and abuse to women specifically because they are women cannot be simply wiped through a blanket application of a single offence that applies to both genders. A much more nuanced approach is required in order to address the needs of women and ensure that SAW are protected by the Act.

Overall, the 2018 Act does not provide the necessary protection for SAW. However, policy introduced through the Joint Protocol under the criminal justice response, addresses some issues to a varying extent.

Joint protocol between Police Scotland and the Crown Office & Procurator Fiscal Service - In Partnership Challenging Domestic Abuse.

As part of the criminal justice response to domestic abuse in Scotland, a Joint protocol was introduced between the Police Service of Scotland (Police Scotland) and the Crown Office and Procurator Fiscal Service (COPFS)¹⁴⁹ to assist the police and prosecution service in delivering a joint coherent approach when dealing with criminal conduct arising from domestic abuse.¹⁵⁰ The protocol outlines the procedures and practices that will be followed by Police Scotland and COPFS in the investigation, reporting and prosecution of allegations involving an element of domestic abuse.¹⁵¹ We will now analyse the protocol to assess the extent to which it affords protection to SAW victims of domestic abuse/violence.

¹⁴⁸ CEDAW (n.2) Art.2

¹⁴⁹ Police Scotland and COPFS, *Joint Protocol between Police Scotland and the Crown Office & Procurator Fiscal Service: In partnership challenging domestic abuse.* (2019) May 5th edition. Available at: [https://www.scotland.police.uk/assets/pdf/keep_safe/175573?view=Standard \(hereinafter Protocol\), last accessed 18 August 2019](https://www.scotland.police.uk/assets/pdf/keep_safe/175573?view=Standard (hereinafter Protocol), last accessed 18 August 2019)

¹⁵⁰ Ibid 2

¹⁵¹ ibid

An awareness of the intersectional approach required to effectively manage cases of domestic abuse is evident in the protocol.¹⁵² Such an approach is pivotal to protecting SAW victims of domestic abuse as in recognising their unique situations, social and justice responses are more relevant and effective. During the investigation stage, the protocol actually makes reference to the need for officers to consider that culture, immigration status, ethnicity, language barriers..... etc can present hurdles to the reporting of instances of domestic abuse.¹⁵³ In this respect, Officers are asked to decide whether additional support should be given during the investigation to assist the victims.¹⁵⁴ With regards to SAW, it mentions ‘honour’ based violence and abuse which is committed with the ‘approval of family or community members who might consider any disclosure of abuse by the victim to break a perceived ‘honour’ code’.¹⁵⁵ However the protocol does not state how the officer should handle the situation if this was the case. The only guidance given is in reference to consideration of these circumstances. The fact that previous abuse is not normally reported to the police or authorities, means that on-the-job experience is not applicable here.

However, the presumption against discontinuation of proceedings¹⁵⁶ contained within the protocol can be shown to protect SAW victims of domestic abuse. The presumption will apply even if the victim requests that the charges and proceedings be dropped.¹⁵⁷ SAW often face enormous pressure from the perpetrator, their families and the wider community to retract their claim of domestic abuse.¹⁵⁸ However, under this provision, once a claim is made the voice of the victim no longer becomes the authority in deciding whether the perpetrator

¹⁵² Para 3 – States that “the approach will meet the needs of the communities we serve by recognising the diversity of culture, religion, ethnicity, age, gender, transgender identity and sexual orientation that comprise our society” – Protocol (n.149)

¹⁵³ Ibid Para 11

¹⁵⁴ ibid

¹⁵⁵ ibid

¹⁵⁶ Ibid Para.72

¹⁵⁷ ibid

¹⁵⁸ Interview with Sikh Sanjog, SAW’s Charity, 18/07/2019

must face the law or not. It seeks to ensure that women who are already in a high state of vulnerability are not taken advantage of.

The adoption of a partnership approach, based on the cultural needs of the SAW victim, also provides a greater level of protection for SAW victims of domestic violence. This is shown through the role of the Victim Information and Advice Service (VIA) within the COPFS. All cases of domestic abuse are referred to the VIA which provides information about the progress of the cases and helps victims and witnesses access information sources or emotional and practical support.¹⁵⁹ Crucially for SAW, VIA also refers victims to culturally specific services available within Scotland. This is a lifeline for SAW victims, who can receive support from people who understand the unique situation of their abuse. SAW victims tend to discuss their ordeal more in a familiar environment, in a choice of language that they are comfortable using.¹⁶⁰ However, the author was only able to find three organisations¹⁶¹ in Scotland which specialise in providing support to SAW victims of domestic abuse. The VIA also referred to the same three organisations. The organisations referred to only exist in Glasgow, Edinburgh and Dundee. Therefore, SAW victims of domestic abuse are expected to participate in a postcode lottery in terms of receiving specialist help. The lack of funding and awareness given to these organisations¹⁶² only exasperates the problem. So, although on paper SAW victims seem to be protected in terms of providing them with specialist support, in reality, this is not the case. Their protection is dependent on their home address.

¹⁵⁹ Protocol (n.149) para.59

¹⁶⁰ Shakti Women's Aid (n.135)

¹⁶¹ Shakti Women's Aid <http://shaktiedinburgh.co.uk/>, Amina <https://mwrc.org.uk/>, and Hemat Gryffe Women's Aid <http://www.hematgryffe.org.uk/>, all last accessed 18 August 2019

¹⁶² Sikh Sanjog (n.158)

In light of the above it is pivotal that the training given out to police officers, prosecutors and others relevant to the COPFS and Police Scotland includes robust cultural awareness of the unique situation of SAW victims of domestic abuse. The protocol mentions a programme of ongoing training to ‘support the principles and standards set out in the protocol’,¹⁶³ however does not detail the elements that it must cover.

Forced Marriage

Further to the 2018 Act and Joint Protocol, the Scottish Justice response also includes legislation targeted at forced marriage. The Scottish justice approach recognises forced marriage as a form of domestic abuse.¹⁶⁴ Thus, in this respect, the justice approach can be shown to protect SAW victims of domestic abuse as forced marriage is predominately experienced by SAW.¹⁶⁵ In Scotland, forced marriage is regarded as a criminal offence, which can lead to 7 years imprisonment.¹⁶⁶ The justice approach also provides for women suffering from forced marriage to apply for a Forced Marriage Protection Order under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011(FMPJA). However, in practice, such remedies aimed at SAW are not effective and curtail the progress that has been made in recognising this aspect. The criminal remedy has been severely underused, with most victims unwilling to criminalise their families.¹⁶⁷ Additionally, the relationship of the perpetrator outlined in the FMPJA is at odds with the relationship of the perpetrator outlined in the 2018 Act. In defining forced marriage as a form of domestic abuse, the relationship of

¹⁶³ Protocol (n.149) Para.83

¹⁶⁴ Scottish Government, *Forced Marriage Strategy Guidance*, [2014] 7 and 33, available at https://www.webarchive.org.uk/wayback/archive/20160118220836mp_/http://www.gov.scot/Resource/0046/00460509.pdf, last accessed 18 August 2019

¹⁶⁵ Traditionally, South-Asian culture accepts this practice, with the majority of victims SAW. See Phillip, A. and Dustin, M. ‘UK initiatives on Forced Marriage: Regulation, Dialogue and Exit’, [2004] 52(3) Political Studies, 531-551.

¹⁶⁶ Sec.122 Anti-Social Behaviour, Crime and Policing Act 2014

¹⁶⁷ Interview with Shakti Women’s aid 24/07/2019

the perpetrators must therefore be the same. The person who can commit the offence of forced marriage must also be the same person that can be found guilty of domestic abuse. However, this is not the case as the 2018 Act only limits the relationships to partners or ex-partners.¹⁶⁸ This contradiction is further iterated by the forced marriages strategy¹⁶⁹ which equates domestic abuse to forced marriage even though there is no mention of forced marriage in the 2018 Act. This mismatch has led to confusion by SAW, whom are unsure as to whether forced marriage is a form of domestic abuse or not.¹⁷⁰

In summary, the level of protection currently afforded to SAW through the Scottish Criminal justice response, falls below international standards. The requirement of due diligence under international law calls for a more robust approach to ensure an adequate level of protection is afforded to these victims. Inadequate training leading to unfamiliarity with the situation of SAW victims of domestic abuse, a postcode lottery of specialist services and confusion within forced marriage legislation and strategy means Scotland cannot be said to be exercising due diligence to prevent the domestic abuse of SAW. To remedy, training must highlight the experience of SAW in domestic abuse, specialist services must increase in order to reach SAW who live in other areas and a more coherent approach must be adopted with regards to legislation.

We will now assess the policy approach adopted by the Scottish Government in relation to domestic abuse.

¹⁶⁸ DA(S)A 2018 Sec.11

¹⁶⁹ Forced Marriage Statutory Guidance (n.164) 4

¹⁷⁰ Shakti (n.135)

Policy

Equally Safe Policy

Scottish policy response to domestic abuse is predominantly shown through the Equally Safe Strategy¹⁷¹, Scotland's latest strategy to eradicate violence against women. The approaches taken by the strategy provide a degree of protection to SAW victims of domestic violence. The partnership approach adopted by the strategy emphasises the role of communities in eradicating gender-based violence¹⁷². This is akin to experiences of SAW, where the role of the community is significant in not only deciding whether to stay in the abusive relationship, but actually defining the behaviour as domestic abuse in the first instance. Furthermore, the strategy adopts an intersectional approach which acknowledges that “women and girls have other protected characteristics that increases their level of risk of experiencing violence and abuse”.¹⁷³ In paying specific attention to ethnic minority communities, it acknowledges that “traditional gender roles can be stronger and.... cultural practices involving violence such as...forced marriage are more prevalent”¹⁷⁴.

Equally Safe uses the UN Declaration on the Elimination of Violence Against Women definition of gender-based violence. The policy explicitly states the types of abuse covered under the term “violence against women” to include domestic abuse, and “so called ‘honour based’ violence, including dowry related violence, female mutilation, forced and child marriages and ‘honour’ crimes.”¹⁷⁵ Whilst this recognises some experiences unique to SAW such as ‘honour-based violence’ it does not include family violence, which plays a major

¹⁷¹ Scottish Government, *Equally Safe: Scotland's strategy to eradicate violence against women*, 2018, <<https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/>> last accessed 18 August 2019

¹⁷² Ibid 7

¹⁷³ Ibid 19

¹⁷⁴ Ibid

¹⁷⁵ Ibid 12

apart in many SAW experiences of domestic abuse. The full experience of SAW is therefore not represented, further curtailing the level of protection afforded to SAW victims of domestic abuse.

The strategic focus on primary prevention¹⁷⁶ shown in the strategy, in line with the Istanbul Convention¹⁷⁷, as a method of eradicating violence against women, also provides another welcome layer of protection for SAW victims of domestic abuse/violence. The prevention approach outlined in the strategy recognises the ‘casual story’ of violence against women and girls- the “interaction between a range of underlying or contributing factors, at different levels of influence – individual, relationship, community and societal”.¹⁷⁸ It is therefore crucial that attempts are made to challenge the cultural presumption of SAW outlined in chapter 2. This will in turn protect SAW from domestic abuse, as it will ensure that domestic abuse is not regarded as a consequence of being a South-Asian female.

However, in terms of specific action to protect SAW suffering from domestic abuse, the strategy falls dramatically short. The only action which relates to experiences of SAW is in relation to commissioning research on forced marriages in Scotland¹⁷⁹. Forced marriage does not cover the wide range of abuse that SAW victims of domestic abuse face and in doing so, the policy fails to recognise their experiences. As argued by Choudhry, limiting the application of intersectionality to these specific groups of women and particular forms of violence, outlines an approach to intersectionality which is ultimately exclusionary in nature which aggravates dichotomies between cultures and contributes to the construction of a cultural ‘other’.¹⁸⁰ Further research should therefore be carried out detailing the overall

¹⁷⁶ Ibid 22

¹⁷⁷ The Istanbul Convention goes further by introducing an obligation of primary prevention – Art.12-17 Istanbul Convention.

¹⁷⁸ Equally Safe (n.171) 23

¹⁷⁹ Ibid 53

¹⁸⁰ Choudhry (n.145) 430

experience of SAW suffering from domestic abuse, something which this dissertation could help to enlighten. This policy action demonstrates a lack of awareness of the true experiences of SAW suffering from domestic abuse. Instead the experience is summed up into one type of abuse, force marriage, an area many SAW victims may not have even been involved in.

Overall the Equally Safe Strategy adopted by the Scottish Government does draw attention to the intersectional aspect of domestic violence affecting SAW, and in turn highlights the very real role that communities play in shaping cultural attitudes towards women. However, this is where the protection ends. There is no concrete action directed towards the unique experience of SAW. Instead this is grouped with forced marriages, with no mention of researching the various aspects of SAW related domestic violence. This disservice to SAW means that they cannot be protected to an adequate level as what they need protection from has not been adequately explored.

National Advisory Council on Women and Girls

This trend is also shown in the First Minister's National Advisory Council on Women and Girls 2018 First Report and Recommendations.¹⁸¹ Within the report, ethnic minority communities are only mentioned in relation to the gender gap in employment.¹⁸² Whilst some may argue that tackling the gap in employment will lead to the empowerment of SAW, this has very little to do with protecting SAW who are currently suffering from domestic abuse and violence. In the recommendations, there is no mention of support packages for SAW including the provision of culturally specific shelters. The only protection afforded to SAW

¹⁸¹ First Minister's National Advisory Council on Women and Girls 2018 First Report and Recommendations, 2018, available at <<https://onescotland.org/wp-content/uploads/2019/01/2018-Report.pdf>> last accessed 18 August 2019

¹⁸² Ibid 16

victims of domestic violence is in relation to bringing the perpetrators to account.¹⁸³ The report seems to have forgotten the very real needs of SAW who summon the courage to flee their abusive marriages. General Recommendation No. 35 identifies the duty of the state to provide various social services for women suffering from domestic violence.¹⁸⁴ Through the absence of provision for the needs of SAW, Scotland has failed these women as it falls below the standard identified in Recommendation No.35. This will in turn affect the number of SAW willing to disclose their abuse to the right agencies, as they know that in doing so, this could render them potentially homeless and in a worse situation.

Is the Istanbul Convention the answer?

As outlined above, current Scottish law and policy does not provide an adequate standard of protection for SAW victims of domestic violence. However, the definitions and duties outlined in the Council of Europe ‘Istanbul Convention’, may provide the answer.

The Council of Europe Convention on Preventing Violence against Women and Domestic Violence¹⁸⁵ (known as the Istanbul Convention), is the first-legally binding instrument that sets standards directed at preventing violence against women and domestic violence, protecting its victims and punishing perpetrators.¹⁸⁶ Coming into force on the 1st August 2011, it has since been signed by 46 countries and ratified by 34.¹⁸⁷ Although the UK has not

¹⁸³ Scottish Government, *Scottish Government's Response to the National Advisory Council on Women and Girls*, 2019, 15, available at <<https://www.gov.scot/publications/scottish-governments-response-national-advisory-council-women-girls/pages/1/>> last accessed 18 August 2019

¹⁸⁴ Gen.Recom.No.35 (n.26) para 46-47

¹⁸⁵ CETS 210 (open for signature 11/05/2011, entered into force 1st August 2014) (herein ‘Istanbul Convention’)

¹⁸⁶ <https://www.coe.int/en/web/istanbul-convention/home>, last accessed 18 August 2019

¹⁸⁷ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures> , last accessed 18 August 2019

ratified the Convention as of yet¹⁸⁸, this has received considerable campaigning efforts¹⁸⁹ with this dissertation as a further argument in favour of UK ratification. The provisions in the Istanbul Convention (IC) outline a more robust approach to protecting SAW. This will now be illustrated in greater detail.

The definition of domestic violence contained within the IC results in a greater level of protection for SAW victims as it covers situations that SAW experience in domestic abuse/violence. The IC frames family violence as a key component of domestic violence. The Convention defines domestic violence as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”¹⁹⁰. Reference to “family or domestic unit” illustrates the point that the convention sought to protect women who face violence in their home as an overall unit, as well as between partner and ex-partners. The omission of family violence from the 2018 Act¹⁹¹, means that the Scottish legal standard not only falls below the standard outlined in the Istanbul convention, but also fails to acknowledge a significant part of the abuse that SAW face.¹⁹²

Greater protection for SAW can also be shown through the gendered- based approach to domestic violence adopted by the Convention. Although the convention encourages states to

¹⁸⁸ The UK signed a commitment to ratify the Convention six years, however this has not come into fruition. ICCChange campaign states that the only barrier to ratification that remains is compliance with Article 44 – extra-territorial jurisdiction. <<https://icchange.co.uk/2018/11/01/ic-change-response-to-uk-government-report-on-istanbul-convention/>>, last accessed 18 August 2019

¹⁸⁹ <https://icchange.co.uk/>, last accessed 18 August 2019

¹⁹⁰ Istanbul Convention (n.182) Art.3(b)

¹⁹¹ The Explanatory notes state that the 2018 Act does not cover family violence/abuse - Domestic Abuse (Scotland) Bill: Explanatory Notes Session 5 (2017). SP Bill 8-EN. Edinburgh: Scottish Parliament, para 53 available at

<https://www.parliament.scot/S5_Bills/Domestic%20Abuse%20Scotland%20Bill/SPBill08ENS052017.pdf> last accessed 18 August 2019

¹⁹² See Chapter 2 on the experiences of SAW in domestic violence - joint-family situations

apply the provisions to all victims of domestic violence (including men and boys)¹⁹³, it recognises that domestic violence affects women disproportionately¹⁹⁴, and that parties should “pay particular attention to women victims of gender-based violence in implementing the provisions of this convention”¹⁹⁵, thus highlighting domestic violence as a form of gender-based violence¹⁹⁶. As this gendered approach is not reflected in the 2018 Act, the convention provides greater protection as it recognises that VAW is both a cause and consequence of the unequal power relations between women and men, which cannot be eradicated without investing in greater equality for women than men.¹⁹⁷ The adoption of special measures to not be considered discrimination, conveys that the Convention acknowledges greater protection must be given to women to ensure that they receive the adequate level of protection for their needs as women¹⁹⁸. Therefore, a gender-specific law must be adopted by the Scottish legal system, rather than a blanket law which applies “equally” to both sexes to address the issue of domestic abuse as it relates to women.

The requirement of the IC for states to collect disaggregated data and research at regular intervals¹⁹⁹, into “all forms of violence covered by the scope of this convention”²⁰⁰ and make this publicly accessible²⁰¹ provides further protection to SAW victims of domestic violence. For SAW in Scotland experiencing domestic violence and/or abuse, no statistical information

¹⁹³ Istanbul convention Art.2(2) and Council of Europe, Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) (“Explanatory Report”). at para 37.

¹⁹⁴ Istanbul Convention (n.185) Art.2(1)

¹⁹⁵ Ibid Art.2(2)

¹⁹⁶ Gender based violence is defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately”, Article 3(d)

¹⁹⁷ The Preamble firmly establishes the link between achieving gender equality and the eradication of violence against women.

¹⁹⁸ Ibid Art.4(3)

¹⁹⁹ Ibid Art.11(1)(a)

²⁰⁰ Ibid Art.11

²⁰¹ Ibid Art.11(4)

is publicly recorded. The author contacted various organisations²⁰² involved in combating and protecting women from domestic violence. However, it was only through a Freedom of Information request submitted to Police Scotland²⁰³, that the author was able find statistical data on the prevalence of domestic abuse incidents involving SAW as the victim. The author was also unable to find data relating to ethnicity on domestic abuse cases on Scottish Government statistical data information sites accessible to the public.²⁰⁴ With regards to research reports, again this left a lot to be desired. The author was referred to one small-scale research report²⁰⁵, which was not easily accessible to members of the public. The production of regular meaningful public reports from data and research collected of experiences of SAW victims, would ensure that strategies and training responses are based on verified qualitative and quantitative research, thus in line with their realistic needs as evidenced.

The application of the IC provides greater protection to SAW victims on domestic violence through the adoption of the due diligence standard²⁰⁶. The Convention focuses on raising awareness²⁰⁷ and places a duty on State Parties to adopt measures to promote changes in social and cultural behaviour patterns, with a view to eradicating prejudices and practices based on the idea of inferiority of women.²⁰⁸ Given the prominent traditional cultural view of SAW held by members of the same community, this provision directly engages state responsibility to challenge this view and ensures that steps are taken to create permanent

²⁰² This includes Scottish Women's Aid (<https://womensaid.scot/>, last accessed 18 August 2019) and the Scottish Government (<https://www.gov.scot/>, last accessed 18 August 2019)

²⁰³ FOI Ref: 19-1672, available at <https://www.scotland.police.uk/access-to-information/freedom-of-information/disclosure-log/0/2019/august/19-1672>, last accessed 18 August 2019. Further information was provided on statistics via email.

²⁰⁴ <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubDomesticAbuse> and <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubRecordedCrime> and <https://scotland.shinyapps.io/sg-equality-evidence-finder/>, last accessed 18 August 2019

²⁰⁵ Dr Elaine McLaughlin, Dr Rhonda Wheate and Mhairi McGowan, '*A confident approach in responding to the needs of domestically abused South Asian women – Laying the foundations for Police Scotland 2026 Strategy*', December 2018, accessible via email to Scottish Women's aid.

²⁰⁶ Istanbul Convention (n.185) Art.5(2)

²⁰⁷ Ibid Art.12(3)

²⁰⁸ Ibid Art.12

change. It ensures that states make it known to all communities that violence against women is a violation of human rights.

Included in the due diligence standard of the Convention is the duty placed on state parties to adopt various support provisions for victims of domestic violence. States are required to arrange and provide for, in an adequate geographical distribution, immediate, short-and long-term specialist support services to victims of domestic violence...²⁰⁹. Under this provision, the postcode lottery of specialist support services that currently exists in Scotland for SAW will be considered unlawful and SAW living in more remote areas would have adequate access to the vital culturally-sensitive services they require. Furthermore, the Convention places a positive obligation on States to pro-actively reach out to victims and provide easily accessible, safe accommodation, especially women and their children.²¹⁰ Whilst shelters are available to women suffering from domestic violence in Scotland, culturally specific shelters are scarce. Given the complexities of domestic violence in SAW, a major factor as to why woman continue to suffer in silence relates to the cultural inadequacy of shelters and services offered to them. Thus, in placing an obligation to do so, this will ensure that the women receive the right support that meets their needs.

Finally, the inclusion of honour-related violence as an unacceptable justification for crimes, including crimes committed in the name of so-called honour²¹¹, provides an additional layer of protection for SAW victims of domestic violence. Lisa Grans states that such justifications could be treated as aggravated circumstances in sentencing.²¹² As honour -

²⁰⁹ Ibid Art.22

²¹⁰ Ibid Art.23

²¹¹ Ibid Art.42

²¹² L. Grans, ‘*The Istanbul Convention and the Positive Obligation to Prevent Violence*’, *Human Rights Law Review*, 18(1), March 2018, 133, 150

related violence is very common, but by far not the only experience of SAW victims, this provision would provide protection through its role as a deterrent as perpetrators know if such behaviour was established, then their sentence would be even greater.

Summary

In conclusion, the current approach adopted by law and policy cannot be shown to adequately protect SAW victims of domestic violence/abuse. Significant omissions in acknowledgement of the true experiences of SAW victims, the non-gendered approach taken in the legal approach and the lack of research and data and culturally specific services all point to the failure of the Scottish State to protect SAW. However not all is lost. The adoption of the duties outlined in the IC will significantly improve the situation and provide the much-needed protection to SAW victims of domestic abuse.

Conclusion

In conclusion, SAW victims of domestic violence are not adequately protected by current Scottish law and policy.

As evidenced in chapter one, the international approach outlines a norm of international law prohibiting domestic violence against women. In order to ensure the application of this norm to SAW, an intersectional approach, as outlined in chapter two, must be adopted to recognise the unique experiences of SAW victims of domestic violence. However, this approach does not exist in current Scottish law and policy. The lack of recognition of the experiences of SAW is evident in the trademark legislation aimed at criminalising domestic abuse, the Domestic Abuse (Scotland) Act 2018. Unfortunately, policies also follow this trend and outline a very tokenistic attitude to addressing the issue of domestic violence/abuse in SAW. The main policy outlining Scotland's strategy to eradicating violence against women, as a nod to SAW, only mentions one experience of forced marriage and honour-based violence.²¹³ It does not recognise any other aspect of domestic violence that SAW victims face.

Therefore, a more robust approach, as contained within the Istanbul Convention, is required to ensure an adequate level of protection for SAW. Implementation of the provisions of the Convention would mean Scottish law and policy would adopt a meaningful approach to protecting SAW. The inclusion of family violence in the definition and emphasis on special protection measures acknowledges the different sources of violence that SAW face. The requirement to collect data and research on experiences of SAW victims of domestic violence will also ensure that they are not left behind. The failure of the Scottish Government to

²¹³ Equally Safe (n.171)

provide this information falls below not only Convention standards but also current international due diligence standards.

However, the Istanbul Convention must only be regarded as a vital stepping stone to ensuring robust protection for victims of domestic violence. A stronger international call, through the adoption of a Convention on Violence Against Women is required which will guarantee that domestic violence is explicitly ousted in its own right and not as a consequence of discrimination. Former UN Special Rapporteur Rashida Manjoo, stated that ““The adoption of a United Nations binding international instrument on violence against women and girls, with its own universal monitoring body, would ensure that States are held accountable to standards that are legally binding;....and it would have a specific monitoring body to substantively provide in-depth analysis of both general and country level developments.”²¹⁴ A convention would therefore require states to ensure that their policies and laws protect women of all ethnicities against domestic violence. Meaningful measures would need to be adopted to guarantee the standard of the binding convention is met for *all* women within the State. No longer would states be able to hide lax policies and laws behind non-binding instruments. The implementation of a monitoring body and stronger reporting requirements would identify areas where states are falling below the standard of the convention, thus highlighting performance on an international platform. The adoption of a convention recognises the centuries of sub-ordination placed on the heads of women, and subsequently cements the much-needed special protection that must be given. Real commitment, therefore, to eradicating domestic violence against women and protecting not only SAW but all women

²¹⁴ Former UN Special Rapporteur Rashida Manjoo, “*Time for binding United Nations rules on violence against women and girls*”, Queen Mary University of London, 2015, available at <<https://www.qmul.ac.uk/law/news/2015/items/time-for-binding-united-nations-rules-on-violence-against-women-and-girls.html>> last accessed 18 August 2019

comes in the form of the convention. Until this is achieved, the rights of half the world's population remain a secondary concern at best.

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c/o Dr Daniela Nadj

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Queen Mary University of London
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16th August 2019

To Whom It May Concern:

Re: QMREC2182 - Does Scottish law and policy currently provide adequate protection to South-Asian female victims of domestic violence?

I can confirm that Kirndeept Kaur has completed a Research Ethics Questionnaire with regard to the above research.

The result of which was the conclusion that the proposed work does not present any ethical concerns; is extremely low risk; and thus does not require the scrutiny of the full Research Ethics Committee.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jack Biddle'.

Mr Jack Biddle – Senior Research Management and Governance Officer

Patron: Her Majesty the Queen

Incorporated by Royal Charter as Queen Mary

and Westfield College,
University of London

