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An Analysis on Domestic Violence due to Spouse-Based Immigration Laws in the USA

ADNAN HAMEED KP¹ AND SANJANA.S²

ABSTRACT

Domestic violence is a booming issue and a genuine concern in various countries across the world. Be it strained marriages or family members, it is a fact that domestic violence does not differentiate on the basis on gender, class, caste, nationality, or creed. In the case of a battered immigrant citizen, it is a rather overwhelming process to approach authorities considering his/her conditional resident status. One of the essential objectives of the instant research paper is to analyse the unprecedented risk faced by women or men in such marriages due to lack of knowledge about the local criminal justice, police and legal system in the place they have immigrated to.

The roots of spouse-based immigration laws can be traced back to the common law doctrine of coverture which establishes the total control over a wife by a husband and chastisement allowed the punishment of a wife by a husband to force obedience to that power³. It can be said that the doctrine is extremely patriarchal and archaic with respect to the rights that women have today. Hence, it can be said that this doctrine that heavily discriminates gender is the primary cause of having spouse domination, a major flaw in various immigration laws related to marriage that subsequently leads to domestic violence. Hence, the instant research paper aims to critically analyse the roots of such heavily discriminatory spouse-based immigration laws, the issues faced by such battered immigrants and it also will explore the legal rights that such immigrant spouses have who are trapped in domestic violence.

I. AN INTRODUCTION TO SPOUSE-BASED IMMIGRATION

According to the Defence of Marriage act, a marriage and a spouse is defined as follows- “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and

¹ Author is a Student at Symbiosis Law School Hyderabad

² Author is a Student at Symbiosis Law School Hyderabad

³Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. Ill. U. L. Rev. 153 (2004).

wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife⁴”. This definition has also been a subject of controversy since the definition is restricted to a monogamous relationship between a man and a woman, thus invalidating couples from the LGBTQIA+ community. Spouse based immigration can be essentially defined as bringing your spouse to a foreign country where he/she is not a permanent resident of that particular foreign country. In the USA, this can be done to bring your husband or wife to and he/she can obtain a green card to continue residing as a permanent resident. However, for this to be possible, the husband/wife that brings his/her spouse to the US should be a US citizen or a green cardholder. “Statistically speaking, spouse-based immigration plays an integral role when it comes to immigration matters in the USA. The number of spouses of United States citizens legally admitted to the country from 1990 to 1999 ranged from approximately 30,000 to 60,000 each year⁵. Women make up the majority of immigrating spouses. For example, in 1997, sixty-six percent of the total number of spouses immigrating through marriage were women. From 1990 to 1997, the yearly average of fiancées has been 6,400 of which about seventy-nine percent were women⁶.”

In the past couple of years, spouse-based immigration laws have been criticized for being heavily plagued with ideas such as coverture or dominance of one partner over the other. This is reflected in the fact that an alien spouse cannot self-petition themselves to become a green card holder but rather has to be petitioned by their resident spouse thus providing control of the resident spouse over the alien spouse to control their resident status which is extremely integral. Conditional permanent residence system is another such drawback when it comes to spouse-based immigration laws. The permanent residence of an alien spouse is given on conditional basis for up to two years of their marriage starting from the day you were admitted to the USA lawfully on an immigrant visa. In order to remove this conditional status and get permanent residence, both the spouses must submit an application jointly to remove the conditions exactly 90 days before their second-year anniversary. In short, the expiration date on the alien spouse’s green card is also his/her second-year wedding anniversary. Failure to apply on time could lead to termination of their conditional resident status. This could pose a huge risk to battered immigrant alien spouses since constant abuse would deter the resident spouse from applying for their permanent residence. It is rather unfair that something as crucial as resident status

⁴ Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255 (1998).

⁵ Bean, F.D. and Stevens, G., *America's Newcomers and the Dynamics of Diversity*. Russell Sage Foundation.(2003)

⁶ Scholes, R. "International Matchmaking Organizations: A Report to Congress." (9 March 2004) uscis.gov/graphics/aboutus/repstudies/Mobrept.

heavily lies in the hands of the resident spouse. This can further contribute to blackmailing and emotional abuse. Moreover, in case the spouse is a victim of domestic violence, he/she can apply to remove the conditions on the permanent residence status and this will be provided only if it is proven that his/her removal from the United States would cause extreme hardship. The need to remove conditions on permanent residence based on marriage is subject to debate to date.

II. THE DOCTRINE OF COVERTURE: AN ACHILLES HEEL IN THE ANGLO-AMERICAN COMMON LAW SYSTEM

The doctrine of coverture is defined as an “Anglo-American common-law concept, derived from feudal Norman custom, that dictated a woman’s subordinate legal status during the marriage⁷.” The doctrine of coverture attempts to imply that a woman’s legal status post-marriage will remain subordinate to men. As a result, she cannot sue or be sued nor can she enter into contracts. Moreover, she will have no rights over her property since her legal existence as an individual will be suspended after marriage. A wife cannot execute a will without her husband’s consent thus the basic right over her own property is taken away.

Shockingly, even to date, several sexist laws exist around the world which is based on the doctrine of coverture. Women in Iran cannot receive a passport without a notarized permission slip from their husband because women are considered to be subordinates to their husbands. Saudi Arabia’s male guardianship system is yet another example of the doctrine of coverture being prevalent even today through such laws. Similarly, the spouse-based immigration system is also plagued by the doctrine of coverture which gives their spouses (who could be domestic abusers) so much control over their lives, thus providing a breeding ground for domestic violence.

The remains of coverture in spouse-based immigration laws and an attempt to minimize spousal control over resident statuses

It is a fact that several spouse-based immigration laws are backed by the doctrine of coverture. As an attempt to alter this law and make it seem gender-neutral, several lawmakers swapped the word “wife” with “spouse”. However, this was a failed attempt since in reality, more than 95% of victims of domestic abuse and intimate partner violence are women⁸. As mentioned earlier, the resident status of the alien spouse is heavily in control of the resident spouse since it requires their petition to release the alien spouse from conditional resident status. Throughout

⁷ Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 Rutgers L. Rev. 73 (2003).

⁸ *ibid*

the 1990s to the 2000s several attempts were made to remove the idea of coverture from spouse-based immigrant laws.

Beginning from the year of 1986 wherein the impact of coverture on spouse-based immigration laws was at its worst, the resident spouse had complete power over the alien spouse's resident status I.e. if the resident spouse does not file a petition after the alien spouse's resident status expires, he/she could completely lose her resident status and will eventually have to leave the country. In 1990, the Congress addressed this issue where spousal power over the resident status of the alien spouse could be reduced. This favoured an amendment wherein the alien spouse could self-petition without the help of her resident spouse I.e. waiver the need to file a joint petition only under the following circumstances:

- If he/she is a victim of domestic violence or if his/her child is battered or is subjected to extreme cruelty.
- If the marriage is terminated
- If he/she would face extreme hardship as a consequence of deportation from the USA

It is to be noted that although initially, the amendment was to minimize spousal control over the alien spouse's resident status, it still does not address the issue but rather expects the battered spouse to go through abuse and extreme hardship before he/she can self-petition thus continuing the resident spouse to give complete control over the alien spouse's resident status. This could lead to the possibility of a resident spouse entrapping the alien spouse in abuse since he/she has complete power over their resident status. Several alien spouses fail to approach the court to self-petition since they fear deportation or If they may lose custody over their child. The co-relation of such laws with domestic abuse along with the issues and challenges will be further discussed in detail.

III. THE CO-RELATION BETWEEN SPOUSE-BASED IMMIGRATION LAWS AND DOMESTIC VIOLENCE

Domestic violence is a serious issue in the United States, especially among immigrant women, given their reluctance to seek assistance for fear of deportation. While the Violence Against Women Act (VAWA) allows battered immigrants to seek legal status without relying on abusive U.S. citizen or legal permanent resident spouses, we find that intensified interior immigration enforcement has curbed the VAWA self-petition rate. "Violence against women/men is not restricted to borders, cultures, class, education, socio-economic, or immigration status. However, it is to be noted that the number of women suffering from

domestic abuse outweighs the number of men going through the same. A recent survey co-sponsored by the National Institute of Justice and the Centers for Disease Control and Prevention found that approximately 4.8 million intimate partner rapes and physical assaults are perpetrated against women annually. For women and their children who have immigrated to the United States, the dangers faced in abusive relationships are often more acute⁹.

Historically, these dangers have been aggravated by immigration laws. Immigrant women face pressure not only to assimilate culturally but to maintain cultural traditions as well. They face language barriers, economic insecurity, and discrimination due to gender, race or ethnicity. Additionally, the problems of domestic violence are "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen's legal status depends on his or her marriage to the abuse." "The battered immigrant's ability to obtain or maintain lawful immigration status may depend on her relationship to her citizen or lawful permanent resident spouse and his willingness to file an immigrant relative petition on her behalf."

"The same dynamic occurs when an immigration law gives an abusive spouse total control over the immigration status of his spouse and children. This can occur when a person has received legal permission, in the form of an immigrant or non-immigrant visa, to live and work in the United States. His spouse and children are then awarded derivative immigration status so that they can join him. Examples of persons whose spouses and children can be awarded derivative visas include diplomats, those who work for religious or international organizations, students, and people who receive visas related to their work. When immigration law gives spouses control over the immigration status of their family members, it forces many battered immigrant women to remain trapped and isolated in violent homes, afraid to turn to anyone for help. They fear continued abuse if they stay and deportation if they attempt to leave."

"Domestic violence is a serious under-reported crime in the United States, with 20 people being physically abused by an intimate partner every minute¹⁰. Immigrant women (those with a non-immigrant visa, as well as the undocumented) are particularly prone to this type of violence given their often reliance on a partner to adjust their immigration status. In addition, many of them have a low socio-economic status and depend on their partners' income –traits linked to

⁹ Patricia Tjaden and Nancy Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* (National Institute of Justice and Centers for Disease Control and Prevention, NCJ 181 867, 2000), p. iii; Leslye E. Orloff and Nancy Kelly, "A Look at the Violence Against Women Act & Gender-Related Political Asylum," *Violence Against Women* 380 (1995).

¹⁰ Domestic violence national statistics retrieved from www.ncadv.org

domestic violence¹¹. Their partners may use their immigration status as a control mechanism to ensure they do not leave an abusive relationship. While immigrant survivors still qualify for protections under the 1994 Violence Against Women Act (VAWA)¹² intensified enforcement has resulted in greater reluctance to seek assistance. This situation might have deteriorated further following the Administration's June 11, 2018 decision to disallow protection from deportation on the grounds of domestic violence

IV. ISSUES AND CHALLENGES THAT RESTRICT BATTERED IMMIGRANT WOMEN FROM SEEKING LEGAL RECOURSE

One of the biggest issues concerning spouse-based immigration laws that are based on coverture is the fact that the resident spouse has complete control over the resident status of the alien spouse. This poses a risk of the domestic abuser using this as a means to trap the victim in the abusive marriage. They can use this to stop the victim from fleeing or reporting the crime. One of the major reasons as to why several victims don't report the crime is because they fear deportation. Proving that they would face extreme hardship if they leave the country is not an easy task. There could be cases where women who don't speak English, from poorer countries, are brought to the USA after marriage and becomes victims of domestic violence or marriage scams. Since they do not speak the language, seeking self-petition and proving the same can be a tedious task. A recent study by CNN Health emphasized the fact that the restrictive immigration policies by the USA are having an impact on the health of immigrant women due to domestic violence or emotional abuse¹³. A lot of partners could give false hopes of legal status and threaten them with deportation to control them. However, solutions do exist and legal recourse is available, yet, many fail to report it simply because they are not aware that legal recourses are available. Deportation is also feared by men or women who enter the country illegally and do not even have the option to report the abuse to the authorities thus forcing them to stay in the abusive relationship.

There are innumerable people who come to the USA without any financial resources or money. Most often than not, the money is often controlled by their spouses and hence they do not have

¹¹ According to the National Violence Against Women Survey (NVAWS), approximately 23 percent Hispanic/Latino females are victimized by intimate partner violence during their lifetimes. In addition, forty eight percent of Latinas report that their partner's violence increased after they immigrated to the United States (Tjaden and Thoennes 2000).

¹² Under the 1994 VAWA, immigrant victims of domestic abuse can petition for legal status without relying on the sponsoring of their abusive citizen/legal permanent resident spouse, parent or child.

¹³ Shelby Lin Erdman, *Deportation fears linked to high blood pressure among immigrant women*, CNN health (Nov. 27, 2019), <https://edition.cnn.com/2019/11/27/health/deportation-blood-pressure-study/index.html>

access to economic resources required to self-petition themselves or to hire lawyers. “This economic dependence is reinforced by the impact of immigration laws concerning employer sanctions and hiring practices”¹⁴. Several women and men also fail to seek legal recourse simply because they fear the police and authorities. If the battered woman is from a nation that views the police as repressive and dangerous, it is difficult for her to have anything but fear of police¹⁵. This distrust can stop them from approaching the police or higher authorities.

Cultural barriers pose a major challenge when it comes to battered women trying to seek recourses to save themselves from intimate partner violence. This is rather problematic and is a result of social conditioning over the years to make women believe that it is acceptable for men to abuse women. For example, in many Asian cultures, Confucianism requires women to obey their husbands and endure the abuse. There is a lot of stigma attached to intimate partner violence since it is seen as something that is a private familial matter and it would be a matter of embarrassment to discuss such issues with higher authorities while seeking legal recourse thus stopping women from rescuing themselves from the domestic violence.

V. DOMESTIC VIOLENCE & VIOLENCE AGAINST WOMEN ACT (VAWA) OF 1994: A PLAUSIBLE SOLUTION

The married status is essential for foreign spouses of U.S. citizens or LPRs who wish to adjust their temporary status and apply for lawful permanent residence under the family-based category. In fact, according to the Immigration and Naturalization Act (INA) provisions, foreign spouses of U.S. citizens and lawful permanent residents (LPR) can be sponsored by their spouses as long as they are living together. This requirement tends to discourage immigrant spouses from leaving abusive marriages and, instead, appears to reinforce the prevalence of domestic violence. In that regard, it is necessary to consider as to how the odds of IPV reporting are higher for immigrant women who had spousal dependent visas or whose partners refused to change their immigration status or threatened them with deportation, than for other immigrant women.”

“To address this problem, the 103rd Congress included three provisions related to abused aliens in the Violence Against Women Act (VAWA) of 1994¹⁶: “(1) self-petitioning by abused spouse

¹⁴ *ibid*

¹⁵ Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. Pub. Int. L.J. 589 (1997).

¹⁶ VAWA is Title IV of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322. The Violence Against Women Act (VAWA) of 1994 and its subsequent reauthorizations in 2000 and 2005 authorized funding related to domestic violence for enforcement efforts, research and data collection, prevention programs, and services for victims.

and children, (2) suspension of deportation and (3) cancelation of removal.” The House Judiciary Committee explained: “the purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse.¹⁷”

The 1994 VAWA was the first federal law to address the increasing cases of domestic violence crimes in mixed-status marriages. Under the new legislation, battered immigrant spouses and children could gain lawful permanent residency” (i.e. apply for a ‘green card’) independent of their partners. “Specifically, immigrant spouses can self-petition for their status adjustment if they could prove:”

1. “The abuser is a U.S. citizen or has lawful permanent resident status,¹⁸
2. The petitioner resides in the United States with the spouse¹⁹
3. The petitioner entered marriage “in good faith”²⁰
4. The petitioner’s deportation would result in “extreme hardship” to either her/himself and any children²¹
5. The petitioner is a person of “good moral character”²²
6. The petitioner and/or a child are or have been subject of domestic violence or extreme cruelty perpetrated by the spouse during the marriage²³

There are two steps to applying for a green card of your own (i.e. self-petition) without the support of an abusive spouse under VAWA. First, one has to file Form I-360, along with the supporting evidence included in the Table C in the appendix, to the U.S. Citizenship and Immigration Services (USCIS). After USCIS receives the I-360 petition, it acknowledges receipt and starts to review the application. If USCIS believes the petition will be granted with the information provided, it will send a “Prima Facie Approval” letter. While no status adjustment has taken place yet, the migrant can use that letter to qualify for some types of public assistance. Once USCIS approves the I-360, the migrant can move onto the second stage, which is to apply for status adjustment (i.e. green card or lawful permanent residence) using Form I-485 and supporting documents. The overall processing time (until a final decision has

¹⁷ U.S. Congress. House Committee on the Judiciary. Violence Against Women Act of 1993, report to accompany

¹⁸ VAWA I § 40701(a)(1)(C)(iii)

¹⁹ VAWA I §§ 40701(a)(1)(C)(iii), 40701(a)(2)(B)(ii).

²⁰ VAWA I § 40701(a)(1)(C)(iii)(1).

²¹ VAWA I § 40701(a)(1)(C)(iv)(II).

²² VAWA I § 40701(a)(1)(C)(iii).

²³ VAWA I § 40701(a)(1)(C)(iii)(I).

been reached) can take anywhere between 150 days to 10 months.”

A. Challenges faced in the System

“Although there has been much progress in securing legislative protections for battered immigrant women and children in the United States, the legal options for immigrant victims are far from complete. Legal reforms are still needed to improve their access to both immigration relief and welfare benefits. A variety of implementation problems prevent them from receiving the immigration benefits and the welfare access Congress sought to provide. Additionally, the rise in anti-immigrant sentiment since September 11, 2001 has created new problems at the state level for immigrant victims of domestic violence who turn to the family courts and the police for help. Some of the outstanding issues can be summarized as follows.”

B. Access to Legal Services

Immigrant victims of domestic violence were given special access to legal assistance in a broad variety of domestic violence related cases in 1998 when Congress allowed Legal Services Corporation (LSC) funded programs to use non-LSC funds to represent battered immigrants in any legal matter related to the domestic violence.¹² However, the law enables only immigrant victims of domestic violence abused by their spouses or parents to benefit from this assistance, leaving those abused by boyfriends or other family members without access to representation. This should be changed to allow any LSC funded program to use non-LSC dollars to represent any battered immigrant victim of domestic violence without regard to her relationship to her abuser, so long as that relationship is covered by the state's domestic violence laws. “

C. Improved Access to Public Benefits

Although Congress granted access to public benefits to immigrant victims of domestic violence who were eligible under VAWA, it created a five-year bar to benefits access that applied to immigrants who first entered the United States after August 22, 1996. This left battered immigrants who qualify for VAWA but who first entered after that date with a five-year bar from some of the most important federal benefits programs offering relief to battered women and their children, including TANF, Medicaid, and food stamps. Additionally, welfare access for battered immigrant victims is limited to those who qualify for relief as VAWA self-petitioners, suspension or cancellation applicants. Battered immigrants who qualify for relief under the new crime victim visas have no access to federal public benefits. The law should be changed to grant immediate access to federal public benefits to any battered immigrant who has filed an application that sets out prima facie eligibility for relief with the INS under a

family-based visa application, VAWA or the new U-visa protections. Further, in many states, implementation problems block access to public benefits for many battered immigrant women. These problems include welfare agencies that turn away immigrant victims or refuse applications because of assumptions about applicants' immigration status based on their ethnicity or assumed country of origin.”

D. Family Court and justice System Issues

Across the country advocates and attorneys working with immigrant victims of domestic violence have seen a broad range of problems with battered immigrants' access to family court and justice system protection that appear to be related to a backlash against immigrants occurring in many communities. These problems include judges in protection order cases calling the INS and turning in immigrant victims rather than granting them protection orders against their abusers. In other cases, judges may refuse to grant protection orders to VAWA-eligible battered immigrants, stating that they believe the victims are only seeking protection orders so as to obtain immigration relief. This approach fails to recognize that any battered immigrant who is eligible for self-petition could have had legal immigration status through her spouse if he had not been not using lack of legal immigration status as a tool of power and control. In still other cases an abuser convinces a judge that because the abused mother lacks legal immigration status, the abuser should be awarded custody of children despite the fact of his abuse. In some communities, police called to a domestic violence case will ask questions about the immigration status of the victim and will turn that information over to the INS. Similarly, prosecutors will deport rather than prosecute immigrant abusers. This approach has the effect in many instances of increasing danger to the victim when the abuser returns to this country after his deportation or when he forces her to follow him back to the home country.”

“These problems provide continuing challenges to advocates, attorneys, government agencies and legislators who wish to help immigrant victims of domestic violence. Some can be resolved by further federal legislative or administrative legal reforms. Others, like the problems of welfare access to legally authorized benefits, require training, education, advocacy and perhaps litigation at the state level. Still others require training personnel in the justice system about the legal rights of immigrant victims of domestic violence and about the role anti-immigrant policies can play in undermining community policing and the criminal justice system's approach to domestic violence, including holding abusers accountable for their actions. Changes in these practices and policies are needed if battered immigrant women and children are to have access to the same protections against domestic violence as all other domestic violence victims in the United States.”

VI. CONCLUSION

In spite several years after the diminishment of sexist doctrines such as the doctrine of coverture, it continues to plague legal systems around the world and hence one can observe that such doctrines have not been completely removed from laws concerning men and women even today. Several spouse-based immigration laws are a prime example of this which continues to give tremendous power to the resident spouse when it comes to the alien spouse's life. This can be used by the resident spouse to blackmail the battered spouse, threatening them with the idea that they could be deported if they report the abuse, thus entrapping the domestic violence victim. Although there is legal recourse available, there are several factors which would deter the battered immigrant women from seeking help such as the lack of financial resources, fear of authorities, cultural barriers or if the victim does not speak English and does not have anybody they can depend on except their spouse. "Since 1990, legal protections for battered immigrant women and children have expanded significantly. VAWA 1994 and VAWA 2000 have effectively brought awareness of domestic violence in immigrant communities. Legislative protections have helped battered immigrant women escape abuse, survive economically, and bring their abusers to justice while reducing domestic violence in their communities. Moreover, these critical pieces of legislation ensure that the children of immigrant parents have the same opportunity to live lives free of domestic violence that VAWA sought to provide to all domestic violence victims. Increased numbers of abused immigrants are coming forward acknowledging that domestic violence is a crime that shall no longer be tolerated. However, implementation of this among a wider population is a challenge even to date. While advocates continue spreading the word, policy makers and national domestic violence organizations are making sure that addressing the needs of battered immigrants is an important part of their national agenda."

VII. SUGGESTIONS

Continuous support from organizations working for the welfare of immigrant women trapped in domestic violence could lead to spreading awareness regarding the same. Several victims are unable to seek legal help simply because they are unaware that provisions exist which could possibly help them. The amendment of several spouse-based immigration laws wherein the alien spouse can self-petition without the help of their husband without having to prove that he/she has been through extreme violence and the termination of citizenship would lead to hardship (Since several factors could deter them from proving this) is an absolute necessity. It is rather unfair that a battered immigrant victim must go through violence in order to self-

petition and obtain citizenship. If the alien spouse is equipped to come forward and seek legal recourse as well as their permanent resident status without having to prove them, more victims would be willing to report the crime without fearing the need to prove the domestic violence. Finally, the government could collaborate with several NGOs in order to provide financial and mental (counselling services) assistance along with a place to stay. While there have been significant changes after the introduction of the VAWA act, one can only hope for absolute development when spouse-based immigration laws that are plagued by coverture is removed from the legal system in the future.
