

SHORTCOMINGS OF DOMESTIC VIOLENCE AND JUDICIAL APPROACH TO AMENDMENTS

MADHUSHREE CHAVAN

URN: 2020-M-01011994

SCHOOL OF LAW

MASTERS OF LAW (LLM)

SPECIALIZATION IN CONSTITUTIONAL LAW UNDER THE GUIDANCE OF PROF.

ETTAMENA VENUGOPAL

ABSTRACT

Violence against women has been a longstanding issue and remains widespread all across the world. Despite rising levels of education, gender awareness and stringent pro-women laws, the change has been very slow and violence against women has been increasing on a large scale. The basic purpose of this study is to critically analyse the act and study the shortcomings or drawbacks of the act stand what is the stand and approach of the judiciary to domestic violence. The study delves into the rights of a woman protected by various laws, and takes one through the history of its formation and its present weightage. The Researcher comes from a litigation framework, and handles domestic violence cases. The research method used is analytical method. The Researcher has made and analysed this research with rights based approach and feminist perspective.

Women form a very essential part of our society. The Researcher through this chapter gives a brief introduction of what was the need of this law, its establishment and enactment. We will now critically analyse the act and then refer to the judicial approach.

1.1 CONSTITUTIONAL PROVISIONS PROTECTING WOMEN RIGHTS

While the Constitution advocates sexual equality and affirmative action for women and other disadvantaged groups, it is institutions, civil society organisations, and civil movements that have to dedicate time and resources to convert this into reality.

- **Article 14:** Equality before law the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
- **Article 15 (1):** the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
- **Article 16(2):** No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State
- **Article 21:** which deals with right to life has been expanded to include the right to Life with Dignity. This provision has been invoked to safeguard the rights of women such as right to divorce, to live a life free from violence and the right to safe abortions.
- **Article 51A Fundamental duties (e):** of the Constitution lays down fundamental duties of all citizens. It stipulates that all citizens have a duty to promote harmony and to renounce practices which are derogatory to the dignity of women.

All these articles are the main pillars of the Indian Constitution which lay down the principles of equality and protect the rights of women.

Hence, if any law is passed or any action is taken to prevent women from taking up employment in government or public sector undertaking, such law or action by the concerned authority can be struck down by the Supreme Court or a High Court, as being against the Constitutional provisions. Similarly paying women lower salaries for doing the same work even when they are qualified for it, is discriminatory and against the Constitutional guarantee of equality. Similarly not employing dalits or Muslims in certain categories of government jobs would also amount to discrimination.

Articles 15(3) (4) and 16 (3) (4) which help to further strengthen the concept of equality by permitting the state to make special provisions for securing the rights of the marginalized sections (women, children, schedule castes and scheduled tribes) in order to help them to overcome the discrimination they have suffered for many centuries and to help them to become equal to others. This is called —positive discrimination.

1.2 OTHER LAWS WITH RESPECT TO WOMEN RIGHTS OR WOMEN SPECIFIC LEGISLATION

- A. Sexual Harassment of Women at Workplace (Prevention, prohibition and redressal) Act 2013
- B. Dowry Prohibition Act 1961

- C. The Commission of Sati (Prevention) Act, 1987
- D. The Indecent Representation of Women (Prohibition) Act, 1986
- E. The Immoral Traffic (Prevention) Act, 1956

1.3 PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT AND ITS FEATURES

The PWDVA provides female victims of domestic violence legal recourse, both civil and criminal. Specifically, it allows women to seek injunctions and protective orders, along with criminal provisions for imprisonment and fines, which come into play when a perpetrator breaches a civil order. This broader response to domestic violence more effectively addresses the social realities that Indian women face, including threats of violence and mental abuse for which they often require immediate civil remedies.

Significantly, the PWDVA did not limit protection against domestic violence to marital relationships. Unlike prior domestic violence legislation, the PWDVA covers “**domestic relationships**,” which include “all relationships based on consanguinity, marriage, adoption and even relationships which were ‘in the nature of marriage.’” The PWDVA also introduced the concept of “**right to residence**,” which prevents women from being forced out of their marital homes. It also emphasized the concept of “**shared household**” that covered women in non- matrimonial relationships. Section 20(1) of the PWDVA empowers magistrates to grant **monetary relief** in favour of the aggrieved woman.

1.4 DRAWBACKS OF THE PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE ACT

It has been criticized for neglecting men who experience domestic abuse. The Act has also been criticized for its lack of clarity and ambiguities. For instance, the Act includes “insults” and “jibes” under the definition of “verbal and emotional abuse” in Explanation I (iii) of Section 3 of the Act, without defining these terms. Section 18 of the PWDVA empowers magistrates to issue prohibitory orders upon prima facie satisfaction that “domestic violence has taken place or is likely to take place.” It is important to note that a magistrate may issue an injunction against the male perpetrator prohibiting him from entering any place that may be “frequented by the aggrieved person” or from operating a bank account “enjoyed by both the parties,” even if that account was held solely by the respondent.

In a situation where ex parte order is passed, the respondent does not have an opportunity to contest the allegations against him, as Section 23 allows magistrates to grant ex parte orders. Moreover, Section 31 of the PWDVA makes the breach of an interim order a cognizable criminal offence. Together, these laws allow female petitioners to obtain protection orders without having their allegations contested and, if an order is breached, they can bring criminal charges against respondents.

1.5 LANDMARK JUDGMENTS AND OBSERVATIONS AND AMENDMENTSa. Hiral P. Harsora and Or. Vs. Kusum Narottamdas Harsora and Ors. (AIR 2016 SC 4774)

Here a mother and a daughter filed a complaint under the Protection of Women from Domestic Violence Act, 2005 against the brother/son, and his wife, and two sisters/daughters, alleging various acts of violence against them. An application was moved before the Metropolitan Magistrate for a discharge of Respondent Nos. 2 to 4 stating that as the complaint was made under Section 2(a) read with Section 2(q) of the Act, 2005, it can only be made against an adult male person and the three Respondents not being adult male persons were, therefore, required to be discharged. The present proceedings arose because mother and daughter filed a petition, in which the constitutional validity of Section 2(q) was challenged. The court held that the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of the Act, 2005 where they are co-Respondent/s in a complaint against an adult male person, who is or has been in a domestic relationship with the complainant and such co-respondent/s. The said judgement is a landmark judgment where in the Apex Court has amended the definition of Respondent and struck down the word "adult male". It critically analysed the definition of a Respondent as per the Rights conferred by the Indian Constitution under Art. 14.

b. Indra Sarma Vs.V.K.V. Sarma (2013) 15 SCC 755

In this case, it was analysed whether a "live-in relationship" would amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" Under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 (for short "the DV Act") and the disruption of such a relationship by failure to maintain a women involved in such a relationship amounts to "domestic violence" within the meaning of Section 3 of the DV Act. Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and the children, born out of such kinds of relationships be protected. This case for the very first time discussed about the difference between marriage and marital relationship. It had its observation on relationship under section 2(f) of the Act and made it into five categories of relationships which exhausts itself since the expression "means", has been used. When a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive. Section 2(f) has not used the expression "include" so as to make the definition exhaustive. It is in that context we have to examine the meaning of the expression "relationship in the nature of marriage".

The Apex Court infact laid down guidelines for the definition of Domestic relationship or a live-in relationship will fall within the expression "relationship in the nature of marriage" Under Section 2(f) of the DV Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

(1) Duration of period of relationship

Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household

The expression has been defined Under Section 2(s) of the DV Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements

Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements

Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up keeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship

Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.

(6) Children

Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public

Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties

Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

Thus this judgement was gave a new dimension to the definition of domestic relationship.

1.6 **CONCLUSION**

The PWDV act covers certain definitions and clears concept which were not held or considered by the judiciary or the legislature before this act came into effect. The PWDVA also expands the ambit of domestic violence protection to unmarried women. It covers all relationships based on consanguinity, marriage, adoption, and even relationships that are "in the nature of marriage". The PWDVA imposes positive obligations on the state to protect women from violence, including mandatory police sensitization and awareness training on issues of domestic violence. It also requires state governments to appoint protection officers and service providers to assist victims in obtaining shelter and medical assistance, and in filing domestic incident reports to the local magistrate.

Thus, at first glance, both Section 498A and particularly the PWDVA are very progressive pieces of legislation that comport with India's obligations under international human rights law to prevent and prosecute acts of domestic violence. However, as we discussed in Sections II and III, these laws have not been successful.

The judicial approach is also very progressive and inclusive, the judiciary has acted in a sensitive way, and made and passed judgements for the betterment of the women. It is has been quite adaptive and not very stringent and limited to the definitions.

BIBLIOGRAPHY

1. https://www.iitk.ac.in/wc/data/Majlis_Legal-rights-of-women.pdf
2. <http://www.legalservicesindia.com/article/415/Domestic-Violence-as-a-Human-Rights-Issue.html>
3. International Institute for Population Sciences Deonar, Mumbai – 400 088 Gender Equality and Women's Empowerment in India by Ministry of Health and Family Welfare Government of India <https://dhsprogram.com/pubs/pdf/od57/od57.pdf>
4. Mangala Subramaniam, Preethi Krishnan and Christopher Bunka Indian Anthropologist (2014) 44: 1 , 37-52 43 ol. 44, No. 1, SPECIAL ISSUE ON ANTHROPOLOGY'S CONTRIBUTIONS TO PUBLIC POLICY (January - June 2014), pp. 37-52 URL: <https://www.jstor.org/stable/43899762>
5. Agnes, Flavia. 2011. 'The Concubine and Notions of Constitutional Justice', Economic and Political Weekly , 46(24): 31- 33
6. <http://www.lawyerscollective.org/about-lawyers-collective/history.html>
7. LAWYER'S COLLECTIVE REPORT, supra note 28
8. The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 20(1), INDIA CODE (2005), vol. 12.
9. Sri T. Mathivanan, A Perception on the Protection of Women from Domestic Violence Act, 2005, (2008) 4 L.W. (JS) 62 (explaining that both are bound in duty the moment they learn of a domestic incident)
10. 'Women Survivors of Violence' by Anjali Dave

11. Agnes, F., & D'Mello, A. (2015). Protection of women from Domestic Violence. *Economic & political Weekly*, 50(44), 76-84. Retrieved from http://www.epw.in/system/files/pdf/2015_50/44/Protection_of_Women_from_Domestic_Violence.pdf
12. Amirthalingam, K. (2005). Women's Rights, International Norms, and Domestic Violence: Asian Perspectives. *Human Rights Quarterly*, 27(2), 683-694. Retrieved from <https://www.jstor.org/stable/pdf/20069801.pdf?refreqid=excelsior:861af0739c0e9d3c5c50d855023d383f>
13. Badrinath, P. (2011). The Challenge of Subjectivity within courts: Interpreting the DV Act. *Economic & Political Weekly*, 46(12), 15-18. Retrieved from <http://www.jstor.org/stable/41151987>
- Bhasin, K. (1993). What is Patriarchy? Retrieved from http://moodle.tiss.edu/pluginfile.php/23672/mod_resource/content/1/bhasin
- Bhasin, K. (2000). *Understanding Gender*. New Delhi: Kali for Women.
14. Bhatia, M. (2012). Domestic Violence In India: Cases Under The Protection Of Women From Domestic Violence Act, 2005. *South Asia Research*, 32(2), 103-122. Retrieved from <http://journals.sagepub.com/doi/pdf/10.1177/0262728012453489>
15. Dave, A., & Solanki, G. (2001). *Journey from Violence to Crime... A Study of Domestic Violence in the City of Mumbai*. Mumbai: Department of Family and Child Welfare TATA INSTITUTE OF SOCIAL SCIENCES. Retrieved from Ghosh, B., & Choudhuri, T. (2011). Legal Protection Against Domestic Violence in India: Scope and Limitations. *Journal of Family Violence*, 26(4), 319-330. doi:10.1007/s10896-011-9369-1
16. International Centre for research on women . (2016). *Seeking Rights Seeking Relief*. Jaising, I. (2009). *Bringing Rights Home: Review of the Campaign for a law on Domestic Violence*. *Economic and Political Weekly*, 50-57. Retrieved from Jhamb, B. (2011). The missing link in the Domestic Violence act . *Economic & political Weekly*, 46(36), 45-50. Retrieved from <http://www.jstor.org/stable/23017848>
17. Karlekar, M. (1998). Domestic Violence. *Economic & Political Weekly*, 33(27), 1741 Retrieved from http://www.epw.in/journal/1998/27/special-articles/domestic-violence.html?0=ip_login_no_cache%3D74f43ae7a6fff3a7680ea6e192a2a8a5

18. Kishwer, M. (1986). Dowry- To ensure her happiness or to disinherit her? *Manushi*, 2-13. Retrieved
Kothari, J. (2005). Criminal Law on Domestic Violence Promises & Limits. *Economic and Political Weekly*, 40(46), 4843-4849. Retrieved from Kumar, S., Lakshmanan, J., Suresh, S., & Ahuja, K. C. (2005). Domestic Violence & its Mental health correlates in Indian context. *British Journal of Psychiatry*, 62-67. Retrieved Kumar, V. A. (2012). Judicial Delays in India: Causes & Remedies. *Journal of law, policy & Globalization*, 4, 16-21. Retrieved from <file:///C:/Users/subhashamli/Downloads/2069-4040-1-PB.pdf>
19. Law commission of India. (2014). *Arrears and Backlogs: Creating Additional Judicial (Wo)Manpower*. New Delhi : Government of India. doi: http://lawcommissionofindia.nic.in/reports/Report_No.245.pdf
20. Lawyers Collective. (2009). *Staying Alive Third Monitoring & Evaluation Report 2009*. New Delhi. Retrieved from <http://nlrd.org/wp-content/uploads/2012/06/Staying-Alive-Third-ME-Report-2009-final.pdf>
21. Ministry of Law & Justice. (2005). *The Protection of women from Domestic Violence Act, 2005*. New Delhi: Government of India. Retrieved from <http://wcd.nic.in/sites/default/files/wdvact.pdf>
22. Mitra, N. (2005). *Marital Violence: A Feminist understanding of violence in intimate relations*. Tata Institute Of Social Sciences. Retrieved from [Retrieved from http://192.168.194.112/handle/1/2761](http://192.168.194.112/handle/1/2761)
23. National Crime Records Bureau. (2015). *Crime in India*. New Delhi: Ministry of Home affairs. Retrieved from <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/CrimeInIndia2015.pdf>
- Palkar, V. (2003). *Failing Gender Justice in Anti- Dowry Law*. *South Asia Research*, 23(2), 81-200. doi:10.1177/0262728003232005
24. Palkar, V. (2003). *Failing Gender Justice in Anti-Dowry Law*. *South Asia Research*, 181-200. Retrieved from <http://journals.sagepub.com/doi/abs/10.1177/0262728003232005> Rew, M., Gangoli, G., & Gill, A. K. (2013). *Violence between female-in-laws in India*.
25. *Journal of International Women's Studies*, 14(1), 149-157. Retrieved from <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1656&context=jiws> Roy, S. (2006). Legal constructions of Domestic Violence . *Indian sociological Society*, 427-448. Retrieved from <http://www.jstor.org/stable/25663733> Sakrani, M., & Panchal , T. J. (2014). *Quest for Justice : A Study of the Implementation of the Protection of Women from Domestic Violence Act 2005*. Government of India.

26. Sangita, B. (2014). Impact of Violence on women's health. *International Journal of Interdisciplinary and Multidisciplinary Studies*, 1(3), 84-86. Retrieved from Sarkar, L. (1995). Women's movement and the legal process. Centre for women's development Studies, 1-24. Retrieved from <http://www.cwds.ac.in/wp-content/uploads/2016/09/Womens Movement.pdf>
27. Seely, J., & Plunket, C. (2002). *Women and Domestic Violence: Standards of Counselling Practice*. Australia: The salvation Army Crisis Service. Retrieved from Sharma, G. (2016). Implementation of the Domestic violence Act 2005. *Economic & Political Weekly*, 51(14), 85-86.

