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# THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: A CRITICAL ANALYSIS

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## Abstract

*The Protection of Women from Domestic Violence Act, 2005 (hereinafter, 'the Act of 2005' or 'the 2005 Act' or 'the DV Act') is the law that governs and punishes domestic violence in India. The law was enacted in 2005 to curb the menace of violence within closed doors. Mostly victims of such violence tend to stay silent over the atrocities committed on them. Thus, this legislation gave them a platform to address their grievances and get justice. However, just like any other law, the DV Act also has many shortcomings and is used as a weapon by vindictive people to satisfy personal vendetta.*

*This paper shall try to focus on all such loopholes and their alleged misuse. The paper shall also try to draw out a solution to eradicate these shortcomings and make it an effective legislation.*

*Instances of misuse have been listed herein to give an in-depth understanding of the grave situation and how the non-application of certain provisions under the Act leads to an ineffective enactment.*

*In the end a conclusion has been drawn as to how such loopholes can be filled and the Act be made more effective.*

## INTRODUCTION

Violence against women is a very sensitive issue and more so in a country like ours where family prestige and honour hold a very special place. Hence, such violence within closed doors are not talked about and mostly brushed under the carpet. Violence against women is widespread and viewed as one of the most inhumane social mechanisms to suppress women.

There is no universally accepted definition of such violence. An attempt was made by the United Nations to define “Violence against Women” in 1993 in Declaration on the Elimination of Violence against Women<sup>1</sup>. The relevant provision is:

“Article 1- For the purposes of this Declaration, the term "violence against women" means any act of genderbased violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

The Vienna Accord, 1994 and the Beijing Declaration and the Platform for Action, 1995 have acknowledged that domestic violence is a human rights issue and hence a serious deterrent to development. The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. XII (1989) had recommended that State Parties should act to protect women against violence of any kind.

Under the Indian law, section 498A<sup>2</sup> of the Indian Penal Code, 1860<sup>3</sup> (IPC) was inserted by the 1983 criminal law amendment. The provision is as under:

“498A. Husband or relative of husband of a woman subjecting her to cruelty Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation- For the purpose of this section, "cruelty" means- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing

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<sup>1</sup> UN GA Resolution 48/104 of 20<sup>th</sup> Dec. 1993.

<sup>2</sup> Ins. by Act 46 of 1983, section 2 (w.e.f. 25-12-1983).

<sup>3</sup> Act 45 of 1860.

her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”

Presently, a woman victim of cruelty by her husband or his relatives, is protected vide this provision. The civil law, however, did not address this issue in its entirety. It was therefore proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution. The Protection of Women from Domestic Violence Bill, 2005 having been passed by the Lok Sabha on August 24<sup>th</sup>, 2005 and by the Rajya Sabha on August 29<sup>th</sup>, 2005, received the assent of the President on September 13<sup>th</sup>, 2005 and came as a statute titled, “The Protection of Women from Domestic Violence Act, 2005<sup>4</sup> (43 of 2005)”.

Highlights of the Act: The Act contains certain specific features:

1. *Comprehensive Enactment-* It covers women who are or have been in a domestic relationship with the abuser in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. It also includes within its ambit relationships with family members living together a joint family. Hence, sisters, widows, mothers, sisters-in-law, mothers-in-law, etc., are covered under the Act, provided they live under the same roof.
2. *“domestic violence” defined-* The enactment defines the expression “domestic violence” to include actual abuse or threat or abuse which is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives are also covered under the definition.
3. *Right of women to secure housing-* The Act provides for rights of women to a secure housing. It also provides for the right to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. The right is secured by resistance order which is passed by the magistrate.
4. *Protection Officers-* The Act provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing

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<sup>4</sup> Act 43 of 2005.

assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

Important definitions under the Act: The Act also lists out certain definitions of specific terms that help in the operation and application of the Act:

1. *Aggrieved person*- As per Section 2(a) of the DV Act, “aggrieved person” means any woman who is, or has been in a domestic relation with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.
2. *Child*- As per Section 2(b) the word “child” means a person below the age of 18 and includes any adopted, step or foster child.
3. *Shared household*- As per Section 2(s) it means a household where the person aggrieved lives or at any stage has lived in a domestic relation either singly or along with the respondent.
4. *Shelter home*- As per Section 2(t) the term “shelter home” means any shelter home as may be notified by the State government to be a shelter home for the purposes of the DV Act.

### CRITICAL ANALYSIS OF THE DV ACT

Gender Bias: This Act focuses on domestic violence against women. Hence, the very first criticism against the law is that it is gender bias. The very definition of aggrieved person under the Act states that women and only women can be subjected to domestic violence and any such act committed on a man is not punishable. In the 21<sup>st</sup> century we treat women at par with men and there have been many instances where women insult, humiliate, ridicule, mentally and physically, men and their families they are in a domestic relationship with. It is not rare today that women are indulging in domestic violence against men. The DV Act is a big example of the wrong application of Article 15(3) of the Constitution.

Article 15(3) (r/w article 15(1)) of the Constitution of India gives the Legislature the right to make special laws for women and children. It is an exception to the rule laid down in Article 15(1).

The relevant provision reads as follows:

“Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1)The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.”

Article 15(1) specifically bars the state from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth, or any of them. Article 15(3), however, gives special power to the State to make special laws for women and children. Article 15(3) recognizes the fact that Indian women have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The object of this provision is to strengthen and improve the status of women. Article 15(3) thus relieves the state from the clutches of Article 15(1) and enables it to make special provisions to accord socio-economic equality to women. Article 15(1) prohibits gender discrimination. Article 15(3) lifts the ignominy and permits the state to positively discriminate in favor of women to make special provisions to ameliorate their social, economic and political condition and accord them parity.<sup>5</sup> However, nowhere does the provision say that such laws must be inherently biased against men. It cannot be implied as well because had it been so, the entire purpose of Article 14 (Equality) would be refuted. The domestic violence law of India is a clear example of the wrong application of the protective provision under the Constitution. In *Harsora v. Harsora*<sup>6</sup>, the Honorable Supreme Court of India deleted the words ‘adult male’ in Section 2(q) of the DV Act. The DV Act is a gender-specific law enacted to protect women against domestic violence at the hands of men. The core provision in this law is that a complainant can only be a woman. The law restricts as per Section 2(q) that complaints can only be filed against adult males, or their relatives, who could be women as well. In this judgment, the constitutional validity of Section 2(q) was challenged. The court, while referring to domestic violence, held, “it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even

<sup>5</sup> Dr. G.P. Reddy, *Women and Law 2* (Gogia Law Agency, Hyderabad, 4<sup>th</sup> edn., 2000).

<sup>6</sup> *Hiral P. Harsora and Ors. v. Kusum Narottamdas Harsora and Ors.*, Cvl. Appeal No. 10084 of 2016.

sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore.....seeks to outlaw domestic violence of any kind against a woman, and is gender neutral.”

498A IPC: The DV Act along with the anti-dowry law of India<sup>7</sup> has given an undue advantage to women and is the most lethal weapon which women use against men to extort, exploit and threaten. In every four minutes, a false dowry case is lodged in India. Innocent husbands and their relatives are facing arrests and harassment for no fault of theirs. On 6<sup>th</sup> February, 2008, a 30 year old man, Pushkar Singh, committed suicide by hanging himself with a ceiling fan at his home. The incident took place in Lucknow.

On August 13, 2010, J. Dalveer Bhandari and J. K.S. Radhakrishnan of the Hon’ble Supreme Court of India in Preeti Gupta v. State of Jharkhand<sup>8</sup>, called for serious re-look at the anti-dowry law of India. The court observed that most of the complaints under this provision are filed in the heat of moment over trivial issues without proper deliberations.

J. Shanker Raju, Ex-member judge of Delhi CAT Bar, Principal Bench observed in a judgment delivered by him i.e. Shri Kishan Pal Singh s/o Shri.... v. Govt. of NCT, Delhi Through Chief.....on 14<sup>th</sup> March, 2007 that:

“In the instant case, as Dowry Prohibition Act and promulgation of Section 498A of the Penal Code has been rather misused than used, various judicial pronouncements have set out as a methodology to arrive as a compromise in a writ petition when the offences are not compoundable. There is every likelihood in a particular case of every family member of the bride or groom not only involved but entangled in criminal litigation to teach them a lesson out of vengeances.”

In Jasbir Kaur v. State of Haryana<sup>9</sup>, the Punjab & Haryana High Court observed:

“It is known that an estranged wife will go to any extent to rope in as many relatives of the husband as possible in a desperate effort to salvage whatever remains of an estranged marriage.”

In Kanaraj v. State of Punjab<sup>10</sup>, the Honorable Apex court observed as follows:

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<sup>7</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 498A.

<sup>8</sup> AIR 2010 SC 3363.

<sup>9</sup> (1990) 2 Rec Cri R 243.

“...for the fault of the husband the in-laws or other relatives cannot in all cases be held to be involved. The acts attributed to such persons have to be proved beyond reasonable doubt and they cannot be held responsible by mere conjectures and implications. The tendency to rope in relatives of the husband as accused has to be curbed.”

In *State v. Srikanth*<sup>11</sup>, the Karnataka High Court observed:

“Roping in of the whole of the family including brothers and sisters-in-law has to be depreciated unless there is a specific material against these persons, it is down right on the part of the police to include the whole of the family as accused”

The Honorable Supreme Court of India in *Sushil Kumar Sharma v. Union of India and others*<sup>12</sup>, observed as:

“The object of the provision is prevention of the dowry menace. But as has been rightly contended by the petitioner that many instances have come to light where the complaints are not *bona fide* and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and *intra vires*, does not give a license to unscrupulous persons to wreck personal vendetta or unleash harassment. It may therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the courts have to take care of the situation within the existing frame work. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not an assassin’s weapon. If cry of “wolf” is made too often as a prank assistance and protection may not be available when the actual “wolf” appears. There is no question of investigating agency and Courts casually dealing with the allegations. They cannot follow any straitjacket formula in the matters relating to dowry tortures, deaths and cruelty.

It cannot be lost sight of that ultimate objective of every legal system is to arrive at truth, punish the guilty and protect the innocent. There is no scope for any preconceived notion or view. It is strenuously argued by the petitioner that their investigating agencies and the courts

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<sup>10</sup> 2000 CrLJ 2993.

<sup>11</sup> 2002 CrLJ 3605.

<sup>12</sup> JT 2005 (6) SC 266.

start with the presumptions that the accused persons are guilty and that the complainant is speaking the truth. This is too wide available and generalized statement. Certain statutory presumptions are drawn which again are rebuttable. It is to be noted that the role of the investigating agencies and that the courts is that of watch dog and not of bloodhound. It should be their effort to see that an innocent person is not made to suffer on account of unfounded, baseless and malicious allegations. It is equally undisputable that in many cases no direct evidence is available and the courts have to act on circumstantial evidence. While dealing with such cases, the law laid down relating to circumstantial evidence has to be kept in view.”

The anti-dowry law of India is a blatantly misused law as has been noted. This law and the DV Act make a lethal combination.

Other loopholes in the legislation: The DV Act is legislation with many loopholes. Though the main drawback is that it is gender bias, there are certain other loopholes as well. These are:

1. *Shared Household*- Section 17 of the DV Act details the right to reside in a shared household. It creates a statutory right in favor of “every woman in a domestic relationship”. The phrase “domestic relationship” includes not only the wife or women related by blood but also a female friend who has lived, even for a small period under the same roof with the male respondent. This provision gives statutory recognition and hence encouragement to extra-marital relationships or relation between persons of opposite sex outside of marriage/illicit relations. The Act nowhere makes a mention or makes it clear as to by what procedure an affected respondent would be able to secure an order of eviction or exclusion against such women. Also, the word ‘shared household’ may include a joint family property of which the male respondent is just one of the several coparceners. By putting a restraint against alienation or enunciation of such rights in a shared household, the law seeks to virtually shake the right of even such persons who may not have any role to play in the dispute. Moreover, there is no time limit prescribed for which the “right to reside” would operate in favor of the women. Since, this right has been created by a special legislation in favor of a specific class of individuals (women), it will not come under scrutiny of the Transfer of Property Act, 1882 as the former has been brought into existence

irrespective of the “right, title and beneficial interest”. Hence, in absence of any provision to such effect within the special law, the male respondent is devoid of any legal remedy against a woman for whose benefit the right to reside was never intended.

2. *Residence Orders*- Section 19 of the DV Act permits an order to be passed, in the event of domestic violence to facilitate enjoyment of right to reside in the shared household against the backdrop of feud between the parties. Some of the possible restraint orders indicated under Section 19 are bizarre and unjustified. Such as:

- (i) Direction to a male respondent to remove himself from the shared household.
- (ii) Restraining the respondent from alienating or disposing off the shared household.
- (iii) Restraining the respondent from renouncing his rights in shared household except with the leave of the magistrate.

The provisions are unjust and unfair to the male respondent, a person in whom right, title or interest in the property vests is not only restrained to exercise his rights but it also restricts the prospect of reconciliation between the parties. The husband being thrown out by the law, it is not conceivable as to how can the system expect the parties to even broach the subject of coming together through conciliation.

3. *Right to Monetary Reliefs*- Section 20(1) empowers the magistrate to grant monetary reliefs in favor of the aggrieved woman. The purpose is to help the woman meet the expenses incurred and losses suffered as an outcome of the domestic violence. Inclusion of clause (d) however is misplaced. The jurisdiction of the magistrate to grant maintenance allowance is governed by Section 125, CrPC. This is bound to create confusion and multiplicity of proceedings which may in turn lead to consequences which would be grossly unfair to both the parties. In spite of maintenance available under Section 125 to all sections of the Indian society, a quantum of allowance that can be fixed is made to said statutory remedy in addition to, and not as an alternative to, the right to maintenance allowance under the various personal laws. Thus, even under the existing

arrangement of laws almost every set of parties is locked in litigation over the issue of maintenance in both civil as well as criminal courts.

### CONCLUSION

“Any fool can make a rule, and any fool will mind it”, said Henry David Thoreau.<sup>13</sup> After all, law is another creation of one man to pull strings of many men and thus can never be ideal. Flawlessness being the mirage in any human creation, even law has succumbed to cracks and crevices.

The Domestic Violence Act, 2005 is a legislation that was enacted to achieve certain objectives. Undoubtedly, it has proved to be beneficial to a great extent. However, the law certainly has some loopholes as have been discussed above. Certain improvements can be made such as:

1. *The law must be suitably amended to remove the unnecessary gender bias.* Cases of males being victims of gender violence are a reality today. However, there is no law wherein such aggrieved men can go. Thus the law must be suitably amended to make it gender neutral and hence more effective.
2. *The law along with the anti-dowry law of India creates a situation of double jeopardy and hence the unnecessary linkage between the two must be sorted.* The anti-dowry law of India and the DV Act must be suitably amended to avoid the situation of double jeopardy which anyways is unconstitutional vide Article 20(3) of the Constitution of India.
3. *The provision of ‘shared household’ must be suitably amended* to exclude from its ambit live-in relationships which again is a gender bias provision. Live-in relationships create a situation of pleasure without responsibilities and hence it’s important to consider it within the ambit of marriage but both the parties must be made equally liable and the burden of everything should not be put solely on the shoulder of the man in the relation.
4. *The provision of ‘residence orders’ must be suitably amended* to protect the rights of males in such a relationship and to avoid unusual harassment of the men in the domestic relationship.

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<sup>13</sup> H. D. Thoreau, *Journal of Henry David Thoreau* (Gibbs Smith, Boston: Houghton Mifflin, 1906).

5. *The issue of maintenance creates a deadlock in litigation between civil (under the DV Act) and criminal (Sec. 125, CrPC). This must be resolved as it leads to unnecessary litigation and an undue burden on both the parties.*

As noted by Mahatma Gandhi, “An unjust law is itself a species of violence. Arrest for its breach is more so.”<sup>14</sup>

An unjust law is not only denial of freedom to individuals but also a grave travesty of justice, since law is the first aspect of any social phenomena and justice only follows. The law must be such that they are themselves a depiction of the non-biased nature of the legal system and wherever such injustice is being observed, the law must take its own course to remove it so that the judiciary can merely focus on its basic job of interpretation and adjudication. It is the duty of the legislature to eradicate all such loopholes in the laws to effectuate them in the most just manner.

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<sup>14</sup> Mahatma Gandhi, *Non-violence in Peace and War 1942-49* (Navajivan Pub. House, Ahmedabad, 1962).