

# PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT: A CONFLICT BETWEEN THEORY AND PRACTICALITY

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## ABSTRACT

The Indian legislators have played an important role in giving desired shape and nutrition to the laws that are necessary for ensuring successful running of the society. Their desperation for the same was to ensure a healthy balance between rights of men as well as women keeping the fact in mind that both of them will constitute the definition of ‘citizens’ of India. However, it cannot be denied that the practical situation is such that one can easily come to the conclusion that we as Indians have failed to remove the tag of ‘patriarchal’ society from our foreheads. It won’t be wrong to say that starting from the time when India became independent, till today, men consider themselves superior to women and this is all because of rituals, customs and traditions prevailing in the Indian society. Sometimes, in order to prove their *so called supremacy*, they start creating problems for their own people that somewhere takes form of ‘cruelty’. In order to curb these kinds of activities including physical as well as mental torture, various laws have been passed by the Parliament of India and *Protection of Women from Domestic Violence Act, 2005* is one of them. The author will try to find out the reasons for the framing of this Act and various remedies that are available for women. Apart from this, a perusal of the fact that whether this Act is ‘unilateral’ or ‘multilateral’ in nature will be done in light of its provisions. The research methodology adopted shall be *applied and fundamental* in nature and the literature review shall consist of reviewing books of eminent authors and articles of researchers who have played an important role in putting their views on the topic in front of the society.

## INTRODUCTION

*'In situations of captivity the perpetrator becomes the most powerful person in the life of the victim, and the psychology of the victim is shaped by the actions and beliefs of the perpetrator'.*

- Judith Lewis Herman

The Indian society is a mixture of various religions, castes etc. that have their own traditions and usages coming for a long time. It would be right to say that 'unity in diversity' has been the essence of Indian sociological framework where social norms have always been given a lofty position. India has its own position in the world but some rituals have played a role in degrading its status<sup>1</sup>. However, apart from rituals, the mentality of people and specially men I would say has also created problems for women, more often than not. The patriarchal approach has led us to believe that somewhere or the other Indians have to sit and think about their thought processes. Crime against women is not a new concept that has come in picture; rather it is a creation of our own beliefs, ideas and the feeling of imaginary superiority. I am not saying that every time it is the male who is the culprit but most of the time, we can see that the pendulum of being the offender swings towards him. Laws are made to control crimes but they can't assure to change the mentality of humans. Their deterrent nature is insufficient to curb problems prevailing in the society but it doesn't mean that we don't need them. I won't rely upon the concept of '*Something is better than noting*' as laws cannot be put in this category. Needless to emphasize the fact that theoretical measures won't serve the purpose and therefore practicality has to be given an upper hand. The Constitution of India has given rights to every citizen of this nation and no one has got the right to take them away unless there is a just, fair and reasonable procedure for doing the same. So, how can we expect any person to commit crime against any other as it is legally as well as morally wrong? But, in a country whose population is nearly 17 percent of the world's total population, it is not that easy to put a check upon crime and criminals. To be honest, the democratic set up somewhere creates hindrance in punishing those who are accused of committing heinous crimes. I am writing this because democracy talks primarily about rights as compared to duties.

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<sup>1</sup> Sati system which was abolished by William Bentinck, where a woman had to burn herself in fire after the death of her husband.

Out of several crimes that are occurring every day in Indian society, cruelty against women is one of the major offences that finds place in our civilization. Like I said, a man sometimes tends to treat his wife like an object and troubles her in everyday life activity which includes demand for dowry, scolding for interference in his personal or professional life, beating under the influence of intoxicated drugs etc. This is nothing but an advertisement of false ‘*manhood*’ coming out of the mind of the husband. A country where women are worshipped in form of goddess Durga, Laxmi, Saraswati etc., how we can tolerate these evils upon her. In order to finish or minimize I should say, there have been steps taken by the legislature in form of laws that have the capacity to do justice with an aggrieved woman. It was need of the hour that the Parliament of India passed this Act<sup>2</sup> in the year 2005 taking in consideration the problems and issues faced by women in their own premises. This Act up to some extent has played an important role in defining the rights of a woman and the meaning of the term ‘cruelty’ including the liability of a man and the quantum of punishment he will undergo in case he decides to bring himself in the definition of ‘cruelty’ against his wife. I don’t mean to say that every man is bad, but the ratio of good and bad has to be understood in light of various reports and data collected. As per the report of National Crime Records Bureau published in December 2017, crime against women has increased by 83 percent over last ten years where 45 percent change can be seen in cases of cruelty by husband or his relatives against the wife<sup>3</sup>. Indian women are hesitant to report the atrocities they face due to social norms and family pressure which encourages males to develop their ego which ultimately leads to a ‘bigger crime’ including death in some cases.

## **PROVISIONS AND THEIR IMPLEMENTATION: A NEXUS TO BE UNDERSTOOD**

The Domestic Violence Act in 2005 has been framed in order to provide adequate safety measures to those women who are victims of cruelty by the respondents or their relatives. It is to be noted that the term ‘cruelty’ has been defined in the Indian Penal Code as any willful

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<sup>2</sup> Protection of Women from Domestic Violence Act, 2005.

<sup>3</sup> Available at <https://newslick.in/crimes-against-women-increased-83-over-last-ten-years-says-ncrb> (last accessed on 26/1/2018)

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 harassment of the woman where such harassment is with a view to coercing 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<sup>4</sup>. However, the Act itself has tried to define the term 'Domestic Violence' by emphasizing on physical, sexual, verbal, emotional and even economic abuse by explaining the meanings of every word<sup>5</sup>. However in its Explanation number II the Act goes on to say that overall circumstances and facts have to be considered at the time of deciding the definition of the term. It simply reflects the fact that the trial of the case will rest upon questions of fact and material evidences adduced thereon. Considering this point we can say that the age of the victim, behavior of the husband towards her, their personal relations, family bonding, desire for child etc. have to be looked into at the time of pronouncing any judgment. Chapter three of the Act tells us about the powers and duties of protection officers and service providers where it is the duty of them as well as the magistrate who has received complaint from the aggrieved person of her being subjected to cruelty or domestic violence to inform her about (a) her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act; (b) the availability of services of service providers; (c) the availability of services of the Protection Officers; (d) her right to free legal services under the Legal Services Authorities Act, 1987 (e) her right to file a complaint under section 498A of the Indian Penal Code 1860, wherever relevant<sup>6</sup>. This reflects the fact that the authorities have to play their part in making the aggrieved know about rights and remedies available to her. The idea to include this provision was to help a woman who is unaware of the remedies been available to her in case of any violation of her right to lead a dignified life. It would be correct to say that the legislature has shown the will to orchestrate a balance between woman's self – respect and her married life which definitely includes relation with the spouse. Of course, these are the antidotes that can be availed after any unfortunate incident that disrespects the relation of husband and wife, but efforts should be made on part of the spouses to solve their disputes without hurting each

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<sup>4</sup> Section 498 –A of the Indian Penal Code, 1860

<sup>5</sup> Section 3 of the Domestic Violence Act, 2005.

<sup>6</sup> Section 5 of the Domestic Violence Act, 2005

other's sentiments where I would say, that the liability of the male member becomes more as he is expected to take care of his wife. The idea of providing shelter homes to the aggrieved woman under Section 6 of the Act has somewhere tried to protect her from the mental and physical problems which she might have faced living at her husband's house. The provisions of this Section try to include a feeling of comfort and satisfaction inside their minds by ensuring their safety which is necessary for them having in such a disturbed state of mind for a long period of time. Even medical aid facility can be provided to her on her demand as per Section 7 of the Act. The protection officers<sup>7</sup> and service providers<sup>8</sup> so appointed have the duty of taking sufficient care of the victim by ensuring the fact that she is provided legal aid, medically examined and monetary relief under Section 20 of the Act. These ideas simply give us a glimpse of the fact that the framers of this law were in no mood to leave any aggrieved person until and unless she succeeds in getting the remedies that were required to be given to her. The social norms that have most of the times, taken favour of the male members of the society were also a reason for the inclusion of these provisions. If we go through the provisions of Section 11 of the Act we'll see that the Central as well as State governments have been authorized to take steps of advertising the provisions of this Act through public media including television, radio and the print media at regular intervals, and to sensitize the judicial officers and the police officials on the issue so that they are aware of the conditions in which a woman is forced to live and their aftermaths<sup>9</sup>.

A careful study of Chapter four of the Act tells us how orders of relief can be obtained by the aggrieved person. Subsection (1) of Section 12 gives the power to move an application to the magistrate for claiming relief either by the protection officer, aggrieved person or any person on behalf of the aggrieved person and Subsection (2) reflects the fact that relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the

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<sup>7</sup> Appointed under Section 8 of the Act

<sup>8</sup> Any voluntary association registered under the Societies Registration Act, 1860 or a company registered under the Companies Act, 1956 (amended by 2013 Act) or any other law for the time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance.

<sup>9</sup> Section 11 of the Domestic Violence Act, 2005

respondent<sup>10</sup>. It is necessary for the magistrate to fix the date of first hearing which has to be within three days from the date of application received by the Court. Needless to emphasize the fact that '*the justice delayed is justice denied*' had been the motto at the time of including this specific provision where it was ensured that the victim doesn't have to wait for a long time period to get the judgment from the Court which not only would have diluted the chances of getting remedy, but would also have played a role in diminishing the hope and expectations on part of the victim. So, it would not be wrong to say that these provisions have automatically given an upper hand to the aggrieved woman so that she can establish her contentions clearly and can get the desired result in her favour from the judges.

### **JUDICIARY: ITS ROLE IN MAKING THINGS TRANSPARENT**

No country is complete in its functioning until and unless there is an independent, impartial, effective and prolific judicial system embodied in its framework. India is quite lucky to have an independent judiciary where the framers of the Constitution were very much inclined towards making the judicial system transparent and efficient. They were aware of the fact that in a democratic set – up, judiciary plays an important role in defining rights and liabilities of citizens and keeping a check upon the functioning of legislature as well as executive. Yes, of course we can say that Article 50 of the Constitution of India provides that there shall be a separate judicial service free from executive control.<sup>11</sup> Judiciary has to be free from outside interference in order to protect its sanctity and therefore this provision was included in the text of Indian Constitution.

The latest decision<sup>12</sup> of the Hon'ble Supreme Court of India in 2017 regarding Section 498 – A of I.P.C has tried to stop the misuse of this Section by some women who for their own materialistic demands, don't hesitate to accuse their husbands for domestic violence. The Court in this case has issued various guidelines; some of them are mentioned here:

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<sup>10</sup> Section 12 of the Domestic Violence Act, 2005

<sup>11</sup> V.N. SHUKLA, CONSTITUTION OF INDIA 389 (13<sup>th</sup> ed. 2017)

<sup>12</sup> *Rajesh Sharma and others vs. State of Uttar Pradesh, Criminal Appeal No. 1265 of 2017.*

(1) (a) In every district one or more Family Welfare Committees be constituted by the District Legal Services Authorities preferably comprising of three members. The constitution and working of such committees may be reviewed from time to time and at least once in a year by the District and Sessions Judge of the district who is also the Chairman of the District Legal Services Authority. (b) The Committees may be constituted out of Para legal volunteers/social workers/retired persons/wives of working officers/other citizens who may be found suitable and willing (c) The committee members will not be called as witnesses. (d) Every complaint under Section 498 - A received by the police or the Magistrate be referred to and looked into by such committee. (e) Report of such committee be given to the Authority by whom the complaint is referred to it latest within one month from the date of receipt of complaint. (f) The committee may give its brief report about the factual aspects and its opinion in the matter. (g) No one can be arrested till the report is submitted by the committee citing the reasons as well. (h) The report may be then considered by the Investigating Officer or the Magistrate on its own merit.

(2) Complaints under Section 498 - A and other similar offences may be investigated only by a designated officer.

(3) Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.

The order of the Court in the case has shown the mirror to those who have from time to time, played with the provisions of criminal law for their own use. The establishment of Family Welfare Committees will not only serve the purpose of uniting the family but will also help in avoiding future tussles. It is normally said that '*Prevention is better than cure*', which simply mean that if parties can help each other by resolving their disputes in an amicable manner or avoiding those disputes, there is no need for the Court to interfere. The reason of not bringing members of the committee in the definition of 'witness' is simply to avoid their presence in proceedings of the court and to remove the blatant possibility of any immature and illegal testimony on their part in the Court. However, the biggest point which has forced some people to raise their eyebrows is non-detention of the person till the report is submitted by the committee. It has been argued that this will simply lead to tampering of evidences and

pressurizing the witnesses but the Court perhaps was more inclined towards the protection of rights of a citizen of India which include refraining from arbitrary arrest. Now, what is an arbitrary arrest is no doubt, a question of fact. The permission of giving testimony through video conferencing is a step that has to be welcomed as personal appearance sometimes is not possible for a woman due to the customs, traditions etc. of her own religion. It can easily be understood that the apex Court through its judgment has tried to create equilibrium comprising of impartial and authentic investigation that can lead to fruitful results.

In *Mohit Yadav and another vs. State of A.P. and Ors.*<sup>13</sup>, Andhra Pradesh High Court had said ‘*The object of the Domestic Violence Act, 2005 is to provide for effective protection of the rights guaranteed under the Constitution, of women, who are victims of violence of any kind occurring within the family. The Act only confers right to remedy to the wives and women in, domestic relationship*’.

The legal validity of Section 498 –A, I.P.C was challenged in the case of *Inder Raj Malik and others vs. Sumita Malik*<sup>14</sup> where it was argued that this Section violates the provisions of Article 14 and 20(2) that talks about Equality before law and the doctrine of double jeopardy as Dowry prohibition Act has also provisions identical to the Section of the I.P.C. However Delhi High Court ruled out any such argument and said that the ‘*provisions of Section 4 of the Dowry Prohibition Act and Section 498 –A are quite different as the former punishes a person merely on the charge of demand of dowry and the existence of cruelty is not necessary, the case not being the same in Section 498 – A where cruelty has to be proved*’.

As already said, that every coin has two sides, misuse of the Act and Section 498 – A has not been a new thing in Indian circumstances. Courts in their orders have tried to explain the necessity of the legal provisions related to violence against women by distinguishing them with non - authentic cases and redefining the extent of their application. In *Kanaraj vs. State of Punjab*<sup>15</sup>, the Supreme Court of India observed ‘*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*

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<sup>13</sup> 2010 Cr.L.J 3751

<sup>14</sup> 1986 (92) Cr.LJ 1510

<sup>15</sup> 2000 Cr.LJ 2993

*conjectures and implications. The tendency to rope in relatives of the husband as accused has to be curbed’.*

This judgment of the Court has reflected the fact that the judiciary has been in no mood to blindly believe and accept cases related to domestic violence involving cruelty only on the account of any kind of ‘apprehension’ of being victimized. The *ratio decidendi* and the observation suggests that the Court’s interpretation of the terms ‘cruelty’ and ‘violence’ is not subject to any presumption and concrete evidences have to be given in order to get remedy in its favour by the aggrieved party except in some cases like Section 113 – A of the Indian Evidence Act, 1872 which talks about presumption as to dowry death.

### **ROLE OF SOCIETY: INTERFERENCE OR A JUSTIFIED SUPPORT?**

Human being is a social animal and requires continuous support, affection and care for his/her overall personality development. There cannot be any culture or tradition that can be justified without any involvement of the humans. Society always plays an important role in giving new laws in a democratic nation. It comprises of people of different choices, needs and up to some extent values as well. It would be correct to say that it plays a paramount role in establishing the fixed principles that are to be followed for smooth functioning of the organization and the country as well. In my opinion, neighbors and the relatives of the concerned spouses should try to resolve their disputes in a manner that is suitable for both the parties. If we consider for a moment that husband is the accused and wife the sufferer, family members of the husband should try to make things clear by counseling him for the sake of his family. It has to be remembered that husband has got the responsibility of taking care of his family which includes his wife, children as well as parents and that is the reason his shoulders always carry high expectations as well. Quarreling over petty matters not only degrades the holiness of marriage but also creates a feeling of ‘insecurity’ in the minds of children. The encouragement on part of the family members as well as neighbors will help the victim to get back her respect as human beings are connected to each other like a garland which contains flowers in it and these flowers make it decorative as well as fragrant. In the same manner, efforts have to be made to reconstitute the conjugal rights instead of separation or anything like that. Emotions and feelings

are part of human life and these have to be preserved and respected in every case. So, it won't be correct to say that involvement of people living in the society in issues of violence between a husband and wife would be a case of unjustified interference; rather it will help in removing the blocks from the path of remedies and help that can play a crucial role in establishing cordial relations between the spouses and connecting them together for their as well as the future of the family. Self-egos and interests should be kept away at the time of deciding the fate of the relationship and due of these reasons even the Domestic Violence Act, 2005 has contained provisions for resolving the disputes between spouses by counseling them.<sup>16</sup> It is to be noted that this system has to be just, fair and reasonable without giving any party the opportunity to misuse any of the provision of criminal law for his or her own benefit as the same will lead to defeat the very purpose of framing the Act.

## EPILOGUE

Padmapriya Govindarajan in her article titled '*A Curious change to India's Domestic Violence Law*' has given a hint that the current law on domestic violence is insufficient and needs some amendments. As per her observation, the Act somewhere lacks the understanding with respect to the compound nature of phenomenon of domestic violence in India.<sup>17</sup> Another author Deshaklayan Chowdhury in his article has emphasized upon the impact of the Act passed in 2005 in present scenario which says that there is high pendency of cases as per the records of N.C.R.B. His observation in regard of 'Protection officers' is absolutely correct which shows us that they are overloaded with work and not provided with guidelines in implementing important provisions of law. He has given a real example where a lady has complained of the system of implementation not being clean and transparent where the police officers refrain from writing complaints and advice the complainant to solve their disputes at the home. Mr. Chowdhury further says that there is no uniform protocol for the service providers as most of them are NGOs and have no connection with the police or the protection officers<sup>18</sup>. Pallavi Mahajan in her article has told that domestic violence is a hindrance in empowerment of a

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<sup>16</sup> Section 14 of the Domestic Violence Act, talks about the procedure of counseling of aggrieved as well as the respondent by the member of service provider after an order of the Magistrate.

<sup>17</sup> Padmapriya Govindarajan, *A Curious change to India's Domestic Violence Law*, THE DIPLOMAT (Nov. 26, 2016), <https://thediplomat.com/2016/11/a-curious-change-to-indias-domestic-violence-law>

<sup>18</sup> Deshaklayan Chowdhury, *Ten years after it was implemented, how is the Domestic Violence Act faring*, SCROLL (Aug. 11, 2017, 8:30 P.M.) <https://scroll.in/article/846666/ten-years-after-it-was-implemented-how-is-the-domestic-violence-act-faring>

woman's health and development of her overall personality.<sup>19</sup> She has interpreted the provisions of the Act on a 'feminist' scale by explaining the need of the Act for Indian women.

An examination of the write ups of various authors gives us an idea that some have advocated for improvements while others are satisfied with the provisions of the Act. Their interpretations have own logics and understanding of the subject but in my opinion the Act definitely deserves some amendments. Though, it has been framed with a view to curb the menace of violence against women, but practical application and need to include provisions for victimized men is still in demand. Unfortunately, those women who misuse the provisions of the Act for their self - gains tend to create problems for the real sufferers. The Act is silent on this issue and has not even discussed anything about the liability of those women. Instead of having a provision similar to this, it has empowered the Magistrate to pass ex - parte orders for enforcing the provisions of Sections 18 to 22 of the Act<sup>20</sup>. One can argue that the principle of natural justice i.e. *Audi Alteram Partum*<sup>21</sup> is infringed but the story goes like this only. This simply reflects the fact that the legislators have missed the chance to take the pain of thinking that even men can sometimes be on the aggrieved side. The name of the Act itself suggests that the law is for protection of women from the misdeeds of her husband or his relatives but it could have been made stronger by inculcating the idea of unbiased process of trial for the culprits removing the possibility of unfair judgment. These reasons have forced the apex court to intervene and provide guidelines in form of rules at the time of solving the disputes between spouses from time to time.

## **SUGGESTIONS AND REMEDIES**

Everyone knows that due to the patriarchal nature of Indian society, women are more vulnerable to crime as compared to their opposite sex. Therefore, laws related to women safety and security has always shown a tilt in her favour at the time of deciding a case. The Protection of Women from Domestic Violence Act is also one of the examples where emphasis has been

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<sup>19</sup>Pallavi Mahajan, *Critical Analysis of Domestic Violence Act*, 2005 PAPERS (May13, 2011) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1840628](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1840628)

<sup>20</sup> Section 23 of the Domestic Violence Act, 2005.

<sup>21</sup> Meaning: Let the other side be heard.

laid upon safety and security of women from her own people. However, in my opinion certain changes in the Act will definitely serve the purpose in a fruitful manner. Some of them are:

- 1) Women who are accused of making false complaints should be punished in the same manner in which the guilty men are punished.
- 2) The provision of passing an ex - parte order should be removed from the Act as it not only violates the basic principle of natural justice but also presumes a man guilty without giving him the chance to defend himself.
- 3) Sub - section 6 of Section 20 where the debtor of the respondent has to pay money to the aggrieved is totally an inappropriate provision and needs to be amended or removed as the debtor has got nothing to do with the case between the spouses and only because of the fact that he has taken loan from the respondent, he cannot be made liable to pay that amount to the aggrieved person.
- 4) The role of service providers has to be enhanced and made more efficient to release some results and proper coordination between them and the Protection officers has to be ensured.
- 5) The provision of taking sanction of the State government in order to prosecute the protection officer under Section 34 of the Act should be finished and steps should be taken in order to punish those police officials as well who are accused of not registering the complaint of the aggrieved person.

Every law is passed with an object of ensuring justice to the victim and punishing the culprit. It cannot be denied in any case that laws play an important role in establishing peace and order in the society. But, at the same time they have to be framed on the platform of impartiality, equality and justice in order to create a balance in society. The Protection of Women from Domestic Violence Act will definitely yield good results if the proposed changes are included in it. However, it doesn't mean that it is fruitless today and is simply a showpiece but some of the provisions need to be checked and amended so that the possibility of unjustified judgments or orders becomes zero. We should not forget the words of Martin Luther King that '*Human progress is neither automatic nor inevitable....Every step towards the goal of justice requires sacrifice, suffering and struggle, the tireless exertions and passionate concerns of dedicated individuals*'.