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SUBJECT NAME	Women and Law
COURSE	BALLB
COURSE DURATION	5 year
SUBTOPIC NAME	SALIENT FEATURES AND CRITIQUE OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005
CONTENT TYPE	Text
SEARCH KEYWORD	SALIENT FEATURES AND CRITIQUE OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005
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# **SALIENT FEATURES AND CRITIQUE OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005**

The **Protection of Women from Domestic Violence Act 2005** is an Act of the Parliament of India enacted to protect women from domestic violence. It was brought into force by the Indian government from 26 October 2006. The Act provides for the first time in Indian law a definition of "domestic violence", with this definition being broad and including not only physical violence, but also other forms of violence such as emotional/verbal, sexual, and economic abuse. It is a civil law meant primarily for protection orders and not for meant to be enforced criminally.



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## **Definitions**

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The Protection of Women from Domestic Violence Act 2005 different from the provision of the Penal Code - section 498A of the Indian Penal Code - in that it provides a broader definition of domestic violence.

Domestic violence is defined by Section 3 of the Act as" any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it:

1. harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes

- causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
2. harasses, harms, injures or endangers the aggrieved person to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
  3. has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
  4. otherwise injures or causes harm, whether physical or mental, to the aggrieved person."

The Act goes on, through the section *Explanation 1*, to define "physical abuse", "sexual abuse", "verbal and emotional abuse" and "economic abuse".

## Scope

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Primarily meant to provide protection to the wife or female live-in partner from domestic violence at the hands of the husband or male live-in partner or his relatives, the law also extends its protection to women living in a household such as sisters, widows or mothers. Domestic violence under the act includes actual abuse or the threat of abuse whether physical, sexual, verbal, emotional or economic.<sup>[2]</sup> Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

### **The salient features of the Protection from Domestic Violence Act, 2005 are as follows:**

- The Act seeks to cover those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or a relationship in the nature of marriage, or adoption; in addition relationship with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with them are entitled to get legal protection under the proposed Act.
- "Domestic violence" includes actual abuse or the threat of abuse that is physical, sexual, verbal, emotional and economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.
- One of the most important features of the Act is the woman's right to secure housing. The Act provides for the woman's right to reside in the matrimonial or shared household, whether or not she has any title or rights in the household. This right is secured by a residence order, which is passed by a court. These residence orders cannot be passed against anyone who is a woman.
- The other relief envisaged under the Act is that of the power of the court to pass protection orders that prevent the abuser from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented visited by the abused, attempting to communicate with the abused, isolating any assets used by both the parties and causing violence to the abused, her relatives and others who provide her assistance from the domestic violence.

- The draft Act provides for appointment of Protection Officers and NGOs to provide assistance to the woman w.r.t medical examination, legal aid, safe shelter, etc.
- The Act provides for breach of protection order or interim protection order by the respondent as a cognizable and non-bailable offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to twenty thousand rupees or with both. Similarly, non-compliance or discharge of duties by the Protection Officer is also sought to be made an offence under the Act with similar punishment.

While "economic abuse" includes deprivation of all or any economic or financial resources to which the victim is entitled under any law or custom whether payable under an order of a Court or otherwise or which the victim requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by her, payment of rental related to the shared household and maintenance and disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the victim has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the victim or her children or her stridhan or any other property jointly or separately held by the victim and prohibition restriction to continued access to resources or facilities which the victim is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household, "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm or danger to life, limb, or health or impair the health or development of the victim and includes assault, criminal intimidation and criminal force.

## **Application to the magistrate**

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An application regarding domestic violence can be presented to the magistrate seeking one or more reliefs mentioned in sections by:

- The aggrieved person,
- Protection officer on behalf of aggrieved person
- Any other person on behalf of aggrieved person

Jurisdiction of court

The first class magistrate court or metropolitan court shall be the competent court within the local limits of which

- The aggrieved person permanently or temporary resides or carries on business or is employed
- The respondent permanently or temporally resides or carries on business or is employed or
- The cause of action arises.

Any order made under this Act shall be enforceable throughout India While disposing application the magistrate shall take in to consideration any domestic incident report received from the protection officer or service provider. The relief sought under this

section includes the issuance of order of payment or compensation or damages without prejudice to the right of such person to institute suit for compensation or damages for injuries caused by the act of domestic violence. If the magistrate is satisfied that an application prima facie discloses that the respondent is committing or has committed an act of domestic violence or there is a likelihood of such violence, he may grant following ex parte interim order against the respondent on the basis of affidavit of the aggrieved person. Magistrate can issue different orders such as Protection order, residence order, monetary relief, custody order or compensatory orders as per the circumstances of the case.

In case of an earlier decree of compensation or damages passed by any other court, in favour of aggrieved person, the amount if any paid shall be set off against the order of amount payable under this act. The application to the magistrate shall be as nearly possible to the formats prescribed under this Act and Rules. After receiving the application the Magistrate shall fix the date of first hearing within 3 days and the magistrate shall endeavor to dispose of every application be within a period of 60 days of the first hearing. The notice of the date of hearing shall be given by the magistrate to the protection officer who shall get it served to the respondent. At any stage of the application, the magistrate may order, counselling of the respondent or aggrieved person either singly or jointly with any member of service provider. The magistrate may secure the service of suitable person preferably a woman including a person engaged in the welfare of women for assisting the court in the discharge of its function. If the circumstance of the case so warrant and if either party so desires the magistrate may conduct the proceedings on camera.

### **Different kinds of order issued by the Magistrate**

#### **Protection orders**

After giving an opportunity to the aggrieved person and respondent of being heard and the magistrate is satisfied that a prima facie case of domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person prohibiting the respondent from the following acts such as Committing any acts of domestic violence

- Aiding or abetting in the act of domestic violence
- Entering the place of employment of aggrieved person or if the person is child, its school or any other places
- Attempting to communicate in any form including personal, oral or written, electronic or telephonic contact
- Alienating any assets, operating bank account, bank locker held or enjoyed by both parties jointly or singly by the respondent including her stridhan
- Causing violence to the dependents, or other relative or any other person who give the assistance to the aggrieved person or
- Committing any other acts specified by the protection officer

#### **Residence orders**

The magistrate being satisfied that a domestic violence has taken place, pass residence order-

- Restraining the respondent from dispossessing or in any manner disturbing the peaceful possession of the shared household
- Directing the respondent to remove himself from the shared household
- Restraining the respondent or his relatives from entering any portion of the shared house hold where the aggrieved person lives
- Restraining the respondent from alienating or disposing of the shared house hold or encumbering it
- Restraining the respondent from renouncing his right in the shared household<sup>[4]</sup>
- Directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her or to pay rent for the same if the circumstances so require.

No order shall be made against women under this section. Magistrate may impose additional condition and pass any other order to protect the safety of the aggrieved person or her child. Magistrate is also empowered to order direction the concerned station house officer of the police station to give protection to the aggrieved person to assist in implementing his order. Magistrate may also impose on the respondent to direct stridhan or any other property or valuables security she is entitled

### **Monetary relief**

The magistrate may direct the respondent to pay monetary relief to meet the expenses of the aggrieved person and any child as a result of domestic violence and such relief include

- Loss of earnings
- Medical expenses
- Loss caused due to destruction or removal or damage of any property
- Pass order as to maintenance for the aggrieved person as well as her children if any

Including the order under or in addition to an order of maintenance under section 125 criminal procedure code or any other law.

The quantum of relief shall be fair reasonable and consistent with the standard of living to which the aggrieved person is accustomed to. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent.

### **Custody orders**

Magistrate can grant temporary custody of any child or children to the aggrieved person or to the person making application on her behalf and specify the arrangements for visit of such child by the respondent. Magistrate can refuse the visit of such respondent in such case if it may harmful to the interest of the child.

## **Compensation orders**

Magistrate may pass order directing the respondent to pay compensation to the petitioner for injuries including mental torture and emotional distress caused by the acts of domestic violence committed by the respondent.

Copies of orders passed by the magistrate shall be supplied free of cost to the parties concerned and police officer and service provider

Any relief available under this Act may also be sought in any other legal proceedings before a civil court, family court or criminal court and such relief may be sought in addition to and along with relief sought for in suit, or legal proceeding before civil or criminal court.

## **SALIENT FEATURES OF THE PWDVA 2005**

### **Secular law**

Act is an important milestone in the history of women empowerment in India for two reasons...Firstly country has taken a huge-step in recognizing domestic violence as violation of human rights which no civilized society can ignore. And secondly this law is civil in theory and criminal in practice, orienting civil and criminal remedies at a time. It is a secular law which provides for more effective remedy fulfilling the Constitutional mandate to the victims of domestic violence.

### **Law to protect woman in every relations**

It overcomes lacunas in previous legal remedies by providing protection to not only women in matrimonial relations but to women in all domestic relationships. It provides solace to women in any form of violent situation in a shared household as wife, mother, sister, or even for the first time in country it provided protection to women in live-in relations and also to those women whose marriage undergoes variety of defects or want of formalities etc. as required by law.

### **A civil law**

That law termed as a civil law which provides compensation and remedies to the victim. PWDVA 2005 is directed towards providing compensation and support to women victim and not just to penalize the perpetrator. This is the law which is victim driven and it does not required the state to initiate e.g. 498 A, where the state is a party to and victim has to depend on the police and prosecution for enforcement. It can be put in to motion by the aggrieved by direct access to court claiming relief Another aspect for

conceptualizing it as a civil law because it restores the agency that rightly belongs to her, redefines the injury so as to perceive her to be injured.

### **Identification of Domestic Violence as Targets**

This law recognizes that women's rights are not violated in their capacity as wives and only due to dowry related cruelty, but also as sisters, daughters, and also live-in partners. This makes a major break-through in recognizing the reality of violence which occurs in life of women and seeks to provide remedies. Previously it used to refer the stories around the married women.

### **Wider inclusive definition of domestic violence**

The important advance is made by the Act in its understanding the term domestic violence which has been given the most liberal and wide perspective, enough to encompass every possibility in case of woman in Indian context. It covers all forms of physical, sexual, verbal, emotional, and economical abuse that can harm, cause injury to, and endanger the health, safety life, or well-being either mental or physical of the aggrieved person. The law while defining domestic violence cured all irregularities in previous laws and kept in view the current relationship culture in Indian scenario. Act provides criterion for the help of judiciary to finalize the act of violence within the ambit of the definition. It also explained with the examples, what constitute physical abuse, sexual abuse, verbal and emotional abuse and economic abuse and for the purpose of determining whether any act, omission, or conduct of the respondent constitute "domestic violence" under this section the discretion of the judges with all the overall facts and circumstances to be taken in to consideration is final. For the first time in our country such a very expanding meaning is considered by the legislature and even emotional and verbal and economical abuse is brought within the purview of definition. This inclusion itself is evident of the forward- thinking strategy of framers. Second advance of the Act is in its understanding of the term 'aggrieved.' The Act for the first time entrenched it protection to 'any woman' in domestic relations and cover the possibility of protections to women in informal relations and recognizes live-in relations. And now a woman in such relation can also take recourse to the provisions of law. The law protects women in bigamous marriage or a marriage termed invalid in law. Now it takes away the possibility of defense by a man to disposes her or to deny maintenance to the vulnerable women. Third remarkable understanding of the concept of domestic relations^ and shared household the relationship between two persons who live or have lived together in a shared household related by marriage, consanguinity or even relations by adoption or in the nature of marriage like relations is considered under the act. As previously when under the 498A provision of the IPC complaint was filed the most obvious way of cutting in support system of women was to throw her away out of household. The Act now takes all such probabilities in to consideration and held a house where the aggrieved person lived in domestic relations either singly or with respondent is termed as shared household. In a joint family the term is considered irrespective of the fact that respondent has any right, title or interest or not.

### **Provided strong Implementation mechanism**

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For effective implementation of the Act precaution is taken to establish the authorities in the name of Protection officer, police officers and also for active participation of the public spirited persons and associations like NGOs and Service Providers, Shelter homes is taken. The NGOs who are working for women's rights can get themselves registered with the state government as 'Service Providers.' They are the organizations registered under the Companies Act. They are assigned the duties to record domestic incident report, forward it to magistrate, get the aggrieved person medically examined and ensure that the aggrieved person is provided shelter in the shelter home if required. The Protection Officer is the immediate responsible authority created under the Act. They are public servants accountable to women victims of violence. They are expected to support the victim in all respect, through filing cases, assisting the court, making available every support system work for women in need. The appointment of the protection officer under the act keeping view the ground reality where in legal system and processes are becoming inaccessible to the most of the women is creditable feature of the Act. This law has conceptualized to be more survivors oriented with simple procedure and immediate relief The Act has not only created the authorities but assigns them functions and powers in the Act itself and also makes them accountable by fixing their duties and making them subjected to penal provisions if failed in duties. This it is a warning to the inefficient officers to follow their duties.

### **Easy access to justice**

The Act has provided simple non-technical procedure to give redress to the victim. It's not required for the victim to go and lodge a complaint but anyone who has a reason to believe, that an act of domestic violence has been or being or is likely to be committed may give information to the protection officer. Complaint can be from aggrieved, protection officer or any one on behalf of her, it can also be lodged by doctor. The procedural technicalities are totally absent in the Act. The courts are also held time bound to complete the proceedings and final disposal within sixty days. The provision for in camera proceeding is provided under the Act. The availability of the Counselors at any stage of hearing can facilitate the parties to reconciliation of the matter. The Act has also made provision for Q post-order proceedings an appeal within 30 days. Under the Act the multiple channel of communication has been set up under the law and it is up to the women in distress to choose which is more suitable to her i.e. Protection officer, police, lawyer, service provider, or magistrate etc.

### **Recognition of external agency support system**

The Act provides the external agency to help the victim of domestic violence along with the state. Its first in time to take the help of the non-state entities in the effective implementation of the law. The service provider will have to get register under the Act. They are empowered in once they register in the following ways.

- 1) Any direction given by them to a medical facility would make it obligatory to provide medical services to victim

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2) Any direction given by them to shelter home would make it obligatory to provide shelter.

3) Act gives them immunity for acting in good faith.

4) DIR (Domestic Incident Report) made by them has the authenticity and would take a place of civil- equivalent of FIR.

### **Too many rights and reliefs under one roof**

The victim driven legislation provides remedies and relief to the victim, to give quick, prompt remedy, the Act has made it clear that judicial officers are at wider discretion to confer the reliefs and recognize the rights of victim in such manner that she shouldn't be denied justice. The court immediately on receiving complaint of domestic violence shall ensure the victim to give relief with 'stop violence order' or 'Protection Order' against the respondent. The intention of this order is to give a space free from violence to a woman facing domestic violence. Where she can evaluate her options and choose her future course of action. It is meant to be immediate emergency law. If the respondent is disturbing the aggrieved in the peaceful living in a shared household, the 'residence order' to restrain the respondent from disposing the aggrieved or disturbing the possession of shared household, irrespective of his legal inequitable interest therein. When the victim has fear for the respondent the court can give custody of children in their interest to the aggrieved during the pendency of application and even the respondent can be denied the visitation rights if it is in the interest of the children under 'custody order.'" When the court is of the opinion to grant compensation to the victim for damages for injuries 'compensation order' is issued. The victim of domestic violence is also protected with the monetary relief and the remedy to the victim under any other civil or criminal court is not barred. The law is enthusiastic in providing multiple rights and remedies to the victim and it is also path breaking in woman empowerment movement, however, with the lacunas in the existing system, could not prove as a best solution. But while drafting the law, the practical assessment and also the review of the success or failure of previously legislations so far not made available. Hence there are more chances of failure of the Act. There are some grey areas which can hamper the effective implementation of the Act and also the laudable object of the Act providing effective remedy to the victim may be in danger. Hence some points of critique can help to overcome the situation and give a way to thought provoking for the society and useful for the state.

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- Includes physical and mental ill-treatment.
- Primarily meant for the protection of wife or female live-in partners.
- Law also extends to sisters, widows or mothers.
- Harassment in the form of dowry demands also included in this law.
- Gives women **right to secure housing**.
- Court can also issue **protection orders** that prevent the abuser to harass the women by acts at her workplace.
- Act proposes appointment of protection officers and NGOs.
- Breach of protection order is a non-bailable offense.

## **CRITIQUE OF PWDVA 2005**

Despite the fact that the PWDVA 2005 was complimented by the women activist and also the women in general as it was pro-women legislation the act met with the strong agitations from some comers of the society. The PWDVA 2005 coming in to an existence though being a welcome step in women's empowerment movement in the country was openly complimented but various provisions were looked with suspicion and whispering sounds of even the feminist critique posed a question mark for its success. There were various issues related with substantive and procedural or conceptual loop holes, hurdles which raised queries regarding effective implementation.

Those issues can be grouped in to categories. They are grouped in the study as follows.

- Lack of evaluating and monitoring assessment of success and failure of previous social legislations
  - For Women and anti Men (Monomaniac legislation)
  - Substantive lacunas
  - Loop holes in over-empowering the Authorities.
  - Procedural lacunas.
  - Services related technicalities
  - Too many rights and reliefs without practical assessment.
  - Not avoided the possibility of misuse

The real effective implementation of any legislation has to undergo a scrutiny of strong public consensus and acceptance in democratic processes. It needs a backing of majority of public opinion and the strong political will to work out effectively. The PWDVA 2005 though was welcomed by majority; the haste in making the law without projecting the ground realities makes it weak legislation and matter of public ridicule. The arrival of this Act was not an offshoot of the public opinion but it was the reaction by Government to the increasing international pressures after ratifying the CEDAW. Hence the acceptance to the statute must come within itself and it should avoid a feeling of being imposed by the external agency for the effective implementation in a democratic society. Which did not happened in the present case it was the need to protect a woman victim for her peaceful survival, but it is made cent per cent with male prejudices.

**Lack of evaluation and monitoring assessment of success and**

**failure of previous 'Pro-Woman' social legislation**

Since independence and after coming into force of the Indian Constitution various legislations for the women well-being and empowerment are passed with gender sensitive attitude. If the number of legislations passed in the country is viewed seriously there is strong a hope for the dignified position of women, but the experience until today is not encouraging due to the weak implementation and lack of strong political will. This has not proved successful. The Dowry Prohibition Law of 1961 as an instance shows the mockery of the Indian system, where day by day the situation is worsen and the statistical data of NCRB reveals the factual position of the reported cases, that instead of the stringent amendments the law proved unsuccessful. Number of statutes came but could not realize its laudable objects. They could not survive except few because of the challenges they have faced. The similar kinds of challenges are likely to come across in implementation of PWDVA 2005. Perhaps then it would not to not possible to fulfill the Constitutional mandate of dignity to women. Therefor this is the most important question to be answered why we have failed in respect of other statutes in the past. Those points of failure can be taken into account while implementing the statutes. Flavia Agnes who has raised a very pertinent question in this regard. She said "while celebrating this enactment (DVA), it is an opportune moment to pause and reflect on why and how several pro women legislations in the past have failed to protect women. Also to examine what are the provisions in this new legislation that sets it apart and elevates this over all the pro- women legislations of the past two decades and to raise some uncomfortable questions. Are we going round in circles and entangling ourselves in further legislative entanglements? As a part of her analysis, she emphasized the effective implementation of these legislations in its true spirit and intent and making them relevant to women at the fringes of society was too formidable a task. The exact problem, which arose in the past and which we could not overcome, according to Flavia Agnes, (may) arise in the natty grittiness of trial court litigation in far-flung towns and rural areas. Sufficient attention was absent in the past to monitor the impact of legislation, enacted at our behest. Too often we have basked in the glory of a legislative enactment, only to wake up a decade later to find that it has failed to address core concerns. The pro-women legislations of the eighties -amendments to rape and anti dowry laws as well as the Family Courts Act provide glaring examples of this phenomenon." These expressions itself make it clear that we need to find different strategy to make the present Act effective.

### **Pro women and Anti Men (Monomaniac legislation)**

Many organizations like 'Save the Indian Family' hold the view that under the grab of providing protection to women, this legislation in fact, strikes at the very foundation of marriage by promoting intolerance and encouraging unnecessary litigation even for petty domestic violence the law is totally based on wrong notion and assumes men as sole perpetrators of domestic violence and the women the only victim. In other words the law is totally gender specific and rules out the possibility of domestic violence against a man, women are conferred ample rights without looking at the necessity and man is overburdened with discriminative liabilities with total denial of rights. The PWDVA2005 is discriminatory against men as only women can complain for the violence under this Act and hence violation of Art 14 and 15 as it discriminates upon the

ground of sex alone. The male prejudice of the legislative intent is so severe that it is amazing to notice that there is no remedy under PWDVA 2005 against abusive or dishonest daughter-in-law if she abuses her mother-in-law or sister-in-law. As well the example that the definition of aggrieved the male child is not considered in sec. 18 (c). The law is based on the wrong assumptions that the women will complain only against the injustice. The experience since the glorying examples of misuse of 498A by women has shown that Women Misusing Sec 498 A of IPC against Men because this law is not balanced and is biased towards women as victims and men only perpetrators. It should be properly framed to rule out the possibility of misuse by one sex. Women have misused this law by taking undue advantage and tortured their in-laws. More urban women are seen misusing the law. Men's hands are tied as this law is women-centric. With this experience in hand the legislature had not given much attention in framing the PWDVA 2005 only making it pro-women.

### Substantive lacunas

The definition of domestic violence in the widest possible interpretation of different types of violence paved way to manipulations. The slack drafting of this law will allow cunning and unscrupulous women to teach a lesson to any of her male relative at her sole behest. This law will recognize and give legal sanctions to apprehensions no matter how trifle and insignificant and fizzy they are. The mere belief of a person, even a stranger will be sufficient to take cognizance by the protection officer. The most justifying fact of the Act is that it does not distinguish between actual abuses and gives the same coverage to the mere apprehension or the likelihood of the abuse. The definition of abuse is too broad and open to manipulation. Section 3(b) also specifies that any type of harassment, harm or injury with aim to coerce unlawful dowry from either the victim or any other person is also considered domestic violence. The manipulation is possible because of what constitutes abuse. In addition to physical and sexual violence, such as beating, slapping, punching and forced sex, it includes verbal and emotional abuse, such as insults or name-calling. Preventing wives from taking up a job or forcing them to leave are also covered. The terms in the definition 'verbal and emotional' 'abuse' in itself are extremely relative and depend upon subjective satisfaction of one. The terms include inter alia- insults; name calling is sure to call problems. Mr. Soli Sorabji is of the view that the definitions are overbroad and bristle with ambiguities should be narrowly and precisely defined, lest the Act becomes paralyzed for lawyers and nightmare for the enforcement authorities. Economic abuse may encompass when by refusal to pay sum of money for whatsoever reason even if the husband himself is devoid of sufficient resources. Another definition came for the interpretation at the judiciary is 'shared household' as mentioned in the Act is vague and judiciary had make it clear that parents independent property in which the husband does not have any share will not amount to shared household Supreme Court in **S.R.Batra v Tarun Batra** held that it could only mean the house belonging to or taken on rent by the husband or the house which belongs to joint family of which husband is member ,but it does not mean the parent's independent property in which the husband does not have any share will amount to "shared household". A question regarding the substantive or remedial nature of the Act a reference can be made regarding a judgment Sanjay

Bhardwaj and Ors. v. The State and Anr. Where the husband filed a petition before the Delhi High Court challenging the order of maintenance granted by the trial court. It was argued that the husband had lost his employment and source of income, and therefore, the Appellate Court was wrong in upholding the order of maintenance on the ground that since the husband had been earning well earlier, he was liable to maintain the wife. The Court clearly observed that the PWDVA does not create any additional right in favour of the wife regarding maintenance. It only enables the Magistrate to pass a maintenance order as per the rights available under existing laws. The court held that awarding maintenance to the wife without any prima facie proof of his employment is contrary to the provisions of the law.

### **Loop holes in over-empowering the Authorities**

The authority established for effective implementation of the Act is a Protection Officer, who is identified by the State Government who is assigned the major role for assisting court, initiating action on behalf of the aggrieved and also to look after the services required for the victim like shelters, hospitals, counseling, legal aid and such other services in question. The appointments made under the Act are in practice not full-fledged, full-time working as Protection Officers but it is given as additional charge to those who are already in Government services. This additional burden of heavy duty is definitely to meet the desired ends of insensitive attitude towards the victim. The officers are not having update knowledge of the functions and powers as well they are not actually concerned with gender sensitized approach for the victim. Protection officers, as per the Act, are a group of officers whose duty is to assist the aggrieved party with the processing and completion of the domestic violence suit. The institution of protection officers is a useful one, emphasizing the need for societal intervention in order to prevent domestic violence, by directly addressing from an external standpoint the relationship of power and control in an abusive relationship. The problem however lies with the resources available in the name of such officers. The judiciary in the state of Maharashtra have however shown very activist attitude in respect of appointment of the protection officers and also given guidelines observing that effective implementation of PWDVA would reduce the number of cases of cruelty and atrocities against women, the court also said government of Maharashtra shall establish at the district level within the jurisdiction of each police headquarter a Special cell for women within prescribed time, as well The Home Department and Superintendent or Commissioner of Police and Government of Maharashtra for its smooth functioning provide necessary infrastructure. Subsequent to that in PIL filed on 3<sup>rd</sup> August 2009, the petitioner raised issues pertaining to implementation of PWDVA2005, including the appointment of full-time protection officers providing them with adequate infrastructure and assistance etc. Government of Maharashtra provided positively reacted and drafted a proposal for one post of Protection officers in each district and a data entry operator in each district. In Maharashtra the judiciary actively appointed High Power Committee headed by Chief Secretary of State and other Secretaries under the chairmanship of Secretary Woman and Child Development constituted 'selection committee'. This shows even after five years of passing of the Act there is very weak infrastructure where the judiciary had to ponder upon. The need for finance for setting up the office and infrastructure of

protection officer the 'Gender budgeting' with the provision of separate budgetary allocation is needed where the strong political will reflects. The present statute requires this positive approach of government.

The police authorities are not directly concerned with the implementation of the Act, but the general approach forced by the patriarchal background is not in favor of the victim. They need to be not only informed but sensitize on the issues of human rights of women and particularly women's dignity. In most of the cases the police under the parental authority advise the women to think again and try and reconcile their differences with their husbands when women have gone to the local police station to register a complaint against domestic violence. The mindset of the Police is a result of long standing service in the Police department based on the patriarchal model of man women relationship. It would be very difficult to change the Police behavior and accommodate the spirit of new law in the administration of Criminal Justice. It would not suffice simply by declaring that the Police man is accountable for non-acceptance of complaint from a woman. The survey conducted by the Lawyers Collective of police in Delhi and Rajasthan provided that police are often the first point of contact for women victim of domestic violence, hence their role have a tremendous potential to play. But their notion and convictions regarding women is the real obstacle, who believes that maintaining the family and the security of children should take precedence over own safety and wellbeing.

### **Procedural lacunas.**

The Act has mandated simple procedural formalities and had made an attempt to give easy access to victim. But the uncertainty,

practicableness about it left certain questions unanswered.

### **In Camera proceeding**

Under sec 16 the magistrate is allowed to hold proceedings in camera if either party to the proceedings so desires. But the experience of in camera proceedings is not very satisfactory, though it is intended to benefit women there is a possibility of misuse for the vested interest. During proceeding in camera women are intimidated in favour of the respondent. This is quite possible when there is only a woman facing all other male members' magistrates, lawyers, protection officers, police etc.

### **The provisions found violation of the "due process of law" in the following situations.**

- 1) In permitting the passing of 'ex-parte' orders
- 2) In granting the power to magistrate to pass orders without laying down any rule of evidence or procedure

3) In granting a power to the magistrate to conclude that an offence under sec 31 has been committed, upon the sole testimony of the aggrieved person

### **The Act is not providing a provision on limitation of time within**

which the aggrieved person should approach the court. It is violating the rule of public policy. PWDVA 2005 does not provide a particular time limit for aggrieved woman to come and file for relief, may be because the offence of domestic violence has been looked in to a form of 'continuing offence'. The provisions relating to 'monetary relief' are unguided due to the absence of guidelines to determine the monetary relief payable to aggrieved women. The proceedings under the Act are criminal in nature. With the bad experience of 498 A it was observed that there can be arrest on mere complaint by the women and there is no investigation which is conducted prior to it.

The action like arresting and putting a person in jail, even before trial has begun, amounts to prejudging and punishing the accused without due process. In such situation many of the complaints are made to take revenge or teach a lesson. Abuse of law is possible by women, who invoke frivolous proceedings against their husband for the purpose of harassment. The law, which was enacted to protect women from dowry harassment, is being used by thousands of unscrupulous women to legally terrorize the husband and his family for extortion or in other words so to say to legally blackmail innocent husband and in-laws for money. Thus it has victimized countless innocent women related to the husband's family. Since there are no legal repercussions of filing a false case, more and more women use this law to facilitate divorce and to make the most of a failed marriage.

**Sec 27** enables the magistrate to pass an order beyond the local limits to which his or her jurisdiction is confined...Who is to implement such orders? The Act is silent.

**Sec 31** says breach of order shall be an offence which is punishable with imprisonment extending to one year. Under sec 31(3) magistrates have been empowered to frame charges under sec 498A of IPC or any offence under the Dowry Prohibitions Act. Sec 32 makes it a cognizable and non-bailable offence—here comes direct conflict.

Criminal law defines an offence punishable with imprisonment for one year as a summons case and the procedure for trying such an offence is totally different from trying a case under sec 498 A of IPC. This glaring lacuna may create confusion and stay the prosecution as to what procedure the magistrate needs to follow and adopt.

### **It is a matter of legal debate**

That there is no statutory provision or a rule which provides the procedure to be followed by protection officer. Even the statute is silent as to the evidentiary value which is attached to the reports given by such officer or mode of their proof. This actually is utmost important because when the judge has to assess the material at the end of the trial and give a final order, relief **Under sec 26** Relief made available under sec. 18, 19,



20, 21, 22 can also be sought in any pending legal proceeding before civil, family, or criminal court. The only provision of appeal provided in Act is sec 29 which says from orders of magistrate appeal will lie to court of sessions. But the Act is silent as to where appeal will lie against orders passed by other courts e.g. family court under the Hindu Adoption and Maintenance Act or Guardians and Wards Act where in application is made in pending case.

### **Time bound adjudication i.e. 60 days**

The statute has conferred jurisdiction on a criminal court i.e. the court of magistrate and empowered it to deal with matters which are otherwise within the jurisdiction of courts higher in hierarchy. Woman victim of violence under the Act has to fight with the judicial time as the courts position is already over-burdened and has mandated to work in the evening sessions, through mobile courts etc, another aspect the matters concerning the family matters are always time consuming. Actually when the legislation is passed in our country it has also to outweigh the cases that can be filed under the Act and required judicial time and also the personnel for effectuating it in a real spirit. But it is always a sorry state of affairs experienced that the impact assessment in our country is very weak and it is not made in advance to make any legislation a success. This is the same fact about the PWDVA2005 that no projection is seen while expecting the effective implementation.

### **Act prescribes the counseling as matter is of family concern**

But in practice we do not have machinery which is set up permanently to provide counseling services and a machinery to monitor the impact of counseling afterwards. When in case of strained relations in family ties, it is observed a woman patch up the relation and accepts to live with the abuser. When she starts to cohabit, it is of utmost necessity to monitor the impact of counseling and if any progress in the behavior pattern. But for that specific infrastructure is required which the Act is not able to prescribed nor any infrastructure is provided therein.

### **The allegations of domestic violence caused by verbal and**

#### **emotional abuse**

Where such complaint is made by a woman it is practically impossible for the court giving the protection to the victim woman or giving order to the Protection Officer to go and stay in their matrimonial home and sit to guard her all the time. A person who is not inclined to live with the woman is being forced to live with her without a single word of exchange. Such unreasonable expectations should be seriously viewed.

### **Services related technicalities**

The was the first statute to provide the relief to the victim by way of support service mechanism like shelter homes, medical services, legal aid, vocational training, financial

help etc. As an alternative to protection officers, the Rules allow the service providers (NGOs) to forward a victim's complaint to the magistrate. However, like protection officers the service providers will not have the state government's accreditation. But the rules provide that they can take care and provide shelter to the victims.

**Section 11** makes provision for the woman to undergo mandatory counseling with the abuser. According to the critics this is against all accepted principles of counseling. Counseling for the innocent party can and should only be voluntary. Mandatory counseling is one method of correcting abusive behavior. It is ridiculous to enable the magistrate to insist on 'mandatory' counseling of the innocent party. Such counseling can only end up 'convincing' her to accept her situation of being abused as being normal, and to continue in a violent marriage. NGOs as service provider are not listed properly. A woman in need of help of an organized shelter home where she can live with dignity and respectability is not listed under the Act. How even though listed tomorrow, who is going to monitor their performance, whether they are managed or overcrowded, provide the basic requirement or not. At present the registration of service provider is the serious problem. Until now, the list of service providers and the support service infrastructure is not updated.

#### **Regarding medical facility**

The Act provides the medical help and facilities to be provided to the victim, but the existing services of government hospital are not able to provide a quick relief to the victim, as the heavy burden and the economic pressures. Then who is to give the woman the medical facility a government or a private institution? If the private institutions allowed? Who is to bear the cost of the medical facility? What the legislative intent had prepared is a serious question.

#### **Too many rights and reliefs without practical assessment**

The Act in its zeal of extending protection to women in all relations guarded the interest of the wife, mother, daughter-in-law, sister, etc. it brought within its scope the women in extra-marital relations or other immoral relationship, which are neither recognized by our society or by our existing matrimonial and penal laws. The concept of "live in" or "living relationship" is sought to be legalized. This is neither permissible nor possible in view of the moral values followed in our society. It is a matter of irony that while on one hand a married women indulging in adultery is not entitled to claim maintenance from her husband, she will be entitled to claim maintenance from the person with whom she had or is having illegitimate relationship. The legislature also did not notice that adultery is also an offence U/S.497. I.P.C. so, therefore while on one hand, a man will be prosecuted for adultery, at the same time he will be compelled to pay maintenance as well as residency rights to a woman with whom he is alleged to have maintained illegitimate relationship. This provision will destroy the matrimonial relationships, thereby

disturbing type social fabric of tile society. The women facing domestic violence within the four comers of their homes need to be protected from domestic Violence faced by them. But it cannot be a reason to recognize immoral and illegitimate relationships. The legislature did not understand that our society is already very much influenced by the western culture. Foreign entertainment channels are spreading and propagating certain ideas and concepts of human relationships, which are not only alien to the Indian society but also against the moral values of Indian culture. In the garb of providing financial assistance to the women, the legislature cannot give legal status to the illegitimate relationships. The illegitimate relationships by stretch of imagination can be considered at par with relationships such as those of wife, mother and sister, which have their own place in our society and are seen with respect and honor.

The Act was a welcome step as it was full of the reliefs and remedy oriented and extending variety of rights to the victim. It was necessary also, taking into consideration the negative impacts of 498A like legal provisions, where a woman was thrown out of the residence and if no shelter at her matrimonial place, she was just a helpless human being. But while considering the situation and in zeal to make it pro-women the legislature has made several loopholes where the judiciary had a scope to intervene and the judgments are coming like S.R.Batra v Truna Batra. Where the court interpreted the husbands place and not the in-laws of the woman. It provided the relief of residence and also the monetary relief immediately to the victim but did not provide the remedy if the husband is not capable to.

It provided immediate relief to the victim against the domestic violence by the protection order but the effective implementation by whom? And how? Remained unanswered. The protection officer is to provide services like shelter-home, medical facility, legal aid but at what expenses? And by whom? What if the service providers are not registered at a particular place? How to serve the victim and at whose coast? There is no provision in the statute.

### **Not avoided the possibility of misuse.**

The definition of abuse is too broad and open to manipulation. Section 3(b) also specifies that any type of harassment, harm or injury with aim to coerce unlawful dowry from either the victim or any other person is also considered domestic violence. The manipulation is possible because of what constitutes abuse. In addition to physical and sexual violence, such as beating, slapping, punching and forced sex, it includes verbal and emotional abuse, such as insults or name-calling. Preventing wives from taking up a job or forcing them to the male member of the family can possibly misuse the provisions opponents. The real beneficiary of the PWDVA, as is intended, would not be the real sufferer women, but the women from upper middle class or affluent class which have developed the sensitivity towards the violence (as we observe generally in the Hindi movies). It's the growing tendencies among the women in urban areas to take recourse of legal provisions and harass the in-laws, in a case **Neetu Mittal v Kanta Mittal** Applicants were living separately from their son and daughter-in-law. The aggrieved person and her husband had agreed shift to a different house under a

compromise arrived at the police station but refused to do so by asserting that she had a right to stay in the matrimonial home, and the other house was not habitable. The respondents in response filed civil suit to restrain the woman and her husband from forcibly entering and disturbing their peaceful possession.

Upholding the contentions of the in-law's court demonstrated sensitivity and understanding reality of the situation to hold that the son can live in the house of the parents as a matter of right only if the house is ancestral in which his share can be enforced through partition. However, where the property is self-acquired the son had no legal right, irrespective of his marital status. During the relations being cordial the parents might have allowed him, it does not mean that the parents have to bear his burden throughout the life. It was also observed that there is no legal liability on the parents to continue to support the disobedient son or a son who becomes liability on them and who becomes a source of nuisance for them. The urban woman might even use the Act as a weapon against her husband in case of disagreements. It has been observed by the court after passing the Act in **Kishore, S/o Shrirampant Kale v Sou. Shalini, W/o Kishore Kale, Master Shantnu S/o Kishore Kale and State of Maharashtra, through P.S.O. Rajapeth** Police Station. The issue before the Bombay High Court was whether an application under the PWDVA, which was filed 15 years after the parties started living separately and where they had very little communication, could be considered to be maintainable. On examination of the contentions of both parties and provisions of the Act, the High Court held that since there has been no contact or communication between the parties for 15 years and no proximity of an act of domestic violence to the date of filing application under the Act could be shown, the case against the husband is not maintainable and would constitute an abuse of the process of law. Also in **Vijay Verma v. State N. C. T of Delhi** which also dealt with the issue of denial of the right to reside on the reasoning that it cannot be used to settle property disputes, but also defined the scope of "shared household" under the Act in a gender sensitive manner. In this case the petitioner filed application before trial court for seeking an immediate right to reside and also the police protection against her brother and his wife. Petitioner permanent resident of US when came to India, she said that she was not allowed to enter premises owned by her father. Whereas the petitioner has already received her share and the brother argued that upon the death of his father the share was devolved upon the grandson by will. The court examined the definition of 'domestic relationship' under the Act and held that 'at any point of time' means where an AP has been continuously living in the shared household as a matter of right but for some reason the AP has to leave the house temporarily, and when she returns, she is not allowed to enjoy her right to live in the property. Irrespective of whether such a right survives in the present, a person cannot claim property as a share household- where a family member leaves the house to establish his own shared household separately and establishes her own household, she cannot claim a right to reside under the PWDVA on the basis of a "domestic relationship". If such a person has a coparcenary's or inheritance right in the property, such right must be claimed through a civil suit and not under the PWDVA2005. The right to reside also has been on many occasions is used by the woman in order to exercise the legal rights wherever she has no necessity also, but to take recourse to law only because one has right is also not proper, in case Master

Ryan through its mother Mrs. **Ridhima Juneja v. P. N. Juneja and Sons**\63(2m9) DLT 14, the court restricted the scope of an interim order for not disturbing peaceful possession passed in favour of the wife to mean constructive possession only. It was held that since she was already staying outside the house, which was the self owned property of the in-laws, a right to re-enter the house could not be claimed.. There is no doubt that number of cases of degrading and brutality against the women amongst the so-called affluent class may also get exposed before court of law. Some of the critique says that this Act would remain in book and will not come into action. Once the propaganda of enacting the new act is over, it will remain on a paper tiger like the Dowry Prohibition Act. It is alleged by the critics that the main reason for the misuse of Sec. 498- A, whenever the victim was complaining for the cruelty or any violation of the provision, the victim used to implicate the respondent on the instigation of the policemen and lawyers who were often found encouraging complainants to add dowry demands as the main cause for cruelty. This has not only created an erroneous impression that all of the violence in India is due to a growing greed for more dowries but this has made the diversion from the real problem of women and the provision of Sec. 498-A Becomes controversial. The domestic violence against women still continues in the houses where there is no convention of dowry basically the problem is the awareness regarding the provisions of the law. The women themselves have to be made aware that such a law exists. There are number of educated young women working in high profile offices but unfortunately they are not aware about pro-women legislations. The problems of illiteracy and ignorance amongst women would be another important hurdle in the implementation of the Act. This problem is not going to overcome within a short period.

The vigor of PWDVA2005 would certainly be diluted by the factors of ignorance and illiteracy. Some critiques even suspect the politics and vote bank that I involved in passing enactment of the pro-women nature. It has been passed just to attract women's votes, because the politicians know that the legislation would remain a paper tiger. One of the critics has voiced his decent by saying: "Till date Indian Women had been protected by their near and dear ones. Now after this AK47 (Domestic Violence Act), they will be protected by so called Protection Officer, Lawyers, Police, Judges. Etc.". But "Who will Protect Indian Women from those so called Protection Officers, Lawyers, Police, and Judges." This is a perennial question of Indian democracy which needs to be answered that when the legislation comes from within the hearts of those being ruled it is greeted and when it is imposed from external agencies it is reverted back this way. The problems of illiteracy and ignorance amongst women would be another important hurdle in the implementation of the Act.

This problem is not going to overcome within a short period. The vigor of PWDVA 2005 would certainly be diluted by the factors of ignorance and illiteracy. The women of prestige or repute prefer not to go any third person or PoHce for their personal and household problem. The Police station is, of course a kind of a taboo for the traditional women; reporting a personal matter or domestic violence to Police may be treated by them as stigmas. Therefore, majority of women do not report the incident of domestic violence to Police. She prefers to tolerate and hides from her maternal parents (at least they Call help her), generally it is resulted in more violence. The mental set-up of Indian

women is to suffer in silence and not to complaint. Regarding the offences of rape, it is generally said that only 5% of the incidences are reported to the Police, out of which only 5% culprits get convictions.

It matters little whether the woman is educated or not, rich or poor. But while one could argue that a poor uneducated woman would be unaware of her rights, or would not know how to turn to the law. The question arises why many educated middle class women upper middle class families where the educated women also suffers from the injustice of Domestic Violence as it happens with the slum are thinking that there is no option to redress such grievances.

### **The legal technicalities**

The legislature while passing the Act has not noticed that having sexual intercourse with any person other than his or her spouse is a ground for divorce u/s.13 (1) (a ) of the Hindu Marriage Act,1955.

Even sections 24 and 25 of the Hindu Marriage Act, 1955.Which provide for maintenance pendent lite and permanent alimony and respectively do not recognize any relationship except that of legally wedded husband and wife. Beside this section 125, Cr. P.C. which provides for grant of maintenance to wife, children, father and mother in a broader perspective, does not recognize persons having illegitimate relationship, entitled to claim maintenance except an illegitimate child. Section 125(4) specifically prohibits wife living in adultery from claiming any maintenance from the husband Sec. 125(1) Cr. P.C. The legislature also did not notice that adultery is also an offence Sec.497. I.P.C. so, therefore while on one hand, a man will be

prosecuted for adultery, at the same time he will be compelled to pay maintenance as well as residency rights to a woman with whom he is alleged to have maintained illegitimate relationship. This provision will destroy the matrimonial relationships, thereby disturbing type social fabric of the society. The Government concerned has to make the arrangement of officers and other officials. It is for the State to decide whether to appoint Protection Officer on honorarium or permanent basis. If the State Government is not serious about the PWDVA2005 then only law can come into reality otherwise it will remain only on paper. The Protection Officer is the pillar on which the Act rests. But regarding the budget allocation of the finance related issues the government should have pro-active approach where it fails in practice.

Some have criticized the law as having too little force, serving chiefly as a civil, rather than criminal, law—requiring a further offense by the accused respondent (such as violating a Protection Order issued under this law) before triggering criminal law sanctions against the respondent (such as arrest and imprisonment). There are several gaps in the implementation of laws. However, groups involved in drafting the law believed this would provide more rapid and flexible relief for the victim.

Men's organizations such as the Save Indian Family Foundation have opposed the law, arguing that it might be misused by women during disputes. It has been noticed by women's groups that such claims emerge only when special provisions are made for the marginalized.

Renuka Chowdhury, the Indian Minister for Women and Child Development, agreed in a *Hindustan Times* article that "an equal gender law would be ideal. But there is simply too much physical evidence to prove that it is mainly the woman who suffers at the hands of man"

Former Attorney General of India Soli Sorabjee has also criticized the broad definition of verbal abuse in the act.

According to the then President of India, Pratibha Devisingh Patil, "Another disquieting trend has been that women themselves have not been innocent of abusing women. At times women have played an unsavory, catalytic role in perpetrating violence whether against the daughter-in-law, the mother-in-law or female domestic helps. Instances exist whereby protective legal provisions for the benefit of women have been subjected to distortion and misuse to wreak petty vengeance and to settle scores. Some surveys have concluded that 90 percent of dowry complaints are false and were registered primarily to settle scores. It is unfortunate if laws meant to protect women get abused as instruments of oppression. The bottom-line therefore, is the fair invocation of legal provisions and their objective and honest implementation.

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the exclusive property of appellant No. 2, mother of Amit Batra. Hence it cannot be called a 'shared household'. No doubt, the definition of 'shared household' in Section 2(s) of the Act ... we have to give it an interpretation which is sensible and which does not lead to chaos in society". Judgement regarding shared household (alternate): "In section 2(5) of the Protection of Women from Domestic Violence Act, 2005 the court has to give an interpretation which is sensible and which does not lead to chaos in society". Date of Judgement: 15 December 2006.

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