



REVIEWING THE EFFICIENCY AND REALITY OF PREVENTION OF DOMESTIC VIOLENCE ACT, NO.34 OF 2005 THROUGH THE LENS OF FEMINIST PERSPECTIVES

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ABSTRACT

Domestic violence is a timeless topic which has been even in the legislative discourse. This paper analyses the Prevention of Domestic Violence Act, No.34 of 2005 in light of two feminist theories, namely, liberal feminism and third world feminism. Even though one may celebrate the incorporation of the above Act, it is problematic to what extent the Act satisfies its objective of prevention of domestic violence. By utilizing the Black Letter Methodology, the author finds that regardless of the Act being a gender-neutral law on its surface, in its practical application it intersects with many gendered aspects which ultimately discriminates women. Thus, the responsible authorities have not been successful in effectively addressing such inherent issues of the Act. The purpose of this study is to suggest solutions while highlighting theoretical underpinning and justifying in reference to selected international conventions. As per the knowledge of the author this is the only Sri Lankan paper which analyses the Prevention of Domestic Violence Act, No.34 of 2005 in light from feminist legal perspectives.

KEYWORDS: Domestic violence, Gender discrimination, Liberal feminism, Third world feminism

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1. INTRODUCTION

Initially in the Western world different strands of feminism emerged advocating for gender equality and non-discrimination based on sex, which eventually influenced the Eastern minds. The subject-matter of this research paper is broadly located within the feminist legal theories; thus, the focus is Sri Lanka.

It is accepted that violence against women diminishes the attainment of equality and breaches fundamental rights and/or freedom of women which restricts their ability to enjoy their lives to the fullest. The imbalance of power has resulted in discrimination and dominance over women throughout the history. In comparison to male counterparts, females are compelled to hold an inferior position (UNGA Resolution 48/104, 1993).

Firstly, the discussion focuses on analyzing the Prevention of Domestic Violence Act, No.34 of 2005 (hereinafter referred to as PDV Act) in light of liberal feminism referring to gender-equality.

The Second portion of the discussion is inspired by the notion of gender justice. It contains three recommendations for progressive improvement of the law. The theories, namely, cultural feminism and third-world feminism provide theoretical underpinnings of the recommendations. Further, the author refers to the Convention on Elimination All Forms of Discrimination against Women (1979) (hereinafter referred to as CEDAW) and Declaration on the Elimination of Violence against Women (1993) to further substantiate the recommendations.

2. METHODOLOGY

Using Doctrinal Research Methodology, commonly referred to as Black Letter Approach, the author has examined the observed research gap and developed recommendations for legal improvements. The Prevention of Domestic Violence Act, No.34 of 2005, alongside relevant international conventions have been examined as primary sources. Additionally, International and Comparative Research Method has assisted to analytically refer similar factual scenarios

of different cultural and country settings. Research papers, journals, and textbooks were chosen by the author as suitable secondary sources. The author has explored additional internet resources to utilize the most updated data. Above mentioned methods are the most suitable approaches for conducting this research as they permit the author to complete desk-based research critically studying the selected materials.

3. RESULTS AND DISCUSSION

Part – 3.1.

3.1.1. The Prevention of Domestic Violence Act, No.34 of 2005 - Through the Lens of Liberal Feminism

Domestic violence by intimate partner affects people worldwide, where most of the victims are females. The legislative intention to tackle the issue nationally resulted in PDV Act.

Liberal feminism advocates for gender-neutral laws and the equality between men and women. In light of which, PDV Act can be evaluated as an Act which reflects the interests of liberal feminism while making progress in the Sri Lankan legal system in terms of gender equality.

Firstly, liberal feminists argued that instead of abolishing coverture of marriage (it means the gender hierarchical common law model of marriage that travelled from England to the colonies), the revolutionary- era political leaders highlighted the marriage as *a social contract to which women freely consented* (McClain et al., 2022).

The same societal approach in Sri Lanka resulted in the lengthy delay in incorporating a law to prevent domestic violence.

When examining the overall PDV Act, one can argue that it explicitly prohibits domestic violence against wives under Section 23 by the gender-neutral term ‘spouse’. This implicates that though the female party may or may not have consented to the marriage, such wife shall not be subjected to violence upon the marriage. Even liberal feminism adherent John Stuart Mill acknowledges in his book ‘The

Subjection of Women (1869)' that the principle of '*legal subordination of one sex to the other*' was '*wrong*' and is required to be replaced by '*a principle of perfect equality, admitting no power of privilege on one side, nor disability on the other.*'

Secondly, Ginsburg who was an American lawyer and judge who served as an associate justice of the Supreme Court of the United States indicates the distinct treatment for men and women in law was justified upon '*natural*' differences of the sexes which accompanied to '*female subordination and to their confined 'place' in man's world.*'⁷ She identifies this as the '*fundamental premise*' of the 1970s cases such as *Frontiero v. Richardson* 411 U.S. 677 (1973) and *United States v. Virginia* 518 U.S. 515 (1996).

It is obvious that women, especially wives are the most common victims of domestic violence because of being subjected to violence of their husbands, confined to his desires, and being domestically controlled due to the power imbalance between men and women in domestic spheres. As a practical aspect, even though physical harm may not be presented, emotional and/or psychological violence is more frequently seen but gone unseen in many domestic violence cases. Such emotionally abused wives may adjust themselves to tolerate the violence and many even do not realize that it is a form of domestic violence, because of being trapped in the patriarchal societal idea that if it is domestic violence then, it means only physical harm and nothing more. This is a perfect example for Ginsburg idea; '*women have their confined 'place' in man's world.*' Due to social, cultural, economic, and family pressure, it is unlikely for such mentally abused Sri Lankan wife to repudiate her marriage.

In such context PDV Act's recognition of emotional abuse as a type of domestic violence under Section 23 is a salutary approach to establish gender equality. This legal recognition extends the parameter beyond the traditional patriarchal ideology in terms of domestic violence against women.

Fourthly, liberal feminists contend that laws that prevent women from engaging in economic, cultural and social activities are frequently portrayed as

'*protective*' and favourable. If the same were put on some members of racial or ethnic minorities, such laws would certainly be regarded unacceptable (McClain et al., 2022).

Due to the potential risk of reverting back to gender stereotypical protectionism, liberal feminists do not advocate for the protection of women.

As PDV Act does not make favourable steps for women, it is obviously in accordance with the liberal stance. The Act gives the Magistrate's Court the authority to grant Protection Orders and/or Interim Orders based on the particular facts of each case as per Sections 5 and 10. Nevertheless, the Act mentions nothing on the necessity of giving special attention (which one may argue essential due different consequences that a woman may encounter) to particular facts in case where the woman is the victims. Additionally, Section 17 of PDV Act ensures accessing the regular court system for both male and female. As a result, both parties enjoy formally equal legal rights, which liberal feminists view as uplifting of gender equality.

Fifth, even with obvious disparities between men and women, liberal feminism primarily supports symmetry or '*formal equality*' under the law. Williams argued that '*it is the better path to 'true' equality; a constitutional principle and a condition for substantive equality of the sexes*' (McClain et al., 2022). In terms of PDV Act, it is evident that PDV Act functions in a gender-neutral manner and aligns precisely with the legal equality that liberal feminism demands. Thus, through liberal feminism lens, the Sri Lankan legal framework for gender equality is gradually developing.

Lastly, it ought to recall that liberal feminists constructed and promoted the term '*sexism*' to describe beliefs and societal norms that maintain women in subordinate roles, which they saw as the root of discrimination (McClain et al., 2022). One distinguishing characteristic of the PDV Act is that cohabiting partners are also within the purview of the Act. Leaving the marital relationships aside, this discourages the perception that women are men's

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partners are also within the purview of the Act. Leaving the marital relationships aside, this discourages the perception that women are men's property, to be used solely for sex or violence to satisfy male desires.

The extended PDV Act's application is salutary approach, because it clarifies; that a woman (wife or others) consenting to sexual activities, shall not be the base of violence. Further, if such a case occurs, the respondent cannot simply deny his wrong under PDV Act, stating that it is an illicit and/or extra-marital relationship. Therefore, this initiative offers a protection for women to not to objectified merely as an element of sexual pleasure in intimate relationships.

3.1.2. The Necessity of Advocating for Further Developments - Through the Lens of Feminism

There are essentially three ways that the law is experienced: Structure, Substance, and Culture. The study above indicates the substance (the PDV Act) is gender neutral. Nonetheless, citizens do not experience law only in its substance. Thus, women (the term 'women' is utilized to emphasis the greater disadvantage towards the women in this gender-neutral law) may experience or be discriminated against by substance, structure and/or culture.

It is established above that the law relating to Prevention of Domestic Violence is one such instance where the law is neutral. However, the implementation may result in discriminating women, because the law has failed to provide a room for a gender-sensitive approach.

Thus, this is an area where women would face structural discrimination though the substance provide a neutral basis. The cultural influence was also seen in the reluctance to accept this legislative reform at the initial stages where the issue came to the public discourse.

Notwithstanding the analysis in the preceding section, the realities at the grassroots level and

cultural constraints question whether the objective of PDV Act is realistically achieved. Thus, one may justifiably contend that despite the PDV Act's inception being a progressive step in the direction of gender equality, it has consistently upheld patriarchal and male-centered traits.

According to MacKinnon, apart from formulating a *solution indigenious* to the issue, the early feminist legal perspective implied that equality meant women being the same as men (MacKinnon, 2005). This approach could have been influenced by the Social Dominance Theory which emphasizes the social oppression based on sex and the unequal societal structures on men and women.

Therefore, the necessity of developing PDV Act is apparent even through the liberal feminism, where it received numerous critiques mainly due to its ignorance of unique characteristic or requirements of women such as pregnancy. Additionally, it is stated that *Common Law made tradition into law, and tradition did not favor sex equality... it has historically reflected social structure, custom, habit, and myth to give legal sanction and legitimacy to men's social power over women* (MacKinnon, 2005).

Therefore, *it is problematic whether the gender-neutral approach in the substance of law has been successful in ensuring gender justice, not mere gender-equality*. Equality may not be meaningful if it lacks justice. From one hand, *the structure and the culture have withdrawn women from benefiting the gender-neutral law* and on the other hand, *PDV Act has failed to recognize unique and gender-sensitive aspects*. Thus, *one can comment that PDV Act is aiming to minimally interfere into the private lives by restricting its scope, without stepping into incorporate gender or rather female sensitive approaches*.

Upon the above grounds, further development for this area of law can be identified mainly through cultural and third world feminism.

Part – 3.2.

3.2.1. Suggesting Incorporating Battered Women Syndrome Defense through the Lens of Cultural Feminism

The term ‘cultural feminism’ refers to a certain set of values and conduct that support the notion women and men are essentially different either due to gender-specific social development or due to fundamental biological disparities. These sexual disparities are said to bring all women together in a shared sisterhood beyond the boundaries such as class, age and race (Ghodsee, 2004).

The researcher was inspired to propose this recommendation by the Washington Supreme Court decision, *State v. Allery* (2023) MT 25, because by ruling that ‘*the expert evidence may have a substantial bearing on the woman’s perceptions and behavior at the time of the killing and is central to her claim of self-defense*’, it emphasizes the importance of incorporating battered women syndrome as a defence, especially in domestic violence scenario.

Cultural feminism seeks to accommodate women's unique needs while maintaining the status quo. Put it differently, the goal of cultural feminism is to identify ways to lessen the worst effects of patriarchy. As a feminist legal theory, which advocates for female concerns, cultural feminism has been responsible for obtaining women essential and significant rights and facilities in the United States, Western Europe, and occasionally throughout the developing countries (Ghodsee, 2004).

One such cases connects with domestic violence is the *Battered Women Syndrome Defense* which is a result of long-term domestic abuse. This is an even more *progressive step towards gender justice that can be incorporated into the Sri Lankan legal system, moving beyond gender equality*. Thus, this progressive suggestion is made to the substance of the law, which can be incorporated by way of an Amendment Act to the PDV Act.

Though the first initiation of the defense was conducted in the United States of America, it is

applicable to every region because, regardless of a victim's country, the traumatization she endures will always be severe. In support of cultural feminism, battered women syndrome is recognized particularly as a self-defense in terms of interpreting the word ‘provocation’ by giving a more gender-sensitive approach.

It is stated that women from jurisdictions where battered women syndrome is accepted are now protected from male- biased self-defense laws and have greater opportunities to defend themselves before the law (Ghodsee, 2004).

One may argue that Sri Lankan courts have already recognized accumulative or sustained provocation cases such as *Premalal v Attorney General* (2000) 2 SLR 403, *W.A. Gamini v Attorney General* CA/142/2003, *Mutubanda* (1954) 56 NLR 217 so that there is no need of separately recognizing battered women syndrome.

Firstly, although cumulative anger is applicable gender neutrally to anyone covering the entire provisions of the penal code, the *focus here is prevention of domestic violence, where many of the victims are females, and especially married women*, who have ultimately become the killers of their male partner. For instance, because many of the incidents reported have occurred in married homes, this illustrates how the husband takes advantage of marital coverture as a tool to control his wife due to their unequal power. It is imperative that a defense tailored to these women be recognized by law, as it is problematic for a law that is basically gender neutral to provide relief for issues that are particularly gender sensitive.

Secondly, *cultural feminism’s value on masculine and feminine reasoning patterns provides a further justification*. It is mentioned that *circumstances under battered women syndrome do not meet the legal assumptions for self-defense under existing law*. Thus, the fact that it is extremely difficult for women to argue in court for a self-defense plea indicates the necessity of the defense to be recognized in law (Ghodsee, 2004).

it is further stated that the objective of battered women syndrome is to eliminate male-centric definition of self-defense and to make equal the adjudication procedure for women before the law. Furthermore, it has been suggested that the court ought to apply criteria that differ from those of the stereotyped 'reasonable man', or even 'reasonable woman' who is submissive and passive and willingly submit to assault (Nigam, 2016).

Thirdly, an additional rationale for this is that, in contrast to an individual who has been subjected to provocation, a victim of battered women syndrome undergoes a significantly traumatizing experience, which is understood only by way of a subjective approach towards such women, as they are. Therefore, if the Act is truly intended to guarantee women's rights and advance gender equality, a gender-sensitive strategy must be taken to establish gender justice.

The prevailing law on self-defense does not consider the psychological state of a battered woman, which may not seem similar to the psychological state seen as typical of a rational male.

battered women syndrome was brought up by the judiciary to assist in clarifying the defendant's psychological status, taking account the surrounding circumstances, which compelled her to commit the crime. When addressing common cases involving women who have experienced long-term cycles of violence, judges must consider the anxious psychological state of the victims (Nigam, 2016).

Further, the suggestion of recognizing battered women syndrome is substantiated by the Indian High Court case; *State v Hari Prashad* (2016). In the same case, the court differentiated battered women syndrome from 'grave and sudden provocation' stating that it is based on anger and not fear. Further, the court admitted that the though 'she is a victim in her life, the legal system would have treated her as an offender. The provocation by Hari Prashad became her compulsion to end the domestic relationship and she did by taking the extreme step of suicide'.

Further, when adopting this reform, a significant burden may lie on the structural part among the three basic units where the law is experienced. Changing the substance of the law is time-consuming. In all the jurisdictions where the battered women syndrome defense was adopted, the initiative was taken by the judiciary, not the legislature. It is also evident that where the substance is gender neutral, the judicial approach is very critical in interpreting the laws to achieve actual justice.

As the Sri Lankan courts without any hesitation adopted the defense of cumulative anger by extending the defense of grave and sudden provocation, battered women syndrome can also be judicially recognized as a branch of 'provocation' and/or 'self-defense', which applies in cases based on male and female intimate partner relationships.

As stated above cultural feminism celebrates the unique reasoning between male and female. In accordance with the above notion, the importance of acknowledging female views is emphasized in *Dr. Sodhi v. Union of India* 367/2009 & CMS 828, 11426/2009 'sexual harassment is a subjective experience, and we prefer to analyze harassment from the [complainant's] perspective. A complete understanding of the complainant view requires an analysis of the different perspectives of men and women...'

It is noteworthy that laws should creatively uphold gender justice than merely moving with gender equality.

3.2.2. Suggesting a Structural Reform and Amendments for Special Laws through the Lens of Third World Feminism

There was internal criticism for feminism theories for their lack of diversity. For an example, in her critique of intersectionality, Kimberlé Crenshaw criticised feminist argumentation for omitting Black women's experiences and highlighted that people can be subjected to discrimination or disempowerment on several avenues, including race, age, class, sexual orientation, or gender identity (McClain, 2022).

Unlike in other feminism jurisprudence which developed upon a study of horizontal discrimination, third world feminism has adopted a vertical study of discrimination. This strand of feminism is aiming to seek into intersectionality or divisions within the umbrella term of women. *The argument is that to guarantee substantive or transformative equality, the law needs to be drastically reformed to suit these marginalized women, because it is fundamentally prejudiced against them in the categories such as culture, race, and religion, where various standards are used to treat them.* Due to these pressing differences which are daily encountered by such women it is *inappropriate to identify women as a homogeneous group whose diversity has not been considered.*

Hence, in terms of Sri Lanka's domestic violence, women such as of minority groups, in rural communities, women in detention and with disabilities can be considered as more helpless (UNGA Resolution, 1993) than an educated women from urban areas.

Therefore, regarding such women who are subjected to a double jeopardy in the system, meaning firstly they discriminated because they are women, and then horizontally, due to various reasons such as ethnicity, race, culture, poverty, location, literacy and education, practical solutions are essential to ensure that they enjoy access to justice effectively and efficiently. Since the PDV Act is to provide a mechanism for domestic violence victims to seek redress, unless the mechanism is accessible for those who further disadvantaged the objective of PDV Act shall not be achieved.

For example, the option for a non-working rural woman who is relying on her male counterpart to go to the Magistrate's Court and undergo all the expenses that would incur in the litigation is limited than for a woman with income. This economic violence with the marital status has made the first women further vulnerable in domestic violence.

However, since the reform of the substance of the law is a long-term process, such women would enjoy justice, if the structure is framed as to their benefit

which will then gradually change the culture of the law.

Therefore, apart from formal court structure, Regional Legal Aid Clinics, which are solely dedicated to the effective implementation of PDV Act are suggested to be instituted. Irrespectively an amendment to PDV Act, the Minister in-charge of the subject shall establish such centers by way of a Gazette Notification or with the aid of international and/or national organizations. Thus, the female representation of those centers must be mandatory.

This was practically implemented in India in June 2020. As per UN official news the first Legal Aid Centre of its kind on an Assamese tea estate opened in the Udalguri area, with professional assistance from UN Women. To enable them to legally assist women in these communities, UN Women trained lawyers from the area on sexual harassment and domestic violence laws related to workplace.

Secondly, amendments to Special Laws namely, Kandyan Marriage and Divorce Act, No.44 of 1952 (hereinafter referred to as KMDA) and Muslim Marriage and Divorce Act, No.13 of 1951 (hereinafter referred to as MMDA) can also be emphasized as progressive suggestions to prevent domestic violence in terms of the substance of law. This has also been emphasized in the UN CEDAW Committee's Concluding Observations on the Eighth Periodic Report of Sri Lanka (CEDAW/C/LKA/CO/8) where the necessity of amending MMDA was reiterated.

As correctly pointed out by the third world feminists, in considering married women in SL, the wives who are governed by those two Acts are further discriminated than a wife under Marriage Registration Ordinance No.19 of 1907.

Section 32 of KMDA requires a wife to prove husband's adultery coupled with incest or gross cruelty, whereas husband proving wife's mere adultery is sufficient for divorce. Section 23 of MMDA allows a man to marry a girl under the age of twelve years and does not stipulate on a minimum age of marriage.

Though one may argue that these do not directly fall within the purview of domestic violence, it is no doubt that marital status with one spouse's superiority over the other may result in violence. The issue is that the legislature, by allowing the cultural and religious norms to be legally acknowledged, by itself has provided grounds which indirectly promote domestic violence.

Thus, India has prohibited by law one of such long-prevalled, highly contended practice among some castes, '*Sati*'. After the incident of Roopkuvarba Kanwar, the Government of Rajasthan enacted Sati (Prevention) Act, 1987 which later became an Act of the Parliament of India as The Commission of Sati (Prevention) Act, 1987.

As the suggestion made above to the structure of law, making amendments to the substance of law is equally important to mitigate vertical violence and discrimination encounter by marginalized women. Further, Williams thought that the best venue for advancing substantive equality for women was in legislatures (McClain et al., 2022).

3.2.3. Justifying the Suggestions in Reference to CEDAW

Firstly, Article 1 the term 'discrimination against women' substantiates the recognition of both horizontal and vertical discrimination, by its reference to the words *sex* and *marital status*.

Secondly, the suggestion to incorporate the defence of battered women syndrome can be supported by Article 2 of CEDAW where it requires the States to adopt appropriate legislative and other measures, including sanctions to prohibit all discrimination against women (Article 2[b]). Further, the same Article demands to repeal all discriminatory national penal laws (Article 2[g]). Thus, it is possible to interpret battered women syndrome into spectrum of self-defense.

Thirdly, in support to the establishment of legal clinics, Article 2(c) is important, as it provides to safeguards women and establish their rights and protection through public institutions including national tribunals.

Fourthly, Article 2(f) adopts a much broader view in eliminating discrimination by incorporating the word 'culture and practices', because not that every woman will experience cultural barriers to the same extent. The protection under this Article is compatible with the third world feminism, where vertical study is emphasized.

Fifth, the States are mostly welcome to take necessary actions to alter societal and cultural norms regarding men's and women's actions to eradicate biases, customs, and any other practices where the superiority of one sex or *stereotyped roles for men and women* are encouraged (Article 5).

The above-mentioned Articles support to suggestions under domestic violence, where the element of violence is undoubtedly the discrimination encountered by women.

Finally, it is interesting to note how the teachings of cultural feminism have influenced CEDAW. The Preamble states that when implementing the Articles of the Convention, the State shall acknowledge factors such as female contribution to the family welfare, and the social significance of maternity where women in reproduction shall not be a ground for discrimination. This is a prominent example for cultural feminism as they celebrate, but not discriminate the differences between male and female.

3.2.4. Justifying the Suggestions in Reference to Declaration on the Elimination of Violence against Women (1993)

As CEDAW does not adequately addresses the element of violence, this Convention was brought up by recognizing the immediate necessity of universal application of female's rights to assure equality, security, and dignity for women.

Article 1 of this Convention broadly interprets 'gender-based violence against women' including but not limited to physical, sexual or psychological harm. Interestingly, the Convention includes both public and private spheres, it is not possible to rule out violent domestic environment as something to be dealt with full privacy.

It is always justified to adopt gender sensitive mechanism as under Article 3 as it imposes State obligation to secure non-violent environment preserving equal opportunities, protection before the law and favourable employment conditions where under Article 3(h) then women's right not to be subjected to inhuman or degrading treatments is achieved.

Most importantly, Article 4 can be related to actions against structural and cultural discrimination of women. It is clearly expressed *that any custom, tradition or religious consideration* which silently encourages or permits violence against women shall not be invoked.

On contrary, the Convention allows the parties to adopt positive measures which overrides the mechanism provided by the Convention. This implies that actions for violence against women cannot be limited and that the established international standards welcome their State parties to pursue the goal of zero violence to the maximum of its ability.

4. CONCLUSION

As per the above analysis one can state that, PDV Act is a progressive step, irrespective of its inherent failures under real scenarios. Therefore, incorporation of recommendations stated under Part II are essential to uplift the value of PDV Act.

In conclusion it should be noted that the enhancement of prevention of domestic violence shall materialized the long-term dedication of various feminists during various periods of time, where the ultimate goal is 'gender equality' and 'gender justice'.

5. LIMITATIONS

This paper limits its scope for two feminist approaches due to the objective of providing a deeper analysis in comparison with the PDV Act and practical instances of the society. Thus, the author has only utilised CEDAW and Declaration on the Elimination of Violence against Women (1993) as those are the most crucial and directly connected

international conventions with the underlining topic of the study which is, 'violence against women'.

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