GENDERING DOMESTIC VIOLENCE AGAINST WOMEN: ARCHETYPE OR ANOMALY?

A CRITICAL COMMENT ON *HARSORA V. HARSORA*

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Abstract

The recent decision of a Division Bench of the Supreme Court in Hiral Harsora v. Kusum Harsora[1] *striking down the words "adult male person" and the corresponding proviso from section 2(q) of the Protection of Women from Domestic Violence Act, 2005 [hereinafter PWDVA] has undoubtedly opened up new vistas of constitutional scrutiny into the validity of an enactment.*

Although the scope of a judgment is largely limited by the arguments of the parties before the Court, the omission of a discussion or even a passing reference to the doctrine of presumption of constitutionality undermines the authority of the decision. Even from the standpoint of equality analysis under Article 14 with reference to the principle of reasonable classification, the constitutionality of the said provision could have been easily upheld. The link between domestic violence and masculinity is widely explored and documented in scholarly literature both at the national level and worldwide and a statutory acknowledgement of this empirical reality is in keeping with the United Nations model framework for legislation on violence against women. In the light of the above, the paper proposes to examine the correctness or otherwise of the judgment on the touchstone of settled principles of constitutional adjudication and interpretation of statutes.

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1 (2016) 10 S.C.C. 165.

I. Factual Background of the Case

The case arose out of an appeal against the judgment of the Bombay High Court whereby it had read down Section 2(q) of the PWDVA to include a female co-respondent along with an adult male person within the definition of "respondent", be it in the capacity of a wife of the son/brother or sister of the concerned adult male person, who is or has been in a domestic relationship with the complainant and such co-respondent.

The factual matrix leading to the aforementioned challenge was that one Kusum Narottam Harsora and her mother Pushpa Narottam Harsora had filed two separate complaints under the PWDVA against Pradeep (brother/son), and his wife, and two sisters/daughters, alleging various acts of violence against them and hence seeking to implead them as respondents under Section 2(q) the PWDVA. Against this complaint, an application was moved before the Metropolitan Magistrate seeking discharge of the three females named in the complaint on the grounds that within the meaning of Section 2(q) of the PWDVA, a complaint could only be made against an adult male person. However, the Metropolitan Magistrate refused the discharge whereupon criminal writ petitions were moved before Single judge Bench of the Bombay High Court that discharged the aforementioned three females. Aggrieved by this judgment, the complainants preferred a writ petition under Article 226 of the Constitution of India before a Division Bench of the High Court challenging the constitutional validity of section 2(q) of the PWDVA and the same was ruled in aforementioned terms. In the appeal against the judgment of the High Court, a division Bench of the Supreme Court set aside the judgment of the Bombay High Court and deleted the words "adult male respondent" as well as the

corresponding proviso from Section 2(q) of the PWDVA holding that the erstwhile definition of "respondent" in Section 2(q) was not based on any intelligible differentia having any rational relation to the object sought to be achieved by the PWDVA but was in fact contrary to it.

In reaching the said conclusion, the Supreme Court relied heavily upon internal and external aids and the need to ensure internal and external consistency across statutes in a bid to arrive at the true purpose of the enactment. It is submitted that the approach of the Supreme Court in the instant case though novel and arguably scholarly is not supported by the settled principles of constitutional adjudication as also principles of statutory interpretation. The different heads of criticism have been elaborated below.

II. Presumption of Constitutionality

The presumption of constitutionality is a time-honoured tradition of constitutional adjudication. In a system of government based on constitutional supremacy, mutual respect for the wisdom of coordinate branches of the government is absolutely crucial for achieving the ideal of constitutional governance. It is a settled principle that a legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.[2] Applied as a principle

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2 Chiranjit Lal Chowdhury v. Union of India, A.I.R. 1951 S.C. 41; State of Bombay v. F.N. Balsara, A.I.R. 1951 S.C. 318; State of West Bengal v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75; R.K. Dalmia v. S.R. Tendolkar, A.I.R. 1958 S.C. 538; Mohd. Hanif Qureshi v. State of Bihar, A.I.R. 1958 S.C. 731; Pathumma v. State of Kerala, (1978) 2 S.C.C. 1; Delhi Transport Corporation v. D.T.C. Mazdoor Congress, (1991) Supp (1) S.C.C. 600; Subramanian Swamy v. Director, CBI, (2014) 8 S.C.C. 682.

of construction, the doctrine of presumption in favour of the constitutionality of a statute means that if two meanings are possible then the courts will reject the one which renders it unconstitutional and accept the other upholding the validity of the impugned legislation.[3]

This principle of deference is centred not only on issues of representative legitimacy but also superiority of institutional design of the legislature and the robustness of the legislative process.[4]It is surprising that in the instant case neither the doctrine of initial presumption of constitutionality was invoked by the respondents nor considered much less relied upon by the court while reviewing the constitutionality of section 2(q) of the PWDVA thus, bypassing one of the settled canons of constitutional adjudication.

The scope of the presumption however, is not confined just to the enacting or substantive provisions of an enactment but is much wider and in fact, it informs the inquiry into the object and purpose of an enactment as well.[5]

Thus, the principle of constitutionality in favour of an enactment has deep foundations among the settled canons of constitutional adjudication and is not just a colonial relic or ornamental formality.

It would, however, be relevant to mention here that besides being rebuttable, the principle of constitutionality is also non-absolute in nature. The presumption of constitutionality is subject to

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3 State of Rajasthan v. Basant Nahata, (2005) 12 S.C.C. 77.

4 *See* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85(4) NOTRE DAME LAW REVIEW 1461 (2010).

5 *See* State of Bihar v. Bihar Distillery Ltd., (1997) 2 S.C.C. 453.

the doctrine of 'strict scrutiny' which has the effect of reversing the presumption and the corresponding burden thereof. The doctrine of 'strict scrutiny' which was evolved by the American Supreme Court has been making not so subtle inroads into the constitutional jurisprudence of India[6] and in certain cases, it is arguably permissible for the superior courts to dispense with the initial presumption of constitutionality and adopt a more exacting standard of judicial review. However, in the instant case whether there was a need for adoption of the 'strict scrutiny' test is not quite apparent in that the legislation in question was not an example of 'suspect legislation' as understood in the light of decided cases[7] nor did the Court explicitly refer to or appear to have invoked this standard in the course of its reasoning.

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6 *See* Anuj Garg v. Hotel Association of India, (2008) 3 S.C.C. 1 [. . . it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State]; Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 S.C.C. 458 [Notwithstanding the lack of doctrinal clarity, the two-judge Bench did seek to put the ratio of Saurabh Chaudri v. Union of India, (2003) 11 S.C.C. 146 in perspective by holding that the 'strict scrutiny' test was not foreclosed for good by the Constitution Bench decision]; The Kerala Bar Hotels Association v. State of Kerala, (2015) 16 S.C.C. 421 [The classification at hand is based on social and economic class . . . Therefore, a strict scrutiny test must be applied, and the Government must be asked to provide a rigorous, detailed explanation in this classification]. *See also* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review For Article 15 Infringement*, 50(2) JILI 177-208 (2008) [arguing for an intense review in cases of violation of the fundamental rights guaranteed by article 15(1), article 19(1)(a) and the negative rights under article 21 and acknowledging that the Court had taken 'tentative steps' in the right direction].

7 *See* Nair Service Society v. State of Kerala, (2007) 4 S.C.C. 1. [A statute professing division amongst citizens, subject to Articles 15 and 16 of the Constitution of India may be considered to be a suspect legislation. A suspect legislation must pass the test of strict scrutiny].

III. Test of Reasonable Classification under Art. 14 and the Impugned Classification

Article 14 of the Constitution of India ensures equality of treatment among equals in like circumstances.[8] Accordingly, it has been asserted: "The first step in determining whether Article 14 has been violated is a consideration of whether the persons between whom discrimination is alleged fall within the same class. If the persons are not deemed to be similarly circumstanced, then no further consideration is required"[9].

By way of judicial decisions, the doctrine of classification is read into Article 14.[10] The principles to be followed by the courts in arriving at a conclusion as to whether a classification offends the right to equality guaranteed under Article 14 have also been laid down in a number of cases.[11]

Equal protection claims under Article 14 are examined with the presumption that the State action is reasonable and justified.[12] The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives

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8 Chiranjit Lal Chowdhuri v. Union of India, A.I.R. 1951 S.C. 41; Shri Kishan Singh v. State of Rajasthan, A.I.R. 1955 S.C. 795; Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P., (1969) 1 S.C.C. 817; State of Jammu & Kashmir v. Triloki Nath Khosa, (1974) 1 S.C.C. 771; Air India v. Nergesh Meerza, (1981) 4 S.C.C. 335; T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 S.C.C. 481; M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212.

9 Ratna Kapur & Brenda Cossman, On Women, Equality and the Constitution, 1(1) NATIONAL LAW SCHOOL JOURNAL 2-3 (1993).

10 M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212.

11 For a brief summary of these principles, *see* Dalmia v. S.R. Tendolkar, A.I.R. 1958 S.C. 538 and In re: The Special Courts Bill, (1979) 1 S.C.C. 380.

12 Kathi Raning Rawat v. State of Saurashtra, A.I.R. 1952 S.C. 123.

of the legislation, that necessity of judicial interference arises.[13] The safeguard provided by Article 14 of the Constitution can only be invoked, if the classification is made on the grounds which are totally irrelevant to the object of the statute.[14]It is well-settled that the law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience.[15]

As regards the comprehensiveness of the classification, the law on the point was succinctly laid down by a Constitution Bench of the Court in Kedar Nath Bajoria v. State of West Bengal[16] in the following manner:

> [T]he legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose.[17]

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13 *Id. See also* Anukul Chandra Pradhan v. Union of India, (1996) 6 S.C.C. 354 [The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision].

14 D.C. Bhatia v. Union of India, (1995) 1 S.C.C. 104.

15 In re: The Special Courts Bill, (1979) 1 S.C.C. 380.

16 A.I.R. 1953 S.C. 404.

17 Kedar Nath Bajoria v. State of West Bengal, A.I.R. 1953 S.C. 404. *See also* Dharam Dutt v. Union of India, (2004) 1 S.C.C. 712; Welfare Association of ARP, Maharashtra v. Ranjit P. Gohil, (2003) 9 S.C.C. 358 [It is difficult to expect the Legislature carving out a classification which may be scientifically

While it is true that every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.[18] If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.[19]

In the light of the principles discussed above, it is submitted that the finding on the part of the Court that the restrictive definition of 'respondent' in the erstwhile section 2(q) of the PWDVA was violative of the guarantee of equal protection was based on an improper application of the nexus test in that it purported to treat unequals as equals. It is further submitted that the impugned classification was based both on an intelligible differentia and had a rational relation with the object sought to be achieved by the Act. The link between 'violence against women' and masculinity is too

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perfect or logically complete or which may satisfy the expectations of all concerned, still the court would respect the classification dictated by the wisdom of Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14]; Namit Sharma v. Union of India, (2013) 1 S.C.C. 745[A statute is not invalid because it might have gone further than it did, since the legislature need not strike at all evils at the same time and may address itself to the phase of the problem which seemed most acute to the legislative mind].

18 State of Bombay v. F.N. Balsara, A.I.R. 1951 S.C. 318. *See also* In re: The Special Courts Bill, (1979) 1 S.C.C. 380 [When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation].

19 State of Bombay v. F.N. Balsara, A.I.R. 1951 SC 318.*See also* Sakahawat Ali v. State of Orissa, A.I.R. 1955 S.C. 166 [It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by article 14 of the Constitution].

well established to require elaboration. A 2006 Executive Summary of the UN Secretary-General's Report on an in-depth study on all forms of violence against women as mandated by General Assembly resolution 58/185 outlined the causes of violence against women as under:

> The roots of violence against women lie in historically unequal power relations between men and women and pervasive discrimination against women in both the public and private spheres. Patriarchal disparities of power, discriminatory cultural norms and economic inequalities serve to deny women's human rights and perpetuate violence. Violence against women is one of the key means through which male control over women's agency and sexuality is maintained.[20]

Similarly, the UN Women has pointed out that:

> Violence against women and girls is rooted in ideas about masculine superiority and natural dominance. . . . it remains overwhelmingly true that men are the main perpetrators of violence, across marked social differences (of age, class, and race/ethnicity to name only three).[21]

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20 EXECUTIVE SUMMARY, STUDY OF THE SECRETARY GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION ii (2006), http://www.unwomen.org/-/media/headquarters/media/publications/un/en/ englishstudy.pdf?la=en&vs=954.

21 ALAN GREIG, SELF-LEARNING BOOKLET: UNDERSTANDING MASCULINITIES AND VIOLENCE AGAINST WOMEN AND GIRLS 40 (2016). *See also* UN WOMEN, TURNING PROMISES INTO ACTION: GENDER EQUALITY IN THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT 193 (2018) [While complex and context-specific factors underpin different forms of violence, the root causes are unequal gender power relations and discrimination against women and girls].

On the national level, a survey conducted by the International Center for Research on Women to explore the links between domestic violence against women and masculinity in the states of Punjab, Rajasthan and Tamil Nadu, revealed that as many as 85 per cent of men reported engaging in at least one violent behaviour in the past 12 months. Specifically, 72 per cent reported emotional violence, 46 per cent reported control, 50 per cent reported sexual violence, and 40 per cent reported physical violence.[22] Similarly, in a 2009 study conducted among the eastern Indian states of Orissa, West Bengal, Bihar and Jharkhand, the overall prevalence of physical, psychological, sexual and any form of violence among women of Eastern India was found to be 16 per cent, 52 per cent, 25 per cent and 56 per cent respectively.[23] The study also concluded that husbands were mostly responsible for violence in majority of cases and some women reported the involvement of husbands' parents.[24]

Thus, the statutory approach in providing a gender-sensitive and restrictive definition of the term "respondent" appears to underscore the empirical realities and a nuanced understanding of the nature of domestic violence against women. Besides, the statutory approach was also in consonance with the United Nations model framework for legislation on violence against women that emphasizes the need to adopt an evidence-based approach to legislative drafting.[25]

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22 INTERNATIONAL CENTER FOR RESEARCH ON WOMEN (ICRW), MEN, MASCULINITY AND DOMESTIC VIOLENCE IN INDIA: SUMMARY REPORT OF FOUR STUDIES 58 (2002).

23 Bontha V. Babu and Shantanu K. Kar, *Domestic violence against women in eastern India: a population-based study on prevalence and related issues*, 9 BMC PUBLIC HEALTH129 (2009), *available at* http://www.ncbi.nlm.nih.gov/pubmed/19426515 (last visited Apr. 21, 2017)

24 *Id.*

25 DEPT. OF ECO & SOC. AFFAIRS, DIVISION FOR THE ADVANCEMENT OF WOMEN, UN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN58 (2010).

IV. Constitutionality of Statutes vis-à-vis Principles of Statutory Interpretation

In coming to the conclusion that the words "adult male person" in the erstwhile Section 2(q) of the PWDVA did not square with Article 14 of the Constitution of India, the Supreme Court relied upon internal aids in the form of Preamble read with certain substantive provisions of the PWDVA namely, sections 2(f) [definition of "domestic relationship"], 2(s) [definition of "shared household"], 3 [definition of "domestic violence"], 18(b) [protection order prohibiting the "aiding or abetting in the commission of acts of domestic violence"], 19(1)(c) [residence order "restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides"], 20 [monetary reliefs] and 26 [relief in other suits and legal proceedings]. As far as external aids are concerned, the Court relied upon the Statement of Objects and Reasons along with the provisions of the Hindu Succession (Amendment) Act, 2005, Protection from Domestic Violence Bill, 2002 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The central arguments relied upon by the Court in deciding against the validity of the impugned classification pertained to internal inconsistency, possibility of proxy violations and impunity enjoyed by potential female perpetrators.

The relevance of internal aids in the form of the Preamble and material provisions of an enactment in any constitutional adjudication concerning Article 14 has been conclusively settled by the pronouncement of a Constitution Bench after a review of a number of decisions on this point in the following manner:

> In considering the validity of the impugned statute on the ground that it violates Art. 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered.[26]

In a bid to arrive at the exact object sought to be achieved by the PWDVA, the Court evidently felt the need and rightfully so to look into the preamble and the material provisions of the PWDVA. The Preamble to a statute is a "key to open the mind of the legislature"[27] and is also said to provide the "key to the general purpose of the Act".[28] Although not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the long title.[29]

Notwithstanding the admissibility of the preamble as an important internal aid, its interpretive utility *vis-à-vis* the enacting provisions of a statute is seriously limited. The Preamble undoubtedly is a part of the statute but since it is not an enacting part, it is not accorded the same weight as are other relevant enacting provisions to

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26 Kangsari Haldar v. State of West Bengal, A.I.R. 1960 S.C. 457.

27 Tribhuvan Parkash Nayyar v. Union of India, (1969) 3 S.C.C. 99; Arnit Das v. State of Bihar, (2000) 5 S.C.C. 488.

28 The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navalakha, (1975) 4 S.C.C. 754.

29 G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 150 (10th ed., 2006). See alsoBrett v. Brett [1826] 162 E.R. 456 [It is to the preamble more specifically that we are to look for the reason or spirit of every statute, rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making or passing the statute itself].

be found elsewhere in the Act.[30] The preamble may, no doubt, be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning, but it can, however, not be used to eliminate as redundant or unintended, the operative provision of a statute.[31] It is also well-settled that when the language of the section is clear and explicit, its meaning cannot be controlled by the preamble.[32] In fact, if the provision contained in the main Act are clear and without any ambiguity and the purpose of the Legislation can be thereby duly understood without any effort, there is no necessity to even look into the Preamble for that purpose.[33] It is therefore not permissible for the Court to start with the preamble for construing the provisions of an Act, though it would be justified in resorting to it.[34]

Understood in the light of the above, the Court definitely bypassed the settled principles of statutory interpretation when it sought to interpret the definition of "domestic violence" in Section 3 in the light of the Preamble instead of the definition clause[35] contained in Section 2(q) of the PWDVA. The definition clause being clear, categorical and exhaustive[36] did not require the invocation of

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30 Union of India v. Elphinstone Spinning & Weaving Co. Ltd., (2001) 4 S.C.C. 139.

31 State of Rajasthan v. Leela Jain, A.I.R. 1965 S.C. 1296.

32 Maharao Sahib Shri Bhim Singhji v. Union of India, (1981) 1 S.C.C. 166.

33 Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., (2013) 15 S.C.C. 677.

34 M/s. Burrakur Coal Co. Ltd. v. Union of India, A.I.R. 1961 S.C. 954. *See also* Tribhuwan Parkash Nayyar v. Union of India, (1969) 3 S.C.C. 99.

35 On the importance of definition clause, see Indira Nehru Gandhi v. Raj Narain, 1975 Supp S.C.C. 1 [Where a word is defined in the statute and that word is used in a provision to which that definition is applicable, the effect is that whenever the word defined is used in that provision, the definition of the word gets substituted].

36 *See* Mahalakshmi Oil Mills v. State of Andhra Pradesh, (1989) 1 S.C.C. 164; P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) S.C.C. 348.

the preamble. Thus, the case of internal inconsistency seemingly made out by the Court between Sections 3 and 2(q) of the PWDVA was one of judicial-making and not the result of legislative classification. In so far as Section 3 lists out the range of acts that may constitute domestic violence, there is obviously no gender component to it but all those instances of domestic violence are qualified by the term 'respondent' used in the opening portion of the Section and hence it could not be described as gender neutral.

Similarly, the invocation of an external aid in the form of Section 6 of the Hindu Succession Act, 1956 to interpret Section 2(s) of PWDVA and establish a case of "glaring anomaly" was also uncalled for in the circumstances of the case.[37]

The next apparently anomalous consequence examined by the Court pertained to Section 17(2) of the PWDVA that leaves open the possibility of proxy violations whereby female members (other than those excepted by the erstwhile proviso) may evict or exclude the aggrieved person from the shared household at the instance of an adult male. While that may be a plausible concern, to be sure, as Gauba points out, except for Section 18 of the PWDVA, "there is virtually no effective mechanism provided for enforcement of the other promised reliefs".[38] However, it is submitted that such a proxy violation may potentially constitute domestic violence because the definition of "economic abuse" in Section 3(d) [Explanation I(iv)(c)] includes "prohibition or restriction to continued access to . . . the

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37 *See* Col. D.D. Joshi v. Union of India, (1983) 2 S.C.C. 235 [If the language of the statute is clear and unambiguous, and if two interpretations are not reasonably possible, it would be wrong to discard the plain meaning of the words used in order to meet a possible injustice. In such a situation, it would be impermissible to call in aid any external aid of construction to find out the hidden meaning].

38 R.K. Gauba, *Domestic Violence Law-A Recipe for Disaster?,* 8 S.C.C.(J) 29 (2007).

shared household" and Explanation II clearly lays down that "whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" depends upon the "overall facts and circumstances of the case". In any case, the immediate remedy against the male perpetrator would lie in an application for a protection order against the respondent under Section 18. Such a protection order may as well be *ex parte* under Section 23 of the PWDVA.

In view of the qualitative difference between the nature of violence sought to be outlawed under the PWDVA and typical female-on-female violence justifying the scheme of classification, it is not necessary to discuss the potential implications of a restrictive reading of the definition of "respondent" on the infractions committed by non-exempted class of female perpetrators of the orders passed under Sections 18 and 19 of the PWDVA.

The reliance on Section 26 to bring out an all-embracing import of the legislation was equally misplaced since Section 36 clearly provides that the provisions of the PWDVA shall be in addition to any other law for the time being in force thereby acknowledging the room for accessing similar or additional reliefs under different enactments and before different fora. As has been rightly substantiated, some of those remedies may be available upon invocation of the relevant provisions of the Maintenance and Welfare of Parents and Senior Citizen's Act, 2007, the Hindu Adoption and Maintenance Act, 1956 and the law of injunction and partition.[39]

It is thus clear that the Court overstated its case while

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[39] *See* Sanjoy Ghose, *A Gender-Neutral Domestic Violence Law Harms Rather Than Protects Women*, THE WIRE, Nov. 3, 2016, https://thewire.in/law/a-gender-neutral-domestic-violence-law-harms-rather-than-protects-women.

highlighting the apparent anomalies in the scheme of the PWDVA.

As regards the reliance on the Statement of Objects and Reasons, it has been held that reference to the Statement of Objects and Reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute and the evil which the statute sought to remedy.[40] However, it is submitted that while concluding that the object of the PWDVA was "to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence",[41] the Court failed to contextualise the violence sought to be proscribed under the PWDVA. In this connection, it has been rightly pointed out:

> Violence is not a "neutral", "objective" term. It implies an evaluation of a person's behaviour. An act that is considered non-problematic, routine, and normal in one era/polity/geography/community, can over time and through change in discourse, become de-normalized and classified as violence. Domestic violence is itself a classic example.[42]

Referring to the Preamble and the Statement of Objects, the

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40 *See* State of West Bengal v. Subodh Gopal Bose, A.I.R. 1954 S.C. 92; K.K. Kochuni v. State of Madras, A.I.R. 1960 S.C. 1080; State of West Bengal v. Union of India, A.I.R. 1963 S.C. 1241; S.C. Parashar, ITO v. Vasantsen Dwarkadas, A.I.R. 1963 S.C. 1356; P. Vajravelu Mudaliar v. Special Deputy Collector, Madras, A.I.R. 1965 S.C. 1017; K.S. Paripoornan v. State of Kerala, (1994) 5 S.C.C. 593; A. Manjula Bhashini v. M.D., Andhra Pradesh Women's Cooperative Finance Corporation Ltd., (2009) 8 S.C.C. 431State of Tamil Nadu v. K. Shyam Sunder, (2011) 8 S.C.C. 737

41 Hiral Harsora v. Kusum Harsora, (2016) 10 S.C.C. 165.

42 Aparna Chandra, *Women As Respondents Under The Domestic Violence Act: Critiquing The SC Decision In Harsora V. Harsora*, LiveLaw.in (Oct. 14, 2016), https://www.livelaw.in/women-respondents-domestic-violence-act-critiquing-sc-decision-harsora-v-harsora/.

Court concluded that the expression "violence of any kind occurring within the family" contained in the Preamble read with the Statement of Objects and Reasons referred to not only categories of violence but also the range of perpetrators meaning thereby that women other than those contemplated under the erstwhile proviso to Section 2(q) could also be the perpetrators under the PWDVA. However, such a conclusion is not warranted if the Preamble and the Statement of Objects and Reasons appended to the Act are read in the proper context.

The Statement of Objects and Reasons of the PWDVA makes explicit reference to the Vienna Accord of 1994, Beijing Declaration and the Platform for Action (1995) and the General Recommendation No. XII (1989) of the UN Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) while laying down the background of the proposed legislation. In fact, the Preamble to the PWDVA is couched in language which is almost identical to the preamble of General Recommendation XII of the Committee on the Elimination of Discrimination against Women. It is also worth noting here that the term "violence against women" has a distinct and specific connotation in the international legal literature on the subject.

Referring to the CEDAW, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) has acknowledged that though the CEDAW "does not explicitly mention violence against women and girls, General Recommendations 12 and 19 clarify that the Convention includes violence against women and makes detailed recommendations to

States parties."[43] The UN Women further mentions that the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) was the first international instrument to define and elaborate upon the concept of 'violence against women'.

Thus, it becomes necessary to read the General Recommendations 12 and 19 in conjunction with the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW). The DEVAW defines "violence against women" as 'gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[44] More importantly, the DEVAW recognises that:

> ***[V]iolence against women is a manifestation ofhistorically unequal power relations between men and women***, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that ***violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.***[45]

Moreover, The Beijing Declaration and the Platform for Action (1995) makes explicit commitment[46] to the equal rights and

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43 *Global norms and standards: Ending violence against women*, UN Women, http://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards#sthash.ebk9cHnM.96kH8X2y.dpuf (last visited April 21, 2017).

44 Declaration on the Elimination of Violence against Women (1993), art. 1.

45 *Id.*, Preamble.

46 Beijing Declaration and the Platform for Action (1995), annex. I [8].

inherent human dignity of women and men and other purposes and principles enshrined in the DEVAW and goes on to reiterate the definition and the foundation of the violence highlighted in the document.[47]

Understood in the light of the above, it would become clear that the primary object of the PWDVA is to proscribe male-on-female violence rooted in the ideas of patriarchal masculinities. Thus, the restrictive definition of 'respondent' in the erstwhile section 2(q) of the PWDVA was in keeping with the object of the enactment. As regards the exception carved via the erstwhile proviso, the same is reconcilable with the assertion in the Statement of Objects and Reasons that the PWDVA is meant to complement the criminal remedy under Section 498A of the Indian Penal Code with a civil one.[48]

In any event, it has been pointed out that: "There may be no exact correspondence between Preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the Preamble."[49] Hence, the conclusion reached by the Court was based on a seemingly perfunctory reading of the Preamble and the Statement of Objects and Reasons of the PWDVA.

V. Conclusion

The foregoing analysis reveals that the PWDVA is essentially a statute seeking to outlaw gender-based violence and providing civil remedies to the victims of such violence and hence while interpreting

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47 *Id.*, annex. II, [113], [118].

48 Clause (2) of Statement of Objects and Reasons to the PWDVA.

49 Attorney General v. HRH Prince Ernest Augustus of Hanover [1957] 1 All E.R. 49.

its provisions, the inquiry must proceed on an understanding that the term 'violence against women' has a distinct and specific connotation having its foundation in patriarchal/hegemonic masculinity. Thus, it becomes imperative that an inquiry into the constitutionality or correct interpretation of an impugned provision of the statute be informed by these considerations. A seemingly beneficial approach whereby the Court adopts a gender-neutral approach to expand the range of perpetrators under the PWDVA by relying upon hypotheticals and penumbral possibilities is normatively undesirable as it inadvertently papers over the lived realities of the victims of domestic violence. The gross mischaracterisation of domestic violence against women also glosses over the fact that it constitutes a prime example of discrimination by men against women. Even as the Court recognised the possibility of females being used by an adult male to commit proxy violations, it failed to note that the same group of females may be used by unscrupulous and conniving males to file a battery of false and motivated counter-complaints against the aggrieved persons in an effort to threaten, intimidate and harass them. Thus, an expansive interpretation of the term 'respondent' may also result in undesirable practical consequences. When the scope of the enactment was thus carefully circumscribed, it was rather cavalier to bypass the settled canons of constitutional adjudication and statutory interpretation in an effort to ostensibly enlarge the protective reach of the impugned enactment. It is submitted that while ruling upon the constitutionality of statutes, the Courts must be sanguine as to the fairness of the settled canons of constitutional adjudication. This approach will not only guard against unwarranted judicial adventurism based on subjective notions of fairness and justice but will also help in producing a consistent and coherent body of law for future application.