Analysis of The Prohibition of Women Against Domestic Violence Act, 2005

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Introduction

International Law defines violence against women (VAW) as gender-based violence. This specific alignment recognizes that the root cause and consequence behind VAW is the patriarchal construct of the society where women are considered subordinate to men. It asserts that this unequal gender relations enables a cycle of structural and physical violence or crime committed exclusively against women and girls.

In order to combat the multilayered nature of VAW, the UNGA adopted the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979 which called upon states to frame domestic legislations to counter discriminatory laws and practices and promote gender equality in political, cultural, social and economic fields.

As India is a signatory to CEDAW, it adopted the Prohibition of Women Against Domestic Violence Act, 2005 in accordance to Article 253 of the constitution which confers parliament to abide by all the international treaties and conventions. Therefore, the enforcement of PWDVA can be viewed as a step to fulfill its international obligations as a key global player.

However, it should be noted that despite acknowledging the severity of the VAW and subsequently launching multiple mandates like, the Beijing Declaration and Platform of Action (1995), World Health Assembly Resolution 69.5 (2016), UN SDG 5 in order to eliminate all forms of VAW at international level, 49 countries have yet to adopt a formal policy on domestic violence. This clearly shows the contradictory stance of global players, further highlighting lack of assertiveness in international mandates.

In this paper, authors shall narrow down their research to Domestic Violence - one form of VAW, as we go onto elaborate upon the legislative actions taken in the Indian context. Following which there is a comparative analysis of DV legislations across the world.

Before we move on to critically analyze the legal provision of PWDVA 2005 and jot down our recommendations it is imperative for us to understand how the domestic violence act came into existence in India.

How did the Domestic Violence Act come into existence?

After independence, dowry culture was a major women-centric issue prevalent in India. Several campaigns against dowry culture led to the emergence of Dowry Prohibition Act 1961, wherein the legislation declared the act to give, take, agree to give and demand dowry a punishable offense. However, the Act remained ineffective and unenforceable due to its limited scope which was characterized by limited definition of dowry, the non-cognizable nature of the law, and lack of defined ceiling under the category of "presents" given in marriage. The Towards Equality Report (1975) submitted by the Committee on the Status of Women in India verified this stance by highlighting the structural flaws in the Act. It also emphasized that despite a rapid increase in dowry practices across states there were no cases reported under the Dowry Act 1961. Further stating that only one case was lodged under the said Act, that too only on the grounds of the ill-treatment faced by the daughter of the complainant.[1]

Thus, the report findings and a spurt in news reports of bride-burning in the 1970s led to an emergence of a new trajectory where VAW penetrated the private domain of family within the public discourse of laws and rights. It should be noted that these cases of unnatural death of young wives were closely linked to the history of dowry demand, violence, psychological torture, murder and suicide within the matrimonial home.

Therefore, a rise in the bride-burning cases and ineffectiveness of the Act resulted in country-wide agitation by the Women's groups like Mahila Dakshata Samiti and Stree Sangharsh which in turn pressured the Indian government not only to amend the Dowry Prohibition Act in 1984 and 1986 but to also criminalize the act of violence, cruelty, unnatural death and suicide within marriage.

Cruelty against the wife by husband or his relatives was made a cognizable, non-bailable offense via inserting Section 498A in IPC in 1983. Thus, the aspects of dowry harassment were included within the broader ambit of the above-mentioned provision. Further, through Section 113A in Indian Evidence Act, courts were allowed to draw inferences of abetment to suicide in case of unnatural death within seven years of marriage if the husband/relatives are proven guilty of cruelty. In 1986 the insertion of Section 304B in the IPC and Section 113B in the Indian Evidence Act asserted that if a married woman died within seven years of marriage under suspicious circumstances and if the

husband/relatives are proven guilty of dowry harassment prior to her death then it will be presumed that it was a dowry death.

Despite these amendments, the established legal redressal mechanism faced multiple shortcomings. First, the act of cruelty only referred to grave physical forms of domestic violence, thus eliminating the redressal access to its other forms such as economical, psychological, emotional. Second, the majority of women lacked the economic support for legal procedures. Third, it was extremely challenging for women to gather proof "beyond the reasonable doubt" against her husband and relatives as the crime majorly took place within the private space of matrimonial home. This challenge was further exacerbated due to the institutional bias which resisted legal intervention in the private sphere and resorted to counseling sessions. Lastly, social stigma, family pressure, fear to lose an earning member of the family restricted women to either lodge or pursue domestic violence legal proceedings.

This failure led to a shift in the discourse as domestic violence was recognized in a broader sense, unconnected with dowry demand/harassment. The Indian Government then enacted the Prohibition of Women Against Domestic Violence Act, 2005 which not only defined domestic violence in a broader sense via including physical, emotional, economic and sexual abuse against any women (not only wives but extended it to sisters, widows, mothers) within the household but also provided civil remedies & reliefs to protect women's rights and enable their recovery in long-run. It also recognizes marital rape.

Statistical Data Analysis of Domestic Violence

The global statistics of domestic violence signifies that there has been a stark rise in DV cases. To state a few estimates - the 2020 Crime Survey England reported a 9% increase in domestic-abuse crimes from 2019 estimates. Whereas, in the U.S. the number of women ever reported a DV case increased by 42% within a period of three years (2016-18). Whereas, India recorded a 30% increase as per NFHS-4 report (2015 -16).

There is also a regional trend which signifies how DV cases vary across developing and developed countries. As per the regional estimates derived by WHO systematic review (2013) countries in the South Asian region are at a higher likelihood for experiencing domestic abuse than other western regions like Europe, America, Western Pacific.

Now, let us unravel the statistical records of India. The report released by BMC Women's Health extracted data from the annual reports of National Crime Record Bureau (NCRB) which divided the DV cases into four prominent heads -

1. “Cruelty by husbands or his relatives” falling under Section 498A of IPC wherein evidence of violence in the form of grave injury or harassment are recognized in association with an unlawful demand for property;
2. “Dowry deaths” falling under Section 304 B of IPC which covers the aspects of unnatural death within a period of 7 years of marriage with supporting evidence of dowry harassment;
3. “Abetment of suicide” giving the scope to cover the risk of suicide by married women; and
4. “Cases registered under PWDVA”, this subhead includes all forms of DV-related offenses.

Now, this broad set of data highlighted the following key findings: -

- Cases reported under section 498A IPC from 2001-18 stood at 1,548,548, of which 35.8% were reported between 2014-2018. Further, the reported cases under this subhead increased by 53% over these 18 years.

- Under the dowry death subhead, a total of 137,627 crimes were reported between 2001-18.

- Under abetment of suicide subhead, a total of 22, 579 cases were reported between 2014-18.

- A total of 2,519 cases were reported under PWDVA between 2014-18.

- Lastly, while highlighting the status of legal trials, the report mentioned that in 2018 only 44,648 cases out of 658,418 filed cases completed the trial i.e., only 6.8% of cases. Further, showing that offenders were convicted only in 15.5% (i.e, 6,921) cases which were complete.

The following data clearly shows that despite an increase in the number of reported cases the rate of conviction remained low. This certainly highlights the inefficiency of formal complaint mechanisms as only 6.8% of filed cases completed the trial in 2018. The low conviction rate followed by delayed trials leads to the emergence of under-reporting which not only provides insufficient data to derive empirical research but also restricts evidence-based policy interventions.

Following the year 2018, with the onset of Covid-19 pandemic there was a global surge in DV cases. In India, after the imposition of nationwide lockdown the number of complaints received by the National Commision of Women (NCW) doubled. As per the records, 69 cases were reported between the 23rd March 2020 to 1st April 2020 as compared to 30 cases in the first week of March. The reason behind this spike can be attributed to the interplay of patriarchal power structure and socio-cultural demarcation of domestic labour.

While describing the nexus between DV and Covid-19, the NCW Chairperson Rekha Sharma asserted on how lockdown has incapcitated women to file a report against domestic abuse as it prevented them to move to safer places compelling them to continue living with their abuser.

This restriction worsened as the victim relief and security machinery provided under the PWDVA was not identified as essential services during the lockdown, thus preventing protection officers and NGO workers from visiting the household of the victim. The condition of the victim deteriorated further due to lack of accessibility in terms of ownership of mobile phones (to contact the police), financial buffer etc. Thus, it can be concluded that due to the limited options for registering a complaint during the covid peak, there could have been under-reporting despite an increasing trend. The issue of under-reporting also surfaced in the recent NHFS-5 (2019-21), wherein it stated that around 73% (urban) and 76% (rural) of women (aged between 18-49) who had experienced domestic abuse did not seek any kind of help from any source.

Now, we shall move on to critically analyze and discuss the key aspects of PWDVA 2005.

Analysis of PWDVA legislation

The Protection of Women from Domestic Violence Act 2005 was a revolutionary legislation passed by the Manmohan Singh government to protect women from domestic abuse in their households. It was officially enacted and brought to force by the Ministry of Women and Child Development on 26th October 2006. After years of deliberation both in the parliament as well as in the academic circles and vehement demands by women's rights activists, this holistic Act was given legal sanction. It was a remarkable legislation not only because it was first of its kind but also because it provided a holistic legal framework to counter the abhorrent practice of domestic abuse of women. It presented a fourfold support mechanism – custody orders (S.) , residence orders, protection orders and monetary relief.

This section aims to analyze the major provisions of the Act and highlight the loopholes and challenges that have emerged in the Indian jurisprudence. At certain places, we have tried to address the problems with solutions, which although crude can provide great insight into addressing the challenges at a broader level.

1) Definition of Domestic Violence (Section 3)

The Act does well by defining the most crucial aspect of this act – domestic violence is a wide and inclusive fashion. The definition isn't just restricted to physical abuse but also extended to other innate and often-ignored types of violence such as sexual, verbal, emotional and

economic abuses. The constant use of the word 'includes' reminds us that the definition isn't all-exhaustive and many more provisions can be incorporated if need be in the future.

Two potential issues arise with this definition. Firstly, multiple terms used to define violence in a nuanced manner are vague and ambiguous. For example, the definition of 'verbal and emotional abuse'[2], includes ambiguous terms like "insults, ridicule, humiliation, name calling" which are nowhere defined in the Act. Lack of clarity which leads to confusion and complexity, especially in such sensitive statutes, usually end up discouraging victims to approach courts and impede their path towards justice. On the other hand, this also leads to the second problem of over-inclusivity. Considering the same provision, even a casual harmless remark by a man to his wife which is intuitively, no way abusive or intended to be abusive can be severely punished under this act because the definition of ridiculing, humiliating and insulting is excessively broad, stretching beyond the intention of the legislators. Additionally, such vague provisions give excessive leeway to judges to step in with their own moral evaluations which can be detrimental at some times.

The solution to this would be to bring in more clarity by defining most terms and leaving no scope for misuse. Although it is agreed that a statute can't be perfectly holistic and that there is a need for it to be generic so that it has a wide cover and incorporates as many cases as possible. Yet there is a very thin line between inclusivity and over-inclusivity which needs to be gauged and tackled either through legislative amendments or judicial clarifications. While the second is risky, it appeals to be the better solution in terms of its comparative ease and efficiency.

2) Definition of "Aggrieved Person" (Section 2(a))

The act defines an aggrieved person i.e., a victim who can register a complaint under the Act as:

> *"aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;*

The prima facie problem with this section which extends to the entire act is its gender-specific nature. Clearly the fact that the statute identifies women as potential victims of domestic violence leaves out a huge population of men and transgender persons (who identify as neither a man nor a woman) outside the ambit of this act. This is indeed extremely problematic on the face of it for the stereotypes from which this provision emerges. As one would assume the act is built on notions that 'only women can be abused'. The notion that men are 'muscular, strong, unemotional' persons who henceforth, can't be abused at least by the hands of their wife is extremely problematic and runs contrary to the values of equality enshrined in Part III of our

Constitution.[3] This problem is not just in principle but also on pragmatic lines where violence against men by their partners is excessively growing.

A study by PubMed Central, funded by the ICMR was conducted to find the "prevalence, characteristics and sociodemographic correlates of gender-based violence against men". The study recorded the following –[4]

> *"Out of 1000 males, 51.5% experienced violence at the hands of their wives/intimate partner at least once in their lifetime and 10.5% in the last 12 months. The most common spousal violence was emotional (51.6%) followed by physical violence (6%). Only in one-tenth cases, physical assaults were severe. In almost half of the cases, the husband initiated physical and emotional violence. Gender symmetry does not exist in India for physical violence. Less family income, education up to middle class, nuclear family setup, and perpetrator under the influence of alcohol were identified as risk factors. Earning a spouse with education up to graduation is the risk factor for bidirectional physical violence."*

The ouster of transgenders is rather a more pervasive problem, wherein, historically, this group wasn't accepted either in our legal framework or in the general society. Fortunately, the Indian judiciary has been sensitive and logical in this aspect and has passed several path-breaking judgments recognizing and legitimizing the existence and rights of the LGBT+ community. As recently as in 2020, the Supreme Court directed the Central Government to amend laws to make them inclusive of the members of the LGBT+ community.

We strongly believe that the PWDV Act shall be amended to make it gender-neutral. Not only will it make the law more holistic and effective but it shall also help to counter the long-existing problematic sexist prejudices from their very core.

3) Definition of Domestic Relationship and its restriction to Marital Relationships

Section 2(f) defines domestic relationship to be a –

> *"relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family"*

On a close introspection, one can notice that there is ambiguity over the inclusion of non-marital relationships such as *live-ins* and *cohabitations.* Although terms like consanguinity

and marriage are fairly obvious, the phrase "relationship in the nature of marriage" isn't defined, which is the root cause of the ambiguity.

This question was taken up by the Supreme Court in *D.Velusamy vs D.Patchaiammal* (21 October, 2010)[5]. Justice Katju opined that the "Parliament has taken notice of a new social phenomenon which has emerged in our country known as live-in relationship. This new relationship is still rare in our country, and is sometimes found in big urban cities in India, but it is very common in North America and Europe."

As per the authors, it is argued that live-in relationships must fall under the ambit of the definition of "domestic relationship" because *firstly,* "relationship in the nature of marriage" couldn't have reasonably alluded to anything else except from non-marital cohabitations which are essentially live-ins. *Secondly,* the other qualifications scattered in this clause namely – a relation between two persons; who should live together; in a shared household – are fulfilled by live-in relationships.

4) Affirmative Action by the Government (Chapter III)

The legislation did a wise job by not restricting the Act to just redressal and adjudication of reported domestic violence cases but also included several provisions that cast an added responsibility on the state to take affirmative action to prevent such instances and also, importantly, offer non-legal assistance to victims. One of the very commonly used institutional setup is that of a shelter home for victims of domestic violence discussed in Sections 6, 9f, 10c. Problem with these is their implementation in the hard realities of our socio-political lives. Issues range from lack of shelters to lack of trained staff, no focus by the government, lack of awareness amongst people, laxity in bureaucratic management etc. The situation dramatically worsened in the pandemic as shelter homes began demanding Covid-19 tests from the victims, which made the apparent 'hassle-free redressal mechanism', an extremely tedious and difficult affair.

In many states the shelter situation is such that many women are unable to access shelters directly and voluntarily –their access to state shelters is governed by formal referrals by relevant stakeholders such as protection officers or service providers or through court orders. This is highly unsatisfactory and in fact in contravention of provisions of PWDVA.

5) Scope of Misuse

A criticism that has been prominently raised in the past is the scope of misuse of this Act by women against their husbands by filing false cases. The authors warn that this criticism treads on a very thin line and the arguments from both sides shall be made very carefully. The courts

in the past have often faltered in understanding the sensitivity of this issue and often passed judgments which are criticized to be stereotypical, misogynistic and unthoughtful. This inherent misogynistic approach of courts isn't just limited to cases under DVA but extend to other women-centric issues such as adultery, rape etc.

Consider for instance, *Rajesh Sharma v State of UP* wherein the Apex Court issued a directive to the police that no automatic arrests be made without adequately determining the veracity of the complaints lodged under section 498A of the IPC. Without examining enough empirical material required to gauge the ground realities, the court concluded that the law is being misused by 'vengeful' women in general. Such a directive can prove to be counter-effective and run contrary to the object of the law. The court failed to realize that although such a directive might reduce a 'few' false-cases it might have a drastically detrimental effect on the other victims which gather courage to report authentic cases. The problem arises when the police start questioning the victim to determine the veracity of their claims, adding an excruciating burden on the victim, who is already ____, to prove her claims, that too outside the court of law.

We must understand that the victims in most cases have been exposed to years of trauma and are hence, quite vulnerable and scared to approach the authorities in the first place. If on top of this, such an excruciating burden – of proving the veracity of her claims – is casted upon her, it might not only delay the process but also discourage them from filing the complaint in the first place. We must be cognizant of the social realities and create a very conducive and sensitized environment where the victim must be treated with utmost care.

While the need of sensitization is of utmost importance, we cannot completely overlook the possibility of the act being actually misused by women as a tool to settle anyone. In terms of statistics, the situation looks alarming. In a reply to a question on cases under the DVA 2005, Kiren Rijiju (ex-MoS Home) answered that only 13 people were convicted out of the 639 charge-sheeted i.e. accused in 2014. In percentage terms, this boils down to a worrisome rate of only 2% authenticity.

Through this paper, the authors argue that while the possibility of fake cases is real, it can't be treated as an excuse to avoid the law altogether. The shortcomings of the Act shall not undermine its importance and necessity in the Indian Context. Till the time there exists even a single authentic case of domestic violence, the law must be upheld and enforced in full spirit. The possibility of fake cases exists in many other offences but that doesn't invalidate the law governing the offence. Rather this serves as an impetus for the state to strengthen the executive implementation wing and also for the judiciary to closely scrutinize the cases to increase authenticity and in turn boost effectiveness. An often-proposed solution is to create deterrence

against false cases by imposing heavy punishment if complaint is found to be so. While this may seem lucrative, on a second thought (keeping in mind the vulnerability of victims and the nature of society in which they exist), such punishments might have a counteractive effect i.e., it might in-turn also deter authentic cases from being filed. In most cases the perpetrator has a dominant position and enjoys greater social capital than the victim. In such situations, the victim might not file a complaint in the fear of it getting wrongly established as 'false'. Hence, in our opinion, the best way out is to strengthen the judicial proceedings to establish the veracity of the cases at the earliest. To speed up the process, the government can also establish Fast Track Courts specially to try cases under PWDVA.

6) Punishments

In the jurisprudence of punishments, one of the major guiding principles is the theory of deterrence which says that the punishment can be a tool of deterring the same offender from repeating the offence and discouraging others from committing the same offence from the threat of punishment. For this to hold, the punishment must be strict and severe.

The authors believe that this is one area where the PWDVA lacks and can be significantly improved. The redressal mechanisms are purely civil in nature – protection orders, residence orders, monetary relief, custody orders and compensation orders.

The concern here is threefold – *firstly,* the lack of criminal liability under this Act reduces the deterrence element by offering the perpetrators an easy escape by settling the dispute with money. *Secondly,* to initiate any criminal proceedings against the offender, the victim has to resort to the generic legislation such as the IPC and file cases under it. Approaching the courts of justice under these regular frameworks is problematic due to the delay and bureaucratic red-tapism associated with it. The PWDVA was formed with the objective of reducing this laxity and easing the path towards complete justice. If the actual redressal is ultimately granted by the general statutes only then the purpose of this act is defeated. *Lastly,* the lack of any separate aggravated punishment for repeat offenders also hinders the goal of deterrence.

The clear suggestion would be to incorporate criminal provisions especially for the senior degree of offences and especially, repeat offenders.

Interjurisdictional Analysis - What can be learnt from the rest of the World?

The issue of violence against women in the domestic arena isn't anything specific to India but is a pervasive issue cutting across countries. Research published by the World Health Organization indicates that globally every 1 in 3 women worldwide have been subjected to violence, either physical or

sexual, by their intimate partner in their lifetime. Realizing the pervasiveness of this problem, an inter-jurisdictional analysis of domestic violence laws and provisions becomes imperative to better understand the problem and improve laws of our nation. This section aims at briefly analyzing such laws of four different countries and evaluating their applicability to their Indian setup. An important caveat to keep in mind is that although multiple countries might offer quite lucrative methods to address issues, they can't be blindly imported and applied here. Different countries operate under different social realities which warrant different legal frameworks.

Philippines

The Philippines Anti-Violence Against Women and their Children Act 2004 establishes a specific implementing agency called 'Inter-Agency Council on Violence Against Women'. This agency is mandated under the statute to officially oversee the implementation of the Act and enforcement of its provisions. It is constituted with representatives from different government departments. The lack of any such agency is one of the major reasons behind the poor implementation of the PWDV Act in India. Although the law is quite holistic and progressive, it has been unable to yield the results the legislators had expected. The same was also highlighted by the 3 Judge bench of the Apex Court in a petition filed by an NGO alleging the gaps in the implementation of the law. The court rightly said, *"It is one thing to create a beautiful, grand law but at the ground, how do you create a mechanism to get feedback to pull the reins tighter"*. One of the suggestions made by the court, which the authors believe is similar to the structure in the Philippines, is the creation of a dedicated cadre of IAS officers to oversee the implementation of laws and act as protection officers. This body shall be directly under the control of the Ministry of Women and Child Development, to eliminate any delays, corruption or red-tapism that is associated with hierarchical government structures. Importantly, any such body shall be given adequate autonomy to take actions for the best application of the law.

Sri Lanka

For the guided implementation of laws, Sri Lanka prepares 'Action Plans' covering all aspects of law implementation, service delivery, awareness creation etc. The "Plan of Action Supporting the Prevention of Domestic Violence Act (2007)" incorporates multiple aspects of training capacity building, creating awareness, record maintenance, coordination and collaboration along with monitoring the implementation of laws. This proposal can be very well adopted in India as well. Instead of targeting far-sighted and generic goals like 'women's safety' etc., implementation may be better done through adopting short-term targeted goals. These plans shall be made at the ground level targeting local problems by local officers who have enough autonomy to implement what they suggest.

The United States of America

Although the USA doesn't have a consolidated law addressing domestic violence, it has multiple provisions in respective state laws that deal with this issue. These provisions are inspiring because they address very niche areas of lives which would otherwise not be thought of and in this way are quite forward-looking as well.[6] For example, many states law expressly prohibit discrimination against domestic violence victims especially in work place. This provision ties in with the constitutional values of equality and social justice and can be directly imported to India. There is absolutely no logical explanation to deny work opportunity to a victim of domestic violence. Among other provisions, the US spends heavily on awareness creation, post-violence healthcare (especially sexual health), and quite importantly, on convict rehabilitation and reformation. For example, in Colorado, offenders committing violence against their spouses will be required to undergo a domestic violence treatment program and complete and treatment evaluation. Although such spending is desirable and useful, it needs to be carefully monitored to protect it from the vices of corruption by the hands of Indian bureaucrats. Although, India can't spend as much as the USA due to obvious budgetary asymmetry, but can at least take inspiration about the different places of investment. With regards to the post-conviction reformation programs, India needs to strengthen its rehabilitation framework. One way could be the designing of such scientifically-nurtured programs, to treat the offender and ensure that the criminal justice system is able to bring a positive change in the society.

European Union

Just like India,[7] multiple EU countries face the problem of low prosecution and conviction rates for domestic violence. As a solution, countries like Spain and UK have established specialized courts to deal with the case of violence against women.[8] This practice of setting up specialized courts, like Fast-Track Courts, isn't something that the Indian judicial framework is unaware about. Just like we have FTCs under the POCSO Act to deal with sexual offences against children, we should set up Specia

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[1] Towards equality report of the Committee on the Status of Women in India | INDIAN CULTURE

[2] S. 3(d)(iii)

[3] Article 14, 15

[4] A Cross-sectional Study of Gender-Based Violence against Men in the Rural Area of Haryana, India - PMC (nih.gov)

[5] Criminal Appellate Jurisdiction, Criminal Appeal Nos. 2028-2029 of 2010

[6] International Violence Against Women: U.S. Response and Policy Issues Luisa Blanchfield, Coordinator Specialist in International Relations Rhoda Margesson Specialist in International Humanitarian Policy Tiaji Salaam-Blyther Specialist in Global Health Nina M. Serafino Specialist in International Security Affairs Liana Sun Wyler Analyst in International Crime and Narcotics July 26, 2011 Congressional Research Service 7-5700 www.crs.gov RL34438

[7] Recent NCRB data of 2020 suggests that the conviction rate of crime against women is meandering at the shallow figure of 23%.

[8] Violence against women in the EU State of play – EPRS | European Parliamentary Research Service

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