

Specialized Domestic Violence Courts Vis-a -Vis PWDVA, 2005 – Experiences Juxtaposed

*Dr. Anuja.S

Abstract

The menace of domestic violence against women encompasses within itself personal/individual dimensions, psychological dimensions, clinical dimensions, and human rights dimensions, social and cultural dimensions leading to a developmental dimension for the country. International and domestic law and the judiciary's role as potential therapeutic agents should be recognised, systematically studied and applied in the development of lower court policy and practice related to domestic violence. The increased level of reporting of domestic violence against women in India from the trail left behind by the enactment of PWDVA, 2005 necessitates the need for discussion of feasibility of envisaging specialized domestic violence courts from the western soil to the Indian setting and the ensuing challenges. The paper discusses whether this type of modification to the traditional role of the judiciary in the adversarial criminal justice system is the way forward in effectively tackling domestic violence cases vis-à-vis Indian setting.

Domestic violence is what happens among persons in domestic relationships and generates within the privacy of the four walls of a home. It has five salient features: Firstly, it is perpetuated by someone in domestic proximity and relationship to the victim, generally her life partner or some other intimate family member; secondly, it happens in domestic settings which are generally outside the law because the precincts are presumed by society to be sites of support and care and within private province and not for public discourse; thirdly, it is marked by a recurrence generally falling into a cycle; the abuse is followed by a lull of prelude after which tensions build up again precipitable as another violent episode; fourthly, the abuser uses domestic premises to control and coerce the victim; and finally the abuse leaves profound emotionally and psychologically harmful effects on the victim. The specific characteristics of the issue would warrant a specific treatment.

An increase in domestic violence by implication is accompanied by an increase in the number of victims (mostly women and children) who approach the judiciary for relief. The judiciary, in turn, is challenged in a number of ways that results in the ineffective management of cases of domestic violence. Despite these challenges, the expectation of the victims remains that the processes of court whether be the complaint procedure, the judicial process itself, or their outcomes will cater justice and be of assistance in the victims' emotional recovery from domestic violence. Given the complexities involved of the issue the need to analyse the role of specialized domestic violence court has sprung up.

Specialist domestic violence courts were developed in parts of the USA in the 1980s and 1990s as a response to concern that the traditional criminal justice response did not adequately address the needs of the victim, defendant or court system in domestic violence cases. A key feature of many of the courts is that they have a specialised caseload linked with dedicated and specially trained judiciary and other personnel. However the scope and practices of individual courts varies greatly. Other than Specialised courts, in parts of the USA efforts have been made in jurisdictions like Dade County, Florida; Duluth, Minnesota; and La Crosse, Wisconsin etc. to develop integrated domestic violence courts that handle both the civil and criminal law matters in relation to the same domestic violence. One key benefit of integrating the civil and criminal justice response to domestic violence is the prevention of inconsistent orders that might previously have been made in the separate systems. Both the specialized and integrated courts were designed with the 'problem solving' approach in mind. The treatment and monitoring of offenders is regarded as an important aspect of the goals of the courts. Whilst the ongoing judicial monitoring of defendants' compliance with court ordered programmes for treatment is a significant feature of both courts, it involves a departure from the traditional adversarial model of criminal justice.

The American courts have, for the most part, served as models for the Canadian domestic violence courts. Based on the principles of therapeutic jurisprudence, preventive law and restorative justice, the two model courts have both criminal and civil jurisdictions with the express purpose of ensuring victim safety and holding the perpetrator accountable. The emphasis is on treatment of perpetrators rather than punishment. Batterer intervention programmes assume significance under this approach. The combining of traditionally separate systems into a single integrated approach contributes to the comprehensive provision of services by supplying a single forum within which both criminal and civil matters can be addressed. The judges also form part of the larger community initiatives and provide sensitization training. Benefits of specialisation were in terms of increased judicial understanding of domestic violence issues, perpetrator accountability and more comprehensive support for victims at an early stage. Hence, both the initiatives utilize an integrated community approach to domestic violence cases that comprises support and advocacy services for survivors, and form a comprehensive response in providing a single forum where women facing domestic violence can seek access to justice.

Salient features of Specialised Domestic Violence Courts

An approach that could assist in facilitating the re-thinking and revision of the judiciary's role in the process of recovery from domestic violence is the so-called "therapeutic jurisprudence approach". One of the core aspects characterizing both restorative justice and therapeutic jurisprudence is the balancing of the needs of offenders, victims and the broader society. It involves the rethinking of traditional adversarial models of law and their effects. A Specialised Domestic Violence Court system encompasses certain salient features paving the way for access to justice. The three important components of the system will be as referred below:

-The system is so structured wherein there will be dedicated courts and prosecutors set up to deal specifically with domestic violence cases.

-Dedicated processing of domestic violence cases implies modifying the traditional/conventional court processes and structuring in such a manner that ought to be to be user friendly for the victims followed by efficiency within the system. This model envisages segregation of criminal cases which involves specialised treatment to be accorded to cases of domestic violence geared towards understanding the plight of the vulnerable women victims.

-Dedicated resources poses the need for inculcating services of specialised staff and support units for victims namely intake units, case managers, resource co-ordinators, those to assist the witnesses involved in each case. The specialised staff attached ought to be equipped with varieties of functions like help victims to file civil protection orders as envisaged under the PWDVA 2005, providing for referred to community assistance, obtaining information from intervention programmes, screening of cases prior to the litigative stage and coordinating in the processes involved. The strategy necessitates an integrated approach and the involvement of different stakeholders from different disciplines. It would require the participation of role players varying from lawyers to social workers to meet a variety of needs ranging from offenders' accountability to safety and the restoration of victims' human dignity, physical and emotional well-being and the protection of all parties' basic rights.

The Core Components of Specialist Domestic Violence Courts identified by the Family Violence Prevention Fund are access to advocacy services, coordination of partners victim and child friendly court specialist personnel even handed treatment integrated information systems evaluation and accountability protocols for risk assessment ongoing training compliance monitoring and sentencing. Court specialisation is beneficial because it facilitates that victims have a voice in proceedings and also the provision of independent advocacy support for victims.

Problem-solving courts are criticized on the basis that they offend due process values, judges in specialist courts are biased, adoption more 'ordinary' adversarial processes and that the domestic violence courts represent a levelling of the playing field that has for too long been tilted against the victim. Specialised Domestic violence Courts themselves may be seen as grounded in principles of what has been termed 'therapeutic jurisprudence'. This signals a welcome move away from traditional adversarial principles and instead adopts a coordinated and problem-solving approach in an effort to meet the needs of victims, their families and the community. The therapeutic approach proposes that the legal system can promote the well-being of both survivors and perpetrators of domestic violence. This approach works well in a conducive atmosphere emanating from the commitment from all parties – from police and judiciary to healthcare and voluntary and community sector support workers. Therein comes the challenge of protecting the rights of women victims in the domestic violence context.

Indian Experience Juxtaposed

Emphasis on culture specific dowry deaths and cruelty; non coverage of other women relations within the household by in laws; inadequacy in dealing with familial violence by criminal law during pre-2005 period; lack of civil injunction responses from courts and need for protective orders with the hope of saving relationships; pressure to follow the civil strategies as propagated in the UN Model Code are the incidents that are stressed in bringing up a civil legislation like Protection of Women from Domestic Violence Act,2005. Culture is a macro concept including the social and ideological aspects governing life and living. Religion reflects institutionalised aspect of culture. Culture along with religion acts as the source of gender constructs on expected roles, responsibilities and related familial relationships. Cultural and religious ideas get crystallized into what is called as the personality of each individual. Patriarchy is the sole factor projected both by the International instruments and also by the Act as the reason for the practice and perpetuation of Domestic Violence Against women. Behavioural problems of the individuals, behavioural changes that result from continuous consumption of prescribed medications, drug addiction, neuro- biological sub traits of human beings, mutual incompatibility affecting man- woman relationships, economic factors promoting economic independence of women has not been considered as factors precipitating domestic violence. Analysing domestic violence solely as a consequence of patriarchy would lead to incomplete understanding of causative factors and produce half- baked solutions as it is apparent in the Act.

The dominant family structure in the western democracies is the nuclear family with its gendered power structure. Indian culture is reflected in the cohesiveness of family units and familial relationships. The formal relationship between religions, theology and the State is different as well. Feminism has taken deep roots in the western regime in a faster pace unlike the Indian counterpart. Law and the allied systems in the western developed countries like U.K and U.S.A is often manifested as a protective mechanism to redress the lack of citizenship and corresponding lack of power. Indian personal law formally institutionalizes Hindu, Parsi, Muslim and Christian religious doctrine in marriage and divorce law applicable to each group. In India women have equality under the Constitution of India. The two sets of law in India highlight contradictions in women's status and power. Hence both the cultures will offer distinctive solutions to problem of emancipation from domestic violence against women. Both have specific conceptions of what constitutes healthy family, healthy relationships and of how social relations should be organized to achieve this ideal.

There have been experiments in countries like USA and UK where the ultimate decision to prosecute has been put on the law enforcement agencies regardless of the level of the co-operation of the victim, for example the no- drop prosecution policies or mandatory arrests. But such a prescription needs careful attention and consideration before being applied in India. This could severely strain the already burdened judiciary, making infinite demand as on the human and

fiscal resources of the state. The complexities of the situation surrounding the average Indian victimized woman are to be understood in this context. However the realization that traditional legal interventions have failed to tackle domestic violence effectively compels policy makers to look for innovative approaches. The culture specific attitudes of the country like India and the trends of family courts established in India are inclined towards the prioritization of interests of family over and above interests and security of women. Coming to the PWDVA, 2005 a civil law having cross overs to criminal law applicability, we follow integrated approach of civil and criminal machineries within a single stop shop arrangement. The concept of specialized domestic violence courts have not been materialized in the Indian context.

From a *Policy of non- intervention* during the pre- 2005 period which lead to serious repercussions of denial of victims' requests for a legal remedy the legal scenario has transformed itself into a strategy of *Policy of intervention that leads to the extreme solution of ending the relationship*. The Need of survivor positions itself in a paradox ie. to end the violence without ending the relationship In toto the Outcome of role of legal norms and legal institutions becomes redundant in the whole process. Hence there has been No attempt made in India to harness the law's power to affect family relationships in constructive ways. Along with India has also resorted to alternative justice delivery systems and multi -agency co-ordination and responses in dealing with the problem of domestic violence. The State intervention has been multi-pronged and mediated through executive and judicial agencies that include the Family Courts, Legal Aid Cells, Women Vigilance Committees, Police Counselling Cells, Women Police Stations, besides induction of women into the police force at different levels. The experience and studies from the NGO's in India working in the field reveals that state intervention in this sphere has fallen short of expectations due to infrastructural inadequacies and lack of adequate trained staff. The family counseling cells operating within the precincts of police station produces two mutually conflicting opinions as that it invokes fear and itself is counterproductive on one hand and on the other it stresses the inherent positive feature in forcing the recalcitrant man to come to the negotiating table.

The National Commission for Women has evolved an innovative concept of PMLA (Parivarik Mahila Lok Adalat) for redressal and speedy disposal of cases under Legal Service Authority Act, 1987, which has its roots in the traditional Nyaya Panchayats. The essential features of PMLA are amicable mutual settlement and flexibility in functioning. The NGOs in association with District Legal Aid and Advisory Board, activists, advocates and others, organize Parivarik Mahila Lok Adalats with the Commission's financial assistance.

The Central Social Welfare Board serves as an apex organization at the national level for funding for welfare activities at the state level is channeled to the grass roots level voluntary agencies through a network of state welfare boards. Short stay homes and Family counseling centres across the country receive support from this source. The shelter homes in India fall short of good

practice due mainly to the lack of holistic treatment of women's concerns. Safety is often interpreted in manner that restricts individual's mobility. Moreover the rehabilitation programmes are not structured in a way that it would encourage the evolution of a woman from being a victim to a survivor of domestic violence. Here Indian experience makes a sharp contrast of India victimized women to the US and UK experience of 'survivors' of the crime.

One of the problems confronting the idea behind the Family courts established in India in 1984 has the set back of promoting the value of integration of family and the institution of marriage. Extreme case of domestic violence inflicted on the partners or individuals often leads to the notion that staying apart or disintegration of a violent family unit is desirable or favourable. The experiences and studies indicate that family courts in India preserve the age old notion of reconciling with the fate by the survivors of domestic violence rather than resorting to marital breakup. Gender sensitive courts can deal with such issues more effectively. The concept of specialized domestic violence courts can be emulated only in the empowered Indian context.

The various interventions by the State were in response to the concerted pressure exerted by the women's movement in the western countries and their counterparts in India. A distinguishing feature of the response to domestic violence in India has been the relative speed at which the State has initiated various legislative measures and executive orders. Wide divergences exist between the proposed agenda and the actual content of state responses. Considering the infra structural problems, issues of outreaching to the victim combined with poor quality of crisis intervention state service that have left the Act's force anemic, it may be helpful to take guidance from domestic violence initiatives abroad to use as models for restoring the teeth back in to the Act. As opposed to India the strategic models evolved to deal with the problem of domestic violence in the U.S.A and U.K revolves around the community intervention models. The funding programmes and partnership alliances are the driving factors behind the cause of prevention and suppression of domestic violence. Specialized domestic violence courts placing special emphasis on therapeutic jurisprudence is yet another contribution by the western model. The sanctions emphasized are both civil and criminal. Mandatory arrests and no drop prosecution policies are the trend reflected.

The strategy of the India towards a problem, specifically to domestic violence and particularly that of women, is to rely largely on law and often only on law. The responsibility of the state ends with the drafting of the required laws, whereas the problems relating to women, particularly domestic violence, are socio-economic and cultural problems which demand a multi-faceted approach. The envisaging of Specialised Domestic Courts ought to be viewed from the standpoint of threat of Family Courts outliving its utility in the context of PWDVA, 2005 where domestic violence cases has been reverted to magistrate courts and the callousness in the setting up of Human Rights Courts in the context of Sec.30 of Protection of Human Rights Act, 1993. The concept of information sharing poses problems given the context of patriarchal values of privacy,

safety and confidentiality issues surrounding the familial matters in the Indian cultural setting. Going for a new court system can enhance the financial commitments and trigger the economic restraints of the State.

The holistic and complex inter relationships that have disrupted the balance in the family is to be studied first. Our identity reflects the richness of our histories and heritage. Healthy interdependence is the core of the extended family life in India. Community provides additional balancing. Support from the elder generations adds to the balancing concept. The family structure and roles, the kinship systems etc. reflects as to how we relate to others, sustain each other and how we act in a system. There is a natural tendency within the system to seek harmony. Services need not be targeted to a specific set of symptoms but rather targeted towards restoration of balance. This type of restoration of balance within the indigenous unique system is not envisaged under the PWDVA,2005. Aggravation of individualistic tendencies within families leads to counter-productive results.

A comprehensive institutional and environmental change is required to empower individuals to be adaptable to such way of thinking. Schools can be strategic entry points for the purpose. Creating sensitivity to roles of family members and the need to sustain family stability can be included in the course curriculum. The need of the hour is revamping community programming and crisis intervention strategies becomes significant which has the potential of leaving the trail for models from the west to be emulated in the Indian context. The induction of Specialised Domestic Violence Courts can prove be fatal in the Indian setting given the socio- economic constraints attached to the justice delivery mechanism in existence in India. Man, woman and child within a familial relationships is to be viewed in a triangular perspective; each contributing and taking from each other, a vicious circle that makes life meaningful. The approach envisaged under the Act is to vest the entire burden of the problem on men and his relatives. An anti-discriminating and protectively discriminating legislation favourable to women cannot be conceived in a vacuum in the Indian familial cultural setting. The remedies offered is likely to be more dangerous than the disease itself. A need based approach rather than rights based approach is suitable in this context. Finding a solution within the familial structure rather than disintegrating the familial relations can take forward the cause of ending domestic violence against women.

The need for preservation of indigenous culture and family is reflected in the views of Malinowski when he states that Family is the universal human institution to be preserved. The normative and symbolic power of the law should not be wielded to gain acceptance for new lifestyles or to disintegrate family ties, but to reinforce the time- honoured values and customs of civilization related to family life. Respecting others, protection of vulnerable, acknowledging the integrity and dignity of others, following the lines of experiences of the aged, etc. within the family form the basic norms on which the higher versions of the same gets reflected in the macro

level application in a society. All these foster the development of capacities such as perspective taking, negotiation, reflective and flexible thinking. This in turn promotes a culture of peace in the society.

It has long been recognized that the legal systems of many different societies struggle to find solutions to the problem of domestic violence. The legal system only partly constitutes the problem and therefore cannot resolve it wholly itself; domestic violence is a social problem as well as a legal problem. In so far as problem-solving courts seek to address the underlying causes of offending behaviour through improved case outcomes they may be thought suited to domestic violence cases. The intimate context of the violence produces an almost visceral reaction that what happens within the home is venerable, impervious to the strictures of law and law enforcement. Identifying the vulnerabilities that are peculiar to women is a necessary precondition to formulating applicable legal remedies to end systemic intimate violence. It is in this wider framework, that the violation of human rights of women occurring at the basic cell of the society i.e. the family referred to as “domestic violence” needs to be viewed as a specific human rights violation from a larger sociological framework and requires states to resort to affirmative actions to combat this menace.

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2. Id.
3. Anel du Plessis and Ingrid Sinclair, Therapeutic Jurisprudence: An Assessment Of Its Possible Application To Cases Of Domestic Violence In Magistrates' Courts, Stellenbosch Law Review, Vol. 18, Issue 1 (2007)
4. Id.
5. <http://www.britisoccrim.org/volume7/008.pdf> last visited on 9.6.2012
6. Advocates act as a ‘liaison, buffer and contact’ between the victim and the court, a source of referrals to other services and, with consent, a conduit of information to the court.
7. This was accomplished with regular meetings and joint training
8. Security at the court should be reviewed and if necessary improved, building on best practice (e.g., separate waiting areas, child care facilities, security guards trained in domestic violence).
9. Specialist domestic violence training for all magistrates/judges, court administrators, prosecutors and other key personnel.
10. Both parties should be adequately represented and the court’s tone should indicate that domestic violence is being treated seriously.
11. Systems and protocols in place for sharing and accessing information, to connect the court with

- community-based service providers and ensure compliance with orders
12. Plans for evaluation (and the systems to carry it out) should be in place from the outset
 13. All agencies should gather information on factors known to increase risk to facilitate risk assessment.
 14. Training should be on a continuous rolling basis and be joint training (to increase each agency's understanding of each other's roles).
 15. Through submission of reports to the court or regular review hearings, defendants' compliance with court orders should be monitored.
 16. It is to be consistent and promote accountability from domestic violence offenders.
 17. Religion and family are supposed to be private/personal domains in the western countries. The relationship between state and citizens is not entirely secular.
 18. Diane Mitsch Bush- Women's movements and State policy reform aimed at domestic violence against women:A Comparison of the consequences of movement mobilisation in the U.S AND India., Gender and Society, Vol.6 No.4,December 1992,P.592
 19. Section 12 of the Legal Service Authority. The Act provides the criteria for entitlement to legal service as follows:(i) A member of schedule cast and schedule tribe.(ii) A victim of trafficking human being or beggar as referred to Article 23 of the Constitution.(iii) A women or child.(iv) A disable person.(v) Victim of mass disaster, ethnic violence, flood, drought, industrial disaster,(vi) Industrial workman,(vii) Person in custody,(viii) person having annual income less than nine thousand or higher as prescribed by the State Govt. A person desires to get legal aid must satisfy any or all of the criteria having a prima-facie case.
 20. Counselling as a Police Role - Counselling is the first response of the Crimes against Women Cells in domestic matters. Many families in India still continue to live as joint families and counselling often involves other members of the family besides the immediate protagonists. The aim of counseling continues to be to remove irritants in the marriage, to prevent abuse or to ensure that there is no further abuse, and to secure the position of the woman in the marriage. The Crisis Intervention Centres have been set up and associate social workers, doctors, lawyers, psychologists and prosecutors with their functioning. A significant service started by the Crimes against Women Cell is a 24 hour helpline that responds to callers in distress. For details See.
http://www.unafei.or.jp/english/pdf/PDF_rms/no69/05_P77-84.pdf last visited on 23-2-2012
 21. http://ncw.nic.in/frmRes_PMLA.aspx last visited on 13/7/2013
 22. Supra Note 3