

Disposal of Domestic Violence Cases : Law, Policy and Practice

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“Violence doesn't have a race, a class, a religion, or a nationality, but it does have a gender.” -

Rebecca Solnit

Introduction

India is a Welfare State committed to the protection and promotion of the well-being of its citizens. People's welfare is at the very heart of the Indian Constitution. This is evident from the extensive provisions for their social and economic welfare found therein. Besides its regulative and welfare role, the State also assumes the responsibility of administering justice as one of its key protective functions. Justice – dispensation is one of the sacrosanct duties of the State. Righting the wrongs and punishing the wrong-doers in accordance with the law are the primary goals of justice administration of every civilized society. Rights would be meaningless without an effective justice- system playing an active role in their protection. Every citizen views the court as a vital means of upholding the law, safeguarding rights and defending freedoms. For those suffering the violation of their rights, courts are the only beacon of hope. The same is also true of victims of domestic violence.

Domestic violence is a form of gender-based violence occurring within the home. A 'cultural universal'², it is the most common form of violence against women prevailing in most societies in some degree or the other. Linked to the perpetuation of patriarchy, it is a pattern of coercive control exercised by one person over the other in a familial relationship. Violence used by the perpetrators has far –reaching consequences on survivors, particularly women and children. It often causes several short –term and long-term physical and mental health problems for its victims.³ Besides the physical injuries being detrimental to a victim's health, research has

shown that the emotional injury resulting there from is even more damaging.⁴ Undoubtedly, the worst part of domestic violence is that it denies its victims their human dignity, besides leaving them scarred for life.

Domestic violence is different from other crimes. Its perpetrator is not the stranger on the street but a person intimately known to the victim. He is one who controls, subjugates and abuses his victims. These victims face different problems from those of other victims of violent crimes. Many of such victims are compelled to continue living with their abusers. The assurances of the law in protecting victims from domestic violence appear to have been undermined. Can the judiciary avoid the secondary victimization of victims of domestic violence? The paper examines the effectiveness of access to justice for victims of domestic violence and makes out a case for the establishment of specialized courts to hear such cases.

Remedies for victims of domestic violence

In the wake of mounting community pressure to effectively address the unmet problems of domestic violence victims, most States responded by enacting laws providing relief to such victims.⁵ The Indian Parliament enacted the Protection of Women from Domestic Violence Act, 2005⁶ to provide women protection from violence within their home and to prevent its occurrence in society.

For this purpose, the Act prescribes a number of reliefs to victims which are obtainable on approaching the criminal courts. A Judicial Magistrate of the First Class or Metropolitan

Magistrate is empowered to issue orders of protection, residence, maintenance and child custody among others in case of proved domestic violence. To ensure expeditious relief, the Act sets out a time –frame for the grant of relief by courts. The Act mandates that the first date of hearing should not ordinarily be beyond three days from the date of the aggrieved person's application being received by the court.⁷ Further, the Act also stipulates that every application made there under, is disposed within a period of sixty days from the date of its first hearing.⁸ Both the provisions confirm an emphasis on the speedy disposal of such cases by criminal courts. Undoubtedly, the law intends to protect women from violence - it recognizes their right to live within the home without abuse, and at the same time safeguards their rights to equality and life with dignity, guaranteed under the Constitution. The moot question though remains. Are the courts protecting the rights of victims of domestic violence adequately?

Victims of Domestic Violence and Access to Justice Concerns

The Protection of Women from Domestic Violence Act, 2005 (PWDVA) is in force for over a decade . This being the case, it is of utmost necessity to examine whether victims of domestic violence enjoy access to justice. Access to Justice refers to the ability of citizens to use justice institutions to obtain the redressal of their common justice problems. The term implies the provision by the State of means and mechanisms for people to protect and enforce their rights. In this context, the Act also permits the grant of relief to victims in any legal proceeding before a civil court, family court or criminal court, in addition to the jurisdiction conferred on the Judicial Magistrate of the First Class or Metropolitan Magistrates courts.⁹ Another important aspect is that the Act directs provision of legal aid under the Legal Services Authorities Act, 1987 to be made available to

victims of domestic violence through the State Legal Authority. Thus the said law prescribes access to criminal courts and assures legal aid for victims of domestic violence- the two essential components of the right of access to justice. Nevertheless, it is common knowledge that mere access to courts is not enough. Such courts must also be in a position to effectively address the needs of victims of domestic violence.

Effective access demands that legitimate grievances are resolved quickly and effectively. The Act has provided for criminal courts established under the Code of Criminal Procedure, to try cases of domestic violence so as to ensure their easy and prompt disposal. This is, no doubt, a commendable provision, as the Act makes provision for civil remedies to be granted to by Magistrates' Courts to bring down procedural delays and hasten relief for victims. Nevertheless, despite the well-intended legal provisions and the assurance for expeditious relief, delays in disposal of domestic violence cases are quite common. Several cases instituted by victims are pending for over three years in the courts.¹⁰ In some cases, victims secure relief only much later.

Inordinate delays in the disposal of domestic violence cases are not justified. It is apparent that the courts have not clearly understood the objectives of the Act. To provide victims with prompt relief, criminal courts are chosen over civil courts as criminal proceedings are far more expeditious than civil court proceedings. Delay undermines this objective. Moreover, States adopt their own distinctive practices in implementing the provisions of the Act. Instead of taking up the cases on a day-to –day basis, in some States for instance, courts are taking up domestic violence cases only once a week or fortnight.¹¹ The fact that domestic violence cases are being taken up sporadically for hearing has thwarted the objectives of the Act and is working to the prejudice of the victims. Furthermore, in

the State of Karnataka for instance, domestic violence cases have been entrusted to traffic courts who due to a heavy work-load fix hearings in such cases on specific days of the week only. With such a practice being adopted, courts have dealt a blow to the rights of victims.

Delay too often defeats justice and should be avoided. Denial of immediate relief in emergency situations affects victims' interests. Another outcome is that there is need for victims to make multiple visits to the court for the relief sought which makes them needlessly incur travel and other expenses. It also aggravates their traumatic experience which results in their further victimization by their long wait for justice. Delay in trial creates an apprehension of retaliatory attacks by the respondent on the complainant victim. There is a greater likelihood for such an apprehension where the perpetrator is not in police custody.¹² Ultimately, as has been observed, "The reluctance of the criminal justice system to proceed vigorously with domestic violence cases erodes the confidence of the victim in the system's alliance with the victim."¹³ It is therefore necessary that the provisions of the Act are complied with and domestic violence cases are disposed of with expedition.

It is also not enough that there is a law which provides reliefs to victims of domestic violence. The law needs to be effectively implemented in *toto*. Although the Act does not mandate hearings by female Magistrates only, in some States, domestic violence cases are referred only to female Magistrates.¹⁴ In the absence of a female Magistrate, the hearings are often adjourned. This practice merely delays the final disposal of domestic violence cases. The idea that domestic violence cases need to be tried by a female Judicial Magistrate only, is absurd. The rationale for the same appears to be that women judges would be more sensitive to and would better understand the problems faced by the victims of violence. However, this view is

erroneous. Instead, it would be worthwhile to provide training to the judges whether male or female, so that domestic violence cases are more effectively handled.

The other concern is that the criminal courts are hardly equipped to effectively handle the special needs of domestic violence victims brought on by the violence. Domestic violence cases are those that require a court to issue the necessary reliefs in the event of proved domestic violence. Criminal Courts are courts with a general criminal jurisdiction empowered by the law to provide civil remedies. This merely implies that ordinarily courts are empowered to try domestic violence cases along with all other criminal cases. In such a situation, victims of domestic violence are unable to receive the special attention they require. Other than prescribing the stipulated reliefs, criminal courts are hardly able to do much for victims in such matters as the former are already overburdened with other criminal cases. In these circumstances, lack of time and skill to address victims' special needs would hinder effective justice.

Addressing the concerns

Domestic violence victims need to be properly heard in order that courts are able to use their discretion judiciously while granting them relief. Victims should get the impression that their case has been taken up with seriousness. Judges as decision –makers have a crucial role to play to ensure that the justice system is effectively implementing the law against domestic violence. It has been rightly suggested that relief in domestic violence cases should be customized to suit the victim's needs. Courts should not be concerned merely with the disposal of cases. Rather, the courts "can and should be an access point to services and assistance to victims."¹⁵

Again, repeat offences are common in domestic violence cases. Punishment alone may not provide the desired results. Although such

offenders deserve to be made accountable for their actions, control must be accompanied by treatment and rehabilitation. The existing law does not prescribe any concrete rehabilitation measures as far as the abusers are concerned. This is a serious lacuna which needs to be addressed by an amendment in the law. As already noted, victims are compelled by circumstances to continue to reside with their abusers. The courts cannot ignore the fact that victims are often dependent on their abusers in both personal and economic spheres. Without rehabilitative measures in place, the law provides only temporary relief to the victims against their batterers. It does not seek to address the larger problem. Victims in such cases must feel reassured about their safety while residing with the abuser. In the absence of such provisions, the Act will fail in its objective to prevent the occurrence of violence within the family. Unless the problem is properly addressed, a recurrence of domestic violence incidents is bound to happen.

Domestic Violence irrespective of the form requires immediate attention particularly when the consequences of violence on a women's health are serious and the victim has to live with the perpetrators. Violence against women amounts to a gross human rights violation. The core international human rights laws emphasize protection against violence and the right to prompt relief in case of its violation. In particular, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)¹⁶ prohibits gender-based discrimination which has the effect or purpose of impairing or nullifying the recognition or enjoyment of women's human rights and fundamental freedoms. Under the Convention, States are obliged "through competent national tribunals and other public institutions the effective protection of women against discrimination."¹⁷ It is significant to recall that India ratified the CEDAW Convention

in 1993 which makes the implementation of its provisions, legally binding.

Likewise, the UN Handbook for Legislation on Violence against Women urges the States regarding the enactment of law which provides for cases involving violence against women, to be heard and disposed of by "specialized courts or tribunals guaranteeing timely and efficient handling of cases of violence against women (Sec. 3.2.5)"¹⁸ The entire gamut of law makes it clear that victims of violence must have immediate means of redress and protection.¹⁹

In the Indian context, one finds that the existing law does not provide for the creation of specialized courts to try domestic violence cases. Absence of such courts adversely affects victims. It is of utmost urgency that specialized courts are set up without further delay to try domestic violence cases. Unlike other criminal courts, such courts are meant to have exclusive jurisdiction to try domestic violence cases. Establishment of such courts would bring down the delay in disposal of domestic violence cases. Only domestic violence cases would be brought within the purview of such courts. Specialization and training of judges in the field would ensure effective address of the special needs of the victims. Their experience in handling domestic violence cases would facilitate more expeditious disposals. With judges investing their time for trying domestic violence cases exclusively, such judges would be in a better position to pronounce more consistent and effective rulings in those cases.²⁰

A gender-sensitive approach is also crucial to the effective disposal of cases on domestic violence. Since the judges receive prior training in handling domestic violence cases, it enhances their competence to deal with such cases. Besides balancing the risk and safety needs of victims', specialized courts can ensure just and effective remedies to victims, including compensation, indemnification, healing of

victims and the rehabilitation of perpetrators.²¹ Judicial monitoring of the implementation of the orders would go a long way in reducing domestic violence recidivism. It is heartening to find that specialized Domestic Violence Courts are already functioning in countries such as Brazil, United Kingdom, Nepal, and several states in the USA.²²

Lessons to be learned

Domestic violence cases involving spouses and family members often entail complex processes that need careful consideration. Despite the lofty aspirations, “A law is as good as its implementability.”²³ Criminal Courts of general criminal jurisdiction are hardly equipped to cater to victims of domestic violence. The establishment of specialized courts to try domestic violence cases would help overcome the barriers to effective access to justice and would also accommodate the special needs of victims. Such courts would be able to²⁴ change the way in which the criminal justice system approaches the problem of domestic violence. The big challenge ahead is to meet the objectives of the law in letter and spirit.

(Endnotes)

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- 1 Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, available at <http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html> last accessed on 6/12/2017
- 2 Rushila Rebello, “Physical and Mental Effects of Domestic Violence on Women,” Vol. 22,(1), Women’s Link ,7, 9(2016).
- 3 *Ibid*.p.10
- 4 119 States have passed laws to prevent domestic violence. Available at: <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#sthash.EzLqmxIX.dpuf> last accessed on 11/6/2017.
- 5 Act No.43 of 2005.
- 6 S. 12(4), The Protection of Women from Domestic Violence Act, 2005.
- 7 *Ibid* ,at s. 12(5).
- 8 *Supra* 6, s.27.
- 9 Available at <http://www.lawyerscollective.org/domestic-violence/case-laws.html> last accessed on 18/12/17.
- 10 Jayna Kothari, *Undermining the Domestic Violence Law*, available at infochangeindia.org last accessed on 2/6/2017.
- 11 UN Handbook for Legislation on Violence against Women, p.39, available at www.un.org/womenwatch/daw/ last accessed on 6/12/2017
- 12 Barbara Hart, *Battered Women and the Criminal Justice System*, available at www.mincava.umn.edu/documents/hart/justice.pdf last accessed on 2/12/17
- 13 For instance, in the State of Goa, the practice is to place domestic violence cases before female Magistrates wherever available.
- 14 Emily Sack, *Creating a Domestic Violence Court, Guidelines and Best Practices*, available at www.endabuse.org last accessed on 10/6/2017
- 15 GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980) available at http://www.un.org/documents/instruments/docs_en.asp?type=conven last accessed on 20/12/2017.
- 16 *Ibid*, Article 2 (c).
- 17 *Supra* 11 at p.19.
- 18 *Ibid*.
- 19 *Supra* 15.
- 20 *Report of the Fourth World Conference on Women, Beijing, China, 4-15 September 1995* (United Nations Publication, Sales No. E.96.IV.13), para. 124. available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> last accessed on 11/12/2017
- 21 Available at <http://www.endvawnow.org/en/> last accessed on 12/12/2017
- 22 Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784629/> last accessed on 12/12/2017