

Reversal of Vulnerability in Marriage: A Juridical Study with Special reference to Domestic Violence

Debasis Poddar

Keywords: family, private property, state, religion, family law, patriarchy, gender bias, vulnerability, reversal, social justice, etc.

Abstract

The forthcoming effort is meant to explore a specific area of study vis-à-vis the institution of marriage in Hindu Family. Domestic violence perpetrated in course of marriage and role of law to address this rupture in otherwise happy family life constitute focus of this effort. With due respect toward *bona fide* intention of the Parliament for curbing the domestic violence, this may be pointed out that the way amendments in criminal law shifted the vulnerability from one spouse to another on the basis of gender raises questions for their efficacy to reduce violence as anathema to family life. Family being the most primary unit of civilization since time immemorial is thereby reduced to another brutal front between spouses and relatives.

Whether and how far reversal of onus of proof against the poor husband and his relatives may be jurisprudent is a moot point of concern to this end. First, the presumption of fact is founded on illicit generalization. Second, abuse of these pro-women provisions- like sections 304B and 498A, IPC- being phenomenal in terms of intensity and frequency, even the Apex Court expressed its concern over the caricature of justice.

The author hereby explores the conundrum of family law to identify major fault lines in the emerging criminal jurisprudence vis-à-vis family as a unit of social solidarity. After all, policing in family life on regular basis and booking the husband and/or his relatives under such non-compoundable offences constitute the end of happy family life that tends to total collapse of such a forum meant for mutual trust and confidence. Also there are laws in the pipeline to award honorarium for housewives while househusbands are deprived of the same for no other fault of their own but to become men in the given patriarchal society. Together these laws demonstrate a trend in legislative policymaking of disproportionate bias in favour of women that is likely to defeat themselves. Besides, even innocent men are posited in adversity that is likely to backfire greater social interest.

1. Introduction

Gender discrimination initiated its ordeal since earliest era of human civilization and family, being patriarchal in its character, is a hallmark of discrimination worldwide; albeit with rare exceptions here and there while the same is still available in pockets of indigenous life-world. Patriarchy being order of the day, now onward this effort is set

to explore patriarchy in Hindu family and consequent hegemony of men on women. In particular, reversal of hegemony in family life- by courtesy amended old statutes and new statutes in relevant domains of family law- despite patriarchy being as it was, poses an interesting research question to this end.

Prevalence of violence, despite change of its side, is one way of looking at reversal of domestic violence in course of change in law. Perhaps such a simplistic perception is too naive to appreciate a political character of violence in family life. Whether and how far patriarchy demonstrates its potential in renewed form and content through role reversal to hoodwink law seems a more problematic research question to this end. This effort also explores strategy of law to turn the table on wrongdoers rather than the cliché of stereotypical blame game against all sundry husbands and their relatives irrespective of available database that wives and their relatives may and do commit offences worse than wildest imagination plausible in a(ny) mind of common prudence. This effort is designed to put such pandemonium in place.

In law of civil side as well, there is disproportionate discrimination against husband that constitutes another focus of this effort. For instance, there is legislative process to award honourarium in favour of housewives while househusbands are not entitled to the same. If this proposition receives endorsement of the Parliament in this form and content, the same is bound to put adverse impact on labour jurisprudence that preaches for benefit of workers concerned out of his own labour while wives are set to cherish output of labour of her husband even if after withdrawal from his society. Except the provision for restitution of conjugal life, that often than not helps husband to put his wife in embarrassment (if not harassment), such increasingly feminist trend in family law arrest natural healing process of family feud by default to the detriment of family life itself.

2. **Upside down: Vulnerability within family life**

A recent trend is set by the Parliament, perhaps out of pressure politics of civil society, to amend the Hindu family law regime in a way that falls squarely against innocent male members of Hindu family. Indeed female members of the family are vulnerable. In its anxiety to prevent cruelty against female members, amended provisions shifted vulnerability to reverse side of the fence to put innocent male members of the family at stake. Thus object and purpose of amendment stands defeated since vulnerability, that put family life into trouble, remains with change of side- from female to male and thereby continues to bleed the community as usual. Other religions communities, e.g. Muslim, Christian, Parsi and Jew, remain unaffected by the experiment since the State identified majority community as first target to escort reform in terms of family law. Thus others are spared from legislative experiment though gender bias seems apparent there as well with wide variation in terms of its extent. Here lies a rationale to identify Hindu family law as research problem of this effort. Matrimonial hostility being overt, the same constitutes core domain of vulnerability.

After independence, despite being a secular state,¹ India initiated legislative reforms in Hindu law while the State received a directive to secure for its citizens uniform civil code throughout the territory of India.² Indeed few other religions are construed as denominations of Hindu religion, e.g. Buddhism, Jainism, Sikhism, etc. For others, however, substantial reform is yet to take place with the result that uniform civil code becomes an oxymoron. Back to vulnerability, under the guise of custom and usage, discrimination on the basis of gender received visa to penetrate from *shastric* regime

¹ *Vide Article 25, read with the Preamble, to the Constitution of India, 1950.*

² *Vide Article 44 of the Constitution of India, 1950.*

to legislative regime to keep female members of Hindu family at real peril as earlier.³ This happened in cases of succession in particular. Even after subsequent amendment to address gross discrimination, residual part of gender bias seems apparent enough to characterise Hindu family law regime in general and the Hindu Succession Act, 1956 in particular. As a matter of convenience, focus of this effort will concentrate on interpersonal behaviour in marriage as a social institution with special reference to the same between members of different gender. Here there is a point of concern. So far as relevant provisions of criminal law vis-à-vis offences related to marriage are concerned, the same are but applicable to one and all irrespective of community. Thus, the matter being primarily associated with the Hindu community, is no longer remains a matter of family law of a community in particular. Rather the same seems applicable to others as well irrespective of identity of the family concerned. A study of domestic violence and its underpinnings in criminal law, therefore, covers all since the same is meant for the offences and not the offenders as such. Under Article 15(3), there may be laws to protect interest of woman. However, the same is subject to reasonable classification under Article 14 of the Constitution.

As mentioned earlier, recent trend of the Parliament lies in crucifying male member in advance even before the judicial process initiates its ordeal to ascertain his guilt, if any.⁴ Even during normalcy, male member is likely to be deprived of the full share of hard-earned resource in his favour so far as recent news of proposed legislation vis-à-vis honourarium for housewife from pay packet of her husband is concerned. Irrespective of the same being in contravention of labour jurisprudence, the same is encouraged with an erroneous reasoning for self-dependence of housewives while househusbands are not entitled to the same from their wives.

³ *Vide* section 3(a), read with 4(a), of the Hindu Marriage Act, 1955.

⁴ *Vide* section 498A, read with 304B, the Indian Penal Code, 1860.

3. Patriarchy: renewed through role reversal

In course of gender movement, amidst this hue and cry, what seems an end result is much ado about nothing- albeit not exactly the way Shakespeare conceived- for societal cause. With a paradigm shift in terms of vulnerability, from women to men, patriarchy survived with its hegemonic character in family life. However, at times, male members of the family become vulnerable in cruel hands of wife- sometimes through the remote control of her relatives- for no fault of their own. Introspection is imperative to neutralize highhandedness from her side as well. Anyway there is no threat to patrilineality through these amended provisions. Patriarchy, on the contrary, is hyperlinked to domination rather than domination by one particular gender though often than not male members perpetrate politics of domination and subordination for historical reasons out of social evolution. Thus, while patriarchy underwent resistance from civil society movement, these amended provisions along with few newer statutes- beneficial on apparent face of record- offered relief to women through shifting vulnerability on the shoulder of men. Prima facie revolutionary enough, this legislative strategy but defeated a core agendum of such otherwise progressive movement to get rid of patriarchy and thereby put a major purpose of egalitarianism vis-à-vis gender in jeopardy. Such a shift resembles the shift of pendulum from one extreme point to another to run the clock (read family system). This seems imperative to mention that time of such archaic clock is over for ever.

At bottom, the paradigm shift in legislative policymaking renewed an assurance in favour of preponderance of strong over the weak. In a way or other, survival of the fittest theory prevailed over theory of justice that by and large offers assurance to

weak for survival from preponderance of the strong. Behind wife, so often than not there are her male relatives and they settle the score with husband and their relatives the way event used to take place earlier in opposite direction. Indeed that does not necessarily mean innocence of wife in every sundry case. The Parliament thereby encouraged a counterrevolution, albeit unwittingly, that put the society in reverse side of pandemonium. Even Supreme Court of India acknowledged (ab)use of amended provisions at random with special reference to section 498A, IPC that covers section 304B, IPC as well.⁵ A naive follow-up of these provisions, therefore, seems detrimental to attain justice being the end of law as social institution.

4. Domestic violence: one step ahead to law

In terms of policymaking vis-à-vis domestic violence, however, the Parliament seems always one step back to address the offence with a result that legislation perennially grapples with one fallacy or another and the offenders so often than not may and do get rid of law. This statement seems applicable to all relevant statutes.⁶ In particular,

⁵ The provision (section 498A, IPC) is intended to be used as shield and not as assassin's weapon. If the cry of "wolf" is made too often as a prank, assistance and protection may not be available when the actual "wolf" appears. There is no question of the investigating agency and the court casually dealing with the allegation. They cannot follow any straightjacket formula in matters relating to dowry torture, death and cruelty. It cannot be lost sight of that the ultimate objective of every legal system is to arrive at the truth, punish the guilty and protect the innocent. There is no scope for any preconceived notion or view. It is seriously argued by the petitioner that the investigating agency and the court start with the presumptions that the accused persons are guilty and that the complainant is speaking the truth. This is too wide and generalized a statement. Certain statutory presumptions are drawn which again are rebuttable. It is to be noted that the role of investigating agency and the court is that of a watchdog and not of a bloodhound. It should be their effort to see that an innocent person is not made to suffer on account of unfounded, baseless and malicious allegations.

Bhaskar Lal Sharma v. Monica, MANU/SC/1335/2009, paragraph 19.

⁶ An inventory of relevant statutes may be provided as follows:

- i. The Indian Penal Code, 1860.
- ii. The Hindu Marriage Act, 1955.
- iii. The Dowry Prohibition Act, 1961.
- iv. The Hindu Adoption and Maintenance Act, 1956.
- v. The Code of Criminal Procedure, 1973.

in domestic violence, stakeholders prove themselves smarter than state to hoodwink judicial process: (i) jurisprudent husband and/or relative (ii) jurisprudent wife and relative (iii) illicit partner of either wife or of husband or of both. Let us put spotlight on these three facets one after another.

In spite of law being seemingly favourable to wife, there are umpteen ways left for husband to trouble wife and her family. By and large, the roots of trouble lie in traditional social psyche not to consider female children as constituent part of concerned family. As a miniature of society, neither family considers bride as constituent part of its unit. Thus, nowhere female members in Hindu family receives place of their own except when there is no male child of her parents. Even then, married daughter living with her parents seems odd in social side; but that is a point apart. Unscrupulous husband takes advantage of her position. If she is dependent to him, then her vulnerability is multiplied. If they have child, circumstance stands worst for her. Under such circumstance, sharing information either by husband himself or by his relatives that husband may proceed for suit of mutual separation or divorce against her is enough to put her mental peace in jeopardy. Now, this cannot be deemed as “cruelty” under section 498A of Indian Penal Code of 1860 since either of these is subject to judicial process and sharing the same with wife cannot be held as an offence. In real life, however, all these are being (ab)used with *mala fide* mind that may hardly be established. Besides economic security, in a traditional society like India, women require care and protection of family and there lies the threat through which husband and his relative hit her below the belt. Neither the court is likely to appreciate this point; not the court may, since presumption is subject to law

vi. The Protection of Women from Domestic Violence Act, 2005.

Besides, there is proposal for another statute- the Housewife Honourarium Guarantee Bill, 2012- that is likely to be introduced soon.

under the Indian Evidence Act, 1872. Thus, for all practical purposes of justice, she deserves economic patronage under the auspices of state to attain economic justice.

The moot problem lies in passing the buck on her husband while there is similar stress on himself and his family as well.

Second facet of *mala fide* against the institution of marriage may be perpetrated on the part of smart wife and her family. With the knowledge of position of law vis-à-vis domestic violence being squarely in her favour, she- either on her own or through remote control of her relatives- may and does perpetrate reverse domestic violence against her husband and/or his family to put his mental peace in jeopardy. Due to excess in police process before judicial process, sometimes he may suffer from loss of occupation or be put behind the bar for no fault either of his own or his relatives. Statutory position is such that there may be injustice in course of judicial process as well since the Parliament held wife as fountain of virtue and therefore innocent which seems a clear case of illicit generalization. This appreciation has found ground in a recent judgment of the Supreme Court of India.⁷

On similar line of mischief, illicit partner in the life of either side may do havoc that constitutes third facet of domestic violence. At times, this may turn worse than others since the spouse under influence of illicit partner may be desperate and thereby acts as devil due to sexual favour (s)he receives from illicit partner. Here there is a conundrum. If law intervenes as per women-friendly provisions while husband and his relatives are innocent, then they are likely be reduced to the victims

⁷ The object of the provision (section 498A, IPC) is prevention of the dowry menace. But ... many instances have come to light where the complaints are not *bona fide* and have been filed with an oblique motive. ... Merely because the provision is constitutional and *intra vires*, does not give a license to unscrupulous persons to wreak personal vendetta or unleash harassment. As noted above, the object is to strike at the roots of dowry menace. But by misuse of the provision, a new legal terrorism can be unleashed.

Supra, no. 5.

of legal terrorism. On the contrary, if law does not while wife and her relatives are innocent, then they are likely to be reduced to the victims of legal pacifism. Therefore, in either case, law is set to suffer setback in terms of delivering justice. In the absence of prudence in legislature, the court stands at bay.

In its successive reports, Law Commission of India also put similar apprehension against abuse of women-friendly provisions in IPC vis-à-vis domestic violence.⁸ In its 237th report, the Commission appreciated excess in terms of vulnerability of husband in cases of abuse of section 498A, IPC by wife. A workable remedy, as per suggestion of the Commission, lies in reducing deterrence of the provision. Accordingly, making the provision compoundable seems one way of addressing the challenge though the same remains far from jurisprudent balance to this end. In its 243rd report, the Commission went into depth of this matter in particular and thereby recommended few points relevant in terms of police process and judicial process while dealing with complaints under the impugned provision. No arrest should take place under section 498A unless and until there is investigation followed by receipt of *prima facie* case to the satisfaction of investigating officer that there is reasonable suspicion against the accused. Thus police process ought to comply with section 41, read with 41A, the Code of Criminal Procedure, 1973. All these provisions of the Code of Criminal Procedure offer a cluster of safeguards to otherwise vulnerable husband against arbitrary arrest followed by eventual procedural syndrome, e.g., loss of reputation, suspension from service, circumstantial stigma in surrounding space, and the like. After all, in common law system, none may be held guilty before his guilt is proved beyond reasonable doubt.

⁸ For details, refer to Reports no. 237 and 243 of the Law Commission of India. Available at: <http://lawcommissionofindia.nic.in/reports/reports216onwards.htm> retrieved on December 8, 2012.

5. Family jurisprudence: crises lie elsewhere

In its anxiety to offer safeguards to vulnerable wife, what the Parliament committed is a mistake of fact that Indian Society in general, and Hindu community in particular, is subject to social change. Indeed in post-independent India, Hindu family underwent phenomenal change so much so that the same may at ease be treated metamorphosis. As a fundamental social unit, Hindu family structure has transcended cultural taboos of archaic closed society prevalent in pre-independent India. With the passage of time, in urban India, women emancipated themselves through advantage of nuclear family. In particular, in the absence of male child in her family, erstwhile economic relation ceases to constrain her since chain of dependency syndrome suffers from discontinuity and she regains paradise, at least in her parents' place, lost with the preponderance of patriarchy. A similar epiphany is unlikely to occur for her at the matrimonial home. Perhaps this may be a political reason for her conflicting with apparent adversity and thereby regaining her desired position there as well.

Besides, there is another development that tends to paradigm shift in her dependence. By courtesy section 5(iii), the Hindu Marriage Act of 1955, average age of marriage for Hindu bride is higher than earlier. Thus, due to prolonged stay at parents' place, her dependency syndrome underwent a paradigm shift. Unlike earlier, Hindu bride suffers from strong sense of alienation since she finds socialization process difficult for her matured age. On reverse side, the way husband and his family used to accept her as member of their own family seems difficult since the bride is a matured lady. Thus, commercial considerations exceed emotional commitments which ought to bind them together for rest of their life. In turn, out of selfish considerations, both count

for their respective scores vis-à-vis profit and loss out of the marriage. Whoever finds self at loss initiates sense of dissatisfaction at first and violence thereafter. Violence may thereby be generated from either side. Since bride stays alone with husband and his relatives, they have a vantage by default to settle score with wife. However, this may not necessarily mean that bride and her relatives cannot settle score with husband. Rather, in cases of family feud, bride receives widespread public support by default. Nowadays, law being swayed by popular sentiment (that may be devoid of reason), bride and her relative strategize the same as vantage point to score against them and, the same is reduced to marital extortion. Nowadays, through creative construction, coercive sex against will of wife stands as marital rape. In similar style, fiscal support may be construed as marital extortion against husband.

The Constitution of India offers a fundamental right for women to be treated alike and, at times, provides for special protection as well.⁹ But the same is not meant to offer women preferential treatment to gross detriment of others that is bound to spread hostility against women and affect themselves. For the Parliament, (juris)prudence lies in balancing between conflicting interests of wife and husband in Hindu family by means of social engineering.¹⁰ Given such provisions opportunity with time, albeit under the (dis)guise of gender justice, they are bound to harm humanity in general and do havoc on modern Hindu family life-world in particular. (Juris)prudence, therefore, lies in striking the balance including preference, if at all, in such form and content that abuse of the same by errant woman must not hit hard husband and his family below the belt. Non-compoundability of the offence is a pointer that requires review and, if plausible, may be reduced to compoundability.

⁹ *Vide Article 15(3), the Constitution of India, 1950.*

¹⁰ For details, refer to arguments in IPC 498A. Available at: <<http://ipc498a.wordpress.com/>> retrieved on December 9, 2012.

If statutory position remains the same, despite a call of time for statutory amendment, the court is likely to take its own course to attain justice the way it likes. Therefore, plausibility of hoodwinking the statutory position by creative judicial interpretation may not be wiped out and, given such circumstance to occur, this will open floodgate of judicial activism under the (dis)guise of its independence and strategic advantage of wife may thereby be subverted from within the system.

6. Conclusion

There lies strong rationale in amending IPC to drag errant husband and his relatives into clutch of the court. While amending the same, the Parliament missed a point that there are errant wife and her relatives to be violent against husband and his relatives. An axiom accepted by the legislature, that women are by default docile and vulnerable while being in matrimonial home, suffers from fallacy in terms of its premise itself. Perhaps the same is administered under heavy politicking of the part of civil society vis-à-vis gender justice. Whatever the ground reason may be, under no circumstance, sovereign legislature may afford to succumb before pressure politics from either side. With recourse to a classic legal maxim- *tutius simper est errare in acquietando quam in puniendo*- that reminds of an axiom that it is always safer to err in acquitting than in punishing; on the side of mercy rather than on the side of justice. Present position of law is in conflict with this cardinal principle and innocent husband experiences the brunt for lack of prudence in law to gross detriment of the family as an institution of mutual trust and respect apart from the biological components of animal life-world. In adversarial process, by courtesy the reversal of presumption in a way or other, such a tendency (criminalization of husband) is anathema to family jurisprudence.

Also this seems in clear contravention of Article 14 of the Constitution of India while there is no deterrent provision for wife with vicious mind who will escape prosecution with little or no trouble in reverse circumstance since law lacks recourse against her. Albeit these are rare; but these are there as well.

Indeed inquisitorial process endorses reverse mode of presumption and onus of proof against the accused. However, in such process, the complainant faces consequence for frivolous allegation while the Parliament put no deterrence against abuse of law by wife. Law against domestic violence lacks sense since the same seems partisan. Concerned proceeding adheres to neither adversarial process nor inquisitorial process of litigation. Consequently, there is no back up to resist abuse of law against husband and his relatives. Given the pandemonium in family life indulgence to carry forward, growing mistrust and disrespect is likely to put family in the whirlpool of anarchy and the same is bound to cause collapse of hitherto social solidarity in the community. Last but not least, unlike others, mutual love and affection rather than jurisprudence constitutes Hindu family life. Besides, there is a religious conviction of togetherness even beyond life that seems one- if not only- driving force behind Hindu marriage. Here lies the epicentre of domestic violence since, with introduction mutual separation and divorce, jurisprudence of post-1955 Hindu marriage underwent perennial change. The Hindu Marriage Act put a pause on pre-1955 position that marriage is sacrosanct and spouses are thereby put together for eternity through nuptial bond- whether and how far the same is prudent is a point apart. Like others, the Hindu people of India left their indigenous institution to take resort to pseudo-contractual arrangement. Violation of nuptial obligation, therefore, seems rule rather than exception. Domestic violence, dowry death, etc. are *ipso facto* no disease but insignia of a larger disease emerged

from the womb of modernity. Rather than acting upon dictate of smart wife, prudence lies in handling violence from either side with care and caution.

Last but not least, even if it sounds awkward, a non-legal wisdom may not pose itself out of track. Law is not an end in itself. Law includes a value system of the society. Law sans value resembles slavery of monster. Unless and until humane value system-of whatever characteristic it may be- is put in place, laws alone cannot resume order in family life. Extension of commercial worldview into family life-world somehow converts the otherwise sacred *mantra* of togetherness into profit-and-loss statement between themselves that prompts both to feel lost to other spouse who is competitor in the chessboard of such market-driven family. Review of its institutional ontology rather than law seems an urgent need of the hour to save family as primary institution and its rival members from one another in time ahead.