

Gender: not to define vulnerability

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Abstract

As recalled from the Abstract, Gender-specific laws facilitate gender subordination, which ultimately leads to oppression of both the second and the first gender and also every other gender that the country fails to recognize. A life of an individual is decided and adjudged by the gender of the individual. It can be seen from the very basic human instinct that little girls are given dolls, toy utensils and playhouses to play with, while little boys are given guns and machinery toys to invent something. Laws are highly based on the protection of vulnerable section of the society, including backward classes and women. Laws based on women protection do not make just the women inherent victims, but also traps the men by considering them as inherent predators. There are various laws which provide so called gender-specific provisions for protection of the vulnerable gender that is the women. But in this paper, we specifically give regard to the Divorce provisions in our country and the effect of gender-specific provisions in that arena leading to rise in matrimonial crimes.

Introduction

The Divorce in our country is based on the Fault theory. This specifically means that the Right to Divorce can be availed as the remedy for an innocent party against the guilty party. Marriage is the most important institution in our country. A union of two individuals willing to stay together for life and share their wealth, souls and DNA, has now turned almost into a social obligation where every individual has to get married as and when the appropriate age comes (varying from 5-50). However, in a social union of two individuals taking vows to stay together and in the situation of conflict of feelings between the two, what is justice? Moreover, while assessing the relationship of two different human minds, who decides the justice?

In a typical family relationship, where one of the soulmates realize that they are at the wrong place to be at, who decides for his/her life?

The society, the family or the judiciary?

Above all of it, if the society, the family or the judiciary has to decide the justice between the two, how do they do it?

The judges and the family members being the outcome of the society leading from oppression and gender subordination decide the justice on the basis of gender roles already vested in our society. This is easily evident from the court cases where a man alleges Cruelty on his wife in a divorce petition stating that she doesn't cook food for him, doesn't care about the household which has caused him immense agony. On the other hand, it is also evident when the women file divorce petitions alleging Cruelty on the part of the husband stating he doesn't earn for the household, whereby she might also be similarly qualified and capable of earning. The views of judiciary are embedded with such gender roles as such petitions are also allowed by the Courts.

Moreover, the judiciary has counseled the parties to work according to their gender roles in order to attain justice.

Individual purposes and liberty are considered secondary when it comes to matrimonial disputes. Legislations such as Fault theory of Divorce and Restitution of Conjugal Rights have given recognition to marriages as social obligatory contracts, rather than the will of one half to stay with the other half.

Moreover, legislations have also been the part of this role-play. Various provisions have been provided in Criminal Procedure Code¹, and other Acts for maintenance of the dependent spouse, mainly wives. But, Maintenance have been denied to those wives if they have resorted to Adultery. However, Adultery is also a criminal offence and the man can be charged for having committing Adultery with the wife of the other.² Further, Section 498A of IPC has been extensively misused by the women.³ Other provisions such as Dowry Deaths, Rape, Sexual Abuse, Outraging modesty, deceitful cohabitation by a man inducing a belief of lawful marriage, Domestic Violence, all being specific provisions in order to protect the women, as women being “necessary to guard” gender, has inherently led to an era which has caused immense frustration and rebellion in every individual, irrespective of their gender. The reason for revolving gender protection around the institution of marriage is that the essence of gender specific laws is the women protection and marriage has been the ultimate way of women protection, where women are transferred from their fathers to their husbands (Kanyadaan). Thus, for gender neutral laws, we first have to evaluate the criteria of women protection where the protection of their women essentially means protection of their sexuality, which is termed as the chastity of a woman. A person is taught a good value of being in the protection of women around him. A man is said to be a man of honor if he drops the woman home, if he protects him from the wicked gazes of the other men and the society. “Women should not go alone in the night”, “women must not stay alone”, “why don’t you take your brother along”: these are some common phrases in an Indian society. All in all, Protection of women is considered as the prime virtue of a good human being. It is not the equality between men and women that is facilitated, but the protection of women, (women being the second gender) by the prime gender that is the male section of the society, ironically from the male section of the society. When we talk about permanent and the highest protection of a woman, a woman is said to be safest at her father’s house in her childhood and then at her husband’s house, when her sexual desires kicks in. A woman belongs to her father before the marriage and her husband after the marriage. Thus, marriage is the ultimate protection of a woman and hence, the Divorce is either hysterical or a stigma. This paper further elaborates the crimes associated with matrimonial institution and the rise in those crimes due to such institution being a social obligation for women protection.

¹Section 125 of The Criminal Procedure Code, No. 2, Acts of Parliament, 1974.

²Section 497 of The Indian Penal Code, No. 2, Acts of Parliament, 1974.

³Section 498A of The Criminal Procedure Code, No. 2, Acts of Parliament, 1974.

Concept and history of marriage

Marriage as a concept is as old as civilization. Indian communities had personal laws of marriage dependent on their religion and regional customs. Thus, marriage laws were derived from the Dharmashastras, Shariat and Christian canon law, reflecting the growing diversity of the country. Every religion had their own customs and rituals but what is common to all however, is that they were, with small exceptions, all patricentric and patrilocal.

Friedrich Engels was a European philosopher who saw a family as an economic unit. In 1884, he published *The origin of the Family, Private Property and the State*.⁴ In his book, he wrote,

“Marriage begins with the advent of private property; private property came to be controlled by men: that was the birth of patriarchy. Women and children became dependent on the patriarch for their financial needs and social identity. Patriarchy needed paternal certainty to ensure legitimate successors, which required that women should be with no other than the men they were married to. And so, the social institution of marriage regulated sexual behavior and chastity became a woman’s highest virtue. Marriage became the legal way to create families as core social units and, by extension, took on importance as life’s central rite of passage.”

According to Hindu traditionalists, marriage is a sacred institution devised by gods for the welfare of human beings. Its primary purpose is procreation and continuation of life upon earth. Sexual union is intended solely for this purpose and should be used as such. A man and a woman are believed to come together as a husband and wife primarily for spiritual reasons rather than sexual or material, although they may not be mentally aware of the fact. Once married, the couples are expected to carry out their respective traditional duties as householders and upholders of family traditions and work for the material and spiritual welfare of each other, the members of their family and also society.⁵ Other traditions such as Muslim law consider it as a mutual contract more than a sacrament, but women were not equal partners in this contract for the reason that all over the world, the pivot of social stability was in an overwhelming patriarchy.

⁴Friedrich Engels, *The origin of the Family, Private property and the State* (1902).

⁵*Hindu marriages purpose and significance*, HINDUWEBSITE (May 20, 2018), <http://www.hinduwebsite.com/marriage.asp>.

In any case, over time, marriage became the most important rite of passage. MalvikaRajkotia, a renowned lawyer on Matrimonial laws and Human Rights wrote in her book *Intimacy Undone*⁶,

“Marriage was propagated by the social pressure to marry rather than a desire to marry. The inducement to marry was access to legitimate sex. The need to marry was to create an independent family unit and earn a respectable status. By creating this need and inducement, society succeeded in its propaganda to make marriage desirable, even aspirational. And in all circumstances it was final, because enabling easy exits from it would defeat its purpose.”

Thus, the origin of marriage and family structure can be credited to the advent of private property. However, the times have changed now over many centuries and now the institution of marriage is the coalition of two individuals voluntarily willing to stay together.

On the other hand, Divorce as a concept came far later. Initially, it was granted only on the basis of Adultery but now many personal Acts provide for various grounds on which the right to Divorce can be availed. However, it is still based on the Fault theory where it has to be proved that the other party has committed such grave faults which have made the innocent party completely uninhabitable to stay with the guilty spouse. According to Bhagavad Gita, a human being is born indebted to his parents and ancestors as they have propagated their lineage and are the cause for birth. One of the ways in which one repays this debt is by continuing the lineage – by having children and bringing them up to understand and undertake the same responsibility.⁷ Thus, a husband and a wife, once tied in the knot of marriage cannot be separated because that will defeat the purpose of the marriage. But it has already been acknowledged that such union can be dissolved by a valid reason, which is the ground of Divorce given in the matrimonial personal laws. But the question that arises here is ‘Is choice not a valid reason, apart from Right to choose, being an extension of fundamental right of personal liberty?’ Can a right to choice and personal liberty be denied to an individual because of his/her marital status? Is it not the violation of Article 14 and Article 21 of the Constitution of India?

⁶MalvikaRajkotia, *Intimacy Undone*, pg. 17 (2017).

⁷*The debts of Dharma, have you paid yours,*

HINDUPERSPECTIVE,<https://hinduperspective.com/2013/06/09/the-debts-of-dharma-have-you-paid-yours/>.

It is to be understood that marriage is based on the existence of Intimacy between two individuals. Often, intimacy in marriage is confused with sex. The law gives foremost importance to sex in the marriage, which is evident from the fact that it is not the solemnization, but the consummation, that validates the marriage. An unconsummated marriage is treated as void in the law. Refusal to have sex is also covered under the ambit of Cruelty as a ground for Divorce under Personal matrimonial laws. Sexless marriages can also be decreed as null and void marriage under Section 12 of Hindu Marriage Act'1955 and under section 24(1) of the special marriage act, 1954. But the judiciary has come to an opinion that the court is not the one to quantify as to how many times a couple needs to have sex for a happy marriage, as for some the sexual incompatibility might be the central factor; however some might be happy enough without sex.⁸ Thus, intimacy revolves around the individuality of the two parties in a marriage and in the cases of conflict between the two; the justice cannot be decided by a third party except in the case of criminal offences. Intimacy, by its definition, means seeing the other person unmasked which thus must include the irrational sides of that other-and of one's self while dealing with the other. Intimacy is unrefined and true, and thus by its very nature tests marriage, which is a house dressed in material finery.⁹

In case of lack of such intimacy in a marriage and obliging a person to live with a person with no such intimacy and will (because of difficult exits), it creates mental tension and suffering in the minds of the individuals which leads them to resort to deviant behaviors which includes assault, violence, Adultery, Bigamy, etc. This deviant behavior leads to the occurrence of crimes.

The reasons for various crimes associated to matrimonial institution are explained in brief under the next head.

Crimes associated with matrimony

1. **Adultery**: There can be numerous reasons for committing Adultery, however According to CNN¹⁰,
'Lacking emotional connection causes rifts in relationships and can lead to cheating. When a man or woman does not feel able to go to his partner for affection or to discuss a problem, he might seek another emotional outlet in the

⁸ShashiBala v. Rajiv Arora, 2012 D.L.T. 1881.

⁹MalvikaRajkotia, *Intimacy Undone*, pg. 21 (2017).

¹⁰*Besides Sex- other reasons men cheat*, EDITION, Besides sex -- other reasons men cheat, <http://edition.cnn.com/2008/LIVING/wayoflife/10/03/o.why.men.cheat/>.

form of an affair. Also, if she feels unappreciated or stress over things like children and bills causes her to have feelings of inadequacy, she might think another person might make her feel better luring her into an affair to regain self-esteem.’

2. **Domestic violence:** According to the other study by ICRW, More than 60% of Indian women reported three or more episodes of Physical or psychological violence in their lifetime.¹¹ In fact, this is not the actual problem. The actual fault lies in the statistics revealed by the World Bank Study that 46.7% of women victims who have reported spousal violence in 2005-2006, justify the violence on them.¹² As per the reasons found by the World Bank Study, not adhering to the Gender roles is the prime reason for such Violence.
3. **Dowry deaths and dowry-related offences:** Where marriage is continued to be a social obligation, such atrocities are bound to occur, as in order to save the repute and status of the woman by getting her into the matrimonial union, parents of the spouses are likely to indulge in the exchange of Dowry and the women are likely to stay in the abusive matrimonial homes, which ultimately leads to homicide of women by the husband’s family or the woman commits suicide. Such evil practices of dowry further paves way for other evils such as prenatal killing of a girl child or infanticide.
4. **Child abuse:** As already been observed in the prior chapters that strained relationships leads to Domestic Violence. Such violence is not just restrained to spousal violence, but also to the children. Apart from physically abusing children, Children who experience or witness violence in their homes, are more likely to commit violence in their adulthood.¹³
5. **Child marriage:** In the year 2005-2006, 60% of the women aged 25-49 years were married by the age of eighteen. Moreover, by the result of the same study, 20% of the women aged 25-49 years were married by the age of fifteen.¹⁴ The status of a

¹¹*Evolving men on gender equality, survey*, ICRW, <https://www.icrw.org/wp-content/uploads/2016/10/Evolving-Men-Initial-Results-from-the-International-Men-and-Gender-Equality-Survey-IMAGES-1.pdf>.

¹²Solotaroff and RohiniPrabhaPande, *Violence against Women and Girls, Lessons from South Asia* by Jennifer L., OPENKNOWLEDGE (May 20, 2018), <https://openknowledge.worldbank.org/bitstream/handle/10986/20153/9781464801716.pdf?sequence=1&isAllowed=y>.

¹³*Witness of Intimate Partner Violence in Childhood and Perpetration of Intimate Partner Violence in Adulthood*, NCBI (May 20, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3108188/>.

¹⁴*Supra Note 12.*

marriage as a social obligation has direct impact on the increasing number of child marriages. As the marriage is a route to legitimate sex, many children are made to marry immediately on attaining puberty or even before that, to channelize the sexual desires towards the legitimate way. The biggest drawback of marriage being a social obligation and providing legitimacy to intimacy and hence reproduction (because according to traditionalists, sexual intercourse is essentially for procreation), is the sickening ritual of child marriage. Child marriage is the biggest form of child abuse.

6. **Marital rape:** Countless women have been forced for sexual intercourse by their own husbands against their will or by the use of force. The ugly part of this is that it is also sanctified by the institution of marriage and is not considered Rape under the law of the land. Lack of Intimacy and understanding will only lead to fulfill marital obligations, sexual obligation being the prime one (doesn't matter consensual or non-consensual).

In fact, there are various other crimes that have their origin or are related to the concept of matrimonial institution such as fraudulent marriages, forced marriages, honor killing, human trafficking and prostitution.

Conclusion

As we look up to social reality, marriage is a social compulsion to gain respect and acceptance in the society. This can be viewed in a perspective that a Right to Reproduce which is an extension of the fundamental right of life and liberty is majorly linked with the union of marriage. The laws of the country refer the children out of the wedlock as illegitimate. They have different laws of inheritance and succession as against the legitimate ones which are born from the valid wedlock, no matter how strained the wedlock was. The illegitimate children are often tortured and emotionally tormented in the society, often called as bastards. Thus, making the union of marriage being a social obligation or a social compulsion. Such nature of marriage being a social obligation can be seen in the instances where:

- the rape victims are asked to marry their rapists to save the honor of the women;
- even after the grave atrocities are put on to women, they are asked to adjust in their matrimonial homes and save their marriages as low as possible;

- the children in our country are raised with the main motive of finding a perfect spouse and getting married or as they say, settled in life and the money has been saved for their marriages since their inception;
- decades are spent to end the trauma of a hollow union;
- same-sex marriages are unnatural and moreover a criminal offence, etc.

The problem in this social obligation lied in the imposed stereotypical conjugal roles for each spouse. The control on sexuality of women has not only harmed the women, but also the male section of the society. In stereotypical roles, women are supposed to give birth to children and rear them and men are supposed to earn bread for the family. In a society like ours where the existence of Cruelty on the spouse is decided by the Judiciary, spouses don't usually decide their conjugal roles but they are imposed on them. In a situation where none of the spouse's work, men are supposed to may maintenance to his wife if he is physically and mentally capable of earning. The dependency of women on men in the social strata is highly evident in our society, but it is time that we cannot just have women sitting around in charity, for the sake of women empowerment. If a man is made a money-making machine, women will always be child-bearing ones.

As now the times are changing, the norms and values today are fast liberating and even in this dynamic society, if the law of the society tends to resist or be reluctant to change, such society becomes stagnant. Such stagnancy in the society, essentially makes room for Deviance in the minds of its citizens.

The core concept of family and simultaneously, the basic need of an individual is his/her emotional security. When a person is deprived of his/her emotional security, he/she tends to develop psychopathic traits, leading to Deviance from the required peaceful structure of the society. This may lead to Alcoholism, Drug Abuse, resort to violence and many more, which is because the individual gets hostile towards fear and punishment. Therefore, it is to say that if we look into the psychological aspect of Deviance, emotional disturbance of an individual leads to the formation of maladjusted personality traits.

Moreover, imposing such gender roles is the gruesome attack on the Fundamental Right of Equality of an individual which clearly states that the State shall not deny to any person

equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.¹⁵

Therefore, in order to give meaning to the fundamental Right of Equality within a State with the biggest religious diversity, it is the need of an hour to provide gender-neutral laws, not only to men and women, but all the genders of the society. Gender discrimination or inequality is the biggest form of discrimination as it shatters the most basic existence of a human being. Moreover, where offences such as Rape, Sexual abuse are specific only to women, it is not denied that men also face such gruesome atrocities and then, the trauma of men experiencing such offences is way too high than women as they not only face the transgression of their fundamental rights, but also being the victim of their own gender roles, which probably makes them resort to committing such atrocities to regain their honor and their role in a gender regulated society.

Suggestions

1. The first step towards forming a gender-equal matrimonial union is to accept the individuality of each person and to transform the union of marriage to will from the prevailing social obligation.
2. The next step is to transform the theory of Divorce from the matrimonial offences to irretrievable breakdown of marriage and the onus of proof of contrary has to be on the defendant side.
3. Gender specific laws such as Protection of Women from Domestic Violence Act should be made gender-neutral.
4. After all these reforms are made, then Adultery and Bigamy can be considered as matrimonial offences. Also, after providing irretrievable breakdown of marriage as a ground of Divorce, the grounds of matrimonial offences shall have actual meaning.

It is high time to keep the State out of personal sphere of individuals. Despite of regulating their conduct, they must enter it, among other ways, by legislating and enforcing family law that effectively supports well-established constitutional and international principles, which has to be on a sex-equal basis. Certainly when states

¹⁵INDIA. CONST. art. 14.

legislate sex discrimination, enforcing the subordinated social status of women to men on the lines just described, constitutional and international obligations are violated no less than when states act officially in these practices because gender unequal laws are worse than no laws.¹⁶

¹⁶K. SrinivasanRaov. DeepaRao, (2013) 5 S.C.C. 226.