

Legal Provisions Against Matrimonial Cruelty

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Abstract

The traditional belief that marriage provides a husband with the license to rape, thereby exempting him from any prosecution for raping his wife is evidenced by the above quote. Outlawing this traditional notion, Justice Brennan of Australian High Court, observed in 1991 that “the common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse”². Surprisingly, India has refrained from outlawing marital rape even though it is most common and repugnant from of masochism in India society, which remains hidden behind the veil of marriage. Research indicates that marital rape has severe and long lasting consequences for women, both physical and psychological.⁴ Physical effects include injuries to private organs, miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases like HIV/AIDS. Women raped by their partners also suffer severe psychological consequences such as flashbacks, sexual dysfunction, and emotional pain for years after violence.

Introduction

The JVC Report noted that exemption of marital rape reduces women to no more than the property of their husbands¹². This is the patriarchal notion that has fuelled this injustice. A woman, however, cannot be relegated to the status of a chattel¹³, and has an identity different from that of her husband. Further, a married woman has the same right to exercise control over her body as an unmarried woman.

The other contention that the State does not want to interfere in the domain of the marital home does not hold good because the right to privacy protects only consensual acts and not violent sexual assaults. Similarly, it is not difficult to understand that the marriage becomes irredeemable when intercourse is accomplished by violent assault or coercion.

Another rationale that is advanced is that marital rape would be difficult to prove in the court and vindictive wives may falsely implicate their husbands. It is submitted that despite the existence of section 114A of the Indian Evidence Act, 1872 (IEA), proving lack of consent is the most difficult part in any rape prosecution. If this be the logic, then virtually all crimes other than homicide should go unpunished for failure to provide overwhelmingly believable evidence. The final argument put forward by male chauvinists is that marital rape is not as serious an offence as other rape and is thus adequately dealt with in legislations such as the Domestic Violence Act, 2005. It is submitted that a crime should be punished under penal laws and not compensated for under civil laws.

The statutory definition of rape in India emphasizes the absence of consent, an important aspect of the actus reus of the offence, as per the 84th Law Commission Report¹⁹ However, in the case of a married woman, consent is nothing more than an over rated illusion. Section 375 of Indian Penal Code, 1860 contains seven descriptions regarding consent, wherein consent of a woman below eighteen years is irrelevant to constitute the offence of rape. Exception 2 to section 375, on the contrary, absolves a man from the offence of rape for sexual intercourse with his wife of fifteen years of age. Firstly, this grants a license to the husband to have sexual intercourse with his wife of fifteen years without her consent. Secondly, it forgoes the right of the wife to grant/abstain from granting consent after eighteen years of age. Thirdly, when compared with section 376 (2) (i) of IPC, which punishes rape of a woman under sixteen years of age with rigorous imprisonment of minimum ten years to life imprisonment, the exemption under section 375 seems to be hypocritical as it condones the act itself.

The Ambiguities and Discrimination in the Criminal Law (Amendment) Act, 2013

The 2007 Report of the Committee on the Elimination of Discrimination against Women removes the exception of marital rape from the definition of rape. "Despite such recommendations, and the continued demands from women groups, the retained marital exception exhibits many discrepancies in the Amendment Act of 2013 and evidences an unnecessary policy of discrimination."²³

The LCR 1971²⁴ introduced the concept of marital rape on the basis of absence of consent when husband and wife are living apart under a decree of judicial separation or by mutual consent, to a limited extent.²⁵

Following the amendment to Child Marriage Restraint Act, 1929 (CMR Act), the LCR 1980²⁶ provided an amendment to the marital rape exemption by increasing the age of the wife to eighteen years as it believed that since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal laws), sexual intercourse with a girl below 18 years should also be prohibited. Subsequently, this was reiterated in LCR 2000²⁷ and also in the 2006 Draft Bill presented by the National Commission for Women which sought to criminalize marital rape. In the 2007 Report, the Committee on the Elimination of Discrimination against Women (CEDAW) has recommended the removal of the marital rape exception.²⁸

Procedural Aspect and Reliefs provided under the Act

As far as the procedures for obtaining the orders and relief are concerned, an aggrieved person or Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking relief under this Act. The Magistrate at any stage of the proceedings may direct the respondent or the aggrieved person to undergo counseling. What is important about the Act is that it rejects the Anglo-Saxon notion of locus standie. It is not essential that the complaint alleging domestic violence can be filed only by the victim, its family members or by the legally recognized person or institution for this purpose. Anybody on behalf of the aggrieved person may file a report. Secondly, the Magistrate shall fix the first date of hearing within three days from the receipt of an application by the Court.

Act provides vast discretion to the Magistrate in granting relief. Magistrate can pass protection orders⁷⁹ residence orders⁸⁰, monetary orders⁸¹, custody orders⁸² and compensation orders⁸³. Thus we see that an attempt has been made to give over all protection to the women. Under this Act Court is empowered to give all kind of reliefs and a woman who is already a victim of violence is not tortured further by compelling her to file various litigations under various laws for the protection of her rights.

While interpreting the meaning of term 'shared household', the Supreme Court held in the case of S.R. Batra v. Taruna Batra⁸⁴ that a woman could claim the right of residence only in relation to a household owned and rented by her husband.⁸⁵ It was observed that in the opinion of the Supreme Court, there is no such law in India, like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law. The judgments a clear oversight of the ground social realities of the joint family system in India. Even if the right to residence is granted, in such a situation there is always a threat to the life and dignity of the woman. Consequently she has no way but to search for an alternative shelter. Also the Act acknowledges speedy justice in the cases. Though the law is civil in nature, criminal procedure is to be applied in accessing reliefs⁸⁶. Again, though the Act addresses the need to have speedy justice in such cases, it overlooks the security needs of victims of domestic violence.

The Magistrate may also direct the respondent to pay the 'monetary relief to meet the expenses incurred and losses suffered by the aggrieved person. However, the Act does not take into account the financial condition of the other party (that is, the respondent) how the 'losses' and 'expenses' are estimated being very subjective terms there are again no clear guidelines in the Act. While the maintenance provision under the Hindu Marriage Act, 1956 clearly defines the amount of monetary support (as maintenance) not to exceed one-third of the total income⁸⁷, no such provisions are enumerated

in the Act. How long monetary relief shall be provided is also not mentioned in the Act. Moreover there is a provision for compensation for the damages and injuries including mental torture and emotional distress by acts of domestic violence. But the entire provision of monetary compensation, relief and other protections is largely dependent on the subjective satisfaction of the Magistrate. The Magistrate may even give custody of the child to the aggrieved (though temporary) which is contrary to the provisions of the Hindu Guardianship Act 1956 which declares the father as the natural guardian⁸⁸ and which may further create guardianship tussle between the parents causing legal complications for the aggrieved. Ideally justice should be delivered within three months but in view of the fact that the courts are overloaded with work, the case may linger in months. In many places, including the model State of Andhra Pradesh, cases may drag on for more than six months.

Protection of Women from Domestic Violence Act 2005- A Critical Overview

The Act inter alia provides for more effective protection of the rights of the woman guaranteed under the Constitution who are victims of violence of any kind occurring within the family. According to the Act any harm, injury etc, by any adult members of the family constitutes domestic violence. Any woman who is or has been in a domestic or family relationship, if she is subjected to any kind of violence she can complain. Aggrieved or effected woman can complain to the concerned Protection Officer, Police Officer, Service Provider or the Magistrate. A detailed study of the Act will show that it covers a wider range of women i.e women who are subjected to cruelty in a relationship other than marriage. Further the definition of domestic violence is more specific and wider discretion is given to the courts while dealing with the complaints under this Act.

This Act covers those women who have been in the relationship with the abuser where both the parties have lived together in the shared household and are related by consanguinity, marriage, or through a relationship in the nature of marriage or adoption. In addition, the relationships with the family members, having together as a joint family are also included. Even those women who are sisters, widows, mothers, single woman or living with the abuse are entitled to legal protection. The Act enables the wife or the female living in a relationship in the nature marriage to file a complaint against any of the relative of husband or the male partner.

But despite all these features the Act suffers from lot of shortcomings. It does not enable any female relative of the husband or the male partner to file complaint against the wife or the female partner. If in case of domestic violence the complaint is registered both under the Act as well as Section 498-A of the IPC, both the agencies carry out their investigations and if the reports are contradictory then what is the way out? Double enquiry may create confusions.

The Act may further be criticized as a lot of scope for the Magistrate's discretion. There are no safety valves in the Act to prevent its misuse. It may prove disastrous for an individual in case the complainant has 'malafide' intentions. Violence faced by the 'mother-in-law' is completely missing. There is no mention of it. The Act completely ignores violence by the daughter-in-law against the in-laws. The country has already seen the misuse of the Dowry Prohibition Act 1986 and Section 498A of Indian Penal Code. It was found that every four minutes in India, innocent persons including old mothers/pregnant sisters/children, are facing false and fabricated dowry cases and are sent behind bars without any evidence, Section 498A being non-bailable. Again there is no mechanism to make it mandatory by the States to enforce the law in its totality consequently in most of the States implementation is half-hearted. Too many laws on one issue create lots of confusion in the large number of already illiterate women who are without any/adequate knowledge of law. It creates confusion for the decision-making authorities also, notably the judiciary.

Moreover this Act provides only temporary reliefs and on urgent basis; permanent solutions are still to be found in personal laws. The failure of personal law due to its civil nature is an open fact; for example, most of the Hindu women still prefer to seek maintenance under Section

125, CrPC rather than under the Hindu Maintenance Act 1956. Further

any legislation should have a simultaneous legal literacy and sensitisation plan. It is an open fact that the victims of domestic violence themselves do not accept it as something wrong. There is total ignorance regarding rights as well as the law on the part of women. Therefore, laws remain paper tigers rather than being the instruments of social change.

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