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DYNAMICS AND DIALETICTICS OF LEGAL REGULATION OF VIOLENCE AGAINST WOMEN IN INDIA

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ABSTRACT

The concept of violence against women is the meeting point of conflicting and competing approaches and implicates the relationship of law with culture, civilization, history, philosophy etc. Certain forms of violence masquerade as discipline or punishment. In the context of domestic relationship, it assumes subtle and obvious forms, thus reflecting the dynamic and dialectic character of violence, concept of violence and its competing and conflicting conceptions. This paper briefly traces the epistemological foundations of violence against women to demonstrate how subordination of women has been considered by the society to be natural and given. It also aims at pointing out the paradoxes of legal regulation dealing with violence against women in considering women as (victims) and perpetrators of violence. Lastly, the paper brings out the ambivalent approaches of the legislature and the judiciary in dealing with violence against women.

Keywords: Violence, women, victims, perpetrators, legal regulation

1. Introduction

The concept of violence against women is the meeting point of conflicting and competing approaches and implicates relationship of law with culture, civilization, history, philosophy etc. Certain forms of violence masquerade as discipline or punishment. In the context of domestic relationship, it assumes subtle and obvious forms, thus reflecting the dynamic and dialectic character of violence, concept of violence and its competing and conflicting conceptions. In order to map the journey of legal regulation of violence against women, this paper is divided into the following sections. Section I deals with the epistemological foundations of women's subordination and victimization. Section II discusses the International human rights law dealing with violence against women. Section III attempts to bring out the paradoxes of the legal regulation of violence perceiving women as (victims) and perpetrators of violence. This paper concludes by drawing attention to the emerging conflict of approaches towards violence against women between the legislature and the judiciary.

2. Epistemological Foundations of Women's Subordination and Victimization

In the history of development of ideas, freedom came first and equality of freedom came later. But this equality of freedom was predicated upon equality of 'man' as exemplified by abolition of the practice of slavery. Women continued to suffer discrimination in matters of property and franchise revealing their entrenched subordination vis-a-vis men. From times immemorial the processes of

formation of norms and paradigms has been controlled by man. Even the Western philosophical tradition has denigrated and sub-humanised women's separate and equal existence. This is reflected for example, in Aristotle's philosophy. Aristotlefirst defined "man" as a rational animal. Thus he identified 'rationality' as the identifying characteristic of humans but then also claimed that women's reason was defective in that it was "without the power to be effective."[1]This is a clear evidence of women being considered to be subordinate. Similarly, one sees this trend in the other Western philosophies too. Notice for example, the philosophy of Locke, who believed that "man" could transcend natural power relations by means of civil agreement. Despite this thought, he considered it somewhat obvious and natural that in case of conflict between husband and wife "the rule... naturally falls to the man's share, as the abler and the stronger."[2] He considered this to be rather obvious and given. Rousseau, who took freedom to be the distinguishing mark of humanity, held that it followed from the different natures of men ('active and strong') and women ('passive and weak') that "woman is made to please and be dominated" by man.[3]The highest degree of this denigration can perhaps be noted in the philosophy of Kant, who observed, "I hardly believe that the fair sex is capable of principles".[4] Reacting to these approaches by popular and influential philosophers of the West, Helen Longino makes an interesting point. She says that the problem with such philosophies is not really their maleness; the real problem rather is homogeneity; that is to say that when a large number of people begin to believe in the same thing then it is less likely for that ideology to be questioned. On the other hand, "diversity of viewpoint and interest generates the 'essential tensions' that promote the generation and testing of new ideas and that militate against premature convergence onto inadequate theories"[5].Applying Longino's reasoning, it is not difficult to see why women objectification and subordination appear to be natural or given.In this context it would be relevant to draw attention to one aspect of Cartesian epistemology and Longino's response thereto. Cartesian epistemology assumes for example, that all knowing is essentially individualistic[6]. This means that it is to the individuals, their beliefs, and their thoughts to which, in the first instance, epistemic norms are applied in order to make their assessment as objective or non-objective, rational, or irrational etc. Longino very vehemently discards this assumption and puts forth a contrary theory that objectivity and justification are fundamentally 'social'. "Objectivity is not, and could not be, according to Longino, a property of individual knowers, for knowers isolated from the productive pressures of social intercourse cannot subject their beliefs to the kinds of testing that is necessary to overcome the limitations of any single epistemic location. Objectivity is thus a social, rather than an individual norm; objectivity is a feature of a properly constituted epistemic community. Longino's view, which essentially broadens general empiricist method to cover societies instead of individuals, is called *social empiricism*"[7]

The feminist movement began to deconstruct this social truth and exposed the deliberate nature of patriarchal power and domination. Therefore the phenomenon of violence against women masquerading as stronghold of culture, is inevitably linked with their objectification and subordination in a patriarchally determined division and hierarchy.

[1]Louise M Anthony, *Embodiment and Epistemology* in Oxford Handbook of Epistemology (Paul K. Moser ed) 465, Oxford University Press, 2005

[2]Louise M Anthony, *Embodiment and Epistemology* in Oxford Handbook of Epistemology (Paul K. Moser ed) 465, Oxford University Press, 2005

[3]Id

[4]Id

[5]Id, 469,470

[6]Id, 470

[7]Id

The further consequence of objectification has been the denial of personhood and/or moral agency to women. Within this frame of reference, violence against women was perceived as a part of cultural discipline or legitimate forms of coercion exercised by man over the body and mind of a woman. Any disobedience or non-compliance with the patriarchally determined standards or norms of behaviour by women justified violence as a part of discipline or legitimate forms of coercion by men on women. It may be observed here that control over the movements of the body, especially in the context of military and in schools has been recognized as a certain mode of shaping the minds of soldiers and children. This has been graphically illustrated by Michel Focoult in his book "Discipline and Punish"[8]. He believes that the mode of being of power is secrecy. The power will be successfully exercised when the person over whom the power is exercised does not realize that he is subject to power. Hence concealment of exercise of power amounts to successful exercise of power. This is especially true in the context of patriarchal power sanctified by the patriarchally determined culture.Focoultobserves, "In every society, the body was in the grip of very strict powers, which imposed on it constraints, prohibitions or obligations. However, there were several new things in these techniques.To begin with, there was the scale of the control: it was a question not of treating the body, (enilasse) 'wholesale', as if it were an indissociable unity, but of working it 'retail', individually; of exercising upon it a subtle coercion, of obtaining holds upon it at the level of the mechanism itself - movements, gestures, attitudes, rapidity: an infinitesimal power over the active body. Then there was the object of the control: it was not or was no longer the signifying elements of behaviour or the language of the body, but the economy, the efficiency of movements, their internal organization;constraint bears upon the forces rather than upon the signs; the only truly important ceremony is that of exercise. Lastly, there is the modality: it implies an uninterrupted, constant coercion, supervising the processes of the activity rather than its result and it is exercised according to a codification that partitions as closely as possible time, space, movement. These methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called 'disciplines'"[9].

Man's power over woman both - her body and her mind has been legitimized by the culture and civilization of society. Thanks to the suffragette movement in the UK led by Emmeline and Christabel Pankhrust, which among other many reasons, presumably led to revision of the system of distribution of social and political powers and freedoms between men and women.

3. International Human Rights Law and Violence against Women

On a careful perusal of Article 1 of the Declaration on Elimination of Violence against Women, it reveals that violence against women has to be understood in its comprehensive dimensions. It includes all forms of violence – physical, sexual, psychological and so on. Article 2 then carries forward the spirit of Article 1 and states that the different manifestations of violence against women recognized in that article are merely illustrative and not exhaustive of the forms of violence that may be perpetrated against women. More importantly, violence inflicted on women is prohibited whether it be perpetrated by the officials of the state or in the privacy of the homes and in society. In other words, irrespective of the sources and causes, violence against women is totally forbidden. It is important to note that violence includes symbolic and psychological forms thereby casting obligation on the states to scrutinize all sources and causes of violence offered as justifications for infliction of violence on women. Article 4 obligates the states to revise its existing laws and customs and social practices followed by its population and to take preventive and curative measures including the use of criminal law and civil and administrative remedies. The article very clearly states that neither religion, nor culture and so on

[8]Michel Faucault, Discipline and Punish, Vintage Books (1995)

[9]Id 136,137

can furnish justification for infliction of violence against women. Thus it will be seen that violence against women is absolutely forbidden.

In addition to the above, the patriarchal culture together with caste based social division and hierarchy contributed to the phenomenon of double discrimination of women. Women may suffer discrimination not only on the ground of their gender but also on gender plus factors. This inter-sectionality is brought about by the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in the context of gender, Convention on Elimination of All Forms of Racial Discrimination in the context of race and Convention on Rights of Persons with Disability in the context of persons with disability. These thematic conventions lay out the perspective within which the status of certain class of human beings, whether it is race, gender or disability has to be taken into account while evaluating possession and exercise of human rights by these classes of humans on the basis of equality. CEDAW has led to the rejection of essentialist conception of women by drawing attention to the social status of different classes of women for e.g. urban and rural women, educated and illiterate women and so on. Therefore while implementing CEDAW the legislative, administrative, social, economic and educational measures have to be suitably tailored, taking note of these different classes of women. These thematic conventions have fundamentally transformed the approach to the study of human rights of women, in that, it rejects the formal concept of equality and demands that human rights of women have to be considered in the defacto situation in which they are placed. Such an approach has a far-reaching implication of strengthening and perfecting the feminist method of de-construction and gives us an accurate and reliable data for revising policies and devising measures to promote gender justice.

4. Paradox of Legal Regulation of Violence against Women

The reforms of the legal system took two distinct forms. Law recognized the right to formal equality between men and women leading to the norm of non-discrimination on the ground of sex[10]. Also, special provisions were enacted to protect women[11], taking note of their biological character and functions[12]. This formal equality did not alter the defacto social reality for women. They remained subjected to the subordinate status and survived on the gracious protection granted by men through special provisions. This is the reflection of the limits of law since law depends for its effective operation on forces beyond its control. In the absence of any social reforms mere normative alterations will not secure the goal of equality in a substantive sense between men and women.

Legal regulation of violence reveals the paradox of the legal system towards the phenomenon of violence. On the one hand the legal regulation of violence against women perceives women as victims of violence perpetrated by man. The assumption on which this legal regulation is based can, at best be described as a charitable one, to say the least. The further assumption is that women are incapable of perpetrating violence thereby denying to them equal moral agency with man. The first assumption undergirds the Declaration on Elimination of Violence Against Women in international law and on the national level, legislation governing sexual harassment. Also, some of the provisions are justified on the ground of a paternalistic conception of protection of women as was section 497 of the Indian Penal Code (IPC) until it was recently declared unconstitutional by the Supreme Court.[13] This section had granted women the exemption from criminal liability in the offence of adultery. The graphic illustration of women being perceived as victims of man's aggressive sexuality and therefore in need of protection

[10] Constitution of India 1950, Articles 14 & 15. *See* also Constitution of United States of America, 14th Amendment.

[11]Indian Penal Code, 1860, Sec 497 furnished one such example.

[12] Maternity Benefit Act for example.

[13]Joseph Shine vs Union of IndiaWrit Petition (Criminal) No.194 of 2017; 2018 SCC OnLine SC 1676

has been furnished by the judgments of the Supreme Court in *Revathi*[14] and *Saumitri Vishnu*[15] cases. The immunity from criminal prosecution accorded to women in the matter of offence of adultery had been perceived as a protectionist measure considered as a 'special provision' authorized by Article 15(3) of the Constitution of India. The conception of a woman as a victim entails two far-reaching implications: (i) that women are always perceived as passive and inactive agents, reason being, the male counterpart, resulting in denial of equality under Article 14 &15 of the Constitution. More fundamentally, it results in denial of equal moral agency in matters of sexuality. (ii)It is a systemic denial of personhood in that, she is not capable of making autonomous choices and being responsible for those choices. In other words, women have no freedom to make their own judgments and are denied the sense of responsibility in making these judgments. Another de-personalizing dimension of Section 497 offence was that the wives were considered to be the property of the husband, access to whose body could be a matter of negotiations on the part of the husband, as his consent could legitimize that access. Justice Chandrachud describes this as husband being the 'owner of wife's sexuality'[16]. It is this archaic and anachronistic perception of women that led the Supreme Court, in *Joseph Shine's* case to de-construct Section 497, IPC and hold it unconstitutional. After noting that in various jurisdictions in common law and in the United States the offence of adultery has been de-criminalized, the court also found that Section 497 runs afoul of the guarantee of equality before law and also denial of equal subjection to law. Furthermore it denies to women equal personhood thereby demeaning her in her own eyes in terms of individuality and dignity which is guaranteed by Article 21 of the Constitution. So any law which prescribes an unjust and an unfair procedure will be violative of right to life and personal liberty under Article 21. Hence insofar as Section 497 violates equality before law and equal subjection to law and undermines her right to equal autonomy and dignity under Article 21, it came to be declared unconstitutional. On the other hand, legal regulation recognizes that women are equally capable of perpetrating violence (sometimes individually and on many occasions by being party to the violent act with man either being abettor of the violence or in executing acts of violence with man, who happen to be her close relatives).

While analyzing violence against women this paradox of the legal regulation has to be kept in view. In addition to the above, in the measures adopted by the Indian legal system to deal with violence against, and by, women - both the strategies of criminal and civil liabilities have been employed. Section 498A of the IPC furnishes an example of criminal liability for violence perpetrated either individually or together with her male close relatives. The graphic illustration of violence by and against women which however is not based on gender is furnished by the on-going trial of Indrani Mukherjee and Peter Mukherjee in the killing of their daughter Sheena Bora.

The Vienna Accord of 1994 and the Beijing Declaration and Platform for Action 1995 have recognized that domestic violence is a serious human rights issue. The United Nations Committee on Convention for Elimination of All Forms of Discrimination Against Women in its General Recommendation No XII of 1989 had recommended that all State parties must take measures for protecting women from violence of all kinds, especially that which is inflicted within the four walls of her domestic house. Violence occurring within the family is a lived experience of many women, but is not very easily visible. The international declarations and conventions governing human rights of women thus obligate the state to adopt measures on a vertical level but more importantly to adopt measures on a horizontal level where discrimination and violence occurs in the domain of social relations in general and domestic relations in particular. The horizontal protection of women's human

[14]1988(2) SCC 72

[15]AIR 1985 SC 1618

[16]Joseph Shine vs Union of India, 2018 SCC OnLine SC 1676, *See* para 64 of Justice Chandrachud's judgment

rights is the toughest challenge confronting the state in the 21st century. The large part of power relations are determined by social and cultural norms and traditions which is at the heart of the religious liberty implicating the concerns for privacy of the home or domestic sphere. Due to the feminist movements the patriarchal nature of the legal regulation was de-constructed as a result of which domestic violence was regulated through a special enactment like the Domestic Violence Act in India. While cruelty by the husband or relatives of the husband is already made punishable under the Penal Code, the Domestic Violence Act was designed to provide some innovative remedies under civil law and to protect women from becoming the victims of domestic violence. The Preamble to the Act says that it is "An Act to provide for more effective protection of rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto". It also clarifies that the Act is broad enough to cover all forms of violence against women, whether it be physical, verbal, sexual, emotional or economic.

In *Harsora vs Harsora*[17], the Constitutional validity of clause (q) of Section 2 was challenged before the Supreme Court. This clause defined the term 'respondent' for the purposes of the statute. The grounds on which the challenge to its validity was constructed were interesting. The word respondent was defined in section 2(q) as under:

"Respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner.

The definition as worded in clause (q) clearly shows that the respondent against whom a complaint can be filed under the Domestic Violence Act must always be a male person unless the complainant is a wife or a female living in a relationship in the nature of marriage.The court evaluated the other definitions in the statute (especially that of domestic relationship, shared household etc) along with the scheme of remedies provided there under and observed that going by the object of the statute, the words 'adult male person' in the definition of 'respondent' is not in tune with, and will frustrate the object of the Act. It also observed that on one hand the amendment in Section 6 of the Hindu Succession Act 1965 has recognized female coparceners in a joint Hindu family, also a 'shared household' could include a household which may belong to a joint family of which the respondent is a member. In the face of all these provisions, the definition of respondent being restricted to an adult male person, the court said, results in a glaring anomaly. Also the court observed that Act is designed to protect women from any kind of domestic violence, irrespective of whether it is perpetrated by a man or a woman herself within the domestic house. This being the object of the statute, the court found that the inclusion of the words 'adult male' in the definition frustrate its object and hence read these words down. Likewise the court observed that the proviso to the definition is also rendered otiose and hence read that down too.

Now the most interesting aspect of Justice Nariman's reasoning in the aforesaid judgment is that the statute enacted by the Parliament dealing with women's rights and obligations should be read as furnishing an integrated perspective. More significantly, the acceptance of equal rights in the context of property would justify a conclusion in respect of civil liability in the context of domestic violence. The requirement of Section 2(q) that the female respondents could be impleaded only when there is a male respondent resulted in the frustration of the object of the Act. Therefore the commitment to equality in matters of property rights would justify equality in matters of subjection to civil liability. This mode of reasoning has the merit of bringing in coherence and consistency in making the laws by

[17]Hiral P Harsora vs KusumNarottamdasHarsora(2016) 10 SCC 165

the Parliament. On a deeper level inconsistency in the statutes will be perceived as discrimination grounded in the Constitutional commitment to equality.

5. Conclusion

After surveying response of the legislature and of the judiciary to violence against women it may be observed that in the first phase, there appears to be an agreement between the judiciary and the legislature that women are in need of protection from men's aggressive behaviour including sexual behaviour. Men were perceived as perpetrators of violence and women were perceived as only the victims of violence[18]. This is duly illustrated by *Saumitri Vishnu* and *Revathi* cases. Even where the legislature intended to rope in women as perpetrators of violence they were seen necessarily as associates of the husband or the "man" as perpetrating the act of violence. This is graphically reflected by the language of Section 498A of IPC or section 2(q) of the Domestic Violence Act. This unified perspective led the Supreme Court to prohibit sexual harassment of women at workplaces. Harassment has also been conceived as one form of violence by the United Nations in its Declaration on Violence Against Women. Verma J. in his judgment in *Vishakha's* case[19] took a novel step of enforcing the international human rights law when it is not in conflict with the fundamental rights provisions in the Constitution, thereby giving subordinate status to the practice of dualism in the context of enforcement of human rights of women. More significantly, Verma J. adopted the recommendations of the CEDAW committee for the purpose of defining sexual harassment. Without going into the details of the definition it may be observed that it seeks to accord protection to women against harassment at any cost without leaving any room for defence for a man who is alleged to have committed sexual harassment. It may be described as a very passionate but not a measured response to violence against women. When in 2013, the Parliament enacted the law[20], it virtually reproduced the law laid down by Verma J. In other words, it is one of such instances where women's interests are protected with great passion and fervour[21].

The second phase of response to violence against women essentially belongs to the judicial initiative working through the doctrine of transformative constitutionalism and the distinction between constitutional morality and popular morality. The Supreme Court perceived section 377 IPC punishing homosexual activity as invidious discrimination and lacking any socially redeeming feature. It was as if the state was advertising its unrestrained potential for violence against homosexual adults in privacy. It also perceived section 497 as an anachronistic or regressive law treating women as property and lacking in any moral agency, giving rise to a perception amongst women that denial of equal moral agency was an insult to her personhood and therefore a form of violence lacking in any rational basis, thereby confirming the thesis that coercive use of force by the state could be justified by atleast minimum rationality. This is one such example. Therefore the Supreme Court's decision in *Joseph Shine* and *Harsora* cases clearly demonstrate that women are not perceived as near victims but they are equally responsible for criminal and civil liability vis-a-vis men. Thus it will be seen that perception of the legislature and the perception of the judiciary in the second phase in respect of the response to violence against women is incompatible with each other. The legislature continues to view women as

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[18] The same thinking is reflected in the Declaration on the Elimination of Violence Against Women

[19]Vishakha vs State of Rajasthan, AIR 1997 SC 3011

[20]Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

[21] Other examples of law's passionate protection are that a statement made by a victim of rape is presumed to be true; Also Section 304B under which if death occurs within seven years of marriage under unnatural circumstances, it is presumed to be dowry death;Some other examples of law's passionate protection, though unrelated to gender are furnished by legislation protecting tenants against landlords or legislations protecting employees against employer.

victims and men as perpetrators of violence whereas the judiciary perceives women as having equal moral agency and as being equally responsible for their acts and omissions as are men.

It may finally be observed here that in the context of matrimonial relationship in general, and mental cruelty as a ground of divorce in particular, there is a very refreshing insight furnished by the reasoning of Chandrachud J. that there cannot be any objective basis on which mental cruelty can be defined. Hence in this context there is no oppressor or oppressed and while deciding the issue of mental cruelty the peculiarities of each matrimonial relationships will furnish a determinate guidance with regard to judgment about mental cruelty. As the Hon'ble Justice observes, "The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife" in contrast to non-Hindu wives as if women professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a"Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on merits, remembering ofcourse the peculiar habits, ideas, susceptibilities, and expectations of persons belonging to the strata of society to which these two belong.All circumstances which constitute the occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that the respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination."[22] Here the court is seen rejecting the stereotype image of "husband" (as oppressor) and "wife" (as oppressed) in any given culture and rather emphasises on a more secular examination for arriving at a finding of mental cruelty.

Thus it is clearly seen that the approaches of the legislature and the judiciary have been far from consistent in dealing with violence against women in India.

[22]Narayan Ganesh Dastane vs Sucheta Narayan Dastane AIR 1975 SC 1534