FINDING THE MASCULINITY IN "NEUTRAL" LAWS

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A feminist critique of family laws and their application in India

INTRODUCTION

One presumption common to all feminist theories is that "gender" is a social construct, i.e. it cannot be determined biologically but rather is learnt through various social and behavioural norms that are present in the society. The institution of family performs an extremely crucial function in understanding the meaning of gender in our society by appropriating different roles and functions to men and women. India, with its rich and diverse cultural heritage, religious beliefs, and customary practices, provides an extremely complex field of personal laws. Family as an institution, especially in India, has always been considered as something so pure and sacred, demanding privacy and freedom from any sort of public scrutiny. Most of the family laws in India, are based on religious texts, which in turn are based on 'divine origins'[1]; thus any sort of criticism towards these laws will always be fraught with risk. However, feminism's principle contribution to the law of family has been to open up this institution to criticisms. By propagating the agenda of "Personal is Political"[2], they seek to question the fairness of a system that has, since its inception, permitted the subordination of some family members over the others.[3]

The matrimonial status of women under Indian family laws has been far from satisfactory. I believe family law has always worked in an extremely regressive manner, denying women of even the most basic rights, including the right of having their own

[1] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims*" Oxford University Press,2011

[2] "An idea suggesting that everything that occurred in the home and had been formerly occluded by the carapace of the private should be a matter of public concern, thus getting the license to critique family laws and domestic violence laws"- Thornton, "The development of feminist jurisprudence" Thornton, Margaret --- "The Development of Feminist Jurisprudence" [1998] LegEdRev 8; (1998) 9(2) Legal Education Review 171

[3] *Katharine* T. *Bartlett*, "*Feminism and Family Law*" 33 *Family Law* Quarterly 475-500 (1999)

individuality or identity, and these laws further influence their status in almost every aspect of their life. Unfortunately, family law in a patriarchal society like India seeks to purport a man's power over the woman and restricts her ability to take actions independently. The aim of this paper is to bring to light and critically analyse, from a feminist perspective, the very hypocrisy of certain family laws that claim to be gender neutral but are inherently gender biased and work towards the disadvantage of women. This hypocrisy is not only seen in statutes but is also evident in judicial discourse. This kind of statutory and judicial bias which is fairly obvious in family law, has made the struggle of achieving gender equality far more strenuous. In this context, the need for feminist theories arises not to bring any changes or development, but to constantly challenge the masculinity of laws. To emphasize on the fact that formal equality isn't sufficient, but we need to look at the underlining reality of inequality that women face in relation to men. To throw light on the need of having substantive equality as well.

THE LANGUAGE DISCOURSE

Family is considered to be a gendered institution, and laws using terms such as 'husband' and 'wife' in their provisions help us grasp the gender- specific legal and social implications of these provisions within matrimonial relationships.[4] I believe that the language of the laws itself, may appear to be as neutral as possible, but in reality it only reinforces the gender inequality that exists in the society. This idea can be supported by the theory of Catherine MacKinnon[5], a radical feminist, who points out that "law sees and treats women, the way men see and treat women". This essentially means that law is written from a male's perspective and thus is masculine in nature. Accordingly, the law does nothing but reinforces and brings to surface, the patriarchal notions that inherently exist, have existed and will continue to exist in the society. We would expect the law to be unbiased because we see it as a force of integration, which keeps the society together, however that is not the case. The law as it is, whether written by judges or in statues, is not gender neutral because the society doesn't see it to be gender neutral, and everybody including women seems to have tacitly accepted this

[4] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims*" Oxford University Press,2011

[5] Catharine A. MacKinnon , "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs: Journal of Women in Culture and Society* 8, no. 4 (Summer, 1983): 635-658.

inequality. Using gender neutral terms such as 'spouse', very superficially tries to disguise the gender inequality underlying the institution of marriage.[6] There are many other provisions in family law as it exists in India, that try to gloss over the fact that women are subservient to men. On critically analysing these provisions, what one realises is that they are only reflective of the society's idea of women as being devoid of any rights, wants or desires of their own. In this context, family laws are like pawns, assisting in the maintenance of patriarchy, that we know exists in every sphere of the society.

The most evident provisions that reiterate this proposition are the provisions regarding divorce laws. Despite having divorce grounds that are common to both men and women, the legal and social consequences faced by each on using those grounds are different. The social standing of a divorced woman is much lesser than that of a divorced man. Society never waits to point fingers at the woman, and often assumes that the woman must have committed some kind of matrimonial fault that led to the divorce. Flavia Agnes in her book, further supports this point by arguing that 'adultery' is a ground for divorce for both men and women[7], however its social and legal implications for the husband and wife would differ.[8] Historically, the practice of polygamy and concubinage were at the time socially accepted, and legally recognised for a Hindu husband. Living an adulterous life was often seen with a sympathetic and humanitarian attitude.[9] While such moral lapses on the part of the husband were ignored by the society, even a single lapse of virtue on the part of the wife is taken far more seriously and may even lead to denial of maintenance or hamper rights to custody of children. [10] Even terms such as 'cruelty' and 'desertion'[11] which may appear to be devoid of any gendered context, actually gain a gendered meaning when used as grounds for divorce. Both these grounds are heavily influenced by stereotypes that exist regarding the role of men and women in a matrimonial relationship, as well as in society in general. When such grounds are used by women then the threshold of evidence is usually less as compared to that of men and judges often give women the benefit of doubt to some extent. The reason for this is simply that the law and the society see men to be more aggressive and thus more prone to subjecting the

[6] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims*" Oxford University Press,2011
[7] Section 12, Hindu Marriage Act 1955
[8] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims."* Oxford University Press,2011
[9] J.D.M. Derret, "*A critique of Modern Hindu Law*" , Bombay: N. M. Tripathi, 1970
[10] D.N. Mitter, "*The Position of Women in Hindu Law*" Inter-India Publications, Calcutta, 1913
See also: *Dwarakabai* v *Prof Mainam Mathews* AIR 1953 Mad 792
[11] Section 13, Hindu Marriage Act, 1955

woman to cruelty or desertion. Women, contrastingly, are seen as weak creatures that can be played by men, and that deserve sympathy and support from the judicial system.

Personal laws have historically been extremely resistant to change as the ideologies that underlie these laws date back to centuries ago. However, keeping the women struggles and the changing society in mind, the laws have tried to adapt but in my opinion they have failed miserably. What they have been able to achieve at most is only formal equality and not substantive, because in my opinion the laws and the society have been immune to the idea of women having independence and freedom from the patriarchal chains. To further illustrate, it can be said that the laws regarding *stridhan* also made a mockery out of a woman's desire to gain independence. What is problematic is the stark difference between the literal meaning of the term and its actual implication. *Stridhan* in a factual sense means property of a woman (*Stri- woman, dhan- wealth/property*), and hence automatically gives rise to a presumption that the *dhan* would be under absolute control of the woman, however that was never the case and women only had limited control. Thus in my opinion, naming the gift or property received by the woman at the time of marriage as '*stridhan*' appeared on the face of it to be something that would safeguard their rights and help them be independent, but actually trivialized the problem even more by reinforcing the fact that women cannot be allowed to hold the property absolutely. It denied them control of what was rightfully theirs. This idea came from the Ancient text *Manusmriti,* [12]Manu writes: "Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence', thus it completely rejected the idea that women can be capable of being independent, let alone getting absolute control over property. Because most of the personal laws derive their origin from historical texts and religious sources, it becomes hard to challenge them, and so changing them is a far cry.

THE REGRESSIVE JOURNEY TO PROGRESS

[12] Manu IX.3: Manusmriti: The Laws of Manu, in Sacred Books of the East 56 (G. Buhler trans. 1886)

Not only are the laws and the way they're written is what is problematic, but often it is the conservative, paternalist and sexist mind-set of judges.[13] It is often argued that "law is so deaf to the core feminist concerns that feminists should be careful of how and whether they resort to law."[14] Catherine MacKinnon points out, what counts as reason will only be a reflection of the way things are in the society.[15] Thus, when judges make laws they do it with the intention of adhering to the highest ideals of fairness and rationality that are present in the society, which unknowingly implies re-enforcing the existing power relations in the society. This argument gets its support from the radical feminist perspective that the state's idea of law, is male in the most feminist sense,[16] and this male point of view, is considered to be the most fair point of view. In an attempt to interpret law in a way that is the most just and rational, the judges actually use law as a tool of dominance and repression against women. This point can be further elucidated through a landmark judgement passed by the Supreme Court[17] , rejecting a man's plea of divorcing his terminally ill wife. While the judgement was clearly an effort by the Court to ensure that the wife is not simply abandoned during her illness, but the Court used this opportunity to deliver a "regressive sermon"[18] on the meaning of marriage in the Hindu society. A few lines from the judgement are as follows:

"*Hindu marriage is a sacred and holy union of husband and wife by virtue of which the wife is completely transplanted in the household of her husband and takes a new birth. It is a combination of bone to bone and flesh to flesh.* ***To a Hindu wife her husband is her God and her life becomes one of the selfless service and profound dedication to her husband.***"

The most obvious feminist response to such a judgement would be that even though the judgement was well meaning, the court by using archaic notions to justify their stance just defied the entire purpose of having a progressive judgement in the first place. The Court is trying to fuse the identity of the woman into that of her husband's and completely rejecting the possibility of her having an identity beyond her matrimonial home. The husband is supposed to her "god", she is expected to renounce all her other duties and obligations that existed before

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[13] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims*" Oxford University Press,2011

[14] Smart, Carol (1989) *Feminism and the Power of Law*

[15] Catharine A. MacKinnon , "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs: Journal of Women in Culture and Society* 8, no. 4 (Summer, 1983): 635-658.

[16] Catharine A. MacKinnon , "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs: Journal of Women in Culture and Society* 8, no. 4 (Summer, 1983): 635-658.

[17] *Vennangot Anuradha Samir v Vennangot Mohandas Samir*, 2015 SCC OnLine SC 1266

[18] https://scroll.in/article/773821/the-husband-is-god-how-indian-courts-endorse-regressive-definitions-of-marriage

marriage, and work solely in service of her husband.[19] The Supreme Court in this judgement is simply trying to promote the idea that being a "devoted wife" for a woman, is her only purpose in life and is her highest virtue. Often when a woman gets married, even if it's in a highly educated society, her identity is solely contingent on someone else's. For example, she is often introduced as "wife of" or "mother of" at events or social gatherings. Women face these kind of situations almost on a regular basis but when one thinks about it, one realises that it is such a prominent display of patriarchy and it's disheartening to see how normal this way of life has become for married women in India. When such gendered stereotypes get judicial sanctions, it in effect promotes injustice and inequity, exactly an antithesis to the very goal of a judicial system.[20]

Case laws in India have shown that judges try to mask this sexist behaviour under the principle of "positive discrimination". In the past, many legislations have been challenged on the ground that they violate the constitutional mandate of right to equality, as their legal consequences are different for men and women. While upholding the validity of these legislations, courts have relied on Article 15(3) of the constitution[21] to defend them on grounds that they favour the rights of women, and are an attempt to set right centuries of discrimination suffered by women. However, a protectionist, paternalist approach of law, cannot always be seen as a favouring approach. Following this approach just brings to light the underlining presumption that women need and want the law to be "masculine" and "protectionist" for their own survival. As Flavia Agnes points out, this is evident from the way the courts have dealt with provisions regarding adultery[22]. Supreme Court has used a paternalist argument to defend these legal provisions which only serve to undermine women's role as equal partners in marriage. In the case of *Yousuf Abdul Aziz* v *State of Bombay*[23], the law of adultery which punishes only the man and not the woman, was challenged as violative of Articles 14 and 15(1) of the Constitution. The Supreme Court upheld the validity of the provision and held that it

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[19] This ideology finds its source in the Manusmriti as well- " *No sacrifice, no vow, no fast must be performed by women apart (from their husbands); if a wife obeys her husband her husband, she will for that (reason alone) be exalted in heaven*".

[20] Saxena, Poonam Pradhan,"Reinforcing Patriarchal Dictates Through Judicial Mechanism: Need To Reform Law Of Succession To Hindu Female Intestates." *Journal of the Indian Law Institute*, vol. 51, no. 2, 2009

[21] Article 15(3) in The Constitution Of India 1949- "(3) Nothing in this article shall prevent the State from making any special provision for women and children"

[22] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims"* Oxford University Press,2011 Adultery is a ground for divorce under S.13 HMA, 1996, and also a criminal offence under section 497 of the IPC.

[23] AIR 1954 SC 321

merely grants a protection to women, and has upheld the same principle in many other judgements as well.[24] Therefore, more than anything, the Court's feel that it is their duty to protect the women because maybe they are too weak to protect themselves, or lack the strength the safeguard their own rights.

This kind of empathetic behaviour of judges towards women is heavily prevalent in the Indian society. The way in which maintenance laws have been approached by the judiciary has also changed over the years. Initially, the law in India was clear on the point that only virtuous and moral women are entitled to maintenance. This essentially meant that women who indulged in unchastity, or immoral acts including cruelty or desertion, were not worthy of getting any maintenance from their husbands.[25] However later, courts were seen adopting a compassionate approach towards women who were the accused ones in matrimonial proceedings. It is now an acceptable judicial standard that a woman is entitled to maintenance notwithstanding any matrimonial fault she may have committed.[26] Thus, maintenance should be made available to the woman despite her conduct in the marriage[27]. Court have taken an even more liberal view by holding that a women is entitled to maintenance even if she continues to "live in adultery" after getting the divorce.[28]

When it comes to provisions and judgements giving special treatment to women, feminist legal theorist are often criticised for being accepting of them without much challenge. Having struggled to be accepted first as "persons" worthy of having rights and laws favouring them, the next struggle is then to fight for treatment equal to men. If such provisions are accepted and normalised, then this implies measuring women's equality to a masculine standard defined by law. Therefore, first legitimizing the masculine nature of law, and secondly, using it as a standard to derive notions of equality. Such instances have led to a division in the equality camp, one side is arguing for equality for women in comparison to men, while the other side argues for the right of women to be treated as free as men, which implies

[24] *Sowmitri Vishnu* v *Union of India* AIR 1958 SC 1618, *Revathi* v *Union of India* AIR 1988SC 835
[25] *Sachindra* v *Barmmala* AIR 1970 J&K 150
[26] Flavia Agnes, "*Family Law Volume 2: Marriage, divorce and matrimonial litigation*" New Delhi: Oxford University Pres,2011
[27] *Dwarkadas Gurmukhidas* v *Bhanuben* AIR 1986 Raj 13
[28] *Sanjeev Kumar* v *Dhanya* II (2008) DMC 19 Ker

the freedom to be themselves- ignoring all biological differences and just equality in all its simplicity.[29]

CONCLUSION

Most of the family laws and judicial decisions are a reflective of the value system which prevailed in England centuries ago, wherein women were treated as property of the husband. For instance, it is argued by feminists that the provision on adultery "does not recognize the role of the married woman in the sexual act as she was viewed only as a passive object or a mere chattel."[30] While India is considered to be one of the most progressive and developing countries in the world, it is nothing but abhorrent that these archaic notions of treating women as devoid of any rationality or having any mind of their own, just like any physical object, are still followed. The fact that in the 21st century, which is often referred to as the century of women, the Indian Judiciary and legislatures still think of women to be weak and fragile that need protection from men, and treat women as mere commodities in the matrimonial relationship, is appalling and demeaning to say the least. By still keeping these provisions alive and refraining from adopting a paternalist stand rather than adopting an "equalist" stand, the judiciary is shamelessly undermining the struggles of women all around the world that aim to end this kind of blatant discrimination.

I believe the role of feminist theories in such a scenario is not to fight for a change, but rather to make people conscience of the gender differences that exist. The issue isn't about whether women should be treated as equal to men, or whether they should be treated as individuals, not being defined by some masculine standard. In order to answer these questions, they first have to acknowledge the fact that gender disparities in our current family law system exist, which get their source from religion, history and culture, and further use it to form theories that challenge them. These theories can then further translate into activism, politics and mass struggles. [31] Bringing reform in law is a much latter step, before that these theories

[29] Persadie, Natalie Renée. *A critical analysis of the efficacy of law as a tool to achieve gender equality*. University Press of America, 2012.
[30] Flavia Agnes, "*Family Law Volume 1: Family Laws and Constitutional Claims*" Oxford University Press,2011
[31] Persadie, Natalie Renée. *A critical analysis of the efficacy of law as a tool to achieve gender equality*. University Press of America, 2012.

should be used to challenge claims like formal equality, to challenge the institutionally male thinking of the state, and to challenge laws- like the various family law provisions such as divorce, maintenance, inheritance- that deprive them of their autonomy and control.