

Conjuality, Property, Morality and Maintenance

FLAVIA AGNES

Indian matrimonial statutes do not provide for division of property upon divorce and for most women the right to maintenance forms the central core of their matrimonial dispute. During legal contests the focus is on the husband's "obligation" and the wife's "need" but situated within the patriarchal order, the right to maintenance is pitted against issues of sexuality and "sexual purity". The right also comes into conflict within the mandate of a monogamous marriage under the Hindu Marriage Act. Even if the theory of property distribution based on the model of equality is accepted, women's needs and dependence will not cease since marriage in India continues to be an unequal partnership with gendered roles. Therefore, though maintenance signifies dependency and reduces the wife to a subordinate position, divorced women are justified in claiming it.

This article examines the economic rights of women within marriage. The four basic concepts which are invoked while determining economic entitlements of women at the time of divorce are: "title", "fault", "need" and "contribution".

The matrimonial laws of most countries have adopted the principle of "division of matrimonial property" at the time of divorce which abandons the three earlier concepts of title, fault and need – and relies primarily upon "contribution". It takes into consideration a woman's non-economic contribution in acquiring assets during the subsistence of a marriage.

In India we continue to follow the old English system of "separation of property" where rights are based on "title" or at the most, upon economic contribution. Within these constraints, women's economic rights revolve around the right of maintenance. This premise is based on "need" and "fault". Since this is the only provision for economic claims within marriage, it is highly contested. A wide range of issues surface during legal contests. The important ingredients are the husband's "obligation" and the wife's "need" but situated within the patriarchal order, the right of maintenance is pitted against issues of sexuality and "sexual purity". Within pluralistic traditions and customary practices which validate "relationships in the nature of marriage" the right of maintenance comes into conflict within the mandate of a monogamous marriage under the Hindu Marriage Act (HMA), 1955.

The claims of women which are situated within these diverse premises are examined here.

Conjuality and Matrimonial Property

When we examine the economic entitlements which arise out of a matrimonial relationship, we are confronted with a glaring void in the Indian matrimonial statutes which do not provide for division of property upon divorce. Hence, fear of poverty, destitution or lowering of economic standards haunt most women during divorce proceedings.

The husband is perceived as the primary "breadwinner" of the family, and in order to facilitate this process, a woman is expected to sacrifice her career and dedicate herself completely to the task of looking after the well-being of her husband. Within the prevalent patrilocal tradition, marriage also results in migration for women, which, in turn, may necessitate resignation from a permanent job. A woman is also expected to be the homemaker with additional responsibilities of childbearing and childrearing. In order to fulfil these obligations, most women may have to opt out of a secure job either permanently or for a limited number of years until these demands become less taxing. Even when she is required or permitted to be gainfully employed, it would mainly

Flavia Agnes (flaviaagnes@gmail.com) is a women's rights lawyer and the Director of Majlis which provides legal help to women.

be to augment the family income, and her earnings are treated as supplementary income of the family.

There are instances where the courts have penalised a woman for pursuing her career at the cost of her primary role as the caretaker of the family, as this act in itself can be construed as cruelty which is a ground for divorce.¹ At times women have to choose between remaining married or keeping their job. This is a concern confined not only to the private domain of marriage and family, but one which spills over into the public domain of employment, where until recently women were expected to tender their resignation at the time of marriage or during the first pregnancy.² Though the situation has improved a great deal in recent years in the public sector, within the private sector employers may still force women to resign rather than pay them maternity benefits or provide crèche facilities. There is constant tension between the dual roles of a woman as homemaker and wage earner within the sharply divided realm of the "private" and "public" spheres of women's lives and requires a fine balancing act to cope with both. This tension is linked to their assigned roles within marriage; men are spared these tensions as the primary breadwinners of the family.

Ironically, a woman's role as homemaker has no economic value attached to it. Women's contribution to the domestic household during the subsistence of their marriage does not get any recognition under the matrimonial statutes. India follows the common law regime of "separation of property". Under this notion, property acquired by the husband is treated as his exclusive property. A wife does not acquire any right, title or interest in the assets acquired by the husband during the subsistence of the marriage. Since marriage is not viewed as an "economic partnership" a woman is not entitled to claim division of property at the time of divorce. Her contribution in creating these assets by performing domestic chores is not considered as a relevant factor.

If the husband dies intestate, the widow is awarded a status no higher than that of the children, thus completely ignoring her contribution to the household and family in the form of unpaid work. She is treated as a "beneficiary" and can be willed out of his estate, if the husband so desires.

The only provision under the matrimonial statutes which addresses the issue of property division is Section 27 of the HMA which is clad in quaint and obscure language: "Property presented on or about the time of marriage which may belong jointly to both the husband and the wife". Hence some courts have held that property acquired subsequent to marriage by the spouses on their own and which is held jointly by them would not fall within the purview of this section. In *Kamalakar Ganesh Sambhus vs Master Tejas Kamalakar Sambhus*³ even though the wife established that she had contributed half the amount towards the construction of the house property, the Bombay High Court held that this could not be the subject matter of an order under Section 27 and set aside the order of the family court on these grounds.⁴ A woman can claim a share in property which is purchased in their joint names as per the rules governing general property laws which foreground economic contributions.

The right of residence in the matrimonial home is protected by the recently enacted Protection of Women from Domestic Violence

Act, 2005 (PWDVA). While this is an important development, it does not provide any solace to a woman who wishes to opt out of the marriage. There is no concept such as a "deserted wife's equity" or "constructive trust" which are important premises of English matrimonial law. By introducing these innovative concepts, in the absence of a statutory law, an English jurist, M R Denning was able to protect the rights of residence of deserted wives in their matrimonial homes. In a series of cases ranging from the 1940s till the 1970s, he was able to protect the rights of deserted wives not only against their husbands but also against his creditors.

For instance in 1962 in *Hine vs Hine*⁵ he had ruled that family property had to be treated differently from other forms of property and the judge has the discretionary power to reallocate property rights between the parties. The discretion transcends all rights, legal and equitable, and enables the court to make such order as may be fair and just. In *National Provincial Bank Ltd vs Ainsworth*⁶ he held that the bank could not claim possession against the wife who was in possession of the matrimonial home. He ruled that since the wife has a right to remain in the matrimonial home by a notion of constructive trust, it is unlawful for the husband to enter into any agreement designed to turn her out.

Under the Indian statutes, divorced women are not protected from eviction by landlords. A Supreme Court ruling in *B P Achala Anand vs S Appi Reddy*⁷ makes this amply clear despite its positive proclamations. The judiciary broke new grounds by invoking the English concept of "deserted wife's equity", and awarded legal recognition to the woman's right of residence by placing her in the position of a sub-tenant. It was held that she has a right to defend herself in proceedings initiated by the landlord for eviction which would deprive her right of possession of the matrimonial home. The court also expanded the scope of Section 27 of the HMA and ruled that it can be invoked to pass orders regarding the separate property of the parties or even the tenanted premises. The decision amounted to judicial law-making and the court emphasised that it was using this power while responding to the demands of social and gender justice, and in order to "do complete justice". But all these proclamations did not benefit the woman concerned as she had already been divorced while the case was pending. Since the terms of divorce settlement did not contain a provision regarding the dwelling home, the apex court ruled that she had no right to the matrimonial home.

This position was affirmed by the Supreme Court in *Ruma Chakraborty vs Sudha Rani Banerji*,⁸ where a divorced woman and her children were evicted from their home which was rented in the husband's name on the pretext that their right of tenancy was terminated with the divorce since this right was not negotiated during the divorce. The apex court held that although the right to matrimonial home exists for a deserted woman, the same cannot be extended to a divorced woman.

The trend followed by most countries runs counter to the position adopted by our Supreme Court in the cases discussed above. The continental law or the civil law of Europe introduced in the 19th century is based on the premise of "community of property". Under this, upon marriage, the property of the spouses acquired after marriage is deemed as their joint property, with equal powers

of maintenance, management, improvement and disposal. Upon divorce, the property is divided equally between them.

Most countries which had followed the common law tradition of "separation of property" inherited from the English legal system during the colonial rule have gradually accepted the premise of "differed community of property". According to this, the property remains separate until divorce with each spouse having the power to manage their respective property. But upon divorce, the property acquired during marriage is deemed as "matrimonial property" and becomes divisible on an equal basis irrespective of title or financial contribution. The United States, Canada, Australia, and New Zealand are examples of this shift which occurred in the 1970s when "no fault" divorce was introduced into the matrimonial laws. Even the English matrimonial law has adopted this premise. Initially the courts started awarding one-third of the assets to the wife. Gradually, the principle of equal distribution is being accepted under the English law.

As per this notion, a spouse does not have to prove "matrimonial fault" such as cruelty, adultery or desertion and divorce can be granted on the basis of "breakdown of marriage" even when the other spouse is not guilty of a matrimonial fault. As this concept would cause great economic hardship to innocent wives, it was deemed necessary to introduce the notion of division of property.

Even non-western countries such as Singapore, Malaysia, Iran, Fiji, and Tanzania have adopted the system of division of property or at least recognised the woman's unpaid domestic labour. In this regard, India (and the south Asia region as a whole) lags far behind. So even while there have been attempts to introduce the notion of "no fault" divorce through judge made laws, there has not been any attempt to introduce the concept of division of property.⁹ What is rather surprising is that the Law Commission's Report 219 (March 2009) which has recommended introduction of "no fault" divorce contains no suggestion regarding division of property. The recommendation appears to have been made in response to popular demands, without application of mind as to the adverse consequences it would have upon innocent wives.

In the Indian context, despite its derogatory connotations, the discussion over economic rights of married women must be situated within the notion of "maintenance" as it remains the only avenue for women to stake their claim to financial entitlement upon divorce. Within Indian family law, women's economic claims arising out of a marriage contract are confined to recurring monthly maintenance or a lump sum settlement or alimony at the time of divorce. Often, settlements are negotiated through the process of mediation. In case the husband is desperate to obtain a quick divorce (in order to remarry) the wife may be able to negotiate a favourable financial settlement. On the other hand, the husband may twist her arm by pressing for joint child custody or increased rights of access to the child. Afraid of the adverse consequences of such an arrangement, the wife may forgo financial claims in order to negotiate exclusive custody of the child or limit his access rights to the child.

Constitutional Claims and Maintenance Rights

As a women's rights lawyer, one is often confronted with a provocative question – within the gender neutral language of matrimonial laws which refers to the "husband" and "wife" as

"spouses" how do we locate the specific claim of women to maintenance? I concede that "maintenance" signifies dependency which has no place in the gender neutral terminology of modern divorce theories. It is a need-based approach which reduces the wife to a subordinate position and does not recognise her as an equal partner in marriage. But we must also accept that despite the terminology marriages continue to be partnerships based on unequal premises. The roles, responsibilities and obligations within marriage are gendered. Mere change of terminology does not transform relationships of inequality into egalitarian partnerships. As per the constitutional mandate equality can only be between equals. Treating those who are not equals as equals only serves to widen the disparity between the two sections.

The provision of maintenance is crucial to women who are in conflict marriages and to deserted and destitute women. Although maintenance can be claimed under the personal laws of the parties, most poor and destitute women opt to claim them under the summary proceedings available under Section 125 of the Criminal Procedure Code, 1973 (CrPC). This provision is a beneficial social legislation aimed at preventing vagrancy and delinquency.

The right of a woman to maintenance needs to be located within citizenship claims enshrined in our Constitution. It is grounded within the constitutional paradigm of ensuring social justice. It is reflective of a social obligation which the state casts upon economically stronger members of the family to provide shelter and sustenance to the weaker members, i.e., women, children, the elderly and the disabled. The provision for additional safeguards and special privileges for disadvantaged groups is grounded in Article 15 (3) of our Constitution. This was affirmed by the Supreme Court in *Captain Ramesh Chandra Kaushal vs Veena Kaushal*.¹⁰ The court commented that it is specially enacted to protect women and children and falls within the constitutional ambit of Article 15(3).

Within the historical origins of the institution of marriage based on a patriarchal paradigm, as discussed above, for a vast majority of women marriage results in economic dependency. It is in this context that statutory law and judicial interpretations must lean in favour of destitute women and vulnerable children by moving away from the rubric of formal equality of Article 14 towards substantive equality guaranteed under Article 15(3) within the constitutional scheme, in order to set right a historical wrong.

For most women, the right of maintenance forms the central core of their matrimonial dispute. It is far more easier to come to an amicable settlement regarding divorce and custody while maintenance remains a contested question.

Maintenance and Morality

Securing an order of adequate maintenance can be an extremely humiliating experience as a high degree of sexual morality surrounds the question of maintenance. Curiously, the core of this economic dispute does not revolve around questions of financial arrangements of the family unit, but hinges upon issues of sexual mores. In the context of unequal power relations prevailing within marriages, women's economic rights are determined in

the context of these codes. The morality dictates of a patriarchal marriage often get entangled in the economic claims.

Allegations of adultery and immorality can constantly be hurled against women. This can extend further to a denial of the marriage itself and consequently to the legitimacy and even paternity of the children. Stipulations such as those contained in clauses 4 and 5 of Section 125 of CrPC also contribute to this process by linking maintenance to sexual morality:

(4) No woman shall be entitled to receive an allowance if she is living in adultery.

(5) On proof that any wife (in) whose favour an order has been made under this section is living in adultery...the magistrate shall cancel the order.

This stipulation provides the armour for husbands to entangle women in vicious and dilatory litigation over a pittance of maintenance. A careful scrutiny of reported cases in any law journal would reveal the extent to which allegations of sexual promiscuity are made to subvert women's claims. To give an example, the *Divorce and Matrimonial Cases* (DMC) (a popular journal widely relied upon by lawyers practising matrimonial law) in Volume I of 2001 reported around 45 cases under the title "Maintenance". In almost half of these cases, sexuality and morality were the core issues of contest.

This challenge on grounds of sexual purity entangles women in protracted litigation despite Section 125 of the CrPC being a summary provision. After the first round of litigation in the trial courts, these cases were appealed in the higher courts, and only thereafter merited reporting in the law journal. Hence, they reflect only the tip of the iceberg. In each of these cases the women were assaulted and driven out. Most of these cases also contained allegations of dowry harassment. But none of these women had filed a criminal complaint under Section 498A (cruelty to wives) of the Indian Penal Code. All they did was file an application for maintenance, which led to the husbands lashing out with allegations of sexual promiscuity.

The layered and multiple contexts through which sexual morality surfaces, as per the norms of patriarchy, serve only one end: to challenge the legitimacy of women's claims. Scanning through the judgments, one can see a positive trend emerging, where the courts have upheld the women's claims and disallowed the husbands' contentions. But despite this change, clauses 4 and 5 of Section 125, CrPC provide the scope for husbands to engage destitute and deserted women in protracted and humiliating litigation. The false and frivolous interventions entangle women in circuitous legal rigmaroles which are time-consuming, financially draining and emotionally charged.

Concubines, Mistresses and Maintenance

Hindu marriages were rendered monogamous by the enactment of the Hindu Marriage Act in 1955. But this mandate of monogamy can be flouted with impunity by husbands. To add insult to injury, during litigation, the fact of a bigamous marriage can be used to defeat women's claims. This plea is advanced so routinely, that the Supreme Court in *Vimala vs Veeraswamy*¹¹ was constrained to hold that when a husband pleads that the marriage is bigamous, he would need to provide foolproof evidence of the previous

marriage. In a similar manner, the Bombay High Court dismissed the plea of bigamous marriage in *Rajlingu vs Sayambai*¹² as a mere afterthought. It is strange that matrimonial misconduct or "guilt" can be flagrantly invoked by a husband to defeat the woman's economic claim, without any adverse criminal or civil consequences visiting him during court proceedings. This type of flouting of a legal mandate and its subsequent invocation to gain financial edge against a vulnerable person can take place only within a blatantly sexist social order.

Despite some progressive interpretations and innovative legal maxims, the path to justice has not progressed in a linear trajectory. There is a great deal of judicial latitude which allows contradictory verdicts to emerge on the same issue, not just between various high courts but also within the same court. In the Bombay High Court ruling delivered by justice M H Kania in 1976 while deciding the rights of a woman in a bigamous marriage, the judge held that since the Hindu Marriage Act is a social legislation, it could not have been the intention of the legislature that even in a case where a Hindu woman was duped into contracting a bigamous marriage, she should be deprived of her right to claim maintenance.¹³

In *Vimala vs Veeraswamy*,¹⁴ the Supreme Court held:

Section 125 CrPC is meant to achieve a social purpose. The objective is to prevent vagrancy and destitution. When an attempt is made by the husband to negate the claim of the neglected wife by depicting her as a kept mistress on the plea that he was already married, the court insists on strict proof of the earlier marriage. A provision in the law which disentitles the second wife from receiving maintenance from her husband, for the sole reason that the marriage ceremony, though performed in the customary form, lacks legal sanctity, can be applied only when the husband satisfactorily proves the subsistence of a legal and valid marriage. This is so particularly when S(ection)125 CrPC is a measure of social justice intended to protect women and children. In the absence of clear proof that the respondent is living with another woman as husband and wife, the court cannot be persuaded to hold that the marriage duly solemnised suffers from any legal infirmity.

In 2004, in a landmark ruling in *Rameshchandra Daga vs Rameshwari Daga*,¹⁵ the Supreme Court upheld the maintenance rights of another woman in a similar situation. The ruling was delivered in an appeal filed by the husband against the judgment of the Bombay High Court. The husband, a widower, had married Rameshwari who had obtained a customary divorce (*chor chittee*) through a divorce deed. The wife alleged that this document was shown to the husband prior to the marriage and he had accepted its validity. Later, when disputes arose and the wife was driven out of the matrimonial home, she filed for judicial separation and claimed maintenance. During these proceedings, the husband denied the marriage on the ground that the woman had not been formally divorced. Rejecting the plea, both the Family Court at Mumbai as well as the high court had upheld the wife's and her daughter's right of maintenance. In the final verdict, the Supreme Court upheld the woman's plea that the husband, an advocate, was aware of the customary divorce at the time of his marriage. Further the court chastised him for denying the paternity of his daughter.

"The facts of this case tell the tragic tale of an Indian woman, who having gone through two marriages with a child born to her, apprehends destitution as both marriages have broken down", the judges commented compassionately. Further the Supreme

Court accepted that Hindu marriages, like Muslim marriages, were bigamous prior to the 1955 enactment. There was also a tacit acceptance that the ground reality has not changed much since the enactment. So though such marriages are illegal as per the statutory provisions of the codified Hindu law, the Supreme Court ruled that they are not "immoral" and hence a financially dependent woman cannot be denied maintenance on this ground.

In stark contrast is the Supreme Court ruling in 2005, in *Savitaben Somabhai Bhatiya vs State of Gujarat*.¹⁶ Justice Arijit Pasayat and Justice S H Kapadia held that however desirable it may be to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 CrPC, there is no scope for enlarging it by introducing any artificial definition to include a woman not lawfully married in the expression "wife". The court further commented that it is inconsequential that the man was treating the woman as his wife. It is the intention of the legislature which is relevant and not the attitude of the party.

A judgment of the Allahabad High Court conveys the extent of humiliation a woman goes through during such litigation:

If the man and woman choose to live together and indulge in (to) sex, no marital status can be conferred automatically by their so living upon such a woman. She is not entitled to the legal status of a wife in the eyes of law and society. Law and society treat such women either as concubine or a mistress....The two may agree to live together to satisfy their animal needs. But such a union is never called a marriage. A woman leading such a life cannot be bestowed with the sacrosanct honour of wife. No marital obligations accrue to such a woman against her husband. Such a wife must be termed as an adulteress.¹⁷

While comments about the high moral standard may appear salutary, it seems that the price for immorality is to be paid only by the woman, while the man is left free to exploit both women.

Pluralistic Traditions and Harmonious Constructions

The advantage of the mandate of "legal monogamy" lies with the husband as he can escape from the economic liability of maintaining his wife on the plea that the marriage suffered from a legal defect or lacked legal sanctity. Since ancient Hindu law and customary practices validated the institution of concubinage, even in present times, the plea that the woman concerned is a concubine or mistress and not the wife can be advanced with ease in legal arguments, as can be observed from the various rulings discussed above. The fact that husbands have taken undue advantage of and grossly misappropriated this mandate is exemplified by the volume of case law on the subject. An oft invoked legal ploy is to term the woman the domestic maid or a mistress and not the "wife" with rights and entitlements.

After the Supreme Court ruling in *Rameshchandra Daga vs Rameshwari Daga* it was presumed that it would no longer be possible for a Hindu husband to escape from the liability of maintaining his wife on the plea that the wife is not formally divorced from her previous husband or that the woman is his concubine since his previous marriage is subsisting. But the subsequent ruling in *Savitaben Somabhai Bhatiya vs State of Gujarat* has again rendered the situation ambiguous.

In this context, one needs to elaborate on two recent judgments delivered by the Delhi High Court, reported in 2008. These judicial pronouncements have attempted to cross the stumbling

block posed by the stipulation of monogamy under Section 5 of the HMA by invoking innovative legal maxims to protect the rights of women.

In the first case, *Suresh Khullar vs Vijay Kumar Khullar*,¹⁸ while contracting the present marriage, the husband's first marriage was dissolved by a court of law. The wife was innocent and oblivious of the fraudulent circumstances under which the husband had obtained an ex parte decree of divorce against his first wife. After a few months of her marriage, the woman was driven out of the matrimonial home. Thereafter, the husband's ex parte decree of divorce was set aside on the ground of fraud and through this legal incident, Suresh Khullar's marriage was rendered bigamous and invalid. She filed a suit for damages against the husband and his first wife on the grounds of fraud and cheating, which was decreed by a civil judge. While upholding the right of the woman, the court with respect to Section 18 of the Hindu Adoption and Maintenance Act, 1956 (HAMA), held as follows: While interpreting a statute, the courts may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. The court invoked the legal maxim *construction ut res magis valeat quam pereat*, i.e., where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. The court commented that if this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. It was held that for the purpose of claiming maintenance under Section 18 of HAMA, the woman should be treated as the legally wedded wife.

The second ruling was pronounced in *Narinder Pal Kaur Chawla vs Manjeet Singh Chawla*.¹⁹ The wife had approached the court for maintenance under Section 18 of HAMA in 1997 and pleaded that her husband had duped her by suppressing information of his earlier marriage. The couple had lived together for 14 years and had two daughters. The husband pleaded that since his earlier marriage was valid and subsisting, his marriage with Narinder Pal Kaur was void. After a prolonged and contentious litigation, she was able to secure an order of interim maintenance of Rs 1,500 every month. But when the case was finally decided in 2005, the trial court dismissed her petition on the ground that she could not be treated as a "Hindu wife" under Section 18 of HAMA as she did not have the status of a legally wedded wife. However on appeal, the Delhi High Court upheld the right of the wife and held that even if the woman cannot be treated as a "Hindu wife" she is entitled to a lump sum settlement by way of damages.

It appears that women who were deprived of their status and rights through the mandate of monogamy introduced by the HMA had to suffer for 50 years before some recognition could be awarded to them. The PWDVA appears to have transformed the concubines of yesteryears into present day cohabitees. Their right to protection from domestic violence and rights of maintenance and residence have been awarded statutory recognition. While some may dismiss the term "cohabitee" as a western or urban phenomenon, this term can now be invoked to protect the rights

of thousands of women, both urban and rural, who were earlier scoffed at as “mistresses” or “keeps” in judicial discourse because of some technical defect in their marriage. The PWDVA does not clearly prescribe whether the new term “cohabitee” will safeguard the rights of women who were earlier denigrated as concubines and mistresses. That is left to judicial interpretation. But it helps to bring the debate to a newer plane.

Jurisprudential Questions and Tools of Interpretation

Confronted with contradictory viewpoints regarding the criterion for determining the “legislative intent” of a beneficial provision, what are the crutches that trial court judges have at their disposal while delivering “constitutional justice”. Justice A K Sikri and justice Aruna Suresh attempt to provide an answer:

Where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than the one which would put hindrances in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.²⁰

In this tussle between the old world, feudal value systems reflected in the ancient Hindu law – the law of the Smritis alongside pluralistic traditions validated by customs at one end, and the newer statutory provisions of the modern codified Hindu law at the other – what are the avenues for harmonious constructions of legal principles? How do we revisit the provisions of the ancient Hindu law in the context of its modern day distortions, within the statutory framework of contemporary Hindu law, while delivering justice? The same bench, comprising Justice Sikri and Justice Suresh, has provided certain tools of interpretations in this respect:

The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. There is clear evidence to indicate that the law of maintenance stems out of the secular desire and so as to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Organically and originally the law itself is irreligious. Its fountain spring is humanistic. In its operational field all though it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.²¹

Beyond protection of individual rights, the courts also have a mandate to evolve the science of jurisprudence as it was brought to our notice by Chief Justice S B Sinha, justice Ramesh Madhav Bapat and N V Ramana of the Andhra Pradesh High Court in the following words:

The interpretation of law is not merely for the determination of a particular case but also in the interest of law as a science. As such, interpretation of law must be in accordance with justice, equity and good conscience, and more so, in furtherance of justice. If the court *prima facie* comes to the conclusion that the plaintiff/petitioner is entitled to interim maintenance, it can award interim maintenance in the interest of justice, without being fettered by orthodox prejudices, by showing liberal readiness to move with times.²²

This call to move with the times and blend the ancient with the modern in pursuit of justice is the call of duty.

The judicial oath mandates this. The primary aim of the courts is to “do justice” as justice P N Bhagwati and justice Ranganath Misra (subsequently both justices became the Chief Justices of India) succinctly point out:

The role of the court is not that of silent spectator or of a passive agency. When a dispute is brought before the court where maintenance of a neglected wife or a minor child is in issue, the court must take genuine interest to find out the truth of the matter. If the magistrate had asked proper questions to the witnesses when they were before him and deposing about the marriage, the relevant evidence would have come up before the court. It was the duty of the lawyer appearing for the appellant also to have played his role properly at the right time.²³

Due to this judicial and procedural lapse, a case for a pittance of maintenance, filed in 1971 had to be sent back from the Supreme Court to the magistrate’s court for retrial in 1985.²⁴

Within this framework of the call of duty and judicial mandate, I must invoke the framework provided to us in 1978 by yet another bench of the Supreme Court comprising legal luminaries, Justice V R Krishna Iyer and Justice D A Desai:

The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.²⁵

Conclusions

While discussing the opposing concepts of “need” and “contribution”, we must try to understand the theoretical underpinnings of these concepts. While need presumes dependency, contribution presumes equality. While lamenting the fact that we do not subscribe to the theory of “division of property” at the time of divorce and while discussing the economic entitlement of maintenance which is “need” based, it is not my argument here that an equality model of marriage as a partnership would protect women better. Women’s needs and their dependency will continue even when we accept the theory of property distribution based on the model of equality. I am arguing not for equality under Article 14 of the Constitution but for additional protections and economic security in terms of matrimonial assets under Article 15 (3) of the Constitution. I am relying upon the comments of Martha Fineman, a feminist legal scholar in support of my arguments. In the context of equal distribution of property in the US she explains:

The material circumstances of divorcing women and children are being detrimentally ignored by supplanting a focus on ‘contribution’ as the primary distributive concept. The ascendancy of ‘contribution’ may represent a nice neat instance of conceptual progress to legal academics and law reformers, but for many divorcing spouses, as well as the practising professionals to whom they turn for advice, adverse material circumstances, and the needs they generate, have not been left behind.²⁶

She comments that one source of controversy about property distribution rules is the existence of two competing and perhaps incompatible and unrealistic, political visions of contemporary marriage. The first is the more modern view that marriage as an

institution has been transformed so as to be more consistent with formalistic notions of equality between the sexes. The second is the more traditional policy stance that the family is the appropriate perhaps solitary, institution to resolve the problems of dependency or "need" that inevitably arise in the context of families. Highly sceptical of the "contribution" model which is based on the assumption that marriage is a partnership between equals, she argues for a "need" based framework.²⁷

Equality standards in the distribution of property at a conceptual level may be linked to broader ideals of placing equal value and promoting freedom of choice in marriage roles. Making

equality the ongoing concept of underlying divorce may be considered part of a series of conscious symbolic choices about how best to ensure a more just society. But when equality rhetoric is translated into specific rules governing distribution of property, the results must be measured and assessed in more than symbolic terms. Symbolic expression may be important, but Fineman argues that it must be ensured that when translated into legislation that has a direct impact on the lives of many people, the results also meet the standards of fairness and justice.²⁸

I end with a similar approach of cautiousness and scepticism and urge that this must reflect in our campaigns for law reforms.

NOTES

- 1 See the ruling in *Suman Kapur v Sudhir Kapur II* (2008) DMC 774 SC where the Supreme Court held pursuing a career and neglecting the family amounts to cruelty on the part of the wife.
- 2 Even public sector undertakings followed this policy which was challenged in the landmark case *Air India vs Nergesh Meerza* AIR 1981 SC 1829 which is popularly known as the airhostess case.
- 3 AIR 2004 Bom 478.
- 4 But after the Supreme Court ruling in 2004 in *B P Achala Anand vs S Appi Reddy I* (2005) DMC 345 SC (discussed later), the situation seems to have substantially changed and it is now possible to claim division of joint property acquired subsequent to the marriage during matrimonial proceedings.
- 5 3 All ER 345 at 347 F.
- 6 [1965] 2 All ER 472, HL.
- 7 I (2005) DMC 345 SC.
- 8 AIR 2005 SC 3557.
- 9 See the Supreme Court rulings in *V Bhagat vs D Bhagat* AIR 1994 SC 710 and *Romesh Chander vs Savitri I* (1995) DMC 231 SC.
- 10 AIR 1978 SC 1807.
- 11 (1991) 2 SCC 375
- 12 I (2007) DMC 396 Bom
- 13 *Govindrao vs Anandibai* AIR 1976 Bom 433.
- 14 (1991) 2 SCC 375.
- 15 I (2005) DMC 1 SC.
- 16 AIR 2005 SC 1809 : I (2005) DMC 503 SC.
- 17 *Malti vs State of Uttar Pradesh I* (2001) DMC 104 All.
- 18 I (2008) DMC 719 Del.
- 19 I (2008) DMC 529 Del.
- 20 *Suresh Khullar vs Vijay Kumar Khullar I* (2008) DMC 719 Del.
- 21 *Narinder Pal Kaur Chawla vs Manjeet Singh Chawla I* (2008) DMC 529 Del.
- 22 *P Srinivasa Rao vs P Indira I* (2002) DMC 749.
- 23 *Sumitra Devi vs Bhikan Choudhary* AIR 1985 SC 765.
- 24 The magistrate's courts are the lowest in the rung of judicial hierarchies. Between this court and the Supreme Court are two other rungs – the sessions court and the high court.
- 25 *Captain Ramesh Chandra Kaushal vs Veena Kaushal* AIR 1978 SC 1807
- 26 M A Fineman, "Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce" in M A Fineman and N S Thomadsen (ed.), *At the Boundaries of Law – Feminism and Legal Theory* (New York: Routledge), (1991) pp 265-79 at p 270.
- 27 Ibid, p 265.
- 28 Ibid, p 276.



Women / Politics / History

Francesca Orsini

PRINT AND PLEASURE

Popular Literature and Entertaining Fictions in Colonial North India

Hardback / 328pp / Rs 695

Gail Minault

GENDER, LANGUAGE, AND LEARNING

Essays in Indo-Muslim Cultural History

Hardback / 328pp / Rs 695

Finbarr B. Flood

OBJECTS OF TRANSLATION

Material Culture and Medieval 'Hindu-Muslim' Encounter

Hardback / Large format with 175 b-w illustrations / 384pp / Rs 1695

Veronique Benei

SCHOOLING INDIA

Hindus, Muslims, and the Forging Of Citizens

Hardback / 368pp / Rs 695

Ayesha Jalal

PARTISANS OF ALLAH

Jihad in South Asia

Paperback / 400pp / Rs 395

Tanika Sarkar

REBELS, WIVES, SAINTS

Designing Selves and Nations in Colonial Times

Hardback / 356pp / Rs 695

Ranjit Guha

THE SMALL VOICE OF HISTORY

Collected Essays

Hardback / 676pp / Rs 895

Vasanthi Srinivasan

GANDHI'S CONSCIENCE KEEPER

C. Rajagopalachari and Indian Politics

Hardback/ 290pp / Rs 695

Simona Sawhney

THE MODERNITY OF SANSKRIT

Hardback / 226pp / Rs 495



permanent black

www.permanent-black.blogspot.com

DISTRIBUTORS: ORIENT BLACKSWAN