THE BLACK LAW DOGMA: EXAMINING THE PERSISTENCE OF COLONIAL PATRIARCHY IN HINDU FAMILY LAW

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INTRODUCTION

Patriarchal laws have governed Indians since the beginning of the establishment of the country's legal institution. Even after 75 years of independence, the effects of colonization can still be felt; socially and legally. This colonialism altered our legal system to an extent that every law formed from the very first days of our independence can still be found with traces of colonialism in them. With these laws still existent post-colonially comes the brunt of patriarchy. Colonial laws are based heavily on principles of creating clear class differences between men and women, something they manifest into our daily lives by implementing laws reflecting these views. Through this paper, the various colonially patriarchal laws will be traced and their effects on our legal system.

Through examples of case laws, I wish to demonstrate why reform is necessary with a view to revitalise and perhaps redefine what this colonial definition of the institution of marriage is and additionally also analyse the dangerous consequences of these laws manifesting into real life with the help of examples of case laws. Most importantly, the need to reform these laws will be expressed in the paper to ameliorate the due process of law.

Statutes and legislation are a part and parcel of our lives. They are the basis on which morality, social conduct and the very institution of marriage are determined. Hence, this paper will be a legal analysis and not a sociological one since sociological and philosophical schools of thought give mere theories and don't consider the ground realities of the repercussions of these unjust legislations.

BACK TO THE ROOTS; A BRIEF EXPLORATION OF BLACK LAWS IN HINDU LAW

An often pondered upon question; how did colonial laws earn the title of being called "black laws"? According to a paper published by Chandra Mallampalli titled "Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hinduness"[1] and Edward Said's "Orientalism"[2] the British, when forming legislation in India, failed to consider how massively diverse the country is. Britain, influenced by the principles of the Church of England formed uniform laws in their own nation. That reasoning transcended into how they framed legislation in India and, in the Hindu context, largely neglected how Hindus view the institution of marriage. With a near 200 years of reign, the institution of marriage in India was forever changed because the laws formed would permanently change the trajectory of "Hindu-ness" is viewed in India.

Presently, Hindu law is plagued by these colonial laws, enforcing patriarchal control over women and minorities. Legislation with regard to adoption, maintenance and preservation of marriage are heavily influenced by the West.

THE FULL PICTURE; THE JUDICIAL STANCE

With such laws still in place, the judiciary also becomes part of the problem. Nearly seven decades after the codification of The Hindu Marriage Act, 1955[3], there has been no push to put an end to these laws. While personal laws take precedence over substantive ones, the instillation of constitutional laws in them is necessary such as the ideas of liberty and equality. The interpretation of these laws by the judiciary when deciding the outcome of petitions and cases filed under the HMA often are from a patriarchal viewpoint. A very common example is the legality of marital rape in India. It is not considered illegal because the laws make it so that the women i.e., the wife, is regarded as the "property" of the husband.

In summary, the persistence of these black laws in India are rooted out of internalised colonialism causing Hindu laws to be in the constant clutch of patriarchy.

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[1] Chandra Mallampalli, *Escaping the grip of personal law in Colonial India: Proving custom, negotiating Hinduness*, 28 LAW AND HISTORY REVIEW 1043–1065 (2010).
[2] EDWARD W. SAID, ORIENTALISM (1978).
[3] Hindu Marriage Act, 1955.

ANALYSING THE CONUNDRUM OF RESTITUTION OF CONJUGAL RIGHTS IN HINDU MARRIAGE LAW

Restitution of conjugal rights (RCR) is a right provided under Section 9 of the Hindu Marriage Act, 1955[4] which provides a remedy to a married person petition for a court order mandating their spouse to return to their matrimonial home and to cohabit with them. This section states that RCR is a remedy provided to that individual if their spouse withdraws from them without reasonable cause. In that case, the spouse can petition for a decree to mandate the other to resume cohabitation. This is a concept which existed in Hindu Law before the British rule but it was not codified at that time and essentially was rooted in the traditional customs and practices of Hinduism.

RCR was a remedy originating from England but implemented later on India by the Privy Council in the case *Moonshee Bazloor v Shamsoonaissa Begum*[5]. In the case, the husband disposed of with his property and misconducted with his wife, compelling her to withdraw from him which led him to later on file an RCR petition.

Interestingly enough, this RCR remedy was abolished in the UK in 1970 as laid down by the Lord High Chancellor in the House of Commons.

One of the landmark judgements on RCR is *T. Sareetha v T. Venkatasubbaiah*[6] wherein the plaintiff challenged the constitutional validity of the section stating that it is in violation of her fundamental rights granted under Articles 14 and 21 of the Indian Constitution. The Court opined that the Section, was in fact, in violation of right to privacy under Article 21. The Court stated that forced cohabitation is "barbarous"[7] and "hostile" against women and comprises their sexual autonomy. This, however was overturned in *Harminder Kaur v Harmander Singh Chodhury*[8] and later reiterated in the case of *Saroj Rani v Sudharshan Kumar Chadha*[9] stating that RCR doesn't force sexual cohabitation and Section 9 was held to be constitutionally valid. However, this opens up a different arena of issues since marital rape in India is not considered an offence. If the husband

[4] Hindu Marriage Act, 1955, §9.
[5] Moonshee Bazloor v Shamsoonaissa Begum (1867) (India).
[6] T. Sareetha v T. Venkatasubbhaiah (1983) AP 356.
[7] T. Sareetha v T. Venkatasubbhaiah (1983) AP 356.
[8] Harminder Kaur v Harmander Singh Chodhury (1984) AIR RLR 187.
[9] Saroj Rani v Sudharshan Kumar Chadha (1984) AIR 1562 SCR (1) 303.

succeeds in his decree to return his wife to their matrimonial home and then forces her sexually cohabit it would leave the woman without any legal remedy.

In the case of *Sukram v Mishri Bai*[10], the husband filed for a decree of RCR stating that his wife had withdrawn from his society without reasonable cause. The wife countered stating that she was married to him when they were both of 10 and 11 years of age and had left his society because she no longer wished to cohabit with him. She also alleged cruelty from in-laws claiming that her reasons for withdraw were justified. The Court disbelieved her claims of cruelty and later held that the decree of RCR was valid and passed it against her will, forcing her to return to her matrimonial home.

Crossing into the threshold of constitutional validity of the section, *Ojasawa Pathak v UOI*[11] is a writ petition filed in the Supreme Court in 2019. It claims that the section is in violation of the basic tenets of the fundamental rights granted by the Constitution. It further states that the remedy is biased against women and isn't congruent with the Supreme Court's prevision judgements i.e., *Joseph Shine v UOI*[12] where the Court puts great emphasis on one's right to privacy and right to sexual and bodily autonomy. Further, it emphasises on how the section is left vulnerable to misuse since, as stated above, marital rape is not illegal in India. The matter was last heard in 2021.

In *Tirath Kaur v Kirpal Singh*[13], after her marriage the wife took up a job in another town with a view of supporting her family which resulted in her husband filing for a decree of RCR. It was held by the lower court that : "the husband was justified in asking the wife to live with him even if she had to give up service"[14]. Reinforcing this decision, the Punjab High Court argued providing the justification that "a wife's first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection."[15] Hence, the wife was then forced to cohabit with her husband.

[10] Sukram v Mishri Bai (1979) MP 144.
[11] Ojasawa Pathak v UOI (2019) (India).
[12] Joseph Shine v UOI (2017) (India).
[13] Tirath Kaur v Kirpal Singh (1964) Punj 28.
[14] Tirath Kaur v Kirpal Singh (1964) Punj 28.
[15] Tirath Kaur v Kirpal Singh (1964) Punj 28.

In the case of *Gaya Prasad v Bhagwati*[16], it was held by the Court that if a wife undertakes employment without her husband's consent in a place which is not located in their matrimonial home which would result in the loss of cohabitation and further if she refuses to live with him in his home then it can be considered that she has withdrawn from his society without reasonable cause.

From the cases exhibited above two key factors arise. Firstly, neither the legislation nor the courts give set the parameter on what qualifies as "reasonable cause" for withdrawal which leaves the section open to dangerous interpretation. Secondly, it strips women of their right to sexual and bodily autonomy and their "choice and dignity".

In favour of deeming this section invalid, in *Shaikh Basid v Yasminabano Yasid*[17] wherein the husband filed for RCR the court tries to legitimise the importance of the wishes of the wife in an effort to reduce physical violence against them credited to "difference of attitude" and "lifestyle".

THE GREAT INDIAN DIVORCE

Laws related to divorce have developed generously since there were not many provisions for divorce before the Hindu Marriage Act was codified. Marriage is considered "sacrosanct" in Hinduism and divorce was considered something which went against the very tenets of the formative principles of that institution. However, these laws don't come without their drawbacks. Section 13(1) of the Hindu Marriage Act, 1955[18] which has, in recent years, been subjected to critique claiming that it comes with large gaps in its definition and interpretation.

Section 13(1) of the HMA allows for dissolution of marriage on grounds of cruelty. "Cruelty" in itself has not been defined in this section which leaves it open for various interpretations. The courts have however attempted at setting some parameters as to what cruelty could mean.

The case *of Samar Ghosh v Jaya Ghosh*[19] points out that the term "cruelty" is multi-faceted and cannot have a static and absolute definition. The District Judge, in the case, granted the divorce

[16] Gaya Prasad v Bhagwati (1965) AIR 1966 MP 212.
[17] Shaikh Basid v Yasminabano Yasid (2019) No. 63.
[18] Hindu Marriage Act, 1955, §13 (1).
[19] Samar Ghosh v Jaya Ghosh (2007) No. 151.

decree in the petitioner's favour by arriving at the conclusion that refusal to cohabit with the plaintiff paired with her autonomous decision of not wanting to have children post-marriage are grounds enough to formulate mental cruelty. Hence, their marriage was dissolved.

Through various precedents, the Supreme Court held that "Mental cruelty is a state of mind." It was held that there can be no "straightjacket formula"[20] or fixed parameters for determine what constitutes mental cruelty. Mere tribulations or quarrels are part and parcel of married life and cannot equate to cruelty, the court held. However, it was also determined that the individual decision of the spouse's refusal to procreate or cohabit can form grounds to cruelty.

However, this notion of not setting large enough parameters could be considered loose since then it would be considered that it would be up to the courts to determine what could amount to cruelty and that leaves too much room for letting personal biases of the judiciary hinder their decision.

In 2016, Delhi High Court held, in a case where the parties remain unnamed that if one deprives their spouse of physical contact or sexual intercourse by denying the partake in it then it can formulate grounds of cruelty. This judgement attracts the danger of depriving the spouse of their sexual autonomy.

To summarise, in judging the conduct, the question is whether the alleged cruel behaviour is such that the wronged party cannot be reasonably expected to put up with it, rather than whether it creates a reasonable fear in the mind of the spouse that living with the other would be harmful or injurious.

THE ISSUE OF GUARDIANSHIP

When looking into the laws relating to guardianship in Hindu Law, experts have claimed that Section 6 of the Hindu Minority and Guardianship Act, 1956[21] spearheads the discussion related to discriminatory laws. The Section provides that the natural guardianship of a Hindu unmarried

[20] Samar Ghosh v Jaya Ghosh (2007) No. 151.
[21] Hindu Minority and Guardianship Act, 1956 §6.

minor girl or boy will rest with the father and the mother's will be subsequent to his. Additionally, it provides that a married minor girl's guardianship rests with her husband.

In the case of *Githa Hariharan v RBI*[22], the petitioner applied for a request in the Reserve Bank of India with the intent of acting as her son's natural guardian and to supervise the investments. The application was rejected stating that the application would only be executed in favour of the father. During this, there was a divorce suit pending between the spouses where the husband petitioned to gain custody of the child. The mother contended that the father was nearly non-existent in the child's life. The court held that considering the welfare of the child triumphs over the father's right to gain natural custody.

Even though this case had a positive outcome, the observation with regards to discrimination still stood. While courts do consider the welfare of the child before granting guardianship, the mere existence of such a gendered law is discriminatory in nature as observed in the above case where it was held that the father and mother are both equal parts responsible in the upbringing of the child. This section which provides for preferential custody rights to the father over the mother impose restrictions on the mother's ability to make decisions for the positive welfare of the child.

Interpreting Section 6 of this act, if the intention of the provision's draft is considered then it can be concluded that excluding the mother from taking natural guardianship of the child does not, in fact, serve the full purpose of guardianship. This is because the statute in this section does not accord with the notion of equality.

TOWARDS A WORTHY CATHARSIS

The debate surrounding family laws in India have largely been centred around the issues that they are too gendered in nature. The elephant in the room being that the laws like the ones discussed above leave too much room for ambiguity. Statutes and regulations must be flexible in nature to accommodate for the changing trends in society but they must not be ambiguous since ambiguity leaves room for personal biases to rush in.

[22] Ms. Githa Hariharan & Anr vs Reserve Bank Of India & Anr on 17 February, 1999.

In *Saroj Rani v Sudarshan Kumar Chadha*[23] the court while upholding the constitutional validity of the remedy of RCR stated that "cold principles" of constitutional law cannot be introduced in a matrimonial home. However, constitutional law safeguards one's freedom of liberty and equality and these principles cannot be put on a lower pedestal or treated with indifference when framing personal laws. Constitutional remedies and fundamental rights are provided uniformly to all the citizen of Indian and cannot face erasure in the face of marriage laws.

The petition put forth in the Supreme Court praying for legalisation of same-sex marriages in India, Advocate Dr Maneka Guruswamy states that "marriage is a bouquet of rights." Foregoing that interpretation, while interpreting it in the context of existing Hindu laws, one can observe that the bouquet of rights granted by marriage like joint insurance and adoption and reproduction, one cannot be asked to choose between their natural constitutional rights over rights given under personal laws.

While reform is necessary, it is still a concept which is miles away. The need of the hour would be to make the existing laws related to RCR, divorce and custody more airtight as demonstrated with the examples of case laws above. The need to forego gendering these laws is a must if we wish to protect one's right to equality before the law.

[23] Saroj Rani v Sudharshan Kumar Chadha (1984) AIR 1562 SCR (1) 303.