

BOOK REVIEW

FAMILY LAW - VOLUME I: FAMILY LAWS & CONSTITUTIONAL CLAIMS AND VOLUME

II: MARRIAGE, DIVORCE AND MATRIMONIAL LITIGATION

by FLAVIA AGNES, OXFORD

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In “The Second Sex”, Simone de Beauvoir famously claims that, “One is not born, but rather *becomes*, a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilisation as a whole that produces the woman inter-mediate between male and eunuch, which is described as feminine”.¹ In essence, gender is a matter of culture, acquired through social conditioning, rather than being “natural” or innate. For de Beauvoir, the source of this gender hierarchy and sexual inequality is patriarchal culture, as purveyed by “religion, traditions, language, tales, songs, movies”, all of which help compose the way in which people understand and experience the world. Agreeing with de Beauvoir, Judith Butler further argues in her work *Gender Trouble* that though feminine identity is a social construct, however, it cannot be simply resisted or avoided at will.² The “discourse” of gender identity is reinforced and regulated by powerful patriarchal institutions like family, state, medicine, media and the law.³

Drawing thoughts from the same tradition, the two volumes on Family Law by Ms. Flavia Agnes, pierces the veil of “neutrality”, “impartiality” and “formal equality” within law,

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¹ SIMONE DE BEAUVOIR, *THE SECOND SEX* 281 (trans. H.M. Parshley, 1993).

² SARAH SALIH, *JUDITH BUTLER* 6 (2002).

³ *Id.*

and analyses the women question within the broad framework of “Personal Laws” in India. Ms. Agnes is a lawyer and founder of Majlis, a legal and cultural resource centre in Mumbai. She has been associated with the women rights movement in India for more than two decades and has written and published extensively. Her contributions are documented in journals like *Subaltern Studies*, *Economic and Political Weekly*, and *Manushi* on the themes of minorities and the law, feminist jurisprudence, gender and law, and law in the context of women’s movements. She is author of the book, *Law and Gender Inequality: the Politics of Women’s Rights in India* (1999). This two volume books on Family Law is another eminent contribution of the author in the fields of women rights within the personal domain of family and society.

Interdisciplinary in its approach, the present books while negotiating the boundaries of formal laws, contextualise social, historical and economic realities. As pointed out by the author, both volumes help to understand social effects of laws and of the sociological factors that shape it. In other words, it explores the “politics of jurisprudence” behind personal laws from a feminist perspective, and not just the positivistic sense of “law”. One distinguishing feature of the work is that it highlights the “differences in culture, history, language and social class in the experiences of women”⁴ within India and from the West. Both the volumes are not only an astute critique of patriarchal culture, as it exists in India, but, also exposes the effect of nationalistic agenda and influence of western feminist legal discourse on the condition of woman in the post-independence period.

The present work intends to reinterpret the notion of justice and challenge the conventional meaning of justice as “fairness” and “equality”. It also challenges the premise that the “law is a neutral, objective, relational set of rules, unaffected

⁴ STEPHEN MORTON, GAYATRI CHAKRAVORTY SPIVAK 76-82 (2003).

in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions”.⁵ These challenges in the context of “Family Law” are intended to provide a “new critical framework to engage with justice”. The book not only heavily relies on the conventional “case-law methodology” but also analyses the pre-litigation strategies, interim orders and negotiations, which play a more critical role in securing rights of a litigant. This feature of the book is, yet another, unique and most crucial as it brings these negotiations in the realm of formal legal academics, which are otherwise outside the purview of the academic discourse.

Broadly, the two volumes of the work are divided into five chapters and focuses on the following three themes:

1. The notions of “equality” or “sameness” between men and women within the marriage and implications of using a gender neutral term “spouse”.
2. The use of generic term “women”, devoid of its specific socio-cultural context and location and its implications for women from minority communities, in the context of the demand for a uniform civil code; and
3. The notion of “universal” human rights values as evolved in the West and the desirability of applying them within specific local contexts of the non-West.

VOLUME I: FAMILY LAW: FAMILY LAWS AND CONSTITUTIONAL CLAIMS:

Volume one is divided into two chapters- Personal Laws and Women’s Rights and Constitutional Law and Citizenship Claims, respectively.

Chapter one of the volume one gives a comprehensive account of personal laws under seven major system that exist

⁵ FLAVIA AGNES, *LAW, JUSTICE AND GENDER: FAMILY LAW AND CONSTITUTIONAL PROVISIONS IN INDIA* xxiv (2011).

in India— Hindu, Islamic, Christian, Parsi, Jewish, Civil, and Customary. The chapter encompasses the debates from colonial to post-colonial periods, it traces back the development of “Personal Laws” as it is understood today. Ms. Agnes very articulately captures the problems of codifying local customs into laws, which resulted in negation of the plurality, otherwise present in the system. As mentioned earlier, the book is acutely aware of the social realities and cultural context, it also discusses the problems arising out of brahminisation of laws, through interpretation, translations and codification, on marginalised sections of the society. Introduction of Anglo-Saxon jurisprudence and adversarial adjudication influenced all the family laws in India- for e.g. introduction of English principle of justice, equity and good conscience in areas where there was no law. Seemingly innocuous, it became the direct channel introducing English legal principle in Indian matrimonial jurisprudence. This principle alongside with the principle of “public morality” was relied upon while curtailing the rights of the women in various situations. One such instance discussed in the book is the Madras High Court ruling where the court observed that dancing girls are sudras and hence *smriti* law cannot be applied to them. As per their custom, daughters were entitled to inherit in preference to sons. The Court also recognized the right of women to adopt girls. But in several other cases decided by the Bombay and Calcutta High Courts, it was ruled that the custom of adopting daughters by dancing girls was immoral and against public policy.

This aim of this chapter has been to widen the debate over personal laws beyond the narrow confines of Hindu (considered progressive) versus Muslim (considered regressive-fundamentalist) and explore the different ways in which various communities have dealt with their personal law. The book also dispels the myth that all customary laws are anti-woman and State enacted law as pro-woman. Contrary to belief, the history of women’s right is complex with various forces constantly at play. Women’s rights are not

only constrained by certain patriarchal norms, but are also shaped and moulded by several social, economic and political factors. Therefore, the chapter explores the colonial intervention and subsequent legislative enactments rather than “religious texts” or “religious tenets”. Within the dynamic terrain of contested claims, statutory stipulations are constantly shaped by judicial interpretation hence landmark rulings which have brought substantial changes within personal laws have been highlighted.

The chapter further divides itself into several sections and deals with different personal laws (with the last two sections dealing with Civil law and customary practices) and a final conclusion. Each head contains political and social history of the statutes in which they were enacted and the impact they had on the rights of the women. The development of law under each head is studied and analysed on its own standing, avoiding inter-mingling of different systems leading to confusion and myths related to personal laws. The most obvious example of this kind of misconception is between Hindu Personal Law and Muslim Personal Law, where the former is considered as progressive and the latter is considered as regressive and conservative. For a reader it becomes easier to understand the context of a particular system and appreciate the jurisprudential development through political and social influences which are unique to every system and which gave the current shape of the law as it exists today.

Chapter two of the volume one is divided into three sections which examine the provisions of modern constitution and its assurances of freedom and equality to its female citizens. This chapter situates women’s rights in the intersection of the personal and political frameworks of citizenship, its inclusion and exclusions and the manner in which the issue of Uniform Civil Code gets framed within the context of majority and minority politics. First section of the

chapter provides an overview of the constitutional scheme of protections and checks and balances, this chapter examines the notions of equality, special protection, freedom and liberty. Many landmark rulings have been provided in this section, which have been relevant for achieving constitutional goals, and have advanced women's rights. The next section briefly sketches the important political evolution which culminated in gender equality being included as a fundamental right and went further to ensure one third reservation for women in local bodies through 73rd and 74th amendments to the Constitution, which gave a push to the process of women's political participation. It analyses the struggle of women from basic literacy, the onward march to higher education, and then on to the formation of women's associations and political participation in nationalistic struggle.

The second section highlights the debate around the enactment of Uniform Civil Code (UCC) in the context of Article 44 of the Constitution. The section further highlights how the debate over UCC got vitiated in communal politics and became anti-minority. It further dissects the role of other factors like media and few judgments by court which vitiated the atmosphere and coloured the debate on communal lines. The book analyses the citizenship claims of women, starting from pre-independence period to Shah Bano Case and more recent debate over Mumbai Bar Dancers. It exposes how the "passive citizenship" of the woman, where law presumes that the woman belongs to private domain of her home, comes to play and define relationship of a woman with the State.

The third section is purely academic in context, since, it analyses the attempts made by different groups to draft a Uniform Civil Code. It analyses the few draft bills prepared by different groups. Finally, the conclusion examines constitutional assurances in the context of gendered notions of citizenship within a broader political context. An attempt has been made to examine the claims within the context of citizenship.

**VOLUME II: FAMILY LAW- MARRIAGE, DIVORCE, AND MATRIMONIAL
LITIGATION:**

The second volume is divided into three different chapters; the first chapter relates to marriage and divorce laws, second chapter addresses concerns regarding matrimonial rights and obligations, and the last chapter deals with the procedural aspects of matrimonial law. The movement of the book is well arranged. It initiates itself with the concept of marriage, the laws governing it, to its dissolution, and, thereafter, consequential rights and obligations arising out of it. In each section, the book does not lose the sight to mark the lived experiences of the women and her interaction with the law. As the author suggests, and from my own limited experience as a lawyer, it is apparent that a law, when enacted, could very well be made to support a cause for women's rights, but the interpretation of it without the context in which it was introduced renders its application as ineffective and inadequate.

The central concern of the first chapter revolves around the issues related to marriage and divorce. The chapter gives a detailed context of the evolution of marriage from a sacramental union to dissoluble contract. Then, all the grounds for divorce, each forming a separate heading, is articulately discussed from a perspective of women's right. In addition to these issues, a gendered analysis of more specific concerns, like custody, shelter, child marriage, NRI marriages, and effect of compulsory registration, is provided in detail. While piercing the "neutral" premise of the law, Ms. Agnes builds up a case to show how neutral law is rendered ineffective and adverse to women's right through its gender biased interpretation in a patriarchal structure. The author presents a strong case against feminist groups who see "woman" as a singular identity, and analyse their situation as against the western feminist discourse. This chapter is an attempt to evolve a theory of marriage and divorce based on Indian realities even while contextualising Western theories of family law and women's right.

There are several cases where a woman, without any protest, continues to live in an abusive relationship because of lack of support except her marital relationship. Whenever, a woman approaches a lawyer (which, normally, happens only after facing long periods of violence), the primary concern for a lawyer, and the client as well, is to secure immediate interim reliefs in the form of maintenance, custody over children, or residence order in matrimonial home. Though the interim orders, normally, does not have any bearing on the final decree of the court, obtaining them in most of the cases take very long period of time, thereby, defeating the very purpose of the relief. Few of the grounds on which women's right to maintenance is sort to be defeated are no income of the husband, ownership of the property, wife's adultery, invalidity of marriage etc. In my limited experience as a litigating lawyer, I have come across some cases where not only the absence of documentation, but even otherwise, it becomes very difficult for a woman to prove her claims of maintenance or alike interim reliefs. Both the substantive and procedural aspects of laws, which are primarily introduced for a woman to secure immediate reliefs, are such that the same process is adopted by the husband to defeat her claim for maintenance or like relief. For instance, if a woman files a claim for maintenance against her husband, who is a director of a private limited company. For all practical purpose, it could very well be the case (which, normally is) that the husband has full control over the company's properties and profits, but on papers, the income of the husband shown is minimal. Here the corporate doctrine of separate legal entity comes in direct conflict with the rights of a wife to be maintained by her husband. Simply put, a wife cannot claim any right over the property of the company because the company is a separate legal entity and the husband is not its owner. Having said that, it must also be stated that there are ways in which one can prove the life style and status of the parties (on the basis of which maintenance can be decided), but usually, because there is lack of concrete evidence, the whole issue becomes very contentious and takes longer period of time to be settled.

It is contradictions such as these, that chapter two tries to encapsulate. The debate on the right to maintenance further gets complicated when we see it through women's right perspective, for the reason of its derogatory connotations inferring that the woman is always in "need" and it is the husband, a superior patriarchal figure, who has a duty to maintain his wife. Nevertheless, given the male-dominated and patriarchal set up of the family in the Indian context, the question of maintenance in the proceedings becomes the most crucial aspect of the whole litigation. In several cases, if the question of maintenance gets decided/settled, it becomes easier to negotiate and settle the case between the parties and obtain a divorce decree based on the maintenance amount. The sexist nature of law can be assessed, if the question is raised with regard to right of maintenance of a second wife (where first marriage of the husband still subsists) or woman in an adulterous relationship, are analysed. One of the common defences to resist wife's claim to maintenance is invalidity of marriage or wife is in an adulterous relationship. In past Indian Courts have refused the right to maintenance in both the cases but with statutes like Protection of Women from Domestic Violence Act, 2005, the reach of these blatant discriminatory provisions are diminishing. Having said that, it is also pertinent to mention that recent decision by Supreme Court in *D. Veluswamy v. D. Patchaiammal*⁶ has once again constrained the scope of rights of women trapped in informal or bigamous relationships. At the cost of repetition, this case is a clear example of an interpretation of law where the context in which it was enacted is ignored and, as a consequence, the same law which is supposed to strengthen the rights of the woman resulted in curtailing her rights.

⁶ D. Veluswamy v. D. Patchaiammal, (2010) 10 S.C.C. 469.

Another crucial aspect of Indian laws is that it does not recognise the non-financial contribution of a woman in a matrimonial home. While deciding the question of maintenance/ property, the domestic contribution of a wife through housework, child care etc. is not taken in consideration. In few jurisdictions (like in U.K. or Canada), while deciding the ownership and division of property in case of divorce, the doctrine of constructive trust has been applied to bring in the non-financial contribution of the wife. The second chapter of the volume reflects on these gendered biases existing in laws made for the benefit of woman. Here again the point mooted is about the re-working of law to inculcate cultural and social realities of the woman in its structure.

The third chapter addresses the procedural aspects of matrimonial law. Since most matrimonial litigation in metropolitan cities originates within family courts, this subject has gained considerable attention in academic discourse. It highlights the effect of informality which is, intended to be introduced in the matrimonial disputes, through family courts. The chapter analyses the effect of relaxing procedures in the family courts and increasing the power of the judge and giving him more discretionary powers. Also, the chapter intends to tell the story of the interface between life and law, between the experiences of women and normative assumptions of the implementation of law.

To conclude, I would say that both the volumes of books will have a deep impact in the class room court-rooms, and lawyer's chamber. These books not only give a direction to the way family law is taught in the class room but also gives a concrete perspective on how it is viewed today.