

REVISITING "THE FAMILY" THROUGH LAW

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"The Family" is a term that is more often assumed rather than explained. There is a need, says RATNA KAPUR, to recognize the diverse forms of family that exist in India today, and review the laws that assume just one family form.

In this edited version of her paper, Ratna Kapur discusses how law reproduces and reinforces a dominant understanding of "the family" and unequal gender relations and explains why it is important for feminists to challenge this dominant understanding and how law can be used in this process.



Legal definitions of family.

The predominant conception of the family in law is that of the joint Hindu family. Yet this definition is primarily a legal construct for regulating property ownership and not an attempt to codify the ways in which people actually live as a family. At the level of law, the joint Hindu family is comprised only of those males, who, by birth, have an interest in joint or coparcenary property. Women cannot be coparceners, but have an interest in the share of their husband's property. The law is more revealing of the gendered nature of the distribution of property, rather than of the actual composition of the Indian family. It is nevertheless interesting to note that this central legal definition contemplates a "family" where all the members are male. There are several other legal definitions of the family, which focus generally on the greater generational depth of what constitutes a family unit. For example, the term parent means different things under different legal provisions. Under the provisions of the Fatal Accidents Act, 1855 it includes the father, mother, grandfather and grandmother, and "child" includes a son, daughter, grandson and daughter. However, under the proviso to section 6(1) of the Child Marriage Restraint Act, 1929, the term parent refers only to the father if he is alive and not the grandfather, and only the father as the parent can be convicted for the marriage of his minor daughter. Legitimacy also determines, in part, who is or is not a parent.

The status of being a parent or child is also limited according to consideration of age. Under the Children's Act, 1960, a child means a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years. This definition reflects the gendered notion of dependency, that is, a girl is considered a child for a longer duration than is a boy. Taken together, the provisions operate to safeguard patrilineality and the son's inheritance rights while balancing the patriarch's right to avoid some type of legal responsibilities for his illegitimate children. In summary, the father is always a "parent" when he wishes to exercise that authority; a boy is always a "son" when property is being distributed; a daughter is usually a "child" until she gets married; and a mother is a "parent" when her illegitimate child needs vaccinations. Notions of dependency also reflect a patrilineal organization of the family, in that a married woman is assumed to sever all economic ties with

her birth family and become the responsibility of her husband's family. Despite the diversity of family forms both in fact and in different laws, the normative joint family arrangement is the most common way in which people define the family in India regardless of its lack of correlation to their own domestic arrangements.

Divorced from reality

At the normative level, the law plays an important role in sustaining a certain understanding of "the family" that obscures the diversity of family forms as well as women's experience of "the family". The terms on which marriage and family operate are not encoded in statute, but are revealed at the point of the breakdown of marriage. Divorce cases provide some of the most important insights about marriage and family life. They also expose the economic vulnerability of women caused by marriage and the sexual division of labor.

Adultery

Adultery is a common ground for divorce for men and women in almost personal laws, yet the cases reveal how these provisions play out differently for husbands and wives. The courts have frequently accepted allegations of adultery by the husband against the wife, on the basis of circumstantial evidence, overlooking the wife's contention that her husband wants to marry a second time, and the easiest way of getting rid of her is by making allegations regarding her fidelity.

Under the provisions of the Indian Divorce Act, adultery is considered a more serious wrong in the case of wives than of husbands. Thus, a husband can secure a divorce on the grounds of his wife's adultery, but a woman needs to prove an additional ground, namely, cruelty, rape, incest, bigamy, or desertion in order to secure a divorce. The discrimination in treatment has been justified on the grounds that the consequences of adultery for men and women are different, that is, a woman can get pregnant. This reasoning serves to restrict women's sexual conduct, confers legitimacy only on motherhood within the institution of marriage, while at the same time penalizing women for having the capacity to reproduce.

The decisions reveal the assumptions of property on which the adultery law is based as well as the passive constructions of women's sexuality. The rights involved are men's rights over exclusive

sexual access to their wives. Any transgression of that right is construed as a breach of his rights of property over his wife's sexuality. A woman is not implicated in the offence, partly because of the law's construction of her as chattel as well as the assumption that female sexuality is passive and that she could not therefore be the "author" of such a "crime".

Cruelty

Cruelty is a common ground for divorce under the different personal laws. Yet, like adultery it has been interpreted to mean different things depending on whether the petitioner is a husband or a wife. The refusal to have children or to abort a foetus has served as grounds for divorce in the case of husbands. In two particular cases the husband was granted a divorce on the ground that an abortion by the wife without the husband's consent constituted cruelty. A woman's refusal to have sexual relations with her husband has been held to constitute cruelty by the wife. Such decisions coupled with the fact that marital rape does not constitute a criminal offence and is specifically exempted from the purview of the rape provisions, leaves a wife little choice in deciding and defining her sexual relationship with her husband.

Maintenance

The formal legal provisions and decided cases on maintenance provide some insight as to how women are constructed as economically vulnerable and dependent. It is a point of marital breakdown that the relative poverty of women and the role of marriage in creating women's economic dependency is revealed. The law operates in a way that reinforces and reproduces women's dependency and the sexual division of labor rather than addressing women's needs, the ostensible justification for the existence of maintenance provisions. The most significant change in this area of law came after the Shah Bano judgement, with enactment of the Muslim Women's Protection of Rights on Divorce Act, 1986, which took away a right to maintenance that Muslim women had previously enjoyed. In fact, the low sums awarded in maintenance cases under all personal laws, exposes the fact that women's domestic labor is not considered to be valuable and only serves to reinforce their dependency. Thus, the payment of maintenance to women has to be earned and serves as a sanction over women's sexual behavior. The effect of this legal practice was to make all separated women into potential economic pariahs. As soon as they had a sexual or an implied sexual relationship with another man they could be forced into an economic dependence on him and the patriarchal marital relationship was reconstituted. It also encouraged a surveillance of women's sexual behavior by separated husbands who had much to gain from discovering their wives had sexual liaisons. When a woman sets up a sexual relationship with a man, maintenance is no longer available. Maintenance laws become a surveillance tool over women's sexual conduct. The law is less concerned about whether they are economically disadvantaged, than it is about the morality and fault of the parties.

Challenge and change

When speaking about change, and the extent to which families are identified as a source or site of women's oppression, we need to address what is to

be done? Can the law play a counter hegemonic role to challenge the dominant understanding of "the family" and the unequal gender relationships on which it is based?

Feminists have demonstrated very different and often contradictory responses to the family. There are those who have struggled to highlight the inequities and abuses that women have experienced in the family, primarily in the form of rape and domestic violence. This approach tends to construct women as victims, that is, they focus on dowry deaths, sati, domestic violence and rape within the family. It is important not to ignore the extent to which women are individual agents, functioning in an albeit limited and socially conditioned environment. There is a need to recognize women as individuals, with agency, with some degree of autonomy within very limited spheres of their lives and it is important to recognize the complexity of social arrangements of the family and of the role of women within it. We need to develop an approach in our analysis and strategies that recognizes the extent to which women are victims, but we also need to preserve and affirm their power and dignity however limited it maybe, in their own lives. It is important not to simply accept prevailing ideological constructions of women as victims or passive agents, for it is such a perception that has led to a protectionist approach towards women, in law. They are perceived as weak, passive, and incapable of decision making and thus, the power of the State and the family over women has been legitimated. Others have resisted efforts to highlight the inequities women experience within the family on the grounds that such challenge will break the family which is an important source of security and support for women. Recently it has been perceived by some activists as a strategy that would be unacceptable to women in rural contexts and the working class. Such a response is not only paternalistic and elitist, but it is also simplistic. Such arguments operate primarily as a way of dismissing or delegitimising feminism and reinforcing right wing positions which are constantly seeking to reinforce "traditional family values" and "rescue" the family critiques and challenges of feminism, regarded as a product of the decadent West.

Feminist Strategies

In developing legal strategies to address women's oppression in the family, we need to question our own assumptions about law as instrument of male power that oppresses all women in the same way. By breaking the myth of the homogeneity of law, it is possible to recognize the potential space that law offers in challenging dominant assumptions about women and the family. It is important to recognize that the law has specific impact on women insofar as it promotes specific forms of regulation of women; it accords women with fewer rights than other persons; and it continues to construct women as economically dependent on men. Yet this does not mean that the law treats all women the same. By appreciating how the impact of law is mediated by women's religious, class, caste, sexual and marital status, we can begin to identify some of the contradictions that exist within the law which will allow space for change. ▲

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