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Identity in crisis: Marriage? not for 'keeps'

Madhu Mehra | Jul 24, 2015, 06.31 AM IST

The discourse on women's rights within marriage has been generally limited to lawful 'wives', with little attention to women in non-marital conjugal relationships. This changed with the Protection of Women from Domestic Violence Act 2005, which extended protection against physical, psychological and economic abuse to women in relationships 'in the nature of marriage'. Sadly, judicial responses to this radical law have been inconsistent in their reasoning, often judging claimants rather than advancing justice.

The act is in keeping with the UN Convention on Elimination of all Forms of Discrimination Against Women, which not only affirms comprehensive rights to women in legally valid marriages but also calls for extending basic legal protection to women in conjugal relationships unrecognized by the law. Such relationships in India include contemporary polyandry in Punjab and Haryana, the Nata Pratha in Rajasthan and Maitri Karar in Gujarat. Many of these practices, whether traditional or not, involve male bigamy. A study by Partners for Law in Development shows that factors like education, demographic patterns, livelihoods and relationship with land determine the nature of these conjugalities. While some practices may be exploitative of women (as arguably some marriages are), public policy goals and justice are not served by denying these women legal redress.

Moral hierarchies

Disregarding such concerns, the Supreme Court has intermittently invoked moral hierarchies to limit the scope of 'relationships in the nature of marriage'. In considering claims of the second woman, judicial reasoning has in some instances favoured the 'innocent' one, who was unaware of the man's preexisting marriage, while being disparaging of those who knowingly do so. In *Velusamy vs Patchaiammal* (2010), the apex court set aside an order of maintenance as the man had questioned the legal status of the respondent on account of his subsisting prior marriage. He was spared the burden of paying maintenance even after he had in effect admitted the woman's claim that they had a customary wedding celebration followed by two to three years of cohabitation and that he had regularly visited her thereafter and participated in her family events. The Supreme Court went on to expound that 'second wives' or 'keeps' would have no remedy within the scope of 'relationships in the nature of marriage' under the domestic violence law, interpreting this phrase to mean only those unions where the parties had no other spouse and voluntarily cohabited.

Immunity for men

Going by the Velusamy interpretation, lower courts rejected women's claims for right to residence. In one case, although it was admitted that the partner introduced the woman to his neighbours as his wife, the court rejected her claim stating that her use of the phrase 'forced cohabitation' (a euphemism for forced sex) indicated she did not voluntarily cohabit as was necessary. In another case, there was no dispute about a sexual relationship, or that the couple was considered married. Yet, the court held, "The question is not whether the society has recognized the parties as spouses, but rather if the parties had held themselves out to the society as spouses. The vital question involved in the present case is if the respondent number 1 has shown any indication that he intended to treat the complainant as if she was his wife." The court appears to view its role as that of affirming the man's perspective of the relationship, granting him immunity from the domestic violence law. In 2013, the Supreme Court judgment in Indra Sarma vs VKV Sarma seemed to take a fresh approach by laying down eight indicators of relationships akin to marriage. These involve duration of relationship, sharing of household, finances, housework, sexual intimacy, children, and relating to society as spouses. Yet, in the same case, the court rejected the claim arising from 18 years of cohabitation, "since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage." Both Velusamy and Indra Sarma illustrate how interpretations can pervert the potential of a radical law. The otherwise objective criteria in Indra Sarma is set aside on the reasoning that women in relationship with a married man are morally tainted and merit no legal protection in their private life. By the same token, such women also stand disentitled from legal protection against physical abuse. In essence, this places the responsibility for such relationships entirely on women, granting immunity to men in relation to their partner -even for domestic violence. The acceptance of the first-wife argument by the courts to shield him from assuming minimal responsibility rebels against the spirit of the law.

Courting confusion

Perhaps one reason for this trend is that despite the 2005 law, the courts still read the term 'relationships in the nature of marriage' from the perspective of the longstanding provision for maintenance, Section 125 of the Criminal Procedure Code. The latter is focused on 'wives' and infused with the spirit of social order and welfare rather than rights to resist discrimination in private life. It led the courts to dwell upon the worthiness of the claimant to justify extending relief to women other than awful wives. Recognizing the need to settle this confusion, the Supreme Court in Chanmuniya vs VKS Kushwaha (2010), allowed maintenance to a widow from Gazipur who entered into customary marriage with her brother-in-law, only to be abandoned later by him. It also called for a larger bench to revisit the definition of 'wife' under Section 125, to align it with that of the domestic violence law. Five years down, this referral remains to be heard.

The references to concubines and keeps and the classification of all non-marital conjugalities as live-in relationships reflect moral opprobrium and anxieties about sexuality outside of marriage.

Regardless of how sections of society might view premarital sex or live n relationships, this is a facet of individual liberty and life, guaranteed by the Constitution. In all these cases, the legal system must be guided by constitutional morality, even if it runs contrary to popular morality.

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