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SOCIAL ISSUES

For a fair deal

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The amendment to the Marriage Laws Bill needs to be redrafted to ensure, among other things, greater economic rights for divorced women.

SAM PANTHAKY/AFP



BRIDES WAITING FOR the start of a mass wedding ceremony in Ahmedabad on October 24, 2010. Women often oppose divorce petitions filed by their husbands because they have no viable economic alternative outside marriage.

SINCE the 1950s, successive amendments to different personal laws on marriage and divorce have mainly focussed on enlarging the grounds for divorce. In the 1960s and 1970s, cruelty and desertion and thereafter mutual consent were added as grounds for divorce in the Hindu Marriage Act (HMA) and the Special Marriage Act (SMA). However, the fact that almost all Indian women and their children suffer a steep fall in their standard of living on separation and divorce has consistently been ignored by policymakers and lawmakers. The reality is that Indian women have extremely limited economic rights on divorce. These rights need to be greatly strengthened to ensure that the consequences of divorce are the

same for men and women. It is in this context that one has to examine the proposed amendments to the HMA and the SMA.

The Marriage Laws (Amendment) Bill was introduced in 2010 primarily to make divorce easier by including irretrievable breakdown of marriage as a ground for divorce in the HMA and the SMA. The Bill was supposedly based on demands and suggestions from various quarters, including the Law Commission of India and the Supreme Court. It allows a party to file for divorce on this ground provided that the husband and wife have been living separately for three years and the court is satisfied about this fact.

Divorce by mutual consent was also sought to be made easier by getting rid of the requirement of the six-month waiting period after a petition had been filed by both parties, who should have been living separately for one year. The only concession that the 2010 Bill made to the economic hardship almost always suffered by women was a clause (Section 13D) that stated that the wife could “oppose the grant of a decree on the ground that the dissolution of marriage will result in great financial hardship to her....” The court would then have to consider this application and either not grant the divorce or stay the proceedings until satisfactory arrangements have been made by the husband. This clause was widely criticised as not providing adequate financial protection to the woman. It seemed to be premised on the grounds that only some women might suffer grave financial hardship on divorce and left the matter to be decided according to the discretion of the court on a case-by-case basis.

When the 2010 Bill was referred to the Parliamentary Standing Committee in the Rajya Sabha headed by Jayanthi Natarajan, most of the non-governmental organisations (NGOs) operating in the legal domain and organisations working on women's issues opposed the introduction of irretrievable breakdown of marriage as a ground for divorce. They argued that such a provision would be discriminatory to women unless a law was enacted granting women an equal right to marital property and unless the laws on maintenance were strengthened. The committee's report recommended that a share of the property acquired during the marriage to which the woman had contributed be given to her. However, even as it mentioned the non-financial contribution of a wife to the household, the report did not say that this contribution had to be taken into account. The report further suggested that the six-month waiting period in a proceeding for a divorce by mutual consent should not be removed.

Share in property

When the 2010 Bill was reintroduced in the Rajya Sabha, it contained a new provision, which said that the court may in any proceeding under the new ground order the husband to “pay to her as financial support such gross sum or share in the moveable or immoveable property towards settlement of property rights in respect of the property acquired during the subsistence of the marriage, as the court may deem (it to be) just and equitable”. Unfortunately, the question whether a share should be given at all and the quantum of the share in marital property were left to be decided by the courts on a case-to-case basis. The reintroduced Bill also contained an inequitable clause that allowed the court to waive the period of six months on a petition by either party in the case of a divorce by mutual consent.

While very few people will disagree per se with the concept of irretrievable breakdown of marriage, women's organisations and groups have pointed out that it is a wife's right to receive at least an equal share in the property acquired by the parties after marriage as she

has to be considered an equal partner in the marital relationship. Women's groups and lawyers working in the area of family law have often found women opposing divorce petitions filed by their husbands because they have no viable economic alternative outside marriage and because of the social stigma attached to a divorcee. It is well known that most divorce petitions are filed and initiated by men. Women, if they can afford to file a case, mostly file for maintenance and residence and return of stridhan and dowry.

Women's organisations and groups such as the All India Democratic Women's Association (AIDWA) had, therefore, put forth a demand to the Standing Committee that a comprehensive legislation on women's right to marital property be enacted as the introduction of the new ground without such a law would result in great financial hardship for women.

They had suggested that this legislation should apply to women of all communities/religions as an equal share in marital property was recognition of the economic content of household work and of the wife's contribution to the family and that no personal law could deny this. The legislation should also unequivocally make provision for women to receive at least a half share of the marital property. It had also been suggested that this division should be allowed whenever a wife petitioned for it after separation.

Other clauses relating to what constitutes marital property should also form part of the stand-alone law, they had said. For instance, inheritance of the husband and wife and gifts to them could be left out of marital property. Other issues such as whether the law should apply to persons living together also needed to be thought about. However, instead of having a proper discussion or debate on the issue, the government has hastily tried to push through the present amendments with some concessions.

Leaving it to the courts to decide the quantum of the share to be given to the woman would invariably result in her getting much less than half of the assets. The courts are manned by persons who represent various shades of opinion, and lawyers and activists working with women have found that sections of the judiciary have a narrow, patriarchal outlook as far as women's issues are concerned. Also, the record of the present court system and the procedural laws for recovering maintenance for wives and children has been dismal.

Although courts have time and again reiterated the principle that maintenance allowances are supposed to allow wives and children to maintain the same standard of living that they had in the marital home, this principle has not been observed by most courts. Normally, the courts' evaluation of what constitutes adequate maintenance falls far short of what women and children require to survive in a dignified manner. Studies indicate that if women approach the courts for maintenance, they are awarded sums that may normally range anywhere from 5 to 35 per cent of the man's income even if there are children to be supported. Large sections of the judiciary have been extremely conservative while awarding both interim and final maintenance.

It would be pertinent to mention that in countries such as Canada where irretrievable breakdown of marriage is a ground for divorce, laws relating to an equitable division of all marital assets also exist. This is because the contribution of a woman to the building up of the household and in being the primary caregiver of the children is recognised and considered to be as economically valuable as work outside the house. In fact, in a recent judgment (Arun Kumar Aggarwal vs National Insurance Company Manu/SC/0507/2010), the Supreme Court of India observed that the government should "assess the value of the

unpaid homemaker both in accident claims and in matters of division of matrimonial properties”.

The court also stated that Parliament should make amendments to matrimonial laws to give effect to the mandate of Article 15(1) of the Constitution. Unless women are treated as equals in a marriage and given the same security, financial and otherwise, that men have on its breakdown, it would be discriminatory to further liberalise the grounds for divorce.

Several studies, including one on separated women by the Economic Research Foundation, Delhi, have shown that whereas men most often leave a marriage without any adverse economic consequences, women and children are left with hardly any assets and resources. Most women have to take refuge in their natal homes and are dependent both emotionally and financially on their parents and siblings.

In fact, men often walk out of the marriage with all the assets the couple acquired during the marriage and with enhanced incomes and potential for earning, which was made possible because of the wife's contribution in looking after, building up and maintaining the household and in taking care of the husband, the children and the elderly (usually her in-laws).

Loss of bargaining power

Some studies show that many men seek divorce because they are in another relationship or want to remarry or are no longer interested in their present partner or want dowry, a son, and so on. The current laws, however, do not allow a divorce without establishing the fault of the other party. Since a lot of husbands cannot prove this, they normally try to settle with the wife on monetary terms and get a divorce on the ground of mutual consent, provisions for which are already in the statute books. Wives, thus, have some bargaining power under the current laws, which they try to use to get a somewhat equitable financial settlement that will enable them and their children (who are normally with them) to survive. Bringing in the new law will deprive women of this bargaining power.

The law for irretrievable breakdown of marriage as a ground for divorce should, therefore, be introduced only after a law has been enacted giving women equal rights in marital property. This law should allow for equal division of the marital property upon separation. It must be ensured that a provision is made for women with children to have a house/place of residence. The laws relating to maintenance for women and children must be strengthened to ensure that women/children receive an adequate amount of maintenance.

Special laws will also have to be considered to ensure that husbands disclose their full income and that in these cases the onus of proving what income they earn is shifted on to them. Ways and means to reduce the discretion of the judiciary in these matters must be thought of as women and children have invariably been awarded very low maintenance amounts by many courts. It has further been suggested that the government should enact a law to enforce and recover maintenance amounts.

Apart from this a fund needs to be created from which maintenance can immediately be given to the wife and children. In several countries, separate enforcement agencies have been created to recover maintenance amounts. It is a duty of the state to see that women and children are not left to fend for themselves in these cases.

Women's organisations such as the AIDWA have suggested that in the short term the amendment to the 2010 Bill should be redrafted and substituted by a section that makes it mandatory for the court to “order that the property acquired during the subsistence of marriage be divided equally between the wife and husband”. It has further suggested that the court should take into account any disadvantage suffered by the woman and her children and give her a further share of the property. This would be a step towards achieving equal rights in a marriage.

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