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Divorce: A Tentacle of an already biased Society

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Social inequality between men and women has been a concern for decades. Due to this inequality, they both have different experiences and the Laws of a state play a very important role in defining these experiences. One would think that marriage puts the two sexes on an equal footing but no, the costs of gendered marriages and subsequent divorces are too high for both spouses. As simple as it sounds, divorce in itself is a hurdle that many people wish to avoid even though their marriages are on the brink of falling apart. This paper will examine the inequality that still exists in our society and how it is interrelated with the legal world. It will then focus on the social practice of Divorce to deconstruct its gendered nature and reflect on how such a practice has evolved in a biased society.

Keywords: *law, society, gender, bias, divorce.*

INTRODUCTION

The Law and Society Movement, according to Friedman¹, can be attributed to two “ideas.” First, all Legal Systems are “man-made objects”, in other words, “social creations”. And Second, “law varies in time and space, according to the conditions of the culture in which it is embedded”. Law permeates all sorts of social life. From birth to death, “law governs our entire existence and

¹ Lawrence M. Friedman, ‘The Law and Society Movement’ (1986) 38(3) Stanford Law Review
<<https://doi.org/10.2307/1228563>> accessed 12 December 2022

our every action.”² Who could have thought that a day will come when the law also controls when one can step out of their home.?With the ever-changing laws, societies also change. When women were given the Right to Vote and ‘her’ share in family property was legally mandated, the status of women as a community changed. Law is part and parcel of Society. None can function without the other. In the 21st century, when awareness about ‘gender’ not being dichotomous increased in the ety, it influenced the laws to recognize other genders. To change societies, you must change laws, and to change laws, you must change societies!

Similarly, as a practice, Divorce was never favoured by any society. However, when the laws mandated such a provision, societies began to accept it. This acceptance comes with a cost of its own. Even today, divorce, supposed to be liberating, often confines the former husband-wife. This paper aims to analyse the biases against women in society which may often get overlooked and the impact of such bias, biases the laws of the state. It will then focus on the practice of Divorce and reflect upon how the dissolution of a marital bond brings different experiences for the parties involved. Due to limitations in carrying out primary research, this paper draws on earlier research by sociologists, their findings, journal articles, and books written around the discussed theme in the form of secondary qualitative data.

REVIEW OF LITERATURE

There is no doubt that men and women have different experiences of the same things in life. It is not because of the biological differences endowed upon them but because of the social differences attributed to them. The background of such foreground gender problems can often go unnoticed. It “instigates various forms of inequality, discrimination and even violence, but do not receive due attention in the everyday life, since they are often regarded to be in the order of things and natural.”³ Aghasi Tadevosyan throws light on some of the very routine things that occur because of the persisting inequalities between the two sexes but is not questioned (a division of housework between siblings, the chance to speak up in public places, etc.). The **root**

² Steven Vago et al., *Law and Society* (5th edn, Routledge 2017)

³ Aghasi Tadevosyan, ‘Gender Inequality and Everyday Practices: Problems and Challenges’ (YSU, 2015)

<<http://www.yasu.am/files/Aghasi-Tadevosyan-Gender-Inequality-and-Everyday-Practices-eng.pdf>> accessed 12 December 2022

cause of inequality, they argue, is in the “focal signs” (4) of men (strong, breadwinners) and women (timid caretakers). Manifesting these signs in everyday practices, both aim to fulfill what is ‘expected’ of them in society (5). Being labelled as the “strong” gender, men tend to acquire a position of power over women. This power takes the form of control in no time (4). From the comforts of home to the public sphere, “a woman is submitted to the male dominance” (4). According to Judith Resnik (1993)⁴, marginalizing women to make them invisible is one way in which gender bias operates (2197).

Constraints levied on women takes many forms. From her dressing style to acts of speech to consumption of alcohol or cigarettes, anything which makes a man “cool” and “desirable”, does the opposite for a woman. The stigmatised loss of ‘virginity’ is a gallant act for one and a hit at the whole family’s honour for the other. The restrictions on women’s sexuality are innate to all types of inequality. First controlled by her father and brother and later, by her husband (3). Resnik (1993)⁵, explores such constraints in the legal world. Women, “assumed to occupy traditional women’s roles” are treated “better” by prosecutors and men are “more important actors” to be “culpable criminally”. Even in India, the laws relating to Rape and Cruelty Against Women are moulded in a way that gives a woman’s word more important than the evidence. While such laws have proven to be helpful in most cases, sometimes they have also put innocent men behind bars. The “cultural bias” proves to be advantageous for women in such cases (2202). The allocation of litigation between the state and national courts and the assumptions made about “women’s issues” highlight the biased constraints. Women’s cases, about divorce, custody, and protection from violence, are assumed to be ‘family cases’ and thus allocated to the state courts because national courts do not do such cases of “domestic relations” (2199). Any such ‘family case’ involves two or more parties and should be given its due importance.

⁴ Judith Resnik, ‘Gender Bias: From Classes to Courts’ (1993) 45(6) Stanford Law Review
<<https://doi.org/10.2307/1229145>> accessed 12 December 2022

⁵ *Ibid*

Thomas Leopold (2016)⁶ comments on the practice of **Divorce** and how its consequences differ based on Gender. Since marriage is known to bring health gains for men, “post-divorce adaptation in health and wellbeing favours women” (6). Looking from an economic view, the burden of divorce falls heavily on women (7). Smock, Manning, and Gupta (1999)⁷ say that Marriage not only causes economic well-being but is also a result of it. “The evidence suggests that women whom divorce might not do as well economically if they had remained married as do those who remain married” (796) because of other factors that arise over the course of the marriage. When one looks at family dynamics, a negative change is bound to occur as a consequence of divorce.⁸

FINDINGS & DISCUSSION

Biased Society and its Impact

Even though *Gender* as a concept is highly supervised by the Law of a state, the same Law may sometimes fail to follow its language. According to the Law in India, everyone is equal before the eyes of the law, but still, for the longest time, women were not allowed to enter temples, equal payments for both men and women is still a distant dream, women cannot even wear ripped jeans⁹ without getting slut shamed while men can walk around shirtless, and “the right to outdoor leisure is a men’s privilege mainly”¹⁰ while women live on a night curfew. In a country where the literacy rate among females is much lower than that of males, the custom of Dowry is still on the rise, and marital abuse is often disguised as love, everyone is surely not equal before the law. This type of bias also hurts the spectrum of law. As was the case in earlier times, son preference and daughter neglect in Indian society led the laws to declare sons as the

⁶ Thomas Leopold, ‘Gender differences in the consequences of divorce: A multiple-outcome comparison of former spouses’ (2016) SOEP Papers on Multidisciplinary Panel Data Research <<http://hdl.handle.net/10419/142749>> accessed 12 December 2022

⁷ Pamela J. Smock et al., ‘The Effect of Marriage and Divorce on Women's Economic Well-Being’ (1999) 64(6) American Sociological Review <<https://doi.org/10.2307/2657403>> accessed 12 December 2022

⁸ Debra Umberson & Christine L. Williams, ‘Divorced fathers: Parental role strain and psychological distress’ (1993) 14(3) Journal of family Issues <<https://doi.org/10.1177/019251393014003003>> accessed 12 December 2022

⁹ ‘Uttarakhand CM criticises women wearing ripped jeans, asks what values they will impart’ (*The Print*, 18 March 2021) <<https://theprint.in/india/uttarakhand-cm-criticises-women-wearing-ripped-jeans-asks-what-values-they-will-impart/623947/>> accessed 12 December 2022

¹⁰ Aghasi Tadevosyan (n 3)

‘only’ heirs of their father’s property. With only one female Prime Minister to date, India has had few women occupying other positions of power. Laws for women are made by men and their perception of women’s issues. Biases in Law and Society, thus, go hand in hand.

Gendered Nature of Divorce

Another field where the inequality between the two sexes can be vividly seen is in the “sacred” act of Marriage and the not-so-sacred act of Divorce. “Regrettably, the laws of marriage have long served as among the chief vehicles for cultivating women’s social and economic dependency on men, inculcating unequal gender roles, and inflicting status harm on women as a class.”¹¹ Marriage waters the seeds of both private patriarchy- the control exercised by the husband within the family- and public patriarchy as gendered marriage limits the equality of opportunity for women.¹² Both parties face the consequences of divorce, be it social, economic, or domestic. However, the nature of these consequences differs substantially.

Societies attach a negative connotation to the practice of divorce. Though the situation is improving, divorce tends to hamper the **social** image of the people involved. The community tends to develop a negative attitude toward them. “The attitude of a community toward divorcee women, in some cases, is so negative that makes them feel that they entirely lost their social position.”¹³ The label “used” is given to women after divorce as if they are a product. Remarrying becomes difficult for both thees as people make assumptions about some ‘defect’ in the person that led to the divorce. “Both receive emotional support from their families.”¹⁴ In the case of India, while men continue to live with their families, women may be “admitted to her parental home but may not be welcomed with open arms.”¹⁵ She is often seen as a burden her *father* now must look after.

¹¹ Karin Carmit Yefet, ‘Divorce as a Substantive Gender-Equality Right’ (2020) 22(2) Journal of Constitutional Law <<https://scholarship.law.upenn.edu/jcl/vol22/iss2/3/>> accessed 12 December 2022

¹² *Ibid*

¹³ Shamsi Miri Ghaffarzadeh & Hassan Nazari, ‘The consequences of divorce on individual, family and society’ (2012) 9(4) Life Science Journal

¹⁴ Paul R. Amato, ‘The Impact of Divorce on Men and Women in India and The United States’ (1994) 25(2) Journal of Comparative Family Studies <<https://www.jstor.org/stable/41602321>> accessed 12 December 2022

¹⁵ *Ibid*

Since the male counterparts are considered the ‘provider’ of the household, the following studies have shown that the **economic** costs of divorce fall heavily on women. This could be traced back to the fact that men continue to occupy high-paying positions because of the existing bias in society. As Karin Carmit Yefet (2019)¹⁶ puts it, “entrenched societal values place a high premium on paid employment while devaluing unpaid housework bolster breadwinning husbands and marginalize the contributions of homemaking wives” (493). A study on the standard of living post-divorce by Peterson (1996) signifies a 27% decline among women and a 10% increase among men.¹⁷ However, Andress’s and Brockel’s (2007)¹⁸ findings suggest that shortly after the dissolution, satisfaction with the household income among women reached the same level as that of men. It can be said that unless the social status of women is revised and the problems of sex the al division of labour, low wages paid to women, and unequal responsibilities given to men are resolved, economic prospects for independent women will remain poor either within the marriage or out of it.¹⁹

In the **domestic** sphere, divorced parents bear the “parental strain associated with custodial arrangements.”²⁰ The bias again steps in when women, who are expected to be caregivers, win the custody of the child as “divorced men rarely obtain custody” (Kalmijn and Groenou 2005, 9). Studies that show the impact of divorce on children indicate that boys tend to show destructive and disobedient behaviour whereas girls are more adaptive.²¹ After ugly custody battles, whoever wins, must provide for the child, and bear the added financial pressure. In such cases, the need for creating another family may also increase.²² Practical problems that arise for divorced fathers include “household maintenance and economic and occupational

¹⁶ Karin Carmit Yefet (n 11)

¹⁷ Richard R. Peterson, 'A Re-Evaluation of the Economic Consequences of Divorce' (1996) 61(3) *American Sociological Review* <<https://doi.org/10.2307/2096363>> accessed 12 December 2022

¹⁸ Hans-Jürgen Andress & Miriam Bröckel, 'Income and life satisfaction after marital disruption in Germany' (2007) 69(2) *Journal of Marriage and Family* <<http://dx.doi.org/10.1111/j.1741-3737.2007.00379.x>> accessed 12 December 2022

¹⁹ Karen C. Holden and Pamela J. Smock, 'The economic costs of marital dissolution: Why do women bear a disproportionate cost?' (1991) 17(1) *Annual Review of Sociology* <<https://doi.org/10.1146/annurev.so.17.080191.000411>> accessed 12 December 2022

²⁰ Thomas Leopold (n 6)

²¹ Shamsi Miri Ghaffarzadeh & Hassan Nazari (n 13)

²² *Ibid*

difficulties.”²³ Studies suggest that divorced fathers were more disorganized than those from intact families²⁴ and “exhibit high rates of psychological distress, alcohol abuse, and mortality.”²⁵ Women taught housework from an early age, tend to adjust easily to the responsibility of doing the housework by themselves. It has been proven that the “housework hours” of men are considerably reduced when they enter “co-residential unions” with women and are increased when they leave such unions.²⁶

Divorce, Marriage, and Religion

In India, the Marriage and Divorce laws find their roots in the personal religious laws of people. And like other laws, they too possess certain biases between the two sexes about marriage.

The obligatory bond of seven births, Hindu marriages have certain aims. Where a man must go through several sacraments, marriage is the only sacrament for a woman.²⁷ Hindu lawmakers expected wives to be “completely devoted to her husband and worship him as god” (377) despite anything. An example of this expected devotion could be the practice of *Sati* which was (and still is) prevalent in India. As Raj Kumari Agrawala puts it, “Divorce was unknown to the *Shastri* law and the Hindu society for about two thousand years.”²⁸ Even today, the Hindu religion looks down upon the practice of divorce as something immoral. “Young or middle-

²³ E. Mavis Hetherington et al., ‘Divorced Fathers’ (1976) 25(4) *The Family Coordinator* <<https://doi.org/10.2307/582856>> accessed 12 December 2022

²⁴ *Ibid*

²⁵ Umberson, Debra, and Christine L. Williams (n 6)

²⁶ Sanjiv Gupta, ‘The Effects of Transitions in Marital Status on Men's Performance of Housework’ *Journal of Marriage and Family* (1999) 61(3) <https://ckgsb.primo.exlibrisgroup.com/discovery/openurl?institution=86CKGSB_INST&rft_id=info:sid%252Fprimo.exlibrisgroup.com-bX-Bx&rft_val_fmt=info:ofi/fmt:kev:mtx:&rft.epage=711&rft.volume=61&rft_id=info:doi/&rft_id=info:sid/primo.exlibrisgroup.com-756758-Bx&resource_type=article&rft.isbn_list=&rft.jtitle=Journal%20of%20marriage%20and%20the%20family&rft.genre=article&rft.issue=3&rft.auinit1=S&rft.aulast=Gupta&rft.auinit=S&rft.date=1999-07-31&rft.eisbn_list=&rft.spage=700&rft.au=Gupta,%20Sanjiv&rft.atitle=The%20Effects%20of%20Transitions%20in%20Marital%20Status%20on%20Men%27s%20Performance%20of%20Housework&rft.issn=0022-2445&rft.eissn=1741-3737&svc_dat=CTO&vid=86CKGSB_INST:CKGSB> accessed 12 December 2022

²⁷ S. POTHEN, ‘Divorce in Hindu Society’ (1989) 20(3) *Journal of Comparative Family Studies* <<https://www.jstor.org/stable/41602038>> accessed 12 December 2022

²⁸ Raj Kumari Agrawala, ‘CHANGING BASIS OF DIVORCE AND THE HINDU LAW’ (1972) 14(3) *Journal of the Indian Law Institute* <<http://www.jstor.org/stable/43950149>> accessed 12 December 2022

aged, with or without children, there is virtually no chance of marriage for a divorced Hindu woman” (441). Hardcore and conservative Hindus may even banish her after the divorce and break all ties with her. Therefore, the majority of women do not legally divorce their partners but continue to be separated. Section 18 of The Hindu Adoptions and Maintenance Act, 1956²⁹ guarantees the woman’s right to maintenance by the husband, and thus “it is of great advantage for her not to lose her marital status and the title of being the wife of someone. Even such empty status means prestige in the Hindu society...” (441). Another reason to not file for divorce could just be the lack of awareness amongst the female community about their rights.

The Muslim laws pose a different kind of challenge for women. A challenge wherein multiple marriages for men are allowed but is a ground for divorce for women. In earlier times, husbands had the unlimited power of divorce. ‘They could give divorce and revoke it as many times as they preferred, arbitrarily accuse their wives of adultery, and could even swear to no intercourse with their wives while living with them.’³⁰ As in Hinduism, though legally allowed, divorce is not favoured in Islam. The practice of *Triple Talaq* gives unilateral power to the hands of the husbands. Even though the laws also take care of the divorced wives in terms of the *Mehr*, they also tend to snatch away every sliver of respect from her through the concepts of ‘*Tuhr*’, ‘*Iddat*’, and ‘*Halala*’. There have been cases in which the wife did not know about the divorce or a couple got divorced over a text message. “This practice of talaq has a deleterious effect on women; breaking a marriage contract has emotional and financial concerns. Often it is not the interest of women, which are at stake, but those of their children as well. The trauma of triple-talaq is rife in the reality of women.”³¹

“Why Most Divorce Filers Are Women?”

Given the superior position attributed to men in society, it is often assumed that they are usually the instigators of divorce. However, this is not the case. Bring and Allen (2000) claim that it is the women who, despite a deep affection for their children and knowing the risks involved, file

²⁹ Hindu Adoptions and Maintenance Act 1956

³⁰ Samreen Hussain, ‘Triple Talaq: A Socio-Legal Analysis’ (2010) 1(1) <<https://ssrn.com/abstract=1597858>> accessed 12 December 2022

³¹ *Ibid*

for a separation or divorce. The reasons might range from the wife's will to secure rights to custody and support, to the fact that it is just more convenient for them to do so (127), to the welfare of the wife (in terms of escaping an exploitative marriage) (137). Also, a large number of divorced women prove to be happier after the divorce than they were before (129). Bring and Allen also theorizes the concept of "quasi-rent" or the "opportunity cost" or the "next best alternative" (130). In the area of marriage, this quasi-rent is the "excess value of a specific marriage over the value of the next best option of not being in that marriage" (130). Depending on the quasi-rent values of each spouse, the next best alternative might be divorce, separation, or remarriage. The exploitative nature of a marriage may reduce the value of the marriage for the wife, thus increasing the value of the next best option. Alternatively, childbearing may increase the value of the existing marriage for one or both spouses and thus keep them together longer. It is seen that "women are about twice as likely to take the initiative to divorce as men..."³²

CONCLUSION

When we see around us, anything and everything could be associated with law in some way or the other. The houses we live in, the type of clothes we wear, the food we eat and when, the water we bathe with, the education we get, the movies we watch, the games we play- everything has its law, and we follow that law. Laws, legal or not, frame our societies. We can understand societies through their laws but also, we can understand the laws through a sociological perspective. The legal laws are made by man, for man. They encompass all the activities humans engage in. To understand laws, we must first understand the people who make them.

Marriages are one such activity that most humans engage in at least once in their lives. As Jessie Bernard (1982)³³ puts it, "There are two marriages... in every marital union, his and hers. And his . . . is better than hers". The practice of divorce still carries a stigma in our society. It contains various costs which are not necessarily monetary- attorney's fees, negative impact on children,

³² Matthijs Kalmijn & Anne-Rigt Poortman, 'His or Her Divorce? The Gendered Nature of Divorce and its Determinants' (2005) 22(2) European Sociological Review <<https://doi.org/10.1093/esr/jci052>> accessed 12 December 2022

³³ Jessie Bernard, *The future of marriage* (Yale University Press, 1982)

loneliness, etc.³⁴ It has been established that while the economic and domestic consequences of divorce might be more or less similar for both sexes, the social consequences burden the women more. "When a marriage breaks up, people are inclined to feel that it is the wife's fault."³⁵ Though the post-divorce economic effects favour men, women too reported better health and higher satisfaction.³⁶

It is no doubt disheartening to see such a bias against a community just because they were assigned a particular sex at birth. With time, the situation is improving. More and more women and men alike are standing up for themselves. They now understand the value of self. Through increased awareness about the rights of women and the responsibilities of men, even this problem could be resolved. This paper highlights the plight of women more than men, but that is the reality. One can say that even this paper is a product of the gender bias we find in society.

³⁴ Margaret F. Brinig, & Douglas W. Allen, "These Boots Are Made for Walking': Why Most Divorce Filers Are Women' (2000) 2(1) American Law and Economics Review <<http://www.jstor.org/stable/42705364>> accessed 12 December 2022

³⁵ Paul R. Amato (n 14)

³⁶ Thomas Leopold (n 6)