

Holistic Perspective on Legalism and Justice in Indian Family Law

A Critical Review Essay on
Redefining Family Law in India

By Archana Parashar / Amita Danda (eds.)

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An interesting book came on my table. It bolstered my passion to understand one crucial legal question; how is family law in India viewed by legal scholars and practitioners of present age? This question bears a thorough legal examination particularly for a subject like family law where customary traditions of cultural mindsets juxtapose current modernity of legal reasoning for a serious role towards justice in family law. And India, no doubt, as a nation of diversity with complex personal laws dramatically amplifies this legal question more than any other country. Being a teacher of public and private international law with an ideal of ultimate justice for every country and every individual across legal systems, I cannot avoid commenting on this book as contents of this book trespass my area of core legal intellect where borderline cases of confluence between public and private rights arise. Family law is one such instance. On reading this book I got a glimpse of this confluence in relation to family law in India as contributed by authors. It also revealed where Indian justice in personal laws stands in the family of nations and globalizing world. Through this review, I share the redefining principles of family law in India as outlined by this assembly of legal literati who boldly entered into this complex legal terrain almost left abandoned that affects individuals, family relationships and society as a whole. As I enjoy writing book reviews I get to research post publication to see what research has gone in pre-publication. From this, authors might get a chance to enhance the quality of next edition if they feel ideas presented in the reviews sensible. With this confidence, let me begin.

To start with, this book, 'Redefining Family Law in India' brought out in honour of Professor B. Sivaramayya, is itself a pleasant thing to read and write for a review. Renowned Professor Mahendra P. Singh's comments on Professor B. Sivaramayya¹ written two decades back is enough to know the value of homage given by these authors through their dedication of this academic labor to one of India's greatest law professors. This book shows what professors from both sides—one who is honoured and others, who worked to make this homage in writing, have something in common to express. Routledge which brought this work in paperbacks series with a

¹ 'On the Retirement of Professor B. Sivaramayya,

http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=931,

<http://www.supremecourtcases.com> Eastern Book Company Generated: Monday, August 8, 2016

sober cover and packed it close to 400 pages, has priced it for Indian Rupees 795 is a good consideration for agreement of learning by readers, researchers, teachers and students of Indian family law.

A one-page Acknowledgements sets the tone in a precise way without being long and uninteresting for readers as some books in general undertake this feature for a usual ceremony. The Introduction by two editors—Professors Archana Parashar and Amita Dhanda, well-known in Indian legal circuit for their scholarly works across various law subjects of their respective interests, gives a good deal of legal dose to understand what this edited work is all about in 29 pages. In a way, this Introduction forces me not to repeat what is already explained in this part. Yet, reviewer's duty of explanation in me that readers look for is not circumvented. The Introduction, highlights many issues that define what the core problems in Indian family law are and, how all authors attempt to address and solve them. Some important considerations as given are; to kick start the process of generating a discourse on 'just family law' with an idea that this just family law ought to be seen as more than a debate on religion verses State or majority verses minority. Just family law is explained at the most basic level, where people live together in relationships of affection with a framework of rules for forming and dissolving unions and an even-distribution of costs in entering into or existing affective relationships. Editors believe that these factors of just family law did not exist properly in our nation owing to a complex history of colonial past. Hence, authors have attempted to give a direction through these articles to move towards justice and fairness in family law theory. Editors also say that the current Indian legal academia must understand how the religious personal laws (RPL) that colonial rulers and their rules have selectively characterized and categorized for implementation. When conflicts between State and religion become intense, personal laws affecting family relationships that fountain from religion and its mindsets automatically impact freedom of individual rights and choice of liberties pushing them to a rickety rumpus. Colonial rulers who had to identify personal law rules in a moribund socio-political religious situation for implementation in their courts of law then, have not done the job at their best. Editors feel, unfortunately independent India inherited this past flawed legacy of lopsided legal logic. This historical point of political situation is made clear through an example of contemporary instance where overriding legal effects take place between rules. The case of Muslim Women's Protection of Rights on Divorce Act 1986 to uphold Shariat rules on maintenance and Juvenile Justice (Care and Protection of Children) Act 2000 allowing adoption of certain children, which potentially conflict Shariat rules of inheritance, is one instance. I feel had there been more instances like these examples in the Introduction itself, it can tempt readers to buy this book.

Some more questions that get inspired in the mind of readers from Introduction are; Is it that the State and her three organs are incapable of bringing just family law theory and interpretation from RPL itself? What is the guarantee that just family law can be clearly brought out couched in legal phrases in new legislations, not to speak of the misfortune of wrong interpretations arising out of political overtones and opportunism especially in a country like India where we have witnessed such occasions? And again, who will accomplish this task and how it is to be done? Can uniformity be allowed in personal law when social heterogeneity is multifaceted in the vast body of a nation like ours just because RPL was misunderstood and selectively operated by colonizers and then followed blindly by India? Is there a fundamental flaw in RPL itself despite the fact that they are largely uncodified and unassimilated towards proper understanding of justice and fairness? Though there is an instance of *non-liquet* proper for non-married partners or grandparents not included in RPL as cited by the editors, can they not be included by dynamic and Realist interpretations in a similar way like Article 21 of the Indian

Constitution that has come to what it is now from where it was six decades back? I feel the problem is not in framing the law through a procedure. Rather, embodying the correct idea and spirit of principles of just family law through a process to be framed into an Act to command collective compliance. When one finishes reading the book, one gets these thoughts. Readers get motivated to think in this direction as a result of a comprehensive synopsis given in Introduction itself. There is also an objection to top-down model of law making as it is contrary to democratic ideals where uniformity can kill variety that comes from individualism as in the case of personal rights, choices and liberties. More so, in the case of women, children and people with alternative sexual and gender orientation who are at the receiving end for several centuries in our country. In the midst of these intricate issues, editors raise an appropriate point that even if secular family law is made, it need not be inimical to minority and religious identity and still they can give due liberty, right and choice to every individual. This categorical point of view idealizes law and law making and, gives legal discipline a supreme status though editors also simultaneously voice concerns of contemporary legal theory which sees a corrosive connection between law and justice. However, this seems to me bit unwarranted as the ground of discussion in this whole book is legal, so we cannot disqualify ideals of justice when law ought to idealize justice, no matter how its institution of legal system is weak out of an under-nourished social collectivity and legal obedience. Still, all authors clearly demonstrate the faith they have in law and the positive results it bestows. This standpoint stimulates serious students of law, researchers of legal policies and teachers of law who ought to believe in law, its spirit and institutions which leads to justice. Another point adequately made in Introduction is what I personally believe, needs a serious look by those who are interested in legal education. It is the necessity of legal education as a whole to concentrate more on foundational and philosophical enquiries of law and its legal systems towards true justice. Students and teachers ought to commit reading jurisprudence or legal theories not only as mere subjects as prescribed in legal academic curriculum. It ought to be more as the whole gamut of legal education itself is nothing but an indispensable part of justice-machinery in society and life. I strongly hold this view as one my core ideologies. Legal education if enhanced properly by teachers of law through their teaching, research and publication can make Executive, Legislature and Judiciary of the State think about justice and the ideal of just family law needs nothing short of this indispensable convergence of State's trinity. Law students leaving academic halls upon graduation have a dedicated role in shaping society and State. Be it Bar or Bench, public or private services, sound legal education can lead nation in a positive direction that starts from family and home leading to society and relationships. Editors also feel family law theory is largely Eurocentric and more Anglo Common in meaning. Fresh parameters of socio-economic themes lead by core legal insights are not yet identified in Indian justice context, they lament. They also cite arguments of John Dewar and Michael Freeman to show how family law theory has moved from discourse of rights to efficiency canons. Postcolonial context of justice and certainty of positivist thinking are also brought in to show how the new trend in just family law is developing. A point strongly advocated echoing Sivaramayya's thoughts is that contemporary legal theory in just family law must engage the responsibility of law, its actors, thinkers and institutions in the making of laws and legal theories. Legal knowledge is a concern of everyone and not marginalized alone or what the hegemony of western thought provides outside-western situations for how and what law ought to be. Legal theory must be informed by sociological, historical and economic interests of every nation without subversion to core canon of legal postulates in time-space context of jurisdiction if objectivity is claimed to its making. Editors show an echo of Cotterrell's politics of jurisprudence here. All these ideas bring interdisciplinary research in law with legal values as the central focus governing knowledge of other disciplines. In short these powerful insights surveys centuries of dominant monistic policy

attitude that are devoid of legal pluralism – to see law from perspective of every nation as well as law from knowledge from every sphere. As a result of these issues, Introduction truly introduces readers to a vast array of legal insights. It appraises readers the pitfalls of past and gives a new direction for secured just family law in India for future. An excellent read at its start. One finds.

With Introduction follows A Work Profile on Professor B. Sivaramayya by Professor Amita Danda. Its style is as interesting as its contents where Professor Amita Danda has meticulously brought out list of his publications through books, articles, notes and book-reviews. The narrative account compels readers to know what Professor B. Sivaramayya was all about, his juristic influences, place of work, his students, friends and teachers who owed intellectual debt and adoration. Amita writes to say, Sivaramayya did not ask for equal treatment of unequals; instead he was continually alive to the different life and social circumstances of persons by which law and justice ought to be centered. This statement on Sivaramayya brings the whole book into a focus on the methodology of how to resolve the knots of unjust family law in India. The choices and responsibility of law making crucial to justice, as Sivaramayya advocated, is brilliantly captured. I see this point as a votary of true legal pluralism which is in the danger of erosion as fast globalization of ideas and market philosophy narrows justice with mere economic parameters. One wonders whether the diameter to measure the length of justice is through points of law and not just flow of cash or efficiency parameters. Legal values hold the right to compliment knowledge from all other disciplines for final manifestation of Constitutional Preamble. Articles 2, 8 and 10 in this book supplement this deduction where justice ought to be justice of inherent worth for women and family, not just ancillaries of temporal worth such as economic costs and compensations. All authors convincingly pitch to this scale.

Twelve Articles spread across 355 pages explore rich ideas on individual's rights impacting just family law from various angles. A quick glance of the same suffices the role of my review-duty. However, I take only few issues from certain Articles as space constraint and reader's anticipation of joyous reading of this book, checks my liberty of expression.

Article 1 titled *Inheriting Modernity: Religious Intolerance in Christianity, Islam and Hinduism* by M. Vasudevacharya highlights contradictions between religious interpretations from traditions and modern interpretations. Author's focus is on interpretation as a method to resolve conflicts of intolerance. He says principles of liberty, equality and mutual tolerance are to be kept to filter interpretations on religious traditions to avoid conflicts between religions and their interpretations. He shows an instance of how a religious text like Bhagavad Gita which is set in poetic meter ought not to be construed and understood in prose meter resulting in wrong meaning as same sentences constructed in prose and poetry can give different interpretations. He illustrates this by an interesting example from a verse in Bhagavad Gita that the reader would be thrilled to read. The author presents his case in three parts for three religions – Hinduism, Christianity and Islam, followed by a conclusion to show how even the methodology of secularism debate as seen in post-modernism cannot solve the problem as it can at the maximum only keep the potentially antagonistic parties apart. What can actually solve the problem of intolerance between religions is a fundamental interpretation method on religious texts as religious traditions evolve only out of religious interpretations – the author strongly believes in this. He also says this (re)interpretation must be done inside every religion sincerely by analyzing their drawbacks and not in competition. Through this he connects law with society and religion, which is commendable. There is also a forceful conclusion where the European solution of secular State by adopting Locke's idea of distinction between public and private sphere of life of a nation cannot be universally made as civilizations across show distinctive characters. For instance, religions like

Islam and Hinduism do not make distinctions between private and public life or State and religion in strict sense which, Christianity and its civilization has done in their social organization of life fixing the boundaries of liberties between the two. He concludes, that what is left for us is only the method of interpretation with ideals of liberty, equality and mutual tolerance. However, it is not known how these values are to be made and administered for a practical course correction in the making and executing of legislations and in justice delivery mechanisms.

Article 2 titled *Wives and Whores: The Regulation of the Economies in Sexual Labour* by Prabha Kotiswaran and Article 3 titled *Saving Custom or Promoting Incest? Post-independence Marriage Law and Dravidian Marriage Practices* by Patricia Uberoi are two different ideas dealing with the themes that are not generally explored. This makes the reading highly interesting as they are presented with good research notes and references for further reading. One cannot avoid seeing how sociology and culture assist law and legal reasoning especially in issues of marriage and gender justice from reading these two articles.

Articles 4 and 5, titled *A Psychosocial Critique of the Law of Adoption in India* by Amita Dhanda and *Paternalistic Law, Autonomous Child and the Responsible Judges* by Archana Parashar respectively need a closer look as they both gravitate around issues affecting children which are a major concern in just family law and religious personal laws. Professor Amita Dhanda starts the argument based on psychological understanding of the differences between 'being born' and 'being adopted' with various actors in the scene – adopters, adoptee and biological parents. Taking on the Hindu Adoption and Maintenance 1956 (HAMA), Guardianship and Wards Act, 1898 (GAWA), Juvenile Justice (Care and Protection of Children) Act (JJA) and Inter-Country Adoption Guidelines (ICA), she shows the difference among these adoptions and how the 'best interest of child' (BIC) is not yet fully understood. With a cry for uniform adoption law, there is an ominous silence in the scene to enhance child's interest and it is almost lost in the procedural din without substance taking a clear voice, is a major concern for this author. With Convention on the Rights of the Child (CRC) that India has ratified, the best interest test is a must and Amita provides the required psychological studies to understand this test. She has presented a harmonious construction of Article 7 and 8 of the CRC to show the test of best interest. Her conclusion presents her passion in this subject that she advocates for, to tell not only normative legal inputs as laws but practical outputs to solve the problems through legal systems and institutions. By this she presents certain clues to solve the problems, which are; law and policy to understand differences between being born and being adopted, scrutiny of the suitability of adoptive parents, pre and post-adoption counseling, networks for adopted children for safety, non-identification as deviants or with marks, belief that nurture prevails over nature, connection with biological reality of child, non-familial adoptions, emotional ties and security of the child, pangs of separation and identity crisis, family crisis a wrong source of giving adoption, strength of socio-economic power to rear the child and many more show a pithy account of what is involved in adoption and how it is to be done with the protection of State and its instrumentalities. However, a bigger question remains as to the definitions of inherent choice and role of a child in his or her own adoption. Probably the last sentence of her article gives a hint that wobbles reader's heart. She says, adoption is safe only when the home is real for the child and not just a change of place with child's feelings, identities and interests broken apart between two places, from the place of birth to the place of adoptive living. All actors and scenes of adoption must have to become one. Nothing else. Archana Parashar on her *Paternalistic Law, Autonomous Child and the Responsible Judges* is very clear in expounding what is best interest of the child (BIC) where judiciary has been given a wider discretionary power to influence this best interest doctrine. When law is the ultimate protector and society accepts the cultural construct of children being

vulnerable owing to a lack of natural maturity that come by the passage of social time and social space, judges get to see a role in deciding issues relating to children. At this juncture, will judges not become paternalistic? Should law then intervene? If so, how and when? These are the questions in her passionate introduction. Upon reading these telling questions, I got to visualize the Storrs Lectures at the Yale Law School delivered by Benjamin Cardozo close to 100 years back. In his 4th lecture, Cardozo speaks of how judges and their judicial reasoning can become influenced by the socio-cultural milieu of a particular time, which he calls as subconscious loyalties. Here in this book, the author presents how a sound basis for relying on authority and expertise of the judges in dealing with issues affecting children are to become a legal policy that can make judges accountable. As Cardozo concludes in his speech at Yale with a distinction between rules and needs, how harmonious construction between the same balances social challenges, the spirit of realism ought to play a serious role in judiciary is the crux. Author makes the same distinction but in different phrases – as tension between discretion and prescription of rules connecting them with law, reality and society. Her article is a three-part study with analysis of the doctrine of best interest of child in India, critical analysis of judicial discretion and legal formulae on the doctrine and finally how conventions of legal reasoning and method of interpretation has to change to appreciate the abovementioned doctrine. This highly researched article not only connects three parties to the problem – law, children and judges inside a court of law, but also connects three elements of law relating personal law –legislations, family and social collectivity. Article has Realist tendencies based on social needs in advocating the cause of action suitable to our current times.

Article 6 titled *Dysphoric Bodies of Law* by Damini Bhalla and Supriya Sankaran that deals with sex, transgender, stereotypes, family as roots of social ostracisation and law relating to these inequalities and discrimination explain the intricate relationship between morality and legality. Conclusion shows how transgenders should be entitled to equal protection and treatment through proper law. They also provide us with a caution that such a proper law be framed by striking a balance between conflicting interests in the light of prevailing mindsets and moralities in relation to transgenders. If this article includes gender and sexuality that vary from ‘actual to acquired to assumed’ gender in the light of scientific and medical developments that are taking place, it will be an additional treat for all those who are interested in marriage, relationship, sex and gender in law, culture and society.

Article 7 titled *Sexuality, Freedom and the Law* by S.P. Sathe requires no introduction. One of the editors of this book, Professor Amita Danda whose article titled *Powering Responsibility, Conscience Keeping In Public Law: The Scholarship Of S. P. Sathe*², is enough to know what this great juristic thinker, writer and academician is all about. Professor Sathe claims sexuality is an inherent right of the individual in choosing the sexual relations with another person. It is a part of human personality and hence its development requires freedom, is his main argument. And this right is not fully developed and understood in India is his major concern. Moreover, this right and its application is also discriminative in the society as sexual exploration of men is considered as a mark of masculinity whereas women are accorded with a stereotype label of ‘good woman’ and she suffers sexual harassment, attacks and choices not just within the confines of her family, rather in society and even from State. Professor Sathe also argues this sexual freedom of choices become difficult when it comes to homosexual orientation, thereby meaning laws, are to be repealed that criminalizes same sexual relationships. Unfortunately, Professor Sathe was not present when the Naz Foundation case of 2013 known as homosexuality case was delivered

² <http://www.commonlii.org/in/journals/INJlConLaw/2007/1.pdf>

overturning the Delhi verdict. This verdict was seen as a point to rally the well-known issue between legislative power of capacity and judicial power of activism. In this context, what Sathe has written is very relevant. The legal recognition of unpopular freedoms is a perquisite to the social acceptance of such rights. He asks – what is the use of liberal interpretation of the Constitution if it does not percolate into the interpretation of statutes particularly penal laws? If rape is not just an offence under penal law but also violative of rights under the Constitution, how can we avoid the restriction of freedom and liberty on the choice of sexuality? He also cites how this Victorian morality is reviewed in Britain, Canada, British Columbia, Quebec, whereas in USA and India there are severe oppositions to homosexuality. He also questions whether the defense of the State against same-sex relationship is sustainable medically as there is no proof of evidence to show increase of HIV/AIDS. He gives a conclusion to the effect that judiciary must act as constitutional protector against all kinds of infringements, no matter the morals of the society or majority uphold them. Those who make unpopular choices require both legal and judicial protection. Non-conformity to the populist choices affirmed by social sanctions seems to be risky for those who believe in numerical force of the majority. Are not judges away from these numbers of democracy? Reading Sathe's article liberates human psyche and frees society from all kinds of burdens. He not only idealizes a role for law, but brings ideals that law can take into consideration and claim very well it's much deserved primacy of knowledge among other disciplines.

There are other Articles in this book such as 'Divorce at the Wife's Initiative in Muslim Personal Law: What are the Options and What are Their Implications for Women's Welfare?' by Sylvia Vatuk, 'Hindu Conjugalities: Transition from Sacrament to Contractual Obligations' by Flavia Agnes, 'Family, Work and Matrimonial Property: Implications for Women and Children' by Kamala Sankaran, Succession Laws and Gender Justice by Poonam Pradhan Saxena, and 'Bargaining', 'Gender Equality and Legal Change: The Case of India's Inheritance Laws' by Bina Agarwal. All these Articles are well-written, exceptionally researched and legally annotated making the book a must for serious rethinking in family law.

What do we see in all these Articles that are presented as an anthology to redefine family law in India? What is the take-home view that we get after reading this interesting book? Does it look like a cry for the Liberal argument to be included in mainstream opinions in order to accommodate the view of marginalized, oppressed and voiceless in India especially women, children or people with different sexual and gender-orientation? Does it look like a presentation of an alternative legal theory to promote just family law in India in association with legal systems of advanced countries? Or, is it yet another new experiment in legal theory? Or does it simply hold a neutral criticism? I feel arguments and alternatives, cries and neutrality are no doubts good experiments to make majority include minority or vulnerable access rights. However, they all are still a weak substitute to counter the elements of strong and big numbers. Success, if countered, fail, if rejected are not a conducive situation for law, nor law holds this game of tug of war as its aim. There must be something else. This is what the editors and authors have tried to present. They had attempted in presenting not just a counter or response to a majoritarian mind that sets another social narrative and normative. They all had, rather presented a set of values to create a new mindset to attract the existing mindset to change into this new mode of thinking on just family law. Legal values are self-inherent and self-independent in their own state of nature. They ought to be away from forgotten state of (majoritarian?) mind largely brainwashed from birth and social conditioning that accepts crowd mentality or group intellectualism. They ought to be away from norm-patterning values of mutual satisfaction and complementarity and be bold without socio-cultural loneliness and its fear. This book presents these issues with a sense of urgency that

cannot be avoided by any reasonable legal scholar. I conclude by admitting my anxiety that if arguments on these values are lost, it will be certainly a sad loss for women. But, is not the loss for women a loss for society as a whole who is an integral part of the fabric of not only lop-sided man-made society but also life as a whole? Who is at loss? Women or society as a whole? This is the big picture sufficient to create thinking on just family law. Neither man gets fulfilment nor women or life as a whole if private interests, rights and choices are lost in society. And still, it is not for the fulfillment of man and society that we needed to think of women or rights of the weak. Rather the other way.

I am sure, we all are made to introspect after reading this book - *Is just family law happening in our house, home, social space and relationships?* Let us start.