NOTES AND COMMENTS

A RELATIONSHIP IN THE NATURE OF MARRIAGE – HOPE AND DISAPPOINTMENT

Abstract

Marriage (besides blood relationships) is not the only relationship that exists between men and women. Such other relationships between men and women can be beautiful, complex and difficult. They may be monogamous, bigamous, adulterous, live-in or any combination thereof. Some of these relationships are encouraged by the society, some are tolerated and some other are despised. What view society forms about a particular relationship is generally reflected in its laws. In the year 2005, the Domestic Violence Act came into force. It recognised a 'relationship in the nature of marriage' as a 'domestic relationship', and provided protection to women in such relationship from domestic violence. However, this Act did not provide any definition of a relationship in the nature of marriage. Therefore, which relationships can be called relationship in the nature of marriage remained an open question. In the year 2010 the Supreme Court of India, in the matter of *D. Velusamy,* filled this gap and defined a relationship in the nature of marriage. Both, the Act and the Supreme Court judgment, were hailed as recognising and protecting a new trend of live-in relationships in India.This paper presents an entirely different perspective to look at this development. This paper attempts to show that the view taken by the Supreme Court of India is not just too narrow, but it suffers from some other more serious defects as well.

I Introduction

IN THE matter of *D. Velusamy* v. *D. Patchaiammal*[1] the Supreme Court of India in its judgment dated 21 October 2010 thought it fit to define 'a relationship in the nature of marriage'[2]. In the court's opinion, a relationship in the nature of marriage is akin to a common law marriage which require that although not being formally married –

The couple must hold themselves out to society as being akin to spouses;

1. (2010) 10 SCC 469.

2. A 'relationship in the nature of marriage' is a 'domestic relationship' u/s 2(f) of the Domestic Violence Act, 2005. Under s. 2(f) 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Existence of 'domestic relationship' is necessary to get any relief under the Act. The Act provides various reliefs to women, including maintenance and protection orders. The Act, however, does not define a 'relationship in the nature of marriage'. In no other statute in India this expression is used.

they must be of legal age to marry; they must be otherwise qualified to enter into a legal marriage, including being unmarried and they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In the court's opinion a relationship in the nature of marriage must fulfil the above requirements, and in addition the parties must have lived together in a 'shared household' as defined under section 2(s) of the Domestic Violence Act, 2005.[3] In order to get the benefit, the conditions mentioned above must be satisfied, and this has to be proved by evidence.[4] If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant, it would not be a relationship in the nature of marriage.[5] It was further mentioned that in a feudal society, sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel *Anna Karenina,* Gustave Flaubert's novel *Madame Bovary* and the novels of the great Bengali writer Sharat Chandra Chattopadhyaya.[6]

In the present paper, an attempt is made to show that the definition given by the Supreme Court suffers from no less than four deficiencies. One, this definition is logically unsustainable. Second, it is not in accordance with the historically acceptable norms of this country. Third, it is not in accordance with the will of the legislature. Fourth, it serves no social purpose. The paper further attempts to present a different interpretation of 'a relationship in the nature of marriage' that covers all the above mentioned deficiencies.

II Logical inconsistencies

Out of the four conditions, prescribed by the Supreme Court, if one observes the third condition closely it is evident that in the third condition laid down by the court, i.e. 'the couple must be otherwise qualified to enter into a legal marriage, *including being unmarried'* there appears to be a presumption that being unmarried is one of the necessary conditions for being qualified to enter into a legal marriage. This, however, is not true in all cases. For example, in India, Muslim man who is already married to a Muslim woman under the Islamic law can validly marry another Muslim woman without divorcing his first wife. Therefore, if one is to read the third condition (set out by the Supreme Court) as making it mandatory for the parties to be unmarried for

3. *Supra* note 1 at 477.
4. *Id.* at 478.
5. *Ibid.*
6. *Ibid.*

having a relationship in the nature of marriage, a married Muslim man can never have a relationship in the nature of marriage with an unmarried Muslim woman though he can legally have a relationship of actual marriage with her. This is logically inconsistent result. It is not logical to say that in law you can marry a woman but you cannot have a relationship in the nature of marriage with that woman when all other conditions remain unchanged.

The third condition can also be read in another manner. One can say that the third condition lays down the rule that 'the couple must be otherwise qualified to enter into a legal marriage, including being unmarried *wherever being unmarried is a necessary qualification to enter into a legal marriage.* Reading the third condition in this manner shifts the focus from the marital status of the parties to the eligibility requirements for marriage under the personal laws of the parties. In other words parties can have a relationship in the nature of marriage if they are eligible to marry each other under their personal laws, irrespective of whether they are already married or not. In this manner, a married Muslim man can have a relationship in the nature of marriage with an unmarried Muslim woman with whom he is qualified under Muslim law to marry, and logical inconsistency herein above pointed out is avoided.

But, reading the third condition in this manner creates another equally serious problem. This interpretation of the third condition makes the question of protection from domestic violence and the question of maintenance that can be granted to a woman under the Act dependent upon the religion (and thus personal laws) of the parties. The answer to the question, 'whether a married man can have a relationship in the nature of marriage with an unmarried woman?' will then depend upon the religion of the parties. If the parties are Muslim, the answer shall be in affirmative because in India a married Muslim man is not disqualified from marrying an unmarried Muslim woman. But if the parties are Hindus (or Christians or Parsis for that matter), the answer shall be in negative because in India, a married Hindu (Christian or Parsi) man is disqualified from marrying another woman.[7] Consequently, whether under the Domestic Violence Act, 2005 there is a case of domestic violence or not and whether protection and maintenance can be granted to the woman or not shall also depend upon the religion of the parties. Conclusion upon reading the third condition in this manner shall be that under the Act a married man and an unmarried woman can have a relationship in the nature of marriage, there can be a domestic violence in that relationship, and the woman can be entitled to protection and maintenance if the man and the woman are Muslims;

7. In the matters of marriage and divorce etc. people in India are governed by their different personal laws, rather than one uniform law.

but neither it shall be a relationship in the nature of marriage, nor there shall be a domestic violence, nor the woman shall be entitled to protection and maintenance if the parties are Hindus (Christians or Parsis).

This is logically absurd result. How can one logically say that the same set of facts amount to domestic violence if the parties are Muslims but do not amount to domestic violence if they are Hindus. Moreover, this result is contrary to the scope and spirit of the Domestic Violence Act, 2005 which is intended to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within family and for matters connected therewith or incidental thereto[8] irrespective of the religion of the 'aggrieved person'[9] and the 'respondent'.[10] The issue of domestic violence cannot be based upon the religion of the parties. The Act does not provide a religion based definition of either 'domestic violence' or 'aggrieved person' or 'respondent'. Protection and relief in cases of domestic violence, or any violence for that matter, cannot depend upon the religion of the parties.

One may approach this problem from another perspective. One may start by asking : 'why would the legislature recognize a relationship in the nature of marriage as also sufficient for granting relief in cases of domestic violence when it has already recognized marriage as a condition for granting relief?'[11] When marriage is already recognized as a condition for granting relief, recognizing a relationship in the nature of marriage as also sufficient can only be for the purpose of making more cases eligible for relief. And, such extension from marriage to a relationship in the nature of marriage could not only be for the purpose of granting relief in more cases but more specifically also for the purpose of granting relief in those cases in which relief could not be granted if the relief remained based upon marriage only.

Two inevitable conclusions can be drawn from here. One that the expression 'relationship in the nature of marriage' should be so interpreted

8. See, preamble, The Domestic Violence Act, 2005.

9. 'Aggrieved person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent'. S. 2(a), The Domestic Violence Act, 2005.

10. 'Respondent means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner', s. 2(q), The Domestic Violence Act, 2005.

11. Under section 2(f) of the Domestic Violence Act, 2005 marriage is covered under the definition of 'domestic relationship'.

that it includes more number of situations as compared to the situations covered under the expression 'marriage'. And second, for interpreting the expression 'relationship in the nature of marriage' a narrow notion of marriage must be abandoned. If one does not abandon the narrow notion of marriage in understanding and defining a relationship in the nature of marriage, the understanding and definition shall always remain limited by the narrow notion. In that case, the understanding of a relationship in the nature of marriage, a different and independent category, shall revolve around the notion of marriage and one shall fail to provide just relief even in the most deserving cases.

The status of husband and wife always arises because of marriage. Conversely a woman is never treated as the wife of a man unless there is marriage. The notion of marriage includes some essential conditions[12] which the parties must satisfy, and some process of solemnization[13] which the parties must undergo. If the parties satisfy all the essential conditions and also undergo the process of solemnization it is called a valid marriage and they are called husband and wife. If the essential conditions are not satisfied the marriage is treated as a void marriage.[14] Even if the parties satisfy all the conditions, but the process of solemnization is not undergone it is not treated as a marriage and the status of husband and wife is not conferred upon the parties. Thus, essentially, marriage means satisfying all the necessary conditions and undergoing the process of solemnization. It must be recalled here that in the year 1992 the Supreme Court of India had already held in *S P S Balasubramanyam* v. *Suruttayan*[15] that a long cohabitation may give rise to a presumption of solemnization. This is by virtue of section 114 of the Indian Evidence Act, 1872 which allows the court to take these kinds of presumptions. Therefore, if a man and a woman are qualified to be husband and wife (*i.e.* they satisfy all the essential conditions to get married to each other) they can be presumed to be married to each other despite an absence of proof of solemnization of their marriage, provided there is sufficiently long cohabitation. It must be clearly understood here that such a relationship is treated as a relationship of marriage and not merely a relationship in the nature of marriage. In *D Velusamy* Supreme Court's definition of a relationship in the nature of marriage has four elements. A relationship to be called 'a relationship in the nature of marriage' must, therefore, satisfy

12. For example, s. 5, The Hindu Marriage Act, 1955.
13. For example, s. 7, The Hindu Marriage Act, 1955.
14. There are some less essential conditions which, if not satisfied, lead to voidable marriage. See, s. 12, the Hindu Marriage Act, 1955.
15. AIR 1992 SC 756.

four conditions namely: i) the couple must hold themselves out to society as being akin to spouses, ii) they must be of legal age to marry, iii) they must be otherwise qualified to enter into a legal marriage, including being unmarried, and iv) they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. It must be noted that condition number (ii) and (iii) are nothing other than the essential conditions which the parties must in every case satisfy for valid marriage, and condition number (i) and (iv) are the conditions which in order to prove their marriage the parties may satisfy in lieu of proof of solemnization (by virtue of *S P S Balasubramanyam* and section 114 of the Indian Evidence Act, 1872). In other words, by Supreme Court's account in *D Velusamy,* the only difference between a marriage and a relationship in the nature of marriage is that for 'marriage' solemnization must be proved and for 'relationship in the nature of marriage' there should be, instead of solemnization, a holding out by the parties for a long period of time that they are man and wife. The requirement of solemnization is replaced by the requirement of holding out for a long period of time. Thus, if a man and a woman who otherwise satisfy all the essential conditions to marry each other undergo the process of solemnization it is called a marriage, but if they hold themselves out as man and wife for a long period of time instead of undergoing the process of solemnization it is called a relationship in the nature of marriage.

As it is noted hereinabove that by virtue of section 114 of the Indian Evidence Act, 1872 and *S P S Balasubramanyam,* satisfying all the essential conditions to marry each other along with a long cohabitation even without a proof of solemnization can be treated as a 'marriage' and not merely a 'relationship in the nature of marriage', all the cases that can be covered under the newly formed (by legislature) and defined (by the Supreme Court in *D Velusamy)* category of 'a relationship in the nature of marriage' are already covered in the category of 'marriage'. Since long cohabitation can already validly replace solemnization for establishing 'marriage', replacing 'solemnization' with 'holding out for a long period of time' will not provide even a single case which can be covered under the category of a 'relationship in the nature of marriage' but not in the category of 'marriage'. All those cases which shall be covered in the category of a 'relationship in the nature of marriage' shall already be covered in the category of 'marriage'. The impact of the Supreme Court's definition shall be that this newly formed category of a 'relationship in the nature of marriage' shall remain empty and hollow.

It is easy to see that a requirement of proving a holding out to the world for a long period of time is a more stringent demand than proving a long

cohabitation. In fact the former includes the latter. It is possible that two people may be cohabiting as man and wife without holding out to others that they are man and wife. Under the law, as it already stood, two persons cohabiting as man and wife for a long period of time, but not so holding out could be treated as married. Ironically, such a couple which can already be treated as 'married' (for the purposes of the Hindu Marriage Act, 1955 *etc.*) cannot now be treated as even in a 'relationship in the nature of marriage' (for the purposes of the Domestic Violence Act, 2005).

In this sense the category 'a relationship in the nature of marriage' becomes narrower than the category 'marriage'. It demands the capacity of the parties to marry each other, long cohabitation and holding out that they are husband and wife; whereas 'marriage' demands only the capacity and solemnization (or long cohabitation). One is of the firm opinion that it should be the other way round. The category 'a relationship in the nature of marriage' should be wider (and different) than the category 'marriage'. It should include more (and different) situations as compared to the situations covered under the category 'marriage'. More specifically, it should include those cases which cannot be called 'marriage' because they do not satisfy the strict technical requirements of marriage in the eyes of law. This is possible when a relationship in the nature of marriage is differently (as compared to marriage) and not very rigidly understood. As a 'relationship in the nature of marriage' is not 'marriage', the requirements of marriage should not be expected to be met in such cases. Such a relationship should be so understood that it may include those cases which cannot be called marriage *stricto sensu*. The requirements to fall in this category should be different and less rigid. Of course, the concept of a relationship in the nature of marriage cannot be so wide that it may include all casual affairs between men and women, but at the same time it can also not be so narrow that it may include no cases other than the ones already qualified to be treated as marriage under the prevailing legal framework.

III Internal and external perspectives

A relationship between two people may be viewed from an internal perspective and it can also be viewed from an external perspective. Internal perspective is the perspective of the parties involved in the relationship. It is how two people view their relationship with each other. External perspective is the perspective of the third parties *i.e.* outsiders, or people other than the parties involved in the relationship. It is how outsiders view a relationship between two people. In finding out the true nature of a relationship between two people from a purely technical point of view, perhaps the external

perspective is relevant. In other words, where the existence of a relationship in law depends upon it satisfying certain conditions prescribed by the law, the external perspective may suffice for determining the existence of the relationship. This is so because the only question to be answered in such cases for determining the true nature of the relationship shall be whether the conditions laid down in the legal definition are satisfied or not – a question that can be answered very accurately from the external perspective. Thus, where, by legal prescription, *saptpadi* completes the marriage the existence of marriage can be determined from an external point of view because the third parties (or outsiders) can very accurately determine whether *saptpadi* was performed or not. But when the relationship under consideration is not a concrete and defined relationship but a relationship *in the nature of* a concrete and defined relationship it is implicit that the requirements of the defined relationship shall not be met in that case. That is precisely the reason why such a relationship is called a relationship *in the nature of* a concrete and defined relationship instead of it being called by the name of that relationship. It is meant to be separate and distinct from that relationship. Expecting a relationship *in the nature of* a concrete and defined relationship to meet the exact requirements of that concrete and defined relationship is, therefore, not only futile but also self-contradictory and unreasonable.

If this argument can be taken as accurate, the external perspective becomes inadequate and, more importantly, irrelevant in finding out the true nature of the relationship between two people when the relationship in question is not a concrete and defined relationship but a relationship *in the nature of* a concrete and defined relationship. In such a case, since the possibility of finding the essential elements of the definition is already out of the equation there is no possibility left for an objective assessment of the relationship. All that is left is what the parties themselves feel about their relationship – the internal perspective. The question of existence of such a relationship between two people, therefore, is a question of what they feel towards each other. It is a question of feelings, emotions and sentiments of two people towards each other. It is a purely subjective question not open for assessment from an external perspective.

Similarity 'marriage' and a 'relationship in the nature of marriage' does not extend beyond internal perspective of the parties. A relationship in the nature of marriage is completely established by the mutual feelings *etc.* of the parties. How they present themselves to others or what others perceive about them does neither further solidify their relationship nor does it dilute their relationship. It must be clearly understood that when, with respect to a concrete relationship,

the expression *'in the nature of'* (that concrete relationship) is used it implies that that concrete relationship is not present, and it also means that multiple possibilities are recognized and accepted within the category which is *in the nature of* some concrete relationship *but not exactly* that concrete relationship. Such an expression inherently points towards various relationships all of which are short of a certain relationship, are to an extent similar to each other in that all of them have the same internal perspective, and are to an extent similarly different from a certain relationship in that all of them fall short on the external perspective that that relationship satisfies.

Therefore, the category 'relationship in the nature of marriage' should not be rigidly and similarly defined just like 'marriage'. Of course, this category cannot be so left open that an influx of all type of relations may be allowed in it. Surely, this category cannot be so permeable that even most indiscrete and casual affairs between men and women may find a place in it. There have to be some qualifying requirements to be satisfied as a precondition for a relationship to be covered in it. But, the argument here is that the parameter set should be such that this category – (i) retains its identity as separate and distinct from marriage, (ii) remains wider than marriage, and (iii) justifies its existence *i.e.* meets the objective for which it is created.

Relationships in the nature of marriage always existed in India, and at least to some extent they were always recognized in law. Therefore, to understand properly what should be meant by a 'relationship in the nature of marriage' it is important to investigate into the classical Hindu law.

IV Position in Hindu law

Position in classical Hindu law

Investigation into the classical Hindu law reveal that, besides the blood relationships, a woman could be related to a man in no less than eight ways. A woman could be related to a man as: 1. *Patnī*,[16] 2. *Yoṣhitā*,[17] 3. *Avaṛuḍdhā*,[18]

16. *Yājñ.* I, 75. See, Srisa Chandra Vidyarnava (trans.), CXXIII *Yājñavalkya Smṛiti* 142 (Chowkhamba Sanskrit Studies).
17. *Yājñ.* II, 145.
18. *Yājñ.* II, 293.

4. *Dāsī,*[19] 5. *Bhujiṣhyā*,[20] 6. *Punarbhū,*[21] 7. *Svairiṇī,*[22] and 8. *Vaiṣhyā*.[23] Regarding *Patnī, Yājñavalkya* says: "She who does not go to another, whether her husband be alive or dead... ."[24] The dictionary meaning of the word '*yoṣhitā*' is '*strī*' (woman). But another word originating from the same root '*yoṣhit*' is '*yoṣhnā*' which means 'woman of bad character'.[25] *Vijñāneśvara* provides an interpretation of the verse of *Yājñavalkya* as well as of *Nāradą* (which use the expression '*yoṣhitā*' and '*strī*' respectively). According to him, "this relates to women kept in concubinage: for the term employed is 'females' *(yoṣid)*. The text of *Nāradą* likewise relates to concubines: since the word there used is 'women' *(strī)*."[26] According to Lord Darling in *Bai Nagubai* v. *Bai Monghibai*[27] the word *avąruḍdhā* is ordinarily and accurately rendered by 'concubine' in English.[28] As far as *dāsī* is concerned, she is described as a female servant (or slave).[29] The correct translation of the definition of *bhujiṣhyā* would be 'a mistress' who is restrained from sexual intercourse with other persons (other than the *swāmī* or the master).[30] She, on whom the sacrament of marriage is again performed is called a *punarbhū* (again sanctified), whether she be a virgin or deflowered. She is called *svairiṇī,* who abandoning a husband takes protection under a person of her own caste, through lust.[31] *Vaiṣhyā* can be translated as harlot in English. All these women were entitled to maintenance from a man's estate if they establish their sexual fidelity to him.[32] They were not required to establish that others accepted their relationship or even that others knew about their relationship.[33] Actual commitment or fidelity to a man was more important than its knowledge to the rest of the world. In this sense, in classical Hindu law, a 'relationship in the nature of marriage' was established from an internal

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19. *Ibid.*
20. *Ibid.*
21. *Vijñāneśvara's* explanation of *Yājñ.* I, 67. See, Srisa Chandra Vidyarnava, *supra* note 16 at 134.
22. *Yājñ.* I, 67.
23. *Yājñ.* II, 295.
24. *Yājñ.* I, 75.
25. See, Kalika Prasad (ed.), *Brihat Hindi Koṣh, Jñānmandal* Varanasi.
26. H T Colebrooke (trans.), *Dāya Bhāga and Mitākṣarā*, ch. II, sec. I, para 28.
27. AIR 1926 PC 73.
28. *Id.* at 75.
29. See, M N Dutt (trans.), *Yājñavalkya Smṛiti 161*(Parimal Publications, 2005).
30. *Akku Prahlad Kulkarni* v. *Ganesh Prahlad Kulkarni,* AIR 1945 Bom 217, para 6.
31. Yājñ. I, 67.
32. See, *Gopal Rao* v. *Sitharamamma*, AIR 1965 SC 1970; *Akku Prahlad Kulkarni* v. *Ganesh Prahlad Kulkarni,* AIR 1945 Bom 217; *Bai Nagubai* v. *Bai Monghibai, supra* note 27.
33. *Dayavati* v. *Kesarbai,* AIR 1934 Bom 66.

perspective of the parties without holding out to the rest of the world. For many centuries such was the accepted legal position in India!

Position in modern Hindu law

The codification of the Hindu law in the mid 1950s drastically changed the position. With the emphasis on monogamy[34] the category 'wife' became very prominent and the category '*avaruddhā / bhujiṣhyā*' went into oblivion. No maintenance was allowed to the woman if she did not fall into the category of a 'wife'.[35] Since bigamy became punishable and the liberty of a man could be curtailed by putting him in jail, the degree of proof of the second marriage had to be very high. As a consequence, there was almost an over emphasis on the proof of solemnization of not only the second marriage but also of the first marriage.[36] Even the admission by the parties that they have contracted a second marriage was not enough. The prosecution had to prove that the alleged second marriage has been duly performed in accordance with law.[37] Merely going through any ceremony was not enough.[38] This entire new scheme of legislation[39] along with their interpretation by the Supreme Court of India of course gave some relief to a married woman at least in two senses. Now she did not have to put up with another woman as a co-wife and feel humiliated all through her life. And also in the unfortunate situation of widowhood now she did not have to share the estate of her deceased husband with another co-widow. But at the same time this new scheme also made it very important and very difficult for a woman to prove her marriage. She could now get no relief if she could not prove the solemnization of her marriage in the very rigid sense in which it was now required under the law. Looking at it from the point of view of a bad man (with due apologies to Holmes J) now he could marry a woman properly and induce the second woman to believe, without actually solemnizing the marriage, that he has married her (exclusively or along with the first woman[40]) thereby soliciting a sexual fidelity from both of them at the

34. S. 5(i) r/w s. 11 r/w s.17 of the Hindu Marriage Act, 1955 r/w s.494 of the Indian Penal Code 1860.

35. For example maintenance u/s 125 Cr PC was denied in *Yamunabai* v. *Anantrao,* AIR 1988 SC 644.

36. *Gopal Lal* v. *State of Rajasthan,* AIR 1979 SC 713.

37. *Priya Bala* v. *Suresh Chandra,* AIR 1971 SC 1153.

38. *Kanwal Ram* v. *H P Administration,*AIR 1966 SC 616.

39. Notably the Hindu Marriage Act, 1955, The Hindu Adoption & Maintenance Act, 1956, The Hindu Minority and Guardianship Act, 1956 and The Hindu Succession Act, 1956.

40. Of course in theory *ignorantia juris non excusat,* but in practice in India where general literacy itself is very low *prudentia juris* is extremely doubtful.

same time without incurring a liability to maintain the second woman. In fact the second woman was left with no remedy. The second woman could claim nothing from him due to an absence of solemnization (which was now strictly required), and the first woman could at the best get a divorce on the ground of sexual intercourse with a person other than the spouse. At any rate, he could not be held guilty for bigamy under section 494 of the Indian Penal Code 1860. If the same situation had arisen under the classical Hindu law both the women would have become entitled to maintenance from the estate of the man in case they survived him. The first woman would have become entitled because of her relation to the man as '*patnī*' (wife) and the second woman would have become entitled because of her relation to the man as '*avaṛuḍdhā*' / '*bhujiṣhyā*' (permanently kept mistress or concubine). Looking at the situation in this manner, now lesser number of women are entitled to get maintenance even if the same number of women might be maintaining their sexual fidelity to a man. There emerges a question of choice between more relief to some women or some relief to more women. The law after 1950s provides more relief to some women (leaving others without any relief whatsoever), but the classical Hindu law provided some relief to more women.

This was a fallout of an exclusive and almost an over emphasis on monogamy and on the concept of marriage in the strict technical sense that there is no marriage without solemnization. Since a question of criminal liability was attached, the courts rightly emphasised on the strict proof of solemnization of marriages. Any relationship with a woman falling short of marriage was not sufficient to make a man liable to pay maintenance,[41] and any relationship with the second woman falling short of marriage was not sufficient to hold him guilty for bigamy.[42] For almost half a century[43] this remained the position of Hindu law in India. In the year 2005 two major changes were introduced.

41. Though it appears that some ray of hope was visible when in *Ramesh Chandra Daga* v. *Rameshwari Daga,* AIR 2005 SC 422 the Supreme Court laid down that permanent maintenance can be granted u/s 25 of the Hindu Marriage Act while passing a decree of nullity. The logic given was that s. 25 allows the permanent maintenance to be granted at the time of passing of 'any' decree, which may include a decree of nullity. But one doubts that even after this judgment any relief could be granted to a woman other than the one who has solemnized her marriage with a man as per the requirements of s. 7 of the Hindu Marriage Act and then applied for nullity u/s 11 of the Hindu Marriage Act on the ground that her spouse had violated s. 5(i) of the Hindu Marriage Act. Despite this judgment the relief still remains based on the marriage solemnized. One doubts that the courts would entertain a petition for nullity with respect to an un-solemnized marriage.

42. *Gopal Lal* v. *State of Rajasthan,* AIR 1979 SC 713.

43. From 1955 to 2005. In the matter of maintenance the position has not altered even after 2005.

One was in the Hindu Succession Act, 1956 by virtue of the Hindu Succession (amendment) Act, 2005,[44] and the other was by way of making an entirely new piece of legislation called the Protection of Women from Domestic Violence Act, 2005. In India the expression 'relationship in the nature of marriage' figures only in the Domestic Violence Act, 2005.

V Legislative intent

On 12th December 2002, the Department Related Parliamentary Standing Committee on Human Resource Development, presented to the Rajya Sabha and laid on the table of Lok Sabha its 124th Report on the Protection from Domestic Violence Bill, 2002. The report reveals that the Secretary, Department of Women and Child Development deposing before the committee put forward the department's view for bringing the bill.[45] Regarding the definition of the term 'relative' figuring in the bill the department's view was that the definition of 'relative' as given in the bill has two requirements. First, the person has to be related by blood, marriage or adoption, and second, he/she should be living with the respondent.[46] The department was of the view that the definition *excludes women whose marriages are legally invalid, women in bigamous relations and other consanguineous relations*.[47] When asked by the committee about the reason for not including such women, the department stated that only those marriages recognized in law were covered under this bill. Such women as have been living in relationship akin to marriage were not included simply because the prevailing cultural ethos of the nation did not encourage such relationship.[48] The committee showed its awareness of the fact that there are numerous cases where a man and a woman, though not legally married, live together as husband and wife and their relationship has got social sanction too. It emphasised that the issue of domestic violence is more proximate with the basic human rights of a woman to live a dignified life. Therefore, providing relief under the present bill to a woman whose marriage is not legally valid won't be in conflict with the existing laws and will not give any legal sanction to the illegal marriages. The committee, therefore, suggested that clause 2(i) dealing with the definition of *the term 'relative' should be suitably amended to include those women also who have been living in relationship akin to marriages*

44. This change, though very important and interesting from the view point of a woman's right to property, is beyond the scope of the present paper and shall not be discussed.

45. 124th Report on the Protection from Domestic Violence Bill, 2002, para 3.

46. *Id.*, para 4.2.

47. *Ibid.* (Emphasis added).

48. *Ibid.*

and in marriages considered invalid by law.[49] It is clear beyond doubt that in this part of their deliberations both, the Department of Women and Child Development and the Parliamentary Standing Committee on Human Resource Development, were thinking about the women whose marriages were legally invalid and women in bigamous relations. The department was of the view that they should be excluded from the definition of the term 'relative'. The committee, however, did not agree and recommended that they should be included in the definition.

The background material clearly indicates that the intention of the legislature was to create a new category in which those women could be covered who were hitherto been deprived of relief because they did not or could not satisfy the requirements of a valid marriage. The use of the expressions like: 'legally invalid marriage' and 'bigamous relations' figuring in the deliberations between the department and the committee further makes it clear that both, the department as well as the committee, were of the view that such category, if included in the Act, shall not be restricted to only those men and women who were otherwise eligible to marry each other, but shall also include relationships of the kind of legally invalid marriages and relationships bigamous in nature.

Under section 2(f) of the Domestic Violence Act 2005, on the recommendation of the Parliamentary Standing Committee, 'a relationship in the nature of marriage' was included in the definition of a 'domestic relationship'. Evidently, the view of the committee prevailed. It would not be wrong to assume that the intention of the legislature, therefore, was to include in this category many more people than those who were otherwise legally eligible to marry each other.[50] The expression 'a relationship in the nature of marriage' used under the Domestic Violence Act, 2005 could, therefore, be interpreted as including all those situations which were not covered under section 125 Cr PC and section 18 of the Hindu Adoption and Maintenance Act (due to the use of the word 'wife' in those provisions), or under sections 24 and 25 of the Hindu Marriage Act (because proceedings cannot take place under the Hindu Marriage Act for the passing of any decree without solemnization of the marriage). Unfortunately, this opportunity was missed by the Supreme

49. *Id.*, para 4.3 (Emphasis added).

50. For the use of pre-parliamentary materials in the interpretation of statutes see, Rupert Cross, *Statutory Interpretation,* 160-61 (3rd edn., Butterworths). 'The courts are now free to consult pre-parliamentary materials in the same circumstances as they can consult parliamentary materials, with the caveat that Parliament does not always follow the views set out in committee reports or even Government White Papers. Such documents will, of course, continue to be useful in identifying the purpose of the enactment.'

Court of India in *D. Velusamy*. Perhaps, the focus of the court was more on the emerging trend of live-in relationships, and age old practice of concubinage was lost sight of. Many more women would have got the protection from domestic violence if 'relationship in the nature of marriage' were differently defined.

The author's argument should not be seen as an argument for making concubinage a legally recognized practice. Rather, the argument is for imposing burden on the man who keeps a concubine, thereby discouraging him from doing so. If law takes note of some social phenomenon and provides relief to the party which it feels needs relief then this does not amount either to encourage the phenomenon or to give a legal recognition to the phenomenon. The argument should also not be seen as an encouragement for women to enter into bigamous relationships or as one against the institution of marriage. It is not even to build a case for rights of a concubine at par with the rights of a wife. Rather, the argument is that if (due to unfortunate circumstances, and not due to lust) a woman finds herself in such a situation then she should not be left at the mercy of her fate. She should be given some support to wriggle out of perpetual exploitation to which she might otherwise remain subjected.

VI Alternative approach

The question – 'what should be the scope of a relationship in the nature of marriage?' may now be answered using the understanding based on pure logic, texts of the classical Hindu law, and the legislative history of the Domestic Violence Act.

In order to determine the scope of a 'relationship in the nature of marriage', for the purposes of providing protection to women under the Domestic Violence Act some questions need to be pondered upon:

Can a man be married to one woman and in a relationship in the nature of marriage with another woman at the same time?

Can a woman be married to one man and in a relationship in the nature of marriage with another man at the same time?

Can a man be in a relationship in the nature of marriage with more than one woman at the same time?

Can a woman be in a relationship in the nature of marriage with more than one man at the same time?

Can a man be made liable to pay maintenance to more than one woman at the same time?

Can a woman be entitled to get maintenance from more than one man at

the same time?

These questions can be easily and clearly determined if it is a common ground that:-

It is a social condition that women in India are economically weaker than men, dependent upon them and are likely to be exploited by them.

It is a possible personal condition that a woman may maintain her sexual fidelity towards a man, even if he is married or involved with other women.

It is not possible for a woman to maintain her sexual fidelity towards more than one man at one point of time.[51]

The presence of her personal condition of maintaining her sexual fidelity towards a man in the background of her perpetual social condition of weakness, dependence and exploitation is enough and also necessary to make a woman entitled to get maintenance and protection from a man.

If these four prepositions are not disputable then the answer to question no. 1, 3 and 5 shall be in affirmative, and the answer to question no. 2, 4 and 6 shall be in negative.

Thus, a relationship in the nature of marriage shall include :

All those relationships in which all the conditions of a valid marriage are satisfied but no solemnization, as prescribed under the law, has taken place.

All those relationships that are of the kind of void marriages due to a legal restriction as to age, prohibited degree of relationship or *sapindaship.*

All those non-adulterous relationships that are of the kind of bigamy or concubinage.

Provided, in the above mentioned situations, the woman has maintained her sexual fidelity towards the man.

Moreover, it is suggested, that in the absence of solemnization, the relationship should exist for some reasonable length of time to be treated as a relationship in the nature of marriage. What shall be a reasonable length of time may be left for the courts to determine on case to case basis. Holding out or even the knowledge of the relationship to the others should not be *sine qua non* to establish the relationship, though that may help in establishing the relationship.

Such an approach towards a relationship in the nature of marriage, it is submitted, shall serve four purposes. First, it shall be in accordance with the

51. Multiplicity of sexual relations shall run counter to the notion of fidelity. Moreover, it is not relevant here to examine the impact of sexual fidelities of a man because his acts of indiscretion can be dealt with under other legal provisions. It is also not relevant because here we are talking about his liabilities which cannot be reduced by his greater infidelities.

will of the legislature. Second, it shall stand the test of pure logic. Third, it shall be in conformity with the historically acceptable norms of the country. And fourth, it shall serve some social purpose.

VII Conclusion

In an effort to provide better quality of life to women in India, legislature introduced the rule of monogamy for Hindus in 1955. Two glaring mistakes were committed at that time. First, except for the vested rights, no protection was ensured for women who were in a relationship in the nature of marriage. Second, the rule of monogamy was not introduced for Muslims. The result of those mistakes was that Hindu women who were in a relationship in the nature of marriage and were already entitled to get some benefit under the classical Hindu law were left helpless; and Muslim women were kept deprived of whatever benefit a woman could get due to monogamy. Though the changes in law were very attractive, but they did not improve the overall condition of Indian women as a group. Without sufficient say in the matters of matrimony, due to *inter alia* economic dependence and general social structure, the notion of providing protection solely on the basis of solemnized marriage improved the situation of only a handful of women in India.

Irrespective of their religion, Domestic Violence Act, 2005 provides some relief to women who are not lawfully wedded. This Act could have slightly improved the situation of Indian women. However, the impact of Supreme Court's judgment in *D Velusamy* is that the scope of this Act has been restricted. It not only keeps the relief out of the reach of many needy women but also makes an unreasonable distinction between Muslim women and women of other religion for the purposes of relief in a similar situation.

The best course of action, surely, is to empower women by education, economic independence and social equality. Till then it shall suffice if the legislature comes to the rescue by properly defining the important expressions used in the Act in the light of vast, rich and complex social life and legal material traceable across the history of India. It must be realized that there are some social realities which can neither be encouraged nor remedied; but, to turn a blind eye towards them is also not the best possible course of conduct.

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