BOOK REVIEWS

ALIMONY AND MAINTENANCE IN THE LIGHT OF THE CHANGING CONCEPT OF MARRIAGE AND DIVORCE. By Virendra Kumar. 1978. Publication Bureau, Panjab University, Chandigarh. Pp. xiv+368. Rs. 65.

THE TOPIC of alimony and maintenance has not received any attention at the hands of writers on family law of this country even though it is an important incident of disrupted marriage. Such an attitude is hardly surprising because family law itself as a distinct subject[1] is emerging out of its nascence. Therefore, a full fledged work on a topic of family law, especially by an Indian writer augurs well for the development of the subject in this country.

The book under review[2] embodies the research which the author undertook in the University of Toronto for his J.D. programme. It is not uncommon to find Asian students pursuing research in western universities undertaking a comparative study of the law of the host country with their own law more as an academic exercise than for its practical utility to either country. However, Virendra Kumar's study of the Canadian law (more particularly the law of Ontario) in the context of Indian experience is of special significance to the students of Indian family law. The author by his pioneering study of this important but neglected area has highlighted the various problems in the field of alimony and maintenance and has put forth several suggestions which can be availed of by the decision-makers in this country. Differing ethos of the two countries may not come in the way of our benefiting from the Canadian experience because both India and Canada have enacted their legislation in this area on the model of British legislation and English decisions have been copiously relied upon by the judges of both these countries.

Uncontrolled urbanization and rapid industrialization in this country have contributed to the disintegration of joint Hindu family and the emergence of nuclear family. Legislation has played no less a role in

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1. Even now there are teachers who feel that family law has unduly usurped the place of personal laws Futher, in many uuiversities the subject is taught more as a jumble of provisions of Hindu and Muslim laws than as a cohesive course.

2. Virendra Kumar, *Alimony and Maintenance* (1978). (Hereinafter referred as Virendra Kumar).

hastening this process. Joint Hindu family, despite several inhibiting factors, rendered a great service to the individual members whenever they faced any adversity, for, there were always other members of the family for supplying the moral and material support. Indeed, it acted as an insurance against misfortunes; a deserted daughter or a widowed daughter-in-law felt equally at home like any other member of the family and never bothered about her maintenance. However, in the background of the disintegration of the joint family the disruption of marriage has brought into focus the question of alimony and maintenance in the Indian society.

It is interesting to observe that Indian law, while it provides three concurrent jurisdictions to the wife[3] for claiming alimony and maintenance makes provision for only one jurisdiction in the case of a husband.[4] Further the courts have not been pragmatic in awarding maintenance to the wife and in most of the cases, the amount fixed by the court has no relevance to the needs of the party. Even though Hindu law provided for 'starving maintenance' only in the case of a fallen woman, the courts have generally reduced all maintenance into starving maintenance! Another area to which the courts in this country have not adverted to is with respect to the division of assets while passing the final decree. The contribution of a working wife in augmenting the assets of the family is obvious, but even in the case of a nonworking wife the contribution, though not necessarily in cash, is not insignificant. The courts should have evolved norms for ascertaining the contribution of the nonworking wife to the family assets and the least they could do was to allot her a share in the family assets apart from the award of monthly pittance. Unfortunately the court have not given any attention to this important question.

Indian law makes provision not only for the maintenance of the spouses but also for the support of dependants.[5] However, Virendra Kumar has confined his study to the problems of alimony and maintenance as between the spouses only.[6] The author has made, in chapter 2, a study of the changing concept of marriage and divorce. After examining the movement from 'status to contract' in the west, Virendra Kumar has rightly observed: "Thus as society progressed from 'status to contract,' the concept of

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3. The wife has a choice of three concurrent jurisdictions before her. She can opt a civil remedy under the Hindu Adoption and Maintenance Act, 1956 in a substantive suit or under the Hindu Marriage Act, 1955 as an ancillary relief. She may as well choose a criminal proceeding under the provisions of the Criminal Procedure Code, 1973.

4. The Hindu Marriage Act, 1955 has made bold and innovative provisions in sections 24 and 25 which provide for award of maintenance in the case of a needy husband also. Perhaps it was an inevitable concommitant of the principle of sexual equality effectuated under the modern Hindu law enactments.

5. See ss. 19-22 of the Hindu Adoption and Maintenance Act, 1956.

6. Virendra Kumar at 5-6.

marriage discarded the element of indissolubility".[7]

The author has further examined the *Samskara* aspect of Hindu marriage and the emerging transformation in the social status of Hindu woman.[8] In order to rationalize the comparative approach he pertinently observes:

> [T]he changing concept of marriage and divorce in India is seen to have followed closely the course of development revealed in the English and Canadian legal systems. Accordingly, a study of the juridical concepts relating to support and maintenance which have been developed in them may prove instructive for providing solutions to the problems arising in India under the impact of similar modern influences.[9]

The reviewer would, however, like to add that though, at present there is practically no difference between the western systems and Hindu law regarding the legal concept of marriage and divorce, there is an important distinction between the two which needs to be noticed. The change in the concept of marriage in the west from indissolubility to dissolubility followed the transformation in the social values.[10] However, in this country the social values have not undergone such a radical transformation. Indeed, it is the legal change which is attempting to reshape the social values. With the result, the problems ensuing disruption of marriage will be more acute in this country than in the west and the courts will have to devise measures suitable to the requirements of this country for alleviating the sufferings of the dependant and ignorant wife.

In chapter 3, Virendra Kumar has examined the concept of alimony and maintenance in England and Ontario. The author has made, in fact, a brilliant study of the development of alimony in England, the ecclesiastical influence on the emergence of this concept and the implications of the principle of unity between the husband and the wife. His discussion on the 'agency of necessity' as a logical deduction of the principle of unity and alimony as an incident of marriage being extended to the case of nullity and divorce as an ancillary relief throw considerable light on this obscure area.

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7. *Id.* at 20.

8. The author has incidentally mentioned in foot note 90 (p. 24) "Recently the Government of India has constituted a National Committee on the Status of Women in India to examine and report on the working of consititutional, legal and administrative provisions which have bearing on the social status of women, through their education and employment." It may be pointed out in this connection that the committee submitted its report in December 1974 and it was published in 1975.

9. Virendra Kumar at 25-26.

10. The Italian experience regarding divorce is revealing. The Roman Catholic dogma could not prevent the emergence of a new set of values in the Italian society and ultimately the law had to be brought in tune with the changing times.

In part III, chapter 4, the author has made a critical study of the present statutory provisions relating to alimony and maintenance in Ontario with special reference to Hindu law.[11] He has made interesting observations regarding the attitude of the Canadian courts which, in order to preserve their jurisdiction for granting relief to the needy, circumvent the statutory provisions. He points out that:

> In Canada, for instance, it is now almost settled that a claim for maintenance under the *New Divorce Act* must be made not later than the time of the trial of the divorce petition to which it was ancillary. Once a decree *nisi* for a divorce has been granted without simultaneously providing for maintenance, the court thenceforth would be without jurisdiction to consider a maintenance claim in that divorce proceeding. Obviously the reason for this is that an original claim for maintenance does not come within the purview of maintenance as an ancillary relief under the *Divorce Act*. However it is interesting to note that the courts are trying indirectly to keep their jurisdiction alive indefinitely by passing an order for nominal maintenance such as, one dollar per week, or per month, or per year while granting a decree *nisi* for divorce.[12]

Fortunately the courts in India are not inhibited by any such restriction and need no such subterfuge for invoking their jurisdiction.[13]

Regarding the standard of proof required in maintenance cases the author has rightly observed:

> We must face squarely the problem: Should there be two different standards of cruelty, one for dissolution of marriage by divorce decree, and another for granting alimony? If that is so, should the conditions for proving cruelty in actions for alimony be of a more stringent and restricted kind than those in actions for divorce, or should it be *vice-versa* ?[14]

Thereafter, the author approves the comparative approach and observes:

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11. For the benefit of western readers, the author has briefly stated the sources of Hindu law (p. 57, f. n.12). However, by inadvertence the author has mentioned "*Dayabhaga* is a commentary by Jimuthavahana" whereas it is a digest.

12. Virendra Kumar at 61-62.

13. S. 25 of the Hindu Marriage Act, 1955 is explicit in this regard. It lays down that: "Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto . . . . order that the respondent shall pay to the applicant for her or his maintenance . . . ,"

14. Virendra Kumar at 76,

> Since the position under the modern Hindu law in respect to the problem as projected above is directly opposite to the position reflected in the opinion of the Ontario Court of Appeal in the *Mildon*[14a] case, a comparative study of the analogous provisons under the two legal systems should help in perceiving the social implications in adopting the one position or the other.[15]

Virendra Kumar has examined in chapter 5 (section 2) the concept of alimony prior to the new Divorce Act and has traced the basis of the liability of the husband to maintain his wife. Further, commenting on the liability of the husband to provide the wife maintenance *pendente lite*, he rightly observes :

> [T]he merits of the principal action should not be examined. Once a *de facto* marriage has been acknowledged or established, alimony or maintenance may be awarded *pendente lite*.[16]

The author is not unaware of the implications of such an approach for many a time the husband may find himself in an unenviable position of being compelled to maintain his guilty wife.[17] However, Virendra Kumar endorses the philosophical view that:

> [T]he occasional hardship to a husband who finds himself compelled *pendente lite* to support a guilty wife should be regarded as being one of the misfortunes of an unhappy marriage.[18]

It may however be observed in this connection that the right of a wife to stay in the matrimonial home and to prevent the husband from dislodging her as recognised in the western countries needs to be incorporated in the Indian law.

In section 3 of chapter 5 Virendra Kumar has examined what he terms as a "reconsideration of the concept of alimony and maintenance". He aptly states that it was because of the dependance of the wife generally on the husband and the merger of the personality into that of her husband that the courts used to award interim disbursement and costs even in the case of an unsuccessful wife. In view of the fact that the position of a married woman has undergone a change beyond recognition in these countries, the author pleads for a reconsideration of the judicial approach. While referring to some interesting examples where the wife is required to pay for the maintenance of her huband in some jurisdictions, Virendra Kumar rightly makes out a case for extending the principle of

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14a. *Mildon* v. *Mildon*, (1971) 1 O.R. 390.
15. Virendra Kumar at 76.
16. *Id.* at 87.
17. *Ibid.*
18 *Ibid.*

equality in proceedings where maintenance, is asked for as an independent relief.[19]

In chapters 6 and 7 of the book the author has made a study of alimony and maintenance as an independent remedy both in Ontario and in India. Comparing the efficacy of civil and criminal proceedings for claiming maintenance, the author prefers a civil remedy. He observes :

> Since the potential consequences of criminal provisions are so grave as even to make a husband guilty of an indictable offence which may result in sending him to prision for two years invoking them would be least calculated to achieve reconciliation. A second reason is that the provisions of section 197 of the *Code* are fundametally and essentially penal, not remedial in character.[20]

He further examines the question of concurrent jurisdictions of the provincial court (family division) and the Supreme Court of Ontario. Whereas, the proceeding before the provincial court is summary proceeding and, therefore, the amount of maintenance awarded is obviously limited, the proceeding before the Supreme Court is lengthy and expensive which may however result in the award of a large sum as maintenance. Virendra Kumar picturesquely observes :

> Looked at from this angle, the maintenance awards of the two courts made under their respective statutes seem to reflect the idea that one forum is meant for the "needy poor wives" and the other for the "needy rich wives".[21]

The author in this connection has drawn our attention to an extremely important provision relating to reconciliation which could, in fact, be incorporated in our law. Section 7 of the New Divorce Act of Canada, imposes a special duty on every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a petitioner or a respondent in a petition for divorce to discuss with the client the possibility of reconciliation and inform his client the various counselling facilities known to him. To make this provision effective, the advocate is required to certify that he has complied with the requirements of this section.[22] It may, however, be observed that the Indian law merely enjoins the court to attempt reconciliation between the parties before passing the decree.[23] The Canadian provision seems to be more efficacious than its Indian counterpart because it explores the possibilities of reconciliation at the earliest opportunity, whereas the chances of reconciliation in the Indian context

19. *Id.* at 114.
20. *Id.* at 123.
21. *Id.* at 124-125.
22. *Id.* at 125-126.
23. S. 23 (2) of the Hindu Marriage Act, 1955.

are remote, for, even the party who is inclined towards reconciliation feels outraged for she or he has been dragged to the court and would like to fight it to the finish.[24]

There is a serious lapse in chapter 7 wherein the author has made a study of the Criminal Procedure Code of this country. Throughout he refers to section 488 of the Criminal Procedure Code.[25] It is surprising that the author has not noticed the Criminal Procedure Code of 1973 which has comprehensively revised the earlier code and which has, in fact, been further amended in 1978 and that section 488 of the earlier code finds place in section 125 of the present code. When the author worked for his doctoral degree, it was the old code that was on the statute book and obviously he has not revised this chapter. It is hoped that the author takes care of this lapse when he brings out the second edition of his book.

Students of family law should be grateful to Virendra Kumar for providing a wealth of meterials in his book and it is hoped that many more books of this type appear in Indian law. Two comments about the production of the book need to be stated. The price of the book is very high and it being a university publication, the price could have been scaled down to bring it within the reach of students. Further the book is littered with misprints throughout and little more careful proof reading would have enhanced the quality of the book.

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24. The resolution of matrimonial disputes before a civil court is considered, even now, to be an anathema in the Indian millieu.

25. It has been incorrectly referred as Act No. 5 of 1895 (See Virendra Kumar at 145, foot note 1). The Old Criminal Procedure Code was enacted in 1898.

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