

BE FAIR TO MY LADY

A judgment of the Punjab & Haryana High Court has given an impetus to gender justice. While some personal laws and the CrPC have helped in "maintenance jurisprudence", the deeper malaise of society has to be tackled

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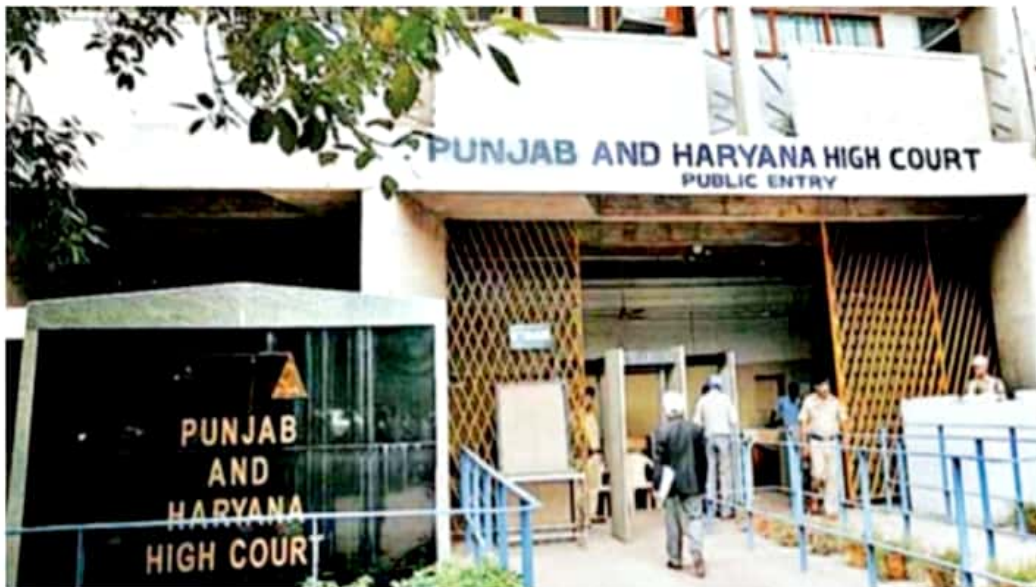
Shantanu Mitra

A recent judgment of the Punjab and Haryana High Court, *Sandeep Malik vs Renu and Others*, has carried forward the jurisprudential legacies expounded by Parliament through various legislations and the right jurisprudence developed by the Supreme Court in many of its judgments.

The High Court had observed that a person who is able to pay a hefty loan amount

cannot deflect from his responsibility towards his wife and children. The observation was made while upholding a family court order directing a Lieutenant Colonel to pay Rs 55,000 to his wife and minor daughters as maintenance.

The concept of gender justice must be elucidated in the context of the marginalisation of certain genders and the elevation of masculinity in all living and ossified cultures around the globe. The process of marginali-



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sation has gradually been achieved and the regression is still passing through a dark tunnel of patriarchy. Feminist movements have raised many fundamental questions whose solutions are hardly fathomable in a violent accumulative culture thriving in the name of neo-liberalism.

Unsurprisingly, the logic of the market coupled with debased rationality are doctoring the ethical codes that evolved historically and directed social life in the past to sustain harmonious social institutions and their holistic practices. The status of women in history has been a much-talked subject. Their enunciation requires breaking the teleological dogma of progression or regression. Women have often been objectified so much so that history has reduced them to merely objects of knowledge whose dignity is required to be recovered from repression.

The status of women in India is not a different story in comparison to other societies in the world. Historically, apart from a few exceptions, women's position in society could not transcend the barriers established by the aggressive culture of masculinity. On the contrary, feminine values such as creation, nurturing, care and compassion are genuine sources of happiness, harmony and peace. Such values, however, could not find adequate place in a power-driven, socio-political culture.

In this background, the Constitution of

India was an emancipatory leap of imagination which established the structure of gender equality through "Right Jurisprudence". Article 15(3) guarantees special protective discrimination in favour of women as a normative gesture for their empowerment so that they transform the fundamental principles of society through care and compassionate jurisprudence. Empirically, one may observe that in urban India women have outsmarted men in many life-fulfilling activities such as education, health, arts, sports, entertainment, etc.

However, their position has only insignificantly improved in rural India. But data suggests that 30.03% of rural women are engaged in employment activities in comparison to 15.44% of urban women who are associated with such activities (Bapan Biswas & Nasrin Banu, 2023). In other parameters such as domestic violence against women, education, health and their voice in decision-making in family matters, urban India is ahead of rural India (International Institute for Population Sciences, 2017).

The constitutional aspirations in its founding moments have witnessed many upheavals after the inception of the Indian Republic as far as women's right to equality and independence are concerned. The right to maintenance to women guaranteed by many personal laws and the Criminal Procedure Code, 1973, has progressed and regressed and the "maintenance jurispru- ▶

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dence" is moving forward through the adjudicatory leadership of constitutional courts.

The Punjab and Haryana High Court in *Sandeep Malik vs Renu and Others* rejected the writ petition of the petitioner's husband who had asked to set aside the judgment of Additional Principal Judge, Family Court, Sonipat. The petitioner's husband solemnised the marriage as per Hindu rites and customs. Two children were born from this marriage, and due to some differences, both parties started living separately. Both children remained in the custody of the wife. In due course of time, the wife approached the court under Section 125, Criminal Procedure Code, 1973, and the matter was heard and decided by the family court, which awarded the decree to

pay Rs 55,000 as maintenance to the wife and children.

The husband approached the Punjab and Haryana High Court to set aside the decree of maintenance passed by the Family Court. The main contention was that as he had many liabilities to bear, including a home loan, car loan, contribution towards provident fund and other statutory deductions, the remaining part of his salary was insufficient to pay the hefty maintenance.

The High Court rejected his arguments and held:

- (a) Since the petitioner was holding a very high position in society as Lieutenant Colonel, he was required to be more socially and morally responsible towards his family members. In this case, the husband was trying to deflect from moral, social and statutory responsibilities.
- (b) While keeping in mind the cost of living and the ability of the husband to pay, the Court found the amount of maintenance fair and reasonable.

Section 24 of the Hindu Marriage Act prescribes paying maintenance during the pendency of divorce proceeding, which is popularly known as maintenance *pendente lite*. Section 25 of the Act mandates paying maintenance while passing the decree of divorce or any time subsequent to this. Notably, both legal provisions are gender-neutral. The court while granting the decree of maintenance is required to take into consideration the respondent's income and properties, the income and the living stan-

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Section 125 of the Criminal Procedure Code, 1973, mandates maintenance to a wife who is unable to maintain herself. The Code is only applicable to the wife for protection from destitution and vagrancy. This law was enacted as a secular law and applicable to people of all faiths or no faith.

In *Mohd. Ahmed Khan vs Shah Bano Begum and Ors*, the apex court held that there was no conflict between Muslim personal law and Section 125 of the CrPc. If a wife fails to maintain herself and the personal law is also unable to protect her, recourse to Section 125 may be taken to provide maintenance to her.

The judgment created controversy and the present government decided to change its course through legislation. The Muslim Women (Protection of Rights on Divorce) Act, 1986, was passed by Parliament. Section 3 of the said Act mandated to pay reasonable and fair provision and maintenance to the wife by the former husband within the period of *Iddat*. It further prescribed that if the spouse was dead and she was unable to maintain herself, then the liability of maintenance would lie on the relatives who would inherit the property after her death. In case of the inability of the relatives to do so, the Waqf Board was obligated to maintain her.

The constitutional validity of the Act was challenged in *Danial Latifi vs Union of India* which was upheld by the Supreme Court. The Court held that “the provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India”. In *Kusum Sharma vs Mahinder Kumar Sharma*, the Delhi High Court stated that maintenance is not just a constitutional right, but an integral element of universal human rights. Further, the Court outlined the two-fold purposes of paying maintenance:

- (i) To prevent vagrancy in case of a strained husband-wife relationship.
- (ii) To provide safeguard to the economically weaker litigating spouse, so that he or she may defend the case adequately before the court.

LEGAL SANCTION

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This implies that legal enforcement of rights cannot solve fragile relationships like that of husband-wife. The Punjab and Haryana High Court's verdict is just carrying the legacy of a top-dressing attitude without diagnosing the deeper malaise of society at large.



But there are cultural and ethical problems to this. There is a thin line between law and ethics. The autonomous will is the best source to solve ethical dilemmas. There is an inherent limitation of law to make a person graceful, righteous or just. In the western school of legal thought, Jeremy Bentham and John Austin conceived the idea that human conduct is guided either by reward or punishment. Inner motivation or the autonomous character of the will was questioned by the legal positivists. There is a presupposition that human nature is selfish and cruel whose disposition could be changed by the coercive power of law.

This logic of law was applied in the jural relationship of right-duty relationship coupled with the state power of enforcement. But there is a limitation to this logic if the law is efficacious enough to cultivate good virtues in a person. For example, the principles of the *Ten Commandments* prescribe to loving thy neighbour, but the law cannot enforce someone to love his neighbours, or it cannot make someone scientific or faithful. This inherent inability of law was well recognised by German philosopher Immanuel Kant who argued for the recognition of categorical imperatives, i.e., morally binding duties and to apply them in solving ethical puzzles.

In the present context, most of the strained family relationships are being fixed by extra-legal processes, such as compromise, mediation or counselling. This implies

that legal enforcement of rights cannot solve fragile relationships like that of husband-wife. Non-fulfilment of social and ethical duties towards wife and children exemplifies the breakdown of ethical principles inherited from religious-social institutions and their practices.

Anarcho-individualistic tendencies are killing the values of fraternal bonds persisting in family relationships. This issue is aggravated through individualistic logic often deployed by courts, ignoring the structural problems. The concept of family does not die simply because one fails to fulfil obligations. It withers away under the tutelage of right jurisprudence which has proved fatal to social and fraternal bonds.

The recent judgment of the Punjab and Haryana High Court is just carrying the legacy of a top-dressing attitude without diagnosing the deeper malaise of society at large. Societal problems like the breakdown of marriages and the consequences thereof can be better solved through cultural solutions provided by holistic education, which is seldom visible in a culture governed by the legal logic of right, obligation and enforcement. ■

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