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Cultures of violence and silence

An account of the evolution of 'privacy' in India is presented here by tracing the conceptual trajectory of privacy through the filter of family regulation. In doing so, it scans a wide discursive canvass for constructions of privacy as well as crucial shifts, continuities and peculiarities of the context. What makes the inquiry of Indian notions on the subject interesting is that among all the social institutions in India, the family enjoys an iconic place in the social imaginary as an ideal unit. Often singled out as a cultural trope with an ahistoric, 'natural' and private existence, it stalls scrutiny into its intimate and sacrosanct space. Hence, the long-standing struggle against the family's firm defence of privacy is replete with tussles among religious jurisprudence, cultural norms, modern legislation, notions of community identity and individual autonomy, justice and human rights' discourse. The discussion here highlights, inter alia, such conundrums vis-à-vis the state's response to the family's class, sexuality, religious orientation, and so on; furthermore, it argues how the family, at the epicentre of these conflicts, has been exposed and rendered permeable, to some degree.

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'Familyism' in legal history

To establish how difficult it has been to distil domestic violence from 'privacy', the philosophical foundations of a culture that subsumes individual identity under the family and community are highlighted: "if there is one 'ism' that governs Indian society, it is familyism".[1] In ancient India (1500 BCE to 500 BCE), both personal affairs and social order were regulated by the principle of *dharma* or moral righteousness, not formal legal mechanisms. When classic Hindu 'law' *per se* emerged as *dharamasutras*, it was a loose assortment of complex, diverse and contradictory codes on ethics, rituals, philosophy and so on. It endorsed physical punishment to discipline a misbehaving wife in tandem with the well-accepted norm that the husband had power over his wife.[2] Settlements were guided by the ideal of conjugal indivisibility; the family was kept intact by the husband's authority, the wife's sacrifice and endurance, and the community's intervention, if needed. Centuries later, as the Indian subcontinent became home to an increasing number of religious and cultural communities, each regulated its familial affairs through its unique religious, scriptural ambiguous tradition or customary 'law'. For example, while scriptures saw divorce as a violation of the 'union-of-souls' Hindu marriage, customary laws permitted termination of seriously flawed marriages. Nonetheless, most ancient Aryan and Hindu texts support the notion of the 'divine' family with women as its moral guardians.

This socio-legal paradigm of self-regulation changed to modern state-based regulation only when the British codified indigenous laws. Ostensibly to avoid tampering with personal matters of Indians, the British ended up creating the simplistic category of 'religious personal laws' by randomly collating disparate ancient laws and patriarchal customs. The repercussions of this codification have been experienced even in post-colonial times, especially with regard to interventions in 'family matters'. Issues such as marriage, divorce, inheritance and so on were placed under religious personal laws that are beyond the reach of the state. Hence, family regulation became doubly guarded and 'private', seen, for example, in the vexing 1986 Shah Bano case involving a destitute Muslim woman's alimony. Having pit religion, gender and state against each other, the issue became a communal raw nerve when a Muslim section protested the Supreme Court's 'interference' in Islamic law, claiming that the latter is divine and therefore beyond human intervention. Ironically, religious laws had already been tweaked by colonial jurists in India. The existing Muslim Personal Law in India also emerged out of the Anglo-Mohammedan law that was collated and drawn up by the British. Hindu personal law has been extensively reformed over the years. On the other hand, the demand to reform personal laws, with the assumption that reform can make laws gender-just, could be erroneous. The political furore led to demands for a Uniform Civil Code for all Indians (irrespective of their religious identities), but the idea has been in cold storage ever since.

In India's baffling heterogeneity, even customary laws can pose as 'private' territories where the presence of state law is questioned. *Khap panchayats* (caste councils), for example, have legitimized brutal murders of youngsters who married against their customary diktats. Community leaders have vociferously demanded that the Hindu Marriage Act 1955 be amended to include a ban on intra-lineage and intra-village marriages which, as per their 'customs', are incestuous. These examples demonstrate how 'private' itself is tightly intertwined with other identities such as caste and religion in India's kaleidoscopic social fabric. Apparently, boundaries between private and public have been blurred repeatedly. In fact, the Indian legislature and state are clearly implicated in the maintenance/creation of laws - religious and secular - as well as the continuities and discontinuities of various hybrid privacies.

Privacy and rights

The debate over privacy and rights has raised its head in Indian courtrooms and left the judiciary divided on the issue. Some judgements reveal the varied stance that judges have taken on the subject. In 1983, a High Court judge struck down a Restitution of Conjugal Rights suit where a man had appealed to have his wife returned to the matrimonial home by stating, "The remedy of restitution of conjugal rights is violative of the right to privacy and human dignity guaranteed by Article 21 of the Constitution. A decree of restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy."[3] This became a landmark judgement as it flagged the woman's rights of privacy as an individual over conjugal rights. On the other hand, in 1984, the Delhi High Court passed a judgment on a similar case but said the contrary: Introduction of constitutional law in the home … is like introducing a bull in a China shop … in the privacy of the home neither Article 21 nor Article 14 have any place.[4]

Despite the substantive transition from ancient *dharma* to modern family law, it was not until 'dowry deaths' grabbed international headlines that the veil of the private family was forcibly lifted. The argument that there are some totally private spaces that ought not to be invaded by the state became difficult to defend from this juncture. In the 1980s, dowry-related violence triggered a high-pitched women's movement that pushed the Indian government to amend existing laws and protect women from violence. Ironically, the punitive amendments to dowry law caused inadvertent collateral damage - all other forms of domestic violence were trivialized and, to some extent, normalized. The definitions of 'cruelty' – "grave injury or danger to life, limb or death" – were interpreted to exclude a whole range of physical and non-physical violence. As a result, the legal approach to domestic violence became lackadaisical and neglectful.

Although Section 498A addressed cruelty and domestic violence, its vague definitions of violence (often excluding sexual violence), difficult implementation, low rate of conviction, lack of civil relief provisions to women and, as described earlier, the overarching conception of violence-as-dowry, made it quite ineffective. It also did not protect women from harassment and cruelty in natal, live-in or other non-marital relationships. The Protection of Women from Domestic Violence Act (PWDVA) 2005 finally presented a clear definition of domestic violence, based as it is on the UN Framework for Model Legislation on Domestic Violence and the United Nations Declaration on Elimination of Violence against Women. Besides covering a gamut of physical, verbal, economic and mental abuses, the act also includes sexual abuse, especially forced, non-consensual sexual intercourse. However, rape is still not recognized in marriage, unless committed with a minor or separated wife. Section 375 of the Indian Penal Code makes an exception to the offence of rape in marriage because sexual intercourse is seen as a right of the husband and a natural implication of the marriage. By conceptually including marital rape in the PWDVA (through the euphemistic term 'sexual abuse'), yet another dimension of violence in the family has been challenged. Yet, women may not always recognize coercive sex by husbands as violence (Lawyer's Collective Women's Rights Initiative and ICRW 2005).

To deal with gendered violence in diverse private domestic relationships, the act has taken the unprecedented step of including "any relationship in the nature of marriage", thus including women in live-in relationships, legally void/voidable marriages and common law marriages. It can also be used in natal family relationships by mothers, daughters, widows and so on. Unlike in the pre-PWDVA days when a woman had to visit a number of courts to seek different kinds of relief, the new law offers her a "single-window clearance" – one court for a number of supposedly immediate relief measures such as protection from violence, monetary relief and compensation, temporary custodial rights and the right to the "shared household". The right to reside in the shared household is one of the highlights of the act as it addresses a major lacuna in the system - dispossession from the house. The PWDVA allows women direct access to the court through new support structures in the form of Protection Officers, Service Providers and even Counsellors.

Monitoring reports of the post-PWDVA scenario indicate an increase in the number of cases filed under the act, but a mixed response vis-à-vis the outlook towards privacy and violence. There have been many pro-women judgements since the implementation of the PWDVA 2005, but cultural stereotypes and biased interpretations persist. The notion of family privacy, however, continues to feature prominently among attitudes and perceptions on the subject. Monitoring and evaluation reports reveal how Protection Officers perceive domestic violence to be 'a family affair', and how they see their role as saving families from breaking down and their need to strike a compromise. The construction of ideal femininity is based on traditional beliefs and practices that emphasize her sacrifice, suffering and endurance for the 'honour' of the family (and nation, in case of the nationalist). Marriage and children are central to the projected image of the ideal woman. The good woman's most valued attribute is her silence. This sentiment is even reflected in several court rulings on rape – "no self respecting woman would come forward in a court just to make a humiliating statement *against her honour* [emphasis added] such as is involved in the commission of rape on her" or "the rapist degrades the very soul of the helpless female".[5]

Womanhood and the culture of silence

The link between these deeply entrenched norms of womanhood and the culture of silence around domestic violence is *a posteriori* – a majority of women interviewed during the last National Family Health Survey justified violence against them by their husbands. As many as 54 percent of women and 51 percent of men agreed that it is justifiable for a husband to beat his wife (for example, when she disrespects her in-laws or neglects the house or children). UNICEF's *The State of the World's Children* 2012 reported that among 15- to 19-year-olds in India, 57 percent of boys and 53 percent of girls believed that a husband was justified in beating his wife under certain circumstances. It seems that notions of self identity, shame and honour exert more pressure and influence on the collective consciousness of women than laws that promise them redress.

With such stiff cultural resistance to making private matters public, a backlash against legislation was inevitable. Men-led groups (comprising husbands, mothers-in-law and sisters-in-law) across the country have facilitated a large and active country-wide network of different organizations such as the *Bharat Bachao Sangathan* (Save India Organisation), *Pariwarik Suraksha Samiti* (Family Protection Group) and the *Pati Pariwar Kalyan Samiti* (Husband Family Welfare Group). Their umbrella network (cleverly titled Save the Indian Family) claims to rescue the institution of the family from the state.

Despite domestic violence legislation, 'public' regulations can simultaneously be rendered ineffective by omnipotent notions of privacy that promote silence and tacit acceptance of domestic violence. Critical feminist analyses of the family have helped problematize notions of the family as secure and private (and women-as-victims) that continue to obfuscate violence and ensure women's silence. Meanwhile, women continue to bear the cross for the family, community and nation's honour in India's patriarchal regime. The heightened presence of law in

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family matters has become a mere chink in the armour of the private family, as proven by the rise in the practice of dowry and dowry-related crime, the prevalence of honour killing, persistent domestic violence and so on. It may not be an exaggeration to say that while law tries to bring order in the family, law itself can be mediated by and enmeshed in culture.

A significant reason for the much-valued notion of family privacy is the high moral, cultural and political stature allotted to the heteronormative family, the only 'natural' looking model validated by law and religion. While its reproductive, child-centred structure and system suits the state and the market, a monogamous, patrilineal and patrilocal family cannot represent the myriad of other family forms such as single-parent, adoptive and same sex families. In fact, the immense zeal of the Indian state to criminalize consensual homosexual relations vis-à-vis its protracted reluctance to criminalize violence in heterosexual private relations speaks volumes about its attitudes. Although feminists have long denounced the private-public divide, their challenge to and critique of the position of the heterosexual family has not been as forthcoming.

Reconceptualization of divides

Central to unpacking the private-public divide will be a compelling re-conceptualization of privacy. For one, the notion that the family has enjoyed privacy is artificial because the state itself has drawn the private-public boundaries. The mid-1970s national family planning drive or the Government of India's Child Care Leave only for its women employees are examples of the state breaching boundaries. Perhaps Frances E. Olsen is right when he asserts that "non-intervention (of the state) is a false ideal because it has no coherent meaning [....] the state is continuously affecting the family by influencing the distribution of power among individuals".[6] Olsen strongly disagrees with the popular view that the state should intervene only when necessary because it "presupposes that non-intervention is a possible choice; and second, it usually accepts non-intervention as a norm or as an ideal".[7]

On another note, feminists and the women's movement in India have had a difficult and paradoxical relationship with law. Since law is inextricably involved in the very acts that it condones, controls and penalizes, it becomes a site of ambiguity instead of a force against these acts. As Nivedita Menon cautions, "our attempts to transform power relations through the law tend rather to re-sediment them and to assert dominant values".[8] It may, therefore, be useful to go along with feminist legal scholars such as Margaret Davies who emphasize the necessity to re-conceptualize law as 'horizontal' or plural, open-ended, self-reflexive and inclusive instead of 'vertical' or hierarchical, positivist, autonomous and exclusive.9 This may create newer and alternative legal meanings that do not devalue subjectivities, and that imagine moving the 'subject' from a passive recipient of law to an active agent of its creation. It still begs the question – even though the family needs to be protected from violence, what if the family needs protection from the violent state? Self-regulation by the family seldom works. On the other hand, the state tends to become panoptic.

This discussion puts forth that while privacy of the family is valuable, it needs re-imagining within the framework of justice and human rights. Privacy has never been totally inviolate, especially because its boundaries have constantly been adjusted by the state. Although law in India does not view domestic violence as a 'private' matter, the cultural ideology that obliquely permits it, does. It contends that since law can subterraneously embody and perpetuate cultural codes, it cannot be expected to regulate, counter or undo prevalent socio-cultural notions and values, at least not single-handedly. The aspiration should be a holistic formulation of the concept of privacy that lies both inside and outside the legislative arena.

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Notes

1 Kakar, S. & Poggendorf-Kakar, K. 2007. *The Indians: Portrait of a People,* Delhi: Penguin
2 Agnes, F. 2008. 'Hindu Conjugality', in Parasher, A. & Dhanda, A. (eds.) *Redefining Family Law in India,* Delhi: Routledge, pp.236-257 (p.256)
3 ibid., p.244
4 ibid., p.245
5 Goonesekere, S. 2004. Violence, Law and Women's Rights in South Asia, Delhi: Sage
6 Olsen, F.E. 1994. 'The Myth of State Intervention in the Family', in Moller Okin, S. & Mansbridge, J. (eds.) *Feminism,* Schools of thought in Politics Series No. 6, Cambridge: University Press, pp.835-864 (p.842)
7 ibid., p.863
8 Menon, N. 2004. *Recovering Subversion: Feminist Politics beyond Law,* Delhi: Permanent Black, p.206
9 Davies, M. 2011. 'Feminism and the Idea of Law', in *Feminists@Law* 1(1):1-7

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