Durgabai Deshmukh Memorial Lecture
2016

HAS CODIFIED HINDU LAW CHANGED GENDER RELATIONSHIPS?

Flavia Agnes

DDML-XXV/2016

2016 Durgabai Deshmukh Memorial Lecture

HAS CODIFIED HINDU LAW CHANGED GENDER RELATIONSHIPS?

by

Flavia Agnes

15 July 2016

COUNCIL FOR SOCIAL DEVELOPMENT
Sangha Rachana,
53, Lodi Estate, New Delhi -110003 (India)
Phone: +91-11-24615383, 24611700
Fax: +91-11-24616061
Email: csdnd@del2.vsnl.net.in
Website: http://www.csdindia.org

DURGABAI DESHMUKH
(1909–1981)

Brief Profile

ACADEMIC QUALIFICATIONS

1939	M.A. Political Science, Andhra University
1941	B.L., Madras University

SOCIO-POLITICAL ACTIVITIES

1921	Protest against status of devadasis, Muslim women and widows
1930	Salt Satyagraha Movement
1931-33	Imprisoned thrice
1946	Member of Parliament

IMPORTANT INSTITUTIONS BUILT

1922	Balika Hindi Pathasala Kakinada (at the age of 13)
1937	Andhra Mahila Sabha, Chennai/Hyderabad
1944	Blind Relief Association of Delhi, New Delhi
1953	Central Social Welfare Board, New Delhi
1964	Council for Social Development

AWARDS/DISTINCTIONS

1946	Member, Constituent Assembly
1952	Member, Planning Commission
1963	Doctorate *honoris causa*, Andhra University
1971	Nehru Literacy Award
1975	Padma Vibhushan

INTERNATIONAL AWARDS

1978	Paul G. Hoffman Award
1978	UNESCO Award

HAS CODIFIED HINDU LAW CHANGED GENDER RELATIONSHIPS?

Flavia Agnes

In order to explore whether the enactment of the Hindu Code Bill changed gender relationships, we need to first revisit the debates which were centre-stage at the time of enacting these laws and the compromises that were made, then examine how these enactments played out on the ground during the last six decades, and finally list out the anti-women biases which still prevail as part of the Hindu cultural ethos which adversely impact women's rights. The question this essay attempts to address is whether the codified Hindu laws were instrumental in bringing about a social transformation by posing a challenge to the Brahminical patriarchy which was dominant at that point of time.

The Historical Context

In 1950, we gave ourselves a Constitution that mandated equality and non-discrimination as non-negotiable fundamental rights and protected the human rights of every citizen irrespective of sex, caste and religion. Within five years, we violated the mandate which prohibits discrimination on the basis of religion by enacting a code only for Hindus. What was the political expedience driving the agenda of Hindu law reform at that time? Volumes have been written on it, however, this paper addresses only a few limited concerns.

Since Hindu women lagged far behind their counterparts from other religions who had two important rights — the right of divorce and the right to inherit property, the reforms for Hindus could not wait till a consensus was reached for enacting a Uniform Civil Code across all religious denominations as mandated by Article 44 of the Constitution.

Given the urgency, it would be logical to assume that the process of enacting a gender just code for the majority would be smooth and expeditious and the nationalist leadership (predominantly Hindu) would be united in this mission. But alas, it was not so. It turned out to be a long drawn and extremely contentious process, spanning over 15 years. The reforms met with severe opposition from conservative nationalistic leaders who opposed introducing the concept of divorce within the Hindu law based on the premise of a sacramental marriage and awarding equal property rights to daughters as it violated the Hindu ethos of treating daughters as *paraya dhan*. There was an apprehension that if Hindu women were granted the right of divorce and property inheritance, the strict sexual control over them will loosen, and women will go 'astray' and the Hindu social fibre will disintegrate.

The reforms were opposed by the then President and Constitutional head, Dr. Rajendra Prasad, senior Congressmen like Pattabhi Sitaramayya, Sardar Patel, P.D. Tandon, among others.[1] Dr. Rajendra Prasad declared that he would not sign on the dotted lines if the concept of Hindu Undivided Family (HUF) property was abolished as it would fragment rural agricultural landholdings. As Prime Minster Jawaharlal Nehru kept vacillating in the face of stiff opposition within the ruling Congress, even after the first general elections which gave an overwhelming majority to the party, Dr. B.R. Ambedkar, who was spearheading the campaign, resigned as the Law Minister, in utter frustration. This mounted the pressure to finally enact a set of piecemeal

1. Lateef, S. (1994): 'Defining Women through Legislation,' in Z. Hasan (ed.), *Forging Identities: Gender, Communities and the State*. New Delhi: Kali for Women; p. 51.

statutes than a composite Hindu Code which would govern family relationships, as was initially envisaged.[2]

Though liberation of women was the stated agenda, there was also a hidden political agenda. There was an urgent need to bring a culturally diverse and pluralistic society, divided along caste, sects and regions under one law and wrest the power to legislate in family matters away from the religious leadership (Parashar, 1992). So the statutes created a legal fiction and defined Buddhists, Jains, Sikhs, Brahmo, Arya, Prarthana Samajis (all of whom had broken away from the Hindu fold through various social reform movements at different historical points during pre-colonial and colonial period) as "Hindu". The net of legal Hinduism was cast very wide, and no one could escape, not even an atheist.[3]

Even if two Hindus married under the secular statute, the Special Marriage Act, they would still be governed by the Hindu Succession Act so that the Hindu male is not ousted from the privileged position of belonging to the HUF property and the resulting tax benefits could be preserved even when married under a secular statute[4].

Archana Parashar argues that while enacting a code for Hindus, the attempt was not to abandon ancient scriptural law or established community customs but to assimilate them within a Code along with principles of English law and, while doing so, establish the law making authority of the newly independent nation, which was, until then, vested with the heads of various religious sects (Parashar 1992).

The only ones who were left out from the application of these statutes were the people of *The Book* — Muslims, Christians, Parsis

2. The four enactments which constitute the reformed family laws for Hindus are — The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956.
3. See the definition of who the Act applies in Section 2 of the Hindu Marriage Act where the net is cast wide which I refer to as 'legal Hinduism'. Similar definition is found in all four statutes enacted at that time.
4. This was introduced through an amendment to the Special Marriage Act in 1976.

and the Jewish people, who were governed by their own respective personal laws.[5]

The reforms privileged modernisation, codification, and unification as key elements of progress and development. Hence, several pro-women customary practices were discarded for the sake of uniformity (Derrett, 1999: 107).

Since the political impediment to reform the Hindu law was grave, several balancing acts had to be performed. Crucial provisions empowering women had to be constantly diluted to reach the level of minimum consensus. While projecting the reforms as pro-women, male privileges had to be protected. While introducing modernity, archaic Brahminical rituals had to be retained. While claiming uniformity, diverse customary practices had to be validated. Only by adopting such manoeuvring tactics could the state reach its goal of Hindu law reform.

Unfolding of the Statutes

The codified laws continued to reflect the patriarchal ideology and validated Brahminical rituals. Despite their claim, they did not bring in uniformity or gender equality as they provided a statutory recognition for the diverse customs and usages followed by various sects, communities and regions.

Under section 5 of the Hindu Marriage Act which stipulates conditions for contracting a Hindu Marriage and under section 7 which prescribes the ceremonies for performing a valid Hindu marriage, customs and usages were awarded due recognition, even while prescribing the Brahminical rituals such as *vivaha homa* (the sacrificial fire), *saptapadi* (seven steps round the fire) and *kanyadan* (offering the bride to the groom)[6] as essential ceremonies.

5. Tribal communities in various states are also excluded from the application of these statutes and are permitted to govern themselves through their own internal mechanisms.

6. A ritual which reinforces the notion that women are the property to be handed over from fathers to husbands.

While section 13 of the Act provides for a judicial divorce, section 29 (2) validates customary divorces. The provision for registering the marriage under S.8 is optional. Hence, despite the law being codified, a Hindu need not approach any state authority, either for solemnising the marriage or for dissolving it, a position not very different from that existing under the uncodified Muslim law. Only through retaining the fluidity of customs of the pluralistic Hindu society, could the reforms be pushed through.

Yet, despite the lacunae, the reforms were projected as modern, secular and gender-just, and uniform. It is interesting to see how these statues unfolded on the ground in subsequent years.

Contradictions and the Lacunae

The Hindu Marriage Act brought in monogamy, prevented child marriage by stipulating a minimum age of marriage and brought in the concept of contract by introducing an element of consent, while the sacramental aspect of Hindu marriage was retained. Premised on the concept of gender equality, it awarded rights of divorce and other matrimonial remedies on same and similar grounds of cruelty, desertion, bigamy etc., and also ancillary reliefs such as maintenance and child custody for both men and women, though the social status, gender roles and responsibilities within marriage were vastly different for men and women.

Since the concept of division of matrimonial property upon divorce was not introduced women's economic rights after divorce were confined to a meagre maintenance, and even this provision carried a rider of sexual purity. If the husband's allegations of adultery or promiscuity were accepted by the court, the woman could be deprived of her right even to the meagre amount of maintenance. So for women in most cases, opting for divorce meant opting for destitution.

Under the Hindu Succession Act, the property inherited by widows became their absolute property and could not be taken away upon remarriage. The daughters were given a limited right of

inheritance in the self-earned parental property. The concept of testamentary succession was introduced and the property could be willed away depriving the legal heirs which often meant depriving the daughters of their share in the self-earned property of the parent. Since women were excluded from the Hindu coparcenary, the notion of equal inheritance rights was illusory. After a sustained struggle, in 2005, through an amendment to the Hindu Succession Act, this gross injustice to women was rectified and they were granted an equal right in ancestral property. While this is an important development, it is cosmetic as property continues to be consolidated in the hands of male relatives.

Due to the retention of the HUF property, Hindus alone were awarded a privileged position of special tax benefits, a discrimination against all other religious minorities. However, this issue is seldom discussed during public discourse as a "Hindu" privilege.

Despite the compromises and loopholes, the misconception that Hindus have forsaken their personal laws and have embraced a secular, egalitarian, and gender-just code, which must now be extended to minority communities to liberate 'their' women persists. Adverse comments in some Supreme Court rulings have added fuel to this tension. For instance, in *Sarla Mudgal*[7], while examining the issue of polygamy by Hindu men by converting to Islam, the Supreme Court, endorsed this view and commented, totally out of context, that oneness of the nation, as well as loyalty to it, would be at stake if different minority groups follow different family laws.

The Remedy of Restitution of Conjugal Rights

Restitution of Conjugal Rights (RCR) was a remedy in English Law which has its base in the medieval church of Europe which viewed marriage as a permanent and indissoluble sacrament. If a wife left the board of her husband, she could be brought back and restored to his

7. *Sarla Mudgal v. Union of India, (1995) 3 SCC 635.*

custody by church authorities, a position akin to slaves. This was based on the premise that the wife is a property of the husband. But by 19th century, when civil law was introduced, the position had changed vastly and since women were awarded the right of legal separation and divorce, RCR could not be used to restore the wife back to her husband.

However, during the colonial rule, this principle was applied to Hindus and Muslim marriages. The most famous case here is that of Rukmabai in 1882-85.[8] Married as a young adolescent, upon attaining maturity she refused to join her husband. In a case filed by her husband for restitution of conjugal rights, the trial court refused to grant him the remedy on the ground that ancient Hindu law did not recognise it. But in appeal, due to pressure from Hindu revivalists, a division bench of the Bombay high court ordered the wife to join her husband and fulfil her conjugal obligations (sexual relationship). Rukmabai defied the order of the colonial court and was ready to face imprisonment which created a furore even in England and tarnished the image of the colonial rulers as saviours of women. Finally the matter was settled after Rukmabai agreed to pay her husband compensation.[9]

Through Section 9 of the Hindu Marriage Act, this remedy was included in the codified Hindu law[10] but was made applicable to both parties. In the following two decades after the enactment, using this remedy, several husbands approached the courts to prevent their wives from taking up gainful employment in a place of their choice, despite the fact that they were the main bread winners of their families. While upholding the husband's unconditional right under a codified

8. *Dadaji Bhicaji v Rukmabai (1885) ILR 9 Bom 520.*

9. See Sudhir Chandra (1998): *Enslaved Daughters.* Also see Flavia Agnes (1999): *Law and Gender Inequality.*

10. This because the matrimonial remedies of the codified Hindu law were borrowed from the then prevailing English family law. Though a few years later, this remedy was abolished under the English law but was retained under the Hindu law. This remedy is frequently used by husbands to defeat the claim of maintenance of their deserted wives.

Hindu law, the courts made the following comments: "A wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection."[11] "The Hindu law imposes on the wife the duty of attendance, obedience, and veneration to the husband, and to live with him wherever he chooses to reside."[12] "According to Hindu Law, marriage is a holy union for the performance of marital duties with her husband where he may choose to reside and to fulfil her duties in her husband's home."[13]

Finally, in 1978, a full bench ruling of the Delhi High Court[14]departed from the position advocated by the earlier judgements and granted women the right to reside separately from their husbands if they were gainfully employed. However, the notion that the husband is the Lord and Master and the wife should be subservient to him (the *Pati Parameshwar* concept), still dominates divorce proceedings.

In 1983, in *T. Sareetha v. T. Venkatasubbiah,*[15] the Andhra Pradesh high court struck down this offensive section and declared it unconstitutional. While the wordings of this section do not discriminate against women, examining the social context in which it operates, Justice P.A. Choudary, in a pro-women ruling, held that the provision violates the right to privacy and human dignity guaranteed under Article 21 of the Constitution and causes the grossest form of violation of an individual's right to privacy. It has the impact of denying a woman her free choice whether, when, and how her body is to become the vehicle for the procreation of another human being.

However, in 1984, the Delhi High Court, in *Harvinder Kaur v. Harminder Singh,*[16] upheld this provision, invoking the legal dictum

11. *Gaya Prasad v Bhagwat*, AIR 1966 MP 212.
12. *Surinder Kaur v Gardeep Singh*, AIR 1973 P&H134.
13. *Kailash Wati v Ayodhia Parkash*, ILR (1977) 1 P&H 642 FB.
14. *Swaraj Garg v R.M. Garg*, AIR 1978 Del 296.
15. AIR 1983 AP 356.
16. AIR 1984 Del 66.

that personal laws are immune to the test of Part III of the Constitution and ruled:

> Introduction of Constitutional law in the home is most inappropriate, it is like pushing a bull into a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 have any place.

Later in the same year, the Supreme Court, in *Saroj Rani v. Sudarshan Chhadha,*[17] affirmed the ruling of the Delhi High Court and overruled the more progressive Andhra Pradesh ruling which had invoked the principles of human rights. So the provision remains and can be conveniently invoked to defeat the wife's claim to maintenance during court proceedings.

The Working of Hindu Monogamy

While examining the developments in Hindu law, Werner Menski, an expert on Hindu law, comments that Hindu law has always been a people's law. Hence, something as complex as Hindu personal law could not be reformed away and abolished by a statute, nor could its influence as a legal normative order that permeates the entire socio-legal Indian field be legislated into oblivion. While the law was codified, in social reality all that happened was that the official Indian law changed, while more and more of Hindu law went underground, populating the realm of the unofficial law. The conceptual framework and ideologies underpinning multiple ways of life and hence the entire customary social edifice of Hindu culture, remained largely immune to the powerful wonder drug of legal modernisation (Menski 2003: 24–25).

Within a pluralistic society, the Hindu Marriage Act validated, diverse customary practices. However, the notion of a valid custom

17. AIR 1984 SC 1562.

remained that of ancient and time immemorial, as stipulated under the English law. This mingling of Brahminical rituals and customary practices with English legal principles resulted in absurd rulings regarding the validity of Hindu marriages, and women have been the worst sufferers.

In the process of urbanisation most customary forms have been modified and urban communities living in close proximity have adopted a synthesis of marriage rituals. The forms range from exchanging garlands, applying *sindoor* on the bride's forehead, to declaring themselves married by signing on a stamp paper, or by taking an oath before a deity in a temple. The media and our Hindi films have added to the confusion by projecting these as valid rituals.

This ambiguity provided a Hindu male ample scope to contract bigamous marriages. Since the law recognises only monogamous marriages, the women in polygamous relationships are denied their rights. In the absence of any clear proof, the man has the choice of validating either his first or the subsequent relationship as a valid marriage to escape from his financial liability towards the other woman. A Hindu husband can routinely deny the marriage or plead that the woman is not his wife and hence deny her claim to maintenance, as there is no official record of any of these rituals. It is left to the lawyer to formulate an adequate strategy that can turn fiction into fact and fact into fiction.

When the man refuses to validate the marriage, the woman loses not only her right to maintenance but also her status as a "wife" and faces humiliation and social stigma as a mistress. An examination of law journals would reveal how widely prevalent is this ploy of refusing to validate the marriage in maintenance proceedings.

So the progressive sounding provision of monogamy not only turned out to be a mockery but in fact even more detrimental to women than the uncodified Hindu law which recognised rights of wives in polygamous marriages. For instance, in a case for maintenance where the husband pleaded that since the woman was

his second wife he is not obligated to pay her maintenance, the court took recourse to the uncodified Hindu law and held that since the couple is governed by the ancient Hindu Law (which permits bigamy) and not by the reformed code, the second wife is entitled to maintenance[18].This judgment speaks volumes for a law that was ushered in with much fanfare as an instrument of social change and women's empowerment.

The flip side of this predicament in maintenance proceedings is the dilemma faced by women in criminal proceedings in cases of bigamy. Here, years of litigation failed to end in conviction for the errant male due to the courts adopting a rigid view that the Brahminical rituals *vivaha homa, saptapadi,* and *kanyadan* were essential ceremonies for solemnising a Hindu marriage. The husband could wriggle out of conviction, despite proof of cohabitation, birth of the child, or the community accepting the couple as husband and wife, if these ceremonies could not be proved by the first wife in respect of her husband's second marriage (Agnes 1995). This was absurd as Hinduism was defined in the widest terms to include castes, sects and religions that did not follow Brahminical rituals, and further, among many communities, the ceremonies prescribed for a second marriage differed vastly from those prescribed for the first marriage of a virgin bride. But the law did not have scope to take into consideration these minute intricacies.

Official report brought out in 1974, almost 20 years after the enactment of the Hindu Marriage Act, *Towards Equality* highlighted the disturbing fact that polygamy among Hindus, Buddhists and Jains (communities governed by the codified Hindu law) is higher than among Muslims.[19] The percentages conceal the huge number of Hindu women who are trapped in legally invalid marriages and are denied their basic right of maintenance and sustenance, when the husband pleads that the woman is his mistress.

---

18. *Anupama Pradhan v Sultan Pradhan* 1991 Cri.LJ 3216 Ori
19. Muslims 5.6 per cent, Hindus 5.8 per cent, Jains 6.7 per cent, Buddhists 7.9 per cent.

Dilution of Monogamy

Contrary to the feeling of perceived disentitlement (as compared to Muslims), it is the Hindu husband who enjoys the privileged position of denying maintenance to a woman with whom he has not only cohabited with, but also produced children, merely by pleading during court proceedings that he has violated the mandate of monogamy without any criminal consequences visiting him. In comparison, the Muslim woman in a bigamous marriage, fares better than her Hindu counterpart, since she is entitled to rights of maintenance, shelter, dignity and equal status. She cannot be discarded as a used doormat.

The reported cases in law journals bear testimony to the frequency with which Hindu men adopt this tactics, while sympathetic and sensitive judges constantly try to find ways in which to secure the rights of women entrapped in such marriages and provide them dignity. The following judgement is an example.

In 2005, in *Rameshchandra Daga v. Rameshwari Daga*[20] the Supreme Court, while trying to grapple with this problem and while awarding maintenance to a woman whose husband had challenged the validity of their marriage on the ground of previous subsisting marriage, conceded that despite codification and introduction of monogamy, the ground reality had not changed much and that Hindu marriages, like Muslim marriages, continue to be bigamous. The Court commented further that though such marriages are illegal as per the provisions of the codified Hindu law, they are not "immoral" and hence a financially dependent woman cannot be denied maintenance on this ground (Agnes 2011).

In the same year, in order to redress the injustice caused to Hindu women in legally invalid marriages and to bring them within the fold of legality, the Protection of Women from Domestic Violence Act, 2005 (PWDVA) introduced the concept of "*marriage like relationship*", which is popularly referred to as "live-in relationship".

20. I (2005) DMC 1 SC.

However, a Supreme Court ruling by Justice Markandey Katju, *D. Valusamy*[21] *proved to be a dampener.* The court was dealing with an appeal by a Hindu man whose wife had been awarded maintenance under Section 125 of the Cr.PC (Criminal Procedure Code) by two lower courts. While setting aside these orders and denying the woman her right to maintenance, the judge also narrowed the scope of the term "marriage like relationship" under PWDVA and held:

> If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant, it would not, in our opinion, be a relationship in the nature of marriage... No doubt the view we are taking would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law.

By a stroke of his pen, the judge undid several earlier rulings that had attempted to find a way of securing some relief to women who were trapped in such relationships.

However, dissenting from Justice Katju's judgement, in 2014, in *Badshah v Urmila Badshah Godse*[22] Justices Ranjana Desai and A.K. Sikhri upheld the right of a Hindu woman who had been duped into a bigamous marriage and thwarted the attempt of her husband to subsequently deny her maintenance. The judgment emphasised that while dealing with the application of a destitute wife under this provision, the court is dealing with the marginalised sections of society. The purpose is to achieve "social justice," the constitutional vision enshrined in the Preamble of the Constitution of India. The Preamble clearly signals that we have chosen the democratic path to secure for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of social justice. There is a non-rebuttable presumption that the legislature, while

21. *D. Velusamy v. D. Patchaiammal* 2010 (10) SCC 469.
22. 2014 (1) SCC 188.

making a provision like Section 125 of the Cr.PC to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

As an example, the judgment cited the journey from *Shah Bano*[23] to *Shabana Bano*[24], which granted maintenance rights to divorcedMuslim women. The judge was referring to the developments within Muslim law in recent times, which have secured the post-divorce economic rights of Muslim women through important rulings such as *Daniel Latifi*[25] and *Shabana Bano*[26] and also *Shamim Ara*[27], which invalidated triple talaq by stipulating strict quranic conditions for pronouncing talaq under Islamic law.

In yet another ruling of 2015, a bench of Justices Vikramajit Sen and A.M. Sapre dismissed a petition by a man who claimed that since he was already married before entering into the live-in relationship, his partner could not claim the status of a wife and was not entitled to maintenance[28]. The man who works in Bollywood, had challenged an order of the Bombay high court, which had held that his live-in partner of nine years and the child were entitled to maintenance. He argued that since he was legally married to another woman for the last 49 years, his live-in partner was not entitled to maintenance as she was well aware of his marital status. He pleaded further that his live-in partner was a 'call girl' and that she had decided to live with him out of her own wish since 1986 and a child was born to them in 1988.The judges slammed the man for referring to his former partner as a 'call girl.

---

23. *Mohd Ahmed Khan v Shahbano Begam*, AIR 1985, SC 945.
24. *Shabana Bano v Imran Khan*, AIR 2010, SC 305.
25. *Daniel Latifi v Union of India*, (2001), 7 SCC, 740 FB..
26. Cited above.
27. *Shamim Ara v State of UP*, 2002 (7), SCC 518.
28. Choudhary, Amit Anand, 2015, "Supreme Court upholds maintenance for live-in partners" New Delhi : *Times of India*, May 6, 2015 available at http://timesofindia.indiatimes.com/india/Supreme-Court-upholds-maintenance-for-live-in-partners/articleshow/47169351.cms.

These recent judgements indicate a change of judicial attitude towards women who used to be humiliated and stigmatised during court proceedings, while rewarding the errant husbands by absolving them of their obligation to maintain their former partners. Despite this reality, the popular trend (within media and progressive groups) is in the reverse direction, with a demand to abolish Muslim polygamy and bring Muslim women on par with Hindu women, while turning a blind eye to these legal developments.

Contemporary Concerns

This brings me to the concluding point of my essay.

As we enter the debate on enactment of a Uniform Civil Code (UCC) there is a view that the codified Hindu law will form its base. There is also a parallel view that the best elements from all personal laws must be incorporated into this ideal code. Tested against this formulation, how will the Hindu Law, which is applicable to the mainstream majority, fare? Apart from the elaborate discussion above on unfolding of the Hindu law within our courts, there is also the need to bring into context certain other vital indicators of gender justice.

As per the recently released census data, India has 12 million married children under age ten, revealed a shocking news report and to place it in context, stated that this number is equivalent to the population of Jammu and Kashmir. The most disturbing part of the report is that 84 per cent of these were Hindus, while 11 per cent were Muslims (Saha, 2016).What do these figures tell us in the context of the current debate on UCC which is focused primarily on reforming the oppressive Muslim law.

As per the Child Marriage Prohibition Act, 2006, as well as the Hindu Marriage Act, the minimum age of marriage for a Hindu girl is 18, while the principle applicable under Muslim law is 'age of reason' which is deemed to be achieved upon puberty. Yet the figures for child marriage do not reflect a social transformation taking place due to the codification of Hindu law.

Though child marriage is prohibited it is not void. Some groups have been campaigning for a total ban on child marriage and for declaring all child marriages void. But examining from the context of social justice, what will be the impact on young Hindu girls who are married upon reaching puberty and are deserted even before they become majors. When a destitute girl with a child in arms approaches our courts, would it be in the interest of justice to declare, since the marriage is void she is not entitled to basic and fundamental right of maintenance?

While this is a legal concern, there is also a social aspect to it. The belief that a girl should be married before reaching puberty is still dominant among various rural Hindu communities. The concept of a virgin bride prevails and the fear of sexual assault which will taint the girl and render her impure and unfit for marriage still persists and the parents are afraid to take the risk of keeping an unmarried girl at home. The fear of the girl eloping with a boy of her choice and bringing dishonour to the family also haunts parents due to which parents prefer to marry off their daughters young. This exposes the young vulnerable girl to sexual and domestic abuse in her marital home. It also results in early pregnancy which is one of the main causes of maternal mortality in our country. Yet the fear of sexual purity and sexual defilement overrides concerns for the girl's health and security while marrying off an underage daughter.

The reformed Hindu law has not been able to bring a change within this deeply ingrained notion. It is not a question of criminalising child marriage and declaring it void, but of providing adequate facilities for education, both formal and informal, skill training, and a secure environment for a young girl to grow up until she reaches the age of 18, along with a change in the parental mind-set regarding the notion of virgin bride are measures which are needed.

A Hindu father still believes that marrying his daughter is a pious obligation which he must perform to attain salvation. Apart from encouraging child marriage, this concept also gives boost to the dowry system despite our laws criminalising dowry and dowry

related violence. The pressure to marry off their daughter at any cost, drives parents to meet the dowry demands of the groom's family, rather than bear the stigma of having an unmarried daughter. Despite the legislative reforms to curb dowry deaths and suicides the figures are constantly rising. In an informal study of dowry deaths which reached the Supreme Court and the Bombay High Court, conducted by Majlis, Mumbai, over 95 per cent of these cases of dowry death were among Hindus.

While the system of dowry has spread to lower castes and minority communities, its roots in Hindu cultural tradition cannot be overlooked. Ironically, the Muslim law which started with the notion of *mehr*, an amount which must be stipulated in the marriage contract, as a future security to the bride. Unfortunately while the community has accepted the anti-women Hindu custom of dowry, while *mehr* amounts are reduced to a mere token rather than being a viable security to the future needs of the bride.

The age old dictum still prevails that a girl who enters a bridal home in a wedding procession must leave the home only in a funeral procession. So despite acute domestic violence girls are sent back to their homes even at the risk of them being killed or driven to suicide. Despite amendments to the Hindu laws which rendered the Hindu marriage contractual, the sacramental aspect still dominates the social psyche and parents prefer to send the daughter back to her matrimonial home rather than risk having a divorcee on their hands.

In contrast, a Muslim marriage is always regarded as a civil contract. While the Christian marriage started on the premise of a permanent and dissoluble sacrament, gradually due to education and exposure, the perception about sacramental marriage have changed. While among the urban, middle and upper classes Hindus, divorce is gradually gaining acceptance and there is greater likelihood of women opting for divorce when faced with domestic violence, in rural areas where conservative views of sacramental marriage still dominate women are less likely to opt for divorce even when faced with cruelty,

desertion or their husband's adultery as marriage is deemed to offer protection to women.

The concept of permanency of marriage and husband as the Lord and Master, still dominates not only our public life, but also litigation in family courts where women are constantly advised to return to save their marriage even at great risk to themselves as at times, the judges themselves endorse this view. Women believe that even if their husbands are abusive, violent or alcoholic they prefer to remain married, since the marriage symbols which are worn by married women like the black beads round the neck and *sindoor* on their forehead are perceived as marks of respect, status and protection against advances from other men.

Despite the enactment of PWDVA, the only advice given to most women is counselling either by the police or social workers situated in police stations, is to reconcile in order to save her marriage and return to her matrimonial home. This appears to be the most viable solution as the state has not attempted to evolve alternate support structures to help women to make the transition from a housewife to an independent and self-supporting person (Agnes and D'Mello). When there is a resumption of violence, the women are in a state of acute depression. A recent international study which covered 187 nations revealed another disturbing fact that suicide among married women is the leading cause of death among married women aged between 15-49 in India, replacing death due to maternal disorders.[29] An overwhelming number of these are likely to be urban Hindu housewives.

While all religions are patriarchal and believe in maintaining a strict control over a woman's sexuality, the hold of Brahminical patriarchy reaches a high pitch when we examine the phenomenon referred to as *honour killings* where a girl is brutally killed by her own parents or at their instance, for transgressing the caste boundaries,

29. Clark Liat, "Suicide is number one cause of death among young women in India" *WIRED* March 27, 2016 available at http://www.wired.co.uk/news/archive/2013-03/27/suicide-women-india

and marrying a man / boy from the lower castes, a reality captured in a recent popular Marathi movie *Sairat*. Earlier this phenomenon was believed to be prevalent only in North India, but now several Southern states have also started reporting these occurrences at regular frequency. The young couple is also killed for contracting *sagotra* and *sapinda* marriages within certain North Indian communities.

Against this overarching evidence of anti-women social practices, can we assume, unproblematically, that the codified Hindu law has been instrumental in bringing social transformation and changed gender relationships and provided the necessary foundation upon which a strong edifice of a uniform and gender just family code for India can be built?

This is the challenging question that confronts us today.

References

Agnes, F. 2011. "The Concubine and Notions of Constitutional Justice"in *Economic and Political Weekly,* 46(24): 31.

Agnes, F. 1999. *Law and Gender Inequality*. New Delhi : Oxford University Press.

Agnes, F. 1995. "Hindu Men, Monogamy and the Uniform Civil Code", in *Economic and Political Weekly,* 30(50): 32-38.

Agnes, F. and Audrey D'Mello. 2015. Protection of women from domestic violence" in *Economic and Political Weekly,* 50(44), Review of Women's Studies, 31 October 2015, available at http://www.epw.in/review-womens-studies/protection-women-domestic-violence.html.

Chandra, S. 1998. *Enslaved Daughters.* New Delhi: Oxford University Press.

Choudhary, Amit Anand, 2015. "Supreme Court upholds maintenance for live-in partners", New Delhi: *Times of India*, 6 May 2015, available at http://timesofindia.indiatimes.com/india/Supreme-Court-upholds-maintenance-for-live-in-partners/articleshow/47169351.cms.

Clark, Liat, 2016. "Suicide is number one cause of death among young women in India", *WIRED, 27* March 2016, available at http://www.wired.co.uk/news/archive/2013-03/27/suicide-women-india.

Derrett, D.J.M. 1999. *Religion, Law and the State in India.* New Delhi: Oxford University Press.

Government of India. 1974. *Towards Equality.* The Report of the Status of Women Committee.

Lateef, S. 1994. "Defining Women through Legislation", in Z. Hasan (ed.), *Forging Identities: Gender, Communities and the State*. New Delhi: Kali for Women.

Mensky, W. 2003. *Hindu Law Beyond Tradition and Modernity.* New Delhi: Oxford University Press.

Parashar, A. 1992. *Women and Family Law Reform in India.* New Delhi: Sage Publications.

Saha, Devanik. 2016. "India has 12 million married children under age ten", *The Wire*, 1 June 2016, available at http://thewire.in/2016/06/01/of-12-million-married-children-under-age-ten-84-are-hindus-39885/.

DURGABAI DESHMUKH MEMORIAL LECTURE SERIES

Year	Speaker	Topic
2015	Abhijit Sen	Demographic Drivers of Economic Growth – Role of Human Capital
2014	N.C. Saxena	Challenges of Good Governance
2013	S.K. Thorat	Growth and its Pro-Poor Character in India 1993–2010
2012	Narendra Jadhav	Reforms in the Higher Education System and 12th Five Year Plan
2011	Devaki Jain	What is Wrong with Economics? Can the Aam Aurat Redefine Economic Reasoning?
2010	Gail Omvedt	Caste in the Census
2009	Shanta Sinha	Deficit Childhood: Implications for India's Democracy
2008	Randhir Singh	Indian Politics in the Age of Globalisation
2007	Mahashweta Devi	Fundamental Human Rights for the Nautch Girls of Purulia
2006	Aruna Roy	Democracy Work
2005	Munda Ram Dayal	Globalisation and the Challenges of Tribal Development
2004	Anil Sadgopal	Globalisation: Demystifying its Knowledge Agenda for Education Policy
2003	Pushpa Bhargava	The Promise and Problems of Today's Biology and Biotechnology and Their Applications
2002	Mushirul Hasan	Islam, Culture & Politics: Awadh Society in 20th Century
2001	N.H. Anita	Women and Health
2000	Leela Dubey	Social Development and Social Research
1999	M.N. Venkatachaliah	Human Rights and Women in India
1998	Swami Agnivesh	Towards a Spiritual Society
1997	Leila Seth	The Girl Child and Social Development
1996	Vandana Shiva	Trading Our Lives Away: Free Trade, Women and Ecology
1995	Kiran Bedi	Concept of Management in Government
1994	Karan Singh	Population and Social Development in India
1993	Vina Majumdar	Women and the Political Process
1992	Suma Chitnis	The Institutionalisation of Social Purpose

COUNCIL FOR SOCIAL DEVELOPMENT

A leading research and advocacy institution
that puts equality and justice at the core of social development

CSD was established in 1962 by Durgabai Deshmukh, a feminist activist in India's freedom struggle who worked closely with Mahatma Gandhi. She was a visionary social worker for whom social development meant upliftment of the marginalised. She was the first Chairperson of the Central Social Welfare Board and a member of the Planning Commission.

Starting as an informal study group of social scientists and activists working towards a just social order in the country, CSD was registered under the Societies Registration Act of 1860 in 1970. Over the years it has emerged as an important institution of social research and advocacy under the leadership of eminent educationists, social sector experts, and academicians. Presently, it is headed by Prof. Muchkund Dubey, former Foreign Secretary with extensive experience in the UN system.

CSD has a Regional Centre at Hyderabad that was established in 1967, and is supported by the ICSSR and the Government of Telangana. Dr. Pushpa Mitra Bhargava, a distinguished scientist is the Chairman of its Managing Committee.

CSD brings out a quarterly journal *Social Change,* and in pursuit of extending its reach to other Indian languages, it will be launching a journal in Hindi, *Samajik – Chintan aur Sameeksha ka Naya Daur*, from January 2017. Both are published by Sage Publications.

CSD also brings out the *India: Social Development Report*, a bi-annual report published by Oxford University Press. Its recent themes of focus have been universal healthcare, minority rights, land question and the marginalised.

There are several on-going research projects spanning a gamut of critical issues from health to food security, education, gender, social inclusion and civil and political rights.

CSD also houses the Right to Education Forum, a collective of education networks, teachers' organisations and educationists working towards systemic reform in education. As part of its advocacy efforts to promote and highlight issues of critical concern CSD organises conferences, seminars and workshops including a fortnightly Social Development Forum.

Flavia Agnes is an eminent women's rights lawyer. A pioneer of the women's movement, she has worked consistently on issues of gender and law reform. She has played an important role in bringing women's rights to the forefront within the legal system and in contextualising issues of gender and identity. A prolific writer, she has provided incisive analysis of many social trends and legal reforms including domestic violence, minority law reforms, secularism and human rights. She is one of the proponents of legal pluralism. Within the premise of 'reforms from within' she has played an important role in reforming the Christian Personal Laws as well as advancing the rights of Muslim women. Her more recent engagement has been with issues of democracy, secularism and identity politics. Her organisation, Majlis has worked consistently in countering the rising wave of Hindu fundamentalism in the country

COUNCIL FOR SOCIAL DEVELOPMENT
Sangha Rachana, 53 Lodi Estate, New Delhi -110003 (India)
Phone: +91-11-24615383, 24611700
Fax: +91-11-24616061
Email: csdnd@del2.vsnl.net.in
Website: http://www.csdindia.org