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Codified Hindu Law

Myth and Reality

Madhu Kishwar

There is almost no principle introduced by the Hindu personal code which did not already exist somewhere in India as accepted law. On the other hand, there were several existing, much more liberal principles which were decimated by the Hindu Code. In their determination to put an end to the growth of custom, the reformers were putting an end to the essence of Hindu law; but they persisted in calling their codification 'Hindu'.

I

IN the first decades of Indian independence, the codification and reform of the Hindu personal law was hailed as the symbol of the new government's supposed commitment to the principles of gender equality and non-discrimination enshrined in the constitution. The history of this legislation and its consequences over the years are in many ways a good example of the gap between governmental promise and performance, and the course taken by state-initiated social reform—a process that began with the establishment of British rule in large parts of India.

The attempt to codify Hindu law was begun in the late 18th century because the colonial rulers wanted to bring under their judicial purview aspects of the social and political life of diverse communities which all erstwhile rulers had never encroached upon. The establishment of British rule marked an unprecedented break from the past. Prior to that no rulers had sought to intervene in what were considered as the internal matters of the 'jat' or 'biradari' organisations of various communities, no matter how far-reaching the changes introduced at the top. For instance, during Mughal rule, the Islamic law explicitly recognised the traditional community-based institutions for resolving disputes. The Mughal court reserved to itself exclusive jurisdiction only in matters they considered crimes against the rulers, as well as in fiscal administration. Most family kinship disputes were not brought before Muslim officials. Rules for dispute resolution differed considerably from one caste to another and from region to region.¹

The Englishmen who came as traders in the 17th century were befuddled at the vast diversity and complexity of Indian society. Having come from a society where some aspects of family and community affairs came under the jurisdiction of canon law, they looked for similar sources of authority in India. Thus began a new kind of study

of ancient 'shastras' to help the British develop a set of rules for governing contemporary Indian society.

During Warren Hasting's tenure, disputes regarding inheritance, the laws regarding marriage, caste and religious usages or institutions were to be settled for Hindus according to the laws of the 'shaster'. Why these subjects and not others? To quote Duncan Derrett: "Hastings and his colleagues were ... predisposed to see the division of topics of law in terms of the contemporary English division..."

They assumed that just as the European marriage laws were based on Biblical tenets, so must the personal laws of various communities draw their legitimacy from some fundamental religious tenets:

All matters of marriage and divorce, and all questions of testaments and distribution of goods, ... all matters of religious worship and discipline, excommunication and so forth were within the exclusive jurisdiction of the Bishops' courts, and the law was ecclesiastical law ... When the Anglo-Indian judges sent ... for 'opinions' ('vyavastha') on Hindu law from the pandits, and acted upon these certificates without bothering to see whether they agreed with others given by the same persons in the like circumstances, they were imitating the practice of the King's bench or the Common Pleas. This was of a piece with the error perpetuated by Sir William Jones, that brahmins were 'priests'. Very few brahmins were priests and there were priests who were not brahmins: and similarly pandits were not bishop's officials, or anything of the kind.²

There was no single or uniform body of canon law or Hindu pope to legitimise a uniform code for all the diverse communities of India, no Shankracharya whose writ ran all over the country. But that did not prevent the British from searching. An even bigger mistake of the British was that at this point they took no steps to collect evidence of local or caste custom. This led to wide discrepancies between the opinions or reports of pandits in different courts. Often same

pandits gave different opinions on similar matters. In order to arrive at a definitive grasp of the Indian legal system, the East India Company began to train pandits for its own service and began to patronise 'shastric' education. This included setting up of a Sanskrit College at Banaras and at Calcutta. However, since the effort began in eastern India, the shastric learning promoted by the company had a visible eastern bias. These pandits could report the law mostly based on the school of Benares and Mithila or the Bengali school. Southern schools of law were conspicuous by their absence.

In 1772 Hastings hired a group of 11 pandits for the purpose of creating a digest of Hindu law. This was made to order text in which the pandits followed the authority of their paymasters. The use of these Sanskrit pandits to interpret the customary laws for the benefit of courts inevitably brought in a heavy Anglo-brahmanical bias. This work was translated into Persian and from Persian into English. In March 1775 Hastings sent this work to London with a preface on its cultural background. In 1776 it was printed in London under the title: *A Code of Ge:100 Laws, or, Ordinations of the Pandits*.³ This could be called the first serious, though far from accurate, attempt at codification of Hindu law by the judges at all levels. The topics included debt, inheritance, civil procedure, deposits, sale of a stranger's property, partnership, gift, slavery, master and servant, rent and hire, shares in cultivation of lands, fines for damaging crops, defamation, assault, theft, violence, adultery, duties of women, etc.

This codification could not put an end to conflicting opinions. The British began to increasingly mistrust the pandits feeling that the latter were misleading the court or that they favoured the interests of their own caste. They were also getting increasingly impatient with having to deal with a vast range of customs which had no shastric authority to back them. The resulting confusions and corruption led William Jones

to work on a more 'definitive' code of Hindu law comparable with Justinian's *Corpus Juris* for the use of European judges in India. He was determined that "the British should administer to [the Indian people] the best shastric law that could be discovered" and was determined to free the British from their "dependence on the pandits". To quote William Jones: "I can no longer bear to be at the mercy of our pandits, who deal out Hindu law as they please, and make it at reasonable rates, when they cannot find it ready made."⁴

The code, prepared by Jones with the help of pandits, had a strong bias in favour of the Bengal school. He then went on to translate *Manu Smriti* which became one of the most favoured texts of the British. It influenced oriental studies in the west far more profoundly than it had ever influenced the administration of law in pre-British India. Despite repeated failures, the British would not give up their search for an authentic text of Hindu law written by a Hindu shastric. After Jones, Colebrook tried his hand at a similar compilation.⁵ In a few years time Colebrook's translations of the *Mitakshara* and the *Dayabhaga*⁶ became the two most frequently quoted and relied upon sources in court judgments. In the mean time several Sanskrit scholars had attempted to write legal treatises to meet with the British demand. Nevertheless the work of European authors on shastric law came to be trusted and used in preference even to the genuine Sanskrit shastric works.

Thus grew the myth that Hindus were governed by shastric injunctions. These new law codes, backed by the authority of British courts, began to make alterations in custom, even when the British law provided for protection of the latter. Since then custom has been forced to struggle against the Anglo-shastric law brought into existence at the behest of the British, which was assumed to be the personal law of Hindus. The literal and obstinate adherence to shastric rules, misunderstanding their original purport, resulted in making the Anglo-Hindu law far more rigid than the shastras. In their attempt to make the shastras more definitive, the British forced it towards greater uniformity.

This ossified Anglo-Hindu law is what the Indian parliament set out to reform in the first decade of Indian independence. The Congress Party was then dominated by lawyers trained in British law or people like Nehru and Ambedkar who had studied law in England. They were not just English educated but also educated in English law and had consequently imbibed all the colonial biases regarding the functioning of Indian society as well as the changes that were supposedly needed to 'modernise' it. This is a major reason that the reformed Hindu law is in conformity with 'reforms' initiated during British rule.

The Hindu code bill began to be drafted in the 1940s. After a long and chequered history, including various attempts to scuttle it, a Hindu code bill was presented to the legislature in 1947, and referred to a select committee headed by the then law minister, B R Ambedkar, in 1948. It faced tremendous opposition both inside and outside parliament. For example, among the written statements submitted to the Hindu law committee in 1945 a large majority were opposed to the notion of codification and a substantial number of those who supported it offered only qualified support. The Congress itself was sharply divided on the issue. In the face of this opposition from within and without, the government finally decided to split the bill into four parts and pass it piecemeal. In this process, the legislation underwent substantial change. By the time the last of the four acts was passed in the mid-50s, they were very different not only from the original draft code but also from the code as it had emerged from the select committee headed by Ambedkar.

Yet, even these highly watered down pieces of legislation were hailed as nothing less than revolutionary by their proponents in parliament, using rather exaggerated rhetoric. This rhetoric remained basically unchanged over the years that the Hindu code was debated in parliament, and seemed to have little relationship to the actual laws being debated. The rhetoric seems to have had more to do with the rhetorician's self view—a paradoxical blend of pomposity and self-contempt—derived from acceptance of the British ruler's view of Indian society. Thus, in 1948, B V Keskar, constituent assembly member from UP, remarked on Ambedkar's Hindu code bill: "... I do not think there has been any bill so radical and so revolutionary which is trying to change the very foundations of Hindu society, a society which has remained fossilised for the last thousand years."⁷

And, in 1956, when the Hindu Succession Act was passed in so altered a form that even its most ardent supporters felt compelled to see it as something of a fraud on women, the hyperbolic rhetoric nevertheless continued. To quote S S More:

...our past which created and perpetuated the caste system... which allowed the sudras to remain in abject slavery, is still hanging over us; but we are striving to snap the bonds of the past and march as steadily and firmly as possible towards a new horizon, towards a new heaven, where the socialistic order shall prevail.⁸

This rhetoric functioned in two ways. First, it projected a myth that Indian women were absolutely equal under the new laws. By a curious sort of myopia, or rather double vision, it became possible simultaneously to give less than equal rights

to women, even in newly enacted laws, and yet to claim that equal rights had been given. Thus, Mulla's *Principles of Hindu Law*, the standard scholarly text on the subject, states in the preface: "The outstanding feature of the changes made in the law is that all disparity in the rights of men and women and disabilities based on...sex are eliminated in matters of marriage, succession and adoption."⁹ And again later: "Male and female heirs are now treated as equal without any distinction."¹⁰

This in a book which documents at length the glaring disparities that persist, especially in matters of succession and adoption. At the popular level too, the notion came to prevail that the reformed law was not only an ideal piece of legislation but had also, like a magic wand, actually removed all injustices. Thus, on May 10, 1956, the *Hindustan Times* carried an advertisement for G P Sippy's film *Shrimati 420*, which proclaimed:

Red Letter Day in the History of Social Reform! Parliament Passes Hindu Succession Bill and Removes Age-Old Injustice to Women! Here is a picture to uphold these ideas which blazes a new trail in revolutionary social dramas!

This is not to suggest that the euphoria served no purpose or was merely so much hot air. It did help to establish the notion of women's equality as a desirable ideal to which the Indian polity was to be committed. It is noteworthy that all the members of parliament opposing this reform in Hindu law, whether they were from the Congress or from other parties such as the Hindu Mahasabha, never failed to preface and end their speeches with an emphatic disclaimer of any intention to oppose justice for women. This establishment of some minimum consensus on the need to protect women's interests was in itself a worthwhile achievement, on which law minister Pataskar commented when the most controversial act, the Hindu Succession Act, was finally being debated in 1956: "I am happy that in spite of some very passionate speeches... the majority of the members of this house...are in favour of doing justice to women...whatever the other differences."¹¹

However, the gap between rhetoric and reality was too large to remain unnoticed. Not only the opponents but even some of the proponents of the acts repeatedly pointed out that they fell far short of equality. When law minister Biswas, in 1954, claimed that "the delay" was "fully justified" because over the years the "bitter opposition" to the bill had died down,¹² Hukum Singh pointed out: "It is not the public opinion that has changed but...the government that has changed its attitude... This is not the original bill...The Hindu code has practically been given up by this government."¹³

Why then the insistence on codifying and unifying Hindu law? There seems to be a fascination, among the social reformers in particular and the English educated elite in general, with uniformity as a vehicle of national unity. In the vein of British distaste for polytheism and glorification of monotheism as somehow intrinsically morally superior, the reformers express disgust with the diversity of Hindu law as practised in different regions, and with its complexities. The reformers perceive themselves as modernising woodcutters wielding the axe against the mystifying jungle of Hindu law. The destructive metaphor of cutting down trees rooted in the earth is a revealing one. B V Keskar's opinion was widely shared among the zealous reformers:

...the present day Hindu law is a maze; it is a jungle like the tarai or sunderbans in which all sorts of practices and traditions come up...the time has come when this maze of traditions and counter-traditions should be put an end to and we must rationalise and consolidate the law.¹⁴

Time and again, the reformers put forward the argument that uniformity is necessary, without explaining why, simply assuming that uniformity is an unquestioned good. One such typical statement by S C Shah: "We have had Hindu law varying from place to place, province to province, having all kinds of local customs and family customs...it is a very great thing that we will, for the first time, have a uniform code at least for the Hindu community."¹⁵

All who questioned that uniformity was a great thing were labelled and dismissed by the 'progressives' led by Nehru as reactionaries. However, a careful study of the opposition shows a wide spectrum—ranging from mindless idealisation of the customary Hindu law, including its discriminatory aspects, to more thoughtful advocacy of retaining diversity, recognising that community-based law had greater implementability, and allowed people more options. Some argued that diversity was not itself an evil, and, more important, that Hindu law had not been imposed by the state or other authority from above but had grown from popular consensus and that this character should be preserved. Kameshwar Singh, a Congress MP from Bihar, tried presenting this viewpoint but to no avail: "The diversity perceptible in different parts of the country goes a great way in establishing the fact that popular acceptance and not imposition from any central political authority has been the sanction behind the personal law of the Hindus.... we should not take the seeming diversity as an evil which must be instantaneously removed."¹⁶

At one level, then, the question was also one of how far the state should take it upon itself to interfere in people's personal and community lives. Ambedkar was among those most enamoured of the state's right to run people's lives. He declared that there was no sphere in which the state could not interfere: "People talk about customs in the country. Well, why have customs grown?...I think the answer is...that so far as this country is concerned, there never was such a thing as parliament..."¹⁷

Disregarding an interjection regarding the co-existence and legal validity of common law with the parliament in England, he went on:

What other way was left open to regulate their life except to make their own custom, because there was no parliament...? But when we have got a parliament, the function of which is to make law, the question that we have to ... consider is whether we are going to allow the people as such who are outside the parliament to have a parallel authority to make their customary laws...?¹⁸

This perception of the state as an instrument of social reform to be imposed on people without creating a social consensus derives essentially from the norms of functioning inherent in colonialist state machinery and ideology. The English educated elite among the Indians had faithfully imbibed the colonial state's ideology, projecting itself as the most progressive instrument of social reform, failing to realise that many of these enactments (such as the Sharada Act) remained paper tigers of which people were not even aware. The contempt for Indian society, labelled backward, uncivilised and degenerate, was all pervasive. Notice the words used by Ambedkar: "...some communities like the Hindu community needed the reform so badly—it was a slum clearance."¹⁹

Having argued that customary law amounted to "anarchy" and that it had evolved only because India lacked a parliament, he also put forward the self-contradictory argument he had picked up from the orientalist that Indian society was static:

...this society is an inert society. The Hindu society has always believed that law making is the function either of god or the 'smriti' and that Hindu society has no right to change the law. That being so, the law in Hindu society has remained what it was for generations... Society has never accepted its own power and its own responsibility in moulding its social, economic and legal life. It is for the first time that we are persuading Hindu society to take this step.²⁰

The derivation of this terminology from that of the British rulers is apparent. It was a commonplace of 19th century British thought to label Indian society stagnant and resistant to change. The diversity of Indian society and culture bewildered the British

rulers and made the task of centralised governance difficult, accustomed as they were to the relatively far more homogeneous societies of Europe. Hence their desire to homogenise Indian society, its norms and practices, and to wipe out all those diversities that they could not comprehend. This attitude was inherited by the English-educated rulers of independent India along with the machinery of colonial government that had fully internalised it.

Arrogating to themselves the status of 'first time' reformers only betrayed the ignorance of the Nehru camp. The evolution of law in precolonial India provides ample evidence of change and reform. To take the most obvious example, the institution of the dayabhaga system by 'jimitavahana' which is considered as the more liberal and reformed school over the more orthodox 'mitakshara'. However, the latter was not static either. Four major schools evolved within mitakshara. There is almost no principle introduced by the Hindu code which did not already exist somewhere in India as accepted law. There were, however, several existing much more liberal principles which were decimated by the Hindu code, and have not been restored even today. (I will provide examples of some of these later in this paper.) In their stated determination to put an end to the growth of custom, the reformers were in fact putting an end to the essence of Hindu law, yet they persisted in calling their codification 'Hindu'.

II

The smritis are collections of precepts written by rishis—that is, sages of antiquity. All of the smritikars stress the importance of custom and usage. But the very same authorities who insist that these smritikars were the founding fathers of Indian jurisprudence themselves admit that ethical and moral obligations were regarded by these exponents of dharma as of more importance than legal obligations. Justice Desai in his authoritative introduction to Mulla's treatise on Hindu law says that "...much of the traditional law of ancient India would be termed as 'morality' because that law was not 'a direct or circuitous command of a monarch or sovereign to persons in a state of subjection to its author'"²¹

Dharmashastras were not strictly religious treatises either. Dharma itself means the aggregate of duties and obligations, religious, moral, social and legal. This code of dharmic conduct was expected from each of the social roles a person performs. But there is no attempt to insist on a universal code for all of humanity. It is meant to be situation and time specific as well as person and place specific rather than an immutable set of laws. And the authority to change, or start

new customs too lies with not just the biradari but also with the 'kula' or family. Narada states: "Custom is powerful and overrides the sacred law".²² *Manu Smriti* itself, which was sought to be provided with the halo of final authority, stresses: "A king... must inquire into the law of castes (jati), of districts (ganapada), of guilds (shreni), and of families (kula), and settle the peculiar law of each" and goes on to add: "Thus have the holy sages, well knowing that law is grounded on immemorial custom, embraced as the root of all piety good usages long established."²³

Even some of those smritis which deal exhaustively with various topics of law and are generally referred to as codes were not codes in the strict sense. The surviving known smritis were compiled at different times and in different parts of the country and consequently differed considerably from each other. But characteristically, none of the smritikars pick up cudgels with or deny the authority of other smritikars in an attempt to prove that theirs is the most authoritative version of a single code of conduct. Instead, they assume that the various codes should coexist, not challenging each other:

The smriti was not autonomic law which is the result of a true form of legislation or is promulgated by the state in its own person. It was not imposed by any superior authority... The general effective motive, according to these smritikars, was observance of dharma and the sanctions recognised by the people themselves... one view of the genesis of legal institutes [codes] was that the king and the law were created by the people.²⁴

Most of the leading smritikars make explicit statements to that effect. For example, Medhatithi and Vijnaneshvara, as also the *Mahabharata* and the *Arthashastra* of Kautilya, maintain the view that law as enjoined in the vedas and the smritis was of popular origin and the sanction behind that law was not the will of any supreme temporal power.²⁵

The smriti of Yajnavalkya gives a list of 20 sages as law givers. The mitakshara explains that the enumeration is only illustrative and dharmasutras of others are not excluded. There is no attempt to assign a hierarchical order to the authority of their authors.

Brihaspati (one of the 20 important smritikars) ruled that a decision must not be made solely by having recourse to the letter of written codes since if no decision was made according to the reason of the law or according to immemorial usage, there might be a failure of justice. Acting on these principles the rishis abrogated practices which had come to be condemned by the people and ordained and prescribed rules based on practices and customs which had

come to be recognised and followed by the people.²⁶ An oft-repeated maxim was that reason and justice are to be given more regard than mere texts.

The dharmasutras of Gautama, Baudhyanana, Apastamba, Harita and Vasishtha are accepted to be the most ancient of those extant and deal with duties of human beings in various relations. However, they do not pretend to be anything more than compositions of ordinary mortals and the writers do not hesitate to make clear that often they are merely "compilers of traditions, handed down to them and clung to that position even when introducing changes and reforms."²⁷ Composed in different parts of the country at different times, they were not bodies of law struggling with each other for supremacy. Each author accepts the validity of other schools of law. For instance, Apastamba's work, which is believed to embody the customs of certain regions of southern India, is one of the most respected sutras. While emphasising the view that the vedas were the source ('pramana') and nucleus of all knowledge, Apastamba takes care, at the end of his work, to impress his pupils with the statement: "Some declare that the remaining duties (which have not been taught here) must be learnt from women and men of all castes" and goes on to add: "The knowledge which... women possess is the completion of all study."²⁸

The *Gautama Dharmasutra* which is believed to be the oldest of the extant works on law lays down the injunction that the king is duty-bound to preserve the time-honoured institutions and usages of different communities—cultivators, traders, herdsmen, moneylenders and artisans. The king is not expected to impose his laws on others, only to preserve and implement. The adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law is to see that customs, practices and family usages prevailed over any outside writ. This distinguished Hindu law from those of societies which adhered the idea that the word of god came to them in the form of a sacred text.

There is no concrete evidence of which caste and community's customs were being documented by particular smritikars. If at all they had any practical application, it was local and specific to certain groups. The rishis who compiled the smritis did not exercise temporal power nor do they owe their authority to any sovereign power. Therefore, what they enjoined was not intended to be imposed from above on any community. The authority their codes enjoyed depended on the reverence they were able to elicit and the willingness of groups and individuals to submit issues to judgment under its provisions. This reverence could not be imposed by force

as modern judges do by threatening to punish on a charge of "contempt of court" people who criticise them or ignore their judgments. Most important of all, a dharmic code, in their view, was one which was "agreeable to good conscience".

Gandhi is one of the few modern social reformers to have understood this simple principle. By this means he could propose a radical agenda of social reform for all communities seeking sanction from no extrinsic authority—textual, religious or temporal—and initiate a far-reaching campaign for social reform, declaring:

Every word of the printed works passing muster as 'shastras' is not, in my opinion, a revelation... The interpretation of accepted texts has undergone evolution and is capable of indefinite evolution, even as the human intellect and heart are... Nothing in the shastras which is manifestly contrary to universal truths and morals can stand... Nothing in the shastras which is capable of being reasoned can stand if it is in conflict with reason.²⁹

He then goes on to add: "My belief in the Hindu scriptures does not require me to accept every word and every verse as divinely inspired... I decline to be bound by any interpretation, however learned it may be, if it is repugnant to reason or moral sense."³⁰

He could present himself as a modern-day sage calling upon people to overthrow customs that did not conform to principles of equality and justice or went against "good conscience" because he had inherited a tradition whereby the power to change its own customary law rested with each community.

This continues to be in some essential ways a living tradition in India. Each caste and sub-caste and occupational grouping continues to assert its right to regulate the inner affairs of its respective community and does not pay much attention to either ancient textual authorities or modern parliament-enacted laws. When a person or a group in India seek to defend a particular practice or resist following something being proposed, the common statement one hears across the country: "*hamare yahan to aisa hi hota hai*" or "*hamari biradari mein to yeh nahin chalta hai*" ("This is how it happens in our community" or "In our biradari we don't do it that way".)

In direct contravention of the genius of the indigenous law, the British rulers, through the privy council, laid down that only such customs would be recognised in law as were ancient, observed without interruption, uniform, obligatory, and not 'immoral' or "opposed to public policy". The legislators in independent India unquestioningly incorporated this formulation into the Hindu code, thereby not only enabling both themselves and judges arbitrarily to overturn any custom by labelling it 'immoral' but also

stultifying custom itself. As Ambedkar succinctly put it: "What are we doing? We are shutting down the growth of new customs. We are not destroying existing customs."³¹

The Indian legislature thus completed the process, begun by the privy council, of trying to homogenise and stultify customary practice by imposing on it norms of their own devising. Although the British claimed that they only interpreted Hindu (or Muslim) law and did not interfere with it, in fact by the very process of setting up their law courts for judicial interpretation (which acquired the force of law through the notion of binding precedent) the British altered the law—in some ways beyond recognition and irretrievably. Let us take a couple of examples—many more could be cited. According to Vijnaneswara, in the *mitakshara*, 'stridhan' (women's wealth) is explicitly defined as including wealth acquired by inheritance and partition. But the privy council in 1912 discarded this, deciding that neither wealth inherited from a male nor wealth inherited from a female becomes a woman's stridhan, and that, therefore, on her death, it does not pass to her heirs but reverts to the heirs of the person from whom she inherited it. The Maharashtra school was in certain respects the most liberal of the different schools of Hindu law in giving recognition to the rights of women. The founder of this school, Nilakantha Bhalta, does not merely present traditional solutions but suggests that he evaluates them keeping in view the current needs of society. Even though in the early years the law courts took this school seriously, it slowly was eclipsed in favour of more conservative schools. The same happened with other more liberal schools. For instance, in 1908, the Bombay high court rejected the *Balamabharti* of the Maharashtra school which was favourable to women. This work was written by a woman named Lakshmidēvi, who expressed very liberal views and gave well-reasoned interpretations in furtherance of the rights of women. At one time considerable importance was attached to the opinions of this author by the Bombay high court but in later decisions the same court ruled that this text "cannot be accepted without due caution and examination".³² Another very telling interpretation relates to the definition of "legal necessity", for which a 'karta', or manager of joint family property, can alienate it, to include "payment of government revenue".³³

These court judgments, over time, became more authoritative than the shastras from whom they supposedly derived their authority. Even though in the beginning these judgments affected only the disputed parties, they slowly came to be seen as binding on the entire community because

British jurisprudence gave the weight of law to judicial precedents. This too added an unprecedented rigidity to Hindu law. The numerous high court, supreme court and privy council decisions gave rise to a mass of case law which came to supersede not only customary usages but the shastric texts on which they claimed to base their pronouncements.

Perhaps even more important than their remaking of the law through misinterpretation was the British attempt at destruction of people's own institutions of arbitration and settlement. A distant law court, functioning in a foreign language, and observing bewildering procedures imported from a foreign country, was to administer laws which had formerly been understood and decided at the community level. When, for instance, it is said that the Bombay school of *mitakshara* law recognised more female heirs than did the other three schools, this meant that people in that area by traditional practice recognised and honoured the claims of those heirs. Once the British courts took over, however, it meant that they translated—and often mistranslated—certain texts, arbitrarily rejected some, including those that favoured women, and decided disputes in a way that took power completely out of people's hands, leaving them at the mercy of English educated lawyers.

It was repeatedly pointed out, in the course of the debates on the Hindu code, both in and outside parliament, that codification might well lead to making life more difficult for people, unless machinery was set up to implement the law easily and swiftly. Language was the first obstacle. For instance, Venkatraya Sarma pointed out: "The codification of Hindu law in English will give to it a permanent alien character..."³⁴

The second obstacle was the expense and delay involved in litigation. This was most evident in the case of divorce, which the reformers claimed to be introducing for the first time to Hindu society, even though they were repeatedly told that formal divorce existed amongst large sections of the population, and *de facto* divorce even among the upper castes, who claimed in theory that marriage among them was indissoluble. Despite being reminded repeatedly over the years that legal divorce would be inaccessible to most people unless institutions were established and implemented for this purpose, the government took no steps to do so. In 1945 the Madras Provincial Backward Classes League, in a statement ardently supporting the Hindu code, had said:

Divorce ...is also welcome—but the procedure for obtaining divorce should be simplified and made within the easy reach of the poor backward classes who constitute nearly 65 per cent of the Hindu population

in this province. We are poor and cannot afford...expensive measures of going to the court for obtaining a divorce. I suggest, therefore, that some government officers should be entrusted with this power in each district for instance, district registrar of assurances, sub-registrar or panchayat officers.³⁵

Thereafter, too, each time the divorce provisions were discussed in parliament, this point was raised. In 1951, for example, Babu Ramnarayan Singh of Bihar said: "In...90 per cent of the society, we know that divorce is a daily routine, ... Two, four or five of them sit together, both the contending parties come and they break some stalk of grass; and their mutual relations are broken—this constituted the 'divorce'. Not a penny was to be incurred on this nor any botheration...Now all of them will have to go to the district judge for divorce, what a lot of expenditure and botheration will this procedure mean?"³⁶

He then went on to remark that the effect of passing such laws without creating an implementation machinery would be that people would ignore them and continue to rely on their own institutions: "We have panchayats and panchs; and [since] in our country customs and usages are pliable, they will continue to hold good and people would accept them automatically...What the country thinks, and what she needs, government never worry about it ...the government go on spending money lavishly...go on passing baseless and futile laws against the will of the public."³⁷

C D Pande of Uttar Pradesh gave a graphic account of the reality of government functioning—how it worked to harass rather than to help people, and therefore how its arrogating to itself more powers could only mean more harassment unless people had the wisdom to keep a healthy distance from this tyrannical machinery:

They do not have enough money even to...try ordinary cases, which are pending for several months together... in this country unfortunately whenever a citizen comes into contact with government machinery, he is subjected to vexations at every step...An ordinary citizen finds it difficult even to get a ration card. Do you think it will be easy to get a divorce certificate in a court of law for a person who is ignorant and poor? You have not got the machinery to deal with the cases...People manage their own affairs in an automatic manner...You wish to take upon yourself a responsibility for which you are not prepared.³⁸

A brief examination of the four acts will illustrate some of the points outlined above. For reasons of space I am only focusing on some of the salient absurdities and drawbacks introduced though much more can be added if one were to examine the changes introduced in detail.

The Hindu Marriage Act, by the time it was passed in 1955, had undergone considerable change. Its original provision for civil marriage had been removed and separately passed under the Special Marriage Act, 1954. Its major innovations related to the abolition of the requirement that husband and wife be of the same caste as a necessary precondition for a valid marriage, the enforcement of monogamy, and uniform provisions for dissolution of marriage for all castes.

The first two were more or less generally accepted as desirable in theory if not in practice, by the time the bill came to be passed. The main objection to enforcement of monogamy sprang from resentment at Muslims being allowed polygamy—a point we shall deal with later—although customary law regarding 'karewa' marriages, polyandry, polygamy with a view to having a son in case the first wife was unable to provide one, were also canvassed. The major part of the debate came to revolve around the provisions for dissolution of marriage. The legislators had borrowed lock, stock and barrel the British notions of dissolution which had developed very slowly and hesitatingly through the 19th century in England. In a desire to adhere to the Biblical dictum "What God hath joined together, let not man put asunder", English law had, as it were, constructed a series of steps on the way to complete dissolution, and had also provided for backtracking—hence the provisions for void and voidable marriage, restitution of conjugal rights, judicial separation. Legal language used by British jurisprudence refers to divorce or separation granted by a court as 'relief', which is to be granted only to an "aggrieved" spouse. The logic appears to be that marriage is a punishment from which the "erring" spouse deserves no 'relief'. Hence the establishment of the legal principle that a spouse cannot "take advantage of his/her own wrong" to seek relief and the even more absurd principle that if both parties concurred in wanting a divorce this amounted to "collusion" and the divorce should be refused.

In contrast, the customary Indian practice of dissolution of marriage went through no such stages. *De facto* separation—living separately without formal dissolution—was practised routinely. Some texts also provided for dissolution if a spouse disappeared or was categorised as a 'degenerate'. In the large number of communities where divorce and remarriage were practised, the split was a one-time affair, not requiring the couple to go through formal stages. The negotiations were conducted by the community decision-

making body in a relatively flexible manner. Undoubtedly, among certain upper caste communities which condemned women to live under numerous restrictions such as purdah and disinheritance, customary law did not provide women adequate protection against the capriciousness of men and allowed for imbalances such as only men being allowed the right to unilateral divorce and even polygamy. However, in a large number of non-Sanskritised communities, women too enjoyed the right to leave their marriage without incurring any social stigma. For instance, even today in Rajasthan there are several communities among whom a woman can freely walk in and out of marriage with no other restrictions except that the man she has chosen as her next husband must reimburse the prior husband the amount the latter paid as bride price and marriage expenditure. Some systems like the 'marumakkattayam' in Kerala even practised what amounted to divorce on grounds of incompatibility at the instance of either partner. As K. Kutikrishna Menon, government pleader from Madras pointed out:

The local legislature has passed the Madras Marumakkattayam Act (XXII of 1933) containing provisions regarding marriage and divorce which are far more liberal than those met with in any other part of the civilised world.... Divorce may be effected by a registered instrument of dissolution executed by the parties...or by an order of a civil court on a petition presented by a husband or a wife...the petition need not allege any grounds...the mere desire of either party...is considered sufficient....The complete freedom...has not disturbed the domestic tranquillity of the people in any way...³⁹

Such forms of divorce finally, after much debate, were excepted under section 29(2) which reads: "Nothing contained in this act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this act." Giving these forms of divorce the right to co-exist with the contrary requirements of the Hindu Marriage and Divorce Act, amounts to declaring that the new law has no teeth at all. It is not surprising, therefore, that barring a small section of the urban educated elite in India, very few people go to court to get their marriages dissolved. Often the women are abandoned by their husbands and thus divorced *de facto* without any formal procedures, or the matter is settled through the mediation of biradari elders.

The norms set up by the Hindu Marriage Act were derived from (a) British law and Victorian notions of the essential indissolubility of marriage, and (b) the

hegemonic culture of dominant groups living on the north-western plains of India which was far more repressive than the culture of many other regions and even of lower status communities in this same region.

The Hindu Marriage Act imposed the notion of adversarial divorce and the notion that it should be made as difficult as possible, which were imported from 19th century Britain. The lawmakers failed to draw on indigenous systems of divorce in framing the law. This was partly because of a contempt for indigenous systems, especially those of the south, which was shared by both the supporters and the opponents of the bill. For example, S. P. Mookerjee of West Bengal, speaking against the bill, expressed typically cavalier disregard of the alternative systems available in the south: "Somebody said...that south India was specially progressive and many of the laws which we are considering are already in existence there today. I say good luck to south India. Let south India proceed from progress to progress, from divorce to divorce...why force it on others who do not want it?"⁴⁰

Several members of parliament pointed out that the framers of the Hindu Marriage Act were mistaken in thinking that British notions and practices were more advanced than Indian ones. To quote S. C. Misra: "...there are certain people... who think that they have brought forward a very progressive measure...it is certainly not more progressive than what you...see around you...It is just like the foreigners who came to India and said: 'You Hindus are in darkness. We are bringing you out into enlightenment.'"⁴¹

In an incisive and well-reasoned speech, a supporter of the bill, Jaisoorya of Madak, pointed out:

The hon minister's ministry evidently did not know where to look for divorce clauses. They possibly thought there is nothing in our ancient system. I say there is Kathyayana Narada and several others... The ministry had to fall back upon...a very very antediluvian, barbaric divorce law called the Indian Divorce Act...of 1869 made by the...old Victorian minded Britishers...in Europe the Europeans considered British social laws as extremely reactionary. But, we for generations have been influenced by British jurisprudence...If you cannot find in our ancient laws, by our own thinking, reasonable provisions for divorce, then you might as well copy from other countries...Scandinavia, for instance, is far more advanced than Britain.⁴²

He went on to point out that while the act, following British law, lays down that a marriage can be dissolved only if a spouse is not heard of for seven years, Narada and Kautilya had allowed dissolution after three

years of disappearance, and Kautilya had allowed for divorce by mutual consent "whenever there is mutual hatred between husband and wife."⁴³ He advocated rational divorce provisions which should form the nucleus of a uniform Civil Marriage Act: "Our laws are always lagging behind... All these ancient and archaic ideas of judicial separation, nullity, restitution of conjugal rights...take years."⁴⁴

He also pointed out that "cruelty, endangering life and limb" was an inadequate formulation as it left out of account mental cruelty, humiliation, and even lesser forms of violence like slaps. His and other members' impassioned pleas, however, fell on deaf ears, and the act was passed with not only all the archaic provisions of British law but the inevitable concomitant bag and baggage of British court decisions which are cited even today as precedents. Over the years, some legal changes have been made as, for example, incorporation of divorce by mutual consent and the concept of mental cruelty. Others have been squeezed in by judicial decisions coexisting uneasily with the archaic provisions. For instance, the partner against whom a restitution order has been passed can fail to comply with it, yet sue for divorce on that ground. Other changes that have come about in British law, such as divorce on grounds of irretrievable breakdown of marriage, have not yet been accepted in India, and the adversarial concept of divorce continues to be dominant.

If, on the one hand, some opponents of the bill pleaded against making divorce more expensive and difficult for the poorer classes, some supporters of the bill actually argued that this was a positive feature of the bill, as it would enforce marital virtue on communities given to easy and 'immoral' divorce and remarriage. The tone of contempt and moral opprobrium thus exhibited seems derived from British missionary discourse. To quote a woman member, Kamala Chaudhri:

...in 80 per cent of our community I have seen that a panchayat is called and separation is effected within a minute's time...in certain communities even the panchayat does not assemble...Males and females are quite free and leaving each other they can remarry whomsoever they like....the greatest benefit that we would have of this Bill is that our backward communities which have no cultural background will become cultured and their moral standard will be raised.⁴⁵

This bias was not an individual aberration; it is incorporated into the notion of 'customary divorce' that the act, in its final form, allowed as a concession to those communities who insisted on their right to retain their own forms of divorce. A "custom", as defined in the act, must not

be "immoral" or "opposed to public policy". Decisions from British times are still treated as precedents. Thus, a caste custom which permits a woman to leave her husband and remarry without his consent was adjudged void for immorality, just as a custom which permits a dissolution of the marriage tie by either spouse on payment of a sum of money fixed by the caste was adjudged void as being opposed to public policy.⁴⁶ There is even a ruling that a prenuptial contract between a husband and wife which enables the wife to live separate from her husband if he leaves the wife's natal village, is void because it is against public policy.⁴⁷ On the other hand the mere fact of a husband marrying a second wife or mere infidelity on the part of the husband or the fact that the wife is a minor was not considered sufficient ground to disentitle him from claiming the restitution of conjugal rights.⁴⁸ Thus, the saving of custom in the matter of divorce merely evaded the problem by passing the buck to individual judicial opinion, thus allowing for law to be made by judges in those instances where the legislature decided to let the custom coexist uneasily with reformed law.

The mindlessness of the tendency to uniformity is to be seen in matters other than divorce in the Hindu Marriage Act. Sushama Sen, a supporter of the bill, replying to a query from a Kerala member, V P Nayar, as to why 'saptapadi' should be considered necessary for a valid marriage when many other forms of marriage were perhaps more widely prevalent (for example, in marumakkattayam marriages, which were contracts not sacraments, the ceremony consisted of a simple exchange of clothes), declared: "I am glad to find that only saptapadi can form a complete marriage. This will be in conformity with the modern progressive society."⁴⁹

How and why saptapadi is more 'modern' and 'progressive' than an exchange of clothing remains unexplained, but the statement is typical of the reformer's style of argument which relied on arbitrarily labelling positive their own measures, and labelling as negative any practice different from the ones with which they were familiar.

The process of creating greater uniformity resulted in annoying a number of communities who expressed the desire to be exempted (Sikhs, coorgs, virashaiivas, among others); it also resulted in taking away superior rights that women had in certain communities without seriously affecting the customary practices among those communities which made women live insecure lives. This process had already begun under the British. For example, the Hindu Women's Right to Property Act (HWRPA), 1937, ostensibly passed to enhance women's rights, established the Hindu widow's limited estate in her

husband's property (in opposition to the original mitakshara law, as noted earlier). It thereby also took away from Jain widows the absolute interest in property inherited from their husbands, including full power of alienation in respect to such property which they actually enjoyed till then under Jain customary law. Thus the reformed law worked to their detriment.

At the same time it did not destroy or override the customary practices of those communities which allowed widows precarious economic rights. For instance, among jats of Haryana and Punjab, the tradition of karewa form of marriage with a view to keeping the widow from inheriting her husband's share of the property continues unaffected despite HWRPA of 1937 or the Hindu Succession Act of 1956. Under the karewa system the widow is to be accepted as wife by one of the younger brothers of the deceased husband; if this arrangement is not possible, she is to be accepted by the husband's elder brother or his agnatic first cousin. Very often the candidate chosen is a mere child and the widow is expected to bring him up. Equally often, the brother chosen may already have a living wife, thus resulting in a bigamous marriage. In most cases, the widows concerned are unwilling but get coerced because claiming their share from a joint family property is not feasible.

The government does not merely look the other way when the law against bigamy or child marriage is openly flouted but in some cases even facilitates it. For instance, 'war widows' are supposed to receive a large sum as compensation as well as numerous additional benefits such as grant of land, army group insurance benefits, special pension and assistance for each dependent child, apart from the usual pension. The ministry of defence reinforces levirate marriages in places like Haryana and Punjab by the simple device of withdrawing these benefits if the widow remarries outside the family. This amounts to making a mockery of the Hindu Succession Act by supporting a discriminatory custom which lays down that a widow's right to husband's property is conditional rather than absolute as laid down by the reformed law.⁵⁰

A glaring example of such backward movement as a result of the Hindu code was what happened to marumakkattayam women who lost their right, among other things, to adopt any number of daughters, and, most important, their full and inalienable right by birth in inheritance of all forms of parental and ancestral property. A Karunakara Menon, a supporter of the code, was one of those who argued for incorporation of marumakkattayam principles into the uniform Hindu law or, failing that, for exemption of marumakkattayam communities:

We should not be dragged down from the position that we are in at present...The provisions have been conceived from a patriarchal point of view...Why should grandson or great grandson be an heir preferred to sister or her children? People in Malabar will never agree.⁵¹

Unfortunately, people, especially women, of Malabar, do not seem to have voiced their disagreement forcibly enough. This could have been partly because, as M V Vellodi argued, these communities had not "sufficiently realised the implications of the contemplated changes."⁵² Originally, the marumakkattayam, 'nambudri' and 'aliyasanthanam' systems had been exempted from the purview of the Hindu code, but the select committee headed by Ambedkar, against his judgment, removed the exemption. Ambedkar accused the committee of having in its "enthusiasm transgressed...the bounds of reasonableness."⁵³ But despite this statement, he and the government did not choose to make the issue a centre of debate, but allowed the select committee's decision to prevail.

It was symptomatic of the cavalier attitude of the legislature towards the south in general, and the overwhelming north Indian bias in their approach to the law, that there was no member on the select committee of 1948 who understood marumakkattayam law. This was pointed out by V P Nayar.⁵⁴ Some members from the south like Vallatharas of Pudukkottai did express their resentment: "...the northern members have not yet got sufficient appreciation of the south just like the Americans are not able to have sufficient appreciation of India..."⁵⁵

Other communities which did not have vocal representatives in parliament got even shorter shrift. For example, the khasi community, amongst whom the youngest daughter inherits the parental home, was mentioned in passing by a member from Assam, Rohini Kumar Chaudhuri,⁵⁶ but no one seriously considered studying their system or incorporating it into the uniform law.

This mindset arose from the fact that parliament was dominated in terms of numbers and political influence by members from the northern plains, who tended to assume that Hindu culture and Indian culture were synonymous with the culture of certain hegemonic castes in their own regions. This assumption, which is dominant even today, had unfortunate effects because the culture of the north-western plains was in many ways the most socially oppressive. These were the regions where the devaluation of women was most severe, manifested not only in such phenomena as institutionalised seclusion through various forms of purdah, but also in exaggerated son preference, low sex ratio, high mortality rates of women and girls, low literacy and employment rates,

and, most important, in the context we are discussing, the perception of daughters as an unproductive liability to be got rid of through marriage and sent as far as possible from the natal village. Norms and taboos arising from this culture (for example, that daughters only take from, and never give to, the natal family) were posited as true for all of India, even though in fact they were not prevalent in very many other regions, including most of south India. The most these other regions and communities could hope for was exemption—as tribals or on grounds of custom—and even this was achieved only in a few cases after a long battle. Ambedkar had been basically opposed even to exemption of tribals. Even though most tribals in the northern plains were now a settled peasantry, yet their culture continued to be much less repressive in matters relating to marriage and divorce. But in matters relating to succession and property arrangements, variants of the mitakshara system as interpreted by the British had been imposed on them during land settlement operations, with the result that women had no independent rights in land but only a usufructory right, the equivalent of a Hindu widow's limited estate. This despite the fact that in almost all tribal communities women are the primary workers on land and run the agricultural economy with little help from men.⁵⁷

CHANGES IN GUARDIANSHIP ACT

A justification repeatedly offered for applying the roadroller of uniformity was that this would pave the way for a uniform civil code for all communities, and that passing the law for Hindus would strengthen the hands of government to pass it for other communities too. However, in actual fact, the passing of a supposedly secular law for Hindus (which was in fact a hybrid of some kinds of Hindu law and some kinds of British Christian law) had the opposite effect—a movement further away from a uniform civil law. There were several reasons for this, some of which will be examined towards the end of this paper. But, most blatantly, the legislature, when it codified laws and labelled them 'Hindu', actually thereby replaced earlier laws which had been applicable to all communities, that is, uniform civil laws which had been accepted without protest. A signal example of this process is the Hindu Minority and Guardianship Act, 1956.

The Guardians and Wards Act, 1890, was already in existence, and applied to guardians and wards of all communities. The Hindu Minority and Guardianship Act was passed "in addition to" the Guardians and Wards Act.⁵⁸ However, it was not explained why, instead of amending the Guardians and Wards Act, wherever necessary, a separate law had now to be passed for Hindus. There was

nothing particularly 'Hindu' about the provisions of the Hindu Minority and Guardianship Act. In fact, the provisions were conceived from an authoritarian statist point of view, giving government powers to interfere with parents in a way unknown to the Hindu or any other Indian community. If any law was to pave the way for a uniform civil code, it would be something like the Guardians and Wards Act, and certainly not a separate act applied to Hindus and arbitrarily labelled 'Hindu' as if it was based on religious principles. As Thakur Das Bhargava argued:

...this is an absolutely unnecessary bill and it also goes against the principle of having a common civil code... this is a mischievous bill insofar as the provisions of the Guardians and Wards Act will not apply uniformly to all the nationals... Now a Hindu minor will be quite different from a Muslim minor and a Christian minor...it creates more distinctions than are there in the present law.⁵⁹

In the prevalent practice, in all communities, a *de facto* guardian of a minor was recognised as such. This continued to hold good for other communities under the Guardians and Wards Act. However, the Hindu Minority and Guardianship Act introduced the artificial concept of a "natural guardian" which would also appear to be imported from England: "As in this country [England] so among the Hindus the father is the natural guardian of his children..."⁶⁰

In the absence or unfitness of the father, the mother would be the natural guardian but no other person could be so termed. This narrow concept of natural affection clearly derives from a western social set-up and nuclear family. A member pointed out:

Under the Hindu law, there is nothing like a natural guardian... As a matter of fact, you have taken away the naturalness of the guardianship. Every person is a good guardian to a minor under the Hindu law...Every *de facto* guardian is a good guardian.

You have thought that India has developed to that extent that there is no relationship except that of the father and the mother. But there is also the grandfather, the maternal uncle...and...many others... who bring up the child after the father and mother are dead...⁶¹

What is here described is a family and community set-up in a culture shared by Hindus and non-Hindus, which may be termed an Indian culture. The legislature created an unnecessary sense of grievance by passing the Hindu Minority and Guardianship Act which, in any case, was unworkable. The act lays down that a person will be recognised as guardian only if appointed by a father or mother in their will, or if appointed by a court. The writing of a will is alien to Hindu law, so the provision has nothing 'Hindu' about it. It should have remained part of the Guardians and Wards

Act. However, it is also irrelevant to Indian conditions: a member had pointed out: "...in a country in which nearly 80 per cent of the people do not know what a will is, and many people are illiterate, do you want to say that in every case in which the father and the mother are not there, the minor's cases must go to court and get a guardian appointed?"⁶²

The Hindu Minority and Guardianship Act also does not allow a guardian, even a parent, to alienate any part of a minor's property without the permission of the court, a patently unworkable proposition. The positive aspects of the act were that it gave the mother (in the father's absence) the right to appoint a guardian by will, and it took away the father's right to make a will depriving the mother of her guardianship right, after his death. However, it certainly was far from giving women equal rights. Several members proposed that custody of the child should be with the mother not just up to age five as the act lays down, but up to ages 12 to 14. Amendments to this effect were moved and summarily refused by law minister Pataskar as "besides the point" and likely to "lead to interminable quarrels between the parents."⁶³

An example of how this new legislation created religious bias in law is the provision (opposed by several supporters of the bill) that a parent ceases to be a natural guardian if he or she converts to another religion. No such provision existed in Hindu law and, in the terms of the bill itself, the word 'natural' would suggest that guardianship was based on biological parenthood and not on the parent's religion. Significantly, this was the only provision approved of by the Hindu Mahasabha MPs who were otherwise opposed to the bill. It was described by government as part of the process of consolidating Hindus as Hindus. In the words of Ambedkar:

The first change is that the power of the Hindu father as natural guardian of his minor son has been taken away if he renounces the world or ceases to be a Hindu. The original law was that the father was the natural guardian and no matter what change took place in his condition either by his religion or in any other way, he still continued to be the guardian of his minor son. The committee felt that as this was a code intended to consolidate the Hindu society and their laws, it was desirable to impose this condition, namely, that the father shall continue to be the natural guardian so long as he continues to be a Hindu.⁶⁴

The Hindu Adoption and Maintenance Act, 1956, is also the product of the same kind of hybridising effort—a weird mixture of British adoption law with one kind of Hindu adoption, 'dattaka', with the result that the act retains such irrational anomalies as not allowing a person to adopt a son if he already has a natural or adopted son, not allowing adoption of a daughter if there is

already a natural or adopted daughter, and thus restricting the number of adoptions possible by any one person to a maximum of two—one boy, one girl.

The main innovation the government claimed to be making was permitting a daughter to be adopted. However, by the law minister's own account, it was an English judge, relying on a doubtful translation by an Englishman (Colebrooke) of *Dattaka Chandrika*, who had ruled that adoption of girls was invalid. Prior to this, several courts had recognised the customary adoption of girls. In Bombay and Calcutta judges had ruled that adoption of a daughter by a dancing girl was invalid, because the judges regarded the custom of professional dancing as immoral. Two Madras decisions had, however, upheld such adoption, even simultaneous adoption of two girls, provided the adoption was not made for the purpose of prostituting the girls. Some of the leading schools of Hindu law laid no restrictions on adoption of daughters. Nanda Pandit in his *Dattaka Mimamsa* has favoured adoption of a daughter and regards it as conducive to spiritual benefit to the adopter and his ancestors. In actual fact, among most communities, girls were routinely adopted under customary law. Often it was only a legal fiction. For instance, if the forbidden 'sagotra' marriage was to be made legal, a relative or friend of another 'gotra' would adopt the girl, thereby technically changing her gotra. Likewise in many parts of India, custom allowed women to adopt on their own. However, the reformed adoption law does not allow a married woman to adopt in her own right, or even jointly with her husband. Only the man can adopt, albeit with his wife's consent. When it was pointed out that this falls short of equality, the law minister Pataskar claimed that such equality would be going too far:

I do not think there can be one adoption by the husband and another adoption by the wife. ...That is simply trying to subject this legislation to ridicule. The wife is not given the right. It is true I do not want to go, nor will it be desirable in the interest of the society to go so far. I want that it is primarily the husband's business to adopt...⁶⁵

In making this statement, Pataskar overlooked the fact that under 'krithima' form of adoption, prevalent in and around Mithila, a wife or widow could adopt a son to herself, without the consent of her husband or anyone else.⁶⁶ Krithima adoption was recognised as legally valid though no ceremonies or documents were required for it. Tek Chand pointed out: "Krithima adoption of the strict Hindu law is a secular type of adoption whereas the 'datta homam' adoption of Hindu law is a sacerdotal form of adoption."⁶⁷

Paradoxically, the Hindu Adoption and Maintenance Act recognises only datta

homam or dattaka type of adoption. Without stating any reason, other customary forms of adoption such as krithima and 'illatom' (adoption of son-in-law, prevalent in some parts of south India), and 'dwayaya-mushayan' (simultaneous adoption of one or more sons) were rendered invalid. These were not extinct textbook rules but were living practices when the law was sought to be codified. For instance, my colleague Giri Deshingkar recalls that his wife's uncle, who came from a village in north Karnataka, was adopted by his own mother-in-law, who was a widow. That made the husband and wife brother and sister, but it was considered a perfectly legitimate adoption. Ambedkar has offered an absurd explanation for legislating such adoptions to be invalid:

...all these customary adoptions are nothing but devices to keep property within the two families which enter into this bargain, and ... since we have passed the constitution and included in the Directive Principles one article saying that the state should take steps not to allow property being concentrated in the hands of one or a few, such devices...ought not to be tolerated.⁶⁸

It should be noted that with the ruling out of customary adoption, property was likely to pass, for want of an heir, into the government exchequer. From such cavalier justification of state interference, his conclusion naturally followed: "Besides, there is no reason why parties who want to make a genuine adoption should not conform to the rules and regulations regarding the dattaka adoption which is permitted by the law."⁶⁹

The dattaka form of adoption required a ceremony of giving by the natural parents or guardians of the child and taking by the adoptive parents. This meant that an orphan or foundling could not be adopted unless he or she had a legal guardian (as defined under the Hindu Minority and Guardianship Act) to perform the giving ceremony. It also meant that *de facto* adoption was not recognised. Even if a child was known to have been brought up from infancy by adoptive parents, the adoption could be challenged in court and held invalid if it was proved that a giving and taking ceremony had not taken place or that the person who gave the child was not a guardian legally entitled to do so. Dattaka adoptions led to endless litigation, as was pointed out by many MPs, and not refuted by government. Government, however, because of its anxiety to label the act 'Hindu', preferred to retain the give and take ceremony as a sign of 'Hinduness' rather than to follow other forms of customary adoption practised by Hindus which did not involve a religious ceremony.

Thakur Das Bhargava once again pointed out that all communities in India had been influenced by one another's laws and evolved similar customs in regions where

they lived in proximity to each other and that the Hindu Adoptions and Maintenance Act, like the Hindu Minority and Guardianship Act, was an unnecessary step in the opposite direction:

Today, in the Punjab, Hindus, Muslims and Christians, all follow the law of appointment of heir.... We are again making the mistake of making an exclusive law for Hindus.... You should have waited a while longer and then made one law for all.... You have taken some things from the Hindu religion and left out the rest. It would have been better if you had just said anyone can adopt anyone they like.⁷⁰

To this, law minister Pataskar replied that the customary practice of appointment of an heir in Punjab was technically different from adoption as under the Hindu Adoption and Maintenance Act, hence the former would not be abrogated by the latter. However, he did not answer the salient question of the inconsistency within the act itself. Most of the inconsistencies arose from the framers' uncertainty as to whether the purpose of adoption was to have an heir or to bring up a child. So, for example, a man is not permitted to adopt a son if he has a living son or son's son or son's son's son. This apparently has to do with the desire to prevent disinheritance of biological male heirs in the male line. Dabhi argued that this defeated the idea of women's equality, as it allowed a man to disinherit his daughter or granddaughter in favour of an adopted son. He moved an amendment supported by Thakur Das Bhargava, an opponent of the bill, and Sushama Sen, a supporter of the bill, which Pataskar negatived. Another such inconsistency was allowing the adoptive parent to disinherit the adopted child by will. As Raghavachari of Penukonda pointed out, once such disinheritance was allowed, why restrict the number of children that can be adopted?

All the objections, both from supporters and opponents, could be summed up in N C Chatterjee's justifiable statement that: "...the hon minister has not the courage of his convictions. If he wants to secularise it, let him do it properly."⁷¹

NEW MAINTENANCE ACT

The maintenance provisions under this act are deplorably inadequate. The established right under Hindu law of a concubine to maintenance was arbitrarily eliminated on the pretext of its being an encouragement to immorality. The code of Yajnavalkya, on which the mitakshara system is based, had laid down that the maintenance granted should amount to one-third of the husband's income. But under the reformed law the amount of maintenance granted to a wife is left to the individual

judge's discretion, though it cannot exceed one-third of the total income. Thus while the law lays down an upper limit, there is no mention of the minimum amount that must be her due. It is not at all clear what either of these alterations had to do with 'Hindu' law or with furthering women's equality. In fact, both move in the opposite directions.

Theoretically, the reformed Hindu maintenance law allows a woman to claim a maximum of one-third of the joint incomes of her husband and herself. That means that if, for example, she is earning Rs 500 and her husband Rs 1,000, she cannot claim anything because she already has one-third of the joint income which is Rs 1,500. But even for those women who are not earning, in practice it is extremely difficult to claim and get their right under Hindu law. The case is a civil one which means that the husband can employ all sorts of dilatory tactics to drag the case out for years. One of the biggest hurdles in the way of getting a fair maintenance is that the burden of establishing the husband's income and assets falls on the abandoned or divorced wife. Given that in India an overwhelming majority of people either work on land or own businesses in joint families or are self-employed, their real earnings are usually not part of any official record. That makes it almost impossible for a woman to prove her husband's income to the court's satisfaction. A woman may end up spending much more on court expenses than the pittance she is likely to get by way of maintenance through the court. Moreover, there is no way of ensuring that the husband will make regular payments. If he were to stop after paying alimony determined by the court for a couple of months, a separated or divorced wife has no redress mechanism available but to go to court again. She cannot, for instance, approach the police to demand that they ensure that the court order is complied with.

The near total failure of Hindu maintenance laws becomes evident if we consider the fact that most women prefer to plead under Section 125 of the Criminal Procedure Code which is not really the relevant procedure for maintenance of a divorced wife. Getting a maintenance allowance from the husband has been defined as the right of a divorced woman in reformed Hindu law whereas 125 CrPC exists to safeguard all destitute women, children and old parents. For instance, even a destitute father could claim maintenance from his children under this provision. Yet most divorced women have to sue for maintenance under this clause because it is a criminal case and they can get relief somewhat more quickly. However, under this provision, they can get a maximum of only Rs 500 per month which is much less than the statutory minimum wage in India

and often ridiculously inadequate in relation to the amount many of them would be entitled to as maintenance after divorce. Also, the sum of Rs 500 is a fixed one and bears no relation to the income of the husband. Even if he is earning lakhs, she can claim a maximum of only Rs 500. Under the Hindu maintenance law, she may be able to claim more, but the procedures under the civil law are so cumbersome that it is hardly worth fighting for under those clauses.

HINDU SUCCESSION ACT

The Hindu Succession Act, 1956, was by far the most controversial part of the four acts. It was also perceived as the key part of the code, as no other rights could be effectively claimed by women unless they had economic rights. Raghuramaiah pointed this out forcefully:

...divorce will not be really effective unless there is... an equal right of property... a woman who has no independent source of living would naturally be very chary about taking recourse to these divorce provisions... this bill will be of no consequence, and of no benefit to the women of India unless they are given an equal right to property...⁷²

But did the Hindu Succession Act actually give women 'an equal right to property' or did it only profess to do so? The original provisions on succession in the Hindu code, framed by the B N Rau committee and piloted by Ambedkar, abolished the Mitakshara coparcenary with its concept of survivorship and the son's right by birth in joint family property, instead substituting the principle of inheritance by succession. These proposals met with a storm of opposition. The extent of opposition within the Congress itself can be gauged from the fact that in 1954, then law minister Biswas, on the floor of the house, expressed himself as not in favour of daughters inheriting property from their natal families. As supporters of the bill pointed out on several occasions, the reason for the virulence of the opposition to this provision was that it affected each individual male personally as he would have to share property with his sisters. Sita Ram Jajoo, marwari from Madhya Bharat, identified the reason for resistance accurately: "Here we feel the pinch because it touches our pockets. We male members of this house are in a huge majority. I do not wish that the tyranny of the majority may be imposed on the minority, the female members of this house."⁷³

However, the tyranny of the majority was in fact imposed, and by the time the bill was finally passed in 1956, it was unrecognisable. The major changes were: (1) Retention of the mitakshara coparcenary with only males as coparceners.

(2) Coparcener's right to will away his interest in the joint family property. This provision was unexpectedly introduced by an amendment by law minister Pataskar in the final stages of the clause-by-clause debate when the bill was to be passed, in 1956. It was widely perceived and pro-claimed, even in the contemporary press, to be a capitulation by government to what were by one MP termed the "fifth column" of the Hindu Mahasabha within the ranks of the Congress.

(3) Removal of exemption of marumakkattayam and aliyasanthanam communities; that is, virtual destruction of the only systems in which women were the equivalent of full coparceners.

(4) Alteration of the original provision that a daughter would get a share equivalent to half the share of a son in self-acquired property of the father who died intestate. Ambedkar saw this alteration as a *fait accompli* in spite of him: "My enemies combined with my enthusiastic supporters and my enemies thought that they might damn the bill by making it appear worse than it was."⁷⁴

Let us look at the implications of each of these provisions. The retention of the mitakshara coparcenary meant retaining, without codifying, a large part of earlier Hindu law which discriminated against women. One way out of this would have been to also make women coparceners. This was suggested as early as 1945. In the written statements submitted to the Hindu law committee, a number of individuals and groups, including nine women students' and youth and ryots' organisations (significantly, all from Andhra Pradesh—the first state to actually amend the Hindu Succession Act in 1984 to make women coparceners) had advocated a full share and a right to partition for daughters. G Krishnamurthi, subordinate judge, Chicacole, Andhra Pradesh, had suggested that daughters be made coparceners. In 1956, when the bill was being finally debated prior to enactment, K C Sharma moved an amendment that the daughter and her children should be deemed to be members of the Hindu coparcenary in the same way as a son or his children. This would have been the logical step to take since the framers of the bill claimed to be trying to incorporate all the most progressive elements of the different schools of Hindu law, and such a system was actually in existence in Kerala. However, law minister Pataskar's reply, instead of attempting logic, merely amounted to an emotional rejection:

I really find that my friend Pandit K C Sharma is very progressive in his outlook. ...I cannot imagine of a family which can go on smoothly by the addition of daughters, their heirs and so on...It is admitted that a daughter does go out of the family by marriage.⁷⁵

This assumption that daughters must go out of the family on marriage and, thereby, cease to be full members of their natal family was at the root of all the inequities built into the Hindu Succession Act. One such inequity was the clause enabling state governments to pass laws to prevent fragmentation of land. Those who had acrimoniously argued for explicit exemption of agricultural land from inheritance by daughters demanded that the minister make an explicit statement that the new clause would amount in reality to the same thing as exemption. Bhagwat Jha Azad had asked:

Is it your understanding that after this law is passed, states in which there is no such prior law can pass such laws, disregarding this law, and can make provisions that landed property shall not be given to daughters...If your interpretation is that under this law daughters will not be able to demand their share in land then I have no objection.⁷⁶

The minister's silence to this question would seem to have amounted to consent.

The second disparity was the list of heirs being different for a male and a female, with a woman's in-laws taking precedence over her parents, while a man's in-laws figure nowhere at all in his list of heirs. The idea of a woman's property and the heirs to it being somehow intrinsically different from a man's derives from the 'stridhan' system, but in-laws did not precede parents as stridhan heirs. The bias in favour of in-laws is thus introduced here purely on the basis of the contemporary north Indian practice, repeated *ad nauseam* by certain members, that a woman's parents would not even drink water in her village, let alone agree to inherit her property. Despite being repeatedly told that there were no such taboos in south India, the north Indian members persisted in identifying the northern custom with 'Hindu' and 'Indian' tradition and ideals. They dismissed the southern practice of normal interaction with daughters as an "aberrant" custom or usage. The exchanges were often almost comical, except that the results of such wilful arrogance were tragic.

When, for example, Mukut Behari Lal Bhargava was arguing that no Hindu parent would want to inherit a daughter's property, L Krishnaswami Bharathi asked:

"Why not? Why not? What is the harm?"
Bhargava: Perhaps my honourable friend comes not from India but from an outside country.

Bharathi: I come from south of India.
Bhargava: In India no father nor mother will ever think of receiving anything from the daughter.

Bharathi: That may be so in the Punjab.
Bhargava: It is so in the whole of northern India. I cannot speak with authority about

south India...in our part of the country the father or mother will not even take water in the house of the daughter.

Bharathi: It is not so bad in our part of the country.

Bhargava: That may be a custom or usage prevalent in your part of the country, but in my part of the country, an overwhelming majority will be opposed to the idea... Therefore the entire fabric of the rules of devolution is based on anti-Hindu ideals."⁷⁷

Interestingly, while a north Indian custom is here passed off as a Hindu ideal, no one quoted the numerous shastras which give precedence to parents of a woman as heirs to stridhan, as a much more well-founded Hindu ideal! Instead, as a concession, the order of heirs was altered only for members of formerly marumakkattayam and aliyasanthanam communities, but the rest of the south was brought under the new inheritance system where a woman's in-laws take precedence over her parents. This was the logical outcome of the provisions in the Hindu Succession Act which facilitated disinheritance of daughters. The property of daughters could not be passed on to surviving parents when the new law accepted the assumption that a daughter should not get inheritance rights in her parent's property.

Yet another inequity were the provisions denying a married daughter the right to residence in her parental home unless widowed or deserted and denying any daughter the right to demand her share in the house if occupied by male family members. There were long debates on whether a widow should have the right to residence if her husband had also left behind a house, and whether only a deserted wife should have the right to residence in the parental house or also one who had left her husband. The law minister's remarks on the last issue are revealing:

I think those women who desert their husbands are not likely to be needy women for whom provision has to be made. ...I do not know whether we should provide for a woman who deserts her husband, because she might desert him for the purpose of marrying another, or she has other means of maintaining herself.⁷⁸

No one mentioned denying the right of residence to a son who deserted his wife. Clearly, the operative assumption is that the right to residence is not really a 'right' the daughter should have as the son does but only a charitable concession to be made for a needy daughter. After much debate, the right was also granted to a woman who has separated from her husband.

Similar arguments based on the daughter being or not being needy were used by the law minister to justify allowing the father to will away his interest in the coparcenary property—a proposal which was one of the

most hotly disputed of all. Pataskar argued that one daughter may be well-married or single with a good job while another is poor and in need, so the father should be able to decide who needs property more. Such an argument would apply equally well to sons but was not used to deny them their right by birth in the coparcenary. The imagined distinctions between daughters derive from such distinctions made by certain schools of Hindu law where, for example, a daughter with a son was preferred to a sonless daughter, or a single daughter was preferred to a married daughter for inheritance purposes. It was the stated purpose of the Hindu Succession Act to do away with all such distinctions and place daughters on an equal footing with sons. Yet, the distinctions persisted.

From the very start of the codification process, many of those engaged in the debate had pointed out that the newly introduced provision of the will could be used as an instrument to deny daughters their rights. Some welcomed this and proposed that it be made easier; others warned of its dangers. For example, in the written statements submitted to the B N Rau committee, we have one high court judge of Madras complacently (and as it happened, accurately) foretelling how the law would remain a dead letter:

...it is possible for the Hindu citizen who does not agree with the proposals to get over them. He could make a will and avoid those rules of inheritance by women which may not be to his liking...I, therefore, do not think they are likely to have any serious consequences in general.⁷⁹

In one of the written statements submitted to the Hindu law committee, a graduate from Moga went further to say: "Easy and unquestionable form of will in favour of the sons and against daughters should be suggested."⁸⁰ Several persons had suggested some check on the testamentary power in order to protect the maintenance right of women, and their inheritance rights. A written statement to the Hindu law committee pointed out: "The right of alienating property by 'will' ...is one not conferred or recognised by ancient law, or by the existing Hindu law. The idea of 'will' itself is foreign and a later importation...There must be a preliminary part dealing fully with testamentary succession and limiting the rights of a testator..."⁸¹

It was suggested that a man be permitted to will away only half of his property on the analogy of Muslim law which allows only one-third to be willed away. The bar association of Rawalpindi, however, pointed out that such a curb in itself would not work because he might "gift away the property to his sons" in his life-time.⁸² These arguments were repeated and elaborated over the years in parliament, so it cannot be contended that

the government was unaware of the implications of conferring the testamentary right with regard to ancestral property—a right absolutely unknown to Hindu law.

That the real pressure groups behind the change in property laws were not women's rights advocates but industrialists who saw economic advantage in rendering property more mobile in the hands of individual male owners is suggested by some very revealing articles in the contemporary issues of *The Eastern Economist*, over the years 1949 to 1955. This was the journal of the Federation of Indian Chambers of Commerce and Industry (FICCI), and thus may be said to represent the view of an important section of big business interests. The position taken by the journal in its editorials was that the most important benefit of the bill, although it was perhaps the least noticed aspect, was not women's rights at all, but rendering property more liquid by allowing men to alienate it. The journal was not in favour of women's inheritance rights. More than once it pointed out that the testamentary right could be used to set at nought women's rights. In the issue of March 18, 1949, the lead article 'The Economics of the Hindu Code' remarked:

It is curious how little of the discussion centred around basic economic factors. There is indeed a feeling among a few that economics played no little part behind the scenes...the Hindu code minimises those factors which attach to an individual by virtue of his birth and enables him to shape his destinies by free contractual relations...the daughter will get a share equal to that of the son... the principle of equal shares to daughters...it is said, not unreasonably, would aggravate the evil of fragmentation of agricultural holdings...But this...can for the most part be avoided by wise use of the testamentary power and neither an urban family business nor a family agricultural holding need be prejudiced...In the ultimate analysis, the true hallmark of a sound property system would lie in its mobility, in the reduction of the hindrances to freedom of transfer...

While rationalist social reformers pride themselves on their conquest of the conservative opposition and women are elated by their hardwon rights, the economist may perhaps find some merit in the system of ownership of, and succession to, property which the code contains. *What has least been noticed may possibly prove to be of the largest economic worth*⁸³ (emphasis mine).

Six years later, the argument had shifted, and the journal actually took the stand that while the mitakshara family system should be replaced by the dayabhaga, daughters should not be given inheritance rights immediately but that these could be left to be introduced gradually by the "more progressive states".⁸⁴ The testamentary right,

then, was essentially a right given to fathers to obviate the rights of daughters.

In the final debate in 1956, this became a central issue. It was pointed out that a man could disinherit not only daughters but even traditional female heirs such as a widowed daughter-in-law. Earlier, these female heirs had a limited estate but this was ensured to them; now the so-called absolute estate would depend on the man's will. It was argued by many members that the clause meant undercutting the whole bill whose ostensible purpose was to provide equal inheritance rights to women. The provision that allowed daughters to sign away their rights in favour of their brother or others even in the insignificantly small share that would come to them in coparcenary property, made a mockery of the whole exercise. S S More expressed his disappointment:

Are you giving anything substantial to the daughters? ...I will say: "No". ...Those who are opposed to this bill, those who want to see that their daughters should not get their dues should do nothing else but ...prepare standard will forms and give them for signature by everybody who has some property...this particular clause is very sinister. It takes away by the right hand what we are trying to give to the daughters by our left. ...this sort of keeping a loophole in the whole measure is not a good practice. Let us be honest. If we do not want to give to the daughters anything, then surely, let us say that... in view of the fact that the elections are in the offing, we are not prepared to go whole length.⁸⁵

On the other hand, some members rejoiced openly in the inclusion of the clause. Raghuvir Sahay said it openly: "By giving this right, the greatest bitterness of the bill is removed. To take the sting out of the tail...When you give a Hindu the right to make a will I think all the faults of the bill are dispelled."⁸⁶ He added that he initially was opposed to the bill but gradually changed his stand, because it represented a middling position between two extremes. The inclusion of the right to will away coparcenary interest clearly played a part in inducing him to change his stand.

One ferocious opponent of the bill, B D Pande of Almora, who claimed that Hindu religion was founded on women's piety and generosity in refusing to take property and break the family, and that men and women were created unequal by god, announced on the floor of the house that he had already made his will and that his daughters had given in writing that they would not claim a share in his property. Thus it was clear even at that point that the right to make a will being introduced in the Hindu Succession Act would be used primarily to snatch away a daughter's rights. Several members wanted to put some sort of a restriction as exists in Muslim personal law on the right to a will in order to ensure a minimum measure of protection for women members of the family.

For instance, Kelappan moved an amendment that a Hindu should not be able to dispose of more than one-third of his property by will, and Jayashri moved that a Hindu not be able to leave by will more than half his property to anyone but his wife or children. The law minister refused to accept these amendments.

Thakur Das Bhargava proposed an amendment along the lines of English law, that if a man disinherited by will his widow, minor sons or unmarried daughters, they could have a claim to maintenance on his property. This amendment was supported by Renu Chakravarty and other ardent supporters of the bill, but Pataskar negated it, saying the right to maintenance would be protected under the Hindu Adoption and Maintenance Act. That was a hoax. The provisions under the new maintenance law were even more inadequate than the deliberately incorporated loopholes in the succession act. Given the clarity with which all the movers of amendments argued their cases, pointing out that the will could be used to deprive women of even the limited rights they had under uncodified law, it can only be concluded that government deliberately chose to create this loophole. Kelappan argued:

I cannot understand how this government can afford to be indifferent to a glaring injustice which this clause 32 seeks to perpetuate... In the interests of justice and the well-being of society, some restrictions have to be imposed on a person's right to will away his property, even if it is self-acquired.⁸⁷

Even the contemporary press saw the amendment introduced by the law minister as "a concession to orthodox opinion"⁸⁸ and commented: "Much as they protested to the contrary, the retentionists of the traditional pattern of Hindu society had little reason to be disappointed with the outcome of their stout opposition to the bill, which has led to its toning down."⁸⁹

The introduction of the right to will away one's interest in coparcenary property in effect meant giving men much more power over property than they had under traditional mitakshara law, not to talk of other schools which were more favourably inclined to women. Even under the mitakshara law the coparcenary system restricted the rights of individual men to alienate property, thereby safeguarding the rights of all members of the family including even infants and children in the womb, and also the rights (though unequal) of women and illegitimate children to maintenance from the joint family property. Although many powers were vested in the karta or male head of the family, who was supposed to administer the property in the interests of all members, decisions regarding disposal of family property were to be taken collectively. Although notionally

each male had an equal share in the property, expenditure was not to be apportioned only to males but also to females. Expenditure on women members' needs, gifts and endowments for pious and charitable purposes, or on the special needs of some members, was to be undertaken from the common funds, and no coparcener was entitled to complain that more had been spent on another member than on himself. Some mitakshara schools even allowed a wife to act as a karta in her husband's absence.

The right to will is completely alien to Hindu law. Its introduction into a law labelled 'Hindu' was thus a singular irony. Pataskar, while defending the new clause, first attempted to give a sentimental tone to the debate:

There are many hon members in this house who feel that if once this right to will is given coupled with the right to partition which the son enjoys, it may defeat the purpose of this legislation. But as I have been always saying, I have got at least better faith in human nature, and I think the father...will have equal regard for the son and the daughter... After all, it is much better to leave it to the judgment of the father and I think he is bound to exercise it in a fair and equitable way. Whom else, excepting the father, can you trust to achieve this purpose?⁹⁰

Yet, this touching faith in the egalitarian propensities of fathers did not prevent him from clearly pointing out in the very same speech that the purpose of the new clause was to give these fathers the right to decide who should get property, a right they did not have earlier; and thereby also the right to disinherit the daughter completely. He argued that a man "...can under the new provision contained in clause 32 of this bill make a will in respect of his interest in the joint family property, and provide that she [the daughter] shall have no share in his interest... It is thus clear that those who want to be governed only by the existing rules of the mitakshara system even after the passing of this act have been given the choice to do so."⁹¹

One would have to look far to find another law minister who was willing to point out so blatantly in a parliamentary debate how a government-sponsored bill contains within itself the means for its own circumvention! The provision of the will has indeed become a standard method for disinheriting daughters. Apart from the father's will, it is a fairly common practice that fathers and brothers make the woman sign a will on the eve of her marriage that she forfeits her share of property in favour of her brothers.

If, indeed, the purpose was to give people a 'choice' to be governed either by the new act or by their earlier systems of law, then why was that choice denied in matters of succession to followers of the marumakkattayam, aliyasanthana and nambudari

systems? The act decreed that at each death in such a family a partition would be deemed to have taken place, and the property devolve by succession, not survivorship. The right of birth in these systems was thus done away with. The original Hindu code had provided similarly as regards the mitakshara system as well, but following protests, had decided to safeguard its existence and continuation. The lack of sufficient protest from matrilineal communities allowed for the decimation of the matrilineal systems and the further spread and strengthening of the discriminatory aspects of mitakshara law.

A genuine 'choice' could have been more validly given to people by passing a uniform civil law with rational and genuinely egalitarian provisions, and allowing people to voluntarily opt for it. This proposal had also been repeatedly made over the years by many people, but had been studiously ignored by government. When written statements were collected in 1945, a number of respondents had suggested that the code be made optional, and had argued that this would be in keeping with the spirit of Hindu law which allowed for new schools of thought and law to take root and flourish. T G Aravamudan, advocate, Madras High Court had put forth the advantage of such an approach:

Hindu law... is a complex of varying schools...

There has been also room in Hindu society for a wide range of thoughts...and practices... from polyandry to polygamy, and from dayabhaga to aliyasanthana. A new school of Hindu law—albeit by way of a code enacted by a legislature—may not therefore be prevented from materialising... No Hindu group ever sought to force its pattern of thought and practice on another... The draft Hindu code should therefore be... a 'school' of Hindu law which one may adopt if one so desires, but which one may not impose on any other.⁹²

It was argued that this would be more democratic and would place upon proponents of the code the responsibility of informing people of its provisions. V Narayanan, an advocate from Madras, had suggested: "...let the progressives...induce large sections of the community to disown their present laws...and...gradually elbow out the diversities of thought and conduct... characteristic of present-day Hinduism."⁹³

The proposal to make the code optional was not a utopian one. Such measures as the Special Marriage Act already existed as examples of options available to citizens of all communities. If the government was genuinely desirous of setting up norms of equality and gender justice, it would have done better to frame a throughgoing egalitarian civil code rather than undertaking the shoddy piecemeal alteration of Hindu law in the name of reform. Such a civil code could then have been made available to any citizen who opted to be governed

by it. The government seems never to have seriously considered this proposal, and by the 1950s it had more or less ceased even to be proposed. When Ambedkar challenged the notion in 1951, no MP was able to offer an answer:

Are women to have the right to make an option or not?... If the husband makes an option under this law, will it apply to his wife...? If the husband does not apply it to himself, will the wife be free to do so?... It would be utter confusion. ...Our law may be deformed in some way, but it should not altogether be unaesthetic: It must be good to look at.⁹⁴

The sudden leap here from practicality to aesthetics suggests the basic nonseriousness with which the proposal was treated. In any case, the reformed Hindu law is hardly aesthetic given the dishonesty with which it was framed to defeat the very purpose for which it was initiated, viz, providing equal rights for women.

AWAY FROM A COMMON CIVIL CODE

The idea of an optional code does indeed raise serious problems, such as who would be allowed this option: the family or a unit or each individual in the family? One possible way out was to allow women special rights to seek redress under the optional, egalitarian, civil law in case they felt dissatisfied with the deal offered to them under their respective customary laws. This step of positive discrimination would be in tune with the professed aim of the new legislation—that is, eliminating the discriminations against women incorporated in diverse customary laws. It would, in effect, amount to giving women in every family and community the veto power in deciding whether a family was to continue being governed by its customary law or move towards an egalitarian civil code. Thus a community would have to evolve their customary practices to be more in tune with the concept of gender equality, in order to continue commanding voluntary allegiance, rather than be able to force obedience.

In the first few years of Indian independence, the atmosphere was relatively more propitious than it is today for the acceptance of an optional civil code by certain sections of all communities, including Muslims. Had such an optional civil code been attractive enough in terms of benefiting those who opted for it and had the government set up a machinery to make the code easily implementable, more people would gradually have gravitated towards it. Those women who felt wronged by the inequities of their community's personal law would have been able to opt for the code, thereby building pressure for reform from within. In such a situation, no community would have occasion to feel that it was being singled out for forced

reform of its laws or that other communities were being pampered by being spared such alteration.

The route followed by the government of forcing an altered uniform law on Hindus alone bred resentment and developed a persecution complex among the educated Hindus, which was based on an understandable logic. Questions such as the one raised by V G Deshpande were never answered:

When I try to understand the meaning of the Hindu code bill, has it anything to do with the name 'Hindu'? Does it signify that it is based on Hindu traditions, Hindu ideas, personal law and values... Government is going to introduce certain mischievous principles which it dare not apply to the Muslims, Christians, Parsis or Jews.... The Hindu code bill is a big conspiracy to encroach upon the personal laws of the Hindus.... The Hindus are...the objects of special favour from our great Congress government! When we come to oppose it, we are called communalists and reactionaries... and those who support it are the secularists, non-communalists and the nationalistic legislators...why this personal law of the Hindus alone is being interfered with in this secular state?⁹⁵

The logic is hard to fault. To pass a law labelled 'Hindu' seems hardly a secular move. Nor were the real motivations of the bill's proponents as genuinely secular as they claimed. They repeatedly spoke of the need to unify and consolidate the Hindu community. And in this aim, they found an ally in the Hindu mahasabha. In an unexpected speech congratulating the minister on passing the Hindu Succession Act, N C Chatterjee of the Hindu mahasabha, who had been opposing the legislation all along, laid his finger on what he saw as its achievements—unifying Hindus, and making property liquid in the hands of men, that is, giving them more arbitrary powers over family property:

I ought to confess frankly that when I was a student of Hindu law...I was amazed at the wonderful diversity of the law, between the 'mayukha' and the dayabhaga, between the Mithila and the Dravidian school. There was almost a feeling of revulsion. I believe in Akhand Hindustan and... I wanted to have...one uniform Hindu law...Sir B N Rau advocated the introduction of dayabhaga and complete elimination of coparcenary system. I was very happy...if you really want to develop trade and commerce, if you really want to build up a new India, if you really want to develop your industries and your business in the private sector, you cannot do it under the antiquated system of law.⁹⁶

There is little love shown here for a key characteristic of Hindu culture, namely, its diversity. It is contemptuously dismissed as an 'antiquated system of law'. Instead, there is a vision of a new capitalist India in which

men control trade and commerce, and of an 'Akhand Hindustan' in which only one kind of Hindu exists, a kind not 'repulsive' to the ideologues of the Hindu mahasabha wishing to reshape Hindu society to resemble the dominant west. The supporters of the bill often used similar logic, arguing against that diversity which was the strength of Hindu culture. In one telling exchange, when a supporter of the code, K Santhanam, was passionately arguing for "unity and integrity", an opponent pointed out the dangerous undertones of this argument: *Santhanam*: "...the great constitution ...is based on the unification, on the integration and on the strengthening of India... Similarly, this bill is based on the principles of unification, integration and strengthening of the Hindu community. ...that Hindus should be dissected under various regional groups... is pronouncing the doom of Hindu society. Sir, the enemies of Hindu society cannot ask for anything better...

Rohini Kumar Chaudhuri: ...the hon member is speaking communalism. He is talking of unifying all the Hindus, probably against the Muslims and others.⁹⁷

Although that may not have been the intention of the speaker, the intervener had perceived an important tendency which was to grow in the following decades, not just among Hindus but also among Muslims, and in which the enactment of the Hindu code did play an important part. This is not to suggest that all those who argued against the codification and reform of Hindu law were upholding the more egalitarian aspects of traditional customs. Nor were many of the opponents of the Hindu code bill inspired by respect for the rich diversity of India's cultures. Many were motivated by nothing better than the desire to preserve male power and privilege and felt threatened by the rhetoric of gender equality used by the reformers. Much of the resistance of Hindu Mahasabha and Jan Sangh legislators as well as the right-wing lobby headed by Congress stalwarts like Rajendra Prasad was founded in their fear that women's independence would lead to domestic disharmony and upset the social order.

Unfortunately, those holding obscurantist views on women's role in society came to be clubbed along with those who had enlightened reservations regarding the efficacy of the proposed reform effort. The latter included many members from the south who were used to traditional systems which provided far better protection to women than the modern reformers were willing to envisage.

In the debates on the Hindu code; we find many members appreciatively and with much learning elaborating the strengths inherent in the diversities of Hindu culture. Today, several of those same sections of political opinion (like the RSS-BJP) are much more

enamoured of 'unity'. Those who once advocated giving people an option or taking a referendum are today vociferously advocating the forcible imposition of a uniform civil code. One reason this important and deplorable change in perception has come about is that government's view of things has become more widely acceptable.

LIMITATIONS OF STATIST REFORM

The government, in the name of modernising the society, was desirous of taking more and more power into its own hands. This was true of all spheres of life, and the attempt to intervene in and control people's lives is evident in the legal sphere as well. Those who saw themselves as progressives simplistically identified government control with an anticapitalist development, especially because the government used socialist rhetoric. In this attempt to use government as an instrument of social reform, not realising that usurpation of power is not synonymous with reform, the progressives were even willing to bypass the people. None of the reformers, for example, seriously disputed their opponents' contention that a large majority of those defined as Hindus, particularly in the rural areas, were completely unaware that their personal laws were being changed so drastically, or that such sweeping powers over their personal lives were being usurped by government; for example, that henceforth they would be required to make wills in order to appoint guardians for their children, or get themselves registered in order to act as guardians for their orphaned siblings, nephews or nieces. The reformers were not unduly disturbed by the ludicrousness of what they were proposing in such matters as these. This is because like the British rulers, they too were enamoured of playing god and tended to see the enactment of laws itself as a substitute for social reform.

To think that a change on paper is a change in fact has been a besetting malady of Indian social reformers right up to the present day. The solution to every problem, whether it is sati or dowry or police atrocities, is sought in yet another high-sounding law or amendment of the law, with little concern for understanding carefully the reality at the ground level. The real effect of the laws, however, is to give a sense of grievance to the group legislated upon, in this case, the Hindus, although the laws were full of loopholes and did not change anything substantially in Hindu practice. For instance, the right to have up to four wives has caused much heartburn to the anti-Muslim lobby among the Hindus. It is projected as one of the prime examples of 'pampering' the Muslim community. However, despite polygamy being outlawed under the Hindu

Marriage Act, polygamous marriages are in fact as frequent among the Hindus (5.8 per cent) as among the Muslims (5.7 per cent).⁹⁸ Yet the Hindu community feels wronged because Muslim personal law had not been formally touched.

The Congress game of throwing illusory crumbs to a misguided Muslim leadership in the form of such enactments as the Muslim Women's (Protection of Rights on Divorce) Act, 1986, also has the effect of consolidating the Muslim community on the platform of resisting a uniform civil code or even any reform in Muslim personal law. (This too evolved through a similar process as the Hindu law under British rule and has little to do with koranic injunctions.) So definite has the polarisation become that even reform of the kind that has taken place in Islamic countries has not been possible in India, and women's protests from within the community are either silenced or silence themselves for fear of engendering a Hindu-Muslim conflict. Muslim belligerence on this issue only reinforces prevalent anti-Muslim prejudices and the Hindu desire for the government forcibly to impose uniformity. This trend was already visible even during the parliamentary debates during the 1950s. Strong anti-Muslim sentiment, barely held in check, was repeatedly expressed, despite the conciliatory attempts made by several Muslim members, like Naziruddin Ahmed, who, from stated motives of self-preservation, fully supported Hindu opposition to the bill. The following comment by U M Trivedi of Jan Sangh provides an example of anti-Muslim hysteria:

...if you desire to elevate the moral standard of the less orderly classes—well, who are the less orderly classes? They are those who can and do marry four wives—you only want to hit at the Hindu society...So, it is not going to govern a Mohammedan who walks about the streets saying talak, talak and divorces his wife.⁹⁹

The issue (which is, in one sense, a non-issue, given the wide gap between legal precept and actual practice in both communities) has fuelled the process of Muslims being perceived by Hindus as a pampered minority, even while they continue to be deprived and discriminated against in several concrete ways. The Muslim community has lived up to the stereotype by seeing a common civil code as anathema. The Muslim leaders have not been able to come up with meaningful alternatives, nor even attempted to work out changes to give better protection to women under Muslim law, as has been done in some of the Islamic countries.

However, the codification of Hindu law did have some positive effects in terms of opinion making, and of opening a debate on

women's rights. The debate enabled many people to come up with far-reaching ideas and proposals which were stimulative of discussion even if not incorporated into law. At various points during the years when the code was being debated both inside and outside the parliament, startlingly radical ideas were thrown up. Here is one example, from the written submissions to the B L Rau committee. Subramanya Ayyar, an advocate from Umayalpuram, proposed:

...as compared with man, women are at a considerable disadvantage... A man can lie down in open street but a woman needs the protection of a home. Similarly men can be with the minimum of clothing... But a woman has to be protected with clothing as a greater necessity. Again a man can beg anywhere and eat. But can a woman expose herself to the mercy of society in this way?... Hence... do you not think that woman should possess rights over residence, clothing and properties (the source of food) in preference to man?...Hence can you not suggest that all inheritance to properties should be woman's and not man's?...Among the Muhammadans at the time of the marriage certain portion of the properties are set apart as the exclusive property of the wife which will not be affected by debts or any other bad circumstances of the husband. ...sheer logic ...and common-sense shows that women should be owner of properties, house, etc, in preference to men... there is nothing opposed to the fundamental principles of Hindu law that women should be owners of properties-in preference to men...Please...press for these reforms even though it may mean explosion of established usage.¹⁰⁰

The reform of Hindu law carried forward the tradition, already established during the national movement, of legitimising notions of women's equality in the polity and in society at large. It paved the way for further gradual reform, such as, for example, introduction of divorce by mutual consent into the Hindu Marriage Act.

SUMMING UP

Yet, the overall effect of the misleading rhetoric used, of codifying law only for Hindus without giving them any option, and of trying to stamp out diversity in the name of Hindu unity, was negative, insofar as:

- (1) It gave Hindus the false notion that Hindu women now have equal legal rights, which is far from being the case;
- (2) It created the myth that reformed Hindu law is 'secular', not 'religious' or 'personal', whereas Muslim personal law is 'religious', therefore, backward, and can be secularised only by Hinduising it;
- (3) It left Hindus with a ridiculous sense of grievance. They have begun to believe that Hindu men are worse off than Muslim men because the former have been deprived of 'rights' that the latter enjoy.

Apart from causing a deep rift between the Hindus and the Muslims, some of the main problems with the acts as they were finally passed were the following:

- (1) They were a curious "hybrid"¹⁰¹ of Hindu law and British law, in many cases of the more irrational parts of both systems of law.
- (2) In an attempt to placate the opponents of equal rights for women, the acts set up untenable and self-contradictory systems that were unworkable and could only be subverted in practice.
- (3) They roadrolled out of existence a number of functioning local and regional legal systems, several of which provided better rights to women in certain respects, without setting up a functional alternative machinery to inform people of their rights under the new laws.
- (4) They failed to live up to the lawmaker's stated intention of combining in the reformed code the most progressive elements of Hindu law. In fact, many of the ancient texts as well as contemporary customary practices provided better rights to women in different important respects than do these acts, which are primarily based on a combination of outdated British jurisprudence and British misinterpretation of Hindu law.
- (5) Codification fossilised Hindu law and customs into a conservative mould. This need not have been the case if the reformers had seriously done what they professed they were attempting to do—viz, make the reformed law an aggregate of some of the most progressive features of various customary practices and shastric precepts. Instead they chose the very opposite route.

The reformed law turned out to be such a shabby unworkable piece of legislation because :

- (1) The reformers' notion of progress was to emulate the rather conservative Victorian English patterns of marriage and inheritance which were then far from egalitarian even when compared to the social norms prevailing in other western societies. Thus the Anglo-Hindu law which we were saddled with provides pitiful rights to women as compared, to say, inheritance and marriage law prevailing in the territory under Portuguese rule. The Goan Civil Code, passed during Portuguese rule is, for instance, far more egalitarian than the reformed Hindu law.
- (2) Within India their reference point was the customary practices of some of the dominant communities in north-western India among whom women's rights have been seriously eroded, rather than a vast number of those which provided adequate protection to women, especially in the north and north-east. This is because the reformers inherited their zeal for reform from the rhetoric of British administrators whose perceptions had a similar regional and caste bias. Through the 19th century, they had assiduously built a stereotype of

Indian womanhood derived from the life condition of those select castes and communities which practised strict purdah, forbade widow remarriage and imposed severe restrictions on women. Nair women from Kerala, Meitei women of Manipur, Meenas from Rajasthan or Jain women who did not fit into the oppressive stereotype, were presumed to be either non-existent or 'non-Indian'. The reforms carried out even in post-independence India envisage limited improvements, taking this limited stereotype as the universal reality all over the country. Thus in many ways the reformed law proved to be a step backward.

In the 1950s (as throughout the freedom movement period), a very large number of politicians, particularly in the ruling Congress party, were lawyers. Educated as they were in English law, they were simply ignorant of customary law. When this elite inherited the mantle of governance from the colonial rulers, they also inherited a good portion of the latter's contempt, based both on ignorance and arrogance, toward the Indian people. As a result most reform efforts undertaken by them have tended to follow the same pattern adopted by the British. Its characteristic features are : (1) an attempt to remodel Indian society to follow British norms; (2) Considering the British norms as progressive and, therefore, superior, even when in actual fact it may lead to introducing retrogressive changes and curtailment of existing rights of the colonised people; (3) Relying exclusively on statist measures such as passing laws and threatening punishment without as much as attempting to inform the people about the new laws being enacted for them, leave alone getting their approval. Thus the laws either become a source of tyranny or are ignored.

The few guarantees for women provided in the new laws could not really be implemented because the reformers did nothing to improve upon the British legal machinery which they inherited after independence. This machinery was designed for harassing and fleecing people rather than for protecting their rights. Instead of dismantling the top-heavy judicial machinery and restoring or building the institutions of local and village self-rule, the rulers of independent India furthered and completed the process begun by the British. This is one reason why so many laws remain a dead letter. Unless villagers chose to spend the time and money to fight a lengthy battle at distantly placed courts in the urban centres, functioning through an alien language, the law was unlikely to intervene in their lives, especially in family matters. Bigamy, child marriage and dowry continue to exist long after they were declared illegal and made penal offences. The statist reformers can then attribute this vast gap

between law and social practice as proof of people's 'backwardness'. Occasionally, they acknowledge the futility of the exercise they undertook. This is evident in their laying down that marriages solemnised in contravention of the law, for example, child marriages, would be valid.

Today, we are reaping the bitter harvest of the seeds sown by the misguided rhetoric and strategy employed by the codifiers of Hindu law. Unfortunately, the reformers of today are following the same track in their insistence on imposing a uniform civil code on all communities despite hostile, active resistance from the concerned communities. One of the reasons for this cussedness is that the progressive historians have projected the controversy around the reform in Hindu law through simplistic stereotypes which portray the pro-reform lobby led by Nehru and Ambedkar as the diehard champions of women's rights and all those who had any kind of reservations about the proposed reforms as conservative obscurantists not willing to concede equality to women. Through my analysis of the parliamentary debates I try to demonstrate that the task of moving a society towards more egalitarian and humane norms is a far more complex task than self-appointed modern reformers are willing to acknowledge. Reform, to be meaningful, has to be based on creating a new social consensus, a task seldom taken seriously by those who are enamoured with statist measures imposed from above.

The history of the Hindu law reform shows that when reformers claim to speak on behalf of huge segments of population, whose traditions and institutions they have no real knowledge of, they are more likely to do harm than good. Even the most well-intentioned reform can end up disastrously without an intimate knowledge of the community which is sought to be reformed.

This knowledge comes only when those seeking reform work closely with the communities involved and are compelled to listen to them in a way that those who control the state machinery are not. Whenever people become objects of reform, rather than active subjects, the effort is unlikely to produce worthwhile results, especially when the initiative comes from an elite which is either literally alien, as were the British, or has become alienated from the lives of people over whom it rules, as are the English-educated elite of India. Those who see themselves as reformers or revolutionaries tend to assume that all their interventions are *ipso facto* for the good of society even while they may actually be doing harm in the process. The claims of self-appointed reformers need to be examined carefully and tested through concrete proof of how their actions affect society in actual fact. Rhetorical claims about the beneficial

aspects of reform they are undertaking should not be taken as a substitute for real benefit.

Much of the current social, economic, political mess is precisely because of the governing elites' callous disregard and ignorance of the real conditions and aspirations of India's people. As one of those who belongs to India's current generation of self-appointed social reformers, I feel it is crucially important that we learn to take the people of this country more seriously; and continually subject our actions and interventions to thorough scrutiny.

Notes

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- 1 J Duncan Derrett, *Religion, Law and the State in India*, The Free Press, New York, 1968, p 225.
- 2 Ibid, pp 233-35.
- 3 Ibid, p 240.
- 4 Ibid, p 244.
- 5 Ibid, p 251.
- 6 The *Mitakshara* is a running commentary on the code of Yajñvalkyā. It was written by Vijnaneswara in the latter part of the 11th century. The *Dayabhaga* purports to be a digest of all the codes. It was written by Jimutavahana who flourished in about the beginning of the 12th century. See Mulla, *Principles of Hindu Law*, N M Tripathi Pvt, 15th ed, 1986, p 86.
- 7 *Constituent Assembly of India (Legislative) Debates*, Vol V, No 1, 1948, p 3647.
- 8 *Lok Sabha Debates*, Vol IV, 1956, Part II, p 6860.
- 9 Mulla, *Principles of Hindu Law*, op cit, p vii.
- 10 Mulla, op cit, p 76.
- 11 *Lok Sabha Debates*, Vol IV, 1956, Part II, p 6951.
- 12 *Parliamentary Debates, House of the People*, Vol V, 1954, Part II, pp 6973-76.
- 13 Ibid, pp 7253-54.
- 14 *Constituent Assembly of India (Legislative) Debates*, Vol V, No 1, 1948, p 3647.
- 15 *Lok Sabha Debates*, Vol IV, 1956, Part II, p 6922.
- 16 *Constituent Assembly of India (Legislative) Debates*, Vol VI, 1949, Part II, p 542.
- 17 *Parliamentary Debates*, Vol XV, 1951, Part II, p 3185.
- 18 Ibid, p 3186.
- 19 Ibid, p 2951.
- 20 *Constituent Assembly of India (Legislative) Debates*, Vol V, No 4, 1948, pp 3652-53.
- 21 Mulla, op cit, pp 10-11.
- 22 Ibid, p 67.
- 23 Ibid, p 23.
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- 25 Ibid, p 11.

- 26 Ibid, p 12.
- 27 Ibid, p 12.
- 28 Ibid, p 15.
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- 30 M K Gandhi, Young India, October 6, 1921, *The Collected Works of Mahatma Gandhi*, Vol XXI, p 246.
- 31 *Constituent Assembly of India (Legislative) Debates*, Vol V, No 4, 1948, p 3652.
- 32 *Bhagwan v Warubai* (1908) 32 Bom 300; *Dattaray v Gangabhai* (1922) 46 Bom 541, 558, cited in Mulla, op cit pp 57-58.
- 33 Mulla, op cit p 325.
- 34 Sri Venkatraya Sarma, *Written Statements Submitted to the Hindu Law Committee*, Vol II, 1945, Madras, 1947.
- 35 Ibid, p 453.
- 36 *Parliamentary Debates*, Vol XV, 1951, Part II, p 3101.
- 37 Ibid, p 3102.
- 38 Ibid, p 3110.
- 39 *Written Statements Submitted to the Hindu Law Committee*, op cit, p 360.
- 40 *Parliamentary Debates*, Vol XV, 1951, Part II, p 2716.
- 41 *Parliamentary Debates*, Vol V, 1954, Part II, pp 7150-51.
- 42 Ibid, pp 7224-25.
- 43 Ibid, pp 7225-26.
- 44 Ibid, p 7227.
- 45 *The Constituent Assembly of India (Legislative) Debates*, Vol VI, 1949, Part II, pp 538-39.
- 46 *Narayan v Laving* (1878) 2, Bombay 140; and *Keshav v Bai Gandi* (1915) 39 Bom, 538, 29 I C 952 (15) A B 107, cited in Mulla, op cit, p 565.
- 47 *Tekait Mon Mohini v Basanta Kumar*, 1901, 28 Cal 751, cited in Mulla, op cit, p 755.
- 48 *Paigi v Sheonarain* (1886) 8 All, 78; *Motilal v Bai Chanchal* (1902) 4 Bom, LR 107; *Binda v Kaunsilia* (1891) 13 All 126, 164, cited in Mulla, op cit, p 567.
- 49 *Parliamentary Debates*, Vol V, 1954, Part II, p 7132.
- 50 See Prem Chaudhry, 'The Custom of Widow Remarriage in Haryana', *Manushi*, No 80, 1994.
- 51 *The Constituent Assembly of India (Legislative) Debates*, Vol VI, 1949, Part II, p 504.
- 52 *Written Statements Submitted to the Hindu Law Committee*, op cit, p 500.
- 53 *The Constituent Assembly of India (Legislative) Debates*, Vol II, 1949, Part II, p 831.
- 54 *Parliamentary Debates*, Vol V, 1954, Part II, p 7124.
- 55 *Lok Sabha Debates*, Vol IV, 1956, Part II, p 6905.
- 56 *Constituent Assembly of India (Legislative) Debates*, Vol V, 1948, Part II, pp 3648-50.
- 57 See, for instance, Madhu Kishwar, 'Toiling without Rights, The Ho Women of Singhbhum', *Economic and Political Weekly*, Vol XXII, Nos 3, 4, 5, January 17, 24 and 31, 1987. The discriminatory provisions denying tribal women equal rights to land were challenged in the supreme court by *Manushi* on behalf of tribal women in 1981.
- 58 *Lok Sabha Debates*, Vol VI, 1956, Part II, p 102.
- 59 Ibid, pp 153-57.
- 60 *Besant v Narayanidh* (1914) 41 I A 314, 38 Mad 807, 819, 24 I C 290 ('14) A P C 41, cited in Mulla, op cit, p 1059.
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- 62 Ibid.
- 63 Ibid, pp 210-11.
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- 69 Ibid, p 835.
- 70 *Lok Sabha Debates*, Vol X, 1956, Part II, pp 2893-2900.
- 71 Ibid, p 2961.
- 72 *Parliamentary Debates*, Vol V, 1954, Part II, pp 7197-7205.
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- 74 *The Constituent Assembly of India (Legislative) Debates*, Vol II, 1949, Part II, p 841.
- 75 *Lok Sabha Debates*, Vol IV, 1956, Part II, p 7227.
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- 77 *The Constituent Assembly of India (Legislative) Debates*, Vol VI, 1949, Part II, pp 469-70.
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- 79 *Written Statements Submitted to the Hindu Law Committee*, Vol II, 1945, Madras 1947, p 356.
- 80 *Written Statements Submitted to the Hindu Law Committee*, op cit, p 757.
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- 82 Ibid, p 734.
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- 100 *Written Statements*, op cit, p 408.
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