

Liberating Hindu Women

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The recent revival of the discussion on enacting a Uniform Civil Code, which its proponents believe will give all women equal rights, overlooks the reality of the discrimination that Hindu women continue to face despite amendments in Hindu personal laws, including on issues of maintenance and inheritance. Rather than uniformity in law, women need an accessible and affordable justice system.

An influential, senior criminal lawyer of the Bombay High Court, a member of the Bharatiya Janata Party (BJP) and, on his own admission, a close associate of the Prime Minister, spelt out the agenda of his party to enact the Uniform Civil Code at a recent lecture. He made it sound so simple: just abolish polygamy and triple talaq, and he added as an afterthought that Christians should be granted the right to divorce by mutual consent (they had already secured this right in 2001 by amending their own personal law). A moment later he added that Parsi matrimonial courts should be abolished. And then, he said, India would be able to enter the comity of nations that follow a uniform secular and civil law, a symbol of modernity, progress and development and finally shed the colonial baggage of dividing people along religious identities. He claimed that this would promote communal harmony and bring about national integration. The task of the judiciary would become simple: one law for all. Then he looked at me, his co-panellist, and commented, “Ms Agnes, you should welcome this move, after all you stand for gender justice.”

He went on to say that “we” had abolished sati, female infanticide, polygamy, child marriage, and dowry and liberated “our” women. Now we need to do the same for other women, liberate them from their oppressive laws. If only it was that simple — to liberate women, irrespective of whether they are Hindus, Muslims or others! Perhaps the lawyer needs to be excused for his ignorance

about the complex mosaic of personal laws in our country. After all, this was not his area of legal expertise. He was only articulating his party’s position.

As I heard him, my concern was less for minority women, and more for Hindus, who are under the erroneous belief that they are governed by a “modern, uniform, secular and gender just law.” Since this popular fiction gets constantly projected in the media in defence of enacting a Uniform Civil Code, it needs to be examined against ground realities.

In 1950, we gave ourselves a Constitution that mandated equality and non-discrimination as non-negotiable fundamental rights. Within five years, we were violating this very mandate that prohibits discrimination on the basis of religion, by enacting a law only for Hindus. This was necessary, since Hindu women lagged far behind their counterparts from other religions who had a right to divorce and a right to inherit property. Reforms for Hindus could not wait till a common consensus was reached for enacting a Uniform Civil Code mandated under Article 44 of the Constitution. The need for reforming the Hindu law was immediate.

The main focus of the reforms were to transform sacramental Hindu marriages into contractual obligations by introducing divorce and other matrimonial remedies along the lines of the English laws and to grant women equal inheritance rights.

Given the urgency, one would imagine that the process would be smooth, and the nationalist leadership (mainly Hindu) would be united in this mission. But that did not happen. Finally, B R Ambedkar, who was spearheading the campaign, had to resign as the law minister in utter frustration. The reforms met with severe opposition from conservative nationalistic leaders who opposed divorce as well as

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granting property rights to women as it violated the Hindu ethos. They apprehended that if Hindu women were granted the right of divorce and inheriting property, they would go astray and the Hindu social fibre would break. Even the then President Rajendra Prasad refused to sign on the dotted lines if the Hindu Undivided Family (HUF) was abolished.

Though liberation of women was the stated agenda, there was also a hidden political agenda. There was an urgent need to bring a culturally diverse and pluralistic society, divided along caste, sects and regions under one law and wrest the power to legislate in family matters away from the religious leadership (Parashar 1992). So the law created a legal fiction and defined Buddhists, Jains, Sikhs, Brahmo, Arya, Prarthana Samajis, and others, as "Hindu". The net of legal Hinduism was cast very wide, and no one could escape, not even an atheist, except Muslim, Christian, Parsi or Jew, who were all governed by their own respective personal laws. Even if two Hindus married under the secular statute, the Special Marriage Act, they would still be governed by the Hindu Succession Act so that the Hindu male's rights to the HUF and the resulting tax benefits could be preserved. This did not come up in the public domain as a "Hindu" privilege.

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

It is interesting to see how this modern, secular, gender-just and uniform act unfolded on the ground in subsequent years. In the following two decades, there were several cases where husbands approached courts to stop their wives taking up gainful employment in a place of their choice by filing petitions for restitution of conjugal rights. While upholding the

husband's unconditional right, the courts made the following comments: "A wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection."¹ "The Hindu law imposes on the wife the duty of attendance, obedience to and veneration for the husband to live with him wherever he chooses to reside."² "According to Hindu Law, marriage is a holy union for the performance of marital duties with her husband where he may choose to reside and to fulfil her duties in her husband's home."³ Though subsequently a full bench ruling of the Delhi High Court granted women the right to reside separately from their husbands if they were gainfully employed, the notion that the husband is the Lord and Master of his home and the woman should be subservient to him, still dominates divorce proceedings.

Claim to Maintenance

When constitutionality of this oppressive provision, which granted the husband the right over the wife's body, was challenged on the ground that it violates the woman's dignity under Article 21 of the Constitution, the Delhi High Court held:

Introduction of Constitutional law in the home is most inappropriate; it is like pushing a bull into a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 has any place.⁴

This provision remains and can be conveniently invoked to defeat the wife's claim to maintenance.

Within a pluralistic society, the act also had to validate diverse customary practices. But the notion of a valid custom remained that of ancient and time immemorial, as stipulated under the English law. This mingling of Brahminical rituals and customary practices with English principles resulted in absurd and ridiculous rulings regarding the validity of Hindu marriages, and women have been the worst sufferers. In the process of urbanisation most customary forms have been modified and urban communities living in close proximity have adopted a synthesis of marriage rituals. The forms range from exchanging garlands, applying *sindoor* (vermilion) on the bride's forehead, to

declaring themselves married by signing on a stamp paper, or by taking an oath before a deity in a temple. Bollywood has added to the confusion by projecting these as valid rituals.

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

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

So the progressive sounding provision of monogamy not only turned out to be a mockery but in fact even more detrimental to women than the uncodified Hindu law which recognised rights of wives in polygamous marriages. For instance, in a case for maintenance where the husband pleaded that since the woman was his second wife he need not pay her maintenance, the court took recourse to the uncodified Hindu law and held that since the couple is governed by the ancient Hindu Law (which permits bigamy) and not by the reformed code, the second wife is entitled to maintenance.⁵ This judgment speaks volumes for a law that was ushered in with much fanfare as an instrument of social change and women's empowerment.

The flip side of this predicament in maintenance proceedings is the dilemma faced by women in criminal proceedings in cases of bigamy. Here, years of litigation failed to end in conviction for the errant male due to the courts adopting a rigid view that the Brahminical rituals

vivaha homa, *saptapadi* (seven steps round the fire), and *kanyadan* (offering the bride as a gift to the groom) were essential ceremonies for solemnising a Hindu marriage.⁶ The husband could wriggle out of conviction, despite proof of cohabitation, birth of the child, or the community accepting the man and the woman as husband and wife, if these ceremonies could not be proved by the first wife in respect of her husband's second marriage (Agnes 1995). This was absurd as Hinduism was defined in the widest terms to include castes, sects and religions that did not follow Brahminical rituals, and further, among many communities, the ceremonies prescribed for a second marriage differed vastly from those followed for the first marriage of a virgin bride. But the law did not have scope to take into consideration these minute intricacies.

While Section 13 of the act provides for a judicial divorce, Section 29(2) validates customary divorces. The provision for registering the marriage under Section 8 is optional. Hence, despite the law being codified, a Hindu need not approach any state authority either for solemnising the marriage or for dissolving it, and can conveniently live outside the pale of official law. In contrast, Muslim law is a contract with consent, forming its essential ingredient, usually reflected in a *nikahnama*, a written document with signatures of the bride, groom and witnesses. So, it is not easy to refute a Muslim marriage and the presumption in Muslim law is in favour of a marriage than concubinage, whereas it is the reverse under the Hindu law.

The ruling of the Supreme Court by Justice Markandey Katju, *D Valusamy*⁷ serves to validate my point. The judge was dealing with an appeal by a Hindu man whose wife had been awarded maintenance under Section 125 of the CrPC (Criminal Procedure Code) by two lower courts. In the process of setting aside these rulings and denying the woman her right to maintenance, the judge also narrowed the scope of the recent enactment, the Protection of Women from Domestic Violence Act, which had included a term "marriage like relationship" to provide relief to a large number of women who were denied rights when their husbands

pleaded that they are not "wives," as they already have a valid marriage subsisting.

The judge held:

If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage... No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law (para 34–35).

By a stroke of his pen, the judge undid several earlier rulings that had attempted to find a way of getting some relief to women who were trapped in such relationships. It is little wonder that women in such situations are today filing cases of rape against the man who has duped them into a sexual relationship under the promise of marriage.

In 2005, in *Rameshchandra Daga vs Rameshwari Daga*⁸ the Supreme Court, while trying to grapple with this problem and while awarding maintenance to a woman whose husband had challenged the validity of their marriage on the ground of previous subsisting marriage, conceded that despite codification and introduction of monogamy, the ground reality had not changed much and that Hindu marriages, like Muslim marriages, continue to be bigamous. The Court commented further that though such marriages are illegal as per the provisions of the codified Hindu law, they are not "immoral" and hence a financially dependent woman cannot be denied maintenance on this ground.

Last year, in *Badshah vs Sou Urmila Badshah Godse*⁹ Justices Ranjana Desai and A K Sikhari upheld the right of a Hindu woman who had been duped into a bigamous marriage and thwarted the attempt of her husband to subsequently deny her maintenance. The judgment emphasised that while dealing with the application of a destitute wife under this provision, the court is dealing with the marginalised sections of society. The purpose is to achieve "social justice," the constitutional vision enshrined in the Preamble of the Constitution of India. The Preamble clearly signals that we have chosen the democratic path to secure for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving social justice. Therefore, it becomes the bounden

duty of the courts to advance the cause of social justice. There is a non-rebuttable presumption that the legislature, while making a provision like Section 125 of the CrPC to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. The judgment cited as a classical example the journey from *Shah Bano*¹⁰ to *Shabana Bano*,¹¹ which guarantees maintenance rights of Muslim women.

In doing so, the judge was referring to the developments within Muslim law in recent times, which have secured the post-divorce economic rights of Muslim women through important rulings such as *Daniel Latifi*¹² and *Shabana Bano* (cited above) and also *Shamim Ara*,¹³ which curtailed the rights of a Muslim husband to arbitrary talaq by stipulating strict quranic conditions for pronouncing talaq under Islamic law.

But these landmark rulings lie buried in law books. Only negative comments about Muslim law interest the media. Contrasting these judgments with the recent comments of Justice Markandey Katju, in support of the Uniform Civil Code on the ground that the Muslim personal law is "barbaric, backward and unjust," makes one wonder whether these comments have a legal base or are politically motivated to suit the agenda of the present government.

Uniformity Has Not Worked

The lessons learnt in the last 60 years are that uniformity has not worked. It has also had a disastrous impact on the rights of Hindu women. While examining the developments in Hindu law, Werner Menski, an expert on Hindu law, comments that Hindu law has always been a people's law. Hence, something as complex as Hindu personal law could not be reformed away and abolished by a statute, nor could its influence as a legal normative order that permeates the entire sociolegal Indian field be legislated into oblivion. While the law was codified, in social reality all that happened was that the official Indian law changed, while more and more of Hindu law went underground, populating the realm of the unofficial law. The conceptual framework and ideologies underpinning multiple ways

of life and hence the entire customary social edifice of Hindu culture, remained largely immune to the powerful wonder drug of legal modernisation (Menski 2003: 24–25).

So the question that needs to be raised at this juncture is whether a uniform law structured in a linear mould will help in securing the rights of women spread across diverse cultural ethos and values. Rather than excluding women from the realm of rights, we need to adopt an inclusive approach, using the constitutional provision of Article 21, so that women at the margins are not deprived of their right to a life with dignity and sustenance by adopting moralistic principles that are alien to cultural ethos and customary practices. Women cannot be discarded and humiliated by labelling them as “mistresses,” “keeps,” or “concubines.” Women need to be empowered to negotiate local and informal systems as well as formal courts for enforcement of their rights.

To extricate rights from informal customary practices, and locate them exclusively within the domain of courts and statutes is not a viable option for a hierarchical and multicultural society. Plurality and diversity need not be construed as inherently inegalitarian. Women’s agency and autonomy to negotiate rights from multiple locations are critical. We need to broaden rights beyond the narrow confines of monogamous marriages, and include all marginalised and vulnerable sections within the realm of rights. Rather than uniformity, what women need are an accessible and affordable justice delivery system and inclusive models of development that will help to eliminate their poverty and destitution and help to build an egalitarian world.

NOTES

- 1 *Gaya Prasad vs Bhagwat*, AIR 1966 MP 212.
- 2 *Surinder Kaur vs Gardeep Singh*, AIR 1973, P&H 134.
- 3 *Kailash Wati vs Ayodhia Parkash*, ILR (1977), 1 P&H 642 FB.

- 4 *Harvinder Kaur vs Harminder Singh*, AIR 1984 Del 66.
- 5 *Anupama Pradhan vs Sultan Pradhan*, 1991 Cri. LJ 3216 Ori.
- 6 The ritual of Kanyadan reinforces the notion that women are the property to be handed over from fathers to husbands.
- 7 *D Velusamy vs D Patchaimmal* 2010 (10) SCC 469.
- 8 I (2005), DMC 1 SC.
- 9 2014 (1), SCC 188.
- 10 *Mohd Ahmed Khan vs Shahbano Begam*, AIR 1985, SC 945 cited earlier.
- 11 *Shabana Bano vs Imran Khan*, AIR 2010, SC 305.
- 12 *Daniel Latifi vs Union of India*, (2001), 7 SCC, 740 FB.
- 13 *Shamim Ara vs State of UP*, 2002 (7), SCC 518.

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