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CASTE, PATRIARCHY AND LAW IN INDIA.

Dr. Nitish Nawsagaray*

INTRODUCTION:

20 years old Manisha Dhangar hailing from a village in Jalgaon district in Maharashtra was allegedly strangled by her father, uncle and grandmother on 12th March 2012 while she was in her sleep. Manisha's family was angry over her affair with Sandeep Patil, a boy from a different caste (Maratha), who was her neighbour. Sandeep and Manisha had decided to elope and marry as they faced opposition from Manisha's family. But her family members allegedly killed her after they got wind of it. After killing Manisha, her father and uncle took her body and dumped it almost 30 km away from their village. In a yet another similar incidence Shankar Shinde, murdered his 25-year-old daughter Asha on 19th February 2012. The reason was she was not willing to marry a bridegroom from her caste. The incident of honour killing, that took place in Aundh, in Satara district, Maharashtra. Asha was in love with a youth from Pune, who belonged to another caste. She kept on rejecting all marriage proposals. Her parents tried convincing her that the family will be looked down upon if she went in for an intercaste marriage. These incidences are not exceptional even in a progressive state like Maharashtra. Girls are killed in honour of caste when they assert themselves to marry outside the caste bounds. Noted historian Uma Chakravarti points an interesting incidence in her book, *Gendering Caste through feminist Lens*¹. She points out that at the height of the anti-Mandal agitation in Delhi, she was struck by a photograph prominently displayed in newspapers showing women college students in Delhi demonstrating in the streets. They were carrying placards that read 'We don't want unemployed husbands'! Women students protested not for themselves but on behalf of their potential husbands. What the placards were saying was that these girls would be deprived of Upper caste IAS husbands. But what they were also saying was that the OBCs and dalits who would now occupy these positions in the IAS could never be their potential husbands. Who had told them that they could not marry the new entrants into the IAS drawn from the 'backward' or dalit castes? Feminist scholars until recently, in India, had regarded the axis of caste and the axis of gender as two discrete entities in the Indian system of stratification. The links between these two axes of stratification were never explored. A marked

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¹ Uma Chakravarti, *Gendering caste through a feminist lens*, Stree, 2006, p.3.

feature of Hindu society is its legal sanction for an expression of social stratification in which women and lower castes are subjected to humiliating conditions of existence. Caste hierarchy and gender hierarchy are the organizing principles of the Indian social order and are closely interconnected. This article attempts to explore and consolidate the links between caste and gender.

The task of exploring the connections between patriarchy and other structures within a historical context was pioneered by Gerda Lerner². Lerner emphasizes that, there is a need to look beyond economic questions and focus on the control over women's sexuality and the manner in which reproduction was organized and thus to look for the causes and effects of such sexual control. Gerda Lerner's exploration of the relationship between class and gender, and the importance of recognizing the crucial place of control over female sexuality as a central feature of the subordination of women in the case of early Mesopotamia, has been a pioneering and influential work in studies on gender stratification. As Lerner began examining her historical sources in detail she was puzzled by the evidence that showed that whereas women seemed to have greatly different economic statuses, that is, while they belonged to different classes, and often enjoyed economic independence, their sexuality was nevertheless controlled by men. This led her to recognize the need to look beyond a simplistic understanding of female sexuality, and the manner in which reproduction was organized. A similar exploration of the process of establishing control over women's sexuality in a highly stratified and closed structure could be useful in analyzing the connection between caste, patriarchy and State.

UNDERSTANDING CASTE:

At the outset we need to understand the ideology and practice of the caste system which is amongst the most significant factors bearing upon the lives of all women and all men in India. Scholars like Dumont and Michael Moffat who dominated the world of sociological scholarship presented the caste system as a system of consensual values –a set of values accepted by both the dominant and the dominated. This viewpoint is popular because it is convenient for the upper castes as it erases their own location within the hierarchical structure. In contrast Dr. Ambedkar formulated Caste as a system of 'graded inequality in which castes are arranged according to as

² Gerda Lerner, *The creation of patriarchy*, Oxford University Press, New York, 1986.

ascending scale of reverence and a descending scale of contempt.³ Which means that as you go up the caste system the power and status of a caste group increases; as you go down the scale the degree of contempt for the caste increases as these castes have no power, are of low status and are regarded as dirty and polluting. An important aspect of the caste system is that those who have dominated the means of production have also tried to dominate the means of symbolic production. This symbolic hegemony then allows them to control the very standards by which their rule is evaluated, so that the perspective of the lower caste has no place in it. Each caste is a closed and bounded group, and all social relations are represented in terms of bounded groups: eating, physical contact and marriage are highly ritualized and strictly confined to other members of each bounded groups. There is a profound inequality between the castes in terms of production resources, social status and access to knowledge. This is evident even in the early formulations of the caste system in the Brahmanical texts. Caste is not merely the opposition between pure and impure but at a more fundamental level it incorporates other kinds of oppositions such as domination and subordination, exploitation and oppression, based on unequal access to material resources. The notion of impurity is crucial to the ideology of the caste system because it keeps the low in a state of subordination, this apply equally to gender, and to the impurities that inhere in women. It is useful to reiterate that caste in India is not only a system of production but caste is also a system of reproduction this distinguishes the Indian system of stratification from other regions and introduces the specific complexities of the Indian situation. Caste cannot be reproduced without endogamy⁴ and it is for this reason that endogamy has been regarded as a tool for the manifestation and perpetuation of caste and gender subordination. Caste has an identity in relation to others, only in terms of its distinctiveness from other caste groups and this can only be maintained through reiterating separation and therefore through endogamy.

WHAT IS MARRIAGE?

What is our understanding of Marriage in Hindu social order? Is there any universal way that it can be defined? What is the history of marriage in India? Answering these questions from women centered point of view will add to our understanding of gender relations in India. The

³, Dr. Ambedkar, Caste in India, Their Mechanism, Genesis & Development, p. 3. Vasant Moon (Ed), Dr. Babasaheb Ambedkar Writings and Speeches, Vol.I, published by The Education Department Government of Maharashtra, 1979.

⁴ Endogamy is the rule enjoining marriage within a specified group, that is, caste.

imperative of separation within the ideology of pure and impure have meant that since each caste is bounded group, it must be reproduced as a bounded group in order to preserve it as a discrete social unit. Endogamous marriages have been the primary means by which this separation is achieved. One of the important areas of feminist research is the exchange of women between groups to facilitate 'orderly' patterns of exchanges among them and the rules that govern such exchange. We need to explore this crucial issue of exchange of women by communities in the form of marriage and the manner in which women's sexuality, and then women themselves, become a resource in the hands of the tribe/clan, or any other group, such as a caste or sub-caste, whose members they are as well as consequences of such exchanges on the subordination of women. Yajnavalkya Smriti says, 'One should marry a women whose virginity is intact, endowed with auspicious marks, not previously wed by another, dear to one's heart, of the same varna, not a sapinda, younger than oneself, not diseased, not from the same pravara and gotra, possessing a brother...'⁵ Among the rules that social groups have created for the exchange of women, ritualized as marriage, have been exogamy and endogamy. The former is a circle of those whom one cannot marry and the latter is a circle of those from within whom one must marry. Those outside the endogamous circle are also prohibited in terms of constituting a legal or valid sexual relationship within marriage according to Hindu Dharmashastra. All societies have some principle of exogamy within which one cannot marry because people within this circle are regarded as too close a set of kin. But endogamy is less universal and is a necessary feature of a society stratified on the basis of birth, as different strata would not be able to maintain their distinctive identities without it. In ideological terms, endogamy is also a crucial way of preserving the qualitative attributes of a caste and establishing its difference from other castes. Arranging marriages is a way of ensuring that endogamy functions in a circumscribed way and limits the possibility of marriage outside the 'culture' that is conceived very narrowly. Since the central function of marriage is to procreate, it is the children born of such normative marriage who maintain and reproduce the social order. The hierarchical relations of caste and the immortality of the male line as well as of the ancestors thus rest on marriage practices. Consequently 'arranged marriages' were and are the norm and so called 'Love marriages', those undertaken by the marrying partners are considered deviant and even dangerous.⁶ To put it in other words, the 'arranged' marriage is the norm in marriage practices in

⁵Yajnavalkya Smriti, I.52-55.

⁶ Supra note 1. P. 33.

India, and it is the underpinning of endogamous marriages, which itself is the basis by which the caste system is reproduced. For a suitable marriage the bride and groom must belong to the same caste or sub-caste and be outside the exogamous category of the gotra⁷. Additionally, in different regions, different degrees of kin on the fathers and mother's sides of the marrying couple are prohibited from being considered for a suitable marriage. At a general level marriage is an aspect of people's notions and practices built around birth and descent. Marriages are entered into and performed to ensure the immortality, continuity and purity of the male descent line. It is also regarded as vital to the maintenance of one's caste status, defined as one's standing among the smaller segmentary subdivisions within the caste.

Nur Yalman, an anthropologist, has argued that a fundamental principle of Hindu social organization was to construct a closed structure to preserve land, women and ritual quality within it.⁸ These three are structurally linked and it is impossible to maintain all three without stringently controlling female sexuality. Neither land nor purity of caste can be ensured without closely guarding women who form the pivot of the entire structure. There is a close connection between caste, class and gender. The religio-legal text of Brahmanic Hinduism mentions, Kaliyuga, the ultimate Brahmanical vision of a dystopia when the normative structure is upturned, is typically a time when women and the lower caste do not perform their duties and there is the dreaded mixing of castes. According to Bhagavad Gita, a fourth or fifth century A.D. text, Kaliyuga is a time when families are broken, rites are forgotten, women are defiled and from this corruption comes the mixing of castes. When women are corrupted all is lost. In the Brahmanical texts it is clear that the upper caste women are the object of 'moral panic'. To prevent such a contingency women's sexual subordination was sought to be institutionalized in the texts and enforced by the power of the state. Women's cooperation in the system was secured by various means; ideology, economic dependency on the male head of the family and finally the use of force when required.

In Patrilineal societies, descent is reckoned through the father and property passes to the eldest male child. Girls do not inherit their share of property as a rule (Islamic laws are an

⁷Gotra is a term applied to a clan, a group of families, or a lineage — exogamous and patrilineal — whose members trace their descent from a common male ancestor, usually a sage of ancient times. Believed to have begun to consolidate around 8-10 Century B.C., the present-day gotra classification is supposed to have been created from a core of eight rishis.

⁸ Nur Yalman, 'On the Purity of Women in the Castes of Ceylon and Malabar', *Journal of the royal anthropological Institute of Great Britain and Ireland* 93 (1962): 25-28, cf, supra note 1.

exception: they assent to girls being given their share of property) except in case where there exists special legislation to ratify their claims on the family property. In India the marriage practices are practically the most tightly controlled sexual practices, the highest forms of rituals and sacraments are for the upper caste women, and the more 'flexible' practices for the lower castes. For example widowhood in India among the upper castes was traditionally and until quite recently, a state of social death. Ideally the chaste women would cease to exist at the death of her husband by joining her husband on the funeral pyre but if she did not become a 'Sati' she is institutionally marginalized. While she was physically alive she was socially dead. At the same time the practice of secondary marriage for widows was/is associated with lower castes and Agriculture castes for these castes associated with agriculture or other kind of work. Even in this case there is not much recognition of her sexual needs but is an arrangement to utilize the productive and reproductive labour of widows. As Prem Chowdhry has shown with respect to Hariyana⁹, if a man dies, his wife is forced into marriage with one or the other of his younger siblings. This practice, known as 'karewa', achieves two things: it prevents the women from marrying someone of her choice, since re-marriage is actually allowed to her in these parts amongst certain agricultural castes. For if she were to marry a man of her choice, she would share her husband 's share of the family property, to which she has rights of enjoyment, with another man. If the latter so desired, he could alienate this property forever. Secondly, Karewa ensures that the women's labour remains available to her marital family; an important consideration in peasant societies, since women labour long and hard both at home and in the fields. In fact, the institution of bride price that is still in place in parts of Hariyana has to do with this: it denotes how women's labour is valued. The family that wants her for a bride is actually interested in purchasing her labour power! Therefore, the constitution of patriarchy has been neither uniform nor homogeneous across caste and region. The upper castes asserted the permanence of marriage for women and enforced absolute monogamy that permitted women to marry only once in lifetime; here the death of a husband signaled actual or social death. Elsewhere in the caste hierarchy, women could be forced to remarry during their reproductive years. Elsewhere still, as in Kerala, the law of patrilineal primogeniture, absolute monogamy for women and female seclusion among the Namboodiri Brahmins could support a system of matrilineal hypergamous polyandry among the non-Brahmin Nair's, with Nair women taking Namboodiri partners. This was a convenient arrangement for the Namboodries. The children of

⁹ Prem Chowdhry, *Contentious Marriages, Eloping Couples*, Oxford University Press, New Delhi, 2007.

these unions were matrilineal, and thus the Namboodiri fathers were absolved of responsibility towards their children by Nair women. At the same time, it was believed that the ritual quality of the blood of the Nairs was enhanced through such an institutionalized mechanism for upward mobility.

Thus to put Ambedkar's argument again, castes are born and thrive through the use of gendered violence, patriarchal relations within castes and exclusionary processes between castes. Membership within the caste is controlled and regulated through practices such as sati, enforced widowhood and child marriages. Gender has been central to the constitution of the caste system. Bodies are gendered by caste in a very specific ways, reproductive capacities being central to this definition. The menstruating woman, the new mother and the widow, as also the eunuch, are equally sources of pollution in the Brahminical schema.

ADVENT OF BRITISH AND FAMILY REFORM IN INDIA:

The advent of British rule in different parts of the subcontinent marked a major moment in terms of governance in the history of India. Apart from economic changes, especially in production relations and revenue collection, there were legal changes, a new administrative and judicial apparatus, and new systems of education. In the late 18th century 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 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. This led to the study of ancient 'shastras' to help the British develop a set of rules for governing contemporary Indian society. 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 patronize 'shastric' education. Till the advent of the colonial rule, civil law was enforced primarily by local and non- state legal fora applying the norms of customary law and adaptations of the Smriti to suit local conditions. But when the British step in to arbitrate in civil and criminal disputes, due to their limited understanding of local traditions and customs, they relied upon Hindu Pundits. This sets in motion the process of Brahminisation of Hindu laws. The plurality of customs often led to the pundits expressing contradictory opinions. The wide range of customs which has no satric authority met with the disapproval of the

administrators. They distrusted the pundits and felt that their opinions were biased and favoured the interest of their own caste. The administrators were of the opinion that if the original texts were made available, they could rule directly, without the help of partisan and corrupt pundits. So in desire to be independent of the local clergy, they took upon themselves the task of translating the ancient texts. These translated texts became the basis of Anglo-Hindu law in India.

In 1772, Hasting hired a group of 11 pundits for the purpose of creating a digest of Hindu law, which brought a heavy Anglo-Brahminical bias into the law. This was translated into Persian and then later into English and was published in 1776 under the title, *A Code of Gentoo Laws or Ordinations of Pundits*. 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 of crops, adultery, duties of women, etc. the British were 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. The code prepared by him 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 British India. After Jones, Colebrook tried his hand at a similar compilation. In a few years Colebrook's translation of the *Mitakshara* and the *Dayabhaga* became the two most frequently quoted and relied upon sources in court judgments. The translated code, backed by the authority of British courts, began to make alteration in local customs. The administrators of Bengal in their attempt to find out the correct and original source of Hindu law, totally disregarded the local customs. But contrary to Bengal, in the Bombay Presidency the English distinction between Kings law and common law was applied rather than the Roman categorization of Canon Law and Civil Law. Custom was granted due recognition as an important source of law. Mountstuart Elphinstone, the first Governor of Bombay Presidency (1819-27), influenced by the English jurist Bentham, was of the opinion that the Bengal model of categorization of law as 'Canon' and 'Civil' would not work in the Bombay Presidency. In his scheme, codification of Common Law was essential to guide the European judges in their administration of the native law to the natives. The Common Law has to be based on customary practices of the people rather than the archaic religious texts. This need for the compilation of

common practices stemmed from two presumptions, desire to preserve for the natives their way of ruling, which was combined with an unwillingness to allow the natives to manage their own affairs. To concretize this scheme, he set up a Regulation Committee and brought about the Regulation Code 1827 also known as Elphinstone code.¹⁰

After the political upheaval of 1857, when the administration of India shifted from the Company to the British Crown, a reassurance of non-interference in religious beliefs and practices became imperative. The Government of India Act of 1858 transformed every aspect of Indian Administration. The legal structure went through a major change. The features of the administration as developed in Bengal were made the basis for new forms of unified administration for all the three Presidencies. The Bombay Presidency's treatment of self-governing groups and its acceptance of customary law gave way to the practice of Bengal Presidency of viewing all groups as possessing of a unified Hindu entity. The policy of legislation adopted by the British was selective and affected only some aspects of civil and criminal law while a large area which was termed as 'religious' was left out of its purview, to be regulated by the natives as per their religious doctrines. By treating only some aspects of these laws as religious, the Britisher's were applying the Roman categorization of ecclesiastical and temporal (canon and civil) laws. All issues concerning 'personal' matters were deemed 'religious' rather than customary. Over a period, the terms 'religious laws' and personal laws' were used as synonymous and interchangeable.

The 19th century was the most critical period in respect of British intervention in Hindu personal law. To drive home the point I would refer to three landmark events of the 19th century, namely, the enactment of the Suttee Regulation of 1829, the Hindu Widow's Remarriage Act of 1856 and the Special Marriage Act of 1872. The first two were prior to the revolt of 1857 while the third one was after that. The anti-sati legislation was largely due to the pressure built upon the British by Raja Ram Mohan Roy. The legislation certainly did not have the popular support and, for this reason, could not be fully effective. There were even efforts to nullify the Suttee Regulation. A group of orthodox Hindus formed a committee, obtained over 800 signatures and

¹⁰ J. Duncan M. Derrett, Religion, *Law and the State in India*, Faber and Faber (1968), chapter 9 and 10 is relied upon in this part.

appealed to the Privy Council to restore the institution. It was because of the efforts of Ram Mohan Roy that the appeal was dismissed.¹¹

WIDOW REMARRIAGE ACT OF 1856:

An early intervention in the law, which had crucial consequences on gender and caste, was the Widow Remarriage Act of 1856. This legislation provided relief for remarriage primarily to those castes that practiced enforced Widowhood, mainly upper castes. The Act was also designed to provide this 'relief' to child widows whose husbands had died before their marriages could be consummated. At the same time the legislation provided a punitive provision, a widow who remarries lost her claims to the limited right to the property of her first husband that she had till then. Since many castes had permitted widow remarriage without forfeiting their claims this new clause clearly widened the operation of upper caste patriarchal norms in property arrangements. In various parts of the British administrated territories the courts were applying the penalty clauses of forfeiture of property of the first husband which the Act has prescribed. The British were seeking to make laws uniform so as to administer easily, at the same time, the educated middle class, drawn primarily from the upper castes in regions like western India were seeking to homogenize laws so that these would apply across castes whatever their distinctive customary practices may have been.

British policy was not to meddle with the family laws of the land, they sometimes did meddle and often in support of traditional values. Whether they did so out of conviction, out of plain ignorance or out of political considerations is of course a moot point. One important segment of this complexity comes to fore in the context of the Native Marriage Bill of 1872. Had this Bill been enforced it would have rendered the Special Marriage Act of 1954 redundant. This piece of legislation was extremely progressive and much ahead of its time. It prohibited polygamy, legalized divorce, made inter-caste or inter-religious marriages valid and raised the age of marriage substantially. But it met with stiff resistance from conservative forces. The result was that, unlike the earlier experience with the Sutte Regulation Act of 1829 or the Hindu Widow's Remarriage Act of 1856 when the Company government had overpowered the conservative forces, the British government succumbed and replaced it with the Special Marriage Act of 1872. According to the Special Marriage Act of 1872 anybody could opt to marry under its provision, but before that he or

¹¹Saroj gupta, 'Sati Custom- A historical Perspective', in Lotika Sarkar & B. Sivaramayya (eds), *Women and Law: Contemporary Problems*, Vikas Publication, New Delhi.

she would have to declare his or her being neither a Hindu, nor a Muslim, nor a Buddhist, nor a Jain, nor a Sikh. Virtually, then, it was meant only for the Brahmos.¹² This law was merely to be 'enabling' and was intended to make marriages between various communities among the Brahmos, the reformist group of Bengal, legal. The Native Marriage Bill of 1872 generated extreme anxiety from caste Hindu society as it made possible marriages across castes, and across religious communities. Most importantly, it was registered as a legitimate union between two consenting partners without getting the sanction of the families of the couples. As the debate around this proposed law unfolded, it became clear that there was violent dissent from many quarters to this form of marriage. Among the responses to the proposed Act was the view that 'native society would never countenance a state of affairs in which distinctions of caste and creed were threatened'. Petitions to the government against the proposed Act played on the notion of Brahmanical purity and hierarchy, and the challenge such a law was mounting against authority. Inter-caste marriages were looked upon with 'hatred', and it was argued that the children of such a union would be regarded as bastards. One opponent went on to celebrate the rigidity of castes, 'India as she now stands is proud of her unmixed blood which would scarcely be found in any other part of the world'. Further, 'the chastity of her women is proverbial,' he boasted. Indian women were also extolled 'as reproducers of moral communities' and as upholding the pure traditions of the land, a situation that was now bound to be corrupted.¹³

The Britisher's also intervened in area joint Hindu family property which laid the ground for the introduction of the capital mode of production in an urban setting. To illustrate few, the Caste Disability Removal Act 1850 set aside the provisions of Hindu Law which penalized the renunciation of religion by depriving a convert of his right in the joint family property. The Hindu (Removal of Disability) Act, 1928 prohibited the exclusion from inheritance of certain disqualified heirs. Also, the Hindu Gains of Learning Act 1930 stipulated that all gains of learning (income earned through professional qualifications) would be the exclusive and separate property of a Hindu male even if he had been supported to acquire professional qualifications from the funds of the joint family.

¹²Parth Ghosh, *The Politics of Personal Law in South Asia*, Routledge, New Delhi, 2007, p. 58.

¹³See, Parveez Mody, 'Love and Law: Love Marriage in Delhi.' *Modern Asian Studies* 36, 1 (February 2001) pp 223-256.

THE HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937:

Simultaneously, through a series of judicial decisions the scope of women's rights was constrained in British India beyond all recognition. A new legal principle was gradually introduced through court decisions that whether the property is inherited by women through her male relatives or through her female relatives it is not her stridhana¹⁴ and that it would devolve in the heirs of her husband or father. The women lost the right to will or gift away her stridhana and it acquired the character of a limited estate. Any transaction by a widow in respect of the property inherited by her had to be justified on two grounds, (1) legal necessity or (2) religious or charitable purpose. Upon the widow's death, the property reverted back to the husband's male relatives. The introduction of the concept of 'reversioners' which is basically a legal principle under the English law, bestowed upon the male relatives the right to challenge all property dealings by Hindu widows. To set right the problems created by the judicial decisions of the English courts which had constrained the scope of stridhana, during the later phase of the nineteenth century, Dr. G.V.Deshmukh introduced the Hindu Women's Right to Property Bill in the Legislative Assembly. Through the Bill, Deshmukh hoped to achieve equality between Hindu men and women in respect of their property. Regarding the devolution of the property of a Hindu dying intestate the bill specifically provided that it would devolve upon the wife, mother, daughter and wife of a predeceased son along with the sons and all would have equal share in the property. The Bill equated the status of women to that of men and made them absolute owners of the property.

The Bill met with a great deal of hostility and Deshmukh was ridiculed for introducing this Bill. After much debate, a watered down version of the original bill was finally enacted in the form of The Hindu Women's Right to Property Act, 1937. The provisions of the Bill granting women absolute right to property were mutilated and widows were granted only a limited right of inheritance through a concept called 'widow's estate'. The provision granting daughters a share in the parental property was excluded. The right of married women to separate property under the

¹⁴While women were excluded from the coparcenary, the Sanskrit corpus included a concept of 'women's wealth,' or stridhana, which had been defined differently by different smriti writers and commentators. Although primarily consisting of gifts given to a girl on her marriages, some commentators also included 'gifts from affection' from her husband, property inherited from her mother or her father, and even property acquired through purchase, finding, or her own labour. Yet the kinds of property it included and the nature of ownership it entailed remained highly contested.

scriptural notion of stridhana, which the Bill originally set to restore was subverted. The women's right to property was confined within the limited sphere of inheritance rights of widows.¹⁵

AGE OF CONSENT BILL CONTOVERSY:

A significant arena of ambivalence, tension and perhaps even contestation during the colonial period, deeply impacting women's lives, was the newly constructed legal notion of 'consent' which came to underpin the law on rape and by extension, on marriage. The debate on consent entered the public sphere in India in 1862 when the Age of Consent Bill was passed. The Bill made ten the age of consent in the case of girls for sexual intercourse even within marriage. Given the Indian marriage system, the relationship between 'age' and the capacity to act autonomously, and act with discretion was never a factor in the legality or otherwise. For a variety of reasons marriage was in the past and even today to be arranged. Also because of the widespread prevalence of child marriage the question of consent between the partners in marriage could never actually be located in the partners themselves but had to be located in the father/brother/guardian of the bride and the groom. The tensions and contradictions that the British administered laws introduced into the notion of consent in the context of sexual relations and marriage hit the public arena in the famous case of Rukhmabai in 1887. In brief the story is, when Rukhmabai, a sutar (a lower caste in Maharashtra), refuses to join Dadaji, also a sutar, to consummate the marriage that took place nearly a decade before when she was eleven. Dadaji files a lawsuit for the restitution of his conjugal rights. Justice Pinhey, who presided over the case at the first instance, gives the verdict in favour of Rukhmabai on the ground that she cannot be forced to honour a marriage, which took place 'during her helpless infancy'. The case subsequently raises a major debate on the issues surrounding marriage amongst various interested parties, ranging from the orthodox Hindus, to native reformers in India, to legislators and the news media in India and Britain, transforming the case of an individual seeking her freedom from unwanted marital relationship into a social drama of struggle for women's rights. Having witnessed the ongoing discourse emerged from the responses to Pinhey's verdict, the judges of the Appellate Bench approach the issue of 'restitution' or 'institution' of conjugal rights in the 'Hindu law' more cautiously when the case comes before them, and they finally, and perhaps predictably, reverse the verdict in favour of Dadaji. Faced with the prospect of either living with a husband for whom she has utter disliking or imprisonment for

¹⁵Flavia Agnes, *Law and Gender Inequality*, Oxford University Press, 1999, p69.

defiance to the court verdict, Rukmabai chooses to embrace the second option and thereby simultaneously challenging the Hindu orthodox patriarch and exposing the injustice in the colonial legal system. The case however ends in an anti-climax with Dadaji agreeing to receive two thousand rupees towards costs of the case and not to execute the court decree for Rukmabai's imprisonment. The judgment, although it satisfied the conservative lobby, was an embarrassment to British judicial practice. The whole issue of non-consensual marriage and the right of husbands over their wives within them were severely tested in the Rukmabai case.

The Rukmabai case received some support from liberal sections but characteristically Tilak, who formed the spine of Indian Nationalists, found the case to be in defiance of the Shastras. In fact Tilak used the Rukmabai case to bolster his argument that education corrupted women; one reason why Rukmabai was perceived as refusing to go to live with the 'husband' was because he was illiterate. Tilak defended the husband's position by insisting that a case of this kind be tried according to Hindu Dharmashastra instead of English common Law. He also wanted the case treated as a criminal offence and not as a civil dispute. He himself would judge the case by ordering the 'erring' woman to be punished. He wrote, 'If a woman does not go to her husband she should be punished by the king. And if she disobeys the king's order she should be imprisoned.'¹⁶

On 9th January 1891, the law minister of India, Sir Andrew Scoble, introduced a Bill in the Legislative Council raising the age of consent for sexual intercourse for Indian girls from ten to twelve years. The Bill proposed to define sexual intercourse with married or unmarried Indian girls below the age of 12 as rape, punishable by 10 years imprisonment or transportation for life. The Bill did not interfere directly with the institution of marriage in India, but only with the premature consummation of child marriage. The Age of Consent Bill was the most fiercely fought issue between the colonial government and upper caste men led by Tilak in the 1890s. It subjected the women's body to the most critical gaze in the public sphere as issue of female sexuality, the medical development of women, age of puberty, and her preparedness for sexual intercourse and reproduction were bandied about in the press. The problem of locating female consent was particularly acute. Was it to be puberty which varied widely or a fixed age for all women, or the age of discretion? What was the relationship of women's consent to marriage? Given the marriage

¹⁶Uma Chakravarti, Whatever happened to the Vedic Dasi, in Kumkum Sangari (ed), *Recasting women: Essays in Indian Colonial History*, Rutgers University Press, 1990, pp 74-75.

arrangements in Hindu families, where father or other male guardians decided the marriages of their offspring, could there be a relationship at all. Why was Hindu marriage non-consensual in the first place, both according to law and custom?

Regardless of the passage of the Bill the problem of women's consent continued to elide a decisive location in a women's autonomy to decide for herself in matters of marriage and sexual relations. It is not surprising therefore that in terms of the law elopements could be presented as 'abduction', and women could be regarded as 'accomplices' in their own abduction.

DRAFTING OF THE HINDU CODE BILL:

The 1937 Hindu Women's Right to Property Act introduced substantial changes in how Hindu joint family property devolved, creating significant difficulties of interpretation an application. To sort the situation out, the government formed the first Hindu Law Committee under the chairmanship of Sir B.N.Rau. The Rau Committee recommended in 1941 that key aspects of Hindu personal law should be reformed and codified, beginning with the laws of succession and marriage. Subsequently, second Rau Committee was appointed in 1944. The Committee reiterated its recommendation to codify and reform Hindu personal law, and presented the government with a draft Hindu Code. Post-Independence India's first Prime Minister, Jawaharlal Nehru, made reforming and codifying Hindu personal law a top priority of his government. He revived the second Rau Committee's draft code and placed it under the stewardship of Dr. B.R. Ambedkar. Ambedkar's omnibus Hindu Code bill consisted of eight major parts. Ambedkar's Hindu Code Bill departed from classical Hindu law in four main ways. First, it provided for separation or dissolution of a Hindu marriages, previously unknown in Hindu law, although lower castes had long practiced divorce and remarriages by custom. Secondly, it abolished the *Mitaksara* joint family system and established the *Dayabhaga* for all Hindus. Third, it gave a share of inheritance to daughters in interstate succession; and finally, it gave widows absolute rather than restricted /limited property rights.

The tension between the traditionalists and modernists continued to dominate the Parliamentary debates around the Hindu Code Bill. Several provisions including the provisions of Hindu monogamy, right of divorce, abolition of coparcenary, and inheritance to daughters, were opposed. It was felt that Hindu society will suffer a moral setback if women were to be granted the right to divorce along with a right to inherit property. The reforms were opposed by Rajendra

Prasad, Sardar Patel, P.D Tandon, among others. In 1952, when Jawaharlal Nehru vacillated due to pressure from his colleagues within congress party, Ambedkar resigned in protest from his post as the first Law minister of the Independent India.¹⁷ After the first General Election in 1952, in the first Parliament of Independent India the Hindu Code Bill was split into the four constituent bills that were introduced, debated and passed by Parliament between 1952 and 1956.¹⁸ By the time these Acts were passed by the Parliament 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. The procedural and substantive concessions that Nehru and the Congress Party government made to the Bills were overwhelmingly those that compromised women's rights, watering down the actual content of the reforms and curtailing legal and social rights Hindu Women might otherwise have won. These include the following changes:

1. The original Hindu Code Bill abolished the *Mitakshara* joint family system and replaced it with the *Dayabhaga* joint family system for all Hindus, which was widely seen as more progressive. But the final version reestablished the *Mitakshara* system.

2. The Original Hindu Code Bill provided for separation or dissolution of Hindu marriage. The final version included a restriction allowing divorce only after three years of marriage.

3. The Original Hindu Code Bill had given daughters a full share equal to the share of sons in intestate succession. This was already a very limited property right, since by definition it excluded agricultural land and joint family property, and included only self acquired property and, of course, property that had not been otherwise willed away. The final version of the Bill reduced this to half a share. In addition, an amendment was added that allowed sons to buy out a daughter's share of inheritance with her 'consent'.

In the process of the Hindu Law reforms and unification of the Nation through uniformity in law, several customary rights of women, particularly from the lower castes and southern regions, were sacrificed in the interest of uniformity. Local customs of matrilineal inheritance and other customary safeguards were not incorporated into the new code. The new law of succession under the Hindu Succession Act, 1956 eradicated many other schools of law in favour of one particular

¹⁷*Supra* note. 15 at p.78

¹⁸The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956 and The Hindu Adoption and Maintenance Act, 1956.

school of *Mitakshara* Law. Neither the women were given equal rights nor were the limited rights conferred on them adequately protected. By establishing a new right to will away property, the Act gave a new weapon to men to deprive women of the rights they earlier had under certain schools of Hindu law.

Before the British rulers attempted to codify Hindu Law or put it into the form of a Parliamentary enactment, communities in different parts of the country were governed by widely differing systems of law; such as the many schools of *Mitakshara* in different parts of India, the *Dayabhaga* in Bengal, the *Marumakkattayam*, *Aliyastana* and other kinds of Matrilineal law in certain parts of the South. While the joint family consisted of both men and women and all had a right to sustenance, control of property was differently vested in different regions. Under patrilineal systems like the *Mitakshara* and the *Dayabhag*, women because of the patrilocal nature of the family were not given a full birth right as the sons were. Conversely under the *Marimakkattayam* law, prevailing in what is now called Kerala, the family was joint and property jointly owned. However, the family was matrilineal and matrilocal. A household consisted of a mother and her children, with joint rights in property. Lineage was traced through the female line to a common ancestress. Daughters and their children were thus an integral part of the household and of property ownership. The concept of *stridhan* (women's wealth) or female owned and inherited property coexisted in *Mitakshara* and *Dayabhaga* coparcenary but it was unknown to the *Marumakkattayam* law since their women were full owners of family property like men.

The Hindu Succession Act, 1956, allows for the retention of the *Mitakshara* coparcenary. If there are no female heirs or male heirs in the family line, the coparcenary remains unaffected by the death of male members. However, the Act lays down that the *Marumakkattayam* and *Aliyasantana* households are broken up as soon as a member dies, and the property devolves by succession, not survivorship. Thus the Act heavily privileges the *Mitakshara* patrilineal system over the matrilineal system. The latter have nearly died out in Kerala today due to a variety of reasons. By introducing the right to make wills, the concept of partition unknown to the *Marumakkattayam* and demolishing the principle of survivorship, the Act virtually decrees the dissolution of a system wherein women had better rights and imposes on them an alien system which puts them at a relative disadvantage for no reason other than "uniformity". When the Bill was debated in Parliament, the proponents of women's rights repeatedly pointed out that either females should be

made coparceners on an equal footing with males, or, the coparcenary itself should be abolished. In the initial Bill, Dr. B.R. Ambedkar had abolished the coparcenary altogether, but this met with much opposition in Parliament and the Bill was referred to a joint committee which restored the distinction. The retention of two kinds of property- ancestral and self acquired- puts females at a disadvantage.

On 9 September, 2005, the Hindu Succession (Amendment) Act, 2005, came into force through a notification by the Government of India. Under section 6 of the Act, it gives the following rights to daughters:

The daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son.

- The daughter has the same rights and liability in the coparcenary property as she would have had if she had been a son.
- The daughter is allotted the same share as is allotted to a son.

The amendment abolished section 23 of the Hindu Succession Act, which denied a woman the right to seek partition of an inherited 'dwelling' unit/house, if other male heirs are residing in it and further restricts her right to reside in the inherited residence unless she is a widow or has been separated from or deserted by her husband. However, women will still be subjected to unequal property rights in agricultural land as section 4(2) of the Hindu Succession Act⁵ allows for special laws to address the issue of 'fragmentation of agricultural holdings', 'fixation of ceiling' and 'devolution of tenancy rights' in those holdings. Several states including Delhi, Uttar Pradesh, Madhya Pradesh, Punjab and Haryana deny women equal rights of succession in tenancy rights. Most importantly the right to 'will away' one's property has not been curbed even though it is well established that it is used mainly against daughters. Therefore, the likelihood of daughters being persuaded or coerced into signing away their rights in favour of their brothers remain high. Moreover, the right of a father to disinvest his daughters in his self acquired property also remains intact.

CONCLUSION:

Establishment of private property for the need to have caste purity required subordination of women and strict control over their mobility and sexuality. Female sexuality is channeled into

legitimate motherhood within a controlled structure of reproduction to ensure patrilineal succession. State which supported the patriarchal control over women and thus patriarchy could be established firmly not as an ideology but as an actuality. Therefore gender relations are organized within the structural framework of family, religion, class, caste, community, tribe and state.

When the Constitution was framed for post Independent India, 'Untouchability' is abolished vide Article 17 of the Constitution. So was the discrimination of any form on the ground of caste was abolished from the public sphere. But no efforts were taken to abolish caste from the private realm. Even more various reports of Scheduled Caste and Scheduled Tribe Commissions and other governmental agencies clearly mention that the practice of untouchability still continues in public sphere even after 63 years of Independence. With the change in the mode of production after independence, many castes have delinked from the traditional occupations and moved out of their original habitats, it is in the field of marriage that caste continues to structure the lives of people. The survival of caste in turn continues to structure production, property and labour especially in rural India, thus creating a circuit that reinforces the deeply embedded aspects of inequality inherent in the caste system. We must recognize that it is not just reservations or caste based electoral politics that is keeping caste alive but rather the very factors like unequal control of property, unequal performance of labour and endogamous marriage system, still bound production and reproduction together. Noted feminist anthropologist, Leela Dube, has argued that women play an important role in maintaining caste boundaries through the preparation of food and in maintaining its purity. The bodily purity of upper castes is believed to be linked to what is ingested- so what is eaten, how it is prepared, and how it is served, plays a crucial role in the purity of the men of the family and of the caste.¹⁹ The Constitution has formally ended caste based discrimination in public sphere. But it has neither broken the hold of upper castes on material resources nor their hold over the state machinery. Thus the enforcement of the non-discriminatory provisions in public sphere remains a dead letter because the enforcers themselves, in many cases, subscribes to the ideology of caste. At the same time Brahmanical patriarchy remains intact because men and women uphold the principle of endogamous marriages, not only in rural part of the country but also in urban India, as we can see all around us in the way marriages are carefully

¹⁹Leela Dube, 'Caste and women'. M.N. Srinivas (Ed), *Caste: Its Twentieth Century Avtara*, Viking, New Delhi, pp6-9.

arranged to uphold material and status interests. Should we be surprised at the conjunction of NRI partners with caste and other qualifications in their advertisement in the matrimonial columns in News papers and Internets? Are we exaggerating the links between arranged marriages and property, status, production, labour and reproduction while looking at some as harmless or amusing as matrimonial columns? The importance of endogamous marriage in cementing, holding blood within a bounded group, and keeping one group distinct from the other, was recognized by Ambedker in Annihilation of Caste he categorically mentioned that, “the real remedy for breaking caste is inter-marriage. Nothing else will serve as a solvent of caste.” Law has to provide legal space for all hetro-normative companionship. That’s the only way by which marriage located within caste patriarchy can be abolished. This should be transcended, because a marriage within Indian context is perpetuating caste patriarchy and sexual reproduction within this institution does not reproduce human beings but it reproduces castes. To sum up we need to take note of the continued resilience of the caste system and Brahminical patriarchy, despite the constitutional guarantee of social and political equality to all citizens. The Brahminical patriarchy remains intact because men and women uphold the principle of endogamous marriages.