



WOMEN AND LAW IN INDIA (2004). An Omnibus comprising of Flavia Agnes' *Law and Gender Inequality* pp vii-xvii+250; Sudhir Chandra's *Enslaved Daughters* ppvii-xii+249 and Monmayee Basu's *Hindu Women and Marriage Law* pp vii-xvii+177. Oxford University Press, New Delhi. Price Rs 695/-.

THREE BOOKS written by three different authors at different points of time are being made available together in this omnibus. Each of the books by traversing different analytical routes have shown that the colonial governors deified custom or demonized it depending on their convenience. These studies show that even when British policy claimed to be driven by the concerns of the governed it was really guided by colonial interests. Women and their rights were recognized or compromised depending upon how they fitted into the larger colonial scheme. Each of the books has illustrated the veracity of this policy by examining issues of family law which are of special concern to women. The economic entitlements of women in and outside marriage; the legal decree of restitution of conjugal rights, the age of marriage and widow remarriage are some of the issues which have been closely examined in the three books. All the studies (to a greater or lesser extent) see lawmaking as an interactive activity which emerges from the interplay of lay and legal actors instead of a state prompted authoritarian task. The common theme and similar methodology justifies the joint publication. This simultaneous availability has made the sum of the whole larger than that of the parts. However to appreciate this enhanced value, a separate examination of the each part is necessary.

Law and Gender Equality

This study by Flavia Agnes is prompted by the desire to recover the discourse on gender justice from the polarized debates on the uniform civil code (UCC), which she opines “leaves very little space for voicing misgivings about the feasibility of an all encompassing code within a culturally diverse pluralistic society.”¹ The UCC debate has she holds increasingly entangled “the issue of women’s rights and family law reform ... within the polemics of identity politics and minority rights.”² She has set out to disentangle these crossed wires, by providing

1. Flavia Agnes, *Law and Gender Equality* 1 (1999).

2. *Ibid.*



a thumbnail sketch of the origin and developments of family law in India, along with an exploration of the state interventions at various strategic points of history, to serve as “necessary backdrop against which the demand for gender equality can be reformulated”³. The study has been divided into four parts. Part one deals with pre-colonial and colonial legal systems. Part II examines the post independence developments, whilst in part III the law reform efforts relating to non-Muslim minorities have been addressed. In the concluding part the author has turned her attention to the various proposals on a uniform civil code and other law reform suggestions aimed to strengthen the economic rights of women both within and outside marriage.

Scholarship promotes social activism when it provides both information and analysis which challenge popular misconceptions and provide for informed understanding. Agnes as an activist scholar has moved to perform this function in her study. Thus, she informs that Manu did not only speak of the perpetual dependence of women but also ordained hell for those relatives who lived off the property of a woman⁴; that the *smritis* did not make a dramatic difference in the economic entitlements of men and women before the property was partitioned;⁵ that the husband was bound to maintain his wife despite all her faults;⁶ that a Hindu man could marry again but he was under the legal obligation to maintain his first wife who was also entitled in supersession fee to an equal share of the property which the husband gifted to the new wife;⁷ that Muslim law protects female heirs by restraining the male power of testamentary succession.⁸ Even as the significance of these pieces of information is undeniable their effectiveness has been reduced by inadequate referencing.⁹

As already mentioned Agnes has adopted a historical approach to promote her case for a personal law which was gender just whether or not it was uniform. An important component of her analysis was to demonstrate how *shastric* law changed and evolved according to the varied needs of society. This process of evolution was however stopped and the law frozen when the colonial governors started to rely on

3. *Id.* at 2.

4. *Id.* at 3.

5. *Id.* at 14-15.

6. *Id.* at 15.

7. *Ibid.*

8. *Id.* at 3.

9. For example, Agnes informs that Manu’s dictate to righteous kings to punish as thieves the relatives who appropriated the property of a woman was quoted in the later *smritis* with approval. The accompanying endnote provides the reference to *Manusmriti* but references to the later *smritis* has not been provided. *Id.* at 15.



shastric law in arriving at their decisions.¹⁰ This was because they treated the customary tenets as fixed and rigid and not evolving and flexible. Further in this process of application the diverse practices which subsisted in different segments of society were ignored; and an upper class inspired, uniform, monolithic, normative system was artificially created and established.¹¹ This process Agnes shows to be especially problematic as it caused several economic rights of women from lower castes to be sacrificed. A fact the author uses to explode the myth that the indigenous system uniformly discriminated against women and this deprivation would have continued unabated but for the interference of the colonial governors. Agnes expose of the top down system of lawmaking is not limited to the colonial government alone. She finds a similar inadequacy in the manner in which the personal laws were drafted post-independence. Thus, for example, the Hindu Succession Act unlike *shastric* law does not set up an independent system of inheritance for women.¹² The negotiations surrounding both the Hindu Women's Right to Property Act, 1937 and the Hindu Succession Act, 1956 only proceeded towards diluting the economic rights of women.

A large part of the work is prompted by the need to question popularly held perceptions be it on the: modern and reformist content of Hindu law, or the regressive and obscurantist content of Muslim law. She has shown how the regressive provisions of Hindu law have been camouflaged by ostensibly progressive provisions; whilst the progressive developments in Muslim law are either downplayed or ignored. Thus, whilst the challenge to the *Shah Bano* decision and the enactment of the Muslim Women (Right to Property on Divorce) Act was highly publicized the pro-women decisions emanating from the Muslim Women Act have been largely ignored. As a result little or no information is provided to challenge popular misconceptions.

The study forges a strong linkage between politics and law. This connection again comes to the fore in the manner in which Agnes discusses the efforts to reform Parsi and Christian law. She contends that due to the high economic leverage the Parsis enjoy in the country the effort to reform their law initiated by the male liberals of their community was accorded greater urgency than the reform efforts initiated by the women members of the Christian community. Religion laced arguments are selectively entertained. Herein of interest is

10. This process opines Agnes shows how the British straitjacketed custom. *Id.* at 45.

11. *Id.* 18-26 for the significance accorded to local custom by the Smritikars and the wide diversity in local practices.

12. See *id.* at 18 for details on the *shastric* system of inheritance.



discussion of two decisions of the Bombay High Court and Privy Council whereby it was ruled that conversion to Zoroastrianism could not happen because whilst Zoroastrianism is a religion Parsis were a race and conversion to a race could not happen.¹³ And the counter of religious personal law can yield strange results. The Parsis sought and obtained a departure from the English inheritance system on the reasoning that Parsis had distinct system of inheritance for Parsi women which evidently provided to Parsi women a better deal than was available in the English law of inheritance. However this same system of distinctiveness resulted in a separate system of inheritance being provided in the Indian Succession Act which accorded lesser rights to Parsi women.

Agnes is neither seeking necessary deference nor inevitable challenge to religious authority. Instead she is attempting to develop arguments and procedures which enhance the psychological and economic well-being of women. Consequently in the face of an oppressive Christian law of divorce she is critical of the decisions of the Supreme Court¹⁴ which held that annulments granted by the ecclesiastical tribunal were not valid under the civil law and couples who had obtained such annulments were not free to marry again. These decisions Agnes points out “rendered Christian marriages even more stringent and blocked all avenues of any progressive interpretation”.¹⁵

Agnes has set out to build a gender just legal edifice; consequently she examines every law reform proposal depending upon how it fares on the gender empowerment scale; if it increases women empowerment it deserves inclusion otherwise it is better rejected.¹⁶ And this scale has been constructed by Agnes drawing from the lived experience of women whose cause she has advocated inside and outside courts. This advocacial experience is the strength of the book; ironically, it is also its weakness. Agnes has been intent on constructing a meta-narrative on the legal oppression of women and has spawned a wide universe to collate her evidence. However, the advocate has often prevailed over the researcher consequently whilst the analysis of information collected is imaginative and forward looking the evidence base for the information is often incomplete. This documentation inadequacy could reduce the effectiveness of a politically alive and legally imaginative monograph and hence needs to be remedied in future editions of the book.

13. Once again whilst the analysis is strong the evidence base for the analysis is weak. Agnes provides the reference for the high court decision but no citations have been provided for the Privy Council decisions. *Id.* at 133-34.

14. *Jordon Diegdeh v. S.S. Chopra*, AIR 1985 SC 935 and *Molly Joseph & Anr. v. George Sebastian*, 1996 AIR SCW 4267.

15. *Supra* note 1 at 157.

*Enslaved Daughters*

If Flavia Agnes has used broad brush strokes to paint her canvas, Sudhir Chandra has employed fine ones to depict the *Rukhmabai* case. Every dispute in a court of law is firstly a conflict in the life of the parties. Generally legal treatises and case analysis foreground the legal reality but neglect or marginalize the socio-political circumstances surrounding the legal dispute. Sudhir Chandra's *Enslaved Daughters* is an exception to this rule. The case study does not only examine the legal case for and against restitution of conjugal rights; it also describes in detail the out of court developments and how these influenced and were influenced by the court proceedings.

It shows how the legal remedy of restitution of conjugal rights reinforces social expectations, and how the law of the colonial state can drive a wedge between various sections of society, not just on how the legal system should deal with the demands made on it, but whether those demands can be made at all on the colonial legal system. These social divisions have then been played out at several legal and non legal sites. Amongst the non legal sites the most important ones were the pages of newspapers. In order to comprehensively document relevant public opinion of the time Chandra has perused, documented and analyzed the regional and English language papers in India along with the mainstream and alternative newspapers in England¹⁷. He has synchronized the editorial and other news reports in the papers with the date wise developments, which have happened in the court case, to hypothesize on the influence the media reports may have had on the case adjudication.¹⁸ And this procedure he has followed through the narration of the entire case proceedings.

Enslaved Daughters as the title itself suggests is primarily an effort to understand the oppression that the institution of marriage imposes upon women across time and place. Rukhmabai's refusal to join her husband in the matrimonial home allows for aspersions to be cast on

16. *Id.*, see here part IV and the manner in which she has processed the various proposals surrounding the uniform civil code and especially the manner in which she reacts to suggestions for compulsory registration of marriage.

17. For a detailed consideration of these materials see chapter 4 of the book *id.* at 111-159.

18. Thus whilst recounting the original court judgment of Pinhey, Chandra reports "Having read the letter of a "Hindu Lady" on Saturday morning and later in his courtroom, seen the character of the men who claimed Rukhmabai among their midst, he had spent an agonizing Sunday." And on Monday the judge remarked to the Advocate General "that unless you are particularly anxious to make some remarks for the assistance of the Court, I think I need not trouble you as I am willing to dispose of the case at once". Sudhir Chandra, *Enslaved Daughters* at



her character by all and sundry. The fact that voices were also raised in her favour and that she did not hesitate to speak up in no way lessened her vulnerability. It is this vulnerability which ultimately caused her to “reject the tyranny of reformist expectations and refuse to be sucked inextricably into the role of a martyr”.¹⁹ It is interesting to note as Chandra’s analysis also shows the points of controversy did not change very dramatically when the Andhra Pradesh High Court held the provision of restitution of conjugal rights to be unconstitutional.²⁰

Whilst vouchsafing the importance of the book as a deep study of the discrimination faced by women at home and abroad it is also recommended as a primary text to judicial process students. As it is rarely that one finds an Indian text which has deeply studied Indian primary materials to construct the progression of a case and to understand its various legal dimensions. Chandra’s book is a tempting invitation to legal scholars to move from sterile analysis of appellate court judgments to studying at least landmark court cases in their entirety from primary records. This fascinating project in legal history asks for emulation.

Hindu Women and Marriage Law

This third book by Monmayee Basu flows from her doctoral work, which addressed the matrimonial problems of Hindu women from 1856 to 1956. Basu begins her study by pondering upon the condition of Hindu Women during the second half of the nineteenth century. This description begins by referring to renowned women teachers such as Gargi and Maitrayee, from whom she jumps to Rani Lakshmi Bai of Jhansi and Ahalya Bai Holkar. Next we are informed that “the condition of Indian women in general and of Hindu women in particular began to deteriorate after the Muslim conquerors settled in India.”²¹ There is no evidence provided for this sweeping statement; even as this bold statement is only one of many other opinionated generalizations that are strewn through the work. Such like generalization diminish the value and authenticity of other better-researched segments of the work.

The chapters on age of marriage²² and widow remarriage²³ usefully document the various controversies and debates surrounding these law

19. *Id.* at 166. It is important to note that after her settlement with Dadaji Rukmabai chose to pursue her medical education. And on the death of Dadaji in 1904 decided to don the Hindu widow’s garb though in his lifetime she refused to accept him as her husband. *Id.* at 202-03.

20. For an exploration of the resonances between the past and the present see *id.* at 206-209.

21. Monmayee Basu, *Hindu Women and Marriage Law* at 2.

22. *Id.* at 39-66.

23. *Id.* at 67-84.



reform efforts. Thus, the author informs how the select committee required to scrutinize the child marriage and age of consent bill deleted the provision whereby all child marriages below a certain age were to be declared invalid and instead introduced a penal provision.²⁴ The chapter on age of marriage also recounts the British response to the social reform petitions²⁵ along with providing information on how select Indian states dealt with the issue of child marriage.²⁶ In comparison the widow remarriage chapter has devoted greater attention to the memorandums documenting the plight of widows. Of special interest here is a letter jointly written by a number of widows to the editor of a leading newspaper expressing their views on widow remarriage.²⁷ Basu again in line with what Agnes has done shows how the property rights that women possessed under both the Mitakshara and Dayabhaga school of Hindu law were substantially superior to the ones recognized under the Hindu Widows Remarriage Act, 1856.²⁸

Even as the study provides useful nuggets of information; this information has not been woven into an overarching analysis. Further the author inextricably mixes her evidence based and bold opinions which accords an uneven quality to the work. All in all it is the weakest link in the trilogy.

Despite the plurality of styles this omnibus which has been tied together with a comprehensive introduction by Flavia Agnes²⁹ provides in the main exciting primary data on the social status of women by exploring the dynamism between statutes, litigants and court verdicts. However, except for some chapters referring to Muslim, Christian and Parsi women and their laws in gender and inequality the omnibus has primarily limited its attention to Hindu women. To that extent the value of the omnibus would have been greater if an in depth case analysis of a leading case such as *Shah Bano* had been included as the third book along with the wide ranging study of Flavia Agnes and the intense analysis of Sudhir Chandra. Be that as it may, even as of now each of the books in different ways assist in developing a deep understanding of the state of women and law in India.

*Amita Dhanda**

24. *Id.* at 54.

25. *Id.* at 40 to 44 and 46-57.

26. *Id.* at 51.

27. *Id.* at 68.

28. See *id.* at 69-70 for the Hindu Widows' Remarriage Act, 1856 which deprived women of their property rights. And for the property rights of widows under Dayabhaga and Mitakshara law see *id.* at 78-79.

29. *Id.*, Flavia Agnes "Introduction to Omnibus" at ix-xlv.

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