Kinship Varieties and Political Expediency: Legislating the Family in Post-Independence India

KINSHIP VARIETIES AND POLITICAL EXPEDIENCY: LEGISLATING THE FAMILY IN POST-INDEPENDENCE INDIA[1]

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ABSTRACT: *Excepting pockets of matrilineal kinship in the south-west and north-east of the Indian subcontinent, Hindu kinship organization predominantly follows the rule of patrilineal succession and inheritance. Indeed, in the nineteenth century Sir Henry Maine had seen in the Hindu family a living example of the "patriarchal family" of ancient times. Contemporary Indian feminists, too, have divined the roots of women's oppression in the "patriarchal" ideology of the traditional family. On the other hand, beginning with Lewis Henry Morgan, generations of scholars have pointed to fundamental, systemic differences in Indian kinship organization between North Indian ("Aryan") and South Indian ("Dravidian") kinship, notwithstanding the general rule of patrilineal succession. These differences, which are focused on variant rules of marriage, correlate with well-articulated differences in a range of factors that are believed to bear upon the question of female autonomy and well-being.*

As the culmination of a hundred years of Social Reform, directed at improving the social position of women, post-Independence India has seen the institution of a series of new laws governing marriage, succession, adoption and maintenance. Both the Special Marriage Act (1954) and the Hindu Marriage Act (1955) expressively de-legitimized Dravidian marriage practices while simultaneously (and contradictorily) allowing their retention as "custom." This paper reflects on the complex politics of this gesture, which has generated relatively little public comment and negligible case law. Certainly, it is nowhere flagged as a "gender" issue.

A GEOGRAPHY OF INDIAN KINSHIP

The Ubiquity of Patriarchy

In 1985, the Anthropological Survey of India, set up some 40 years earlier in anticipation of the challenges of nationhood, embarked upon a mammoth project to document the biological, social and cultural traits of "the peoples of India" (Singh 1993, pp. xi-xiii, 1-3). The survey began – problematically, in some reckonings – by identifying 4,635 distinct "communities" in the subcontinent. Over the next five years, some 500 scholars spent 26,510 days in the field, recording the testimony of 24,951 key

1 Among others I would like to thank: Toshie Awaya, Kriti Kapila, M.S.S. Pandian, Sumathi Ramaswamy, Jaivir Singh, B.K. Singh and J.P.S. Uberoi, along with participants in the Conference on "The Logic of Female Succession: Rethinking Patriarchy and Patrilinearity in Global History"(Kyoto, International Research Center for Japanese Studies, 10-14 January 2002).

informants of these communities in 3481 villages and 1011 towns and cities throughout the country. The outcome has been a score or more of state-wise community surveys, and a series of synoptic volumes on different themes, one of them an "anthropological atlas" that includes some 28 maps on various aspects of social organization (ibid.).

A number of maps in the Peoples of India *Atlas* indicate a strong patrilineal emphasis throughout the subcontinent: for instance, Map 47 (Singh 1993, p. 52) shows an overwhelming preponderance of inheritance in the male line, typically male equigeniture (3680 communities),[2] and succession through the eldest son in 4427 communities,[3] while Map 43 (ibid., p. 48) shows a strikingly similar profile in respect of the norm of patrilocality. Put together with the information that almost all communities report some kind of internal division, and that many – distributed throughout India – have a clan organization or some other type of exogamous division, one may presume that descent groups organized along patrilineal principles are a very widespread phenomenon. While the *Atlas* does not expressly map bilateral inheritance and succession (nor, for that matter, neolocality), the maps do record the small but significant presence of a matrilineal type of social organization, linked to a norm of matrilocality, in the southwest of India, especially the present state of Kerala, as well as in the northeastern, "tribal" states (ibid., pp. 49, 53).

Given this picture, it is little wonder that Indian society[4] is routinely characterized as a typical and classic example of a "patriarchal" society as conventionally defined, that is, as one in which descent and group placement, inheritance and succession are all "harmoniously" in the male line; where post-marital residence is patrilocal; and where familial authority resides with the senior male members (see e.g. Radcliffe-Brown 1952, p. 22). Indeed, Sir Henry Sumner Maine, the celebrated author of *Ancient Law* (1861) and a founder of anthropological kinship studies, believed that Indian customary practices, as reported by ethnographers and colonial administrators, provided living evidence of an earlier stage in the evolution of human social life (see Uberoi 1993, pp. 8-12). This stage, which he termed "ancient society," was characterized by the social formation of the "Patriarchal Family" – "a group of men and women, children and slaves, of animate and inanimate property, all connected by common subjection to the Patriarchal Power of the chief of the household" (Maine 1895, p. 15). This ancient type of family was instantiated in Roman law and in the social organization of the ancient Teutonic tribes, as well as in classical Hindu law (the

2 But also male primogeniture (129 cases) and male ultimogeniture (55).

3 Younger son (27); adopted son (117). Note that the map conflates rules of inheritance and succession.

4 Perhaps one should specify more precisely that the reference is to the *Hindu* communities of India, Hinduism being the religion of approximately 80% of the population. The ethnographic coverage of Indian Muslim communities is relatively limited, though Leela Dube, for one, has brought Indian Muslim communities into the purview of her comparative study of gender and kinship in South *versus* Southeast Asia (1997). On the Muslim family, see Ahmad 1976.

dharmashastric texts which are the religious basis of the Hindu Joint Family [see Lardinois 1992]).

The predominance of patrilinearity through South Asia is not merely a quaint ethnographic fact of interest to a handful of anthropologists. To the contrary, a number of demographers and population experts see patriliny as an important "cultural" fact or that can economically explain several contemporary social phenomena in the region, for instance, the notorious South Asian "son preference", continued excessive fertility on this account, skewed sex ratios and – related to these – women's compromised "autonomy." In a typical account (to which I too have contributed):

> *Patrilinearity* means that group membership is passed through the male line. Typically, this involves passing on the main productive assets through the male line, which constrains women's ability to be economically viable without being attached to a man. *Patrilocality* means that it is normative for couples to live in the man's home. Women have rights of maintenance as daughters in their husband's home, but they have no rights to own key productive assests such as land. The combination of rigid patrilinearity and patrilocality essentially means that women have little independent social or legal personhood.
>
> . . . [O]nly *men* constitute and reproduce the social order. The mother merely gives birth: it is through the father that a child acquires a social identity and is incorporated into the social order. Since only boys remain in the lineage, the significant social reproduction is that by the father of the son. Men are the fixed points in this social order, and women are the moving points because when they marry they leave their home and lineage, and are absorbed into their husband's lineage (Das Gupta *et al.* 2000, pp. 3-4, original emphasis).

Indeed, so tenacious is the hold of the patrilineal tradition of social organization in some societies (India, China or Korea, for example) that some scholars insist that modernization processes may actually work to *exacerbate* the pre-existing sex bias in favor of males, or to compromise any but the sternest efforts on the part of the state to enhance women's autonomy (Das Gupta *et al.* 2000; Sen 2001).

Alternatively, the developmental state may itself be conceived as a "patriarchal" institution, articulating the "familial ideology" of patrilineal kinship through law and public policy (see e. g. Agarwal 2000). "Familial ideology," claim two feminist legal scholars summing up the characteristics of the present-day Indian legal system, constructs women as "self-sacrificing mothers, loyal and chaste wives, [and] dutiful and virginal daughters": "Women who live up to the ideals of motherhood and womanhood are given some protection: Those who fail to measure up are penalized" (Kapur and Cossman 1996, p. 97). Similarly,

> Many aspects of legal regulation are shaped by assumptions of women's economic dependency within a patrilineal and patrilocal joint family. Within this structure, women are assumed to be economically dependent on male members of their families – fathers, husbands, adult sons... . [B]oth maintenance and property laws, as well as the legal regulation of women's work, are shaped by and serve to reinscribe women's economic dependency (Kapur and Cossman 1996, pp. 96-97).

As the foregoing quotation suggests, Indian feminists have been quick to connect the conspicuous sex bias in the region with the predominance of patrilineal kinship organization. Anthropologists with feminist leanings also discern significant differences in women's status between the patrilineal and matrilineal communities within India, and between largely patrilineal India and the bilateral communities found through much of southeast Asia (e.g. Dube 1997, esp. ch. 3). Thus, in both public and academic discourse in India, the notion of "patriarchy" tends to retain its original meaning, that is, *directly connecting* the descent principle with the unequal social relations of the sexes and the power of senior men over junior in the family or lineage (e.g. Bhasin 1993). On this asymmetrical structure may be overlaid certain features peculiar to a "caste society," for instance, the specific construction given to the ideal of women's "purity" in South Asia (Chakravarti 1993). In the European context, by contrast, the connection between patrilineal social organization and patriarchal relations of the sexes – if it is invoked at all – is deployed to explain the "origins" of patriarchy, that is, transposed backwards into a pre-existing stage of human history (Engels 1977). In short, in the European case it is the modern *sexual division of labor* in the family and society, rather than the *rule of descent*, that defines patriarchy, whereas in the Indian case the two are seen to be intrinsically interconnected and mutually enforcing, in the present as in the past (see Uberoi 1995).

Returning to the cartography of Indian kinship, one might say, in sum, that focus on the descent principle produces a map of India which appears largely homogeneous. Patrilineal descent, supported by the norm of patrilocal residence, is almost universal, as is the corresponding social institution of the patrilineal joint family. Seen thus, the chief problem to be explained is that of the relationship of matrilineal communities to the larger society, for instance: (i) the singularity of regions of matrilineal kinship with respect to standard development indicators, particularly those relating to the social position of women; (ii) the accommodation of matriliny to "patriarchal" Islam and Christianity; (iii) state intervention and community self-reform during the colonial and post-colonial periods; and (iv) the dynamics of the social and cultural integration of matrilineal communities into the national "mainstream" after Independence.[5]

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5 See, for instance, Dube 1969; Jeffrey 1993; Nair 1996, pp. 150ff; Nongbri 1993; Saradamoni 1999; Uberoi 1996a, to cite but a few examples.

The Variety of Marriage Rules and Practices

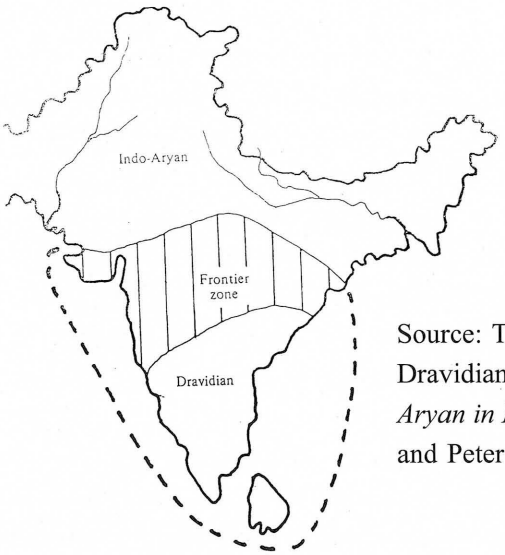
There are, however, *other* conceivable cartographies of Indian kinship that contrast with the relatively homogeneous picture produced by mapping the descent principle. For instance, and notably, the distribution of "consanguineous marriages" as represented in the *Anthropological Atlas* shows a marked difference between the north of India, especially the northwest (disregarding the Muslim-majority state of Jammu & Kashmir), and the south (the states of Kerala, Karnataka, Tamil Nadu and Andhra Pradesh) in respect of the prevalence of cross-cousin marriage (marriage with the mother's brother's daughter [MBD] or father's sister's daughter [FZD]) (Singh 1993, pp. 41, 42), a practice conspicuous in the south but almost absent in the north (except among Muslims).[6] The regional difference is especially striking with regard to uncle-niece marriage (of the mother's brother-[elder] sister's daughter type [MB-eZD]) (ibid., p. 43).

As it happens, the regional differentiation in marriage preferences corresponds roughly with the distribution of language families and major languages in the subcontinent (Singh 1993, p. 77). In brief, the conspicuous feature of the language map of India is the north-south distribution of Indo-Aryan and Dravidian languages, a division which is *also* manifested in distinctively structured kinship terminologies. Leaving aside here the Munda (Austro-Asiatic), Sino-Tibetan, and other exceptional cases, Indian kinship terminologies are polarized between an Indo-Aryan type (north India) and a Dravidian type (south India), with a "frontier zone" of mixed features between the two (Indo-Aryan vocabulary/Dravidian structure; Dravidian vocabulary/Indo-Aryan structure) (see Figure 1; Trautmann 1979, p. 163; 1981, esp. ch. 3). In a general sort of way, these differential kinship semantics find reflection in different kinship practices and rules of behavior, notably in respect to marriage.

Genetically speaking, as Thomas Trautmann has argued (1979, 1981), the structure of the Dravidian type of kinship vocabulary presumes a rule of sister exchange or, in anthropological terms, a rule of bilateral cross-cousin marriage, matched by a corresponding proscription on parallel cousin marriage (marriage with FBD or MZD). (Cousin marriages of *all types* are prohibited in the north.) The hypothesized Dravidian rule survives intact, or in a modified (unilateral) form, in the kinship terminologies of present-day Dravidian speakers (see Figure 2), with their marked cross/parallel distinctions. It is represented also – to a greater or lesser extent – in their kinship practices. Of course, for a variety of reasons, including demographic contingency, practice nowhere accords fully with the "rule," and one finds instances of marriages in the region of Dravidian kinship (i) that conform to rule only by extension (marriage with

6 Parallel cousin marriage is relatively rare, again, except among Muslims. The *Atlas*' mapping of the incidence of parallel cousin marriage does not, unfortunately, distinguish between the matrilateral and patrilateral types (see Singh 1993, p. 44), a compelling distinction in view of the overall patrilineal bias through the subcontinent.

FIGURE 1. Approximate Geographical Distribution of the Dravidian and Indo-Aryan Kinship systems



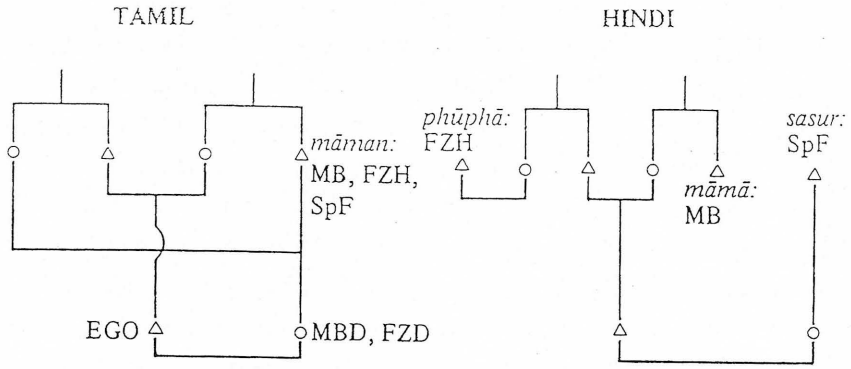
Source: Thomas R. Trautmann, "The Study of Dravidian Kinship." P. 163 in *Aryan and Non-Aryan in India*, edited by Madhav M. Deshpande and Peter Edwin Hook.

"classificatory," not "real," cross-cousins); (ii) that contradict the rule; or (iii) that can be construed as both conforming to and contravening the rule, depending on which way the kinship connection is traced (see e. g. Trautmann 1981, pp. 216-28). Similarly, in the region of north Indian kinship, marriages may in fact take place in disregard of the rules which, as we will see, disallow not only cross-cousin marriage but also inter-marriage within a much wider, bilateral circle of kin. Limitations of choice (e.g. the need to arrange a marriage with "known" families; very narrowly defined caste-endogamous boundaries; inflated rates of dowry, etc.) and considerations of caste status are among the reasons commonly cited for the infringement of exogamous rules in the north.

The special features of Dravidian kinship – at least as these are formally articulated through the kinship terminologies of languages of the Dravidian language family – had also been noted by nineteenth century scholars like Lewis Henry Morgan, another of the founders of anthropological kinship studies. For Morgan, the "discovery" of the terminology of Dravidian kinship was the final piece of evidence he required to figure out the basic "systems of consanguinity" of the human family and the genetic relationships between them (see Morgan 1870; Trautmann 1981, pp. 62-72; 1987), linking the social organization of speakers of Dravidian languages with that of the Iroquois and other native peoples of North America.

As is well known, Morgan's work has left a mixed legacy in anthropological kinship studies (see Trautmann 1981, pp. 72-90; 1987). On the one hand, it has been derided for its "speculative" historicism; on the other hand, it has proved to be the

FIGURE 2. Tamil and Hindi Kinship Terms for B Mother's Brother, Father's Sister's Husband, and Spouse's Father



Notation: F=father, M=mother, B=brother, Z=sister, H=husband, W=wife, S=son, D=daughter

Source: Thomas R. Trautmann, "The Study of Dravidian Kinship." P. 159 in *Aryan and Non-Aryan in India*, edited by Madhav M. Deshpande and Peter Edwin Hook.

inspiration for formal kinship semantics as well as the impetus for structural-functionalist investigations of the relationship between kinship terminologies and kinship practices. In the Indian context, additionally, Morgan's work has inspired a number of attempts to reconstruct an original "Indo-Aryan" kinship system through the evidence of the classical legal sources, the Sanskrit Dharmashastras. The writings of G. S. Ghurye and his associates and pupils come to mind here.[7]

In her long standard, but latterly rather neglected work, *Kinship Organization in India* (originally published in 1953), Ghurye's student Irawati Karve drew on the evidence of kinship terminologies in the first instance, and the ethnographic record by way of supplement, to differentiate four main varieties of kinship organization in the Indian subcontinent, coordinating with the distribution of language families. The major division, and the chief focus of Karve's attention, was that between (1) the North Indian or "Indo-Aryan" system, which she saw as continuous with the model represented in the classical Sanskrit legal texts; and (2) the southern region of "Dravidian" kinship. Between these two she posited (3) a "Central" kinship zone with mixed features, covering Maharashtra, Gujarat and parts of Rajasthan through Madhya Pradesh to Orissa, while (4) a non-contiguous "Eastern" zone, effectively a residual category in her scheme, included speakers of the Sino-Tibetan and Austro-Asiatic language families (Karve 1965; see the excerpt in Uberoi 1993, pp. 50-73).

7 See especially Ghurye 1955; Kapadia 1955; Karve 1965; Sundar n.d.; Upadhya n.d.; also, importantly, Prabhu 1995.

For Karve, as indeed for others who have focused on the differentiation of North and South Indian kinship, the intellectual problem and heroic challenge was that of explaining the unity of the two systems, notwithstanding their typological and genetic differentiation. Karve's answer was, simply, that these differences pertained within the overall cultural unity provided by the twin institutions of the *Hindu caste system* and the *Hindu joint family* (see Karve 1965, pp. 5, 8). Other scholars have proposed somewhat different solutions to this conundrum in a debate that dominated the field of Indian family and kinship studies through several decades (see Carter 1973; Dumont 1966; Trautmann 1981: esp. Ch. 4; and essays in Ostor, Fruzzetti and Barnett 1983).

Be that as it may, we note here, simply, that Karve's differentiation of north and south Indian kinship centered in particular on the fact that the Dravidian system allows (indeed it positively enjoins) marriages with certain types of close kin that are prohibited as marriage partners in the north. Along with this go certain other kinship practices that are believed to entail a moderation of the strongly patrilineal emphasis of the north Indian Indo-Aryan system. For instance, north Indian customary rules of exogamy not only require a ban on marriages within the patrilineal localized descent group, but sometimes extend this exogamous prohibition to cover *all* co-villagers, whether distantly or only putatively related under the same patronymic, or completely unrelated (see below); in south India, by contrast, intra-village marriage is generally permitted. Thus, in the north, women typically marry total strangers, at a considerable distance, and thereafter take up residence with their husbands' families, whereas in the southern kinship system women may marry within the kin-network, possibly within the same village, and have greater flexibility in regard to post-marital residence arrangements. Add to this the higher prevalence of dowry marriage in the north, and you have there a family system which is qualitatively and experientially different from that in the south, at least from a woman-centered perspective.

Karve's picture of regional differentiation in kinship practices was further amplified by anthropologist Pauline Kolenda in a series of papers from 1967.[8] Utilizing materials from a number of ethnographic studies of the 1950s, along with household and other information from the 1961 Census, Kolenda's main purpose was to correlate the incidence of different family forms – particularly the patrilineal joint family – with factors such as caste status, size of land-holding, and rural/urban residence. To these she added a set of proxy-measures of women's domestic "bargaining power," referring to the emotional or material leverage that a young married woman might bring to bear on her husband to persuade him to set up house independently of his patrikin (Kolenda 1987, chs. 1, 2 & 5):[9] high or low rates of divorce and remarriage;

8 Collected in Kolenda (1987) and dedicated, significantly, to the memory of Irawati Karve.

9 Kolenda's concept of "bargaining" is somewhat different from the interpretation recently given it in the writings of feminist economists such as Bina Agarwal (1994, ch. 2), though substantive features overlap.

bridewealth or dowry payments; and stronger or weaker ties with the wife's kin (uxorilaterality versus virilaterality) (Kolenda 1987: Chs. 1, 2 & 5). Kolenda's studies indicated the higher prevalence of joint families in the northern zone; conversely, factors enhancing women's bargaining power appeared to be stronger in the south. As she also noted, these regional differences in the prevalence of the joint family appeared to correlate with certain other significant social phenomena that are now regarded as indicators of "social development."[10]

REGIONAL KINSHIP PATTERNS AND SOCIAL DEVELOPMENT INDICATORS

Though Karve and Kolenda were chiefly interested in investigating patterns of family and kinship *per se*, focus on the regional dimension of family practices has subsequently been co-opted to other, and wider, explanatory ends. In the first place, it has been used to explain regional patterns of demographic behavior. "The main states of India," Dyson and Moore wrote in an exceedingly influential paper in 1983,

> can be broadly grouped into *two basic demographic regions*. In contrast to the north, states in the south and east are characterized by the following: relatively low overall fertility; lower marital fertility; later age at first marriage; lower infant and child mortality; comparatively low rates of female to male infant and child mortality, and, largely as a consequence, relatively low [male to female] sex ratios (1983: 42, emphasis added).

Dyson and Moore related these differences in demographic behavior to the different levels of "female autonomy" enabled by the respective family and kinship systems: low in the north, higher in the south.

Subsequent studies (e.g. Agarwal 1994; Basu 1992; Raju *et al.* 1999) have in general endorsed Dyson and Moore's observations, while refining the notion of demographic zones,[11] and seeking to account, in one way and another, for apparent anomalies in the data. In particular, as indicated earlier, the regional asymmetry of sex ratios is an issue that has attracted much scholarly attention – from demographers and economists, and, of course, from feminists.[12] Sex ratios are generally female-adverse throughout South Asia, as they are also in some other patrilineal societies like China

10 For instance, the south has more female-favorable sex ratios, higher levels of women's education, and a greater proportion of women in salaried occupations (Kolenda 1987, ch. 5). See also Raju *et al.* 1999.

11 See, for instance, Bhat 1996, who, working with better quality data than was available to Dyson and Moore, is able to distinguish seven distinct levels of fertility transition; also Bhat and Xavier 1999.

12 See among others Agnihotri 2000; Miller 1981; Miller 1989; L. Visaria 1999; P. Visaria 1972.

and Korea. But what is notable all the same is the distinct regional differentiation between north and northwestern India on the one hand, and south and east India on the other. This clearly calls for explanation *beyond patriliny*, that is, in (i) some other endogenous feature of the kinship system (such as marriage rules and practices); (ii) in kinship-related social practices (e.g. women's inheritance rights, or female seclusion [purdah]); (iii) in other exogenous factors of society, polity and economy; or (iv) in some mix of these features.

A major demonstration of the homology between regional patterns of kinship and marriage and other factors that may enable or inhibit women's "bargaining position" in the family and society is offered in economist Bina Agarwal's carefully documented *A Field of One's Own: Women and Land Rights in South Asia* (1994). This study seeks to map women's customary and statutory rights of inheritance in South Asia (India, Pakistan, Bangladesh, Nepal and Sri Lanka), specifically, their rights of inheritance in *arable land*, which is the most important resource and chief means of livelihood for some three-quarters of the region's population (1994, esp. ch. 3). Agarwal's study reveals a noticeable north/south India dichotomy, women in the south being more likely to inherit land under customary law as wives or as daughters, or to be apportioned land as dowry. She found a similar patterning, too, in respect of a number of other factors that may affect women's bargaining position in the family: (i) post-marital residence; (ii) close kin marriage; (iii) purdah practices; (iv) controls over women's sexuality and freedom of divorce and remarriage; (v) rural female labor force participation rates; (vi) rural literacy rates; (vii) total fertility rates; and, rather more problematically in my opinion, (viii) measures of land scarcity (1994, ch. 8). Taken together, Agarwal suggests, south India has customarily allowed women superior access to material resources, resulting in their better bargaining power in the family and better leverage in availing of the gender-equal inheritance rights that were provided in the Hindu Succession Act (HSA) of 1956. The crucial factor in Agarwal's account is the distinctiveness of the south Indian kinship system (specifically, the different rules of marriage and norms of post-marital residence), along with the co-presence of pockets of matrilineal and bilateral succession in the southern region, stretching down into Sri Lanka.

A number of other economists have drawn attention to regional differences in respect to a range of indicators of social development, gender equity, and distributive justice. On measures of female literacy and levels of education, health delivery, maternal and child survival, male and female life expectancy and, of course, sex ratios, southern India – and most notably the southwestern state of Kerala – has an outstanding profile in comparison to the north and northwestern states (see Drèze and Sen 1996a; 1996b; Jeffrey 1993). Reflecting on this phenomenon in the light of the revelations in the 2001 Census of an increased anti-female sex bias in natality and post-natal

child mortality, Amartya Sen has spoken of "something of a social and cultural divide across India" (Sen 2001, p. 12). Even the "partial misfit" in the picture, the state of Tamil Nadu, does not really detract from the "astonishing finding" that

> the vast majority of the Indian States *fall firmly into two contiguous halves*, classified broadly into the north and the west, on the one side, and the south and the east, on the other. Indeed, every State in the north and the west ... has [a] strictly lower female-male ratio of children than has every State in the east and the south..., and this indeed is quite remarkable (Sen 2001, p. 12, emphasis added).

LEGISLATING MARRIAGE

It will be clear from the above, albeit cursory, survey of a truly vast literature, that social scientists have placed considerable explanatory weight on aspects of kinship and marriage as factors accounting for differential regional patterns of demographic behavior and economic and social development in South Asia. In this light it is interesting to see how, if at all, these regional diversities have been accommodated and articulated in the politico-legal regime of post-Independence India.

As is well known, the enactment of the new Hindu Law Code in the mid-1950s was a tremendously controversial affair that stretched over more than a decade.[13] The process had begun, piecemeal as it were, with the nineteenth and early twentieth century social reform movements, and consequent legislative enactments in British India and in "progressive" native states like Mysore and Baroda. The demand for a comprehensive Code for all Hindus and for all aspects of Hindu personal law came as a recommendation of the B.N. Rau Committee, constituted in 1941 to consider lacunae in the Hindu Women's Rights to Property Act (1937). The work of the Committee was stayed by War, resuming in 1944, and the Report eventually submitted to the Legislative Assembly in 1947. The Hindu Code was hotly but intermittently debated through the next four years, ultimately provoking the Law Minister, B.R. Ambedkar, to resign in protest against what he believed to be deliberate delaying tactics motivated by narrow electoral calculations.

The family law Bills were taken up once again following the first general elections and the constitution of the new Parliament. The Special Marriage Bill was presented first, and the expressly Hindu personal law divided into four separate Bills, the better to ensure their smooth passage through the House: The Special Marriage Act

13 Described at length in, e.g., Parashar 1992. See also Agarwal 1994, pp. 199-215; Derrett 1968, ch. 10; Forbes 1996; L. Sarkar 1976; Som 1994, among others. See also Law Minister Pataskar's introduction to the Hindu Marriage Bill, *Lok Sabha Debates (LSD)* 26.iv.1955, cols. 6468-70.

(SMA) and The Hindu Marriage Act (HMA) were passed in 1954 and 1955 respectively, to be followed by The Hindu Succession Act, The Hindu Minority and Guardianship Act and The Hindu Adoptions and Maintenance Act, all in 1956. Here we are concerned primarily with certain provisions of the Special Marriage Act and the Hindu Marriage Act which bear on South Indian marriage practices.

The purposes of the two Acts were rather different. The SMA was essentially a reenactment of the 1872 Special Marriage Act,[14] retaining a notable penalty of the earlier Act, namely, severance of the parties from Joint Family property.[15] ("Either he should have the wife or the property," as one unsympathetic Member put it.[16]) The SMA was billed as a secular and territorial law of marriage and divorce which, notwithstanding its problems, was still "a step in the right direction" towards the ultimate goal of a Uniform Civil Code.[17] It would encourage frugal marriage ceremonies, rather than the extravagant festivities associated with religious rituals,[18] and contribute to national unity by enabling inter-caste and inter-religious marriages.[19] Changing socio-political circumstances commended a new, "progressive" and "contractual" approach to marriage.[20] "Democracy," said D.C. Sharma during consideration of the Bill, "means freedom of choice":

> We can choose in marriage anybody we like. I think this Bill gives us that freedom of choice. This is a freedom which cannot be denied to men and women. It cannot be denied to persons when they receive high education, when they are brought up in a democratic atmosphere, and when they are taught that they should love freedom. If they can have political freedom in other spheres of life, I do not see why they should not have freedom in their choice of partners.[21]

The explicit and stated purposes behind the promulgation of the Hindu Law Code were to bring "certainty" into the operation of Hindu law; to "unify" the various schools of classical and customary law; to eliminate restrictive practices and antiquated rules;

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14 Originally introduced to legalize Brahmo marriages. Members of the reformist Brahmo Samaj, founded in the nineteenth century, repudiated Hindu rituals. At the same time, the form of marriage that they instituted could not be condoned as "customary", for "custom" by definition must be of long standing. See Shri Biswas *LSD* 26.iv.1954, cols. 7798-99. A similar problem arose in the case of Tamil non-Brahmin marriages (see Menski 2001, pp. 13-15).

15 This was corrected for Hindus married under the act by an Amendment in 1976 (Article 21A, SMA).

16 Shri Algu Rai Shastri, *LSD* 16.xii.1953, col. 2319.

17 See Law Minister Biswas' introduction to the Special Marriage Bill, *LSD* 19.v.1954, cols. 7797-99; also Renu Chakravartty, *LSD* 16.xii.1953, col. 2317; *LSD* 7.ix.1954, cols. 1222-24; C.C. Shah *LSD* 19.v.1954, cols. 7831-32; C.R. Chowdary *LSD* 20.v.1954, cols. 7880-82; Jawaharlal Nehru *LSD* 14.ix.1954, cols. 1860-62. Article 44 of the Constitution states as a Directive Principle: "The State shall endeavour to secure for the citizens a uniform civil code through the territory of India."

18 Dr. Rama Rao, *LSD* 7.ix.1954, cols. 1214-16.

19 C.R. Chowdary, *LSD* 20.v.1954, cols. 7881-82.

20 Renu Chakravartty, *LSD*, 16.xii.1953, col. 2317. This point of view was also stated with eloquence by Prime Minister Jawaharlal Nehru, *LSD* 21.v.1954, cols. 8048-54.

21 D.C. Sharma, *LSD* 17.xii.1953, cols. 2370-71.

and - at least for some - to provide a benchmark of progressive legislation en route to the Uniform Civil Code (see Derrett 1968, ch. 10). Specifically, the HMA sought: (i) the abolition of caste [endogamy] as a necessary requirement of a valid marriage; (ii) the enforcement of monogamy; and (iii) the facility for divorce or the dissolution of marriage on certain grounds.[22] The "monogamy" and "divorce" provisions were the heart of the controversy over the Bill: the former because it interfered with a "right" to which a section of Hindu men felt entitled (whether by "tradition" or by comparison with the rights of Muslim men); the latter because it was seen to controvert the indissoluble, "sacramental" character of Hindu marriage. Nonetheless, Law Minister Pataskar took pains to assure the House that this legislation was in conformity with the principles of Hindu Law which, he claimed, had always adapted to changed circumstances, and that it in no way aimed to violate the sanctity of Hindu marriage.[23]

The Parliamentary debates around these legislative enactments, which occupied much of the time of the House through 1954/55, provide ample evidence of the contradictory ideological and regional pressures at work in the production of a new personal law regime for independent India. After considering these debates in some detail, I refer briefly to case law relevant to the exogamic principles enunciated in the SMA and the HMA: *briefly*, for the reason that the de-legitimization of Dravidian marriage and its allowance by "custom" have given rise to remarkably little case law. This itself is a matter for some puzzlement, for in this highly litigious society, such silence is virtually thunderous.

Marriage Rules under Classical Hindu Law

Before discussing the post-Independence legislation and the public discourse that it generated, mention should be made of the rules of marriage under classical Hindu law. This is not to claim that the Dharmashastric rules have been observed in practice: they certainly have not. Nor, *strictly* speaking, are they relevant to interpretation of points of law under the HMA, which provides its own definitions of the relevant concepts (Mulla 1998, p. 41; Singh 1983, pp. 18-19, 41). All the same, it is important to recognize that the codification of Anglo-Hindu law in the latter half of the nineteenth century, and the subsequent enactment of a *Hindu* Law Code in post-Independence India (along with a secular and territorial marriage law), have consolidated the legal recognition of the Dharmashastras as the authoritative source of the governing principles of family law for all Hindus (see e.g. Diwan 1993; Mayne 1991; Mulla 1998).[24]

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22 Pataskar, *LSD* 26.iv.1955, cols. 6468ff. It did not escape critics and cynics that divorce and remarriage were already allowed, often on more liberal grounds, by the customary law of an estimated 80% of the Hindu population; and that the Act's cautious allowance of divorce made this law at once "brahminizing"for the majority, and "liberalizing"for the upper caste minority.

23 Pataskar *LSD* 26.iv.1955, cols. 6475-6502.

24 The Parliamentary debates we consider below also offer ample illustration of this point.

It is another matter that some scholars are convinced that *genuine* Hindu law, as transmitted by the *rishis* [Hindu sages], is for all practical purposes a dead letter! (Derrett 1978).

In short, the Hindu law books do not speak with one voice on the rules of marriage – as on any other matter. There are substantive differences between the Mitakshara and Dayabhaga Schools, and between different texts and commentaries. Additionally, since the nineteenth century, the practice of "Anglo-Hindu" law has generated its own body of authoritative texts and legal precedents, modified piecemeal by reformist legislation. Some cautious generalizations may be made, however:[25]

(1) Classical Hindu law recognized eight forms of marriage with different legal entailments – four of them "approved" forms, and four "unapproved." However, only two of these forms were deemed pertinent under Anglo-Hindu law, the other six being declared "obsolete." These were the prestigious *Brahma* form, an approved form in which the bride is gifted in marriage without her guardian receiving any consideration from the bridegroom (effectively, "dowry marriage"); and the unapproved and socially reprobated *Asura* form, which is marriage with brideprice. The unapproved *Gandharva* form of marriage, a voluntary union of a young man and woman sprung from sexual desire (now often glossed as "love marriage"), was recognized only grudgingly, and only in some jurisdictions.

(2) Classical Hindu law also commended marriage within the same *varna* (class) and *jati* (caste): indeed, the Hindu "caste system" as a hierarchical ordering of social groups depends crucially on the practice of caste-endogamous marriage. Nonetheless, inter-*jati* marriages within the same *varna* were usually considered to be valid in law, as were inter-*varna* marriages, *provided that* the man was of superior status to the woman (*anuloma*, "with the grain"), the children of such unions being assigned an intermediate caste status (Tambiah 1973). *Pratiloma* marriage, that is, marriage between a lower caste man and a higher caste woman was deemed invalid, a distinction upheld by the British courts which spent much time adjudicating on the validity (or otherwise) of inter-*varna* and inter-caste marriages and on the legal entitlements of the children of mixed unions.

(3) Additionally – and this is our major concern in this paper – classical Hindu law specified certain rules of exogamy which were quite extensive in their range of prohibitions – "extravagant," Louis Dumont termed them (1983, pp. 14-15; see Madan 1989, pp. 91-92, 287). Firstly, intermarriage was banned between kin in the patrilineal line of descent from putative *gotra* and *pravara* ancestors (Kane 1930-62,

25 Here I follow in particular the pioneering work of P.V. Kane (1930-62), especially Book II, Part 1 [1941]) and Thomas Trautmann (1981, ch. 4); also J.D.M. Derrett (1968, 1978), Robert Lingat (1973), P.H. Prabhu (1955, esp. 154ff) and others, including the standard compendia of Hindu law, such as Banerjee (1984, pp. 57ff.), Mayne (1991) and Mulla (1998, vol. 1, ch. 22), and more recently Diwan (1998, chs. 3 & 7).

II, 1, pp. 482ff; Kapadia 1955, pp. 19-21). The *gotras*, 18 in all, are exogamous patrilineal clans whose members claim descent from eponymous Hindu Sages, while the *pravara* are similarly exogamous units, subordinate to the *gotra*, to which they are complexly related (see Trautmann 1981, pp. 239ff).[26] Properly speaking, the *gotras* and *pravaras* are restricted to Brahmins, and only by courtesy, so to speak, extended to the second and third classes (*varna*) of the Hindu caste order.[27]

Secondly, marriage was prohibited between persons in a *sapinda* or "shared body" relationship with each other. The concept of *sapinda* relationship defines graded responsibilities in ancestor worship and death rituals and, relatedly, entitlements to inheritance. In these contexts it is exclusively, or almost exclusively, agnatic. However, in the context of defining the boundaries of the exogamous group, *sapinda*-ship takes on a cognatic dimension, with just a slight prioritization of agnatic kinship in the limit of recognition of seven degrees of relationship on the father's side *versus* five on the mother's (see Trautmann 1981, pp. 246ff; also Dumont 1983). Unlike *gotra* and *pravara* affiliation, the relationship of shared body is universal, not restricted to Brahmins.[28] It is this [*a*]*sapinda* rule that is hostile to the Dravidian practice of cross-cousin marriage.

Numerous Dharmashastric texts expressly prohibit cross-cousin marriage. Prominent among them, and much cited in this regard, is the *Baudhayana Dharma Sutra* (*ca* 500-200BC), which concedes that MBD and FZD marriages are among the cultural peculiarities of South India. While local custom should, in general, be taken as authoritative – and this principle has been invoked by several authorities to justify Dravidian marriage practices – *Baudhayana* himself rules that such practices are contrary to the Veda, and should be prohibited (see Trautmann 1981: 302-04).[29] On the other hand, other jurists, notably Madhava (*ca* 1350), have argued that cross-cousin marriage is allowable *not only* on grounds of regional "custom" practiced by "the learned," but also for the reason that marriage in any of the four approved forms, that is, involving *kanyadana* (the symbolic "gift" of the bride, laden with jewels, in tribute to a ritual superior), transubstantiates the bride from a *sapinda* of her father to a *sapinda* of her husband: the bride becomes, as the phrase has it, of "one body"

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26 It is an extension of this ideology of patrilineal descent that justifies the oft-reported rule of "village exogamy" in north Indian kinship practice. All co-villagers, even persons of different castes and descent groups, are treated as though they are descended from a common patrilineal ancestor (Hershman 1981, pp. 133-37; Lewis 1958, pp. 160-61). Thus marriages and liaisons *within* the village are regarded as heinous and attract strong sanctions (see Chowdhry 1998, esp. pp. 339-42).

27 The fourth class, the Shudras, were not recognized to have *gotras*, and were allowed to be governed in matters of family life by their own customs. The Untouchables were considered to be beyond the pale of Hindu law.

28 A cognatic, *sapinda*-like concept is invoked in the so-called three- or four-*gotra* rule of marriage in north Indian kinship. This rule prohibits marriage with partners from the patrilineal descent groups, even the patronymics, of the father, the father's mother's father, the mother's father, and, possibly, the mother's mother's father.

29 For further discussion see Derrett 1968, pp. 86-87, 1978, p. 63; Kane 1930-62, II, Pt. 1, pp. 458-67; Kapadia 1955, pp. 117ff.; Mayne 1991, p. 134.

with her husband (ibid., p. 291).[30] By this rather convoluted logic, *both* cross cousins (MBD and FZD) are defined as non-*sapindas* and therefore marriageable – providing, of course, that the marriage is in the appropriate form. So too, logically speaking, is the elder sister's daughter.[31]

Here, in sum, we have the complex legacy that confronted the law makers attempting to codify a uniform Hindu personal law for independent India: a tension between agnatic and cognatic concepts of relatedness; between notions of immutable law and mutable custom; and between different and contradictory renditions of the classical law, some traditions of which found means to justify the distinctive practices of Dravidian kinship.

Prohibited Relations under The Special Marriage Act (1954) and The Hindu Marriage Act (1955)

By 1954-55, caste endogamy was no longer a requirement for a valid Hindu marriage. Nor was the principle of *gotra* exogamy.[32] Hindu reformers had long argued that the primitive eugenic wisdom of the *asagotra* rule made no sense in modern times (e.g. Iyengar 1941, p. 16; Kapadia 1955, pp. 120-21): It might needlessly inhibit, say, the marriage of a Kashmiri brahmin with a Tamil brahmin if both happened to be of the same *gotra*, though they could not conceivably be close blood relations. However, both the SMA and the HMA, albeit on different grounds and in different terms, laid down certain exogamous requirements for valid marriage.

Section 4 (d) of the SMA specifies that a marriage may be solemnized between two persons *if, inter alia*, "the parties are not within the degrees of prohibited relationship." To this is appended the proviso:

> Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that

30 Trautmann (1981, pp. 438-46) provides a useful translation of Madhava's comment on the authoritative text of the *Yajnavalkya Smrti* (1.52) that prohibits marriage with a *sapinda*.

31 On the other hand, the Dravidian taboo on marriage with the matrilateral parallel cousin might be weakened by the same logic (cf. Kane 1930-62, II, Pt. 1, p. 469). See J.D.M. Derrett's critical comments on Madhava's rationalization of Dravidian marriage (1968, pp. 86-87), which creates a predicament for those castes which practice marriage in the *Asura* form (formerly, widely prevalent in South India).

32 The case for inter-caste marriages had already been won through The Hindu Marriage Disabilities Removal Act, 1946, and The Hindu Marriages Validity Act, 1949, which were repealed with the coming into force of the HMA (HMA, Section 30). Section 29 (1) of the HMA confirms the provisions of this earlier legislation: "A marriage solemnized between Hindus before the commencement of this Act [1955], which is otherwise valid, shall not be deemed to be invalid, or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or subdivisions of the same caste." The term "religion" in this Section refers to those religions, sects and reformist groups which are defined as "Hindu" under Section 2 (1) of the HMA: it includes Buddhists, Jains and Sikhs, but explicitly excludes Muslims, Christians, Parsis and Jews.

they are within the degrees of prohibited relationship.[33]

Schedule I of the Act lists the specific kin who fall under "prohibited degrees of relationship" from the viewpoint of the husband and wife respectively. These are (in anthropological terms) opposite sex lineal ascendants or descendants in three generations; the spouses of same sex lineal ascendants and descendants; siblings; nephews and nieces; aunts and uncles; and matrilateral and patrilateral parallel- and cross-cousins. In short, the SMA expressly prohibited, among others, the typical forms of south Indian marriage alliance (MBD, FZD and eZD marriages), which were "saved" by "custom" only through a 1963 amendment to the Act[34] that brought the SMA into line with the HMA in this regard (see below).

The HMA scheme of prohibited relationships overlaps to a large extent with that of the SMA, though it tackles the question of exogamy a little differently. On the one hand, the HMA disallows marriage between persons "within the prohibited degrees of relationship, unless the custom or usage governing each of them permits of a marriage between the two."[35] Unlike the SMA, the HMA does not provide a Schedule listing the prohibited partners, but provides a genealogical calculus. Perhaps this was the outcome of legislators' earlier criticism of the lists of "prohibited relationships" in the SMA: They argued that it was an insult to intelligence to prohibit, for instance, the marriage of a man with his great grandmother; and an insult to Hindu wisdom to mindlessly copy British legislation when Hindu law had already developed a comprehensive approach to exogamy.[36] While both the SMA and the HMA prohibit marriage with lineal ascendants or descendants or their spouses (as the case may be),[37] the HMA expands this scheme to include also certain affines – "the wife of the brother or of the father's brother or mother's brother or of the grandfather or grandmother's brother of the other."[38] The operative provision from the viewpoint of Dravidian kinship, however, is Section 3 (g) (d) of the Act, which prohibits marriage between two persons "if the two are brother and sister, *uncle and niece*, aunt and nephew, or *children of brother and sister* or of two brothers or of two sisters" (emphasis added). The

33 "Custom" is here defined to mean "any rule which the State Government may, by notification in the Official Gazette, specify ... as applicable to members of that tribe, community or family." It should be "continuously and uniformly observed for a long time," "not unreasonable or opposed to public policy," and, if a family usage, not "discontinued" (SMA Section 4, "Explanation").

34 Act 32 of 1963, Section 2 (c).

35 HMA Section 3 (g) (a) and (b).

36 See U.M. Trivedi, *LSD* 17.xii.1953, cols. 2411-12; S.S. More, *LSD* 1.ix.1954, cols. 810-11. Thundered More: ".... The First Schedule is not a good thing. When you concretize certain facts you are reduced to such a ridiculousness. ...If this legislation is taken up by some foreigner, he would get an impression that in India people are out to marry their grandfather's mother and therefore, the sovereign Parliament was forced to say that you cannot marry that lady. By the time he is ready to marry, she will be in her grave already" (ibid.).

37 HMA 3 (g) (a) and (b).

38 HMA Section 3 (g)(c). This provision expressly disallows leviratic marriage, a common practice in many parts of India.

inclusion in the list of prohibited relationships of the children of brother and sister was apparently a change made by the Joint Committee of the two Houses of Parliament before the reintroduction of the Bill into the Lok Sabha in 1955.[39]

Secondly, and this is another point of departure from the SMA, the HMA prohibits marriage of persons who are *sapindas* of each other, *again*, "unless a custom or usage governing each of them permits of a marriage between the two."[40] The invocation of the concept of *sapinda*-ship, which is one of the few features that distinguish this Act as "Hindu" law from its purported model in the British Matrimonial Causes Act, 1950 (see Derrett 1978), unambiguously prohibits Dravidian cross-cousin and uncle-niece marriage. Though the limits of *sapinda*-ship are reduced from the classical 7/5 model to just five generations in the line of ascent through the father and three through the mother,[41] the prohibition nonetheless includes quite a broad range of agnatic *and* cognatic kin.[42] It is still needlessly comprehensive, in some opinions (see Kapadia 1955, p. 121).

In sum, then, cross-cousin and uncle-niece marriages are *doubly* prohibited in the HMA, to be saved only by "custom" or "usage," which must be longstanding, continuous, reasonable, and not opposed to public policy.[43] Significantly, in this case too, the allowance of "custom" was not originally conceded in the Hindu Code Bill (see Kapadia 1955, p. 257), but clearly emerged through processes of political negotiation and compromise, the precise details of which remain obscure.

PROHIBITED INCEST OR ALLOWABLE CUSTOM?

It will have been obvious from the foregoing account of legal provisions and the legislative process that an intense struggle had been going on in the public domain – and no doubt even more behind the scenes – over the legitimacy of Dravidian marriage practices. In this section, we review some of the arguments for and against Dravidian marriage put forward in the course of Parliamentary debates on the "prohibited relationship" clauses of the SMA and the HMA.

Although the stated purposes of the two Acts were rather different, as noted, arguments on the clauses overlapped to a considerable degree; the *dramatis personae*

39 Pataskar, *LSD* 26.iv.1955, col. 6475. The cross-cousins (though *not* the brother's widow) were also prohibited as *sapindas*.

40 HMA Section 5 (v).

41 HMA Section 3 (f) (i) and (ii).

42 For a working out of *sapinda* relationships in the context of the HMA, see e.g. Mulla 1998, vol. 2, pp. 29-36. That practicing lawyers find little use for this provision of the Act (Section V (v)) is surely demonstrated by the garbled and frequently incorrect explanations of *sapinda*-ship provided in legal textbooks, including such recognized authorities as Mulla 1998 (above) and Diwan 1993.

43 HMA Section 3 (a).

were in many cases the same people, reiterating well-rehearsed positions; and arguments that properly speaking pertained to the HMA were brought up in connection with the SMA, this being the Bill presented first. The fact that two Hindus could choose to be married under either Act[44] further complicated matters, since legislators were acutely aware that the provisions of the one might undermine the legislative intent of the other.[45] Thus, there was constant cross-referencing between the two Bills, and to the anticipated provisions of the Hindu laws of succession, adoption and maintenance, still to come.

The debate on "prohibited degrees of relationship" was articulated primarily as a debate on the role of "custom" and "usage" in the legal regime of post-Independence India; an important subsidiary theme, however, was the science of eugenics. The "saving" of "custom" – and the reference was *especially* to Dravidian marriage practices – was a zigzag process. Allowance of custom was first an amendment proposed to the SMA, clause 4 (d). It was stoutly resisted by the Government[46] and outvoted in the House, although pre-Act marriages in contravention of the clause could still be *registered* under the Act[47] (an anomaly that alert legislators did not fail to notice). Meanwhile, however, a proviso regarding "custom" had been added to the "prohibited relationship" clauses of the HMA and within a few months, appearing to contradict itself, the Government defended this proviso against spirited criticism and numerous amendments calling for its deletion. Finally, in 1963, the SMA was amended[48] to make provision for "custom" after all, citing as justification the precedent of the HMA.[49] It was altogether a peculiar story.

One set of arguments on degrees of "prohibited relationships" revolved around the nature of the SMA, in contradistinction to the HMA. Was the SMA to be seen as a "special" Act, meant just for the few citizens seeking to contract inter-religious marriages? If so, the majority of citizens would continue to marry under Hindu law, where "custom" had a recognized role. Or was the SMA a progressive, secular and territorial law for modern times which would seek to bring ever larger numbers of citizens under its sway? If so, it would need to come to an expedient accommodation with customary practices, at least in the short run.[50] The irony of the situation was not lost

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44 Originally made possible by Sir Hari Singh Gour's 1923 amendment to the SMA (1872). See Biswas' statement, *LSD* 19.v.1954, cols. 7802-04.

45 See for instance Shri Raghavachari, *LSD* 7.ix.1954, col. 1221; also Renu Chakravartty *LSD* 7.ix. 1954, cols. 1223-24, among many others.

46 See Law Minister Biswas' statement, *LSD* 19.v.1954, cols. 7797-7811-12; also *LSD* 1.ix. 1954, col. 836.

47 SMA Clause 15.

48 Many Members demanded to know the source of the "demand" for amendment of the Act. The only person actually named in this regard was nationalist leader, Rajagopalachari. See Bibidhendra Mishra, *LSD* 28.viii. 1963, col. 3268.

49 The procedure for establishing "custom" was somewhat different, however. In the case of the amended SMA, custom was to be established by State Government notification, rather than through judicial procedure, as in the case of the HMA.

50 See B.C.Das, *LSD* 8.ix. 1954, col. 1256.

on critics of the proposed SMA amendment. Love of one's own customs and usages was understandable, Hindu Mahasabha Member V. G. Deshpande conceded, but

> You are doing away with the [Hindu religious] marriage ceremonies, you are doing away with the sacred fire, you are doing away with all this sacred vow, but you are sticking to all kinds of customs which we do not know, and parading in this House that you are introducing a uniform civil law for the whole country, and that a model system of marriage is being introduced.[51]

The whole idea was "ridiculous," he said.

Similar arguments were advanced on behalf of the HMA clause on "prohibited relationships": If the aim of the Code was to unify, clarify and reform the Hindu law of marriage, why should deviant customs be given recognition? Pandit Thakur Das Bhargava was among the vehement critics of the introduction of a "custom" clause into the HMA. What is the use of a Hindu Law, he asked, where "any person can marry any person and may divorce in any manner he pleases?"[52]

> In [the HMA] clause 2 [on the application of the Act] we say that it is binding on all and in the rest of the clauses we say it is not binding on all the Hindus. They can have their own customs. My submission is that we should be consistent and logical. Let us do the right thing *which will bring about solidarity among the Hindus in India*. We should have a law which will bind all people.[53]

Other Parliamentarians were quite explicit that marriage practices in contravention of the *shastras* (and also of north Indian norms) should *not* be allowed under the HMA, or indeed under the SMA as well. They argued that even a secular, territorial law must endorse the principle of sacramental marriage "that has ruled our country for at least 5,000 years": "Are you passing this legislation," asked N.C. Chatterjee in debate on the SMA, "following India's *Swadharma*, India's tradition? ... .We must keep our own culture, our *dharma*, that is, the essence of our being, our inborn nature, and we have to assimilate it and re-create our own country, our Indian society, on its old, own moorings."[54] Just see what has happened in Western countries, he added for good measure: not the "progress" but the "degradation" of womenfolk.[55]

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51 Ibid., cols. 1229-30.
52 Pandit Thakur Das Bhargava, *LSD* 3.05.1955, col. 7458.
53 Ibid., cols. 7458-59, emphasis added.
54 N.C. Chatterjee *LSD* 17.xii.1953, cols. 2384-85.
55 Ibid., col. 2386-87.

Also speaking on behalf of Hindu ideals and sentiment, Mulchand Dube reiterated Chatterjee's point:

> This [SMA] is a piece of social legislation and I take it that the object of all social legislation should be to promote unity and solidarity in the society. Now, the two parts of the Schedule mentioned in the Special Marriage Bill permit marriage between persons *which would otherwise be prohibited according to Hindu sentiment*. For instance, the children of cousins can inter-marry. *This kind of thing is repugnant to Hindu society...* . [T]he persons who undertake such marriages ... would not only incur the contempt of the rest of society, but this kind of thing may create antagonism and be the cause of disruption of their society. So my submission is that the sentiments of the people who are likely to be affected thereby should receive primary consideration, and *if such a thing is incestuous or repugnant to the sentiments of Hindus*, there is no reason why this should be introduced at the present stage.[56]

Some nine years later, U.M. Trivedi spoke in almost the same terms in opposing the 1963 SMA Amendment:

> Generally among the Hindus – leave alone the customs pertaining in some parts of South India – *it was always considered derogatory, most derogatory and most heinous, for any man to conceive of an idea of marrying his own sister* – sister in that sense includes maternal uncle's daughter, paternal uncle's daughter or aunt's daughter. To marry a sister like that was considered most abominable in North India. In North India nobody would conceive such an idea.[57]

Moreover, as many speakers pointed out, if you make an exception for "custom" in one case, where does this end?

> Some hon friends said that there is a custom among certain sections of the people of marrying [the] maternal uncle's daughter. If these customs are allowed, not only will one be able to marry the maternal uncle's daughter, but he would be able to marry his own sister's daughter, who is considered by some people to be one's own daughter. Not only that: there are customs prevalent among certain communities whereby one can marry the paternal uncle's daughter and

56 Mulchand Dube, 2.ix.1954, cols. 850-51, emphasis added. See also Dube's proposed amendment to the SMA First Schedule, 16.ix.1954, cols. 2159-60. Dube was of the opinion that exogamous prohibitions should extend to second cousins at least.
57 U.M. Trivedi, *LSD* 28.viii.1963, col. 3234, emphasis added.

> sometimes also the sister of half-blood. So it would mean that all these marriages would be allowed. If you allow all these marriages, then there is no use incorporating this provision regarding prohibited degrees of relationship in the [Special Marriage] Bill.[58]

Indeed, as Tek Chand, another active North Indian participant in all these debates put it,

> Custom may be an absurd sort of custom; custom may be that of the *Vam Margis* [Tantric "left-handed" cults] who do not recognize the degree of prohibited relationship. Nevertheless, they have only got to show that it is their custom, whether it is immoral or vicious, whether it is reprehensible or unacceptable to you, or whether it is intolerable. Nonetheless, it is their custom, and you jolly well have to tolerate it.[59]

The ultimate argument for a comprehensive schedule of "prohibited relationships" was that of "eugenics." No particular scientific authorities were cited in this regard: it was taken to be common knowledge that the universal "horror of incest" was based on established principles of eugenic science. If "custom" were to be allowed, medical doctor Jaisoorya said,

> There will be no end to concessions to all sorts of customary laws, and the very purpose and spirit of this Bill will be lost. Do you believe that there is no such thing as eugenics, that eugenics is all bunk? In the ancient Egyptian empire, the Egyptian kings married their own sisters. There is no evidence that it was bad.[60] Where are you going to put a stop to all this? It is incestuous. Marriage with your niece is incestuous, whether you call it customary law or not; marriage with your cousin is incestuous, whether you call it customary law or not.[61]

Indeed, it was quite probable, asserted one Member early on in the debates, that consanguine marriages, such as "are obtainable amongst the Semitic people, amongst the

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58 Shri Dhabhi, *LSD* 8.ix.1954, col. 1257.

59 Tek Chand, *LSD* 13.ix.1954, col. 1754.

60 Presumably he was replying to a point made by Dr. Rama Rao (see below) that there was no adequate scientific evidence to support the idea of the ill-effects of consanguineous marriage.

61 Dr. Jaisoorya, *LSD* 7.ix.1954, col. 1226. Among many other references to eugenics, see e.g. Shri Biswas, *LSD* 19.v.1954, col. 78111; C.C. Shah, *LSD* 19.v.1954, cols. 7835-36. Eugenics is the rationalization that many South Indians give nowadays for their discontinuance of consanguineous marriages. Some South Indians have also sought to distinguish the relatively innocuous cross-cousin marriage from the more exotic practice of uncle-niece marriage, on both eugenic and moral grounds (Iyengar 1941, p. 17).

Arabic people, etc.," result in excessive fertility and spell "ruin" for a country already overpopulated.[62]

For the most part, South Indians (and other advocates of the "custom" clauses) did not contest the eugenic argument: some of them even added their own evidence of the general ill-effects of such practices.[63] They simply argued that such marriages should be legally permitted in a "transitional" society until such time as people could be "educated" into *voluntarily* giving them up – an uphill task, apparently[64] – or the customs declined in the natural course.[65] A rare note of defiance on behalf of Dravidian marriage was struck by Dr. Rama Rao. Speaking as a medical man, he maintained that there was no conclusive scientific evidence to substantiate the harmful effects of consanguineous marriage: in any case, Parliament was not "a scientific body deciding eugenics."[66] "I want to appeal to our North Indian friends," he said,

> not to have a stone curtain before their eyes but to see beyond the Vindhyas [the mountain range that is taken to divide North from South India] and understand the customs and laws of the South Indians. Most of our thinking is conditioned by things we are used to. People in South India marry their maternal uncles' daughters. That is a very common thing, but the wonderful list of prohibited relationships prohibits such marriages... . It is not abnormal and therefore I request my North Indian friends not to see things through their limited glasses only. Customs differ; habits differ... .[67]

Bengali Brahmins eat fish; Punjabi women wear trousers - these are disgusting practices in South Indian eyes. "Similarly, the thinking of our North Indian friends is conditioned by things they are accustomed to."[68]

The struggle to prevent the outlawing of Dravidian marriage practices by the combined forces of North Indian prejudice, traditional Hindu orthodoxy and Enlightenment eugenic science was conducted over a decade or more. The upshot was a political compromise on behalf of a nation struggling for unity and stability in changing times. Few legislators actually defended Dravidian marriage practices, *except* as "custom," and only one Member in my recall (V.G. Deshpande) referred to shastric

62 U.M. Trivedi, *LSD* 17.xii.1953, col. 2413. See Trivedi's similar comment almost a decade later, *LSD* 28.viii.1963, col. 3235.
63 Vimla Devi, *LSD* 28.viii.1963, cols. 3230-34.
64 Ibid., col. 3232.
65 R. Venkataraman, *LSD*, 3.v.1955, cols. 7542-43; Shri Velayudhan, *LSD* 7.ix.1954, cols. 1235-36. Punjab Legislator Sardar Hukam Singh, however, was convinced that consanguine marriages would increase if women were given property rights under the HSA: Either that, or one would see female infanticide on a large scale (*LSD* 3.v.1955, col. 7485).
66 Dr. Rama Rao, *LSD* 7.ix.1954, col. 1214.
67 Ibid., *LSD* 7.ix.1954, col. 1214.
68 Ibid., cols. 1214-16.

endorsement of cross-cousin marriage.[69] The ultimate solution was a political one, however. This was no time to drive a wedge between North and South India, whatever one's opinions on Hindu ethics, eugenics, or other people's "incestuous" unions. As Law Minister Pataskar put it, summing up the debate on "prohibited relationships" in the HMA:

> I know that amongst the people in the North the prohibited degrees vary from the prohibited degrees in the South. There are customs in the South even amongst the highest [castes], the Brahmins, ... which permit marriages between certain persons which are not allowed in the North. *It is not desirable to enter into controversy whether one is right or wrong.* It has been a subject matter of controversy in the past and it will continue to be so for some time in future also.[70]

The answer is to lay down a definitive scheme of "prohibited relationships" – to show "how the wind blows and what is the trend of public opinion," but to allow people to follow their own customs if they so desired:[71]

> ... I would appeal to my hon. Friend ... to think of the times in which there are already enough problems *and we should not add to it one of North or South.* Therefore, ... – whatever our own ideas may be – it may be that what the hon. Member feels is more correct than what is followed by other people – it is much better to go along with the rest... . No one group of people living in the North or East can debate that one custom is bad. I think this should be better than exactitude in any way whatsoever.[72]

But what of the *gender* politics of "prohibited relationships?" Both marriage Bills were promoted as gestures towards women's equality;[73] both were critiqued, too, as likely to be injurious for women, particularly when it came to the liberalization of divorce. But these battles were fought for the most part over clauses on monogamy,

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69 V.G. Deshpande, *LSD* 7.ix.1954, cols. 1227-30. Said Deshpande, who claimed to belong to a caste that practiced cross-cousin marriages: "I would accept challenge from anybody to prove that they are against shastras, or against any laws of eugenics. If you read the old *nibandas* and *prabhandas*, there are very scholarly discussions on this point" (ibid., col. 1227). Deshpande objected only to smuggling recognition of these practices into the SMA under the provision for "custom."

70 Shri Pataskar, *LSD* 3.v.1955, cols. 7567-68, emphasis added.

71 Ibid.

72 Ibid., col. 7568; see similarly Bibudhendra Mishra, *LSD* 28.viii.1963, cols. 3266-70. Though it might be assumed that the "unity" of India meant the unity of *Hindu* Indians, at least one Member argued for tolerance of Muslim (cross- and parallel-) cousin marriage, abominable as it might seem to Hindu sentiment: After all, Muslims too had "contributed to the progress of our country and of the world" (K.K. Basu, *LSD* 14.ix.1954, col. 1850).

73 See e.g. Renu Chakravartty, *LSD* 16.xii.1953, cols. 2317-18; *LSD* 14.ix.1954, cols. 1823-32; *LSD* 2.v.1955, cols. 7254-62; Shri Pataskar, 26.iv.1955, col. 6500; S.S. More, 2.v.1955, cols. 7392-95.

divorce, age of marriage, maintenance and restitution of conjugal rights. The question of "prohibited relationships" was not construed as a "gender" issue affecting women's status one way or the other. A stray and tantalizing exception was the report by a southern legislator, Vimla Devi, of unsuccessful attempts by women's organizations to campaign against consanguineous marriage.[74]

CASE LAW

The struggle for the legal recognition of Dravidian marriage practices in post-Independence India appeared to have been won by 1963 when the SMA was amended to allow breach of the "prohibited relationship" condition on grounds of "custom" and "usage." There remained a practical problem, however. "Custom" was not recognized *ipso facto*, but had to be *established* – either by government notification (SMA) or by due legal processes (HMA). Given the litigiousness of Indians in all walks of life, one would have expected vigorous exploitation of the vagaries of these clauses. As it is, legal textbooks confirm that almost *all* clauses of the Hindu personal law have attracted robust case law, and clauses that bear on the validity of marriage are part of the routine armory of those claiming or contesting succession to property, or seeking to avoid prosecution for bigamy or suits of maintenance (see Menski 2001, pp. 35-43, and ch. 4).

"Custom" is indeed amply contested in the context of, say, Section 7 of the HMA, which specifies the ceremonies required for a valid Hindu marriage. All *other* grounds for nullity – bigamy, want of consent, impotency, mental incompetence, age of marriage, etc. – are also exploited to the full (cf. Uberoi 1996b). *But*, the clauses on "prohibited relationships" have attracted hardly any case law worth looking at.[75] Much of the exemplary case law refers to judgments under Anglo-Hindu law, and though many of the latter do involve South Indian cases,[76] more recent case law is not especially focused on Dravidian kinship practices - our specific interest here - but deals with customary usage in other regions.[77]

I put this puzzle to a number of legal experts of my acquaintance. "But *everybody knows* that South Indians marry their cousins," said one, by way of explanation. The problem is that such a custom has to be legally *established* – whether by Gazette notification (SMA) or by appropriate evidence (HMA). Extrapolating from the

74 Vimla Devi, *LSD* 28.viii.1963, col. 3232.

75 An observation confirmed by search of the Supreme Court Cases.

76 See Balusami Reddiar v. Balakrishna Reddiar, AIR 1957 Mad. 97, regarding the pre-Act marriage of a man with his granddaughter (DD). Though possibly allowable by "custom" in the community concerned, the custom was deemed "revolting to all principles of morality, decency and eugenics"(p.98): "No custom which is opposed to public policy can be recognized by a Court of law. Nor can immoral usages, however much practiced, be countenanced"(p. 99, para. 9).

77 For instance, Punjab, where Hindu law was not earlier in force. See e.g. Shakuntala Devi v. Amar Nath, AIR 1982 P & H, 221.

ethnographic record, one can imagine cases where one form of cross-cousin marriage is customarily acceptable, the other not; or cross-cousin marriage is approved but uncle-niece marriage deplored; or a marriage may be correct in one reckoning, but improper in another. All such uncertainties should be grist to the lawyers' mill. On the other hand, a practicing lawyer construed the problem as a simple one of *locus standi:* It is unlikely that either party to a null marriage within the prohibited degrees would be motivated to file a nullity petition. But his answer disregards the plethora of nullity suits on *other* grounds, and the considerable utilization of nullity clauses by heirs and other interested parties in property disputes. The puzzle remains.

CONCLUSION

South India as a region has long been known for its singular rules of marriage which, along with other related practices, appear to have had the effect of moderating the sternly patrilineal emphasis of the rules and practices of Indo-Aryan kinship. These particularities have latterly become the focus of social science attention – not alone by kinship specialists, who seem to have reached a dead-end on the issue some time ago, but by demographers, development economists, and feminists, who have taken a keen interest in the southern region's superior track-record on questions of social development and gender equity.

Yet, these same rules and practices were de-legitimized on grounds of morality and eugenic science by supposedly "progressive" post-Independence legislation. Ultimately, a lengthy process of political lobbying and negotiation, concluding in 1963 with the amendment to the "prohibited relationships" clause of the SMA, ensured their "saving" on grounds of "custom." It appears that the political class desired a "progressive" legal regime, but ultimately *not* at the cost of driving a wedge between the Hindus of North and South India.

To keep things in proportion, the struggle to ensure the (albeit qualified) recognition of Dravidian kinship practices was a relatively minor one in the overall context of marriage law reform: questions of monogamy, divorce, and the age of marriage were the salient points of controversy. Yet there *was*, obviously, an intense struggle going on both in public and behind the scenes, and it is rather surprising that there has been almost complete silence on the question ever since, whether in public debate or in academic discourse.[78] Nor has the legal profession seized the opportunity to exploit the vagaries of the concept of "custom." And it appears that there is no sense of grievance over the issue, even on the part of activists of the anti-Brahmin movements

78 Apart from a few stray remarks by the inimitable Derrett, issues relating to the exogamic provisions of the marriage laws find no mention in secondary writings on Indian family law. Menski (2001) and Parashar (1992) are cases in point.

which have been a powerful force on the South Indian political scene for many decades.[79]

Is this because Dravidian marriage practices are now securely "saved" by the provision for reasonable customs and usages? Are South Indians excessively embarrassed by their usages in the face of the hegemonic ideology of Indo-Aryan kinship? Or do they just discreetly seek to avoid controversy, rather than draw further attention to South India's "incestuous" singularity?

Whatever the answer, it remains a matter of curiosity that the de-legitimization of Dravidian kinship has *not* been construed as a "gender" issue, though the distinctive marriage practices of the region appear to be at the core of the differentiation of North and South India, in kinship as in a range of social development indicators.

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79 M.S.S. Pandian, personal communication.

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