



## GENDER INEQUALITY UNDER PERSONAL LAWS IN INDIA

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### ABSTRACT

India is a country of people having faith in different religions. As there are various religions in India and therefore there are various religious laws. People belonging to particular religion are governed by that religious law known as personal law. The Hindus, Jains, Buddhists and Sikhs are governed by Hindu Law. People belonging to the Mohammedan religion are governed by the Muslim Law. The Parsees are governed by the personal Parsee law. The Christians are governed by the Christian law. Thus, every religion has its own personal laws relating to the property rights, marriage, divorce, adoption and maintenance etc.

**KEYWORDS:** Mohammedan religion , uniform civil code , International Instruments.

### I. INTRODUCTION:

There is no uniform civil code in India. A uniform civil code is one where a common set of civil law replace personal laws for all citizens of the country without considering the religion and sex of the citizens. The rights of women relating to the marriage and property are not adequately protected under these personal laws. This discriminatory treatment to the women relating to the marriage, adoption and property under these personal laws are the violation of the provisions of Indian Constitution and International Instruments.

Human rights are the rights of every human being. Every human being must have these human rights by virtue of him or her being a human being. The Protection of Human Rights Act, 1993, defines the concept of 'human rights' as rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.<sup>1</sup> All these human rights are inherent in every individual and not dependent on any law of the State. They are conceived of as rights inherent in individuals as rational, free-willing creatures, not conferred by mere positive law, and not capable of being abridged or abrogated by positive law.<sup>2</sup> Thus, the Indian Constitution has guaranteed all these human right to every citizen of India without any discrimination on the ground of religion, race, cast, sex or place of birth. At international level also there are various International Covenants. Universal Declaration of Human Rights, 1948 is the first international document which has recognized the human right of every individual.

In spite of the Constitutional provisions and International documents relating to the protection of basic human rights of every individual, the personal laws denied the certain rights to the women and made a woman inferior and helpless. Due to such discriminatory treatment, there are lots of difficulties to live a life with self respect and dignity to a woman. This discriminatory and unequal treatment hinders the path of woman in the backward direction. Women have to fight against this discriminatory and unequal treatment

<sup>1</sup> The Protection of Human Rights Act, 1993, Sec 2 (d).

<sup>2</sup> A. N. Sen, "Human Rights" 6 (2002).

to attain the self respect and human dignity. Due to the Constitutional provisions enough efforts have been made in the civil laws still existence of personal laws creates hurdles in the path of the development of women and denies right to live a life with their own terms and conditions. Therefore it is necessary to change the mind sets of people regarding the women's rights.

## II. EFFORTS OF INTERNATIONAL COMMUNITY FOR PROTECTION OF HUMAN RIGHTS OF WOMEN:

In a number of meetings and conference, the international community has shown very keen interest in the protection of human rights of women. The United Nations General Assembly has adopted the Convention on the Elimination of All Forms of Discrimination Against Women in 1979 which is described as an international bill of rights for women. This Convention forbids all forms of discrimination on grounds of gender as violation of fundamental freedoms and human rights. The Government of India acceded to Convention for Elimination of All Forms of Discrimination against Women and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity. Article 1 of the Convention defines what amounts to discrimination against women. Article 13 of the Convention also declares that the states should take appropriate measure to eliminate it. The Universal Declaration of Human Rights, 1948 has also provides for the equal protection of rights of men and women in its preamble.

The framers of the Indian Constitution were much inspired by the Universal Declaration of Human Rights, 1948. This is evident from the fact that they have incorporated the same spirit of equality of treatment and protection of fundamental human rights in the preamble of Indian Constitution itself. Other provisions of the Constitution also seek to protect human rights. Article 21 provides for the right to life and personal liberty, which is recognized as a fundamental right under the Indian Constitution. Article 14 of the Indian Constitution guarantees to all persons equality before law and equal protection of law. Article 15 prohibits the discrimination among citizens on the grounds of religion, race, caste, sex or place of birth. Article 16 provides for the equality of opportunity to all in matters of public employment.

## III. WOMEN IN HINDU LAW:

Hindus have considered personal law based on the 'dharmashastra', a part of their Religious tradition.<sup>3</sup> Before the codification of Hindu law in 1955 and 1956 the Hindu women did not enjoy equal rights along with the Hindu men in all respect. Before The Hindu Marriage Act, 1955 polygamy was permitted among the Hindus. The Hindu women had no right to get the property from the parents, they had right to get dowry only which is known as 'Stridhan' at the time of the marriage. Even after the codification of Hindu law, there are some discriminatory provisions still exist even today. The object of this paper is to highlights those discriminatory provisions under Hindu Law.

**A. Right of Marriage and Divorce:** The ancient Hindu Law discriminated women in all respects. The marriage and divorce laws were not equal for men and women. The ancient Hindu law was based on 'Dharmashastra' which was described under the Vedas. The nature of Hindu marriage and divorce is also described under the Vedas. According to Vedas a Hindu marriage is the union of husband and wife which is indissoluble union till eternity. In other words, husband and wife cannot be separated from each other. It is defined as a union of 'bones with bones', 'flesh with flesh' and 'skin with skin', the husband and wife become as if they were one person.<sup>4</sup> Hindu marriage is considered as sacrament. It is indissoluble union and therefore the woman has no right get herself separated from the husband even if he is cruel, drunkard, impotent, insane etc. The woman has also no right to ask for remarriage even after the death of her first husband. The husband and wife are considered as one person and therefore the woman cannot have her own individual identity or existence. However, this principle of indissoluble union cannot be applied to the

<sup>3</sup> Reporter. (2010, January 02), 'Why Personal Laws in India are based on Religion', <http://news-business.vlex.com> accessed on 08/11/2018.

<sup>4</sup> Shyama Charan Sarkar, "Vyavastha Chandrika", 480 (1883).

husband and he is free to enter into marriage by any number of times. This system of marriage shows that unlimited polygamy was permitted under Hindu law before enactment of the Hindu Marriage Act, 1955. The Hindu Marriage Act, 1955, however, has removed these disparities to a large extent. It has made rule of monogamy which becomes applicable to both men and women. Now, according to the provisions of Hindu Marriage Act, 1955, the woman can dissolve her marriage on the grounds enumerated under this Act and freely enter into another marriage. Section 5 of the Hindu Marriage Act, 1955 says that both the parties to the marriage should have the capacity to give consent to the marriage. Section 12 (c) of the Act further says that if the consent was obtained by force or fraud then the marriage is voidable. But in the male dominant society the consent of woman always ignored and importance is given only to the consent of man. If the marriage was solemnized without her consent or against her wishes, she still continues to be in the marriage fearing defamation of her parents is the society or because of parental pressure. Thus, under Hindu Law, there is discriminatory treatment to woman relating to the marriage and divorce.

**B. Right of Property:** Before the codification of Hindu law, there were different schools of Hindu law. Under these schools, only coparceners are the owners of the joint family property. In coparcenary properties, only a son, a son's grandson acquires the right to property by birth. No women could be a member of coparcenary and hence had no property right, so this is prompting inequality between males and females. The Hindu Women's Right to Property Act was passed in 1937 which conferred property rights to women. But the equal or absolute right to woman over the property was not given by this enactment. Thereafter, in the year of 1956 The Hindu Succession Act was passed which also conferred property rights to women. The Hindu Succession Act made mother, wife and daughter a Class-I heirs. However, the concept of coparcenary that only a son can be a coparcener and daughter cannot be a coparcener did not change. Even after passing of Hindu Succession Act, 1956, women were not kept on equal footing with the male. Under the Hindu Succession Act, the property of male and female intestate devolves differently and preference is given to the agnates rather than the cognates. Succession to a female intestate's property depends on the type of property. The property inherited from the female intestate's parents devolves upon her father's heirs if that female has no children. The property inherited from her husband or father-in-law would go to the husband's heirs if that woman has no children. In the case of female intestate's self-acquired property, a gift, or property received under a valid will first would go to her children and her husband and in the absence of children and husband, the property would go to her husband's heirs and in the absence of her husband's heirs the property would go to her parents. Thus, in one or the other form we can see the gender based discrimination relating to the property rights in the laws. But the Hindu Succession (Amendment) Act, 2005 has made a drastic change and Section 6 of the Act provides that the daughter has the same rights in the coparcenary property as that of a son. But in the male dominated society, it is believed that only sons are entitle to the property rights and not the daughters and therefore even after this amendment, the women can be deprived of the property rights. Because the male coparcener has absolute right to dispose of his property and therefore he may dispose of the property by executing the will in favour of his son with an intention that the property should not go to his daughter. Therefore there must be a check on the absolute right to disposition of the property by male coparcener without which The Hindu Succession Amendment Act, 2005 may not serve its true purpose.

**C. Right of Adoption:** A woman gives a birth to a child but in the matter of adoption Hindu woman had no right to adopt a child on her own. Under the Shastric Hindu Law, woman's right to adopt child is very limited because she can adopt child under rare circumstance. In 1956, The Hindu Adoption and Maintenance Act, was passed which has introduced uniformity in the matter of adoption among the Hindus. Though the Hindu Adoption and maintenance Act has given a right of adoption to women but discrimination in respect of adoption still continues because Sec. 8 of the same Act provides that a married man can adopt but a married woman cannot adopt child during the subsistence of the marriage. Even she could not be the natural guardian of her own children during the life of her husband. This is totally unacceptable to a woman but this is the reality and thus woman has been given inferior status in the society. The Personal Laws Amendment

Act, 2010 has now removed the disparity of sec. 8 of Hindu Adoption and Maintenance Act, 1956 and has provides that now married woman can also adopt the child even during the subsistence of the marriage.

#### IV. WOMEN IN MUSLIM LAW:

Islam means peace and submission. "Shari'ah is an Arabic word that means the Path to be followed," referring to a number of legal injunctions known as Islamic law. The primary source of Islamic law is the Quran, which Muslims believe to be God's words. Though the Quran does contain legal prescriptions, it is mainly concerned with general ethical principles and guidelines rather than strict instructions. Therefore, the Quran is supplemented by other sources to form the basis of Sharia.<sup>5</sup> Islam introduced a legal system in which there would be no discrimination between male and female and will have the equal rights but in reality there is no place for this system of equal right for the men and women. There is big difference between the ethical principles given in the Quran and Sharia'h formulation. The ethical principles given in the Quran are purely supermundane while the formulation of Shariah has been totally influenced by thinking of human beings. The Shariah is a result of the interpretation given to the holy pronouncement in the Quran. Therefore the basic holy pronouncements in the Quran are totally different from Shariah which people brought into existence. Women are also the blind followers of this male dominating society. The transcendental ethical spirit of Quran is conveniently ignored and the prevailing situation is rationalized through contextual Quranic pronouncements.

**A. Marriage and Divorce:** A marriage is called 'Nikah' in Islam. Particular age for marriage is not given in Muslim personal law. Therefore, age of marriage depends on puberty, which may vary according to the biological characteristics. Thus, the girls may marry early as they mature early rather than on attaining particular age. This system of marriage is very shocking. Marriage is a civil contract made for the purpose of procreation in Muslim personal law. There is also a system of 'Mahr' at the time of marriage given from the girl's side. A Mahr means a mandatory payment in the form of money paid by the groom's father to the bride that legally becomes her property. But there is no such rule for the bride's side. This is gender disparity in Muslim personal law. In Islam the system of marriage shows an inclination towards the males. A Muslim marriage is a civil contract made for the purpose of procreation. This clearly shows that the purpose of marriages is to give comfort and pleasure to man and to produce children. The respect for woman or the comfort or right and willingness of woman is not considered in Muslim marriage. It seems that women are just like objects for the use of men according to their caprices. In Islam polygamy is a very contentious issue. It is a manifestation of how Patriarchal interpretation can prevail and dominate.<sup>6</sup> The sanction for polygamy among Muslims is traced to the Quran iv.3: which states "You marry two, three or four wives, but not more: but if you cannot deal equitably and justly with all you shall marry only one."<sup>7</sup> A Muslim man may marry with the number of wives but not exceeding four. But a Muslim woman has no such right to marry with the number of husbands but she can marry only one Husband. If Muslim woman marries another husband during the lifetime of her first husband, she is liable for bigamy under Section 494 of Indian Penal Code and the children from such a marriage are considered illegitimate under the Muslim personal law. The logic behind the polygamy is that during pregnancy or menstruation man should have legally married wife for sexual intercourse. This logic itself shows that in Muslim marriage the comfort of man is considered and not the respect, right or willingness of woman. Such kinds of rules are really very shameful and disrespectful for a woman. There was absolute power of the husband to divorce the wife. It was sufficient to write a bill of divorce. It was also not necessary to give the reasons for divorce and divorce to wife was possible for no cause. The divorced wife had neither right to ask for the reasons nor the right to apply to the Judge. The

<sup>5</sup> Mashhour A. "Islamic law and Gender Equality – Could there be a common ground? : A study of Divorce and Polygamy in Sharia law and contemporary legislation in Tunisia and Egypt", Human Rights Quarterly, 2005 ; 27 (0): 562-596.

<sup>6</sup> Ibid.

<sup>7</sup> Chawla M., "Gender Justice: Women and Law in India", Deep and Deep Publication, New Delhi, 2006, 33-67.

Muslim wife has no such absolute right to divorce from her husband but she has the right to divorce from her husband only under certain specific circumstances. Particularly the method of divorcing the wife by the husband by pronouncing triple "Talak" is highly discriminatory. Recently the Allahabad High Court has held that practice of the 'Triple Talak' is unlawful and void.<sup>8</sup> According to Muslim Law, any husband, who possesses a sound mind and has attained puberty, may divorce his wife according to his caprices.

**B. Property Rights of Muslim Women:** Before the passing of Shariat Act, 1937 the Muslims in India were governed by customary laws which were highly discriminatory and against rights of women. After the Shariat Act, 1937 Muslims in India are governed in their personal matters, including property rights, by Muslim personal law. But even after the Shariat Act, 1937 there is no major changes in the property rights of Muslim women. Under Muslim law, men and women both have right of inheritance. If a Muslim male dies, and his heirs include both male and female, both will inherit the property simultaneously but not equally. The share of man in inheritance would be twice that of a woman. Thus, if son and daughter inherit the property of their deceased father, the son gets  $\frac{1}{2}$  share in the property and daughter gets  $\frac{1}{4}$ <sup>th</sup> share in the property. This is an example of unequal treatment to the Muslim woman relating to the property rights under Muslim law.

#### V. WOMEN IN PARSEE PERSONAL LAW:

**A. Right of Marriage and Divorce:** The Parsee personal law provides that if a Parsee woman marries the person who does not belong to the Parsee community then their children are not accepted as part of the Parsee Community. However this rule relating to the marriage with non-Parsee is not applicable to the man in Parsee personal law. Therefore if the Parsee male marries the non-Parsee female then their children are accepted by the Parsee community. This is manifest gender inequality under the Parsee personal law. In respect of the divorce, The Parsee Marriage and Divorce Act, 1936, provides an additional ground for divorce to the wife that if she has been compelled by her husband for prostitution then she can take the divorce from her husband.

**B. Property Rights of Parsee Women:** Under the Parsee personal law, if the non-Parsee woman marries Parsee man then after the death of that Parsee man she cannot inherit the property of her husband though their children can inherit the property of their father. The rules for intestate succession among Parsees also discriminatory. The rules of devolution of property of male and female intestates differ resulting in the discrimination against daughters and mothers. If the mother dies intestate then the son and daughter are entitled to have an equal share in the mother's property but if the father dies intestate then the daughter is not entitled to have the same equal right in the father's property. Thus, there is gender based discrimination under the Parsee personal law.

#### VI. CONCLUSION:

Half of the Indian populations too are woman. In spite of that the women have been exploited for the centuries in this country. Women have always been discriminated against and have suffered and are suffering discrimination in silence in India. There are various religious personal laws which are formulated male dominating society and for the convenience of male in that particular religion. All these religious personal laws give discriminatory treatment to the women in all respects. The position of women in civil laws is far better than in religious personal laws. These civil laws prohibit the gender based inequality but all these civil laws are on the paper and not in the practice because of the male dominating mind set of the people.

The women of this country want equal right with men in all respects. It is possible only when there is a unification of personal laws in the form of uniform civil code including the fair, just and non-discriminatory provision and the woman of this country should be free to enjoy their human rights. Thus, there is urgent need of formulation of Uniform Civil Code in order to improve the position of woman in India.

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<sup>8</sup> Ibid.



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