

AN ANALYTICAL EXAMINATION OF PROBLEMS AND PROSPECTS OF WOMEN'S RIGHT WITH SPECIAL REFERENCE TO MARRIAGE, DIVORCE, SUCCESSION AND OTHER PERSONAL LAWS

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ABSTRACT

Women rights are human rights as women are also born free so they are also entitled to have equal rights which are provided to men. It can be seen that women are having always inferior position than men and expected to be in home. It is believed that women should handle only home and children and she cannot or she should not work outside the home. But nowadays scenario has changed. If we want to achieve success globally, contribution of women is most important without that we cannot succeed. For such purpose it is important that women are provided with sufficient and equal rights so they can also contribute to the nation as well as world. India is a country where many rulers have ruled and consequently Indian culture has diversity. Different people of different religion lives here. According to which personal laws are enacted. Every religion has their own customs and tradition. Muslim personal law applies to Muslims, Hindu law applies to Hindu, Christian law applies to Christians. Different personal laws has given different rights to women but this rights are not sufficient and equal as traditional mentality of people of India is male dominated. This paper analysis the rights of women provided by different personal laws and problems regarding women's right in personal laws. It is an analytical study of rights given by personal laws to women and safeguarding legislation enacted by government for providing sufficient rights to women.

Keywords: *Women's Right, Personal Law, Marriage, Divorce, Succession, Safeguarding Legislation.*

Introduction

"Just as bird could not fly with one wing only, a nation would not march forward if the women are left behind"-swami Vivekananda

Swami Vivekananda explained us with this thought that a nation cannot make progress until women are not taking part in growth of the country.

Almost each and every nation of the world is concerned about one issue which are human rights. In this dynamic world it is very essential that every human being should be entitled to growth and development. For such purpose it is very important that they should be provided with equal opportunity without any discrimination on any ground. Women's right also one of the most concerned and discussed issue in every country. For betterment of the country as well as world. Contribution of every human being is essential without any distinction made between male and female.

Every human being is born free. So, it is fundamental right of every human being to work according to his/her thought process. Nobody can resist any one express his thoughts, problems, views only on ground of being male or female.

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Women's rights are also human rights. Every man and woman should have equal rights in all matters without being discriminated on ground of their sex. We all know that women are having inferior position than men in whole world. Women are also born free so they are also entitled for the rights which have been provided to men.

Although, many countries have enacted laws for providing rights to women. United Nations have taken a step forward to strengthen the position of women in this dynamic world. Article-1 of United Nations Charter provides that "to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental rights freedoms for all without distinction as to race, sex, language, or religion."

Women's rights were made part of international human rights law by the universal declaration of human rights which was adopted by UN General Assembly on 10th December, 1948. In 1979, the General Assembly adopted the convention on the elimination of all forms of discrimination against women (CEDAW).

The society as we know has been a male dominated all along all times. Biological superiority of men over women has made her weak and vulnerable and thus prone to inequalities both socially and legally. There has been inequality against women seen in the society. They have been treated as secondary to the men in the society and not only that have been subjected to different types of atrocities and injustices due to this discriminatory approach.¹

In traditional patriarchal societies it is generally believed that women should be contained in home only and should not step out of the home following the orders of her husband. Although in Vedic period women enjoyed more rights and better status than in post Vedic, medieval and British periods yet during the pre-independent India gender inequality and gender violence were all prevalent.²

Although constitution of India guarantees equality, including sexual, to everyone (articles-14&15) all laws which are inconsistent with the fundamental rights enshrined in the constitution are void (article-13), yet religious personal laws that discriminate against women are still valid, not void, even after decades after the adoption of the constitution. The present situation is that the women of the minority communities like Muslims continue to have unequal legal rights.

Some of the customs and traditions of the personal laws discriminate women or provide lesser rights than men though such customs and traditions are accepted by Indian judiciary as it recognizes the personal laws. Discrimination against women in India was prevalent in every sphere of life and most of women experience some form of disadvantage.

Analysis of Women's Right and Problems under Personal Laws

Women's Right under Muslim Personal Law

Rights of Muslim women are most concerned issue in almost every country of the world. Muslim women are provided with lesser rights than their male counterpart. Rights which are provided to them by their personal laws are also not expressed and more or less depends on the consent of the male counterpart.

- **Marriage: (Consent as a Right of Women)**

Marriage under Muslim law is a contract. For contracting a valid marriage there must be three conditions should be fulfilled.

- There must be proposal and acceptance
- The parties must be of sound mind.
- They must have reached the age of majority. Further two conditions should be fulfilled (a) both the parties that bride and groom should give their consent for marriage (b) there should be at least two witnesses who would personally enquire from the bride as to whether she is willing to marry or not.³

If we take marriage into consideration with right of women we can say that Muslim women are given complete right in respect of marriage. As for contracting marriage consent of a woman is essential element and without free consent of women marriage cannot take place.

¹ Law and social transformation in India-women and law

² Law and social transformation in India-women and law

³ Law relating to women and children

A woman on attaining puberty can marry and no other person's advice or consent is necessary. Marriage of the minor girl and boy can be contracted by their respective guardians. Though they have right to repudiate marriage on attaining majority. They are vested with this right only when the contract of marriage was entered into for a minor by any guardian other than the father or grandfather.

It is said in Koran, (OH BELIEVERS! IT IS NOT LAWFUL FOR YOU THAT YOU SHOULD TAKE WOMEN AS HERITAGE AGAINST THEIR WILL.)¹

- **Polygamy:** One of the most debatable aspect of Muslim law in India is polygamous marriage sometimes, Maulvis gave impression that under Islamic law, bigamous marriage, has been fully recognized on socio-legal platform without any sanction. It is necessary to note that bigamous marriages were allowed in times of wars left children orphaned and women widows with an intention to support them, maintain them and protect their life and property and to avoid their explanation.

- **Divorce**

In Islam marriage is very simple procedure and considered as civil contract marriage can be contracted by words "qubool hai" similarly divorce in Islam is also an oral procedure but it is not that much easy procedure. Marriage can be repudiated by husband on saying three times "talaq".

Talaq means termination of marriage which means repudiation of wife/husband by husband/wife. Most questioned and doubted form of divorce under Muslim law is talaq-ul-biddat (triple talaq) in which husband can divorce his wife by saying three times "talaq". In this type of divorce, divorce is irrevocable. Women cannot refuse to take divorce when husband pronounces divorce.

Divorce under Muslim law is much debated issue in India. As women are not given equal right in respect of divorce. Because according to Muslim law a husband who is sound mind and have reached the age of puberty may divorce his wife whenever he desires. Without giving any reason of explanation. Some of the view is that right of man divorcing his wife is restricted. But the question arises whether it is effective on part of women. Muslim women are not given any protection against men's right to pronounce talaq. Nowadays, this matter has become so serious that, now it is been practiced through electronic media, men are pronouncing divorce through mobile. It has become very vital that it requires concern of judiciary because women faces social, economic, challenges after divorce.

Though khula is one provision which provides right to Muslim women to obtain divorce. She cannot obtain divorce without consent of the husband.

- **Succession: (share of a female under Muslim personal law of succession)**

- **Daughter:** According to the concept Muslim personal law woman is worth half a man according to which daughter's share is equal to one half of the son's.

She has, always full control over his property. It is legally for hers to manage, control, and to dispose of the property which she owns as her wish in her life or death. Though she may receive gift as a means of circumventing the inheritance law of one third of a man's share, since, under Muslim law, the share of inheritance are very strict.

- **Wives:** In Islamic law, identity of women, does not extinguished in her husband despite having inferior status to men.

The she has full control over her goods and properties. She has a right to the same maintenance her husband gives to his other wives. If he make any discrimination between his wives in matter of in maintenance she may take action against him.

She has a right to inherit from her husband to the extent of one eighth if there are children or one fourth if there are none. the share may reduce to one sixteenth if he is having more than one wife. In circumstances, where there are no sharers in the estate as prescribed by law. The wife may inherit together a greater amount by will, a Muslim may dispose of one third of his property by will, though not to a sharer in the inheritance. A widow gets $\frac{1}{4}$ of the estate of the husband when no other blood relation is there and $\frac{1}{8}$ share if she is having children.

- **Mother:** property of a muslim mother should be divided according to rules of muslim law. She is entitled to inherit one sixth of her deceased child's estate.

¹ Sura-4, aayat-19

Problems Relating to Rights of Muslim Women under Personal Law

There are several issues regarding rights of Muslim women. Such as in marriage, though the consent of the women is necessary without which marriage cannot take place but a minor girl child can be given in marriage by her respective guardian and she cannot repudiate marriage after attaining puberty if she is given in marriage by her father or grandfather.

Polygamous marriages are total discrimination against women rights because Muslim men may have four wives at a time and she does not have any strong right to resist her husband from doing a second marriage and she cannot contract a second marriage during the existence of one marriage and if she does so she is punishable under section-494 of IPC. In such a situation women may be placed in an inferior position. The most discussed and concerned issue of Muslim women's right under personal law is divorce. She is not having any specific express right to obtain divorce from her husband. Even she does not have the right to resist her husband to give divorce.

Also, in matter of succession, a daughter will receive a share half of the son. There is discrimination on the part of females regarding succession. It is provided that all the matters relating to intestate succession, special property of females, including personal property inherited or obtained under contract or gift should be decided according to personal law of Muslims. Which clearly explains that females should inherit according to their personal law. As personal law does not have provision to provide equal share to a daughter there is a question arising about the right of Muslim women in matter of succession.

Women's Right under Hindu Law

As per ancient Hindu law giver Manu: "women are supposed to be in the custody of their father when they are children, they must be under the custody of their father when they are children, they must be under the custody of their husband when they get married and under the custody of her son in when they reach at old age or become widows. She is not allowed to assert herself independently.

The above described position of women as per Manu is still the case in present modern day social structure. Barring few exceptions here and there. ¹ Women have no power to take independent decisions either inside their homes or in outside world.² There are still some conservative societies who believe in the prescribed structure that women should be confined to home and look after children and family.

• Marriage

For a Hindu, marriage is a Sanskara (religious rite of sacrament). It is in fact, the last of the ten sacraments, enjoined upon by him by the Hindu religion for purifying the body from inherited taint. According to the Vedas, a marriage is "the union of flesh with flesh and bone with bone." It is a bond which Vedas regard as indissoluble. As long as husband is alive, the wife is directed to regard him as her god; similarly, the wife is declared to be half the body of her husband and shares with him equally, the consequences of all his acts, good or bad.

For a valid Hindu marriage it is necessary to fulfill three conditions:

- **Identity of Caste:** According to the text prescribed in the ancient text that if the parties did not belong to the same caste, the marriage is invalid unless sanctioned by custom. There is a prohibition on marriage between a male of lower caste and a female of higher caste in prescribed texts. However, a marriage between a male of a higher caste and a female of lower caste is permitted under such ancient texts.
- **Parties should be Beyond the Prohibited Degrees:** The second condition to contract a valid marriage under prescribed texts is that a man cannot marry a girl of the same gotra and parties to the marriage should be sapindas of each other.
- **Performance of Proper Marriage Ceremonies:** the third and the last condition prescribed by the ancient Hindu text as regards the proper marriage is ceremonies. Broadly speaking, there are two such ceremonies, which are necessary to validate a Hindu marriage
 - vivah homa-invocation before the sacred fire,
 - saptapadi: which consists in the bride and the bridegroom taking seven steps around the sacred fire, the marriage is complete only when the seventh step is taken.³

¹ Principles of Hindu law

² Principles of Hindu law

³ Principles of Hindu law

If we look at right of Hindu women in respect of marriage we can say that Hindu women is not allowed to marry a male who is of lower caste than her but a Hindu male is free to marry a women who is of lower caste than her. There is not equal right given to a Hindu female as compared to Hindu male.

- **Polygamy:** polygamy was prevalent amongst Hindus in ancient India during Vedic period, although currently, it is illegal. It was practiced mostly by rich merchants and the warrior castes. Marriage in traditional Hinduism was meant primarily for procreation and to fulfill one's obligatory duties. If polygamy served these ideals, Hinduism did not object to its practice. Many Hindu gods were also delineate as polygamous, with two or more wives. Until 1955, there was no prohibition on polygamy for the Hindus. However, Hindu women was prohibited to marry more than one men.¹

- **Divorce**

The concept of divorce was, of course, not recognized by the ancient Hindu law, and once the marriage is solemnized it cannot be dissolved once solemnized. It is a relation for eternity and male and female cannot be separated. In ancient Hindu law women were not allowed to take divorce from their husband in any situation. A Hindu female cannot be separated from her husband even her husband is not good. It is said that the relation between husband and wife cannot be dissolved even after death, so, there was a custom in ancient Hindu law which is called sati where wife has to burn herself with the body of her deceased husband. Also, even she was not entitled to marry again after death of her husband. Which is total discrimination against women as they are deprived of their right to life. Hindu male can marry after the death of his wife but Hindu women were not allowed to marry after death of her husband.

Divorce under Hindu law is vital innovation of introduced by the law in the Hindu social framework. Hindu marriage act has provide 12 grounds for dissolution of marriage which are available to both husband and wife but there are 4 grounds which are available to wife only:

- **Bigamy:** namely, that in the case of a marriage solemnized before the commencement of the act, the husband has married again before such commencement, or that any other wife of the husband, married before such commencement, was alive at the time of the petitioner's marriage.
- **Rape, Sodomy or Bestiality:** namely that the husband has been guilty of rape, sodomy of bestiality after the solemnization of the marriage.
- **Decree or Order Awarding Maintenance:** under s.18 of the Hindu adoptions and maintenance act, 1956, or in proceeding under s.125 of criminal procedure code, 1973, a decree or order was pass against the husband awarding maintenance to the wife and that since the passing of such decree or order, cohabitation between the husband and wife was not allowed for one year or more.
- **Repudiation of Marriage:** when the marriage is solemnized before the wife attained the age of fifteen years, and that she repudiate the marriage after attaining that age, but before attaining the age of eighteen years.²
- **Sati:** the word sati refers to the ancient Indian practice of burning widow on her husband's funeral pyre or burying her alive in his grave. The term is sometimes also used to apply to the widow who commits the act.
- **Widow Remarriage:** Hindu widow was not allowed to marry again after death of her husband after the abolition of *Sati pratha*. Male Hindu may contract second marriage after death of her first wife or even during life of first wife in ancient Hindu law.

- **Succession**

There were different schools of Hindu law prior to the codification. Under these schools of law only coparceners were considered as owner of the property. As Women could not be coparceners according to these schools hence had no property rights. This is clear discrimination that only male can be coparcener and female cannot be coparcener.

Also earlier it was believed that all property which is acquired by female Hindu has only limited ownership and succession of such property depended on whether she was married or not, and in the former case, whether her marriage was one of the approved or the unapproved forms. But section-14

¹ Principles of Hindu law

² Principles of Hindu law

marks a bold departure and overrides the old law on the subject, by providing that any property possessed by a female Hindu, whether acquired before or after the commencement of the act, is to be held by her as the full owner thereof, and not as a limited owner.

It provides that property includes both movable and immovable property acquired by a female Hindu:

- by inheritance or devise
- at a partition
- in lieu of maintenance or arrears of maintenance
- by gift from any person, being a relative or not and whether before her marriage or at the time of her marriage, or after her marriage
- by her own expertise or assiduousness
- by purchase
- by prescription
- in any other manner whatsoever and includes any such property held by her as *Stridhan* immediately before the commencement of the act.¹

Problems Relating to Rights of Hindu Women under Personal Law

Ancient Hindu law does not recognize equal rights of men and women. As far as marriage is concerned it restricts right of women to marry with person of her choice if such person belongs to the lower caste but Hindu male can marry a woman from lower caste. Ancient law also had ritual like sati and prohibition of re-marriage or widow. Where women were compelled to end her life with the death of her husband. Also Hindu male can marry again after death of her wife while female Hindu cannot do so. There was no prescribed form of divorce so women cannot ask for divorce even if she faces cruelty from her husband.

In succession as well male Hindu can be considered as coparcener but female Hindu cannot be. Though Indian government has many laws which have abolished such types of customs. But as Indian society is male dominating society people with orthodox mindset believe that only male can have share in property and female cannot be coparcener. It may be possible that the male coparcener who has the power to dispose of his property by executing a will may dispose of the property in favor of his sons, to avoid share of daughter.

Various Legislation Safeguarding Rights of Women

Special Laws

- **The Hindu Marriage Act, 1955**

The Hindu marriage act, 1955 has tried to remove disparities to a large extent by enacting monogamy rule for both men and women. Women are given right to dissolve her marriage and freely enter into another marriage according to law. The Hindu marriage act, 1955 has set forth the grounds for divorce. Section-5 of the Hindu marriage act, 1955 lays down the conditions for a marriage. It says that both the parties to the marriage should have the capacity to give consent to the marriage.²

- **The Hindu succession act, 1956 with amendment in 2005**

In 1956 The Hindu succession act, is enacted to give property rights to women. Mother, wife and daughter are made class-1 heirs under this act. But the concept of coparcener that only a son can be a coparcener and daughter cannot be a coparcener did not change.³ Even after enactment of this act women are left to become coparcener of the property. But Hindu succession act, 2005 took a historic step towards making women coparcener of the property.

- **Dissolution of Muslim Marriage Act, 1939**

Muslim women did not have express right to take divorce this act expanded rights of Muslim women to obtain divorce. Section-2 of dissolution of Muslim marriage act, 1939, provides that a Muslim woman may obtain divorce from her husband on any ground mentioned in section-2 of the act.⁴

- **The Muslim Women (Protection of Rights on Divorce) act, 1986**

¹ Principles of Hindu law

² The Hindu marriage act, 1955

³ The Hindu succession act, 1956

⁴ Dissolution of Muslim marriage act, 1939

section-3 of the act entitles Muslim women for maintenance during Iddat period and section-5 provides that if Muslim husband or wife by affidavit declares that they would prefer to be governed by the provision of section-125 to 128 of code of criminal procedure code,1973 and file such affidavit or declaration in the court hearing the application, the magistrate shall dispose of such application accordingly.¹

- **Muslim Women (Protection of Rights on Marriage) Act, 2019**

This act was enacted to protect Muslim women from instant triple talaq. Section-3 and section-4 clearly says that triple talak is punishable and whoever pronounces talaq referred in section-3 upon his wife shall be punished with imprisonment for a term which may extend to 3 years and shall also be liable to fine.²

Conclusion

India being a male dominated society women are not given equal rights. The main factor behind unequal rights provided to women is application of personal laws in India. Different personal law put women in different position according to their customs and traditions. If we look up to provisions of the personal laws we can see that women are given lesser rights than male counterpart in matter of marriage, divorce and succession which are very essential matters and also biggest factors affecting lives of women.

But government has taken a step forward to provide equal rights to women and abolish this inequalities promoted by personal laws. Several laws have been enacted by government to strengthen Indian women. Government has drastic changes by abolishing customs which renders women in inferior position.

Though government has made several laws and taken many steps to provide sufficient rights to women male dominating society in India which have mentality or men being superior than women has not adopted these laws wholeheartedly.



¹ The Muslim women (protection of rights on divorce) act, 1986

² Muslim women (protection of rights on marriage) act,2019