Part-I

WOMEN EMPOWERMENT AND PERSONAL LAWS:
CONCEPTUAL ANALYSIS
Chapter-1:
Women Empowerment:
A conceptual Analysis
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WOMEN EMPOWERMENT:
A CONCEPTUAL ANALYSIS

1.1 INTRODUCTORY REMARKS

Women are the bearers of the next generation, the caregivers in the family but they suffer deprivation and maltreatment at every strata of the social set up. The life of average Indian women is still governed by customs, habits, prejudices and unwritten codes of conduct. The Indian society is averse to treating a woman as a human being. The legal equality which women enjoy under the Constitution and the special privileges are all on papers. Though in their public utterances, men praise the concept of equality and show concern that women should be able to avail of their constitutional and legal rights, yet at heart they are the most conservative. She has a undergo sex determination test to know the gender of the child. She is teased on streets, harassed everywhere, molested in public places but she is mum because of the fear of retaliation from the offender. Most crimes against women go unreported. The condition of women in India cannot be improved by any single method or merely by pronouncing the world ‘Women Empowerment’. There is need to change the traditional mental set-up which is deep rooted in the minds of the society only then this concept can turn into reality.¹

The traditional social structure, equal norms and value systems continue to place Indian women in a situation of disadvantage in terms

of role relationship, decision making and sharing of responsibility. Their social status is still shrouded by a variety of institutional complexes, connections and myths. "The emancipation of women will not be handed over on a silver-plate by some party or political movement". In order to strive for equality, women must express their will to achieve it. Women must fight back for their participation and respond to the demands of progress. No social change can occur without talking about women. Any social change that does not include a change in the position of women is futile and is ultimately bound to fail. President A.P.J. Abdul Kalam in one of his speeches mentioned that the "empowering of women is a prerequisite for creating a good nation, when women are empowered, society with stability is assured. Empowerment of women is essential as their thoughts and their value system lead to the development of a good family, good society and ultimately a good nation". Therefore the empowerment woman is very important not only for the growth and development of the family/society but also to the nation as a whole.²

1.2 CONCEPT OF EMPOWERMENT

The role and status of women is a widely discussed and debatable issue in our country. The present position and status of women in general and rural women in particular is not satisfactory rather their position in society is in no way better than second class citizen. Theoretically women are considered important and equal partners in the process of development, but in practice they are generally ignored. In spite of so many statutory productions, women still remain under privileged,

under-valued and exploited and various kinds of discriminations continue to persist against them. Women as a group of the human community, them status role and problems have been an important issue of debates among the intellectuals from pretty time.\(^3\)

The women's empowerment has become a social word or a 'buzzword' for a long time. It is a result of several important critical discussions, dialogues and debates generated by the feminist movement all over the world which is widely used but seldom defined. It is crucial to clarify what is empowerment? Empowerment is a word which stands by for the sense of increasing power, gaining control or participating for decision making.

The word empowerment is not listed in the Webster's New World Dictionary but in Webster Collegiate dictionary the word 'empowerment' means to authorize or to give authority. Generally the word signifies about the process by which power is gained, developed, seized, facilitated or given. The word empower is a synthesis of two words 'em' and 'power'. The prefix 'ein' is attached to the noun 'power' to create a verb. Thus to empower denotes to give power or authority. Power is a key word of the term 'empowerment'. So to understand the empowerment the understanding of tile word power is essential.\(^4\)

Power is usually understood in two senses:

1. The ability to get what one wants

2. The ability to influence others to think, feel act or believe in

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ways that further ones interest

The word empowerment also refers to the ongoing capacity of individuals or groups to act on their own behalf, to achieve a greater measure control over their lines and destinies. Power does not likely to be handed over to the powerless group in the society yet it must be developed or taken by the powerless themselves, for which an effective action on behalf of self is necessary. Power does not come from physical capacity, it comes from an indomitable will. The driving force which impels the individual along with his or her life plan is known as the will to power.

The word empowerment is defined by various jurist legal luminaries and social activists in the following ways.

Lorraine Gutierrez (1995) has defined the empowerment as "it focused on developing critical awareness, increasing feeling of collectiveness and self efficacy and developing skills for personal interpersonal or social change".

According to a noted sociologist Zippy (1995) empowerment represents a means for accomplishing community development tasks and can be conceptualized as involving two key elements giving community members the authority to make decisions and choices and facilitating the development of the knowledge and resources necessary to exercise these choices.

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5 Ibid
6 Ibid
7 Ibid, p. 17
The most conspicuous feature of the term empowerment is that it contains within it the word 'power'. So obviously, empowerment is about power and about changing the balance of power. Empowerment of women is the keynote of women's movement now-a-days. Empowerment contains the word 'power' which is exercised in economic, social and political relations between individuals and groups. Power may be defined as control over resources and ideology. This definition makes it clear that women in general are relatively powerless because they do not have control over resources and hence have little or no decision making power, yet the decision taken, affects their lives every day.\(^9\)

The concept of empowerment is related to the concept of freedom. Empowerment is equipping one to improve the living condition. It does not identify power of women in terms of domination over others, but in terms of the capacity of women to enhance their ability to gain control over the crucial material and non-material resources and thus minimize their risks. Empowerment approach recognizes the triple role of women namely production, reproduction and community management which manifests itself through the formation and organization of groups.\(^10\)

The movement for women's empowerment was launched in 1996 for taking women with dignity and equality into the next century. The objective of the movement were gender equality, gender justice, social security, elimination of all types of discrimination against women and

\(^9\) Supra note, p. 27
\(^10\) Supra note, pp. 28-29
integration of women into economic development and mainstream of economy.

Women's empowerment is relatively a new concept in the realm of development. It is a process, which changes the existing power relations in favor of the poor and marginalized, among the women. It is a long-term process that requires changes in the behavior and attitudes of women and men and the ideas that societies hold about gender.

The empowerment of women can be defined as "global access to resources, power and decision-making". This is an essential requirement to attain gender equality i.e, the process required for the realignment of power in decision making at the household, institutional and at all levels of the society. The ultimate goal is equitable partnership between women and men, built on the strengths of shared knowledge of the energy, skills and creativity.\textsuperscript{11}

The women empowerment is a process that enable woman to gain access to and control of material as well as information resources. The concept of women's empowerment all over the world has its root in feminist movement which in simplest means is the manifestation of redistribution of power that challenges the patriarchal ideology and the male dominance. Empowerment is the key solution of many social problems as the growth of population, environmental degradation, low status of women, perpetual gender discrimination and economic dependence of women etc.

According to Charlton Everett & Standt "Women empowerment is the initial phase of women's liberation, freedom and equality as well as a

\textsuperscript{11} Ibid
long range goal of women's liberation freedom and equality. It is the first step in a long journey toward the formulation and realization of human rights and responsibilities that transcend gender role stereotypes and the objectification of women and the men".

Pillai, another sociologist said in 1995 that "empowerment is an active multi dimensional process which enables women to realize their full identity and powers in all spheres of life. Power is not a commodity to be transacted, nor can it be given away in alms. Power has to be acquired, it needs to be once acquired to be exercised, sustained and preserved".

On the basis of above discussion it is evident that empowerment is primarily a goal for some people while others consider it as a form of intervention. To some it is a process of emancipation, therefore is it not something which can be given like alms but it is a process by which people begin to develop their awareness and the ability to organize, to take action and to bring about changes.

Empowerment has become a widely used word which is something overextended Empowerment in its emancipatory meaning is a serious word. It is also a concept which brings out a broader analysis of human rights and social justice. The underlying assumptions are that if women understood their conditions, knew their rights and learned skills traditionally denied to them, they would not only make their lives meaningful for them but the pathology of its lays the foundation for the collective universal development of the society at large.

Rousseau had once observed "Man is born free but everywhere he is in chains" The cannon of this observation has been reflected and
translated as a global phenomenon and has been incorporated as a necessary, essential and sacrosanct conditions of all human lives. The nature has given not only a life to all human beings but a freedom as well to act according to choice and to flourish as a human being.\textsuperscript{12}

Empowering women is the basic to the basics of human rights where she wants neither to beg for power nor search for power hierarchy to exercise power against others. On the contrary she demands to be accepted as human first of all. She as a person in command of herself and for that necessarily all the resources physical, social, economical, political, cultural and spiritual to be equally accessible to her, are pre-requisites for considering the whole question of empowerment.

Indian society is inherited with male chauvinism but now the society has started to realize women’s importance and has accepted women’s empowerment, women as an active agent for development, participating in and guiding their own development.\textsuperscript{13}

Gandhiji said that women are the companions of men, gifted with equal mental capacities. She has the right to participate in the minute detail of the activities of life and she has right of freedom and liberty with man. But today in India with special reference to the village, we see that by sheer force of vicious customs even the most ignorant and worthless men have been enjoying superiority over women which they do not deserve and ought not to have. We can however see that the trends have changed to a great extent with more and more women coming out and competing with men in many spheres. We can see

\textsuperscript{12} I.A. Khan & Urusa Mohsin “Empowerment of Women through property”, Quest for Justice, Vol. II No.1 pp. 15-16, 206-07
\textsuperscript{13} .......
today women in all sphere of life with no exception. But majority of these women are from urban areas and only handful are from villages. If this trend has to change, social empowerment of women is a must. Of course this is visible in the matters of fewer rules of socio cultural segregation too. Widows are in most cases today not treated or shunned as inauspicious the way they used to be, two generations ago, however this could be seen in urban areas. In villages we still see the prevalence of certain age old taboos and there should be a change in the social order by which Indian women especially from the rural areas stand as a monumental example of social and cultural emancipation, worth enough of the whole world to take an example.

Human Development directly correlated to people participation and development not only by-passed women but also made them victims of it. Participation leads to empowerment supported by economic and social dependents. It is now recognized that women hold the key to sustainable development. Empowerment of women is the most important aspect that our policy makers should have in mind before embarking upon any scheme, programme, meant for women.\textsuperscript{14}

1.3 ELEMENTS OF WOMEN EMPOWERMENT

Following are the in elements of women empowerment in any society:

- Equal opportunity to women for active participation in decision making process at par with men in all walks of life.

- Independent recognition of women for developing and civilizing the full latent of women.

\textsuperscript{14} Supra note 2, pp. 48-49.
• Elimination of any kind of discrimination economic and non-economic, based on sex such as wages, employment share in property, status in family and society etc.

• Inculcation of feeling for self pride by women themselves so that they should not feel weak, helpless, powerless comparatively to their counterpart men.

• To provide opportunity of women to determine her own way of life based on her talent, capabilities virtues and likings. Her position should not be determined by her husband, father, brother and son.15

Empowerment is a multidimensional process, which should enable the individuals or a group of individuals to realize their full identity and powers in all spheres of life. It consists of greater access to knowledge and resources, greater autonomy in decision-making to enable them to have greater ability to plan their lives, or have greater control over the circumstances that influence their lives and free them from the shackles imposed on them by custom, belief and practices.

Empowerment of women may also mean equal status to the women, opportunity and freedom to develop her. Empowering women socio-economically through increased awareness of their rights and duties as well as access to resources is a decisive step towards greater security for them.

Mikhail Gorbachow said, "The status of women is a barometer of the
democracy of any state, an indicator of how human rights are
respected in it".

Empowerment of women would mean equipping women to be
economically independent and personally self reliant, with a positive
self-esteem to enable them to face any difficult situation. Moreover
they should be able to contribute to the development activities of the
country. The empowered women should be able to participate in the
process of decision. Women empowerment is a dynamic process that
consists of an awareness-attainment-actualization cycle. Again, it is a
growth process that involves intellectual enlightenment, economic
enrichment and social emancipation on the part of women.\(^{16}\)

Empowerment aims at making women self confident and self reliant so
that they feel secure and are in a position to take their own decisions.
In most societies women have to take decisions keeping in mind the
well being of their families. It is assumed that being thoughtful, caring
and even sacrificing to some extent, does not harm but adds to a
woman's power and dignity. The basic condition for empowerment and
emancipation is that woman is considered and treated as an individual,
with intellect, fundamental right and feelings, similar to that of man.
Thus it is hoped that by the turn of the century women will be much
better educationally, politically and socially than they are today and
consequently will play an effective role.\(^ {17}\)

\(^{16}\) Dr. J.C. Pant & Dr. Upasana Sharma 'Suggested Measures for the Empowerment of Women' in
(Mahamya Publishing House, 2007).

\(^{17}\) Mrs. Rakhi Mittal 'Women's Equality: Still a Dream in Meenu Agarwal Women Empowerment:
The concept of empowerment emerged during the U.S. Civil Rights Movement in 1960's after substantial work took place in civil disobedience and voter registration efforts to attain right for Afro Americans with the name of 'black power'.

"It is a call for black people in this country to unite, to recognize their heritage to build a community. It is a call for black people to begin, to define their own goals and to think their own organizations".18

Concerning with the women the word empowerment is applied with the women's movement in the mid 1970's. Applied to gender issues the word empowerment began at its international level with Sen and Grown with their book Development, Crisis and Alternative Visions: Third world Women's Perspective (1985) which was prepared for the Nairobi Conference at the end of the U.N. Decade for women in 1985. In this book, a section on "Empowering Ourselves clearly identified the Creation of Women's Organization as central to the design and implementation of strategies for gender informations."19

Since the U.N Declaration of the Decade of Women in 1975, the issues concerning women have got preference all over the world but the quest of gender justice in law courts was started about fifty years ago with the question related to person clause, whether the word 'person' includes the women? The answer of this question was consistently in negative till 1929 all over the world.20 The House of Lords expressly held that women did not fall with in the meaning of term ‘person’. The

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19 Ibid
20 Narain v. Scotch University (1909) AC 147: 100 L.T.
U.S. Supreme Court had already the similar opinion. Though a court in South Africa held otherwise which, was over ruled by the appellate court. In India the full benches of Calcutta High Court and Patna High Court rejected the applications of women for enrolment under person clause in the Legal Practitioner Act. The Allahabad High Court is the first court which recognizes women under the 'person' clause by admitting Cornelia Sorabji as a legal practitioner under Legal Practitioner Act of 24 August, 1921.

At international level the Privy Council admitted it and expressed the obvious in one time: "the word person may include members of both sexes and to those who ask why the word should include females, the obvious answer is why not."  

In India with the Civil Disobedience Movement in 1929 the concept of equality of men and women in political, social and economic field were crystallized. Sarojini Naidu said "... It was not for men to give women any rights, nor was it appropriate for men to make decisions for women. Women must begin to exercise there own rights." 

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21 Bradwell v. Illinois (1875) US 162  
22 Incorporated Law Society v. Wooley (1912)  
23 In re Regina Guha IAR (1917) Cal 161  
24 In re Sudhansu Bala Hazara, AIR (1922) Pat. 269.  
In 1929 the demand of a single standard of morality for both men and women and equal rights had been made by the women's Indian Association.\textsuperscript{28}

1.4 SEEDS OF THE CONCEPT: WOMEN EMPOWERMENT

In real sense, the seeds of this current phenomenon lie in the past. The positions of women in India have not been very sound in proceeding few hundred years. Manu the father of Hindu Dharma Sutra says about woman:


duo raksati kaumare
Bharta raksati yauvane,
Raksanti sthavire putra na
Stri svatantrayamarhati”

The subordination and dependence of women particularly in socio-economic life continued till independence. The word empowerment, although it gained widespread usage in the context of the US Civil Rights and Women's Movements is an extension of earlier concepts of equality, justice and freedom which were expressed in many anti-imperialist and political struggles. These are also enshrined in international agreements and also underlie the precepts of many religious traditions, including Islam. In India several attempts have been made for giving a rich status to women. It is evidenced from the provisions for elevating the status of women in our laws.\textsuperscript{29}

\textsuperscript{28} Rani P, "Women's Indian Association Movement in Madras 1925-1936: Perception on Women' in Women and Indian Nationalism (1994), p. 103

\textsuperscript{29} Supra note 1, p. 4
1.5 PROCESS OF EMPOWERMENT

Implicit in participation is empowerment or transfer of power to the people. Empowering is development of skills and abilities of people to enable them to manage better, negotiate with existing development delivery systems. Some see it as more fundamental and as essentially concerned with enabling people, to decide upon and undertake actions, which they believe are essential to their development. The empowerment process encompasses several mutually reinforcing components but begins with and is supported by economic independence, which implies access to and control over production resources. A second component of empowerment is knowledge and awareness the third is self-image and the final is autonomy.

The women in India have been identified as a disadvantageous group. They form a weaker section and are subject to excessive male domination. For this reason they seldom get a chance to develop their health, personality and participation in development programmes within and outside their home environment. The women form a great-untapped reservoir of human energy that comes out from within the treasure of unlimited human resources as against limited natural resources. The natural and material resources in India are very much limited in respect of its overwhelming population and therefore this country greatly depends on maximum utilization of human resources. India cannot afford to keep the womenfolk aside from making their participation in the process of development. Moreover, the condition of women will not improve unless they get opportunities and make use of such occasions to earn experience, increase skill and efficiency and
prove their ability in discharging their social responsibilities. The situation of women as it exists is one of low status of women that are powerless, endangered by development, suppressed by poverty and oppressed by patriarchy. Traditions structures have failed to make room for them as equal partners in the decision-making processes; nor has the system ensured that their interests and concerns are reflected in development plans and local programme.

They are ignorant, unaware and ill informed about how they could live better lives with less drudgery, morbidity and fear of violence. Even though nature has endowed them with superior biological strength, the environment stifles their development. At every age more women die than warranted to keep the sex ratio adverse in most parts of the country.

The issues of empowerment of women moved centre stage during the last three decades of the second millennium mainly through the efforts of the United Nations by declaring 1975 as the Women's Year for the abolition of discrimination against women in centuries where it still exists. The resolution by the United Nations of the International Women's Year urged: "to strive for equality between men and women; to promote a higher role of women in the economic, political, social and cultural life of countries; to promote their active participation in the struggle for the development of friendship and co-operation between nations for peace and social process". The decade 1975-82 as the women's decade, this period coincided with the 6th Plan period in India when the approach was shifted from welfare to development and further efforts during the subsequent Plans culminated in the farming of a National Policy for Empowerment of Women approved by the
Cabinet on 20th March 2001. However despite constitutional guarantee of equality and justice, legislative support of a plethora of Acts and introduction of policies and programmes, the goals of gender equality and justice, empowerment of women still remains a distant dream for Indian women.30

1.6 SOCIAL EMPOWERMENT OF WOMEN

Women's role in any culture says no words to emphasis. It is obligatory to consider women as a weaker section. Neglect of women power in our society is perhaps the most important cause of our backwardness. The national movement under the leadership of Mahatma Gandhi was one of the first attempts to draw Indian women out of the restricted circles of domestic life into equal role with men, empowerment of women also means equal status to women/Empowering women socio-economically through increased awareness of their rights and duties as well as access to resources is a decisive step towards greater security for them. Empowerment includes higher literacy level and education for women, better health care for women and children, equal ownership of productive resources, increased participation in economic and commercial sectors, awareness of their rights a?id responsibilities, improved standards of living and acquiring i elf-reliance, self-esteem and self-confidence.31 Empowerment is a process of acquiring rights, developing self (personality development) and deciding by self, independently (self decision - making process). It is, in fact, that way of conscience, which paves the way for playing greater active role in

30 Supra note
all spheres of life and simultaneously empowers the person to control and change the major works. In other words, it is a process which is directly related to the power and for to change of power, i.e., the power to control the resources and concepts. When we talk of women empowerment, we mean providing women social, political, economical, and religious rights so that the status of women may become equal to the men in society.

The following may be said to be the objectives of Social Empowerment of Women:

- To increase awareness in women, for their development to use their talent optimally not only for themselves, but also for the society as whole.

- To develop the skills for self decision-taking capabilities in women and to allow them to present their point of view effectively in society.

- To create sound and proper environment for women's pride, prestige and healthy physical and mental development.

- To make efforts in organizing the women for fighting against the problem and difficulties related to them.

- To create awareness among women to be truly ambitious and to dream for betterment.  

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1.7 EMPOWERMENT OF WOMEN AND EDUCATION

Education is the corner stone of women's empowerment because it enables them to respond to opportunities, to challenge their traditional roles and to change their traditional roles and to change their lives. Education of women benefits the whole society. It has a more significant impact on poverty and development than men's education. It is also the most influential factor in improving the child's health and reducing infant mortality. It also has an effect on family size. The more years of education a woman has, the higher is the degree of her independence. Education would actually accord women certain advantages in areas where women have historically lacked access or differential rights. Education would empower women to achieve many social, psychological, economic and political dreams which are denied to her traditionally.

The policy of the government of India for empowerment and development of women lays emphasis on removal of women's illiteracy and obstacles inhibiting their access to elementary education, women's participation in vocational, technical and professional education at different levels. The government also lays stress on non-discrimination, thus seeking to eliminate sex stereotyping in vocational and professional courses. It actively promotes women's studies as a part of various courses and encourages educational institutions to take up programmes to further women's development and to promote women's participation in non-traditional occupations in existing and emerging technologies.
Equal access to education for women and girls will be ensured. Special measures will be taken to eliminate discrimination, universalize education, eradicate illiteracy, create a gender sensitive education system, increase enrolment and retention rates of girls and improve the quality of education to facilitate life-long learning as well as development of occupational/vocational/technical skills by women. Reducing the gender gap in secondary and higher education would be a focus area. Sectoral time targets in existing policies will be achieved with a special focus on girls and women, particularly those belonging to weaker sections including the scheduled castes/scheduled tribes/other backward classes/minorities. Gender sensitive curriculum would be developed at all levels of educational system in order to address sex stereotyping as one of the causes of gender discrimination.\textsuperscript{33}

The single most resource that liberates empowers people is "knowledge" a society, by using knowledge through all its constituents, endeavor to empower and enrich its people and thus will become a knowledge society, a literate women is a sure sign of education of coming generation because a literate woman can never tolerate illiteracy in the house. That is why Pt. Jawaharlal Nehru, rightly pointed out that if education is given to women the it would lead to education of home society and world at large. So it goes without saying that to awaken the people, it is the women who should be awakening first and they should be trained to play an effective role in the walks of life. Education is also a powerful instrument since

\textsuperscript{33} Supra note, 2 pp. 34-35
education enables women to gain more knowledge about the world outside, skill, Self-image and self-confidence.\textsuperscript{34}

1.8 POLITICAL EMPOWERMENT OF WOMEN

The concept of political participation of women is broader than the one covering women's participation only in the electoral and administrative processes. It includes the whole gamut of voluntary activities with a bearing on the political processes, including voting, support of political groups and communication with legislator, dissemination of political views and opinions among the electorate and other related activities.

Political empowerment of women in India has limited application mainly because of various dubious considerations of social, economic and political variables. Broadly, political participation of women is severely limited due to a nexus of traditional factors; these are the domination of Indian politics by consideration of caste, class, religion, feudal and family status etc., all of which are essentially patriarchal forces that work in favour of men against women. Consequently, women are still left on the periphery of the political process and political participation remains in contesting elections and also capture of some seats of power and influence.

There are several socio-economic constraints by which women have been marginalized. The number of women in leadership position at the local village, district and national level is still not commensurate with their number in society. In India, limited adult franchise was granted to women in 1937, since then, women have been participating in political process as voters as candidates contesting the elections involved in

\textsuperscript{34} Supra note 15 p. 290.
deliberations both in State Assemblies and Parliament and also through holding public office at different levels in the judiciary.

Women's participation in formal elections is to a great extent dependent on the mobilization efforts of the political parties, general awareness among the community of the importance of exercising franchise and the overall political culture.

If we have a look at the past history of the women's political participation, we find that no serious efforts appear to have been made to mobilize women as a political pressure group by any political party. In addition, over the years, the number of women contestants in parliamentary elections has not increased. Political parties seem uniformly reluctant to field women candidates. The high cost of the electioneering is another deterrent to most women candidates. Because of these factors there is an increasing tendency among women to contest elections as independent candidates.\footnote{Supra note 2, pp. 45–46}

Participation in the freedom struggle brought political awakening to our women. Reservations in the local bodies have ensured women's entry into the political process at the grass root levels. There is now a demand to carry these reservations forward into the Assemblies and to Parliament in order to empower women and bring them into leadership positions. But empowerment is more than political participation. Women have to be equipped to help themselves, they have to be made aware to their rights and enable to discover their own potential.\footnote{Supra note 2, p. 35.}
The Political component of empowerment includes the ability to organize and mobilize for change. Generally the political participation of women simply means to elect representative to caste vote on issue, to campaign and to decide matters. But to contest an election is the highest level of participation according to Rush and Althoff.26 Women's participation in world politics is very low as compared to men. Politics has been from the very beginning of the human civilization, the domain of males and women's regime is inside the home. They are not supposed to indulge in ‘public-life’. Politics being highest expression of public life was thought to be unfit for women. Barring handful of women who could make it up to the top their country's politics, there was a strong struggle for women to come at par with their male counterparts.

In India gendering in politics is very strong. As a result the women's representation in politics is very less and those who are in politics are mostly from upper caste or upper stratum. When 33% seats reservation bill for women was presented in the Parliament, it was depreciated by the male members of Parliament. Recently, All India Women’s Conference, Centre for Women's Development Studies, Forum for Right of Children, guild of Service, National Programme of Muslim Women's Forum and Young Women’s Christian Association have given an ultimatum to the UFA Government that they are not in mood to back the postponement of the Women's Reservation Bill as it has not been included in the list of monsoon session and threaten that if the demand is not fulfilled the campaign will intensify and spread to all parts of the country.37

37 The Hindu 1st April 2006, p. 13
1.9 EMPOWERMENT OF WOMEN: ECONOMIC PERSPECTIVE

The economic component requires that woman should be able to engage in a productive activity that will allow them some degree of autonomy, no matter how small and hard to obtain at the beginning.\textsuperscript{38} Marx and Angles consider economic forces to be the sole detriment of each and every social change. According to these two thinkers the seed of every social change is to be found in some economic circumstances and that without changing in the economic forces there is no social change. According to Marx there is always a conflict between an economic relations and potential economic forces. Kant W. Duch believes that social mobilization is a process in which old social economic and psychological commitments are eroded or broken and people became available for new patterns of socialization and behaviours. So economic component of empowerment is of paramount importance for the upliftment of women.

The feminist movement is one step forward and two step back ward for the common women. There are contradictory forces at work. On one hand there is a progressive thinking which has led to decentralization which is pro-women, on the other hand there is economic onslaught which is detrimental to women. Due to current economic model millions of women are losing their livelihood.\textsuperscript{39}

The whole economic paradigm is pulling a premium on being power hungry. A recent survey done in an European country discovered that man on top have successful marriage and children where as the women

\textsuperscript{38} Stromquist-cited by Diumarti op.cit., p. 7.
\textsuperscript{39} Times of India 2\textsuperscript{nd} April 2004, editorial page.
on top are either unmarried or divorcée. So women have to give up every thing while men have every thing. For a successful man a good marriage is an asset but for women it is seen as a hindrance.  

There are several reasons including some self imposed as marriage is still the principal detriment of women's position and career choices. Her decisions are influenced by marriage, parenthood and responsibility in home making and expected social responsibilities. They are in search of a professional role congruent with the feminine role expectations. Many term women sacrifice their career for the sake of their spouses and children. The women income is still considered a secondary to that of husband.

Capitalism in many ways supports patriarchy because of the dependence of a woman on men for financial security. Men think that they can subject her to object of humiliation just because of that security. It is necessary that women should be aware of the importance of being financially independent and can equip them with self esteem and self reliance. As divorced women have been almost totally at financial mercy of their husband and can literally find themselves homeless, They are bound to live with her despotic husband and endure bad marriage rocked with physical violence and mental abuse without a whimper. At last the economic empowerment of women are the most important for gender justice and upliftment of feminism.

Cultural traditional and economic necessity has always meant a significant role for women in agriculture. In India, it is not uncommon that women do not have control over the land. Even, where women

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40 Kamala Bhasin (The pioneer of fair movement in India) “Fair Movement” Times of India 2nd April 2004 editorial page.
constitute a larger share of agricultural produce but there are cultural constraints to easy communication between men and women because almost all extension workers are men. Therefore, the role of agricultural extension workers is very significant. Besides, cultural norms have to be addressed before we tackle other dimensions.

In animal husbandry women have a multiple role. UN estimated 75 million women as against 5 million men are engaged in the Indian dairy sector. Their activities vary widely ranging from care of animals, grazing, fodder collection, banning of animal shed to process milk and livestock products. Though women play a significant role in livestock management and production women's control over livestock and its products is negligible. Though women work in every sphere of the farm sector they are not recognized as farmers. Consequently, they remain outside all agricultural development programmes and services.

Not only do women perform more tasks, their work is also more arduous than that undertaken by men. Both transplanting and weeding require women to spend the whole day and work in muddy soil with their hands. Moreover, they work the entire day under the intensely hot sun while men's work, such as ploughing and watering the fields is invariably carried out early in the morning. Women's work, unlike men's does not involve implements and is based largely on human energy, it is considered unskilled and hence less productive.

Women work longer hours and their work is more arduous than men's. Women's contribution to agriculture -whether it is subsistence farming or commercial agriculture - when measured in terms of the number of
tasks performed and time spent, is greater than men. "The extent of women's contribution is aptly highlighted by a micro study conducted in the Indian Himalayas which found that on a one-hectare farm, a pair of bullock's works 1,064 hours, a man 1,212 hours and a woman 3,845 hours in a year".

Women's participation in income generating activities is believed to increase their status and decision making power with employment. They do not remain as 'object' of social change, but become 'agents' of social change. They cease to be only 'consumers' of economic- goods and services but true 'producers'. They participate in social reproduction as well as reproduction of labour for the next generation.

The economic contribution is related to their status and role in the family and in the society. If a woman is not economically self-dependent, she can never claim an equal status with man. The problem of poverty cannot be tackled without providing opportunities of productive employment to women. Even where there is a male earner, women's earning forms a major part of the income of poor household. Moreover, women contribute a large share of what they earn to basic family maintenance than men; increases in women's income translates more directly into better child health, nutrition and family well being.

Women's participation in the labour force also brings about changes in awareness and attitudes, which may have long-term benefits such as access to health and education programmes, reduction in birth rates, thrift and savings etc., Economic independence of women will create far reaching social changes and prove as a necessary weapon for them to face injustice and discrimination.
One of the pre-requisites to promote empowerment of women is promotion of organizations among women. Women can be organized through a variety of means namely through formation of co-operatives, Mahila Mandals, Self Help Groups and the like. Through collective action, women can be empowered socially, economically and politically. Organizational behavior of the women's group was the major influencing factor contributing to the success of the economic pursuits.

The goal of poverty reduction and empowerment of women can be effectively achieved if poor women could organize into groups for community participation as well as for use of their rights in various services related to their economic and social well-being.41

Hence, it is the right time to make sincere efforts to break the Vicious circle. Poverty in India can be elimination to a long extent and the general status of women in the society will be enhanced if this vicious circle is broken. Women empowerment should directly connect to the family, society and country. The cruelty with women is very painful, for her and her family and also shameful for society and country. A single crime with women reverses all forwarding steps of other women and the chain of development breaks up. These should be a positive change in attitude of man, society, religion and government so that woman can be given a fair chance to develop without any fear.42

In recent years, empowerment of women has been recognized as a central issue in determining the status of women. Empowerment

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41 Supra note 2, pp. 40-42.
covers aspects such as women's control over material and intellectual resources. Empowerment is process, not an event, which challenges traditional power equations and relations. Abolition of gender-based discrimination in all institution and structures of the society and participation of women in policy and decision making processes at domestic and public levels are few dimensions of women empowerment. In 1995, the human development report quoted that out of 1.3 billion poor people living in developing countries, 70 per cent are women. Poverty among rural women is growing faster than among rural man. Over the past 20 years, for example, the number of women in absolute poverty rose by 50 per cent as against some 30 per cent for rural men. Women in India form 89 per cent of the informal and unrecognized sector. It is fact that women are capable to play their role in economic development like the men at least equally well if not better. The success of all programmes aiming at to allow women to play her proper role in economic development would depend on increasing women's participation, particularly on actual target groups to move from empty generalizations to concrete measures and to increase women's self reliance and determination to play more active role in the development process.

Countries that hope to be in the vanguard of economic development and social change should accord women as high a status as that of man to enable them to play the necessary complimentary role in the progress of the national. Women are the core of development in India. The striking characteristic of Indian women is the multiplicity of their role in development but is unrecognized. After centuries of neglect, the past two decades have seen unprecedented human development efforts
contributing greatly to rapid progress in building women's capabilities.\textsuperscript{43}

1.10 WOMEN EMPOWERMENT THROUGH LAW

For centuries, women in this country have been socially and economically handicapped. They have been deprived of equal participation in the socio-economic activities of the nation. The Constitution of India has taken a long leap in the direction of eradicating the lingering effects of such adverse forces so far as women are concerned. It recognizes women as a class by itself and permits enactment of laws and reservations favouring them. Several Articles in the Constitution of India make express provisions for affirmative action in favour of women. It prohibits all types of discrimination against women and lays a carpet for securing equal opportunity to women in all walks of life, including education, employment and participation.

In spite of all these developments, the truth remains that widespread violations of women's rights continue to persist. The forces of globalization and extremism and the unwillingness of other segments of humanity continue to pose a threat to women's human rights. The law cannot change a society overnight, but it can certainly ensure that the disadvantaged are not given a raw deal. The courts can certainly go beyond mere legality insulating women against injustice suffered due to biological and sociological factors.\textsuperscript{44}

\textsuperscript{43} Supra note 31, pp. 224-225
The constitution declared India to be a Sovereign Democratic Republic based on the four pillars of justice, liberty, equality and fraternity.

The principles of gender equality and equity and protection of women's right have been the prime concerns in Indian thinking right from the days of independence. Accordingly, the country's concern in safeguarding the rights and privileges of women found its best expression in article 14, 15, 15(3), 16, 39 and 42 of the constitution. Article 51(A) (C) imposes a fundamental duty on every citizen to renounce the practices derogatory to the dignity of women. To make this *de-jure* equity into a defect, special legislations have been enacted from time to time in support of women. The concept of women development envisaged as 'welfare oriented' in the early phase of our planning era was subsequently shifted to development oriented" during 1970's which started recognizing women as participants of development. The current phase of planning, marking a shift from development to 'empowerment' of women, envisaged that the women must be enabled to function as equal partners and participant in country's development process. With the changing concept of women development, government adopted various plans and programmes for the upliftment of women in India.

Social legislation has been passed to improve their status and rights of women. Special steps are taken to improve their education, health facilities, economic position, marriage act and for their proper participation in family and community life.

The legislation which has been passed after independence to bring women at par with men is based upon our constitution. To remove all
the anomalies in the rights of men and women, the Hindu Code Bill, which covered all the aspects regarding the rights of women, was presented to parliament in 1948, but due to strong opposition from orthodox section, the same could not be passed in toto. Later, this legislation was passed in a piecemeal manner to improve their position.

The various laws made are the Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956.

Under the Hindu Marriage Act, the rule of polygamy has been put to an end and the right of divorce has been given to both males and females. Under the Hindu Succession Act, widows have been given full rights over their property. Besides, the mother and daughters have also been given equal rights in property with the sons. Under the Minority and Guardianship Act, the custody of a minor child under the age of five years shall ordinarily be with the mother instead of the father. Under the Hindu Adoption and Maintenance Act, a woman can adopt the son in her own name. Both male and female can be adopted, and in case the wife is alive, the husband will have to take the consent of his wife in adoption. Thus, in many respects the rights of women have been brought at par with men.

The socio-economic programme, started on a modest scale in 1958, has become one of the principal programmes of the Central Social Welfare Board as it helps in social and economic betterment of a large number of women and the disabled. Under this programme financial assistance is provided to voluntary welfare institutions to organize a wide variety of income generating projects for the benefit
of needy women and the disabled persons who are provided with full
time or part-time jobs. Assistance is also provided in the form of
grants or loans through voluntary organizations to eligible candidates
for self-employment.

After 1958, Medical Termination of Pregnancy Act, 1971; Equal
Remuneration Act, 1976; Child Marriage Restraint Act, 1976;
Immoral Trafficking (Prevention) Act, 1986 and Pre-natal
Diagnostic Technique (Regulation and Prevention of Measure) Act,
1994 etc. has been passed to safeguard of women empowerment.45

Recently, Government has now empowered Indian women with a law
to protect themselves from violence of any kind occurring within the
family, and equal property right in the paternal estate.

1.11 LEGISLATION AGAINST DOMESTIC VIOLENCE

Some forms of violence like rape and wife-beating are recognized as
universal forms of violence. Others like dowry, sati and female
foeticide are perpetuated by specific cultures and communities.

Therefore, there are reasons to cheer the passage of the protection of
women from Domestic Violence Bill, 2005 by both houses of
parliament. This path-breaking legislation seeks to protect women
from all forms of domestic violence and check harassment and
exploitation by family members or relatives. Women will now be
able to take legal action against abusive husbands and those who
harass them.

45 Dr. Upasana Singh: Social Empowerment of Indian Women in Meenu Agarwal Women
Empowerment: Today’s Vision for Tomorrow’s Mission p. 263-264 (Mahamaya Publishing House,
2007).
Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The Bill is an important step in fulfilling the promise of legislation against domestic violence and gender discrimination made to women by the UPA government under the Common Minimum Programme.

August 24, 2005 the Union Minister of state for Human Resource Development Ms. Kanti Singh, assured that the Bill would not disturb equations within the family. The Bill, she said, was aimed at empowering women and liberating them from the cycle of violence, not from any one individual.46

1.12 EQUAL PROPERTY RIGHT

To give equal right to daughter as son in the ancestral property has came into force with its notification on September 09, 2005. The Hindu Succession (amendment) Act 2005 was passed in the assembly and by coming this act into force, both son and daughters now have equal right in ancestral property. In The Hindu Succession Act 1956, para 6, the girls of Hindu families were discriminated and they were seriously overlooked. This act not only deprived the girls from their ancestral property but also was partial on the sexual basis and also deprived from the basic rights of similarity given by the constitution.' As The Hindu Succession (amendment) Bill has been passed, the para 6, of The Hindu Succession Act 1956 has been amended and like the boys, now the girls also got the equal right in the ancestral property.

Though the amendment in the para 6, where the girls got equal right in the ancestral property and the self-occupied property, there at the

46 Id. P.
same time the married daughters will also get their share in the
property. Till now it was applicable only to unmarried daughters only.
With another amendment like the children of son, the children of
daughter will also be treated equally.

It can be highlighted that mere legal or institutional equality alone
cannot guarantee implementation of equal rights to women unless the
urge among women themselves to end the discrimination is
developed. The role of voluntary organizations is to strengthen the
process of women empowerment. Proper training of women in
improved technology and trade unions among female workers are
steps that may be advocated for.47

1.13 SOCIAL LEGISLATION IN INDIAN PLANNING

Different Five-year Plans have consistently placed special emphasis to
improve the conditions of women and to increase their access to and
control over material and social resources and also integrate them in
economic development process in India. A series of social legislation
have been enacted from time to time for raising the status of women in
the country.

The Five-year Plans also consistently placed special emphasis on
providing minimum facilities integrated with family welfare and
nutrition for women, acceleration of women's education, their increase
in participation in work force and welfare services for women are
needed. Various welfare and development schemes have been
introduced form time to time to improve the living conditions for
women. Special steps have been taken to remove legal, social and

47 Id. P.
other constraints to enable them to make use of their rights and new opportunities becoming available for them.

The Eighth Five-year Plan intends at enabling women to function as equal partners and participants in development by extending the services to women both qualitatively and quantitatively. Moreover, the plan also aims to effectively implement social legislation for women by formulating and strengthening women's group at grass-root level.

The Ninth Five-year Plan, aim for empowering women as the agents of social change and development. Formation of National Commission for Women (NCW) and idea of setting up of a National Council for Empowering of Women are encouraging steps in this direction. Actual formation and functioning of National Commission for Women (NCW) started in 1992. Moreover, the effort to formulate the National Policy for empowerment of women and setting up a National Resources Center for Women are other steps taken for the development of women and child development. The progress of women and of the society seems to have retarded. Even after forty years, examples galore where on the one hand the sensitivity over women's issues is lacking and on the other hand atrocities against women are rising.\(^{48}\)

The Committee on Status of Women in India (CSWI) recommended as early as in 1975, the setting up of a National Commission for Women (NCW). Many women activists and organizations also pressed for the demand and finally parliament passed the act in 1990 for setting up a women's commission. Actual formation and functioning of National Commission for Women (NCW) started in 1992.

\(^{48}\) Id. P.
The National Commission for Women (NCW) has been designed as a watch dog on how the various government sectors perform vis-a-vis gender justice.

Women related issues have many dimensions but they can be summarized as violence, denial and deprivation. Violence, can be paternal or matrimonial house, or at work place or elsewhere in the society. Denial comes as denial of the right to be born, or denial of nutrition, education, health, home, property etc. Deprivation, results from debarring them from several opportunities of empowerment-political, economic or carrier-wise. The commission has some programmes -

1. Providing funds to voluntary organizations, academicians and other bodies.

2. The programme of legal literacy camp is designed to organize a three-day legal awareness for a group of nearly 50 women by any organization.

3. The third programme is the programme of public hearing under which hearing is given to a group of 30 or more women who are affected by a typical situation at one or more places.

4. Funds are also given for holding seminars/workshops on topics relevant and important for women's questions.

5. Funds are also given to academicians to carry out survey and other studies.49

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49 Id. p.
1.14 WOMEN'S EMPOWERMENT YEAR

With improved social status of women, their claim to educational opportunities also received greater attention in the past few decades. The education of women will make available to the country a wealth of capacity that is now wasted through lack of opportunity.

A plan of action for the empowerment of women with measurable goals to be achieved in a time of the next 10 years is being formulated in consultation with the State Governments and various Ministries and Departments of Government of India.

The Government of India had declared the year 2001 as the year of Women's Empowerment. The year was formally launched by the Prime Minister in a function held at Vigyan Bhawan on 4th January, 2001 when he also awarded the first "Stree Shakti Puraskar" to five distinguished women from the grassroots who had made outstanding efforts for the social, educational and economic empowerment of women in remote and difficult areas.

The purpose of declaring the year 2001 as the Women's Empowerment Year was as follows -

1. To create and raise large scale awareness of women's issues with active participation and involvement of all women and men.

2. To initiate and accelerate action to improve access to and control of resources by women.

3. To create an enabling environment to enhance self-confidence and autonomy of women.⁵⁰

⁵⁰ Ibid.
The Government approved, for the first time a National Policy on Empowerment of Women in order to mainstream gender into all activities of the Government and other agencies.

The main objectives of the policy are:

1. Creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential.

2. The *de-jure* and *de-facto* enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres -political, economic, social and cultural.

3. Equal access to participation and decision making of women in social, political and economic life of the nation.

4. Equal access to women to health care, quality education at all levels, carrier and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office, etc.

5. Strengthening legal systems, building and strengthening partnerships with civil society, aimed at elimination of all forms of discrimination against women.

6. Changing societal attitudes and community practices by active participation and involvement of both men and women.

7. Mainstreaming a gender perspective in the development process.
8. Elimination of discrimination and all forms of violence against women and the girl child.\textsuperscript{51}

1.15 CONCLUDING REMARKS

Empowerment is a very broad term encompassing all type of empowerment such as education economic, social, political, legal and cultural empowerment women. The world declaration in world conference in 1990 laid emphasis on "Education of all" lays stress on universalizing access and promoting equity, the two issues which are vital to empowerment of women.

The process of women empowerment is thus concerned with changing the power relations between individuals and groups in the society and involves awareness raising building of self confidence expansion of choices, involvement in decision making and increased access to and control over resources unless they themselves become conscious of the oppression met out to them and show initiative both to push forward. It would not be possible to change their status much some of the employment mechanisms could be identified as follows:

- Literacy and higher education.
- Better health care for herself and her children.
- Higher age of marriage.
- Greater work participation in modernized sector
- Necessary financial and service support for self employment.
- Opportunities for higher positions of power
- Complete knowledge of her rights and above all.
- Self-reliance, self respect and dignity of being a women.

\textsuperscript{51} Ibid.
Empowerment is envisaged as an aid to help women to achieve equality with men or, at least, to reduce gender gap considerably. Empowerment would enable women to perform certain social roles which they cannot perform without it. This would mean helping women to enjoy their constitutional and legal right of equality. Though men and women are declared to be equal before the law and though discrimination on the bases of sex is forbidden by the constitution it is common knowledge that women are still at disadvantage in many areas of life. Indeed one could even say that the position of women in India has not improved much since the enactment of the Constitution when it comes to the issue of gender justice.
Chapter-2:
Women and Personal Law
Systems in India
Chapter-2
WOMEN AND PERSONAL LAW SYSTEMS IN INDIA

2.1 INTRODUCTORY REMARKS

In India family laws are called personal laws. The laws are personal in that they relate to the sphere of personal relation but also in that they are person-specific. The specificity flows primarily from religious affiliation, though local custom is also important. As a result, family laws are hived off from the main body of civil law, codified separately for four communities-Hindus, Muslims, Christians, and Parsis-based on their religious prescriptions. In reality, the four codes are a mix of scriptural sanctions, heterogeneous customs and practices, and most important precepts forwarded and established through the political maneuverings of powerful spokespersons from these communities. Thus the laws necessarily reflect patterns of social political dominance based on religion, caste and gender.

“Personal laws define the relationship between men and women with the family and control and direct marriage, divorce, maintenance, guardianship of children, adoption, succession and inheritance. All four codes concern women intimately, and all treat women as subordinate to and dependent on male kin. The male is considered the head of family, and women do not have equivalent rights, especially to property.”

2.2 PERSONAL LAWS IN INDIA: MEANING AND SCOPE

"Personal laws are codified separately for the four religious communities—that is, they are not just customary or communal law, but also statutory law based on religion. As a secular nation-state, India maintains these religious laws alongside secular laws, civil, criminal, all of which are administered by the same legal judicial apparatus."

Personal law (i.e. laws covering family relations, marriage, divorce, inheritance, custody rights etc) is a contested arena for women empowerment. It not only defines the relationship between men and women in marriage and family relations but also marks the relationship between women and the state while civil and criminal laws in post independent India are secular, personal laws are governed by the respective religious laws.¹

By systems or regimes of personal law, we refer to legal arrangements for the application within a single polity of several bodies of law to different persons according to their religious or ethnic identity. Personal law systems are designed to preserve to each segment its own law.³ In the last several centuries, the most prominent instances have been personal law regimes in the areas of family law (marriage, divorce, adoption, maintenance), intergenerational transfer of property (succession, inheritance, wills), and religious establishments (offices, premises, and endowments)." Such personal law typically co-exists with general territorial law in criminal, administrative, and commercial

¹ Seema Qazi, Muslim Women in India, Minority Rights Groups International, 1999, p. 20.
matters. On occasion, some commercial or criminal rules may be included in personal law.

In India, the British raj established a general territorial law that operated in a common law style and was administered in a nationwide system of government courts. Over time, through infusion of common law and codification, the substantive law came to resemble its British counterpart. At the same time, the British preserved enclaves of personal law. The Bengal Regulation of 1772 provided that in suits regarding inheritance, marriage, caste, and other usages and institutions, the courts should apply "the laws of the Koran with regard to Mohammedans, and those of the Shaster with respect to the Hindus. Under the British, the personal laws of Hindus and Muslims were administered in the regular courts by judges trained in, and familiar with, the style of the common law. Until about 1860, the courts had attached to them "native law officers," pandits and kazis, to advise them on questions of Hindu and Muslim law respectively. To make the law more uniform, certain, and accessible to British judges—as well as to check the discretion of the law officers—the courts relied increasingly on translations of tenets, on digests and manuals, and on their own precedents." In 1860, when the whole court system was rationalized and unified, the law officers were abolished and the judges look exclusive charge of finding and applying the personal law. These religious law systems were now reduced to texts severed from the living systems of administration and interpretation in which they were earlier embodied. Refracted through the common law lenses of judges.

5 Tohir Mahmood Pesonal Law in Crisis, pp. 42-43 (New Delhi, Manohar, 1986).
and lawyers, and rigidified by the common law principle of precedent, there evolved distinctive bodies of Anglo-Hindu and Anglo-Muslim case law.\(^6\)

These bodies of personal law were administered by the courts of British India and (later) independent India. The Constitution of 1950 appears to envision the dissolution of the personal law system in favor of a uniform civil code. After the Constitution came into force in 1950, the continued administration of separate bodies of personal law for the various religious communities was challenged as a violation of the right to equality guaranteed by the Constitution, The Indian courts upheld the continued validity of disparate personal law and the power of the state to create new rules applicable to particular religious communities. The judges in the leading case\(^7\)—a Hindu and a Muslim, both distinguished legal scholars as well as prominent secularists—were sanguine about the continued existence of personal law, presumably in anticipation of its early replacement.

While retaining the personal law system, independent India introduced a note of voluntarism, The Special Marriage Act of 1872 had provided a code of general law under which couples could choose to marry and divorce, but in under to utilize this option they had to affirm that neither was a Christian, Jew, Hindu, or Muslim. In effect they had to renounce their religious and property relations with their families. In 1954, Parliament passed anew Special Marriage Act that eliminated the onerous renunciationary costs of availing of civil marriage.\(^8\)

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\(^7\) State of Bombay v. Narasu Appa Mali AIR 1952 Bom, 84.

India retains a system that governs certain family matters of Hindus, Muslims, Parsees, and Christians by their respective religious laws. There is also a set of religiously differentiated public laws regulating religious endowments. While personal law in India covers issues of adoption, succession, and religious institutions, marriage and divorce are the main focus of public attention. Twelve pieces of national legislation deal with particular issues of marriage and divorce for the various religious groups in the country. The administration of these personal laws in India remains in the hands of state judges.

It is submit that India’s personal law system is not associated with much conflict within the several religious communities. Political conflict in India over personal law appears more prevalent between, rather than within, religious communities. This is not to say, however, that interreligious dissension is entirely absent in India. Debate about women’s rights in their respective personal law systems is present within the Hindu, Christian, and Muslim communities—many Hindu women who champion equal rights for women support drastic reforms within (if not a complete abandonment of) Hindu personal law. Many Indian Christian women, similarly, struggle and protest against the obstacles Christian personal law poses for women who seek divorce. And there is a series of feminist critiques of Muslim law's treatment of women in divorce and maintenance.

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9 Derrrett, Religion, Law and State in India, p. 328.
2.3 SOCIETY AND LAW IN THE HINDU TRADITIONS

The relationship between law and Hindu society involves both the actual and the ideal. To the extent that particular laws are related to a particular society, they can be regarded as a reflection of its value system. But law (both customary and codified) were also seen as a means of controlling society and, as such, an attempt has been made to perfect the legal framework, which then becomes a reflection of the aspirations of society in which these laws were evoked.

In the Hindu and Buddhist traditions this framework can be deduced from a number of texts and documents, most of which were composed in the period between 400 B.C. and A.D. 500, much of the later literature is in the nature of commentaries on the earlier works, which reflect relevant changes in both society and its laws.

There are two approaches to an attempt at understanding humane in these traditions. First of all, the metaphysical aspect provides a framework of a rather generalized kind emanating from a small group of thinkers. Metaphysical thought certainly contributes to the ethos of a society, but this contribution becomes fairly diluted by the time it reaches the concrete reality of a legal code. The second and more significant aspect of the study is provided by the law books themselves, which draw a more distinct picture of the legal framework. However, reliance, even on such definite sources, 15 not without its dangers. The Law books are both a reflection of early Indian society as well as attempts at working out what was believed to be a perfect social system. Therefore, the aspirations of the lawmakers are also to be considered. Nevertheless, the danger can be mitigated somewhat by
testing from historical sources the actual validity of the legal systems codified by lawgivers.

Hindu law was first formulated in a tribal society and it was based on customary practices and relationships. As is frequent in kin-societies, social control had the force of law. The central problem at this stage was to maintain peace between the tribes rather than to protect the rights of the individual.

The acceptance of a monarchical system by these tribes introduced two new features. The political structure required by kingship encouraged an element of authoritarianism amongst the lawmakers. The close association of kingship with divinity was projected into the realm of law and provided a supernatural sanction for it whenever necessary. The status of the individual in society came to be conditioned by these new factors.\(^\text{12}\)

### 2.4 DHARMA AND LAW

Briefly, Dharma refers to the norm of conduct and of duties on each man in accordance with his caste. It derives from both legal treatises of the past (often regarded as sacred texts) and from approved custom, particularly that which is not opposed to the sacred texts. The idea of Dharma is fully articulated in the theory of Varna-asrama - Dharma, where the definition of one's duty has reference not only to one's caste but also to the particular stage in every stage of life. Gradually, Dharma becomes the most significant concept in the Hindu tradition and the very basis of the status of the individual in Hindu society. Individual acts according to the rules of his Dharma meant that a man

\(^{12}\) Supra Note 1, pp. 48-50
must accept his position and role in society on the basis of the caste into which he was born and the norms which had been set for that caste by the authors of the law books. Duties implied obligation and stress was far more on obligation than on rights. This tendency was further emphasized by the strongly patriarchal character of the family unity.

Dharma was essential because it promoted individual security and happiness as well as the stability of the social order. Each man's dharma had its own role in the larger and more complex network of the social structure. Therefore, by observing the rule of his own dharma a man was showing an awareness of others in society as well. If individual members of society tried to formulate their own rules of dharma the result would be a chaotic society. Dharma was the foundation of individual and collective security since a state of nature without law was equivalent to anarchy. The fear of anarchy led to the elevation of dharma to divine status and this in turn gave it even higher status than the king and the government. To further safeguard the position of dharma another concept was introduced that dharma is protected by danda (literally a rod or staff, signifying punishment).

The lawmakers who were by and large members of the Brahman caste and who naturally tried to maintain the superiority of their caste formulated the rules of the dharma. Inevitably since they were the ones who gave definition to dharma, the innate superiority of the Brahman was ex-rounded. As a complement to this, it was necessary to formulate a system of social hierarchies. Social and often economic and legal privileges decrease with each descending step in the social hierarchy. Certain categories of Brahmans were immune from the more extracting labours of routine living such as paying taxes, and could on
occasion be regarded as above the law. The concept of dharma rooted
in caste was extended to every aspect of human activity. It was logical
therefore that the equality of all before the law was not recognized.
According to the law books judicial punishments were required to take
into considerations the caste of the offender Rights were extended
primarily to the privileged upper in castes. The lower orders had only
obligations. The burden of society fell almost heavily on the shoulders
of the *shudras* and the untouchables who could claim hardly any
privilege of rights.

An important characteristic of caste is that an individual is born into a
particular caste and cannot acquire the status of any other caste. This
resulted in a check on individual social mobility. It also came to be
associated with a basic religio philosophical concept of Hinduism, that
of Karma which maintains that one's deeds and activities in one's
present incarnation determines ones status and happiness in the life to
follow. Thus a man's caste status was entirely of his own making and
he was in a position to improve it by conforming to dharma and being
reborn at a higher status in his next incarnation. It also acted as a
powerful check on nonconformity through the fear of worsening one's
condition in future incarnations.

Among the various means of maintaining the purity of the caste two
are specially stressed: the ban on commensality among members of
various castes and the strict observance of rules of endogamy and
exogamy as applied with reference to caste. The rules of marriage
were rigidly enforced and marriage was primarily a social institution.
The lower the status of women the stronger was the legal tie of
marriage. The patriarchal system tended to keep the status of women at
low-level, and the emergence of the joint family with special property rights for the male members reinforced male dominance. The family was recognized as a basic unit of society and enjoyed the right to protection by society and the state. This was accentuated in the case of families who owned land and worked on it. The concept of property in the Hindu tradition was usually associated with the ownership of land. The right to own property was granted to those who could afford it. The Law books maintain that property is founded on virtue and that the king has a right to confiscate the property of the wicked, of which, however, there is no record in historical record.

The Hindu pattern did not see man and society as antagonistic to each other. The two entities has mutual obligations and a commitment to these obligations would ensure the welfare of all. The Hindu vision was that of an orderly society with each man attending to his appointed task, which would infuse a people with a sense of community and which with its intense loyalty to the social group, i.e. caste would provide both economic and psychological security. The careful classifying of all degrees of social relationships into a well-ordered system was partly to meet the requirements of this vision and partly due to normal tendency of Hindu theorists to classify everything to its minute detail. This carefully worked out socio-legal framework reflected the Brahmanical vision of the perfect society. Those who were opposed to such a vision could take a nonconformist stand by opting out of society perhaps by becoming ascetics or mendicants or by joining a dissident group.\textsuperscript{13}

\textsuperscript{13} Supra Note 1, pp. 51, 91
2.5 HINDU LAWS UNDER MUSLIM PERIOD

There were two parallel systems of personal law in India during the Muslim period. But minimum influence was exerted by one upon the other. A closer look at things would show, however, that the two personal systems of law though widely different, they were, on doctrinal basis, essentially identical. Both systems had a religious conception of law in the sense that they were ultimately supposed to have been based on divine revelation and that the law bound the kings, the judges, and the subjects alike to carry them out. Both in the Hindu law and the Muslim law the rulers themselves administered justice as far as possible and the exceptionally honest and learned judges appointed by them after serious deliberations and mature considerations did the rest. The adjudication by the rulers was often sought by the people for their quick and impartial decisions. Clearly, both the systems of Hindu and Muslim laws were largely governed by the law. Thus the doctrinal similarities between the two systems played a very important part in avoiding major conflicts and frequent clashes in administration of the law in the country as a whole. The analogy between the Hindu law and Muslim law does not end with the points of similarity regarding the fundamental doctrines. In the developments of these two systems of law as well as in the consideration of the different sources to which they owe their existence also there were essential points of resemblance.

The important sources of Hindu law are the Vedas, the Smritis, the Nibandhas and the commentaries and customs and equity. The Muslim rulers did not interfere with the personal laws of the Hindus. On the contrary they adopted many time-honoured principles and institutions
of the Hindus.¹⁴

2.6 BRITISH RULE IN INDIA

The powers in the courts of British India to apply the personal laws of the Hindus and the Muslims were derived from and regulated by the statutes of the British Parliament and the central and provincial legislatures of India. The personal laws of the Hindus and Muslims were applied only in some and not all matters. The questions regarding succession, inheritance, marriage and religious usages were decided according to the personal laws of the Hindus and the Muslims, except in so far as some laws were amended by legislative enactments. There were certain other matters in which the personal laws of the Hindus and the Muslims were applied sometimes by the application of the principle of soft justice, equity and good conscience.

In civil disputes between two persons of the same religion, their personal law was recognized, but the disputes were usually referred to their Pandits or (Panchayats) or jurors as was the procedure adopted by the Abbaside Caliphs of Baghdad. The purely Islamic code of governing the laws of inheritance, marriage and other analogous matters of the Muslims did not apply to the Hindus. The Hindus were allowed to be governed by their own laws on these topics of civil law. But criminal law was applied more or less equally to both the Hindus and the Muslims alike for guaranteeing security of life and property. The Hindus in a sense generally enjoyed self-government and the rulers did not interfere with their personal laws and local affairs.¹⁵

¹⁴ Supra Note 1, p.65.
2.7 ASCERTAINMENT OF THE PERSONAL LAWS

The necessity to prepare books in the English language on the Hindu and Muslim laws was enhanced further by the Act of 1781 which prescribed the application of the Hindu and the Muslim laws for certain heads of litigation before the Supreme Court of Calcutta.\textsuperscript{16} The English Judges wished to master the principles of the personal laws so as to reduce their dependence on the Indian law officers whose honesty and integrity they rated very low. The English Judges, due to their ignorance of these laws, felt very sensitive and uneasy as they thought that they were completely in the hands of the Pandits and the Moulvies, and the best way to avoid this dependence was to have authoritative works in English on these legal systems.

The first steps towards the ascertainment of the Hindu and the Muslim laws were taken by Warren Hastings. A wrong notion appears to have gone abroad that the Hindus and the Mohammedans did not have any definite system of laws and that, whatever laws they had, were all mixed up with superstitions and nothing else. Warren Hastings was anxious to remove this misapprehension from the minds of the people in England.\textsuperscript{17} Also, with a view to give confidence to the people, to make it possible for the English Judges in India to have some knowledge of the two ancient systems of law so as to better enable the courts to cases with certainty and dispatch, to guide the decisions of the several courts, and to preclude arbitrary and partial decisions, Hastings projected the compilation of codes of Hindu law and Muslim law, in the English languages, with the best authority obtainable. To

\textsuperscript{16} Supra, 98
\textsuperscript{17} Supra, 368-74; Also see, Derrett, \textit{op.cit.}, 239
prepare a Code of the Hindu law, the following steps were taken. Ten of the most learned Pandits were invited to Calcutta from different parts of Bengal. The most authentic books on the Hindu law, both ancient and modern, were collected. The original text of the Hindu Code was prepared in the Sanskrit language. The Pandits started their work in May, 1773, and completed it by the end of February, 1775. The, text was then translation into the Persian language, from which an English version was prepared by Nathaniel Brassey Halheid, and therefore, the work came to be known as the Halheid’s Code of Gentoo Laws. In this code, the substantive and’ adjectival laws (civil and criminal) are mixed up. It is divided into 21 Chapters; most of the Chapters are subdivided into sections, and each section is further subdivided into paragraphs which correspond to the sections of the modern Indian codes. In the preface to the work the author characterizes it as follows: this code-'must be considered as the only work of" the kind, wherein the genuine principles of the Gentoo Jurisprudence are made public, with the sanction of their most respectable Pundits." The author pays tribute to Warren Hastings in the following words:

Wherefore a thought suggested itself to the Governor-General, the Honourable Warren Hastings, to investigate the principles of the Gentoo religion and to explore the customs of the Hindus and to procure a translation of them in the Persian language, that they might become universally known by the perspicuity of that idea and that a book night be compiled, to preclude all such contradictory decrees in future, and that, by a proper attention to each religion, justice might take place impartially, according to the tenets of every sect.
The same motives which dictated the preparation of a code of Hindu Law also induced Warren Hastings to promote the preparation of a comparable work in Muslim Law, so that this law could also be ascertained and some authentic guide furnished to the Judges to handle cases in that area. In the books recommended for this purpose was discovered "a system copious without precision, indecisive as a criterion (because each other differed from or contradicted another), and too voluminous for the attainment for ordinary study." From these a compendium might have been prepared but being a mere compilation, it might not have been regarded as authoritative as the Muslims could treat it as a new code rather than as a revision of the old. The translation of *Futwa Alamgiree* was undertaken. This is a work in the Persian language prepared under the authority of Aurangzeb, But soon it was found that this consisted of a simple detail of cases and decisions, and would do little to develop the principles of Muslim law and hence the project was abandoned. Some learned Mohammedans then advised that a translation should be executed of 'some work which, by comprehending in the same page the dictum and the principles, might serve at once as an exemplar and an instructor; and for this purpose they recommended the *Hedaya* "because of being regarded as of canonical authority, and uniting in an eminent degree, all the qualities required." The work being in the Arabic language was translated first in the Persian language by four learned Moulvies. Then Hamilton translated it into the English version.

These two translations, one on the Hindu law and the other on the Muslim law, projected by Warren Hastings were carried out under his immediate patronage and, in the end, derived their existence through
his continuous support. These two works represent the earliest attempts on the part of the Englishmen to ascertain the principles of the two systems of personal laws, and thus constitute a standing monument to the benevolent support which Warren Hastings extended throughout his tenure to the cause of the personal laws. In course of time, Hastings's policy of preserving the indigenous Indian laws came to be increasingly appreciated. It came to be recognized that to ensure stability of the British Government in India, it was of fundamental importance that affections of the Natives be conciliated, and that nothing could be more effective from this point of view than a toleration in matters of religion and adoption of such original institutes of the country as did not clash with the laws and interests of the conquerors. It was pointed out that a similar policy led to the success of the Romans who not only allowed their foreign subjects the free exercise of their own religion—and administration of their own laws, but sometimes even naturalized such parts of the mythology of the conquered as were in any respect compatible with their own system. Such views were expressed by Jones, a Judge of the Supreme Court of Calcutta, who resided in India for five years and devoted himself to the study of the Indian laws and institutions and who was a very enthusiastic advocate of their preservation. In his words:

Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could anything be wiser than, by a legislative act, to ensure the Hindu and Musalman subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would
have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance.

As a result of these sentiments, the project of preparing books in the English language on these laws was taken further in the years subsequent to Warren Hastings. The quality of the earlier works produced under the patron-age of Warren Hastings was not rated very high. These works suffered from many defects.\(^{18}\) Apart from all other considerations, the extreme vagueness and uncertainty with which the principles of these laws were shrouded made the task of ascertaining these laws quite complicated. It was much more so in the case of Hindu Law which for all the duration of the Muslim rule in India was administered not through any formalized agencies, like the courts, but through *panchayats* and private arbitration. The law was, thus, more traditional rather than written except in a large number of religious books. On many points of law, these books contained inconsistent doctrines. This difficulty can be illustrated by reference to *D.D. Munnooal v. Gopce Dutt*, a case decided by the Calcutta Supreme Court in 1786. The two Pandits attached to the court differed on the law point in dispute. The court then asked its interpreter to seek the opinion of the other Pandits. The matter was then referred to Justice Jones who was asked to put questions to the Pandits. He held a discussion with the Pandits, consulted original texts himself, and then

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\(^{18}\) According to Derrelt, 'The order of appearance of the chapters (in the Halheid's Code), and the relative weight given to each does not correspond with anything known to the usual sastric works.... Unfortunately the order lacks logic as well as completeness and the general appearance, though nearly digested for a Sanscrit legal work, is repellent to a lawyer trained in the common law.' *Ibid*, 241.
only could the court come to a conclusion as to the law applicable to the case. At times, the Supreme Court sought the opinions of the Sadar Diwani Adalat on problems of personal laws. The extreme uncertainty and the amorphousness of the personal laws, and the difficulties which attended the administration of justice according to them are fully explained in the following extract from a minute recorded by Governor Elphinstone in July, 1823 with reference to Hindu law:

The Dharam Shaster, it is understood, is a collection of ancient treatises neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge of perhaps the most learned Pundits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by known customs, Tounded indeed on the Dhurm Shaster, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text. The uncertainty of all decisions obtained from such sources must be obvious, especially when required for the guidance of a foreign judge, himself a stranger both to the written law, and to the usage which in cases supplies its place. The usual resource, when the Shaster has to be consulted, is to refer to the Pandit of the court, on whose integrity the justice of the decision must in the first instance depend. Supposing, however, that he is honest and learned (which last quality is not now common, and must daily become rare), he has the choice of a variety of books to quote from, and in many instances the same books has a variety of decisions on the same question. When the question depends on customs the evil

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is at least as great. The law is then to be collected from the examination of private individuals; the looseness of tradition must lead to contrary opinions; and even when any rule is established, it is likely to be too vague to be easily applied to the case in point. Add to this the chance of corruption, faction, favour and other sources of partiality among witnesses.21

Even as late as 1878, Mayne could say as regards the administration of Hindu Law: "The great difficulty which meets a judge is to choose between the conflicting texts which can be presented to him on almost every question." Thus, a great need was being felt to ascertain the principles of two systems of personal laws. In 1788, Justice Jones of the Calcutta Supreme Court, a great linguist who had an intimate knowledge of thirteen, and a fair knowledge of twenty eight, languages, proposed to Cornwallis that he might be provided with financial assistance to prepare the codes of the personal laws. His proposal was to prepare "complete digests of Hindu and Mohammedan laws, after the model of Justinian's inestimable Pandects, compiled by most learned of the native lawyers, with an accurate verbal translation of it into English, and if the copies of the work were deposited in the proper offices of the Sadar Diwani Adalat and of the Supreme Court, and that they might be occasionally consulted as a standard of justice, we should rarely be at a loss for principles at least, and the rules of law applicable to the cases before us, when their imposition might so easily be detected.' The Government agreed to provide necessary funds to Jones and the work was accordingly undertaken. In 1972, he published his translations of the Mohammedan Law of Succession. 'Al Sirajiyah'"
on Inheritance was selected for this purpose for it was regarded as an authoritative work in all Mohammedan countries which followed this system of Abu Hanifa. Jones also published his Institutes of the Hindu Law, or the Ordinances of Manu, early in 1794. In the meantime, a digest of the Hindu Law was in the course of preparation. Jones could not see the completion of this work as he died early. The Digest of the Hindu law projected by him was ultimately prepared after his death by Pandit Jagannath which was later translated into English by Colebrooke.\textsuperscript{22} Governor Elphinstone of Bombay also planned "to compile a complete and consistent code from the mass of written law and fragments of tradition, determining on general principles of jurisprudence on those points were the Hindu books and traditions present only conflicting authorities, and perhaps supplying on similar principles any glaring deficiencies that may remain when the matter for compilation has been exhausted." What he wanted was to prepare a code of Hindu civil law, based partly upon the written books and partly upon the existing customs which should be administered generally by the English courts. The first step, according to Elphinstone, to accomplish such an objective "appears to be to ascertain in each district whether there is any book of acknowledged authority, either for the whole or any branch of the law. The next is to ascertain what exceptions there are to the written authorities and what customs and conditions exist independent of them." He suggested that the best modes to conduct these inquiries would be, first, to examine the Shastras, heads of castes, and other persons likely to be acquainted either with the law, the customs of castes, or the public opinion regarding the authority attached to each; and, second, to extract from

\textsuperscript{22} For further details see Derrett, op.cit., 245-50
the records of the courts of justice the information already obtained on
these subjects in the course of judicial investigation. Elphinstone's
project could not be accomplished. The only immediate results were
however compilation of a work by Steele, a young civil servant, which
was characterized as "very comprehensive in its treatment of the whole
subject, as it not merely gives an account of the legal treatises in the
original Sanskrit which were held in repute, but a mass of information
regarding rules of caste, marriage, inheritance, and the customary law
in some branches of contract, gathered by inquiries through various
channels, official and private." This work was followed by a series of
reports of the decisions of the courts of law, prepared by Borradaile,
another civil servant, and by a translation by him of a Sanskrit book on
inheritance. These different works, however, appeared only after
Elphinstone had left India.23

These were some of the initial attempts made by the Englishmen to
ascertain and define the principles of Hindu and Muslim laws. These
works were not by any means clear, uniform or of a very high quality.
Halheid's Gentoo Code has been declared to be of "no value", while
Jagannath's work, translated by Colebrooke has been held to be of
"great value." Colebrooke was a great Sanskrit scholar and Jagannath
was one of the most learned Pandits that Bengal had ever produced and
whose authority on questions of Hindu law ranks only next to
Jimutvahana.24 The work of ascertaining the laws was continued in
Jater years as well by many scholars and some of the later works which
were thus produced were of a very high merit. Sir Francis Macnaghten,
a Judge of the Calcutta Supreme Court, published his Considerations

23 Cotton, Elphistone, 178-84 (1896)
24 Kerry Kolitani v. Moniram Kolita, 13 B.L.R. 1, 49.
upon Hindu law in 1824. A more valuable work was published by Sir Thomas Strange, the Chief Justice of the Madras Supreme Court, in 1825. By far the most important authority amongst the Hindu Law books by European authors was Sir William Hay Macnaghten's Principles and Precedents of Hindu Law published in 1829. Mayne's Treatise on Hindu Law and Usage published in 1878 has become almost a classic on Hindu law and has practically superseded all the earlier works. Similarly, in the area of Muslim law were printed several works by European scholars of which two are worth mentioning here: Sir William Hay Macnaghten's Principles and Precedents of Muhammedan Law published in 1825, and Mr. Neil Baillie's Treatise of the Law of Inheritance which is described as excellent. Some Hindu and Muslim scholars also expounded the principles of these legal systems in learned works. Thus were brought to light the principles of these laws in an organized and systematized manner. These works also played a very important role in dispelling many misapprehensions which had been previously entertained about the intrinsic worth and merit of the personal laws. The preparation of the works as mentioned here was the second best alternative to adopt in the absence of codification of these laws through the process of legislation which stage was to come only after a lapse of considerable time.

The Hindu jurists always accorded a place of great importance to custom as a source of law. It was regarded as coming after Sruti and Smriti. The process of integrating custom with this law was, however,

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25 Morley's Digest, I, ccxiv.
28 While the ancient Hindu law givers like Manu and Gautam gave custom a low priority, Narada declared: custom is decisive and overrules sacred law. By the time Mitak shara and Dayabhaga
continuously carried on in ancient society and thus was born the various Dharmasastras. When the Smritis fell out of date in relation to the needs of the contemporary society, the commenter's adapted the Smriti-law, by the process of interpretation, to bring it in accord with customs which had taken roots in the then society. What the commentators did was to take up an old text of the Dharmasastra and interpret it in such a manner as to bring it in harmony with the social mores and customs of the people. This process has been recognized by the Privy Council in the following words: "The Digest [Mitakshara] subordinates in more than one place the language of texts to custom and approved usage." According to Derrett, "The Smritis had been enlivened by commentators who introduced customary elements into their exposition." It is how, starting from the same base, two major Schools, Mitakshara and Dayabhaga, grew in the country and the Mitakshara even came to have four sub-schools, viz., Dravida, Mihiha, Bombay and Banaras. On the other hand, the attitude of the Muslim jurists to custom was somewhat different from that of the Hindu jurists. The sources of Muslim law are Koran as containing the word of God; hadis or traditions being the inspired utterances of the Prophet and precedents derived from his acts; ijma, the consensus of opinion among the learned; urf or custom and kiyas, the analogical deductions from the first three. Urf or custom thus assumes a somewhat subordinate position in the scheme of Muslim law.

During the British administration, the question of the place of custom in the personal laws of the Hindus and the Muslims assumed a great

schools were established, the supremacy of custom was also established.
30 Administration of Hindu Law, op. cit., 40.
31 Tahir Mahmood, Customs as Source of Law in Islam, 7 J. I.L. I., 102-6.
significance. In this respect, a distinction may be drawn between the Presidency towns, on the one hand, and the mofussil on the other. The Act of Settlement, 1781, provided for the application of the 'laws and usages' of the Hindus and the Muslims to matters of inheritance and contract.\textsuperscript{32} Thus 'usages' were specifically recognized, the question was authoritatively decided in \textit{Hirabae v. Sonabae} by the Supreme Court of Bombay,\textsuperscript{33} where a similar provision operated.\textsuperscript{34} The question for the consideration of the court was whether Khojas and Cutchi Memons, who were Muslims by religion but who followed the Hindu customs of inheritance, should be governed by their customs or by the orthodox Muslim law. The court refused to accept the thesis that this provision meant the application of the \textit{Koran} only, and that it excluded customs set up in conflict with the text of the \textit{Koran} as regards the Muslims. The court held that the provision was framed solely on political grounds, and without any reference to orthodoxy, or the purity of any particular religious belief. The purpose of the provision was to retain the laws and usages of the Hindus and the Muslims. The policy which led to the making of the provision proceeded upon the broad and easily recognizable basis of allowing the newly-conquered people to retain their domestic usages. The provision did not, therefore, adopt the text of \textit{Koran} as law any further than it had been adopted in the laws and usages of the Mohammedans, and any class of Mohammedan dissenters found to be in possession of any usage which was otherwise valid as a legal custom, and did not conflict with any express law of the English Government, would be entitled to the protection of the provision to the same extent as the most orthodox

\textsuperscript{32} Supra 78
\textsuperscript{33} Ind. Dec. (O.S.), IN, 100, 112.
\textsuperscript{34} Supra, 111.
Sunni. It was thus clearly established that in the Presidency towns, a
custom would be applied even though at variance with a religious text.

The position in the mofussil was somewhat different. Neither the rule
of 1772, nor that of 1793, referred to custom as a source of law. It was
only in Bombay in 1827 through S. 26 of Regulation IV, that custom
was given a preferential place to the law of the defendant. Thus, there
was doubt whether a custom in conflict with the written text of law
would be followed or not. Perhaps, in the beginning the tendency was
to ignore custom and apply the law of the books rather rigidly. This
was mostly because the early British administrators were ignorant that
custom played a momentous role in the lives of the people, and they
wrongly supposed that the Hindus and Muslims were governed only by
their sacred religious textual law.\textsuperscript{35} It has been asserted by some that
the insistence of the courts that the advice must be based on the
original sources and commentaries, led to the application of rules
which were either obsolete or which had never been observed. In the
case of Hindu law, more specifically, it has been stated that to take the
law from the Pandit meant the elimination from the court's horizon of
much of the customs and usages which in the past had kept the law
growing. But, this was not all, and the fact remains that "the British
judges themselves were more royalist than the King in their devotion
to Sanskritic learning," and even when a Pandit attempted to counter a
text with the customary practice the judges would notice the variance
and ascribe deviation from the text to the corruption of the Pandit and,

\textsuperscript{35} Rudolph and Rudolph, Barristers and Brahmins in India: Legal Cultures and Social Change, VIII
Comparative Studies in Society and History (Hague, 1965), 24-49; Venkataraman, Influence of
Common Law and Equity on the Personal Laws of the Hindus in Revisia Del fusitudo de Derecho
Comparado, 156 (1957). Also see. Rudolph and Rudolph, The Modernity of Tradition: Political
Development in India (1967).
consequently, customary law was at a discount. The result of this approach was that at times some norms contained in the religious texts were applied which had become obsolete in practice, in course of time. But then the realization dawned, and custom came to be accorded an important place in the scheme of things. As regards the Hindus, the position was settled rather early as the Privy Council, taking note of the great importance accorded to custom in the traditional Hindu Jurisprudence, ruled in 1868: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law." The point was settled, still more specifically somewhat later when it was stated that where custom was proved to exist it would oust the general law, which, however, would regulate all outside the custom. As regards the Muslims in the mofussil, the place of custom remained doubtful for some more time. As late as 1904, the Allahabad High Court held in *Jammya v. Diwari* that a family custom among the Muslims excluding the daughter from inheritance could not be applied. This attitude of the courts was due to the low place allotted, to custom traditionally by the Muslim jurists. But then the Privy Council conferred a favoured position on custom in *Mohd. Ismail v. Lola*

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36 *Collector of Madura v. Mooloo Ramalinga*, 12 ML A. 397, 436 (1868). At this time, an interesting and scholarly controversy arose regarding the nature of Hindu law. Nelson, a Madras district judge, in a number of publications ranging from 1877 to 1887 denied that any such thing as Hindu law had ever existed. He also denied that Mitakshara was an authoritative praksha on Hindu law. In a scholarly article, Mayne met these views of Nelson. He cited eviдаence and opinions of many scholars to show that Mitakshara was a work of great authority. He also stated that in the absence of a specific custom, Hindus were satisfied when Hindu law was administered to them and that even their customs were by and large in accord with the traditional Hindu view: Mayne, "Hindu Law in Madras." 3 L.Q.R. 446 (1887); also, Preface to the First edition of Wayne's *Treatise on Hindu Law and Usage* (1878).


38 In 1866, in Jawal Buksh v. Dharam Singh, (1866) 10 MIA 511, the Privy Council had left the question open whether a Muslim convert from Hinduism could plead as a family custom, the Hindu customs of inheritance.

39 (1901) I.LR 23, All, 20

40 In 1886, in *Surmust Khan v. Kadir Dad Khan*, IFB Rulings, NWP (1866), the same view was propounded.
Sheomukh⁴¹ Custom now got precedence over, and was made legally enforceable even when in derogation to, the traditional and orthodox Muslim law. In Md. Ibrahim v. Shaik Ibrahim,⁴² the Privy Council stated that in India "custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mohammedan Law, governing the succession in a particular community of Mohammedans.⁴³ But then the Shariat Act, 1937, abrogated custom to a large extent as regards the Muslims.⁴⁴

Then there were certain territories in India, like Punjab, Oudh, Kumaon Hills, where the sacred books of the Hindus or the Muslims had not penetrated and had not bad much impact, and which were areas predominantly of customary law. In these areas, custom was specifically made the first rule of decision. It was only when no custom was proved that the personal law was applied.⁴⁵

Thus, the courts gave the utmost scope to custom in administering justice to the Hindus and Muslims. All types of customs were applied, e.g., tribal, communal, sectarian, local, family etc.⁴⁶ For example, the Supreme Court sustained a custom among the Jains under which a widow can adopt without the consent of her husband.⁴⁷ But while recognizing custom on one hand, the courts were, on the other hand, making it more formal or rigid. A custom to be enforceable, it was held, must be ancient, certain and reasonable. A general rule accepted

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⁴¹ 17 CWN 97.
⁴² AIR 1922 PC 59.
⁴⁴ Infra, 483
⁴⁵ Abdul Hussain v. Sona Dero, 45 I.A. 10 (1917)
⁴⁶ Shiba Prasad Singh v. Prayag Kumari, 59 I.A. 331 (1932)
was that a custom prevalent in 1773 or 1793 A.D. was ancient and enforceable.

These dates were selected because in 1773, the Supreme Court was established in Calcutta and in 1793, the Cornwallis scheme was introduced in the mofussil of Bengal, Bihar and Orissa and also a system of registration of Regulations was introduced at that time. Thus, during the British Administration, custom came to be given a place of honour in the administration of justice. It became an important source of law and a large volume of case-law arose around the various customs. Custom was given preference over the religious law of the parties. This was a just and reasonable approach for, in practice, the law of the Shastra or the Shara was not observed by the people in all its pristine purity and all kinds of customs had ingrained themselves into the scheme of things. It was just and equitable that the law which the people observed in practice be enforced rather than the theoretical law contained in the religious books. It would have been harsh on the people to force them to forego their customs which constituted the living law in favour of the orthodox system of law. The courts adopted a kind of tolerant attitude towards the customary law of the people, and did not adopt a very scrutinizing attitude in the formative stages of the law in India with the result that most of the customary law of the people could be preserved. This was good in the days when the legislature was not active as a law-maker. It also came to be ruled that a custom against public policy, or against justice, equity and good conscience, or an immoral custom could not be enforced by the courts. This led to the non-recognition of many customs. Thus, the

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47 Munalal v. Rajkumar, AIR 1962 SC 1493
48 Ambalika Dasi v. Aparna Dasi, 1918 ILR, 45 Cal. 835
49 Supra, 147.
courts came to exercise a kind of censorial power on customs. But, it may be remembered that in course of time, proving a custom in court in derogation to Shastric law became an extremely onerous exercise, and thus many existing customs which could not be proved satisfactorily could not be judicially recognized. In course of time, proving a custom in the court in derogation to Shastric law became an extremely onerous and hazardous exercise, and thus many existing customs ceased to be recognized by the courts as they could not be proved satisfactorily. Before the advent of the British rule, customs were enshrined in the unexpressed" consciousness of the people and were enforced by village panchayats. They were unwritten and unrecorded. Till this happened, customary law retained elements of flexibility and growth. But the British courts began to insist on formal methods of proof. The onus to prove a custom was laid on the party asserting its existence by clear and unambiguous proof, by cogent and satisfactory evidence. There was no presumption that a custom existed. To facilitate proof of custom, records of customs came to be prepared in wajib-ul-arz or riwazi-am which could be received in evidence in the courts. Entries in these documents were held to constitute a prima facie evidence of customs but were not regarded as conclusive and could be rebutted by other reliable evidence. In addition, some official and private attempts also came to be made to record customary law in some regions, and, thus, a few collections of customary law appeared during the British period. Also, in course of time, new

51 Flalgobindv. BadriPrasad, 50 T.A. 196 (1923). Difficulties in proving custom are very well illustrated by Kochan Kant Kamuram Kani v. Matheran Kani, AIR 1971 SC 1398. The case originated in 'S56' and was finally decided by the Supreme Court in 1971. The Supreme Court agreed with the trial court as regards the non-existence of the custom asserted and overruled the High Court. So, to prove custom protracted legation may ensue at times. Also, Sada Kaur v. Raktawar Singh, A.I.R. 1970 Punj. 289.

52 A few of the important collections are: Tupper, Punjab Customary Law (1881); Rattigart Digest
customs ceased to be recognized by the courts. The courts began to insist that only ancient customs could be recognized by them. Custom then ceased to contribute much to the growth of law and the legal system tended to become rigid and fossilized.

It may, however, be noted that too much dependence on custom has its own disadvantages. Custom tends to make law very much less uniform as the law could vary from family to family, community to community and region to region in certain respects. Ascertaining of a custom places a heavy load on the judiciary for it must take evidence to find out what the custom is and whether it is ancient or not so as to be enforceable. With the development of society, with the increasing mobility of the people, with the maturity of the legal system, a time comes when uniformity of law becomes a great desideratum. So long as tribal sectarian or communal customs survive, the class distinctions among the people also continue. It is only through the evolution of uniform law that the Indian society may become more closely knit and integrated.

Modern legislation has abrogated custom to a large extent and the value of custom as a source of law has thus been reduced. For example, S.4(a) of the Hindu Marriage Act, 1955, gives overriding effect of the Act, and abrogates custom with respect to any matter for which the Act makes a provision, except for certain matters for which custom has been preserved. These matters are: recognition of marriage between parties within prohibited degrees and sapindas; rites and ceremonies of Punjab Customary Law (IRPO); Thurston, Castes ami Tribes of Southern India (1909); Risley, Tribes and Castes of Bengal (1891); Crooke, Tribes and Castes of the North-West Provinces and Oudh (1896). These collections made the proof of custom somewhat easy. For example, Rattigan's compilation's authoritative value has been recognised by the Supreme Court as being beyond controversy; Jai Kaur v. Slier Singh, A.I.R. 1960 S.C. 1118.
regarding celebration of marriages; divorce. Thus a customary divorce is not abrogated. The Hindu Adoptions Act, 1956, abrogates custom except on two matters: adoption of a married person, or of a person over 15 years of age. Similarly, the Hindu Succession Act, 1956, abrogates all custom. This has introduced by and large uniformity and certainty in law.

For Muslims, as early as 1937, the customary law was abrogated by the Muslim Shariat Law Act. This law vitally affected such communities as Khojas, Memons, Vohras, who were converts from Hinduism and continued to follow the Hindu customs in the matter of inheritance and succession. The Shariat Act abrogated these customs. Except three matters, viz., wills, adoption and legacies, where a Muslim can adopt Muslim law, in all other matters Muslim law was made obligatory for him. The reasons given to abrogate the customs among the Muslims were uncertainty, expense of ascertaining custom and inadequate rights granted to women under customary law as compared to Muslim law as such. The truth however is that the main agitation for abrogation of customs among the Muslims was carried on by orthodox Muslim religious bodies who did not relish that Muslims continue to follow customs having links with their previous Hindu culture.

54 *In Madho Prasad v. Shakuntala*, A.I.R. 1972 All. 119, a custom for divorce by mutual consent of the spouses was recognized by the court.
56 There are still pockets of tribal areas where custom remains preponderant. Thus, under Art. 371A of the Constitution, Acts of Parliament are not to apply to the State of Nagaland affecting the religious or social practices of Naga, their customary law and procedure etc. unless the State Assembly so decides by a resolution. Provisions for preservation of customary law in Meghalaya and Mizoram also exist. The social pattern of people in these areas is still tribal and they are not yet ready to give up their traditional values.
The Indian Constitution has also nullified some customs.57

2.8 HINDU LAW AND THE LEGISLATURE

During ancient times, the Hindu law had flexibility and an inherent capacity to grow. The methods usually employed for the purpose of growth of the law were the processes of interpretation and assimilation of customs. After the introduction of the British pattern of justice in India, these traditional instrumentalities of legal change and growth ceased to operate. New customs could not be recognized by the courts because of the theory that a custom could be enforceable only if it was ancient. The process of commenting, the powerful technique by which the Hindu jurists like Vijnaneswara and Jimutvahana shaped and moulded the ancient law to keep pace with the needs of the contemporary society, is simply not available to-day. A new interpretation of an old text would not be acceptable to the courts howsoever eminent the interpreter may be. The courts thus remain bound by the authority of the dead jurists. During the British period, the growth of Hindu law was arrested and Hindu law came to be fossilized.58 Under these circumstances, the Hindu law is to develop, and develop it must in response to the changing pattern of life, then the only means of developing the law are either judicial interpretation or legislation. Judicial interpretation can merely be of limited efficacy as the courts are bound by authoritative works on law and the theory of precedent. When it is the question of reforming, modifying or abrogating well established principles of law in a modern society, the only way out is legislation.

The ancient system of Hindu law, contained in the Smritis and the Commentaries, was developed in the context of a social environment, economic condition, and a state of civilization which were radically different from those of the modern times. Some of the features of the traditional law are thus bound to be out of harmony with the contemporary social conditions and facts of life. Need has thus been felt to modify the law in certain respects so as to adapt it to meet the modern exigencies and circumstances. But in undertaking this task, the British administrators functioned under a self-imposed discipline and limitation. They hesitated to modify the personal laws in consonance with the modern needs of the society because of the view that the personal laws were too much identified with religion. They were afraid that interference with their law might be regarded by the Indians as an interference with their religion and thus be resented by them. The British administrators were careful not to injure the religious susceptibilities of the Indians; they wanted to take the line of the least resistance and avoid all complications to the extent possible. This attitude was given expression to authoritatively by the Second Law Commission in its second report when it laid down that the personal laws ought not So be codified. The main reason advanced for this view was that the personal laws being religious in nature should not be interfered with by an outside agency.59 Similar was the opinion of the Fourth Law Commission.60 A number of other important Englishmen expressed the same view from time to time. For example, Morley said:

In considering the propriety of altering or abrogating the Hindu or Mohammedan laws, all pre-conceived notions of the relative

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59 Supra, 429
60 Supra, 439.
excellence of the English and the native systems of jurisprudence should be taken as secondary considerations; nor should it be called in question whether such systems are in themselves good or bad; for it should never be forgotten, that, in the present state of society in India, they are undoubtedly the best adapted to the wants and prejudices of the people who form the great bulk of the population of the country; that they are an integral part of the faith of that people; and that, though we may not be bound by absolute treaty, we have virtually pledged ourselves to preserve them by repeated proclamations and enactments.

In the same way, Sir C.P. IJbert pointed out that one of the difficulties in codifying the personal laws of the Hindus and the Mohammedans arises "from the natural sensitiveness of Hindus and Mohammedans about legislative interference with matters closely touching their religious usages and observances." The apprehension of giving offence to the people made the Legislature during the British rule very chary of modifying the personal laws. Nevertheless, some changes had to be made in these systems by passing corrective and ameliorative legislation during the last hundred years or so, though generally, it may be said, that the Legislature moved mostly in response to strong public opinion in favour of the proposed changes and when the initiative for the reform came from the community concerned.

Taking a broad view of the legislative changes effected in the area of Hindu law during the British period, the first and foremost place may be accorded to that body of legislation which sought to improve the social status and the legal position of the Hindu women. The prejudices of some of the Dharmashastra writers along with the degenerate customs which arose in the Hindu society in course of time under the
impact of foreign domination, mainly the Muslim rule, were responsible for making the social position of Hindu women rather weak and inequitable. They came to occupy an inferior position in the eyes of law. This needed to be corrected and, therefore, the Legislature enacted a number of statutes designed to improve the lot of the women in the Hindu society. The custom of *Sati* was abolished in 1829.\(^6^1\) The Caste Disabilities Removal Act, 1850, affected Hindu law.\(^6^2\) The Hindu Widows' Remarriage Act, passed in 1856, was the first important measure in this series. The Act legalized the remarriage of the Hindu widows. It was an enabling Act and was passed at the instance of a reformist section of the Hindus. The next in the series was the Hindu Women's Rights to Property Act which was enacted in 1937. The Act conferred on the Hindu women better rights of property than they had possessed previously. It was by far the most important piece of legislation which effected revolutionary changes in the domain of the Hindu law of joint family, coparcenery, partition, inheritance, etc. The last statute in this series was the Hindu Married Women's Rights to Separate Residence and Maintenance Act enacted in 1946, The Act enabled a Hindu married woman, without dissolving the marriage, to claim separate residence and maintenance from her husband under certain circumstances mentioned in the Act.

A few statutes were enacted to suppress some objectionable social practices which had come to have the sanction of law and custom amongst the Hindus. The first step in this respect was the abolition of the inhuman practice of *sati* by Lord William Bentinck very early in

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\(^6^1\) The difficulties faced by the British administrators in reaching and implementing this decision are described in K. Ballhatchet, *Social Policy and Social Change in Western India*, 275-91; 298-305

\(^6^2\) Supra, 423.
the day.\(^3\) A very conspicuous evil which was sapping the very vitals of the society, was the practice of child marriage. To discourage this practice, the Child Marriage Restraint Act was enacted in 1929.

A few Acts were passed to relax the rigidity and rigours of the joint family system and to amend the law of inheritance. By the Hindu Gains of Learning Act, 1930, all acquisitions through learning, whether ordinary or specialized, whether imparted at the expense of joint family or of any member thereof, became the self-acquired and absolute property of the person acquiring the same. That the Hindu public opinion had undergone a great change can be seen from the fact that a less drastic Bill of similar nature passed by the Madras Legislature in 1901 had to be vetoed by the Governor of Madras in view of the intensity of public feeling against it. The Hindu Inheritance (Removal of Disabilities) Act, 1928, laid down that no person, except one who has been lunatic or idiot from birth, would be excluded from inheritance by reason only of his disease, deformity, physical or mental defect. The Act applies only to the *Mitakshara* School and not to the *Dayabhaga* School. The Hindu Law of Inheritance (Amendment) Act of 1929 altered the order of intestate succession under the *Milakshara* law with a view to prefer certain near cognates to agnates. Thus, son's daughter, daughter's daughter, sister and sister's son were declared to be entitled to succeed next after the paternal grandfather. This was the result of a realization that the *Sastric* law needed to be altered in order to bring the rules of inheritance in correlation with the dictates of natural love and affection. Reference may also be made in this connection to the Caste

\(^3\) Supra, Chapter XV; also, note 1.
Disabilities Removal Act, 1850.\textsuperscript{64}

Since independence, the Legislature has taken a more positive attitude in the matter of law reform and has undertaken to enact some of the measures which the British administrators were hesitant to undertake. The Hindu legal system was based on a rigid caste system. The caste system however broke down, and came to be regarded as an anachronism, in course of time, as a result of the release of new political and social forces. People began to think in terms of a classless and casteless society. As a consequence, many old principles of Hindu law perpetuating the caste system needed to be done away with. The Hindu Marriage Validity Act, 1949, constituted a great step in this direction; it came to validate inter-caste marriages. Before 1949, there was some confusion on the point and a few High Courts had declared such marriages void.\textsuperscript{65} The Act of 1949 removed this confusion, declared such marriages as valid and thus sought to help in the consolidation and integration of the Hindu society. It was no doubt a step forward towards the evolution of a casteless society which is the great need of the day in India.

2.9 PERSONAL LAW OF MUSLIMS

1. Muslim Law System: The Mohammedan Law is founded upon revelations and blended or mixed with the Muslim religion. Its origin is 'Al-Quran' or the 'Quran' which is believed by the Mohammedans to have existed from eternity, subsisting in the very essence of God. The Prophet himself declared that it was revealed to

\textsuperscript{64} Supra, 485, note 3.
him by the angel 'Gabriel' in various portions, and at different times. Besides inculcating religion and theology, the 'Quran' contains also passages which are applicable to Jurisprudence, and form the principal basis of the 'Shara'. The entire system of Muslim law has actually been built up upon the two foundations—the 'Quran' and the 'traditions' (Sunnah and Ahadis). 'Quran' may be said to be the first and great legislative Code of Islam.

2. Development of Muslim Law: The development of Mohammadan law may be divided into four periods:

(a) The Period of Quranic precept: This period ranges from I to 10A. H. From the time of the memorable flight, which makes the commencement of the Hijra era, the Prophet had the full responsibilities of a temporal sovereign, first over the city of Madina and ultimately over nearly all Arabia. Most of the legal verses of the Quran were revealed during this period.

(b) The Period of Sunnah: This period begins from 10 A. H. and ends at 40 A. H. The two things are apparent in this period are the close adherence to ancient practice under the fiction, adherence to Sunna and secondly the collection and the editing of the text of the Quran.

(c) The Period of theoretical study and collection: This period ranges from 40 A. H. to 300 A. H. During this period in the region of the 'Ummayyadas' the full possibilities of the traditions as sources of law were begun to be realized. The work of collecting the traditions took place and the collections of Bukhari and Muslim, for instance, came to be recognized as authoritative.
(d) **The Modern Period:** This period ranges from 300 A.H. to the present day. After the four great Imams, namely, 'Abu Hanifa, Malik Ibn Anas, Ash Shafei and Ibn Hanbal' the modern learned doctors of Islamic law continued the process of interpretation. During this period there emerged two parallel doctrines namely the Mjithad' and 'Taqlid'.

Having thus studied the Muslim legal system and its development in brief let us study its development in India under Muslim Rulers.

3. **Muslim Law in India under Muslim Rulers:** The particular forms of Islam faith and practice now prevalent in India are naturally those followed by the bulk of original immigrants. By the time of the Muslim Conquest of Hindustan was completed Hanbahism and Shafeism had ceased to count for much in the great law schools of Khurasan and Transoxiana, which would be the chief recruiting ground for the 'Ulama of Muslim India' The real struggle in those regions was thenceforth between the 'Hanafia' and 'Shias' and in this India was not uninterested. There is difference at this stage between the 'Shias' and 'Sunnis' which must be pointed out. The Shias recognize "Imams' as their heads in all matters both spiritual and secular. 'Mujtahlds' are also recognized to the present day. The Mughal Emperors were Hanafis. The Kazis appointed by them administered the Hanafi law. Thus Hanafi Law was, in the Mughal times, the law of the land. This continued till the establishment of the British rule.

4. **Muslim Law under the Company**

(a) **Application of Muslim Law:** The condition of the Mohammedan Law under the Company was exactly the same, as it was of
Hindu Law.\(^1\) In the early days of British rule the influence of Islamic Law, pure and simple was felt everywhere. The Mohammedan Law was applied as a branch of personal law to those who belonged to the Muslim persuasion in accordance with the principles of their own school or sub-school. Rules of Warren Hastings and Impey as embodied in the Regulation of 1793 and provisions made in Act of 1781 saved personal law of Muslims certain matters.\(^8\) In early British period Criminal Law was Muslim but it was successively modified and by 1862 it finally disappeared. Today Mohammedan Law applies to such topics as Inheritance, Succession, Waqfs, Preemption, gifts, Marriage, Parentage, Divorce, Guardianship and Maintenance.

Muslim jurists have criticized the judicial pronouncements from time to time. Fyze observed that: It is a matter of some interest, however, that in *Abdul Fata v. Russomoy*,\(^3\) by holding that family Wakfs were void, their Lordships misunderstood an important point of the Mohammedan Law of Wakf, misapplied a rule of English Law to the Muslim institution of wakf, and overruled a long line of Muslim jurists, both modern like Mr. Justice Ameer Ali and ancient too numerous to mention. Poetic justice was, however done when they themselves were overruled by an Act of the Indian Legislature".\(^1\)

**Another jurist Rahim expresses his opinion as follows:**

"If we analyze the rulings, the results may be thus summarized. In the domain of law governing domestic relation and succession the Courts have allowed themselves a much narrower margin of freedom if any freedom at all, in applying the rules laid down in books written by mediaeval writers to the altered circumstances of modern world then in
matters relating to dispositions of property, such as by gift, wakf or will."

(b) **Works on Muslim Law:** The same motives which led Warren Hastings to prepare a Code of Hindu Laws, induced him to have a translation of 'Hedaya' into English language. The Arabic version of this book was rendered into Persian, from which Hamilton prepared an English translation. Sir William Jones in 1792, published his English translation of the Mohammedan law of inheritance and the Mohammedan Law of Succession to the property of intestate. It was based on Sirajiyya and its English translation, known as Ai Sirajiya. This work was of great utility. In the words of Neil Baillie: The Sirajiyya is very brief and abstruse (hard to understand) and without the aid of a commentary, or a living teacher to unfold and illustrate its meaning, can with difficulty be underload even by Arabic scholars. It is therefore not a matter of surprise that its translation by Sir William Jones should be almost unknown to English lawyers, and be perhaps never referred to in His Majesty's Supreme Court of Judicature in India. With the assistance of the Sureefeea it is brought within the reach of most ordinary capacity; and if the abstract translation of that commentary for which we are also indebted to Sir William Jones; had been more copious, nothing further would have been requisite to give the English reader a complete view of this excellent system of inheritance." In 1850 Mr. Neil Baillie further produced Mohammedan Law of Sale. Later on other works came into existence.

(c) **Muslim Law Officers:** To bring the rule of Hastings, reserving their personal law to Mohammedan, into action, the Mohammedan Law Officers were employed in the Courts of Law. Their function,
like Pandits, was to expound the law. The appointment of Maulvis as Law Officers was done with the same motives as it was done in the case of Hindus,\(^3\) *viz.*, the English Judges were not conversant with the habits, manners and customs of Muslims, and they could not derive any help from the Law Books written in Persian or Arabic. However, this class of law officers was abolished by an Act XI of 1864. The reason for so doing were almost the same as they were in the case of Hindu Law Officers.

**(d) Sects and Sub-sects:** The Mohammedans are divided into various sects and sub-sects. The two major divisions are Shia and Sunni. It seems that the Mohammedan Law as a personal Saw was applied to them in accordance with the principles of their own school or sub-school.\(^1\)

In *Rajah Deedar Husain v. Ranee Zuthoornissa* the Privy Council observed: 'According to the true construction of this Regulation, in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mohammedan Law of Succession applicable to each sects ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mohammedans, but that the Mohammedan law, whatever it is, shall be adopted. If each state has its own rule according to the Mohammedan Law, that rule should be followed with respect of litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it has founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged.
2.10 MUSLIM LAW AND THE LEGISLATURE

The attitude of non-interference adopted by the British administrators in case of the Hindu law was reflected much more tenaciously in the case of the Muslim law. On the whole, changes made in the Hindu law were far greater than was the case in the domain of the Muslim law. Fewer changes were effected in the Muslim law than the case with respect to Hindu law. In fact some of the statutes were passed in order to restore the orthodox doctrine of Muslim law and to undo the effect of judicial decisions. This can be ascribed to conservative public opinion among the Muslims. The two Acts which affect the Muslims are Caste Disabilities Removal Act, 1850 and the Child Marriage Restraint Act, 1929.

The first legislative change was made in the Muslim law in 1913 when the Legislature enacted the Wakf Act. This was to undo the effect of the Privy Council ruling in the famous case *Adul Fata Mohamed Ishak v. Roosomoy Dhur Cliowdhary*, in which it held that wakfs which were founded for 'aggrandizement' of family, or gifts or charity which were illusory, or wakfs which were merely nominal, were void. The Muslims regarded this judicial dictum as being inconsistent with the true view of the Shariat. The Wakf Act of 1913, therefore, sought to bring the law back to the Muslim Shariat law and restored to the Muslims the right to make valid wakfs in favour of the family. The communities like Rhojas, Memons, Vohras had become converts from Hinduism to the Muslim religion. Even though they renounced the Hindu religion, they did not renounce the Hindu law completely and in

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66 Supra, 475
67 See, Tahir Mahmood, Muslim Persons Law, 41-45 (1977)
the area of inheritance and succession, the Hindu law continued to be administered to them by the courts as a customary law. The orthodox Muslim opinion did not relish this position. Therefore, in 1937, the Shariat Act was passed which abrogated these customs and brought these communities under the Muslim law. In effect, Section 2 of the Act abrogated custom. In all matters except agricultural land, the rule of decision among Muslims in family matters was to be the Personal Law (Shariat). Charities, charitable institutions and religious and charitable endowments are excluded from the scope of this Act. These two Acts restored the Muslim traditional law to the Muslims. Another piece of legislation was enacted in 1939. The Dissolution of the Muslim Marriage Act gave to a Muslim wife the right of judicial separation from her husband which had been denied to her earlier, perhaps because the courts followed mainly the Hanafi School of interpretation of the Muslim law. This Act was based on Islamic law of the Mallki School. This is the only legislative measure which has introduced a substantive reform in the Muslim law over a long period of time.

On the whole, the effect of some of these Acts was to make the law somewhat rigid and to do away with the liberal tendencies released by some judicial pronouncements. This does not, however, mean that the Muslim law does not need a number of adjustments and amendments to accord with modern needs. The old system was developed in an age when social environment was completely different from the modern Indian society. Some of the rules of the Muslim law appear to be quite

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68 Supra, 481, 483
69 Fyzie, Outlines of Muahi Law
70 For background information regarding the passage of this Act, see, Tahir Mahmood, Muslim Personal Law, 54-57

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out of context with the contemporary notions of social norms, as for example, polygamy, *muta* marriage, law of divorce, etc. On many points, the law remains uncertain even today. To mention only a few points, in the spheres of wills and gifts, the Muslim law remains uncertain even after its exposition by the Privy Council in the famous case of *Amjad Khan v. Ashraf Khan* in 1929.\(^1\) Widow's right of retention over her dower property is also uncertain to some extent. Then, it appears to be an anachronism that while the Hindu law is being shaped according to new ideas, the Muslim law should remain static and be unresponsive to those very forces. For these considerations, it appears to be necessary and desirable that a number of legislative changes ought to be made in this law, but the lack of public demand in this respect remains a stumbling block in the way of doing what considerations of social good otherwise dictate. The Government of India remains chary of making a move *sun motu* to modify the Muslim law until there arises, a strong public opinion amongst the Muslims themselves to support it.\(^2\) The truth also remains that many Muslim countries have modified Muslim law in many significant particulars.\(^3\) As a reviewer suggests, Muslim countries with modernist orientation have modified Muslim law and he underlines three aspects of these reforms: (1) blending traditional law with Western ideas; (2) selection of principles and opinions from various schools of Islamic law; (3) interpretation of the Quranic text to suit contemporary thought. On the other hand, the Muslim or the orthodox opinion in India shuns any act of reform in the law and do

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\(^{1}\) 56 L.A. 213

\(^{2}\) I.I.I. Proceedings of the Seminar on Reform of Muslim Law (1972)

not accept that it is out-dated with the contemporary realities of life.74 Besides, on several questions of Muslim law, there exists a diversity of judicial opinion among the High Courts.75 There exist gaps and uncertainty on several questions of Muslim law. The only way out is either an authoritative pronouncement on those points by the Supreme Court as and when an opportunity arises before the court for the purpose or legislation to clarify the law. The reform of any law through judicial process is slow and it has its own defects and limits. To effect quick and symmetrical changes, legislation has to be resorted to.

2.11 CODIFICATION OF HINDU LAW

During the British rule in India, except towards its close, no attempt was made to codify the personal laws.76 As had been noted above, the British felt hesitant to interfere with the customs and religious-cum-legal principles applicable to the Hindus and the Muslims. This attitude was borne out of their desire not to interfere with the religious susceptibilities of the Indians. The First Law Commission had however expressed a desire to prepare a code of the personal laws77 but, thereafter, it became an accepted tenet of the British policy not to interfere with these systems, to leave them severely alone and to modify them only to the extent there was demand for the same backed by a strong public opinion. The Second Law Commission expressly gave vent to this policy78 and the same was repeated by the Fourth Law

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74 Jaffar Imam, Legal Modernism in Islam, 7 JILI
75 See Survey of Muslim Law in IIL, Annual Survey of Indian Law, for conflict of judicial opinion.
76 See Derrett, The Codification of Personal Law in India: Hindu Law, 6 Indian Y.B. of Int. Affairs, 189 (1957); Gajendragadkar, note 1 at 484, supra.
77 Supra, 418.
78 Supra, 429.
Commission.\textsuperscript{79} Another factor militating against codification was that these systems were still in the process of evolution; their principles had not become fixed; the systems were far too much flexible and time was not ripe to undertake their codification. Typifying this attitude is the following observation of Mayne as regards the Hindu law as it stood in 1878: "The age of miracles has passed and I hardly expect to see a Code of Hindu law which will satisfy the trader and the agriculturist, the Punjabi and the Bengali, the Pandits of Banaras and Ramaiswaram of Amritsar and of Poona. But I can easily imagine a very beautiful and specious code, which would produce much more dissatisfaction and expense than the law as at present administered." Here Mayne was dilating upon the lack of uniformity in the Hindu law as it operated in the various parts of the country, arising out of the various schools and sub-schools of Hindu law as well as the variable customs. It was a right policy not to make an early attempt to codify the personal laws because these systems were in an evolutionary stage and gradually the courts were ascertaining and declaring the principles of these systems applicable to varied facts of life. The growth of Hindu law was very fast as would be evident if one were to look through the various editions of Mayne's Hindu law. During the period 1878 to 1938, there were ten editions of this treatise, and between one edition and another, so many important decisions were rendered by the courts, and so many new points settled, that each subsequent edition needed a lot of rewriting. Case-law multiplied very fast and important decisions on several branches of Hindu law came in quick succession. To a limited extent, the same was true of the Muslim law as well.

\textsuperscript{79} Supra, 439.
In 1937, the all important Hindu Women's Rights to Property Act was enacted. It struck at the roots of the *Mitakshara* system of joint family. It presented "in the compass of two sections the concentrated drawbacks of uncoordinated piece-meal legislation." The Act created a number of difficulties and presented a number of problems for, unfortunately, 'its impact on the Hindu law in its entirety was not visualized by the legislature. Pleading for the codification of Hindu law in 1938, the Editor of the tenth edition of the Mayne's Hindu Law, S. Srinivasa Iyengar, said:

"But it is obvious that the age of the legislator has come. While many parts of Hindu law require reform and legislation may be welcome, it is essential that Hindu law should be in a form readily accessible to the Indian ministers, politicians, legislators, the Press and the Public. A codification of the Hindu law of property and succession is very desirable. In future, the legislatures will be frequently called upon to consider measures of reform. And any legislation will be most unsatisfactory if reform is undertaken at one point without envisaging its consequences throughout the whole field of Hindu law. The time has certainly come to cheapen the ascertainment of law, to make it, if only in its broad outline, a common possession of all literate citizens and to minimize the inconveniences and complications of a personal law, intermixed as it is with local or family customs which have long outlived the needs of an earlier day, by the enactment of a code of Hindu law applicable to the whole of Hindu India which is governed by the two Schools.

"With the emergence of such sentiments amongst the educated Hindus, it became desirable for the Government of India to take steps towards the codification of the Hindu law. Consequently, the Government appointed a Hindu Law Committee to prepare the draft of a Hindu Code. The Committee submitted its report on February 21, 1947,
advocating codification of the Hindu law, and presenting a draft code. The Committee adduced a number of reasons for favouring codification of Hindu Law. First and foremost was that it would instill certainty and simplicity into the system of Hindu law as administered in India. Generally speaking, a virtue of codifying any branch of Jaw is to bring forth certainty and simplicity by enunciating legal propositions in short and simple sentences. The principles of Hindu law at the time lay buried in a multitude of cases of a number of courts. On some points, the High Courts had rendered conflicting opinions. On some points, even the Privy Council had changed its opinions from time to time. It was quite a difficult task to ascertain legal principles from the mass of undigested case law. Codification was bound to solve these difficulties. It would help in dispensing with a vast amount of legal literature. Law would become certain and better known which would tend to avoid long and costly litigation. Another advantage which could accrue from codification was that uniformity could be introduced into the Hindu law throughout the country. Hindu law at the time was divided into two main schools and a number of sub-schools. Although there was a considerable measure of uniformity amongst the various schools, yet there were differences also some minor, some major, amongst them. It was thought that it would really be a great achievement if Hindu law could be unified and a code produced which might apply uniformly to all Hindus throughout the country. On points of difference amongst the schools and sub-schools, the best course would be to adopt that view which appeared to be the most liberal and best suited to contemporary social needs. Lastly, there was the reformative aspect, Hindu law is a very old, ancient, legal system. According to Mayne, it has "the oldest pedigree of any known system
of jurisprudence.\textsuperscript{80} It is expounded in a vast mass of literature produced at different periods of time, at different places within the country and by different persons. A study of this literature will reveal the basic truth that as a system of law it has never remained static that it has always grown. Unfortunately, due to foreign domination, first of the Muslims and then of the British, its inherent capacity to grow was arrested- The old instrumentalities of growth, the process of interpretation and assimilation of customs with the traditional written text, were not available with the introduction of the British system of justice.\textsuperscript{81} The Hindu society was undergoing a change; new ideas new values of life, new modes of living continually affected the society and imparted to it a new tinge and changed outlook, IQ the absence of the law keeping pace with the change, a gap, a dichotomy, had arisen between law and society. Hence the need to modify the law so that it might satisfy the legitimate wants aspirations and needs of the people. This could be done only through legislation. During the past years, some changes had been introduced here and there in the system which affected the orthodox system in many vital respects, for example, the Hindu Women's Rights to Property Act is said to have struck at the roots of the Hindu joint family system. But these changes were sporadic, piece-meal and unplanned and were undertaken to meet a need here and a demand there without much of a system. What impact would a change in the law at one place have on the rest of the law had not been carefully analyzed. The result of uncoordinated, piece-meal legislation was to give rise to many unforeseen difficulties. The Hindu law being an integrated mass, a change at one place had its inevitable

\textsuperscript{80} Hindu Law and Usage, Preface to the First Edition.
\textsuperscript{81} Supra, 473.
repercussions at various other places. If this was not foreseen and taken care of, it resulted in creating confusion, complexity and vagueness in the law. The only way, therefore, was to take the law in one piece and introduce reform in all those places where reform was desired all at once so that an integrated and coordinated body of law could emerge. This could be done only through the process of codification. Consequently, the Hindu Law Committee prepared a draft Hindu Code after taking evidence from lawyers, bar associations and other bodies and private individuals. The draft code was Introduced in the form of a Bill in the Legislative Assembly by the then Law Member in I 947 and was referred to a Select Committee which presented its report in August, 1948. The Legislative Assembly then again took into consideration the report of the Select Committee. All through this period, right from the day of the appointment of the committee to prepare a draft of a Hindu Code till the time the Assembly took into consideration the Select Committee report, orthodox sections of the Hindu society opposed the passage of the code. Even President Rajendra Prasad was opposed to its enactment. As a result, the Assembly did not proceed with the passage of the code. Instead, the code was broken up into separate parts dealing with separate matters and separate Acts were thus enacted. Thus, the Hindu Marriage Act was enacted in 1955; it was followed by the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956. These Acts have given a uniform law to large sections of the Indian people as they apply to Jains, Sikhs, Buddhists and Hindus of all denominations and castes. The Hindu Succession Act does however maintain distinction between

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82 Setalvad
Mitak-shara and Dayabhaga Schools. The most complicated area, viz., of the Joint Hindu Family, has been left untouched and for the present there is no move to codify this branch of the law. It is in this area that the two Schools of Hindu Law, Milakshai-a and Dayabhaga, differ fundamentally. The effect of the modern Hindu legislation has been to secularize the Hindu law, to make it certain and uniform, and to reform the law so as to bring it into conformity with the facts of modern life. For example, in the area of marriage, monogamy and divorce have been introduced. Both of these are fundamental departures from the traditional Hindu law. Such Western concepts as judicial separation, cruelty, desertion, nullity of marriage have been introduced into the marriage law with the result that courts freely cite English cases to expound the meaning of these concepts and law has become Anglo-Hindu law. Thus, in Priti Parihar v. Kailash Singh, the court has held on the basis of the English cases that mental cruelty is included within the concept of cruelty. These statutes have modernized Hindu law by eliminating the caste factor from the law and conferring equality. On the two sexes. In those areas, however, which have not been codified, the law remains uncertain. It may be hoped that sooner than later the whole of the Hindu law would be codified.

No steps have, however, been taken yet for codification of the Muslim law although its codification is desirable precisely for the same reasons for which codification of the Hindu law was suggested. The Muslim law as of to-day needs many changes; it represents an age long gone by and so it needs to be reconditioned to suit the

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contemporary societal needs. But as the public opinion amongst the Muslims favouring legal change is practically negligible. In today's context, Government hesitates to undertake any step \textit{suo motu}. 
Chapter-3:
Empowerment of Women under Personal Laws in India
Chapter-3

EMPOWERMENT OF WOMEN UNDER PERSONAL LAWS IN INDIA

3.1 INTRODUCTORY REMARKS

Gender does not refer simply to the study of women. Rather it refers to the manner in which male and female differences are socially constructed. Invariably, culture plays an influential role in assigning gender roles. There was a time when rights and women were considered antonyms of each other and incapable of co-existence. A combination of the two was viewed as a mismatched amalgamation. Despite various religious injunctions and well defined legislations. The strong patriarchal traditions continue which view daughter as a liability, wife as an object of subordination, mother as an aide of family burdened with house maintenance and daughter in law as a typical housewife who is suppressed and shackled by the age old customs and traditions. Subjugation of women is deep rooted to such an extent that it goes largely unseen, unexamined and unquestioned. In this chapter an attempt is made to critically analyze the position of women under various personal laws.

3.2 WOMEN IN HINDU CULTURE

The construction of Indian women's identity is wholly defined by her relation to others. From late childhood itself there is a deliberate attempt to train and mould girls into 'good women' - docile, submissive and self-effacing. Marriage and removal from all childhood attachments confound the identity struggles of the adolescent girl. It is
only motherhood that confers status, respect and identity to a female. But these problems and pictures are more complex in Hindu culture. In the name of 'sanskaras', Hindu women are tied up with the bondage of superstitions, which they carry till their death. In the Manu Smriti the woman is born a sort of slave of her father when young, to her husband when she is middle aged and to her son when she is a mother.

The patriarchal Hindu structure is the product of this type of Gender formation, which resulted in over-emphasis on the male child, the preference for sons and neglect of daughters. Hindu Code Bill tries to change the laws of Manu, which were misogynistic and reduced a woman to a commodity. The Hindu Code Bill is a sense marks the end of the laws of Manu and brings forth a text that has possibilities for the liberation of women.\(^1\)

Because of caste hierarchy and patriarchal structure women are second-class citizens in every day social life.

The legal position of women according to Manu, the earliest exponent of law was definitely unfortunate. They were always dependent on somebody either the father, or the husband, or the son. A woman is not entitled to be independence; her father protects her age in her maidenhood, her husband in her youth and her son in her old age. They were treated in law as chattels and a non-entity in the family. A wife, a son, and a slave these three even are ordained destitute of property whatever they acquire become his property whose they are.\(^2\)

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\(^2\) Nandini Chavan & Qutub Jahan Kidwai, Personal Law Reforms & Gender Empowerment: A Debate on Uniform Civil Code, Hope India Publication 2006, p.59
According to the Manusmriti, women are not to be free under any circumstances. In the opinion of Manu:

- IX 2. Day and night women must be kept in dependence by the males (of) their (families), and if they attached themselves to sensual enjoyments, they must be kept under one's control.

- IX 3. Her father protects (her) in childhood, her husband protects (her) in youth, and her sons protect (her) in old age, a woman is never independent.

- IX 4. Considering that the highest duty of all castes, weak husbands (must) strive to guard their wives.

- IX 47. By a girl, by young women, or even by an aged one, nothing must be done independently, even in her own house. A woman does not have the right to divorce.

- IX 45. The husband is declared to be one with wife, which means that there could be no separation once a woman, is married.

Manu does not prevent a man from giving up his wife. Indeed, he not only allows him to abandon his wife but he also permits him to sell her. But he prevents the wife becoming free. See this:

- IX 46. Neither by sale nor repudiation is a wife released from her husband. Manu reduced a wife to a level of slave in the matter of property.
He says:

- IX 416. A wife, a son and a slave, these three are declared to have no property: the wealth, which they earn, is (acquired) for him to whom they belong. When she becomes a widow, Manu allows her maintenance. Manu never allows her to have any domination over property.

In the context of the Hindu Dharma (religion), caste hierarchy and patriarchal system dominated the Hindu society. This ultimately led to the subordination of the woman status.³

### 3.3 WOMEN'S RIGHTS AND CUSTOMARY LAWS

Custom was an important source of law. Its validity under Smriti law and its relevancy to castes and tribes, who were not governed by the Smriti law, is there.

Local customs were held in high esteem and were acknowledged as an important source of law under the Smritis. Gautama, Manu and Brihaspati granted special recognition to custom. The local customs varied from region to region. The Southern states granted women greater rights. Both Yajnavalkya, and Vijnaneswar who had expanded the Kya, and Vijnaneswar who had expanded the parameters of women's right to property, hail from the Southern (Dakshina) region. The Southern, and predominantly Dravidian regions, followed various pro-women practices of property inheritance even under Smriti law. The liberal construction of Stridhana under the Bombay and Madras schools is an indication of this. A custom of handing over a piece of

³ Ibid, pp. 93-94.
land to the daughter at the time of her marriage prevailed within the Madras presidency.

A woman's right to one-third of the property upon her husband's remarriage was also recognized within certain lower castes of Madras Presidency and was termed as Patnib-hagam. In Andhra Pradesh there was a practice of giving land to the daughter at the time of her marriage, which is known as Katnam. In the Karnataka region Virasaiva women inherited twelve per cent property in the form of land from their mother and this property customarily passed on only to daughters, even when boys did not inherit from their fathers. The Buddhist literature also indicates that women could own property and gift property in their own right.

The Brahmanical-Aryan customs followed by the upper castes of North India exercised a strict control over women and their sexuality and the status of women among them was low as compared to women from the lower castes and the Dravidian regions. The Shudras, considered to be out of the caste system, were not governed by the code of Smritis.

Shudra women worked and contributed to the household and hence were not totally dependent upon their men. Most of the lower castes practiced the custom of bride price, where the father of the girl had to be compensated for the loss he suffered by the marriage of his daughter. Although the Smritis shunned this practice, as it amounted to sale of a daughter, the fact that it is mentioned in most Smritis and commentaries indicates its wide acceptance by the various castes including the Brahmans. It continued to be followed by several castes
in the southern region, northern Himalayan region, and various tribes’
right up to the pre-independent India.

Marriages among the various lower castes were less sacramental and
more contractual. In the Deccan region remarriages of women whose
husbands had been absent for a long time was permitted. If the first
husband eventually returned, the woman had a choice to live with
either the first husband or the second husband but who was deserted
had to be reimbursed his marriage expenses.

The custom of divorce and remarriage was also prevalent among
Lingayats of Karnataka, Kapus of Telangana, Jats of Punjab and
Haryana, certain castes among the Maravars, Namoshudras of Bengal
and the Bania of Bihar. In the northern parts of Bihar, Orissa, Chhota
Nagpur and Assam all castes and tribes permitted remarriage. It was
also accepted as a universal custom in the Darjeeling and Manipur
regions. As a community progressed economically, it took upon
Brahmanical practices and exercised a stricter sexual control upon its
women.

A casual glance at the customs of the lower castes is sufficient to
indicate an absence of a strict sexual code and correspondingly wider
scope for negotiating women’s rights of divorce, remarriage, property
ownership, etc. among them. ⁴

3.4 POSITION OF WOMEN IN THE VEDIC SOCIETY

The analysis of women’s status in Vedic period is necessary in view of
the fact that it is in the Vedic period when, for the first time, women's

⁴ Supra Note 2, p. 41.
role formation began. However, the whole discussion regarding women was, then, based on philosophy and spirituality. Women's socio-economic status was altogether ignored. This was the reason which necessitated gradual declined of women's role and status in society, till Dharmashastra period. Although there had been talks over issues like women property (Stridhan), Marriage (Vivah), adoption (Dattaka) but not to enhance the status of women. Women's issues centered on women's sexuality, glory of motherhood and idealistic image of women. Consequently, women found themselves under many restrictions and bindings, which did not allow them to have their identity and freedom. Factor of casteism and patriarchy added fuel in deteriorating women status in the society. Nevertheless, it cannot be said that women's position was similar in every section of society. As there had been some customary laws, which favored women as far as their rights are concerned, such as marriage and divorce. In the colonial period women's positions in general became more and more prisoned in the hands of cruel practices like child marriage, dowry, widowhood, etc. This undue situation demanded immediate attention. As a result, subsequently many reformers came in the Hindu society.\(^5\)

The status of women in the Vedic society is a matter of some debate. While there had been a consistent tendency to idealize their position, it is likely that reality may have been more complex. That women played a certain part in the productive process is evident from the term duhitr, as well as from their involvement in activities such as weaving. Further there are references to women seers of Vedic hymns, which would indicate some access to ritual and spiritual traditions. Besides, certain

\(^5\) Flacia Agnes, Women and Law in India, OUP, New Delhi 2005, pp. 18-22.
practices such as child marriage seem to have been organized *patrilineally* and while there were prayers for the birth of sons in particular and for praja or offspring in general there was none for the birth of a daughter. Further, most of the major *deities* in the early Vedic pantheon temple are male, which could possibly indicate male domination on the human plane as well. Moreover, while early Vedic society was by and large relatively undifferentiated, there are no indications to suggest that women could occupy the highest positions of authority and prestige those of priests or the raja. Thus, a certain degree of social stratification along gender lines is *discernible.*

Vedic women had neither property nor the right of inheritance and their status was on a level with that of the Shudra. But other evidence tends to show the opposite. The wife as a companion in conjugal life in Vedic society was not an unusual feature.

The basic social unit was probably the patriarchal family. The four-fold *Varna* system, on the other hand, was virtually absent. There are only fourteen references to Brahmans, nine to Kshatriyas and one to the *Shudra,* the last named being referred to only in the context of the *purushashukta hymn,* which occurs in the tenth *mandala* of the *Rigveda* which is commonly regarded as late.

There are four Vedas but comparatively, in the Rig Vedic period the women enjoyed a high position in society. Many women made a mark as renowned scholars and philosophers like *Visvavara,* *Ghosala* and *Apala.* *Saunaka* in *Brahmadevta* mentions 27 *Brahmavadinis,* great scholars who contributed *Shuktas* in the *Rigveda.* Women were
married at a mature age, participated in religious ceremonies and had freedom in the choice of husbands. Polygamy was rare.  

3.5. POSITION OF WOMEN IN THE EPIC PERIOD

The dawn of puranas witnessed a significant change in the role of Hindu women which was limited and restrained to the basic ends of human existence. The men wanted their dominance making their women folks subservient to them. Neither they were left with freedom of choice nor did they become only the means for Hindu men to attain their end. The women lost their past status and glory and subjugated to men's whims. The concept of dual existence and rhythm of cycle of birth and death and rebirth and theory of pinddan threw the Hindu women to a place of subservience. Whatever they received in the Vedic period, they began to lose in the Puranic period. They became dependent on men. The marriage lost its independent value. It failed to secure a firm grip in the changing events of Hindu life. Hindu women began to be confined to the kitchen and producing a son. The Daughters were un-welcomed. Freedom to Hindu women was not recognized. They were just physical machines of production of the Praja for the family. Where they failed their life became hell. Son became important to them because through son the Hindu began to find their salvation. The Hindu pantheon god became figurative than supernatural power in the mind of the Hindus and everything began to be understood in the light of attaining Moksha through son.

Marriage began to be treated as Sanskar and a religious act and obligatory to marry. The freedom to marry or not to marry was

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6 Supra Note 2, pp. 45-46
disallowed. The question of choice also lost its meaning because that period attached no significance to consent of the girl in a marriage. The martial life was tagged with religion and religion made her dependent. Marriage alone was her granted salvation. This virtually degraded the position of Hindu women in the Puranic era. Whatever independence she enjoyed in Vedic period she now began to lose. The concept of sonship was affiliated to the theory of pindddan and for offering the pind to the deceased the presence of the son was essential. Therefore, the women who could not beget a son for the husband suffered indignity and hollowness of her physical existence. One can then find a significant change in the attitude of the men towards women. The story of desertion, cruel treatment, hostile and callous attitude began to show the seeds on Hindu women.\(^7\)

### 3.6 THE FAMILY AND FORMS OF MARRIAGE

In several regions apart from monogamous relationships, there were also more archaic forms of marriage to be found. The husband was the head of the family. Gradually certain changes came about in the position of women who eventually became fully dependent upon their sons and spouses. Marriage was turned into a sort of property deal. The man purchased his wife and she became his chattel. Source materials tell of wives being sold or lost in the course of gambling. The women’s position was extremely hard one. In childhood, she was expected to be completely in the power of her father, during her youth in that of her husband in the old age in the power of her sons. This is how women were placed in Dharmashashtra. Wives have to be patient unto death and strictly observe their obligations. The Dharmashashtra demanded

\(^7\) Supra Note 2, pp. 58-59.
of a wife to respect her husband as a god even if he possessed no
virtues. Only husbands were able to divorce their spouses. A wife was
unable to abandon her family. Even if her husband sold her or left her,
she would still be regarded as his wife. An unfaithful wife would be
subjected to most terrible punishments, including death. A man could
have several wives and would not be considered sinful. A wife had to
belong to the same Varna as her husband. Only in rare cases were
women allowed to marry a man from the lower Varna. The most
serious crime was held to be a marriage between a Shudra and a
Brahman woman. A father’s power over his children was decisive and
final. 8

3.7 RIGHTS OF WOMEN

The foremost rights of a wife and the corresponding obligation as a
husband, is the provision for her support and maintenance. It has
always been repugnant to Indian feeling that a husband should let
himself be supported by his wife, as instanced by Sita’s contemporary
reference to actors living on the vice and earnings of their wives.

The kanya-dhana or bridal gifts offered by parents at their daughter’s
marriage became her stridhana. This property must have remained at
the disposal of wife. Besides, kings occasionally transferred property
and gifts on their wives who then acquired absolute rights over their
use and disposal.

As far as conjugal right is concerned, it emphatically laid down that the
husband, during the proper season must visit his wife and that it would
be a sin for him not to fulfill her wishes then.

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8 Supra Note 2, pp. 61-62.
The association of wife in the coronation rituals further establishes the status of equality accorded to her on some of the most essential ceremonies. A widow took part in the funeral ceremony of her husband. The wives of Vali are described as joining his funeral procession along with men. Women often led the way on such occasions. They also participated in offering water libations to their deceased relatives.

Normally husband and wife performed religious prayers and sacrifices jointly. If the husband's participation was not available for some reason or the other, his wife could perform the rites alone. In the absence of her husband she had the right of attending to the daily agnihotra. Worship of the gods and performance of Sandhya were not denied to women. Kaushalya performed all alone the svasti-yoga ceremony to ensure felicity for her son evidently because Dashrath was engaged in assuaging Kaikaiy. These instances show that a women's participation in sacrifices was real and that very often husbands used to leave the affair to the exclusive charge of their wives when busy otherwise.9

a) Property Rights of Women and Diversities in Hindu Law during Dharamashastra Period

In the early Hindu society, women had no legal status. The Hindu law of inheritance had deprived women of the right to property (except the right to their Stridhana). As a result, their economic security was completely dependent on the pleasure of the man—husband, father, and brother.

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9 Supra Note 2, p. 60.
Every member of the coparcenary has a right by birth in the property of the coparcenary. This right is not determined until partition is made; it is liable to fluctuations; it increases with every death in the family and decreases with every birth. The persons constituting the coparcenary own the property of the family as a joint tenant with the right of survivorship and they leave the management of the family and its properties in the hands of the manager, who is clothed with some special powers. But even these special powers do not justify the alienation by the manager of the property of the family unless the transaction is supported by legal necessity. On the other hand, under the Dayabhaga system of Hindu law coparcenary is unknown. The father is the absolute owner of the property so long as he is alive; his sons can claim no share in this property by their birth and on his death his property devolves by succession amongst his heirs, each one of whom takes his share as his separate and absolute property and all of whom together own the property not as joint tenants, but as tenants in common.

_Yagnavalkya_ states that the father is master of the gems, r-earls and corals and of all other movable property; but neither the father nor the grandfather is so of the whole immovable property. Then he refers to the Manu's texts in which Manu says, "the support of persons who should be main-timed is the approved means of attaining heaven; but hell is the man's portion if they suffer. Therefore (let a master of a family) carefully maintain them."

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10 Gajendra Gadkas (P.B) (1951), Hindu Code Bill – Karnataka University Lectures, Karnataka University, Dharwad, pp. 35-36.
Jimutvahana states that in Bengal it was quite common for the father to sell ancestral immovable property without any objection, and he naturally wanted to bring that practice within the framework of Hindu law. In fact, this part of Jimutvahana's reasoning shows that he was attempting to adapt and adjust the principles of Hindu law to the changed and altered practices that had become popular in Bengal.

At a time when and in the territory where Vijnaneshwara lived the popular usage and custom had clothed the sons with the right in the ancestral property by reason of their birth. There are texts, which support both the views of both Mitak-shara and Jimutvahana. The text of Devala unequivocally supports Jimutvahana because Devala says, "the father being dead, the sons should divide the father's wealth-since there cannot be ownership in them, while the father is living- being faultless. The text of Gautama says: "From the very moment of birth, one obtains the ownership of wealth-thus say the authorities". "The material text of Manu reads thus": After the father and the mother, the brothers having assembled together, should divide the paternal inheritance. Of the immovable property, and the slaves, although acquired by one's own self, there is neither a gift, nor a sale, without assembling of all the sons. Those who are born, those who are unborn, and those who are laying the womb, they wish for sustenance. There is neither a gift, nor a sale". He says the land apportioned by the grandfather, or corrody, or property, therein the ownership of both the father and the son, should be alike. Jimutvahana wanted to confine the absolute and unrestricted power of alienation of the father to his self-acquired property.
According to the authors, Dayabhaga and Mitakshara differ radically in their treatment of joint family property, each one of them propounds the thesis that his view is based upon ancient Hindu texts.\textsuperscript{11}

b) Daughter's Property Rights

Two distinct tendencies are clearly discernible in the ancient Sanskrit literature dealing with this question. The protagonists of the view that the daughter must be excluded can take comfort from the thought that their view receives the support of a passage from the \textit{Rigveda} itself. The famous 31st hymn in the third \textit{Mandala} of the \textit{Rigveda} as explained by the Sayana provides: "the son does not vacate the inherited wealth for his sister, he makes her the repository of the issue of him who takes her; although the parents procreate both the males and the females, the one is a worker of good deeds, the other is graceful. In ancient Vedic times where the strife and struggle were the order of the day, it is not surprising that the warrior should have monopolized succession to the estate and the female should have been treated as merely the repository of the issue of him who takes her.

Both Manu and \textit{Yajnavalkya} do not seem to subscribe to this unqualified and absolute prohibition against the daughter's claims to succeed to a part of their father's estate. Manu in chapter IX, verse 130, says: Just as a person is born through his son, so is he through his daughter: the daughter and the son are equal. If the daughter is alive, how can anyone else take away the estate of the father? Verse 118 in the same chapter says: "To the maiden sisters let their brothers give portions out of their allotments respectively: to each one-fourth part of

\textsuperscript{11} Supra Note 2, pp. 68
his appropriate share. Those who refuse to give shall be degraded." Yajnavalkya in chapter II, verse 127, says, "And sisters should be initiated into marriage giving them the fourth part of ones own share. It is somewhat surprising that though the Dayabhaga School is of later growth than the Mitakshara, the views of Dayabhaga on this question are more retrograde than those of Mitakshara. In commenting on verse 127 of Yajnavalkya Vijnaneswara noticed a contrary view and severely criticized it. "If it is said that here also, the speaking of the fourth share is not intentional, that the real intention is to declare the payment of only as much wealth as is required for the sacrament of marriage, this is not so. Because there is no authority for saying that both the Smritis (Manu and Yajnavalkya) have spoken of the fourth share to be given, without really meaning the same; and because we hear also of there being a sin in case of non-payment."

Therefore, after the death of the father, the unmarried daughter is entitled to get a share; before, however (i.e. before the father's death), whatsoever the father gives, she gets. Thus it becomes unobjectionable. Says Yajnavalkya, "Those not religiously initiated should be initiated by brothers previously; initiated and sisters also-giving however, one-fourth share from the self-appropriated share". He is speaking of the indispensableness of initiating the unmarried daughters; (which means marrying); not of their right. And when there is much wealth, wealth requisite for the marriage should be given; there is no invariable rule for one-fourth share. This is the conclusion.

As to the nature and extent of the rights of women over property obtained by them, the texts of Yajnavalkya and Vishnu, which recognize the rights of the widow, the daughter, the mother, and other
females as heirs, do not make any distinction between the character of
the estate taken by them and that of the estate taken by the male heirs.
The words used in reference to both the estates are the same, and
reasonably construed they do not justify the distinction made by
judicial decisions between the two estates. The same is the position
with regard to the text of Manu, which says that the widow of childless
man, keeping unsullied her husband's bed and preserving in religious
observances shall present his funeral oblation and obtain his entire
share. On the other hand both Katakana and Narada seems to negative
the absolute estate of women. Katyayana says: "The childless widow
preserving unsullied the bed of her lord, and abiding with her
venerable protector, should enjoy with moderation the property until
her death. After her the heirs should take it."

According to Mitakshara all kinds of property in the hands of a female,
howsoever it might have been obtained by her, is her absolute property.
The text of Yajnavalkya, on which Vijnanaeswara has built his theory,
speaks in these terms: "Whatever is given by the father, the mother, the
husband and the brother and whatever is obtained near the nuptial fire
and at the marital procession and the rest is known as Stridhana."
Vijnaneswara has interpreted the word ‘adyani’ as including all other
kinds of property, which a woman may obtain. Vijnaneswara puts his
thesis succinctly by emphasizing that the word stridhana is used in its
literal sense and not in its technical sense. This interpretation of
Vijnaneswara is consistent with his view that women are entitled to
inherit. According to Dayabhaga the property inherited by a widow
from her husband is not her absolute estate, and it must be conceded
that the courts in India have in effect imposed the Dayabhaga view on
the followers of Mitakshara School. Even so, it is perfectly legitimate if the Hindu Code seeks to make women's property absolute, as Vijnaneswara did in his Mitakshara.

Regarding the daughter's property rights under the schools of Hindu law, which do not admit a daughter to share in the property of her father, it is well recognized that at a partition between the members of the joint family, provision has to be made for the maintenance and marriage expenses of the daughter.

Scholars are divided to the genesis of this right. One view is that the provisions for the maintenance and marriage expenses of the daughter have to be made because the father is liable to maintain all his children and he is bound to get his daughter married before she reaches the puberty. On the hand, this view is not accepted by a large number of scholars of Hindu law who think that the better reason for this rule is really the historical remnant of her larger right.

According to Justice Ramesam, under the early Hindu law the rights of both the sons and daughters were imperfect rights in the property, which could not be materialized by compelling partition against the wishes of the father. Gradually however the son's rights developed into a right to compel partition, whereas the daughter's right first became a right to compel partition against the brothers only and not against the father and later on degenerated into merely a right to maintenance and marriage expenses. In other words, a study of the historical development of this branch of the Hindu law shows that it is wholly inaccurate to say that the daughters were always treated as being inferior to the sons in the Hindu law. It may be that for some centuries
past their rights had gradually decreased and now have crystallized into a claim merely for the maintenance and for marriage expenses. If the Hindu Code seeks to confer upon the daughter somewhat larger rights than she enjoys today, it can well be claimed that the Hindu code has in that behalf the authority of ancient Hindu texts. If out of two undivided brothers one dies leaving behind him his daughter, she would get no share under the orthodox J view of Hindu law but the daughter of the survivor would get the estate solely because her father was the last to die.\textsuperscript{12}

3.8 SOCIAL AND LEGAL POSITION OF HINDU WOMEN IN COLONIAL PERIOD

The subjection of the Indian women in the pre-British period was rooted in the social and economic structure of the society of the period. Birth determined the status of an individual in that society. The disabilities of a woman arose from the fact that she was born a woman. This inferior status of woman in society was made sacrosanct by religious ordinances.

Women had to strive hard for their rights in different spheres of life. The hesitation of the British government and the reactionary resistance of the orthodox sections of the society had to be combated before legislation was enacted such as would increasingly make woman man's equal in matters of civic rights. Among the organizations, which worked for the social, political and educational advance of the Indian women, the All India Women's Conference stood in the forefront. Orthodox India and old social and psychological habits were arrayed

\textsuperscript{12} Supra Note 10, pp. 37-45
against it. However, the movement scored important success, though slowly.

There were barbarous customs in the past as Sati and infanticide from which the Indian women suffered. The widow had to throw her living body on the pyre with the corpse of her husband when he died. Parents killed girl babies for the marriage of a girl was too expensive for poor parents. Even when the custom of Sati was abolished, widows were prohibited from remarrying. Infanticide was also subsequently declared a crime. Yet it continued at many places. Child marriage had been one of the principal evils from which the Indian women, more than even men, suffered. Owing to the efforts of Ishwar Chandra Vidyasagar, the Act of 1860 was passed raising the age of consent for married and unmarried I girls to ten. It was also due to the efforts of the same social re-I former that, in 1856, the remarriage of widows was legally permitted. However, it was only in 1929 that a decisively legal step was taken to strike a blow at the harmful custom of child marriage. The Child Marriage Restraint Act passed in that year raise the age of marriage age for girls to fourteen and I for boys to eighteen. 13

In the past, religio-reform movements like Buddhism tried even partially to elevate the status of the Indian women but it was only during the British period that big movements were organized to destroy the social and legal injustices from which they suffered for centuries. The social reform movements, which arose out of the new conditions of social existence, set itself the task of removing the social and legal injustices and inequalities from which the Indian women suffered.

The call for comprehensive reforms was premised on recognition of the entrenched and formidable power of Indian patriarchy; only comprehensive legislation could tackle the tightly interlocking questions of monogamous marriage, divorce and inheritance. In late 1920's and 1930's the nationalist women's organizations failed to sustain pressure for changes, which would most certainly have divided the nationalist women's movement. The advocates could not successfully speak for Hindu women with much confidence and ease in the 19th century when women had little access to the public political space. A discourse of women's rights as opposed to a discourse of women's duties to home and nation was slowly, if hesitantly, being articulated. If the discourse on women's duties to the home and nation had provided the only acceptable, indeed legitimate, basis on which to demand reform, the ideology of equal rights was gaining ground.

Basing themselves on the Karachi Congress Resolution, which guaranteed sex-equality, the women's sub-committee called for a uniform civil code to replace the separate personal laws. The Deshmukh Bill put some pressure on the government and it appointed (1941) the B.N. Rau committee to enquire into the need for a Hindu Civil Code.

The B.N. Rau committee, which had no woman member, affirmed that the time had arrived for a uniform civil code, which guaranteed more equal rights to women in keeping with the modernizing trends in Indian society but "the main emphasis of the first HLC (Hindu Law Committee) report was to legitimize the project of reform by reference to ancient Hindu traditions". There was neither an attempt to rigorously read and cite the Smritis nor to revamp the traditional legalities to
make them consonant with modern judicial systems. The opponents and supporters of the codification bills framed their arguments in terms of scriptural validity. The debate of the pre-independence years continued the practice of scriptural referencing. At the same time, at no point did women themselves make similar use of the scriptures in their favor.

The property rights of most Hindu women were governed by the Mitakshara and Dayabhaga systems of law. The Mitakshara system made the distinction between the two kinds of property, joint family property and separate property. The first included ancestral property (namely property inherited from up to three generations in the paternal line) as well as any property that had become part of the joint property. Only male members of the family, up to four generations, were coparceners of this property, a right to which they were entitled from birth. Despite strict observations on its alienation, especially when it was immovable property such as land, every coparcener had the right to demand partition, without affecting the right of the others to stay undivided. On the other hand, under Mitakshara law, a man had absolute right to sell his self-acquired property, and if he had no male heirs up to the fourth generation, he could treat his share of ancestral property.

In the case of Dayabhaga, man enjoyed absolute right over all property, whether ancestral or self-acquired, including the right to gift, sell or mortgage it. Unlike the Mitakshara system, which conferred coparcenary right at birth on sons, and where the interest in the property varied according to the number of survivors, the Dayabhaga system ensured no birthright, and defined a fixed and non-fluctuating share for each heir.
Women's rights were extremely restricted under both systems. While systems recognized the absolute control of a woman over her Stridhana, this recognition was more or less confined to movables, and there was considerable confusion, of a textual or a practical kind, about whether it could include immovable properties such as land. Under Mitakshara law women only had a right to maintenance as wives, widows, or unmarried daughters, while the expenses of a daughter's marriage also devolved upon the family. On the condition that she remained chaste, a widow could enjoy a limited (lifetime) interest in her husband's property but only in the absence of male heirs up to the fourth generation. This meant that the widow could not alienate the property except in dire times of necessity. The daughter figured as an heir only after the widowed mother was dead but she too enjoyed only a limited estate. The chances of a woman inheriting property under Dayabhaga were slightly better, since women inherited both ancestral and self-earned property, although here, too, widows and daughters followed male heirs up to the fourth generation.

The movement to strengthen her position in society began from the second half of the 19th century. The earliest attempts may be traced back to 1865. The Act X of 1865 was the first step towards conferring economic security upon Indian women. The Indian Succession Act 1865 (Act X of 1865) laid down that "no person shall, by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done 'if not married to that person.' In 1923, the Married Women's Property Act of 1874 was amended by Act XIII of 1923 so as to bring Hindu women and others
within its jurisdiction. On 15 February 1923, the Select Committee's report on the Bill to amend further the Married Women's Property Act of 1874 was taken into consideration. The bill intended to provide a policy of insurance, which could be for the benefit of the wife, or the wife and the children of the insurer. The Bill was finally passed into law in March 1923.17

The year 1923 was indeed a landmark; this was the year when the Hindu woman's independent right to property was recognized for the first time, although to a limited extent. No doubt, Section 4 of the Widow Remarriage Act 1856 entitled the childless widow to a share of her husband's property; this right was very limited in scope. So the attempt made in 1923 may be regarded as the first move when women's economic rights began to be honoured.

The Married Women's Property Act of 1874 was further amended in 1927 by Act XVIII of that year. Its aim was to safeguard the interests of husbands—a part of limited their liability when his wife had obtained a probate or letter of administration and was a trustee, executive or administrative either before or after marriage.

Another effort to effect changes in the Hindu Mitakshara Law was made through the Hindu law of Inheritance (Removal of Disabilities) Act of 1928 and the Hindu law of Inheritance (Amendment) Act, which further extended the Act of 1850 and put women in the line of succession. Further advancing the claim of women to property was the Hindu Women's right to Property Act of 1937. This was by far the most important single piece of legislation, and was well known as the Deshmukh Act. The Deshmukh Bill, introduced shortly after Sharda's
Bill to grant Hindu widows a share in their husband's property had suffered a resounding defeat in 1932. In order to enhance its chances of being passed, it confined itself only to the Hindu widow's inheritance rights. The Bill, passed in 1937, did substantially improve the inheritance rights of Hindu widows and introduced as heirs a man's widowed daughter-in-law and widowed grand-daughter-in-law. Even so the more radical aspects of the Deshmukh Bill were not included, and daughters were completely excluded from its purview.

The piecemeal nature of the proposed legislation greatly disappointed members of the All India Women's Conference, who clearly recognized that the overwhelmingly male legislative assembly was unlikely to initiate the changes that would undermine their existing privileges and powers. Lakshmi Menon declared at the 1933 conference of the AIWC: "If we are to seek divorce in court, we are to state that we are not Hindus, and are not guided by Hindu law. The members in the Legislative assembly who are men will not help us in bringing any drastic changes which will be of benefit to us".

It may therefore be clearly seen that the Hindu women enjoyed a position of eminence under the Shastric law but slowly and gradually they started losing their rights at the hands of the strong patriarchy that started viewing women as an object of rights instead of being a subject of rights. This position continued until the enactment of the Hindu Code Bill that faced much resistance from the ruling class before it could be passed.
3.9 POSITION OF WOMEN UNDER ISLAMIC LAW

The debate on Islam and women's rights can be traced back to the time of its evolution. Prophet Mohammed was born in Mecca C. 570 CE when a variety of marriage and divorce practices, and matrilineal customs existed. The initial discourse on gender and women's rights in seventh-century Arabia, when Islam first appeared, continued ideas and traditions set in place by the preceding Judeo-Christian tradition. The veil, for example, which was part of the prevailing custom practiced by a certain class of women in the Christian Middle East and Palestine permeated emerging Muslim societies.14

Before the advent of Islam, the position of women in Arabia was not good. The Arabs never wanted to have a female child as the same was considered a burden and a liability. The Arab society was a tribal society, where one tribe always fought against the other. Women needed the males to defend themselves and were, therefore, a liability. They were merely a share in the inheritance and the booty. 15

There is another aspect of the matter. A daughter on attaining puberty was required to be given away in marriage to someone. This was something disliked by the Arabs. They abhorred the very idea of being called a father-in-law. They thus considered daughters as a drain on their resources. They were required to spend a lot on their upbringing almost as much as they had to do in the case of boys and yet not getting anything in return. They thus found out a way out of this

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14 Seema Qazi, Muslim Women in India, Minority Rights Group International 1999, p. 28.
impasse i.e. to bury a female child alive. The Holy Qur'an refers to this in the following verse:

"When if one of them received tidings of the birth of a female, his face remain darkened, he is wrathful inwardly.

He hideth himself, from the folk because the evil of that whereof he hath had tidings (asking himself) shall he keep it in contempt, or bury it beneath the dust. Very evil is their decision." (16:58-59)

As a corollary of the above, the Arabs wanted to get rid of their daughters as soon as possible and when a girl attained her 5th or 6th year, she was either buried alive or hurled down from a hilltop.

There was yet another reason for doing away with females. It was poverty. Arabia is a desert and it was hard to eke out one's existence in that country. Poor parents could not have thus borne the additional burden, which the birth of a female child entailed. Thus the easiest way was to get rid of her by killing her. The Holy Qur'an cautioned them-

"And that ye slay not your children because of penury." (6:152)

"We provide for you and for them." (17:31)

The Qur'an was the first scripture to have conceded so many rights to women and that too in a period when women were very oppressed in the major civilizations, namely the Byzantine, Sassanid, etc. And yet we see that the later Fuqaha (Islamic jurists) drew much from the Arab 'adat (pre-Islamic traditions) and resorted to formulations which curtailed, if not trampled upon, women's rights.
The first step, which Islam took in ameliorating the lot of women, was the abolition of this abominable custom. Why be afraid of the birth of a female? It is just possible that a female may bring you laurels, fame and reputation and a male may prove to be the source of disgrace and humiliation. The mother of Mary regretted the birth of Mary and wished that if she were a boy, she could have served better her God. The Holy Qur'an advised,

"All knew best of what she was delivered. The male is not as the female." (Q3:36) Beside, a woman is necessary for the perpetuation of human race. The holy Qur'an further lays down.

"He created you from a single soul." (Q4:1)

"The prophet while convening women to is lam took an undertaking from them that they would not kill their female children." (Q60:12) Prophet Mohammed has observed that education is compulsory for both man as well as woman; there cannot be any distinction on the basis of sex/gender in this regard. Even the slave girls are to be taught as it is considered an act of piety. I am tempted here to reproduce the words of the Prophet. He says,

"If a man has a slave girl, and he gives her good education and a proper training setting her free, married her, then such a man will have a double reward."

(Bukhari: Kitabul Ilm)

It is thus evident from the above that under Islam imparting of education is of vital importance. In fact, it has been considered as a domain of every Muslim irrespective of sex. A duty has been cast on
the shoulders of every Muslim to learn. The Prophet ordained, "It is essential for every Muslim man and woman to acquire knowledge." He had again reiterated, "Seek knowledge though you may have to go China for it."

Once it was observed by him, "Knowledge is the lost property of a Muslim and he should retrieve it, whenever he finds it."

Islam prescribes that when a woman goes out, she should conduct herself in a decent way. She should not flaunt her charms in order to attract the attention of others. In this connection, the Holy Qur'an has injunctioned the females in the following way:

"And tell the believing women to lower their gaze and guard their private parts, and to reveal not their adornment save such as is outward." There is a definite purpose behind the above order. More often than not it has been observed, that the women while going out parade their charm. They want to be the cynosure of all eyes. A woman does everything to embellish herself before going out. She would clad herself in the best costume, wear the best jewellery and use the best possible cosmetics to make her cheeks rosy, her lips bud-like and her eyes, like that of a gazelle. This is sufficient enough to attract an evil eye. Thus, all this parading is forbidden as it may lead to grave consequences like rape, outraging of modesty, etc. Women have been instructed to "abstain from evil look, thought, word and deed".

However, a woman has been permitted to open her face and hand, though of course she is instructed to cover her bosom with a wrap of some sort as in the word of the Holy Qur'an, "And to draw their veils
over the bosoms." Obviously the above instructions do not come into operation while she is within the four walls of her house.

There is no prohibition on women attending to outdoor duties. Instances are not lacking when women were deputed to attend sick and wounded soldiers in the battlefield. They were also at times assigned the task of bringing the bodies of a dead person to the Madina. They also helped men in outdoor work during the "Haj" and while circumambulating the "Kabah", they were permitted to open their face and hands.

It is true that Islam permits a man to have four wives at one and the same time. But however, I feel that this is only an enabling provision as is fully manifest from the verse cited below:

"And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four but if you fear that you do not do justice (between them) then (marry) only one." (Q4:3)

Thus those who are incapable of doing justice between the wives are enjoined to have only one wife as is evident from the above observation.

The Qur'an further provides,

"Ye will not be to deal equally between (your) wives, however, much ye (to do so)." (Q4: 129)

If the above two verses are read conjointly then the only inference which can be drawn is that though the plurality of wives up to four is permissible in certain circumstances, there may be a case when a woman is not in a position to perform her conjugal obligations, in that
case, a man may have a second wife—the wife of a person may be unable to give birth to a baby on account of illness or otherwise. Second, in case of war when young soldiers have died leaving a number of widows. All the young girls are not in a position to find suitable matches due to the number of casualties, in such situations the above provisions can come to the rescue of a particular country. For example, such situations developed after the Second World War in Germany and subsequently in Vietnam and Iraq.

If a girl has attained puberty she cannot be given away in marriage to a person without her consent. A marriage without her consent is void ab initio. In case a girl was married before she attained the age of puberty, she can repudiate the marriage after attaining the age of puberty "khayrun baloogh".

Dower or "mahr" is essential for the performance of the marriage according to Islamic law. No marriage is possible without it. Mahr can be either in the form of cash or property. It is to be paid by the husband to the wife during the subsistence of marriage or on divorce. It is the property of the woman. She can spend it in any way she likes. She can also will it as per her choice. It is a pecuniary safeguard, which the Islamic law provides for a woman. In my humble opinion, there is no analogous provision in any other law in the world. Being well provided in this way, she would be in a position to live with dignity throughout her life and also command respect from her husband.

Islam is the first religion in the world to have; allowed women a share me property left by her parents/husband. Previously, she did not enjoy any such rights, besides the right of inheritance; she has also been
permitted to earn her own livelihood whatever she earns is hers. To substantiate this point, I would like to cite an observation from the Holy Qur'an:

"To men is allotted what they earn and to women what they earn " (Q4:32)

Islam accords to the womenfolk a pride of place and equality of status to both the sexes. The Holy Qur'an lays down,

"And they (women) have rights similar to those against them in a just manner." (Q2:228)

To illustrate the relationship between the husband and wife the Qur'an referred to them as raiment for one another. To quote the exact words of the Holy Qur'an:

"They are raiment for you and you are raiment for them." (Q2:187)

Further saying "Oh children of Adam, we have revealed unto you raiment to conceal your shame." (7:26)

It is abundantly clear from the above that men and women are complementary to one another. Men must hide the weaknesses and mistakes of women and women on the other hand have been instructed not to humiliate men by exposing them. However, there is a division of work, according to the tenets of Islam between man and woman. A woman is enjoined to look after household affairs whereas man has been assigned the task of outdoor duties. Thus the wife is, the minister of home affairs whereas her husband, the minister of external affairs. The man has been declared as the head of the family in order to run the
affairs of the family smoothly. He has to earn and spend his earnings on the maintenance of the family. But this provision in no way detracts from the position and the status, which a wife enjoys in the family. In what esteem the Prophet held the females is manifest from his following saying:

"One who brings up one's daughters, teaches them good manners and morals, arranges their marriages and treats them with fairness deserves to be ushered into paradise."

Abu Dawud

He then observed:

"Paradise lies at the feet of the mothers."

(As Suyuti)

Islam is the first religion in the world to have conferred on the wife a right to divorce her husband. Marriage is a contract according to Islamic law and under this contract, both enjoy certain rights and have to shoulder certain responsibilities.

The rule governing divorce has been given out in the following verse of the Holy Qur'an:

"O Prophet! When you divorce women, divorce them for their prescribed time, and calculate the number of days prescribed, be careful of (your duty to) Allah, your Lord. Do not drive them out of their houses nor should they themselves go forth, unless they commit an open indecency and there are limits of Allah and whoever goes beyond the limits of Allah, he indeed does injustice to his own soul! You do not know that Allah may after that bring about reunion." (2:231)

If we scrutinize the above verse, we find that the following conditions must be fulfilled before and after the divorce:
1. Divorce cannot be given without a valid reason.

2. Divorce will take effect not immediately on pronouncement but after the expiry of the prescribed period of time.

3. The wife after the divorce will not leave the house of her husband but would remain there till expiry of the period of "iddat".

4. For the husband, it is mandatory to think over the grave consequences which are likely to follow as a consequence of divorce.

Divorce is considered the most reprehensible act under the sun. It is thus resorted to only in those discerning few cases, when there is absolutely no possibility of living together. To substantiate the above point, I would like to cite a saying by Prophet Mohammed. He is reported to have said, "Of the many things which God has made permissible for man, the most displeasing to God is divorce."

In the above circumstances, every possible effort is to be made for reconciliation between the husband and wife. For the said end, the parties can use the good offices of their near and influential relations. It is only when every effort has failed for conciliation, then the recourse to divorce is taken. Even after the divorce, the wife is to live with the husband during the period of "iddat" in order to enable an opportunity to reconcile. It is just possible, during this period that the husband may think over the good qualities of wife and that the decision of divorce was a result of anger, anxiety and the husband may repent later on and may revoke it. Thus, in case the wife leaves the houses immediately
then the possibilities of compromise are reduced to a minimum. Living
together may rekindle the love between them. During the period of
"iddat" if cohabitation takes place, then the divorce is automatically
cancelled it is, therefore, mandatory that divorce is to be pronounced
only when the wife is in a clean state. There cannot be any divorce
when the wife is having her menstrual period.

It is amply clear from the above that the Holy Qur'an permits only one
type of divorce, which has been narrated above. If a person is
permitted to divorce his wife thrice at one sitting, then it becomes
irrevocable and the possibility of reunion is lost forever, unless the
wife remarries and the said marriage is consummated. Such a divorce I
feel would be against Qur'anic injunction. In such a case the wife has
to leave the house of her husband and pass the period of "iddat"
somewhere else. In fact, the practice of divorcing thrice at one sitting
was condemned by the Prophet in the strongest possible terms. It was
regarded as trifling with the Qur'an. During the period of Prophet and
during the regime of Hazrat Abu Bakr and even for two years during
the rule of Hazrat Omar, the pronouncement of divorce thrice at one
sitting was regarded as one divorce. However, later on Hazrat Omar
yielded to public pressure and issued instructions that once divorce is
pronounced, thrice even at a single sitting, the same may be treated as
complete and final.

When the wife thinks that it is not possible to live with the husband on
account of incompatibility of temperament or any reason, she may seek
a separation from her husband, which is technically known as
"khulah". If a woman seeks "khulah", the husband is under an
obligation to grant her request. All that he can claim back is the dowry,
and whatever he has given her at the time of the marriage in lieu of divorce-, Rubbia Dinth Muawwiz had sought khulah from her husband but he refused. On being approached, the Caliph Usman declared that her husband could take back, whatever he had given her, but he could not compel her to live with him against her wishes. To the same effect is the decision given by the Prophet in case of Jamila, wife of Sabil.

However the tenets of Islam have not remained isolated from the social & cultural practices of its people. As far as women’s question is concerned cultural & traditional influence tend to be quite strong. Unfortunately, many Shariah formulations are based on such traditions and thus many of the rules reflect the cultural prejudices of the Arabs and the Persian rather than the greatness of the Qur’an and its just liberal outlook.

A brief history of the evolution of Sharia law may help in the better understanding of the various factors that led to substantial changes in the liberal outlook of the Quranic injunctions particularly with regard to women’s rights in Islam.

Islamic law or the Sharia (literally meaning the path or way) was compiled during the ninth and tenth centuries CE by Muslim jurists, well after the death of the Prophet Mohammed. While the basis of the Sharia is divine in that its principal source, the Quran, is believed to be the word of God. it has also been subject to human reasoning and interpretation by Islamic jurists over the centuries. Differences among Islamic jurists in analogical reasoning led to the evolution of four major schools of Islamic law (i.e. Sunni law - Shias have their own law) viz., Hanafi, Shafi, Maliki and Hanbali.150 All laws agree on the
fundamental dogmas, but differ in the application of the Quran and its interpretation. Jurisprudential difference among the adherents of different schools of law also resulted in varied legal positions for female conduct. Thus, for instance, while all schools agree to the unilateral and extrajudicial termination of marriage by men, women are entitled to judicial divorce under Maliki law.

Maliki law allows a woman to petition not just on grounds of sexual impotence, as in Hanafi law, but also on grounds of desertion, failure to maintain her, cruelty, and her husband's being afflicted with a chronic or incurable disease detrimental to her.

Hanafi law, meanwhile, allows women to stipulate conditions in their marriage contracts, although it permits polygamy; the other three schools consider both conditions unacceptable.

These varied interpretations on women do not reflect any frozen, definitive model of future family relationships for Muslim women. Rather, this interpretative diversity illustrates how the Sharia has been subject to human reasoning and interpretation at different historical periods, in varied political, social, economic and cultural contexts. The Sharia is therefore a 'historically conditioned document', 53 combining both divine revelation and human intervention, and was never intended to be the blueprint for all future Muslim societies. Once this point is appreciated it is possible to argue that the different interpretations of the Sharia reflect the constant flux in historical conditions and that the legal principles applied in the ninth and tenth centuries need not be replicated in the twentieth (or twenty-first) century where social, political and cultural conditions differ considerably than those of
seventh century Arabia. Furthermore, as a Muslim scholar commented, 'there are very few women interpreters in the history of Islam because women are seen to be the subject of Islamic Sharia and not its legislators'.151 In the absence of female theologians, there developed a tradition of misogyny among male interpreters of Muslim law. As Zinal-Din, a Lebanese scholar observed, When I started preparing my defense for women, I studied the works of interpreters and legislators but found no consensus among them on the, subject; rather, every time I came across an opinion, I found other opinions that were different or even contradictory. As for the aya(s) [Quranic, verses] concerning hijab [veil], I found over 10 interpretations, none of them in harmony or even in agreement with the others an if each scholar wanted to support what he saw and none of the interpretations was based on clear evidence.

The contention then is not Islam but historical interpretations of Islam. This is the fundamental premise of the present debate on Muslim women's rights. Women's rights activists need to simultaneously uncover and emphasize the coexistence of patriarchal legal texts with the Quran's spiritual and ethical vision. The voice of the latter is muted-vet unmistakably there- remaining a source of inspiration for all Muslim women who believe in the Islamic vision of equality between men and women. As Leila Ahmed points out, 'Even as Islam instituted marriage as a sexual hierarchy, in its ethical voice– voice virtually unheard by rulers and law makers– it insistently stressed the importance of the spiritual and ethical dimensions of being and the equality of all individuals. While the first voice ha-s been extensively elaborated into a body of political and legal thought, which constitutes
the technical understanding of Islam, the second- the voice to which ordinary Muslims, who are essentially ignorant of the details of Islam's technical legacy, give their assent- has left little, trace on the political and legal heritage of Islam. The unmistakable presence of an ethical egalitarianism explains why Muslim women frequently insist, often inexplicably to non-Muslims, that Islam is not sexist. They hear and read in its sacred, text, justly and legitimately, a different message from that heard by the makers and enforcers or orthodox, andocentric Islam.

This new Islamic order institutionalized women's subordination through the institution of patrilineal marriage laws endorsing the control of women and female sexuality. Laws relating to marriage, the family and women's conduct explicitly endorsed the patriarchal control of women and female sexuality. This preceded the physical seclusion of women, the notion of women's submission to male control, the practice of polygamy and the unilateral (male) right to divorce.

The provision of polygamy, which later translated into classical Islamic law, did not heed the Quranic injunction of the equal treatment of co-wives, nor did it place and restriction on the right of men to enter into polygamous unions. The male right to polygamy was later incorporated into family codes/personal laws. However, this verse could also be interpreted as an endorsement of monogamy as it acknowledges that men may not be able to treat their co-wives equally. This ambiguity and divergent interpretations of Islamic law have to be viewed in the light of its historic evolution and formalization.
3.10 MUSLIM LAW AND JUDICIAL REFORMS

It is needless to reiterate the distinct family laws govern most of India's major religious groups—Hindus, Muslims, Christians, Parsis and Jews—as well as many so-called tribal groups (Hindu law governs Sikhs, Jains and Parsis). Muslim leaders pressed for the retention of legal pluralism far more than the leaders of other religious groups did soon after Indian independence, especially during the debates of the Constituent Assembly. Concerns about the recognition of distinct religious identity were most strongly felt among Muslims in the aftermath of the formation of Pakistan.

While the legislature introduced major changes in Hindu law in the 1950's, major policy makers claimed that they were leaving changes in the laws of the religious minorities to their representatives, who in practice were typically conservative religious and political elites. The conservatism of such elites made major changes in these laws seems unlikely. Nevertheless, some changes took place in Muslim law and in India's other family laws gave women greater rights as compared with the ones enjoyed by them in the last generation. The judiciary was the main agent of change, although legislatures and some religious leaders and religious institutions also played some roles. However, changes were slower in Muslim community.

Of the three Acts pertaining to Muslim Personal Law in India, the Dissolution of Muslim Marriage Act of 1939 governed the grounds on which Muslim women could get judicially mediated divorce. Another law, the Muslim women's (Protection of Rights on Divorce) Act, governed the rights of Muslim women to post-divorce maintenance
after it was passed in 1986. The other Act, the Muslim Personal Law (Shariat) Application Act of 1937, stated that the Sharia would apply to Muslims in family matters without specifying the rules it recognized, although the 'Islamic laws' applied in different regions of the world vary considerably. The silence of this Act left much of the content of India's Muslim law to the judiciary's discretion.

Indian legislatures gave the content and implementation of Muslim law little attention after independence. Not one of the one hundred and eighty-two official Law Commissions of the post-colonial period assessed the functioning of Muslim law or considered possible changes in Muslim law. Only a few legislative changes were introduced in Muslim law through the instrumentality of the pieces of legislation mentioned above after independence.

The above discussion clearly spells out that a woman under Islam occupies a position of eminence. It grants her an equal status with man. In fact the status of Muslim women in India as that of any other woman in the country is interconnected with their social and economic upliftment in the country. In case we are in a position to empower them economically and socially, it would lead to a rise in their status. I am in perfect agreement with Quarratualin Hyder when she says that “Muslim women are as modern and as backward as their counterparts in the various income groups in other communities. The various economic and sociological problems of Muslim community cannot be isolated from the problems of the general backwardness and poverty of India masses.”
3.11 STATUS OF WOMEN IN CHRISTIAN SOCIETY

Beliefs about the roles and responsibilities of women in Christianity vary considerably today as they have during the last two millennia. This is especially true for women in both marriage and ministry.

Christianity has traditionally given men the position of authority in marriage, society and government. This position places women in submissive roles, and usually excludes women from church leadership, especially from formal positions requiring any form of ordination. The Catholic and Eastern Orthodox Churches, and many conservative Protestant denominations assert today that only men can be ordained as clergy and as deacons.

Many progressive Christians disagree with the traditional male-authority and female-submission paradigm. They take a Christian egalitarian or Christian feminist view, holding that the overarching message of Christianity provides positional equality for women in marriage and in ministry. Accordingly, some Protestant churches now ordain women to positions of ecclesiastical leadership.

Despite these emerging theological differences, the majority of Christians regard women with dignity and respect as having been created alongside men in the Image of God. The Bible is seen by many as elevating and honoring women, especially as compared with certain other religions or societies. Women have filled prominent roles in the Church historically, and continue to do so today in spite of significant limitations imposed by ordination restrictions.
Women's behavior was extremely limited in ancient times, much as the women of Afghanistan during the recent Taliban oppression. They were:

- Unmarried women were not allowed to leave the home of their father without permission.
- Married women were not allowed to leave the home of their husband, without permission.
- They were normally restricted to roles of little or no authority.
- They could not testify in court.
- They could not appear in public venues.
- They were not allowed to talk to strangers.
- They had to be doubly veiled when they left their homes.16

Christian priests went to the extreme of considering the woman as the cause of "original sin" and the source of all catastrophes from which the entire world has suffered. For this very reason, the physical relationship between man and woman has traditionally been labeled as "filthy" or "dirty" even if it were officially done and performed within a legitimate marriage contract.

Saint Trotolian says:

"Woman is the Satan's pathway to a man's heart. Woman pushes man to the "Cursed Tree." Woman violates God's laws and distorts his picture (i.e. man's picture)."

16 www.religioustolerance.org
Wieth Knudsen, a Danish writer, illustrated the woman's status in the middle ages saying:

"According to the Catholic faith, which considered the woman as a second class citizen, very little care and attention was given to her."

In 1586 a conference was held in France to decide whether women should be considered as human beings or not. The conference came to a conclusion that: "Woman is a human being, but she is created to serve man."

Thus, the conference approved the rights for women as human beings, a matter that was previously in doubt and undecided. Moreover, those who attended the conference did not decide on full rights for the woman, but rather she was a follower of man and a maidservant to him with no personal rights. This decision was in effect until 1938, when, for the first time, a decree was issued to abrogate all the laws that forbid a woman from conducting her own financial affairs directly and opening a bank account in her own name.

Europeans continued to discriminate against women and deprive them of their rights throughout the Middle-Ages. It is also surprising to know that English laws turned a blind eye to the selling of one's wife! The rift between the sexes, men and women, continued to increase, so much so that women became fully under the control of men. Women were stripped completely of all their rights and whatever they owned.

All that a woman owned belonged to her husband. For instance, until very recently women, according to the French law, were not considered capable of making their own financial decisions in their
private ownership. We can read article 217 of the French law that states:

"A married woman has no right to grant, transfer, bond, own with or without payment, without her husband's participation in the sale contract, or his written consent to it, regardless of whether the marriage contract stipulated that there should be a complete separation between the husband's and wife's possessions and ownership of various items."

Despite all amendments and modifications, which occurred in these French laws, we can still see how these laws are affecting married French women. It is a form of civilized slavery. Furthermore, a married woman loses her surname (family's name) as soon as she enters into a marriage contract. A married woman shall carry the family name of her husband. This, of course, indicates that a married woman will only be a follower of her husband and she will even lose her personal identity.

*Bernard Shaw*, the well-known English writer says:

"The moment a woman marries; all her personal possessions become her husband's in accordance to the English law."

Lastly, there is one more injustice that has been imposed upon the woman in the Western society which is that a marriage bond is made to last forever, in accordance with legal and religious teachings. There is no right of divorce (according to Catholicism, at least). Husband and wife are only separated from each other physically. This separation may have contributed to all sorts of social decay and corruption, such as having affairs, mistresses, boyfriends, girlfriends, as well as possibly prostitution, and homosexual and lesbian relations. Moreover, a
surviving widow is not given the chance to remarry and lead a normal married life after the death of her husband.

No doubt, what is called modern western civilization and which endeavors to dominate the globe, is indebted to the Greek and Roman traditions for its civil foundations, and to the Judaic-Christian traditions for its ideological and religious foundations. The abuses mentioned above collectively led, due to gradual and eventual effects of technological and social modernization, to the expected and natural reaction: movements demanding women's rights in the society, led by thinkers, educators, lobbyists, and human rights and women rights activists.

The pendulum was set to swing in the other direction, and they demanded absolute equal rights and liberation from male chauvinism and abuses. In many of the modern secular societies, women are indeed given numerous equal rights, but at the same time, equality has exposed them to the molestation and double standards rampant in the immoral materialistic culture that markets her as an object of sexual desire, for sale, contract or rent. The ensuing breakdown of the family unit, and the widespread sexual immorality, abortion, homosexuality, and criminal deviancy from sexual liberation, has led to some counter reactions in the society, especially from the religious conservatives, but apparently, the trends are too strong to turn the tide back.

In this global context, and from this historical legacy, we will present the salient features of women's rights in Islam and shed light on some common misconceptions in order to show the superiority of following
Allah's guidance rather than men and women guiding each other by whim and desire.¹⁷

3.12 PARSİ WOMEN IN INDIA

Parsi Women enjoy a respectable position in their society with respect to their sisters of other communities.

Parsi women occupy a much more honourable and independent position with regard to either their Mohammedan or Hindu sisters in society. As per scholars a high authority on Zoroastrian scriptures, 'the position of a female was in ancient times much higher than it is nowadays. They are always mentioned as a necessary part of the religious community. They have the same religious rites as men; the spirits of deceased women are invoked as well as those of men.' A Parsi man usually makes an affectionate and good husband, and discharges honestly his matrimonial duties, and the woman is evenly conscious of her duties towards her master and lord. Thus their families normally lead a peaceful and happy life.

Women of Parsi community perform a vital role in all domestic concerns untrammeled by the heavy shackles which caste and usage have imposed on in Hinduism and Islam. They also engage themselves in dress-making for themselves and their children. Some also have taken to embroidery and a number of other works done by the ladies. Parsi women of poorer classes usually engage themselves in the kitchen and in sewing either for domestic or for commercial use.

¹⁷ womeninislam.ws
The subject of discussions among the Parsi ladies is limited to their
dress and latest fashions or regarding some forthcoming betrothals and
marriages. The subject of current political scenario influences then a
little and their criticism hardly went beyond the limits of innocent
wonder. However, the scenario is changing with Parsi ladies taking the
lead in female education.

The utmost desire of a Parsi girl is to have a good husband and once
this objective has been attained her position is secured and her
happiness may be regarded as complete. As a woman, she is loving,
cheerful and likes children and always seen with them grouped around
her. Thus, the mother in a Parsi family is the soul and centre of all its
happiness. The women of this community are also good neighbours
and assist their neighbours in their bad times. This praiseworthy
practice of being helpful to one’s neighbour has passed into a proverb;
‘Our neighbours are like our fathers and mothers’.

Previously, like the Hindus and Muslims, Parsi women of the upper
and middle classes did not appear in public. They never joined the
company of the men, nor did they even venture to drive out in open
carriages by themselves. However, presently the Parsi ladies of all
classes can be seen in public just like the ladies of the western world.
Half a century ago Parsi women of the middle and better classes were
hardly seen on foot but this has also been changed in recent years.
Since the reformation of Back Bay in Mumbai hundreds of the Parsi
fair sex is noticed every evening strolling there and taking pleasure in
the pure sea-breeze.\(^\text{18}\)

\(^{18}\)idianetzone.com
Zoroastrian religion does not discriminate between men and women. Leaving aside the differences with regard to religious observances and role responsibilities, both the sexes are treated equally in the religious texts. Unlike in the Vedic religion there is no preferential treatment for male children. There is no such argument that male children are necessary for the deliverance of parents into the ancestral world. The initiation ceremony, Naujot is performed for both male and female children. Of the six Immortal Beings created by God, three are feminine and three are masculine. According to the *Bundhahism*, "the sky, metal, wind, and fire are male, and are never otherwise; the water, earth, plants, and fish are female, and are never otherwise; the remaining creation consists of male and female." Both men and women have equal importance in protecting the sanctity and divinity of the world. Children are advised to honor both mother and father equally.

According to the Zoroastrian theories of creation, both men and women originated from the seed of Gayomard, the primeval man. When he was attacked by the evil forces, before passing away, he gave forth seed. The seed developed into Matro (Mashye) and Matroyao (Mashyane). They grew up from the earth like a plant united below the waist, whereby it was difficult to know who was male who was female. Ahura Mazda separated them from each other and changed them from plant into the shape of man. To them He said, "You are man, you are the ancestry of the world, and you are created perfect in devotion by me; perform devotedly the duty of the law, think good thoughts, speak good words, do good deeds, and worship no demons!" After receiving instructions from God they decided to follow His commandments.
However soon they were attacked by the evil forces and their minds were corrupted.

Zoroastrian scriptures suggest that women are prone to the temptations of evil and therefore should be kept under regular watch. Women are expected to follow the example of *Spenta Aramaiti* and cultivate the qualities of love, devotion, sincerity and perfection. According to *Arda Viraf*, women who are desirous of going to heaven should honor water, fire, earth, trees, cattle and sheep and all the good creations of God. They should perform the religious ceremonies sincerely and offer prayers and service to God and the spiritual beings. They should show reverence and obedience to their husbands and lords and should practice the faith of Mazdayasnians without doubt. They should practice good thoughts, good words and good actions and abstain from sin. Adultery and unnatural intercourse are regarded as sins of heinous kind.

The Denkard classifies women on the basis of their conduct into four classes: "good as well as bad; not bad, and good; not good, and bad; and neither good nor bad. From among these any woman who is not bad and is good should be selected to manage household affairs and to give happiness and comfort to the master of the house. And to keep oneself free from unhappiness she who is good and bad ought not to be obtained; and (men) should positively keep aloof from choosing, from among the two descriptions of women mentioned above, her who is not good and is bad, over her who is neither good nor bad."

The *Meno-i-Khard* describes the best of women as "The woman who is young, who is properly disposed, who is faithful, who is respected,
who is good-natured, who enlivens the house, whose modesty and awe are virtuous, a friend of her own father and elders, husband and guardian, handsome and replete with animation is chief over the women who are her own associates."

Zoroastrian scriptures prohibit inter religious marriages. Followers are urged to marry within the religion to ensure the practice of righteousness without any complications. The texts suggest to select women who are wise and modest and firmly anchored in the religion. As for the son-in-laws they should be good natured, honest and experienced, even though they may be poor.19

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19 www.hinduwebsite.com