Chapter – 1

INTRODUCTION

We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concept and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke the progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must, therefore constantly be on the move adapting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation.

Justice P.N. Bhagwati, National Textile Workers' Union etc. vs. P.R. Ramakrishnan and others, 1983 (46) FLR 38 (Supreme Court)

Hindu law is one of the oldest systems of Law. It is generally agreed, that it has the most ancient pedigree of any known system of jurisprudence. Thus, the study of any concept, rules or practices existing under the Hindu Law have to be examined over a vast period of time. The Hindu Law is indeed generally recognized as having its origin in the Vedic age. The term 'Hindu Law' as we understand it today, has a somewhat different meaning than what it meant originally. Hindu Law may be broadly categorized as Ancient Hindu Law and Modern Hindu Law. It is generally believed that the theological tenets of the Vedic Aryans and the philosophical theories which the genius of the race produced necessarily influenced the system of Hindu Law. Thus, the “Ancient Hindu Law not abrogated or modified by legislation, may be described as rooted in the Vedas and enounced in the Smritis as explained and

2 Radha Binod Pal, History of Hindu Law in Vedic and Post Vedic Times down to the Institutes of Manu, p.6, (1958)
enlarged in recognized commentaries and digests and as supplemented and varied by approved usage”. With the passage of time, and changing social norms, the rules of Hindu Law also underwent some change. With the influence of English law and legislative changes, the body of Hindu Law was greatly modified and there came into being the Modern Hindu Law, as modified and abrogated by legislation.

The subject of women’s rights has been dealt with extensively in the past by researchers and social thinkers having a keen interest in the feminist jurisprudence. In the present work, an attempt has been made to undertake an analysis of the rights of Women under Hindu Law. Thus, when we talk of Hindu Law, it simply means to assess the position from the Vedic ages to the modern times. The term 'right', means "that which is so directed for the protection and advantage of an individual." Black's law dictionary puts it as "something that is due to a person by just claim, legal guarantee, or moral principle, a power, privilege or immunity secured to a person by law, a recognized and protected interest the violation of which is a wrong.”

Thus, the present work focuses on the claims, privileges, immunities etc. granted to women under the Hindu Law. The term Hindu has been defined in all the enactments under the Hindu code. Section (2) of the Hindu Marriage Act 1955 defines the term to include any person who is a Hindu, Sikh, Buddhist, or a Jain. It is in this sense that the term ‘Hindu’ is to be inferred in this work. Thus, rights of women mean rights of all women to whom Hindu Law is applicable. The term right encompasses a variety of rights like the social, economic, political, personal etc. Women in India, irrespective of any religion they belong to have been granted certain basic rights by the constitution. Article 14 of the Constitution provides that the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth and Article 16(2) of constitution provides that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of

---

1 Supra 1, p 2

4 A.S. OPPE, Wharton’s Law Lexicon, 14th ed. (1938)

any employment or office under the state. Thus, formal equality for women is explicitly enshrined within Indian Law. However, not withstanding formal guarantees of equality, Indian women's lives continue to be characterized by pervasive discrimination and substantive inequality.\(^6\)

The rights of women and gender inequality are inalienable concepts which can be seen in different spheres in Indian society and the Hindu society has not been able to keep itself aloof from the same. India is a land of many religions and being wedded to the tenets of secularism, each religion has its own set of personal laws distinct from each other. Thus, in the area of personal laws, women in India continue to be governed by these different laws. A study of Hindu Women's rights thus necessarily falls under the purview of personal law of the Hindus. Thus, the rights granted by the personal laws of Hindus have been dealt with in this work like marital rights, parental rights, and proprietary rights. During the course of study it was felt that a discussion of some related laws was also necessary as they had a direct impact on the rights granted to Hindu Women under the personal law. Thus various laws like the Prohibition of Child Marriage Act, 2006 the provisions of the Domestic Violence Act 2005 have been discussed where ever required.

In order to examine the rights and privileges enjoyed by a Hindu woman it is necessary to assess the status enjoyed by her during the different phases of Hindu society. The law of a particular community in fact represents the spirit of that community and rights of a particular class are largely determined by the attitude of the society towards that class. Thus, the position and status of Hindu women during different periods has had a direct relation with the rights she has possessed, be it legal, proprietary, personal or socio-cultural rights.

Thus, in the present research, an attempt has been made to map the changing facets of Hindu Law with regard to Hindu women's rights and the question of gender inequality has also been evaluated. For this purpose, the existing framework of statutes and the extent of reform brought about by them has also been traced. The need for more effective legislation and its implementation is the rallying point of the

present work. Moreover, the scope of the legislative provisions, their impact on Hindu women’s status, their efficacy and failures is also examined.

Problem Profile:

As is well known, the Indian society and precisely the Hindu Society is passing through a phase of transition. Needless to say, alongside the changes in various aspects of society and culture, changes have also come about in the position of Hindu women. In fact, “a new concept of womanhood is gradually emerging in India which is at odds with the traditional concept of Hindu woman as a devout wife confined to hearth and home.” The consequent result of such a change has been an enlargement of rights of the Hindu women. If this is the position, then where does the problem lie? The problem in fact is that despite the empowerment of Hindu women, certain rights granted to her remain illusory. Men, and women, though belong to the same human species; Hindu law has treated them differently in some respects. “Although the reformed Hindu law is projected as the ideal piece of legislation which liberated Hindu women, the underlying motive of reform was consolidating the powers of the state and building an integrated nation. This crucial objective could be achieved only by diluting women's rights to arrive at a level of minimum consensus so that the agenda of reform could be effected without much opposition and several customary rights were sacrificed to arrive at uniformity. The statutes that were finally enacted were merely ornamental instead of being markers of genuine and concrete efforts at rectifying the gender discrimination written into Hindu law.” The judiciary, though again came to the rescue of Hindu women, but still, some discriminatory aspects could not be declared to be unconstitutional (e.g. the provision of restitution of conjugal rights has been retained and upheld by judiciary in several cases). Various statutes comprising the Hindu code; namely The Hindu Marriage Act 1955, The Hindu Succession Act 1956, The Hindu Minority and Guardianship Act 1956, The Hindu Adoptions and Maintenance Act 1956 were passed. Crucial provisions empowering women had to be constantly watered down to reach the level of minimum consensus. While projecting to be pro-women, male privileges had to be

---

7 Inderjeet Kaur, Status of Women in India, p. 4 – 5. (1983)

8 Flavia Agnès, Law and Gender Inequality: the Politics of Women’s Rights in India, p.77, (1999)
Introduction

protected. “While introducing modernity, archaic Brahminical rituals had to be retain [S.7(2) of The Hindu Marriage Act, specifically mentions saptpadi which is a Brahminical ritual. Most lower castes were not permitted the ritual of saptpadi. Among some castes five steps were permitted and among others only four.]”9 The reforms though did ameliorate the lot of Hindu women but the position was far from satisfactory. Ever since, then, the pace of reforms was slow. However, amendments continued to be made in different phases. For example, right to divorce by mutual consent was added later on and recently, the Hindu women have been granted the right in coparcenary property by the Hindu Succession (Amendment Act) 2005. The existence of gap between the statutory provisions and its working can be assessed through few instances: The Hindu Marriage Act 1955, promulgated the rule of monogamy for both Hindu males and females.10 Polyandry is not recognized anywhere in India except, in perhaps significant tribal area in the Himalayas11 (though polyandry existed in some tribes and hill areas of Assam, Madhya Pradesh, Himachal Pradesh).12 Thus, polygamy has been more Prevalent than Polyandry. In fact polygamy was quite widespread and had to be abolished only by law. However, Instances of polygamy among Hindus have come up before courts even after passing of the Hindu Marriage Act 1955. The following observation by Justice V.S. Deshpande clearly puts forward the problem: "... those Hindus and Christian husbands who wish to marry again without being able to get a divorce become Muslims. The existence of polygamy side by side with monogamy is a standing offer and a temptation to the Hindu and Christian Husbands to become polygamous..... Thus instead of extending monogamy to the Muslim wives and husbands this evil practice takes away monogamy from Hindu wives and husbands.”13

9 Id., p.81-91
10 Hindu Marriage Act, 1955, section 5: “Conditions for a Hindu Marriage- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-
(i) neither party has a spouse living at the time of marriage; .......
13 Supra 11, p. 122
This problem to some extent was addressed by the judgment in *Sarla Moudgil v. Union of India*,\(^\text{14}\) by holding such second marriages performed by virtue of conversion to Muslim religion without dissolving the previous marriages as void. However, to some extent, the sufferer might still be the wife of such second marriage whose marriage would be void even for no fault of hers at times. Thus, the law seems to be inadequate and ineffective to the extent that it does not curb the menace of polygamy and many-a-times prevents the polygamous husband from being brought to the book because of still another loophole i.e. by being able to perform sham ceremonies which may not amount to valid marriage. This brings to light another lacunae in the personal law of Hindus regarding marriage namely; no necessary requirement for compulsory registration of Hindu marriages. It is indeed heartening to note that the judiciary has again given a clarion call in this direction. The Supreme Court in *Seema v. Ashwani Kumar*\(^\text{15}\) has called upon the legislature to enact a law, making registration of marriages as compulsory. However, the law still has not been passed.

Another grey area in the matrimonial laws of Hindus is the provision for restitution of conjugal rights.\(^\text{16}\) Although, the aim of the provision may have been to preserve the institution of marriage by enforcing the defaulting party to perform his/her conjugal rights but in reality, it has proven to be a hindrance in the path of achieving equality for women. In a patriarchal set up, the provision seems to have failed to achieve its desired objective. For decades after the enactment, in a series of decisions,\(^\text{17}\) the courts held that Hindu marriage is a sacrament and it is the sacred duty of the wife to follow her husband and reside with him wherever he chooses to reside. Flavia Agnes summarizes the irony as follows "Ironically while women were burdened with the responsibility of maintaining the husband under a modern concept

---

\(^{14}\) (1995) 3 SCC, p. 635

\(^{15}\) AIR 2006 SC 1158

\(^{16}\) Hindu Marriage Act, 1955 Section 9: Restitution of Conjugal Rights: “When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court for restitution of conjugal rights and the court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.”

Introduction

of equality (in reference to S. 24 & 25 of Hindu Marriage Act, 1955), the courts continued to undermine a woman’s right to retain her job against her husband’s wishes under the ancient notion of the Lord and Master and granted them the privilege of determining the choice of matrimonial home.”

However, we cannot ignore some significant decisions of various courts recognizing the women’s right to hold on to a job away from her husband’s residence. The modern outlook of the courts towards the issue of restitution of conjugal rights is certainly a welcome step but, the law laid down in S.9 seems to stand unchanged, dependent upon the construction and meaning given to it by the judiciary from time to time. A question which comes to our mind is whether there is any utility in keeping such a provision which in the modern times where each individual is free to express his/her will. Can force be the basis of any conjugal obligation? Claiming maintenance from her husband during matrimonial proceedings too is a herculean task. Very often, she fails to establish the income of her husband if he is self employed. The difficulties faced by women in executing the maintenance decrees add to the woes of a wife whose home lies shattered by divorce. Thus in spite of beneficial provisions she struggles for years to claim and actually get maintenance.

Apart from this, there are various other issues under the Hindu Law pertaining to Hindu Woman’s rights which quiz the mind of the researcher. The Position which she was accorded under adoption and guardianship laws till late was also not satisfactory. Though the process of codification has helped in bringing reforms but again the bias towards patriarchal set up could be clearly noticed. The secondary position occupied by a Hindu wife in matters of adoption till late was clearly noticeable by a bare reading of the Hindu Adoptions and Maintenance Act 1956. A married woman could adopt only if her husband had renounced the world, became insane, or had ceased to be a Hindu. Relief was provided to a Hindu woman lately by passing the Personal Laws (Amendment) Act 2010, which equates a married Hindu Woman to a Hindu male in matter of taking and giving a child in adoption. Now she may adopt a child or give a child in adoption provided she has the consent of her

---

18 Supra 8, p. 83-84
husband. The complication that might arise when the couple is facing divorce proceedings seems to have been ignored by law makers.

Moreover, although the doctrine of relation back has been abolished in law, the deceased husband of the widow is still treated as the father of the adopted child, owing to the judicial interpretation. However, the relation of deceased wife of a widower with a subsequently adopted child is not clear. Thus, it seems the law still needs to clear all such ambiguities.

The preferential right of a father to be the natural guardian of his legitimate children has also been retained in the bare wording of section 621 of Hindu Minority and Guardianship Act, 1956. The Personal Law (Amendment) Act 2010 has amended the Guardianship and Wards Act, 1890 and thereby raised the status of the mother by recognizing her as a natural guardian along with the father in section 19. However, judiciary has interpreted section 6 (a) of Hindu Minority and Guardianship Act 1956, liberally. The Supreme Court in Githa Hariharan v. Reserve Bank of India and Vandana Shiva v. Jayanta Bandhopadhaya held the mother to be the natural guardian of the minor under certain circumstances and the word "after" has been interpreted to mean "in the absence of" rather than "after the life time". Thus, it seems that the judiciary has often tried to bridge the gap in the law but the legislature has often failed to incorporate the changes in the enactments.

The Hindu Laws of succession till late had been discriminatory to the extent that females did not get a birth right in the coparcenary property. However, lately the Hindu Succession (Amendment) Act 2005, has been passed bringing the daughter at par with the son in relation to the right of inheriting the coparcenary property, by making her a coparcener by birth. Though, it is too early to comment on the
effectiveness of the present law, it has definitely been a progressive step and will certainly act as an instrument of social change. Though the acceptability of the law may not be there in the true sense in the rigid patriarchal set up, but slowly, it will help in changing the value orientations of the Hindu society. The limitations at the time of passing the Hindu Succession (Amendment) Act of 2005 are well understood but it is felt that the ultimate solution will rest in abolishing the concept of coparcenary. As it is, the traditional concept of coparcenary already stands extinguished.

Thus, the problem lies partly in ill drafted laws and partly in their non-implementation due to the gap existing in the value orientations of the society and the existing legal provisions. In this work, the researcher has attempted to find a solution to the above said problem in order to empower the Hindu women with their personal rights in the true sense.

Object of Research

The issue of women’s rights and especially those of the Hindu women has always attracted the attention of the researcher. The codified Hindu law has been held up as a model of reform (among other communities), glossing over the fact that this codification has not been able to arrest the trend of increasing violence towards and even murder of young Hindu brides in their matrimonial homes, to curb Hindu bigamy nor protect Hindu wives from poverty and destitution.\textsuperscript{23} The scope of the present research work is to study the status and position of the Hindu women under the Hindu law ever since the Vedic age to the modern times and to critically analyze the rights granted to them at various stages of development of Hindu law. In the present work, an attempt has been made to study the changes brought about in the rights of women under Hindu Law owing to social change and codification. Though the present set up of laws talks exhaustively of gender equality, the present research work explores the existing realities and bias in the laws.

\textsuperscript{23} Supra 8, p. 3-4
Hypothesis

The hypothesis underlying the present research work is that the Hindu laws are still deficient and have been unable to equip Hindu women with equal rights as compared to their male counterparts. In some spheres, law has not kept pace with changing needs and value orientations of society and in some areas law has leaped ahead of society's acceptable notions. Thus, there is a need for effective framework of Hindu law which guarantees equal rights to women which are not illusory.

Research Methodology

In accordance with the requirements of the present research work, both library research and empirical study have been undertaken. Although the study focuses on the rights of Hindu women, and is indeed an analysis of the legal framework, existing statutory provisions, law reports etc., an exploration of certain historical developments and related provisions under laws other than Hindu Law has also been made. The nature of study is interdisciplinary because, in today's world no subject can be studied in isolation. The research is based upon published material such as legal texts, official reports, case law, articles, media reportage and critical evaluation of various statutory provisions has also been undertaken so as to achieve the true object of research.

Plan of Study

Status of Women under Hindu Law

The present chapter is an analysis of the status of women during different phases of development of Hindu Law. The rights enjoyed by women all through these stages have been reflective of the position and status accorded to them. Thus, the study of the status is directly co-related with rights enjoyed by Hindu women. The period for the survey has been divided as follows:

1. Ancient period
   a) Vedic age
Introduction

b) Post Vedic age

2. Muslim period

3. Period of Colonial Rule

4. Post Independence Developments

The position which women occupied in Hindu Society at the dawn of civilization during the Vedic age is much better than what we ordinarily expect it to have been. The hymns in the Vedas repeatedly speak of them as mothers and wives. As mothers they were taken to work as pivots in the social organization and their motherly functions could attract all praises from Indian Hindu ideals. The position can be judged from the following observation: "husband and wife constitute a unit in society and that a man without his wife was only half and as long as he does not obtain her, so long is he not generated, so long he is incomplete." In social and religious gatherings women occupied prominent position. In hymn VIII, 31, where a couple are described as washing and pressing the soma juice, and plucking the sacred grass for sacrifices we get a glimpse of the Home life of the Rig Vedic times. Here the couple lived in harmony helping each other in their daily routine work. "Gods may the husband and wife who with one mind offer oblations and purify them (the soma) and (propitiate you) with the soma ever mixed with milk constantly associated, may they acquire appropriate (sacrificial) viands, may they be able to offer sacrifices." The husband and wife were partners not only in domestic life but also in religious sphere. The sati custom was not in vogue at all; the widow could if she liked, contract another marriage, either gradually or under custom of niyoga. However, women had no proprietary rights. The reasoning for the same is given by Dr. Altekar that landed property could be owned only by one who had the power to defend it against actual or potential rivals and enemies. Women were obviously unable to do this and so could

---

25 Supra 7, p.6
26 Shastri Shakuntala Rao, Women in Vedic Age, p. 91 (1960)
27 R.V. VIII. 31.5 and 6, quoted by Id., p. 1-2
hold no property.\textsuperscript{28} Thus, on the whole it could be said that women occupied a fairly satisfactory position in Vedic age, especially from familial or social point of view. Unfortunately she had no legal and political status during that period i.e. she could neither hold acquire or dispose of property nor could she participate in the administration of the country.\textsuperscript{29}

The Position of women In Hindu society gradually changed over the period extending from the age of later Samhitas, Brahmanas, Upanishads; the age of sutras, epics and early Smritis; and the age of later Smritis, commentators and digest writers. In the post Vedic age, there was a gradual decline in female education. As a consequence, there arose a tendency to curtail the religious rights and privileges of the average woman.\textsuperscript{30} The birth of the daughter slowly came to be looked down upon. A son was preferred to a daughter because he would always remain with his parents, continue the family line, and offer oblations to the ancestors for their spiritual benefit. The Aitraya Brahmana lays down that "a daughter is a source of misery and that a son is the saviour of the family."\textsuperscript{31} The position of the widows was still worse. They were treated as most inauspicious. The restrictions on them were strictly imposed and they were not allowed to live a life of comfort.\textsuperscript{32}

The deterioration in the position of women continued gradually. The age of marriage for girls was being gradually lowered. In the Vedic age, she was married at about 16 or 17; she could thus devote six or seven years to her Vedic studies before her marriage. During this period, a girl could equip herself fairly well for her post-marriage participation in sacrifices, as the Vedic literature was then not extensive and could be studied as popular religious poetry.\textsuperscript{33} Lowering of marriage age resulted in discouraging their upanayana ceremony and education. At about A.D.200, the need for upanayana for girls was not felt and it was declared that marriage was a substitute

\begin{itemize}
\item \textsuperscript{28} Supra 24, p. 51
\item \textsuperscript{29} Kulwant Gill, \textit{Hindu Women’s Right to Property in India}, p. 25 (1986)
\item \textsuperscript{30} Supra 24, p. 52
\item \textsuperscript{31} V.M. Apte, “Social and Religious Life in Grihya Sutras”, p. 18, (1954) quoted by Supra 7, p. 7
\item \textsuperscript{32} P. V. Kane, \textit{History of Dharamshastra}, vol.1, p.331
\item \textsuperscript{33} Supra 24, p. 57
\end{itemize}
Introduction

for upanayana in case of girls. Upanayana was usually performed at about age of 9 or 10 and the same now came to be regarded as ideal time of marriage for girls.34

Even in the age of Smritis, commentaries and digests, the position of women continued to deteriorate. Manu ordained certain eternal laws for a husband and wife who keep the path of duty. Chapter IX of Manu Smriti clearly portrays the status accorded to a woman. He says:35 “Day and night woman must be kept in dependence by the males (of) their (families), and if they attach themselves to sensual enjoyments, they must be kept under ones control.” This verse shows that women well not treated as independent beings. Further, the next verse is to the effect: "Her father protects (her) in childhood, her husband protects her in youth, and her sons protect (her) in old age, a woman is never fit for independence".36 The last line of the verse leaves no scope for any positive construction of the above said verse.

However, there was improvement in one sphere i.e. the proprietary rights. There is no doubt that daughter like sons did not have right by birth in the Joint family property. As a rule, females could not be coparceners in the coparcenary, the daughters right of succession in the coparcenary did not arise. But so far her right in the separate property of the father was concerned, she was not altogether ignored.37 It is evident from a text of Brihaspathi who stated:

The wife is declared to be the inheritor of the husband's wealth and, in default of her, the daughter; the daughter, like a son springs from the limb of a man; how can any other man inherit her father's property while she lives?38

However, the daughters’ right was a limited one as she could succeed only in absence of son, grandson, great grandson, and a widow. In normal circumstances, her

34 Id., p. 58
35 Manu Smriti, IX, 2; available at http://www.sacred-texts.com/hin/manu (visited on 12.4.07)
36 Id., verse 3
37 Supra 29, p.27
38 Brihaspati XXV, 56; quoted by Id., p.27
share was to be one-fourth of what she should have had, had she been a son. This is evidenced by a verse from Manu Smriti:

    But to the maiden (sister) the brothers shall severally give (portion) out of their share, each of his share, one-fourth part, those who refuse to give (it) will become out castes.  

The scope of stridhana too was extended by Mitakshara school by including in it property acquired even by inheritance and partition. The widows’ estate continued to be limited one. In all other spheres i.e. apart from proprietary rights, her status was deteriorating. The custom of sati had become common among fighting classes. Gradually, the Brahmins too started following the custom as they did not like to be excelled by Ksatriyas in pursuit of ascetic practices. Widow remarriage became a taboo. Thus, on the whole, the status of women became highly degraded.

While studying the position of woman over all these periods, it is quite interesting to note that the material available regarding a particular thing may of times seem to be quite contradictory. On the one hand women are condemned and on the other hand they are idealized. For example, Manu, who prescribes stringent laws with regard to women, also ordained that women must be greatly honoured. Certain verses of Manusmriti furnish evidence to this observation:

    Women must be honoured and adorned by their fathers, brothers, husbands and brother-in-laws, who desire (their own) welfare.

The next verse is also to the same effect:

    Where women are honoured, there the Gods are pleased but where they are not honoured, no sacrifice yields rewards.

---

39 Manu Smriti, IX, 118; available at http://www.sacred-texts.com/hin/manu (visited on 12.4.07)
40 Supra 29, p 31
41 Supra 24, p. 62-65
42 Manu Smriti, IX, 55; available at http://www.sacred-texts.com/hin/manu (visited on 12.4.07 at approx. 6:00 p.m.)
However, it seems that there was some ulterior motive behind bestowing the special honour to women. They were not regarded as separate entity; rather it was for man's own welfare that honour of women was considered necessary. The same can be gathered from the following verse:

Hence men who seek (their own) welfare, should always honour women on holidays and festivals with (gifts of) ornaments, clothes and (dainty) food.44

With the advent of Mughals, the status of women continued to decline. Child marriage was a popular feature of social life in Mughal period. Hindu daughters were married before the age of nine or ten and in some cases girls were married even before they had learnt to talk.45 Although the purdah custom was beginning to get a footing in a few royal families in the post Vedic period, the custom failed to became popular. The advent of Mohammedans however changed the situation. The customs and manners of the conquerors were imitated with as much zeal in the thirteenth as they were in the nineteenth century. In the beginning the purdah entered the families of feudatories and nobles, and then it gradually spread among higher classes in northern India. The Muslim influence was weak in the south and so the purdah found no general acceptance there.46 The evil of sati too continued to be practised during Muslim period.

Improvement in the status of Hindu women was brought about after the advent of British rule in India. In fact, India’s contact with the west even though it came through the agency of a foreign rule, had been a major factor in changing the traditional outlook of Hindu Society. It is interesting to note an observation made by Flavia Agnes in her book 'Law and Gender Inequality: The Politics of Women Rights in India", regarding the reason as to why the colonial rule ushered in reforms. She remarks in context of some practices like widow immolations and child marriages: “these projections which rendered the Hindu society barbaric, provided the moral

---

43 Id., III, 56
44 Id., p. 59
46 Supra 24, p. 66
justification for colonial rule and its reformist scheme. The writer has tried to put forward the thought that reforms were indeed a tool to justify the colonial rule because the status of English women in the corresponding period too was not very high.

Nevertheless, whatever might have been the motive of the colonial rulers, they did bring about some reforms which helped in ameliorating the lot of the Hindu Women. Moreover, the political struggle for Indian Independence gave a tremendous impetus to the feminist movement in India. Social reformers like Raja Ram Mohan Roy, Ishwar Chandra Vidya Sagar, Swami Vivekananda, and Mahadeo Govind Ranade took up the cause of emancipation of Hindu Women and restoration of their right place in society. Their efforts helped in bringing about a gradual social change. Various legislations were passed during this period. In 1829, in spite of strong opposition, a historic resolution of far reaching importance was passed by which sati was made, "a crime of culpable homicide punishable with fine, imprisonment or both." The *Hindu Widows Remarriage Act 1856* enabled the Hindu widows to remarry without obstacles. Further, the *Child-Marriage Restraint Act, 1929*, raised the age of marriage for girls up to 14 years and boys up to 18 years. In 1946, the *Hindu Women's Right of Separate Residence and Maintenance Act* was passed. The act provided for the separate residence and right to maintenance to Hindu wives even without having judicial separation under certain circumstances. The proprietary rights of a woman too were given legal protection by passing some acts. The earliest legislation bringing females into the scheme of inheritance is the Hindu law of *Inheritance Act, 1929*. This Act conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister (thereby creating a limited restriction on the rule of survivorship). Another landmark legislation conferring ownership rights on women was the *Hindu Women's Right to Property Act (XVIII of) 1937*. This Act brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of coparcenary but also in the law of partition, alienation

---

47 Supra 8, p.3
48 Supra 29, p.37
of Property, inheritance and adoption. The woman was given a right to enjoy the property during her lifetime. Thus, she remained a limited owner of her property.

After attaining Independence, the democratic republic of India adopted the principle of equality and an effort was made to remove all kinds of discriminations. Various articles of the constitution are evidence to this fact. The preamble appended to the Constitution of India, 1950 contains various objectives including "the equality of status and opportunity" to all the citizens. The objective has been inserted with the view to give equal status to men and women in terms of the opportunity. Part III of the constitution grants fundamental rights to all its citizens. Among these, article 14 grants the right to equality which provides for equality of opportunity, equality before law, and equal protection of Laws. Then, article 15 (1) prohibits discrimination by state on grounds of sex, and article 15(3) permits the state to positively discriminate in favour of women to make special provisions to ameliorate their social, economic and political conditions and accord them parity.

Apart from these constitutional safeguards, a number of enactments comprising the Hindu code were passed which have empowered the Hindu women to a great extent. The Hindu code comprised of laws on marriage, divorce, adoption, maintenance, guardianship and succession. Timely amendments in these laws have also been made. Thus, law, slowly and steadily has acted as a catalyst of social change. The most appropriate example of the same is the recent amendment in the Hindu Succession (Amendment) Act 2005, which has brought daughter at par with sons as far as the rights in the coparcenary property were concerned. Thus, the long awaited reform in Hindu laws was made which has greatly overcome the gender disparity in proprietary rights of Hindu men and women.

The present chapter focuses on the changing status of Hindu women, owing to changing perspective of Hindu Law. The change in the perspective was the result of changing norms of society, advent of foreign rulers and most importantly legislation. Thus, a detailed study of the same has been taken up in this chapter.


Marital Rights of Hindu Women

The concept of marital rights which embodies numerous rights within its fold like the right to marry, right to maintenance, conjugal rights, right to judicial separation, divorce etc. have been granted to Hindu women by the Hindu Marriage Act, 1955. The right of maintenance is partly provided by the Hindu Adoptions and Maintenance Act, 1956 and partly by the Hindu Marriage Act, 1955. Section 18 of Hindu Adoptions and Maintenance Act, 1956 provides the right of maintenance to a wife as a personal obligation of Hindu husband. Section 24 and 25 of Hindu Marriage Act, 1955 provide for the right to maintenance pendente lite and permanent alimony. Section 125 Code of Criminal Procedure 1973 also entitles a wife to claim maintenance. Since it is a secular law, even a Hindu wife may claim under it. It is quite interesting to note that the concept of maintenance under the Hindu Marriage Act 1955 reflects absolute equality between men and women. The present chapter studies the various rights available to Hindu female under Hindu Law as well as some other laws which make her marital rights more fruitful. Thus the rights under Prohibition of Child Marriage Act 2006, maintenance under Protection of Women from Domestic Violence Act 2005, lack of any provision to penalize marital rape have also been discussed. The exception to section 375 of Indian Penal Code provides that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. Thus, if a husband has forcible sexual intercourse with his wife above 15 years of age, it does not amount to an offence or rape. However, it cannot be denied that it definitely amounts to kind of a domestic violence. The lately passed, Protection of Women from Domestic Violence Act, 2005, to some extent may provide a solution. as the term domestic violence is quite comprehensively defined and includes any kind of a sexual abuse. An effort has been made by the researcher to study the impact of these rights in empowering the Hindu woman. In the above said pursuit, special emphasis has been laid on the much controversial area of restitution of conjugal rights and persistence of child marriage.

51. Protection of Women from Domestic Violence Act 2005, Section 3, Definition of domestic violence.-“For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;.....”
Proprietary Rights:

Discrimination against women has been very pervasive, so much so, that at times it surfaces on a bare perusal of the law made by the legislature itself. The discrimination against women was evident in the Hindu law of succession and inheritance. The said law was biased in favour of men as against women. A woman in a Hindu joint family, consisting both of man and woman, had a right of sustenance, but the control and ownership of property did not vest in her. In a patriarchal system, like the Mitakshara school of Hindu Law, a woman was not given a birth right in the family property like a son. The Hindu Succession Act 1956 recognized the right of Hindu female to inherent the separate property and equated her with her male counterpart. With regard to the coparcenary property, section 6 was incorporated. Section 6 (as it stood before amendment in 2005) dealing with the devolution of the interest of a male Hindu in coparcenary property and while recognizing the rule of devolution by survivorship among the members of the coparcenary, made an exception to the rule in the proviso. According to the proviso, if the deceased had left him surviving a female relative specified in class I of schedule I, or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary would devolve by testamentary or intestate succession and not by survivorship. Thus, in spite of this provision, the inequality in proprietary rights continued because a coparcenary was a narrow body of persons consisting of father, son, son's son and son's son's son. Thus ancestral property continued to be governed by a wholly patrilineal regime. Since a woman could not be a coparcener, she was not entitled to a share in the ancestral property by

---

52 The Hindu Succession Act, 1956, Section 6: “Devolution of interest in coparcenary property- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in the Mitakshara coparcenary, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.”


54 ibid
birth. A son’s share in the property in case the father died intestate would be in addition to the share he had on birth.\textsuperscript{55}

The bias towards the patriarchal mind set is clearly visible in section 15 of \textit{Hindu Succession Act} 1956. The property is to devolve first to her children and husband; secondly to her husband’s heirs, thirdly to her father’s heirs, and lastly to her mother’s heirs. Thus, with a view to end the discrimination against women which was evident in section 6 of \textit{Hindu Succession Act} 1956, the \textit{Hindu Succession (Amendment) Act} 2005 was passed which has given the daughters of the joint family, with right in coparcenary property by making them coparceners. However, the reforms were a result of the efforts made by the Law Commission in the 174\textsuperscript{th} report of the Law Commission, which was on the issue of reforms in property rights of women. In this regard the Law Commission ascertained the opinion of a cross section of society in order to find out, whether the Mitakshara Coparcenary should be retained as provided in section 6 of \textit{Hindu Succession Act} 1956 or in an altered form, or it should be totally abolished.\textsuperscript{56} Out of the people from whom questions were asked through a questionnaire, the majority opined in favour of abolition of the coparcenary.\textsuperscript{57} However, the Law Commission studied the impact of such an amendment being made and it seems the view that prevailed was that abolition of coparcenary would affect the rights of women adversely. On further examination it became clear that if the joint Hindu family is abolished as on date and there are only male coparceners then only they would hold as tenants in common and women would not get anything more than what they were already entitled to by inheritance under section 6 of \textit{Hindu Succession Act} 1956\textsuperscript{58} (as it existed before amendment).

Thus, ultimately, in 2005 when the amendment to \textit{Hindu Succession Act, 1956} was passed, coparcenary was retained and daughters were given a birth right in the coparcenary property along with sons. Thus, a revolutionary change has been brought about which shall go a long way in raising the status of Hindu women, as far as

\textsuperscript{55} Id., para 2.4.1
\textsuperscript{56} Id., chapter IV.
\textsuperscript{57} Id., para 4.2
\textsuperscript{58} Id., Chapter V, para 5.7
proprietary rights are concerned. However, the order of heirs to a Hindu female in section 15 has not been changed, thus retaining the bias towards patriarchal set up.

In this chapter the changes brought about in proprietary rights of women have been studied to ascertain whether women have truly been given the so called equal rights in this matter. Moreover, the effect of these changes and their acceptability in our patriarchal set-up has also been studied.

Parentage and Related Rights of Hindu Women

The parental rights of a Hindu woman are granted by two statutes; namely the Hindu Minority and Guardianship Act 1956 and Hindu Adoptions and Maintenance Act 1956. It seems that some bias in these laws still continues to exist, owing to the patriarchal set up of our society. The Hindu Minority and Guardianship Act 1956 provides\(^59\) that "the father and after him the mother" shall be the natural guardian of a minor person. Thus, traditionally a preference has been given to the father. However, the judiciary has once again given a liberal interpretation to the said provision. The Apex court in Githa Hariharan v. Reserve Bank of India\(^60\) held that the father cannot claim that he alone was the natural guardian and his wife could not make decision without his permission. It was held that the mother of a minor was relegated to an inferior position on the ground of sex alone since her right as a natural guardian is made cognizable after the father, which was violation of Articles 14 and 15 of the constitution on that ground. Hence, the mother can act as a natural guardian of the minor during the lifetime of the father who would be deemed to be absent.\(^61\) Thus, if both mother and father are there, father is deemed to be the natural guardian. In case of law regarding adoptions, too, a Hindu wife cannot adopt incase her husband is present. She can only consent to such an adoption. Thus, the actual decision and act of

\(^{59}\)The Hindu Minority and Guardianship Act 1956, Section 6: Natural guardians of a Hindu minor-
"The natural guardians of a minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are-

(a) In case of a boy or an unmarried girl- the father, and after him, the mother, provided that the custody of a minor who has completed the age of five years shall ordinarily be with the mother..."

\(^{60}\)AIR 1999 SC 1149

\(^{61}\)Id., p. 1152, para,10
adoption rests in the hands of the husband. Moreover, whenever a widow adopts, the child so adopted still is related with her deceased husband filially, owing to the interpretation given by the Supreme Court in *Sawan Ram v. Kalawanti*. On the other hand, the act nowhere talks of the relation of deceased wife of a widower with the subsequently adopted child. Thus, the present chapter shall study all the provisions regarding adoption guardianship and custody and the rights of Hindu women with regard to the same.

**Rights of Women under Hindu law *Vìs-à-vìs* other Related Laws**

There have been certain issues which are intrinsically related with personal law, yet have been out of the purview of the same due to some reason or the other. For example, issues like marital rape, domestic violence, dowry related incidents, and female foeticide and infanticide are issues related with rights of women. Hindu Law has not taken up any of these specifically. However, there are various legislations regarding some of these issues like the *Dowry Prohibition Act 1961, The Protection of Women from Domestic Violence Act, 2005, the Prohibition of Child Marriage Act, 2006, Pre-Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994* etc. Such allied matters have completely been out of the purview of Hindu Law. This may have been partly because these issues relate to women of all religious communities, and probably there was need to bring all women under the purview of these laws. Thus, even if these issues are not directly within the ambit of Hindu law, they are related being allied matters and give rise to certain inalienable rights of women including the Hindu Women. It appears that no research work regarding women rights can be complete without taking up an analysis of these issues. Hence, the chapter on related laws studies the prevailing social evils and their impact on the women's rights movement. An attempt has been made to critically analyze the laws which aim to vindicate the position of women and place her at par with the men folk. Certain provisions of the *Convention on Elimination of all forms of Discrimination against Women, 1979* have also been discussed as the convention has a direct bearing upon the enactment and implementation of domestic laws which aim to end discrimination against women.

---

62 AIR 1967 SC 1761
The rights of women are definitely dependent upon the status they enjoy in a society. However, in modern times, to improve the status of women, we have empowered them with rights. However, in the humble submission of the researcher it seems that any right can be fruitfully enjoyed only if the society allows the exercise of such rights by doing its corresponding duty. Thus, of society is not ready to accord complete acceptance to such rights, their existence becomes merely illusory. Thus, a complete social change which is reflected in the attitudes and mind-set of people can be the only solution to reach a completely egalitarian set up. In this regard, role of law nevertheless, cannot be undermined. In establishing the boundaries of acceptable behaviour, law creates new behaviour patterns which frequently produce new attitudes. Law not only regulates, then, it educates and inculcates; it changes the values of society.63

Thus, if this is so, then why law has not achieved the true purpose. Here we may note that law is better understood as a catalyst of change rather than singular effector of change. The ability of law to produce social change is probabilistic, contingent and sequential. If a law is enacted it is probable that certain changes will follow, but the degree of change is contingent on certain circumstances prevailing. Law in other words is no talisman. It is not self executing. In fact amount of change brought by law shall depend upon the cost-benefit calculus (i.e. if individual determines that he stands to suffer a greater loss from obedience than disobedience, he will break law. If he judges that he will suffer greater loss by disobedience, he will comply)64

Hence, for our laws to become an instrument of social change, it is a necessity that society should be educated about the loss arising from their disobedience. In this direction it is of utmost importance that laws should be more stringent so as to truly create an apprehension of loss from disobeying them. The process may have many hurdles which shall have to be overcome.

Apart from this, change in social attitude and institutions cannot be brought about abruptly. It is necessary to accelerate the change and the onus of the same i.e. changing social attitude and consequently the status of women has to be shared by

64 Id., p.202
both the government and community. Role of voluntary organizations, educational institutions and media would thus be indispensable to launch a campaign for dissemination of information about legal rights of women and how they can exercise them.

Thus, the chapter tries to resolve the problem of ineffectiveness of some laws and inability of women to exercise their rights by providing some solutions for the same.