Concluding Remarks & Suggestions

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And
SUGGESTIONS

In India the post-independence era has gradually but definitely produced a new jurisprudence, the evolution of which may be hailed as an evolution in our society and politics. But the result it is viewed has not been quite appreciable. In the last decade attention was paid to improve upon the status of women and it was felt that there was more need to arouse the consciousness of society towards the recognition of her identity and freedom. The unsatisfactory condition of women particularly in a developing country like India has inspired the humble soul to carry on this work. When one is reaching at the door of 21st century, boasting alone will not suffice and one has to make positive and constructive efforts in right direction to achieve the said goal. An effort is being made through this work which, it is thought will be quite useful to governmental machinery, social scientists and law reformers and champion of gender justice to find out ways and means to improve upon the status of Indian women.

The position of Hindu women during the *vedic* era was at par with men. In every social and religious ceremonies, she was associated with and actively involved. In the post-*vedic* era, the status of Hindu women gradually deteriorated and she was regarded as subservient to her counterpart i.e. male in all social and cultural activities. This condition could not improve even during the British rule. In the later part of the 19th century, national leaders and social reformers tried their best to improve upon the status of Hindu female. After independence, the

Constitution of India envisaged socio-economic equality to all Indian citizens, irrespective of caste, creed or sex. No efforts have been spared in passing non-discriminatory legislations for the upliftment of socio-economic status of Hindu woman by the Indian Parliament.

In western countries, women were not given the right of franchise earlier as the rise of feminist jurisprudence is the testimony of the effect. Fortunately, after independence India did not allow such conditions to prevail and from the very beginning Indian women were given equal status to contest and vote. The People Representation Act, 1951 provides that every Indian citizen who has attained the age of 18 years is eligible to cast vote[1] and every one is eligible, subject to prescribed conditions, to contest election for the respective legislative bodies. There is neither special protection nor discrimination on the ground of sex to encourage or deprive woman to exercise her voting right or to contest or vote but it does not serve any purpose in the present day Indian polity. Still only 17 per cent of Indian women are literate. And only a small number of women know the value and importance of their voting rights. Even one per cent of the total women folk do not like to come in the public life and contest the election. Till 1970, Hindu women could not understand the value and importance of their voting rights and were solely dependent on the advice and directives of male members. Education, social awakening, employment opportunities and efforts of certain women organizations have now created an environment where women in general and Hindu women in particular are now aware of their voting right, its values and importance. A drastic change has been witnessed in the voting pattern

[1] Representation of the People (Amendment) Act, 1989; and Sixty-First Constitution of India (Amendment) Act, 1989 which reduced the voting age from 21 years to 18 years.

during 1970 and 1980. It was observed that even ruralite Hindu women are independent and conscious of their voting rights. The need of the hour is to provide reservations for women in legislative and administrative bodies so that this group may protect and promote their own interest.

The researcher agrees that declaring child marriage void could create a chaos in the society. The law should take any other alternate drastic step for preventing child marriages. It is suggested that the enforcement agencies and officers in the social welfare department should report the incident of child marriage so as to penalize erring parents of brides and bridegrooms. Registration of marriages may be made compulsory and that would be possible only when the brides and bridegrooms are of the required age.

Prostitution is one of the most heinous offences against the dignity of women and a slur on the face of a civilized society. The Constitution of India declares its faith in the dignity and worth of human being by incorporating the cherished goal of humanity, justice-social, economic and political for all. It prohibits immoral traffic in human beings and declares it to be an offence punishable under its Article 23. To fulfill this there is the Suppression of Immoral Traffic in Women and Girls Act, 1956 (now the Prevention of Immoral Traffic Act, 1986). Under this Act, prostitution as such is put to an end but has it been checked no, rather it has taken newer forms.

There are inherent flaws in the Act, for example, the externment order for the prostitutes is like depositing garbage at others doors. It is highly counter productive. The alarming dimensions of this

exploitation are not unknown. The call girl culture has come into existence. Five Star Hotels, Massage Parlours and Fashionable Bars, all have call girl system and sale of flesh. The well advertised entertainment offered by Bars, Hotels, Turkish bath and Massage in big cities is often a thing in disguise for the actual prostitution market. The abuse of power, economic, political and administrative factors create such circumstances in which women employees are tempted and at times prepared to barter themselves and their families. This is a new form of prostitution which goes on unobserved by the society and law enforcement authorities because it does not fall in any category of offences connected with prostitution. To deal with the problem of prostitution, it requires a more action oriented research in a new perspective for its control.

Almost every day there is news in the newspapers of "dowry deaths and criminal cruelty to women". It gives realization that women in India are still treated as play things and faithful servants of their male counter-parts. In *Shastric* era Hindu women have been suffering in silence. They were only asked and urged to sacrifice their interests and happiness. Time and again there has been a hue and cry in the press and social pressure from voluntary organizations to prevent inhuman treatment of women in their matrimonial homes especially on dowry demand and daughters' birth. The Dowry Prohibition Act, 1961 has also been amended with intent to make it more effective in curbing the practice of giving and taking dowry and the resultant harassment of women by their husbands and in-laws. Recognized welfare institutions or organizations have now been permitted to lodge complaints before the Magistrate for the harassment of women in their matrimonial

homes on account of dowry demand. A survey on theme: "why women burn" was conducted in 1983 which revealed that the oppressive attitude towards a married woman by her husband and in-laws remained on two counts: either because of insufficient dowry or on her giving birth to a female child.

The Constitution of India being the supreme law of the land, enjoins equality of sexes but unfortunately Indian society is still harsh to women in the same way as it was during the period of Manu. Inspite of discriminatory provisions for the protection of women and drastic amendments in the criminal laws, crimes against women are on the increase. Reduction of crime against women remains a wishful thinking. There is a constant increase in the criminal exploitation of the weaker sex.

What course other than suicide is left for a woman, especially when parents in India push her married daughter back to a disgraceful life with her in laws rather than to stay her with them or encourage her to make a life of her own?

The plight of Indian women did improve much even during the British period. A very few legislations could be passed at the instance of social reformers of British people during the British period but it did not ameliorate the condition of Hindu and Muslim females in particular and the Indian women in general. The legislative measures could only provide transitional relief and hope for survival but the environment and the public mood and opinion could not stand against social bias emergence from religious bias to show the willed psychology of males to free women from systematic subjugation. India

became free in 1947 and the Constitution of India came into operation in 1950. A new society and social order thus took birth. It was a society based on democratic norms. The new culture showed its sign. Prof. Deicey's conviction that from Coolie to the Prime Minister should be treated by the same law of the land and like should be treated alike became true theoretically after the enforcement of the Constitution of India. This Renaissance period is responsible to encourage women in general to fight for their identity and seek participation in public life. She now wants to be an active member of the changing pattern of the world. In every part they not only fight for the right of franchise, social and political activities, safety and security in hazardous private and public enterprises, but are devoted for ensuring their self-respect and dignity. The focus, it may be stressed is on the fact that a consciousness of right, liberty, freedom and engagement in public activities began to take its germs. Conditions of societies in every part of the world began to change in the 19th century. It saw the origin of a new concept of equality before law that no one should be discriminated on the ground of caste, creed, sex and religion. This noble principle of universal appeal gave a new lease of life to the words of Mahatma Gandhi, Lokmanya Tilak, Swami Dayanand and others that women should not be deprived of education and participation in the social and political life. The abolition of *sati Pratha,* punishment for arranging child marriages and the social approval and legal recognition for widow marriage and disintegration of Hindu Joint family howsoever slow it may be in the early Nineteenth Century opened the new vistas for her struggle in seeking a new identity of her own and finding a base for developing her personality. Equality before law in true democracy is a matter of right.

In 1950, the Constitution of India in its preamble provided ideals and aspirations of the people of India. The chief one of which was the equality of status and of opportunity. Article 14 of the Constitution partly incorporated the Dicey's principle- of equality before the law and partly the American concept of equal protection of laws. The equality clause expressly prohibits discrimination on the basis of race, religion, caste, sex and place of birth and guarantees of equality before the law and equal protection of laws irrespective of race, religion, caste, sex etc. Thus the Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women. This constitutional spirit found a distinct place and recognition in Hindu law legislations passed in the years 1955 and 1956 affecting matrimonial and property matters. In every sphere of domestic life the Hindu woman was treated at par with man whether it was the case of matrimony or marital rights or right to adopt and be adopted or to exercise the rights of guardianship over the minor children. It was conferment of a new status on her under the constitutional framework for the first time in the history of Free India. A new chapter was thus opened to improve her position and status in the family and accord a new personality and identity. The Hindu Succession Act, 1956 with the help of its sections 6, 8, 14 and 30 conferred a substantial and positive proprietary status on her and this showering of constitutional blessings could became a solid background for enriching her property rights. The legislative effort and judicial activism, if carried on persistently and uninterruptedly in its right earnest; with desired enthusiasm and zeal; with boldness and courage and with dynamism the day would not far off to grant her emancipation in general, the base has been laid down. It simply requires strong will,

a great determination and concerted will of each and every unit of the society to translate the aspirations of the Honourable members of the Parliament and make it a reality.

Article 14 of the Constitution ensures equality of status to all men and women. All men and women are equal before the law and are entitled without any discrimination having equal protection of laws. It recognizes women as a class. It removes disability attached to-women by passing the Hindu Succession Act, 1956. This Act has declared in an unequivocal term the property of the women belongs to her as her absolute property. Further, Section 8 of Hindu Succession Act has put female heirs at par with male heirs. Under Section 22 of the Hindu Adoption and Maintenance Act, 1956 allows illegitimate daughter to claim maintenance from those who take the estate in which she has a share and is not obtained by her. This preferential treatment is not violative of Article 14, as it puts daughter equal to son. In *C.B. Muthamma v. Union of India,*[2] the court upheld the principle of equality before law and held that denial of right to employment to married woman was discriminatory on the ground of sex. The Court upholding the principle of equality to status held that the female employees be treated at par with the male employees. The Orissa High Court *in Radha Charan v. State,*[3] held that the rule was discriminatory on the basis of sex if a married woman was disqualified from being selected at post of District Judge. The Supreme Court of India from time to time held the view that for being of fair sex if some disability was attached to woman it amounted to hostile discrimination against her being violative of Article 14 of the Constitution. Mr. Justice Fazal

[2] AIR 1979 SC 1868
[3] AIR 1969 Ori. 237

Ali in *Air India v. Nargesh Meerza* and others,[4] 5 held the rule violative of Article 14 if Air India Employees service Regulations provided that an Air Hostess was to resign from service: (a) upon attaining the age of 35 years, or (b) on marriage if it takes place within 4 years of service, or (c) upon first pregnancy whichever occurred earlier.

Mr. Justice Fazal Ali observed that termination of services of an Air Hostess under such circumstances was not only a callous and cruel act but an open insult to an Indian Womanhood. No civilized Society could ever allow it because it was unfair to women. A number of cases have been decided by the Supreme Court of India in which the women have been saved from discriminatory treatment under Article 14 of the Constitution. Section 354 of Indian Penal Code and Section 125 of Cr. P. C. too provide right and protection to women. Article 15 provides that no discrimination can be made by the State in matters of rights, privileges and immunities on the basis of sex. It also provides the making of special laws in favour of women and children. Numerous laws have been enacted relating to prohibition of female infanticide, dowry, exposure of women, advertisements and films, female child marriage, atrocities and molestation, abduction and rape, maternity benefits, medical termination of pregnancy, prohibition of prostitution and trafficking in women, protection of employment etc. The decisions of the Courts have served as a right signal for the Indian legislators to enact new laws or to bring about the changes in the existing ones with a view to afford better protection to women. Article 16 prohibits discrimination on the basis of sex in matter of employment. Sex can

[4] AIR 1981 SC 1829

not be sole ground of ineligibility for any post. She can not be denied promotion for being woman. Mr. Justice Krishna Iyer observed in *C. B. Muthwnma* v. *Union of India,*[5] that "we do not mean to universalize or dogmatize that men and women are equal in all occupations and in all situations and do not exclude the need to pragmatise where the requirements of peculiar employment, the sensitivities of sex or the handicaps of either sex may compel selectivity, but save where the difference is demonstrable, the rule of equality must govern.

Article 23 of the Constitution prohibits trafficking in human beings and forced labour. Similarly, Article 24 prohibits employment of any child (which includes a female child) below the age of fourteen years to work in any factory or mine, or engage in any other hazardous employment. A brief analysis of these provisions would reveal how much our founding fathers were concerned in not only protecting the interests of women but also to ameliorate the conditions of this lot in totality. Forced labour in any form including Beggar and traffic in human beings is completely prohibited and any contravention of this provision has been declared an offence punishable in accordance with law.

In pursuance of the above provisions the state has enacted a number of Acts.[6] A remarkable feature of this Article is not only the protection of the interest of women but also to ameliorate her condition in all walks of life in totality. The Constitution is the saviour of dignity as it saves her from indecent exposure. The Constitution has also taken care of

[5] AIR 1979 SC 1870

[6] Suppression of Immoral Traffic in women and Girls Act, 1956 amended as Prevention of Immoral Traffic in women and Girls Act, 1986; Indecent Representation of women (Prohibition) Acl, 1986; The Bihar Harizan (Removal of Civil Disabilities) Act, 1949; The Payment of wages Act, 1936; Bonded labour system (Abolition) Act, 1976; Employment of Children Act, 1938.

health, and protection of female workers. It also provides safety against exploitation of young females below the age of 14 years in employment. A number of Acts have been passed to attain these objectives.[7]

It appears that the Indian legislature is fully conscious about the need to protect the interest of women and to give them a status equal to their male counterparts in the society. However, the enforcement aspect generally remains neglected and needs improvement.

The evaluation of the status of women in India has been a continuous process of ups and downs through out the history. From the *Vedic* era to the present day, there has been a variform up and down falls in the position of the Hindu woman.

The Vedic *Samhitas* refer to women taking active part in agriculture and other crafts like leather work, making gur, drawing water; churning butter milk, making wine, weaving mats and sewing. They were also in charge of house hold finances and they were farm labourers. Some of the upper class women were highly educated and actively participated in intellectual, philosophical discussions. One comes across references to lady sages like Gosha, Apala, Lopamudra, Indrani, Gargi and Maitreyi. During the *Vedic* period girls and boys were initiated into the *Vedic* studies by performing a rite called 'upanayam ceremony: *Rig Veda* shows that women had other careers open to them apart from a more literary career. They entered fields of teaching, medicine, business, military and administration. The wife

[7] The Factories Act, 1948;The Mines Act, 1952;Employment of Children Act, 1938;The Merchant Shipping Act, 1958; the Motor Transport Workers Act, 1951; the Bidi-Cigar Workers (Conditions of Employment) Act, 1966; the Apprentices Act, 1961; the Plantation Labour Act, 1951.

enjoyed with her husband full religious rights and regularly participated in religious ceremonies. In fact, such ceremonies were invalid without the wife joining her husband. It is further ordained that the woman whose hand is accepted in marriage should be treated with respect and kindness and all that is agreeable to her shall be given to her. All these indicate that woman held status equal to man and there were considerably fewer restrictions on her activities outside her home. The wife was always supposed to participate in religious ceremonies along with her husband. In fact, no religious rite was complete without her presence. A home without the wife is like wilderness. The subordinate position of women became an accepted cultural norm for the majority section of the population until the beginning of the nineteenth century.

A perusal of the *Dharmashastra*, i.e. various Smritis show that woman hardly possessed a legal position and was, therefore, almost incapable of possessing any property. *Manu* also subscribes to this view that women have no property of their own.

Over *Stridhan*, woman had an absolute right including the right to dispose of the property. She might alienate in favour of any person which could not be questioned even by her relatives, including her husband. Manu was of the opinion that woman was incompetent for administration. Woman could not be a good head of the State. He also prohibited the king from consulting the woman for secret missions, because woman betrays secret acts. Further, he was of the opinion that women could be qualified witness for women only and not for others. Thus he did not rely on woman as witness.

The Directive Principles, under various Articles, provide special favour to women and direct the State to treat men and women equally. Article 38(2) directs the State to eliminate inequalities in status, facilities and opportunities. Article 39 provides that equally all men and women have the right to have an adequate means of livelihood and further, that there shall be equal pay for equal work for both men and women. To achieve this objective the State has passed, the Equal Remuneration Act, 1976. Article 42 provides that the labour must be provided just and humane conditions of work and maternity relief. Article 43 provides that the State shall endeavour to secure a "living wage" and "decent standard of life" as a result of which the State has made suitable amendments in Factories Act, Mines Act, Plantation Act, etc. However, in 1987, the Parliament has amended the Equal Remuneration Act, 1976, having in view the pathetic condition of the unorganized sector, in order to ensure equal wages to all including women. The States have been directed by the Centre to enforce the provisions of the equal Remuneration Act strictly.

Women have acquired somewhat a respectable position through the Hindu law legislations now. An analysis of class I heirs reveals that out of 12 heirs, eight are female heirs and in schedule of class II heirs, ten out of twenty heirs are female. The most important change made by the Act is that daughter has been treated with son at par. Further, position of woman has been discussed in the light of Sections 15, 16 and 23 of the Hindu Succession Act. The discussion reveals that this Act has brought revolution in the process of Hindu law affecting society, culture and family behaviour and extolled the Hindu woman. The revolutionary changes brought about by the Hindu Adoption and

Maintenance Act, 1956.

It has also been made clear in the light of the Supreme Court decision *Appaswami Chattier v. Sarangapani Chattier*[8] that the adoption made by a widow cannot be declared valid or void on the ground of her motive. Under the present law the woman adopts a child for herself and not for continuing lineage of her husband. Thus, such changes are in accordance with the changing socio-economic position and status of woman. The rights and capacity of Hindu Woman have been discussed in the light of Sections 6,7,8,9 of the Hindu Minority and Guardianship Act, 1956, which reveals that the Act has not made very radical changes. It continues to maintain that the father shall be the natural guardian of child and in his absence only a mother can become a natural guardian, but the judiciary has taken a bold step and declared that mother can be natural guardian during the life time of the father if it is for the welfare of the child. The discussion deals with also the right of maintenance of a Hindu woman in the light of the changes made by the Hindu Adoption and Maintenance Act, 1956. This reveals that the legislators have carefully kept in mind the interest of Hindu woman paramount.

The modern trend in law is towards the realization of certain values, namely, the equality of sexes, social and economic security for women and the development of secular outlook. The success or failure of marriage laws depends upon the extent to which they seek to realize these values.

Marriage and divorce are the most important institutions. On the one hand these are personal institutions. On the other the very basis of our

[8] 1978 SC 1051

society depends on these institutions and so their social aspects become extremely important. Marriage is now a basis of harmony and the foundation of co-operative endeavour.

It reveals that prior to Independence, the *Shastric* laws of marriage, succession, guardianship etc. were heavily biased against the wife. After Independence, however, most of the inequalities in respect of marital rights of Hindu wife have been sought to do away with through legislative measures. The basic objectives of these enactments were to confer equal rights and status on both the spouses and to ensure justice to Hindu wife in their matrimonial home. However, these legislative measures though aimed at extending protection to women in their matrimonial home ignore many major aspects and there are plenty of loopholes in the existing laws. The present study also reveals that these laws are not applied in the manner to accord rightful justice to the Hindu wives who are yet to secure legitimate rights and position in the matrimonial home. Very few have been benefited from this reformative and protective drive .Giving an account as to why the reformation drive by way of Hindu Code failed to deliver the desired good, M.Kishwar says:

> *"In the first decades of Indian independence, the codification and reform of Hindu personal law was hailed as a symbol of the new government's supposed commitment to the principles of gender equality and non-discrimination enshrined in the Constitution. This history of Hindu law reform, however, shows that when reformers claim to speak on behalf of huge segments of population, whose traditions and institutions they have no real knowledge of, they are more likely to do harm than good. Reform, to be meaningful, has to be based on creating a new social consensus".*

The author then continues:

> *"There is almost no principle introduced by the Hindu Personal Code which did not already exist somewhere in India as accepted law. On the other hand there were several existing, much more liberal principles which were decimated by the Hindu Code. In their determination to put an end to the growth of custom, the reformers were putting an end to the essence of Hindu law, but they persisted in calling their Codification 'Hindu'.*

Finally, the author sums up with the following note:

> *"Yet, the overall effect of the misleading rhetoric used of codifying law only for Hindus without giving them any option, and of trying to stamp out diversity in the name of Hindu unity was negative; insofar as:*
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> *(1) It gave Hindus the false notion that Hindu women now have equal legal rights, which is far from being the case;*
>
> *(2) It created a myth that reformed Hindu law is 'secular', not 'religious' or 'personal' whereas Muslim Personal law i.e. 'religious', therefore backward and can be secularized only by Hinduising it;*
>
> *(3) It left Hindu with a ridiculous sense of grievance. They have begun to believe that Hindu men are worse off than Muslim men because the former have been deprived of 'rights' that the latter enjoy. [Thus it ends up] "Causing a deep rift between the Hindus and the Muslims".*[9]

As regards Christian law, it still remains in a chaotic state. It is unfortunate to note that the Christian Marriage and Divorce Bill made no headway as also the Indian Divorce Act is dreadfully antiquated. The Parsi family laws suffer from dichotomy. The Parsi of the presidency towns and those living outside are not governed by the

[9] Madhu Kishwar, 'Codified Hindu Law: Myth and Reality; Economic and Political Weekly, Aug. 13, 1994. The paper was originally presented at a conference held at Oxford from May 30 to June, 1, 1990.

same law. Their law is partly codified, and the procedure for application of divorce and related relief is not well designed. Very little is known about the family law of the Jewish community living in India A Jewish wife enjoys limited right to obtain a divorce by application to the Jewish panchayat. This segment of our family law regime has received no attention so far. It needs ardent attention. Even after the codification of Hindu law, the scheduled tribes particularly those who come within the definition of term 'Hindu', are exempted from its operation.

The changes in the world situations have had a great impact on the Islamic world and on Muslim community living outside the world of Islam. In India also there arose a movement of social change which gained momentum much before the declaration of Independence that ushered in an era of social legislation seeking to codify and modify the old marriage laws. The Muslim Personal Law (Shariat) Application Act, XXVI of 1937 is most important legislation in the closing years of British regime in India. The Act almost abolished the legal authority of customs among the Muslims of British India. The position of Muslim women, in few cases, was seriously undermined by then prevailing customs. Inheritance in particular had continued to be ruled by, often excluding women, among numerous communities of Muslims. The Shariat Act aimed at correcting such defects. It applies to all Muslims in India in the matter of marriage, various forms of its dissolution, dower, maintenance, guardianship, intestate succession (except the question relating to agricultural lands) and gifts, trust and wakfs (with exception to charities and endowments). The Dissolution of Muslim Marriages Act, 1939 was passed empowering the Muslim wives to

secure the dissolution of marriage by the court of law on specified grounds. Many state Governments also passed legislations, such as Assam Muslim Marriage and Divorce Registration Act, 1935, Orissa Mohammedan Marriage and Divorce Registration Act, 1949. And then there developed a bottleneck on the question of loss of faith and identity as a Muslim.

While bigamy has been made an offence for Hindus and the second marriage is void in law, such marriages are still prevalent. This law has become harmless to bigamist because of some procedural as well as substantive lacunae in it. In a considerable number of cases because of technical construction placed on Section 17 of the Hindu Marriage Act the existing penal provision against bigamy is defeated.

In the Hindu society polygamy was in vogue since time immemorial. The situation underwent a change with the passage of the Hindu Marriage Act, 1955 which made monogamy legally compulsory for all Hindus. Despite the law, certain devices have been engineered by the irresponsible persons to make it possible for them to get a second wife in the presence of their first one. Some of these new devices are *maitri karars* and conversion.

India, a country of diverse religions and personal laws permits conversion from one religion to another. Among various personal laws operative in this country, bigamy is allowed only by Muslim Personal laws. Sometimes a non-Muslim in order to take a second wife in the presence of his first one resorts to 'sham conversion' to Islam,[10]

[10] "Hema (Malimi) met Dharmendar, a married man with grown up children--- Even though Dharmendra did not divorce his wife Prakash, Hema agreed to being a second wife, despite this being illegal.In fact many Bollywood people converted to Islam just to marry again, another one being Mahesh Bhatt"- Nawalesh Pathak, "Why actress fall for married men". The Asian Age

thereby defeating the object of monogamous marriage law. The newly emerging trend of dishonest marriages through *malafide* conversion, if not checked in time, would cause the major source of trouble for women and society in near future. No doubt our Constitution guarantees to all citizens religious freedom including the option for conversion from one faith to another. But then it must be a *bonafide* and sincere conversion. This noble provision of our Constitution, under no circumstances, be allowed to be misused to trigger the unhappiness for women in their matrimonial home. Among the existing Indian personal laws Parsi marriage law and the Special Marriage Act, 1954 prohibit second marriage by conversion.

The restitution of conjugal rights came to be introduced in the Indian courts during the British regime.[11] Perhaps it was based on the notion of sound public policy and natural justice.[12] The relief emanates from the concept of 'consortium'[13] and was extended to both spouses,[14] though in actual practice it is the husband who in most of the cases appears as plaintiff in his attempt to secure the society and company of his wife.[15] The paucity of the number of wives coming forward with such plea reflects the peculiar Indian social set-up wherein the wives' lack of courage to espouse their cause is manifest.[16]

In a restitution petition the real object is hardly achieved. It fails to bring about reconciliation between the contending parties who desperately find ways for separation. It serves no purpose other than

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[11] Paras Diwan, The Modern Hindu Law (1976), p. 164.

[12] R.K. Agrawala, Matrimonial Remedies under Hindu Law, (1974), p. 10, Mohammad Shabbir, Muslim Person law and judiciary (1988) p.

[13] A.A.A. Fyzee, Outlines of Muhammedan Law (edn. 4th) p. 121.

[14] K.P. Saksena, Muslim Law as Administered in India and Pakistan, (1954), p. 207.

[15] *Kateeram Dokanee v. Mst. Gendhenee,* (1875) 23 Soth WR 178.

[16] Supra note 62.

providing psychological relief to the plaintiff who is determined to expose the other party in public. A perusal of the restitution cases under the Hindu law since 1954 has confirmed the fact that the restitution petitions were either to defeat the maintenance claim of the wife or to create conditions for divorce. It equally holds good, for cases under the Muslim law.[17]

Lord Gorell observed that permanent separation without divorce has a distinct tendency to encourage immorality and is an unsatisfactory remedy to apply to the evils which it is supposed to prevent.[18] As soon as decree of judicial separation is passed, the petitioner is permitted to live apart from the respondent. Generally at this stage both the spouses are young. And there is danger of their indulging in immoral practice. It is often used as a stepping stone for divorce, the preliminary stage *to* reach the final stage. The decree of judicial separation opens the door for divorce. If the spouse obtains the decree on the ground of cruelty, and cohabitation is not resumed for one year after the passing of decree, divorce can be finalized by either party.

It is submitted that now-a-days the law is being manipulated at the connivance of both Judiciary and Legislature. Such a position should not be allowed to continue, for law cannot be a party to fraud or ambiguity. Section 13 (1-A1 (i) of the Hindu Marriage Act has been criticized as most unfair, because once judicial separation is granted the respondent becomes the proven guilty party, and to permit him/her to get the marriage dissolved seems like rewarding a person for his/her fault. It is inequitable and contradictory to the spirit of provision of

[17] *Ibid.*
[18] As quoted by *Krishna Bahadur* in The Hindu Law of Marriage and Divorce, vol. V, p. 126.

Section 23 of the Hindu Marriage Act, 1955 which says that no person shall take advantage of his/her own wrong. It is submitted that the guilty party should not be allowed to get the marriage dissolved at his choice. It may be said that under certain unavoidable circumstances, the spouse may be compelled to obtain a decree for judicial separation, but he/she may not be interested in divorce. In India, where majority community considers marriage a *samaskar*, divorce should not be forced upon them unwittingly.

The Indian Divorce Act, 1869 enacted by British Parliament for regulating matrimonial relations among Indian Christians is outmoded and archaic. The original British legislation, the harbinger of the Indian statute, has undergone qualitative changes to accord equality to both spouses in matrimonial matters. But the Indian law has failed to keep pace with the change as was done in cases of Hindu and Parsi law. There have been recommendations from many quarters for changes in this discriminating law. The Supreme Court and High Courts have called upon the Parliament and State Legislatures to introduce changes in this law.[19] The Law Commission of India has recommended revamping of the Christian marriage and divorce legislation in its several reports. In its *Fifteenth Report on Law Relating to Marriage and Divorce amongst Christians in India (1960),* the Commission had made detailed recommendations for reform of Christian marriage and divorce laws As a result, the Law Ministry drafted a Bill and referred it back to the Commission for eliciting public opinion. On the public opinion being obtained, the Law Commission submitted its *Twenty-second Report on Christian Marriage and Matrimonial Causes Bill*

[19] *SC Selvaraj v. Mary,* (1958) 1 MLJ 289, *Ms. Jonden Diengdeh v. SS Chopra,* AIR 1985 SC 935.

1961, recommending a thorough revision of the existing legislation. Accordingly, a Bill entitled 'The Christian Marriage and Matrimonial Causes Bill' was introduced in Parliament in 1962. The Bill however, lapsed with the *Lok Sabha* being dissolved. Years later, the Law Commission in 1983 headed by K. K. Mathew had taken up *suo motu* the issue of revision of Section 10 of the Indian Divorce Act in view of sex-based discrimination applicable to Christians.

It is relevant to note that the Fifteenth and the Twenty-second Reports were prepared after collecting evidence from the dignitaries of the Christian Church represents of the Christian Associations. Members of Christian Community, Bar Association and judicial officers of the country. The Report would reveal that there was a demand from the Christian community itself for inclusion of the progressive grounds for divorce like cruelty and desertion which are available in almost all modern legislations on the subject.

In the Hindu society the custom of dowry has been prevailing since time immemorial. It has gradually become an evil. The social reformers have been trying their best to uproot it. Though dowry has no place in Islam, it has made inroads to the Muslim society of this subcontinent, as they too, form a part of the indigenous social texture. As back as 1940, Maulvi Aftab Ahmad of Bengal moved a Dowry Prevention Bill in the Bengal Legislative Assembly which, however, could not be enacted due to various reasons.[20] On independence, Indian Parliament passed the Dowry Prohibition Act in 1961, which was amended in 1984. It applies to all communities. In 1967 the Pakistan

[20] Pradyumma Arora; 'Pakistan: The Dowry and Bridal Gifts (Restriction) Act, 1976'. Islamic and Comparative Law Quarterly (Vol. II:1) 1982, p. 73.

Dowry (Prohibition and Display) Act was passed. The situation assumed so much an alarming proportion that the Dowry and Bridal Gifts (Restriction) Act, 1976 had to be legislated, followed by the Dowry and Bridal Gifts (Restriction) Amendment Ordinance, 1980. Bangladesh, too enacted a legislation in a bid to thwart this evil in 1980.

An approved marriage among Hindus has always been considered a *kanyadan*. The *Dharmashastra* also rules that this meritorious act is not complete till *dakshina* was given to the bridegroom. Father after decking his daughter with costly garments and honouring her by presents of jewels gifted her to a bridegroom whom he also presented in cash or kind known as *vardakshina.* Certainly whatever presents or gifts were given to the daughter constituted her *stridhan* or separate property. The ground reality is that the *vardakshina*, under no circumstances, constituted property of the bridegroom. Based on love and affection, the gift was completely voluntary in its origin and character. Later it assumed the frightening name of dowry, an inhuman coercive transaction

The Dowry Prohibition Act, 1961 did not prove effective. The evil continued to reign supreme. Several Indian states like West Bengal, Bihar, Orissa, Haryana, Himachal Pradesh, Punjab amended the act of 1961 in a bid to curb the evil by enhancing punishment for dowry offence, but with little success.

Later a Joint Parliamentary Committee was appointed to look into the problem which attributed two reasons to the failure of the Act, namely, the Act's exclusion of all presents, whether given in cash or kind, from

the definition of the dowry unless given in consideration of the marriage, and lack of effective enforcement machinery. Accordingly the Joint Committee made some recommendations. Parliament accepted some of them. These were incorporated in the Dowry Prohibition (Amendment) Act, 1984.[21]

In the Amended Act the words "as consideration for marriage", have been substituted by the words "in connection with the marriage" to widen the scope of definition. Two safeguards against the abuse of "presents" are laid down: (a) all presents made to the bride or bridegroom are to be entered in a list; and (b) such presents should be commensurate with the financial status of the giver.[22]

In the amended Act, too, the *mahr* or dower under the Muslim marriage continues to be excluded from the purview of definition of dowry. It makes the dowry offence cognizable and non-compoundable. The Joint Committee recommended that the dowry offence be tried by family court. However, it was not accepted. Likewise, the recommendation of the Joint Committee to appoint dowry prohibition officers went unheeded.

> *Pradyumna Arora observes: "The Pakistan Act of 1976, on the other hand, appears to be more realistic. It does not prohibit absolutely the giving and taking of dowry but, instead, put restriction on its quantum. For this purpose it groups 'dowry', 'bridal gifts' and 'presents' as separate transactions".*[23]

The Act is unique in one particular aspect. It bans absolutely receiving of the presents by state dignitaries, VIPs and high government officials

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[21] Paras Diwan: Notes & Comments, Dowry Prohibition Law, JILI (vol. 27: 4) 1985.
[22] Section 3(2)
[23] *Supra* note 19.

which will go a long way in cleansing public life of corruption and favouritism. The rules framed under the Act provide that such forfeited property shall be duly deposited in a *jahezkhana* to be made available to those who need help in their daughter's marriage. Thus the provision would act as a deterrent.

The monetary restriction on dowry, bridal gifts and marriage presents, and ceiling imposed by the Act on the total expenditure on marriage and related ceremonies would helpfully put an end to the ostentatious and wasteful expenditure on marriage. In order to achieve the desired results the Act provides that any person can make a complaint to the Deputy Commissioner within nine months from the date of marriage alleging that any provision of the Act has been violated.

In course of time dowry has become a widespread social evil. It has now assumed an alarming proportion. The cases of brides being beaten up starved and tortured for not having brought sufficient dowry are the usual feeds of our national dailies. In order to update the procedural aspect of the law, the Law Commission of India recommends as follows:

> *"(1) A provision as under should be inserted in the Indian Evidence Act, 1872:*
> *"where—*
>
> *(a) married woman dies, within five years of her marriage, of burns or injuries sustained by her in the house in which she and her husband were residing together immediately before the death, or from other cause of a similar nature, and the death takes place behind close door?, it may be presumed that the death was not accidental."*[24]

[24] Law Commission of India, Ninety-First Report (1983)

Surprisingly the evils of dowry have spread to the other communities which traditionally were not involved in this custom. The practice of giving and taking dowry is operating in the Muslim community in the guise and pretext of *jahez (dahez), salami,* and *neundra* of which our Indian legislation has no mention.

Suggestions

The following suggestions are advanced to resolve the problems:

1. In Chapter IV-A of the Constitution there is need for insertion of duty to honour woman. Also, the following amendment may be made in Article 51 A(k) — "Citizens of India shall have a duty to respect and honour a woman and renounce practices derogatory to the dignity of woman."

2. The term "woman" may be included in backward classes in Article 16 of the Constitution for their speedy upliftment.

3. Article 19 clause (2) must have a reasonable restriction that the man should not make any speech or expression which is derogatory to the dignity of woman.

4. Eight offences under Sections 294, 341, 342, 354, 397, 498, 509 of Indian Renal Code specifically mention that the court can either award imprisonment or fine or both. The Court has the discretion to award either of the two or both together. These offences are not grave by nature and provide maximum imprisonment upto one year or fine except in the case of two Adultery (Section 497) where the offender can either be punished with imprisonment which may extend to 5

years or fine or both. The discretion given to the Court does not appear reasonable and it is suggested that the Court should necessarily award imprisonment and also be authorized to impose fine. Similarly, in case of "enticing or taking away or detaining with criminal intent a married woman" (Section 498), fine should be imposed in addition to the punishment of imprisonment and not in lieu of imprisonment.

5. Looking to the far-reaching and highly dangerous consequences of the crimes against women, it is suggested that the punishment provided under Section 294 obscene act and songs in public place; Section 354 assault or criminal force to woman with intent to outrage her modesty; Section 498-A subjecting a woman to cruelty; Section 509 word, gesture or act intended to insult the modesty of woman is not sufficient and it must be raised. The punishment provided under Sections 376-B, 376-C, 376-D should be raised from five years to seven years equivalent to the punishment provided under Section 376 and the minimum punishment should also be prescribed because very often it has been seen that Public Servants, Superintendent of Jails or Remand Home, Member of Management Committees themselves indulge in crime against women. Minimum punishment should be laid down to prevent these law protectors from becoming law violators. If such persons abuse their positions, they must be strictly dealt with. Further, alike Section 376, some minimum punishment be prescribed for these offences

as an offence committed by public servants has more grave, pernicious and far reaching consequences.

6. In accordance with the Law Commission's Report (42nd, 1973) both man and woman should be punished for the offence of adultery under Section 497 of the Indian Penal Code.

7. Some provisions for compensation to rape victim must be made. This may be imposed as fine by the court on the accused. Section 376 may be amended accordingly.

8. The definition of minor as one under 16 years of age in rape law is arbitrary since elsewhere the legal definition is anyone upto 18 years. Therefore it must be amended accordingly as already pointed out by a committee set up by the National Commission for women in October, 1992.

9. If First Information Reports are not recorded by police in rape cases, then the police man concerned must be punished.

10. Provision relating to women (providing special protection to women) must be strictly followed by the authorities concerned.

11. The Court should have a provision in Section 468 that the cases relating to women (regarding offences committed against women) are decided at the earliest possible. The time limit of two years may be provided for such offences because justice delayed is justice denied.

12. The Supreme Court Judgment in *V. M. Arbat v. K. R. Sawai*[25] is a psychological blow to the women's crusade for economic independence and does not further the cause of women's right. Therefore, Section 125 of Criminal Procedure Code must specifically provide that married daughters are not under an obligation to maintain their parents. In exceptional cases, where the daughter is an earning member and without heavy responsibilities, she should be asked to pay maintenance to her parents.

13. "Special Family Courts" have become the need of the time. In some of the states these courts have started functioning though with little satisfaction. It is because of lack of required zeal and determined will, and further due to procedural drawbacks and set standards for the courts. They must be established without any further delay to deal with the offences against women only in every state. It is suggested that these courts should have at least a few female judges or atleast more than half of their total number. Further, the need for the availability of services of female prosecutors in such cases can not be denied.

14. The law insists that offence of Bigamy will be committed only when the second marriage is strictly proved. Anything short of second marriage will not amount to a bigamous marriage and accused is liable to be acquitted because the Act does not punish mock marriage *(Bhau Rao* v. *State of*

[25] AIR 1987 SC 1100

Maharashtra).[26] This appears to be serious lacunae in the Hindu Marriage Act, 1955, as only offence of bigamy has been made punishable in the Act read with Sections 494 and 495 of Indian Penal Code. Similar provisions would have been made for mock marriages. The illegitimate children have not received a fair treatment in the Act, as is conferred to them in other countries which treat their responsibility to take care of such children. A new trend is visible in the present century that people in cosmopolitan cities to have children without marriage by virtue of living relationship. The present law is insufficient to take care of such children who are born without a legal wedlock of their parents.

15. The provision regarding registration of the marriage under Section 8 of the Hindu Marriage Act should be made compulsory and all the Revenue officers, Sarpanchas, Patwaries should be authorized to keep marriage register for the same, so that the chances of fraud and mock marriages could be checked and detected.

16. The Revenue Officers, *Sarpanchas, Patwaries, Chowkidars* of the villages and neighbour of the offender (of bigamy) must have a "legal duty to inform the police or the Court about the second marriage of the persons". It may not be expected only from the first wife to bring an action against the husband, but any other person can put the law in motion for bigamous marriages.

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[26] AIR 1965 SC 1564: 1565 (2) Cr. L.J. 544.

17. A reasonable restriction should be imposed on the testamentary power of a Hindu male who wants to disturb the usual line of inheritance.

18. For giving equal rights to females, the differences between agnates and cognates to inherit the property of a male Hindu should be abolished.

19. The property of a female 'Hindu is divided for purpose of succession into three classes which is not justifiable. It shows a retrogressive step. Therefore, it must be reviewed and distinction must be abolished. The law of inheritance of Hindu female's property requires a thorough review.

20. The remaining uncodified Hindu Law pertaining to Joint Family, partition, religious endowment etc. should be brought into statutes book. A central legislation on the subject is the need of the day.

21. In case of adoption by an unmarried mother, mother's name should be recognized as parent's name for all purposes.

22. In case of the death of husband, parents of the widow should be the guardians of the widow in place of the in-laws.

23. Mother and father both must be recognized as natural guardians of the child to ensure the welfare of the child.

24. As per provisions of the Dowry Prohibition Act, 1961, the giver and the taker of the dowry are punishable. As a result, complaints for dowry extortion are not being lodged. Hence,

the persons giving dowry should be excluded from liability.

25. The Maternity Benefit Act, 1961 was enacted with the object of bringing uniformity in regard to maternity benefits available to women workers. However, certain anomalies still exist which should be taken care of by the legislature. Firstly, the Maternity Benefit Act, 1961 applies to every establishment which is a factory, mine or plantation including those belonging to the Government. It also applies to every establishment where equestrian, acrobatic and other similar acts are performed and exhibited. The Employees State Insurance Act, 1948, on the other hand, applies, to all factories including factories, belonging to the Government but excluding seasonal factories. By Section 2 (2) of the Maternity Benefit Act, 1961 it has been clarified that this Act shall not apply to any factory or other establishment to which the provisions of the Act are applicable excepting the woman who is covered under section 5-A of the Maternity Benefit Act. An insured person under the Act, 1948, is entitled to get maternity benefit provided the employee has made at least thirteen weekly contributions which must be continued for the purpose of availing this maternity benefit in future. A woman worker under the Maternity Benefit Act is entitled to get maternity benefit without making any such contribution but she should fulfill the requisite condition of having worked in the establishment of the employer at least for one hundred and sixty days during the twelve months preceding immediately before the date of her expected delivery. No

such condition is prescribed under the Employee's State Insurance Act, 1948.

26. Under the Maternity Benefit Act a woman worker resuming duty after child birth is entitled to get two nursing breaks of the prescribed periods for taking care of her child under Section 11 of the Act till the child attains the age of 15 months. This provision has been made with the object to provide facility to the woman to take care of her child so that the child may enjoy and have good health. There is, however, no such provision under the Act.

27. The employer under Section 4 of the Maternity Benefit Act, 1961, cannot compel a pregnant woman to do any work of arduous nature which requires standing for many hours or which is likely to interfere with her pregnancy or adversely affect her health within a period of seventy-two days from the date of her delivery. The employer cannot make any deductions for giving the women workers easy or less arduous work. No such provision exists in the Employees State Insurance Act.

Thus in view of the above disparities a woman worker getting benefits under the Act finds herself in a disadvantageous position in comparison to a woman covered under the Maternity Benefit Act. It is, therefore, suggested that the position should be rationalized and brought at par to the maximum possible extent by making suitable amendments in the Employees' State Insurance Act.

28. The existing provision that no woman shall be entitled to any maternity benefit unless she has actually worked in an establishment for a period of not less than 160 days during the twelve months immediately preceding the date of her expected delivery is quite unreasonable. The service of only three months is sufficient to qualify even casual woman labour for this benefit. The Act should also cover agricultural labourers.

29. There should be effective implementation of the Maternity Benefit Act in all States. The provisions contained in Section 12 with regard to dismissal due to absence during pregnancy should be scrupulously implemented. Stringent penalties should be imposed for the violation of the Act.

30. Lastly, the piecemeal protection provided under different labour legislations[27] has failed to protect the legitimate interests of female workers. It is suggested that a comprehensive legislation providing productions to female workers employed in different establishments should be enacted so that their legitimate rights are duly protected.

31. The National Commission for women should review the Hindu Marriage Act, the Hindu Succession Act, the Hindu Adoption and Maintenance Act and the Hindu Minority and Guardianship Act and other concerned laws.

32. The State must come forward to encourage the remarriage of divorcees and victims of rape.

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[27] The payment of Wages Act, 1936 Bonded Labour System (Abolition) Act, 1976, Mines Act, 1952, Employment of Children Act, 1938, Factories Act, 1948, The Merchant Shiping Act, 1958, Bedi & Sigar Workers (Conditions of employment) Act, 1966, The Motor Transport Workers Act, 1951, The apprenticers Act, 1961, The Plantation labour Act, 1951, etc.

33. Government must provide free legal aid to dowry victims.

34. Anti-dowry study material must be inserted in School curriculum.

35. Mere protective benevolent legislation is not enough. To bring social awareness women organizations should work more promptly and actively. The State must give priority to education to all. Education upto 12 standards must be made compulsory and free of cost for women. Such education system should compulsorily transmit primary legal education to women. Various enactments relating to Hindu women and other related laws e.g. the Dowry Prohibition Act, must be taught to Hindu women.

The position of Christian women appears to be nearly satisfactory due to higher percentage of literacy, progressive views and open mind attitude. They are enjoying more liberty in action; freedom in choice of job and protection through law. The minority protection clause in the Constitution also helps her in securing freedom and equal treatment like any other women. But many changes are required in the laws applicable to them for actual amelioration.

Parsi women suffer from two major setbacks namely.

1. That their stringent law does not permit inter caste marriages.
2. Discriminatory treatment is meted out to them in matter of holding and succeeding the property.

It is hoped that the existing Parsi Law will be changed in course of time to bring it in tune with Indian democratic norms.

It appears that the empowerment of women in the area of personal

laws through legislations differs personal law to personal law. Hindu Personal law after the commencement of the Constitution of India has witnessed improvement ensuring gender justice and over all empowerment. In Christian matrimonial laws the pace of empowerment is quite poor and there is need to improve the situation taking into account the egalitarian philosophy of the constitution of India, however, in the area of property matter there is no objectionable provision. Parsi personal law has improved itself ensuring empowerment of women. Under Muslim Personal Law to empower women still a lot to be done yet in India.

Indian Muslim women have not been able to come up to catch the fast march of progress as compared to women belonging to other communities especially Hindus, Christians and Parsis because they are lacking enlightened leadership and also due to extra care of religious and cultural identity which is based on orthodoxy. They are in need of empowerment especially in area of their personal laws affecting their matrimonial and property matters. In post-independent India legislative outcome in this area is quite minimal. They are also not much organized as they are not having dominant and influential organizations for pushing the matter of empowerment as other communities women organizations are doing very effectively. Researcher points it out this aspect whenever relevance is sensed in process of expanding the thesis. Also, researcher is of the view that to satisfy the essence of empowerment reforms in Muslim Personal Laws are immensely needed taking into account fast changing pattern of society sharing the trends of the Muslim world respecting the primary sources of Islamic Jurisprudence. Muslim Personal Law Board is only organized institution and it comprises enlightened Muslim leadership

alongwith experts in different area of knowledge who can contribute meaningfully and constructively for the empowerment of Muslim Women in the area of Muslim Personal Law. This Board has been urged to come forward taking up the agenda of empowerment of Muslim women in the area of personal laws.

An encouraging development in all these years is the growth of organized articulation of women's problem by women organizations. There has been a rapid growth in Women's organizations to protest against crimes of violence against women, against the institution of dowry, against discrimination in employment and economic status and the like. While many new women's organizations sprang up, older, more established organizations also become more active. All these organizations have displayed new capacity to take up women's problems, concerns and issues at different fora-media, political parties, law, academia, the bureaucracy and other professions cutting cross the sex and caste considerations.