



**WOMEN EMPOWERMENT THROUGH LEGISLATIONS  
IN THE AREA OF PERSONAL LAWS: A SOCIO-LEGAL  
STUDY OF SELECTED LEGISLATIONS IN POST  
INDEPENDENT INDIA**

**ABSTRACT  
THESIS**

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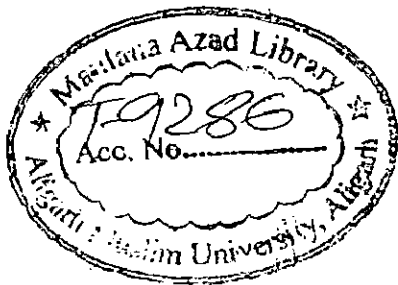
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## ABSTRACT

In India almost half of the Indian populations are women. They have always been discriminated against and have suffered and are suffering discrimination. Even though self-sacrifice and self-denial are their nobility and virtue, yet they have been made the victims of all inequalities, indignities, inequities and discriminations, from time immemorial. These are some of the factors that prompted the legislature to make various laws to give the women their due share. The Constitution of India prohibits discrimination on the ground of sex. This prohibition of gender-based discrimination has been given the status of a fundamental right. Various other laws have been enacted to deal with the personal matters like marriage, divorce, succession etc. with regard to the women. The criminal law also contains numerous provisions to deal with the crimes committed against women; enactments like the Dowry Prohibition Act supplement the existing criminal laws to combat the evil of dowry. Number of labour and industrial laws provide for the protection and welfare of the women, which include maternity benefit, prohibition of employment of women in dangerous activities and creche facility for the children of working women. In order to curb the immoral and anti-social practice of prostitution, the Immoral Traffic (Prevention) Act has been enacted. The female foeticide and infanticide have assumed dangerous proportions and the determination of sex of the foetus which became possible due to the advanced scientific inventions, abetted the commission of these inhuman acts. The Parliament has passed the Pre-natal Diagnostic Techniques (Regulation & Prevention of misuse) Act, 1994 to arrest this undesirable trend. These legislative

measures aforementioned are only illustrative in nature and not at all exhaustive.

The Parliament of India has realized the importance of a monitoring institution to examine and investigate all the matters relating to the safeguards provided for woman under the Constitution and other Laws, This realization has led to the enactment of the National Commission for Women Act, 1990 which came into force with effect from 31<sup>st</sup> January, 1992. Though this Commission consists of a Chairperson and five members nominated by the Central Government, has been entrusted with the task of presenting to the Central Government the problems of women, deprivation of women's rights, and the reports of the progress of the development of woman under the Union and any State, though it has not been given Constitutional Status. However, this body has been burdened with the laborious responsibility of reporting to the government as to the efficacy and effective implementation of the safeguards for improving the conditions of woman by the Government, and for monitoring the socio-economic development of woman in all walks of their life. Unfortunately, the Commission can make only recommendations and send the same to the respective authority for action. It has no Judicial Powers for making it an effective instrument for providing relief to woman in distress. Mr. Justice V. R. Krishna Iyer aptly remarked that a National Commission for Women has "hardly any teeth or nail". It is good development that now the Commission has been given the Judicial Powers and also conferred the Constitutional status. Indian women are becoming more and more conscious of their constitutional and statutory rights. This consciousness has awakened in them a sense of urgency in

experiencing equality and social justice. Without equality and social justice there cannot be democracy in the real sense.

The Universal Declaration of Human Rights adopted by United Nations General Assembly in 1948 claims that "All human beings are born free and equal in dignity and rights." For egalitarianism, men and women are equal before the law and there must be 'equality of opportunity'.

Equality provides social justice. It makes a full human being. The holistic development of man and woman is impossible without social justice. It protects the weak and limits the powers of the strong and acts for the welfare of every one.

The discrimination being a female is obvious in the Indian Society, such as the lower life expectancy, minimum education, poorly paid jobs, lower status expectations and very few rewards than men in comparable situations. The process of selection and elimination operating through a complex system of institutional network results in the narrowing down of options for women. Sex role differentiation and ideological assumptions about "Women's place" is linked to the unequal distribution of resources, rewards, rights and authority between men and women which in turn influence patterns of family and work life.

The Hindu law-givers did not permit women to inherit property. So a revolutionary change took place with the passage of Married women's Property Act of 1874 which widened the scope of *Streedhana* and the money she acquired through her artistic and literary skills. Side by side the *Streedhan*-movable property which was given to the woman by her

parents or husbands also remained intact. The women's lot needed amelioration was the prevailing view and the reformers wanted women to return to the *Vedic* glory and other placed definite plans to eradicate their problems. Some reformers, like Dayanand Saraswati, gave a severe shock to the traditional society when launched the *Suddhi* movement and attempted to take back women in the Hindu fold who were converted to Islam or Christianity. Other reformers argued in favour of holistic development programme. Yet others fought for official intervention and social legislations. All reformers had to face opposition from the reactionaries in Hindu society.

Since Independence, All India Women's Conference became interested in constructive work and left its agitational attitude of pre-independence era. Its activities since Independence led to the enactment of social legislations with reference to women. Some significant ones are: Women's Legal Rights, 1952; the Suppression of Immoral Traffic in Women and Children Act, 1954; The Special Marriage Act, 1954; the Hindu Marriage Act, 1955; the Hindu Marriage and Divorce Act, 1956; the Hindu Adoption and Maintenance Act, 1956; the Hindu Minority and Guardianship Act, 1956; Interstate Succession Act, 1956; the Orphanages and Widow Home Act; The Orphanages and other charitable homes (supervision and control) Act, 1960; and the Dowry Prohibition Act, 1961.

The position of women reflects the cultural attainment of a society. A major index of modernization of any society is the position of its women *vis-à-vis* men. The more balanced the opportunity structure for men and women, the higher the status enjoyed by women in the

society. However, the status of women suffered a setback both on the religious and Philosophic as also on the socio-legal plane.

Originally a female under the Roman law had very little of personal and proprietary independence, but gradually she extricated herself out of it. According to Sir Henry Maine, there were three modes in which marriage might be contracted under Roman usage: '*conferreatio*' involving a religious solemnity and, '*coemptio*' and '*usus*', involving observance of certain secular formalities. On marriage, the husband acquired a number of rights over the person and property of his wife which was on the whole in excess of such as are conferred on him in any system of modern jurisprudence. However, at the most splendid period of Roman greatness, these three forms of marriage fell into disuse and were founded on the modification of the lower form of civil marriage.

Hindu law and customs were extremely unfavorable to woman. She was treated as inferior to man. The great law-giver Manu says that "Day and night must women be held by their protectors in a status of subjection". It is true that after some time life interest in the property was given to them under the name of *stridhan*, but because the custom of *suttee* came into practice that right was of no practical value. A widow burnt herself alive with the dead body of her husband and that horrible custom was the most gloomy picture of the position that women held in the social economy of the Hindu life. Women were some times made the wife of several brothers at the time. She was sometimes put on the gambling stake and lost. Even up to the other day there was no limit to polygamous marriage in Hindu society. A Hindu widow could not adopt a son unless her deceased husband had left her

permission to do so. She could not get any alienable right in property. She could be married without her consent when only a child of four or five years of age. Marriage was viewed as a gift of the bride by her father or other guardian to the bride-groom. As a daughter she was only entitled to expenses of her marriage from her father's estate. She had no right to succession along with her brother. No girl was allowed to be adopted by Hindus. Remarriage was not allowed. Once married, she could not get divorce. Her status in the society was negligible. A father was never expected to eat at her husband's house, and so on.

The whole fabric of Christianity rests upon the criminality of woman. If Eve had not shown the frailty of going astray, if she had not tempted innocent, child like Adam, sin would not have become inherent inhuman nature, and no saviour would have been required no spilling of human blood would have been needed to "cleanse". Jesus said that he had come to fulfill the law, so he accepted "Thy desire shall be to thy husband and he shall rule over thee" as the maxim of a married life for women. Under English law, wife had no independent identity. The notion of the unity of the personalities of husband and wife prevailed. She had no separate legal existence. She was incapable of holding separate property. So neither the husband could make any grant in her favour, nor could she bring any action for redress against anybody without his consent. The disabilities were subsequently modified by the Court of Equity And The Married Women's Property Act.

The women in Pre-Islamic Arabian Peninsula were treated as chattels. They enjoyed no legal rights. In youth, they were the property of their fathers and after marriage the husband became their lord and master. A woman was not a free agent in contracting marriage. It was the right of



her father, brother, cousin or any other male guardian to give her in marriage, whether she was old or young, widow or virgin to whomsoever he chose. Her consent in marriage was not required.

Polygamy was prevalent, and there was no restriction as to the number of wives one could have. Along with the formal marriage, group marriage, flag marriage prostitution, marriage by barter and temporary marriage (*'muta'*) were in vogue. In regular marriage, dower formed a part of the marriage contract. In some cases the guardians of the girls used to take the dower for themselves. Imputation of unchastity used to deprive a woman of her dower. Husband's power as regards divorce was unrestricted. He could divorce his wife as many times as he liked and could contract fresh alliance of marriage with her every time. Even on pronouncement of divorce, it depended on his discretion whether the marriage was dissolved or not.<sup>1</sup>

It strictly abrogated the last three forms of marriage. Prostitution was abolished. Temporary marriage (*muta*) was forbidden after the tenth year of *Hijra*. Polygamy was restrained by a *Qura'nic* injunction limiting the number of wives up to four at a time with a note of caution: "If you (husband) cannot deal equitably or justly with all, you shall marry only one", a condition which is practically impossible to comply with. Ill-treatment of wife is strictly prohibited and where she is habitually ill-treated, she has the right of obtaining a divorce. Wilson opines: "According to the special needs of his time and country, Prophet was a very earnest champion of woman's rights."

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<sup>1</sup> See Abdul Rahim, *Muhammadian Jurisprudence* (1912), pp. 32-35.

In India, as already observed, the status of women suffered a socio-legal and cultural setback resulting gradually in loss of their freedom and decline in their education. This caused erosion in their personality and lowering their status. Evils like child marriage, polygamy, female infanticide, *sati* and exclusion of women from succession to property cropped up. Social inhibition and discriminatory practices continued during the British Raj. However, nineteenth century saw social reform movement and considerable awakening against social evils. With the intensification of freedom movement, the social scenario started changing. The national celebrities who were also the champion of women's equality motivated the women folk to get into the mainstream of national life. The period of British subjugation turned out to be an era of social reform. Multitudes of woman organizations sprang up to enhance women's cause through education and employment opportunity.

The framers of the Indian Constitution ushered in a new era for the Indian women who were accorded an equal status with men and a place of honour and dignity in the society. The Constitution envisaged the ideal of equality in its preamble which was elaborated in several provisions of its parts dealing with Fundamental Rights, Directive Principles of State Policy and Fundamental Duties. The fundamental law also prohibits discrimination on the ground of sex. It enables the states to make special provisions beneficial to women. The Constitution also casts on every citizen the fundamental duty to renounce practices derogatory to the dignity of women.<sup>2</sup>

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<sup>2</sup> See Article 14, 15(1) (2), 16(2), 15(3) and 51 A(e) of the Constitution of India

Keeping with the letter and spirit of the Constitution, the legislations, that followed, comprised, *inter alia*, some codified personal laws of Hindu community. The sanctity and inviolability of the institution of marriage had degenerated into the instruments of women's enslavement and humiliation. Their status was sought to be restored in mid-fifties by introducing, through enactments, monogamy,<sup>3</sup> eligibility of daughter, widow and mother to inherit property along with son,<sup>4</sup> requirement of the consent of wife for adoption of a child by a married man, eligibility of a woman in child adoption, eligibility of a wife living separately to claim maintenance<sup>5</sup> and entitlement of a woman to appoint a guardian at will.<sup>6</sup> On the procedural side, the establishment of family courts facilitated speedy disposal of cases. And the appointment of women as judges has brightened the prospect of gender justice.<sup>7</sup>

The above and so many other considerations have motivated the researcher to do justice with the theme: "*Women Empowerment through Legislations in the area of personal laws: A socio-legal study of selected legislations in post-independent India*", by studying, analyzing, and suggesting the suitable yardsticks in this regard for ensuring the empowerment of women in the area of law and justice.

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

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<sup>3</sup> See Hindu Marriage Act, 1955.

<sup>4</sup> See Hindu Succession Act, 1956

<sup>5</sup> See Hindu Adoptions and Maintenance Act, 1956

<sup>6</sup> See Hindu Minority and Guardianship Act, 1956.

<sup>7</sup> See Family Court Act, 1984.

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 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.

That the primary cause of the family is purely biological is not true. To day, marriage under every religious system is not merely a response to the first instinct of men. Instead, it is a means to achieve some useful social goals like social harmony, well-being of weaker members of society i.e. women, children and aged ones, and healthy development of the human species. In view of the modern industrial age, it is necessary that there should be more consolidation and solidarity among the members of the family, and therefore, there is a need for state intervention now state is having welfare orientation.

As already stated, the present work is an attempt to analyze the various protective enactments concerning married women under the existing four major family laws (Hindu, Muslim, Christian and Parsi) with a view to examining how far these legislative measures ensure remedies in the marital life of the spouses. It reveals that prior to Independence, the *Shastric* laws of marriage, succession, etc. were heavily found 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 do 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.

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'. At relevant places in the present study, the scope of improvement is pin-pointed by the researcher.

## **REVIEW OF LITERATURE**

Several books, journals, articles, judicial decisions and juristic works which are available in different libraries on the topic, have been reviewed out of which numerous materials referred in the Bibliography have been studied and conclusion has been drawn in this regard. Apart from these materials available on different websites has also been taken into consideration while preparing the synopsis of the thesis.

## **RESEARCH HYPOTHESIS**

The proposed research project plans to tackle the following questions hypothetically. Thus in the area of personal laws the Hindu law was given a sweeping face-lift in mid-fifties. The Parsi law has been amended in 1988 and has been brought almost at par with the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955.

The law of divorce of the Christians is still based on the English statute of 1857. I find a very outmoded law of divorce for the Christians. A few years ago an attempt was made to re-enact and consolidate the Christian family laws, but the move was strongly opposed by the orthodox bishops and was, therefore, dropped. Thus Christian divorce laws still remain extremely uncharitable to the Christian wives. Time and again pleas were made for its reform which had gone unheeded so far.

Considering from the above view points, the present attempt includes, in the main, the following selected enactments of post independent of India empowering women for critical analysis:

1. The Special Marriage Act, 1954.
2. The Marriage laws (Amendment) Act, 1976.
3. The Dowry Prohibition Act, 1961.
4. Maternity Benefit Act, 1961.
5. Equal Remuneration Act, 1976.
6. Family Courts Act, 1984.
7. The indecent Representation of women (Prohibition) Act, 1986.

8. The commission of Sati (Prevention) Act, 1987.
9. The National Commission for women Act, 1990.
10. The Muslim Women (Protection of Rights on Divorce) Act, 1986.
11. The Hindu Marriage Act, 1955.
12. The Hindu Adoption & Maintenance Act, 1956.
13. The Hindu Minority and Guardianship Act, 1956.
14. The Hindu Succession Act, 1956.
15. Indian Divorce Act, 1869.
16. Criminal Procedure Code, 1974
17. Christian Marriage Act, 1872

Obviously the study extends over varieties of laws and enactments, among religious and secular, substantive and procedural codified and uncodified- directly and indirectly connected with the women empowerment. In fact, these apart, there are a few more laws and enactments dealing with personal laws nevertheless only laws with wider scope of application have been considered and discuss critically. Those with limited scope have not been included for the purpose of this thesis.

## **RESEARCH METHODOLOGY**

To accomplish the task, the researcher has utilized the following libraries:

Library of Indian Law Institute, New Delhi; Supreme Court Library, New Delhi; Sapru Library of New Delhi; Library of Faculty of Law,

B.H.U., Varanasi; The Library of Law Seminar, Faculty of Law A.M.U., Aligarh; The Library of Dr. Ambedkar Chair of Legal studies and Research, Department of Law, A.M.U., Aligarh; Maulana Azad Library, A.M.U., Aligarh; Library of Department of Sociology, A.M.U., Aligarh; Library of Department of Advance Study and Research of the Department of History, A.M.U., Aligarh; Library of the Department of Political Science, A.M.U., Aligarh, Library of Nadwatul Uloom, Lucknow, Library of Devband, Saharanpur, Library of Parliamentary Studies, New Delhi have been duly utilized for the purpose of this thesis.

Research methodology is treated to be effective tool to achieve the result. In process of the present study and research, the 'Doctrinal Research Methodology' is adopted focusing on materials available in different libraries. It is a library based research relying on leading libraries of our country dealing with books, treatises, journals, Acts, legislations, enactments, commentaries, approaches of social reformers, social activists and social scientists.

## **RESEARCH PLAN**

Introduction apart, the total attempt in the shape of the present work has been divided into four parts namely: Part-I Women Empowerment in Personal Laws: Conceptual Analysis. An attempt on conceptual analysis of women empowerment has been made in Chapter-1. Women and Personal Law Systems in India are discussed in Chapter-2. Empowerments of women under personal laws in India are explained at length in Chapter-3. Empowerments of Women through different religious systems are discussed in Part-II under the



following chapters: Chapter-1 Marriage, Chapter-2 Dissolution of Marriage, Chapter-3 Succession, and in Chapter-4 Maintenance. In Part-III Empowerment of Women through legislations in post-independent India: Evaluation of relevant legislations are explained under Chapter-1 Hindu Women, Chapter-2 Muslim women, Chapter-3 Christian Women and in Chapter-4 Parsi Women. Selected Acts empowering women in post-independent India are critically analyzed in Part-IV like the Special Marriage Act, 1954, the Marriage laws (Amendment) Act, 1976, the Dowry Prohibition Act, 1961, Maternity Benefit Act, 1961, Equal Remuneration Act, 1976, Family Courts Act, 1984, the Indecent representation of women (Prohibition) Act, 1986, the Commission of Sati (Prevention) Act, 1987, The National Commission for Women Act, 1990 and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Under the caption of 'Concluding Remarks and Suggestions', the academic exercise and research venture have been done pin-pointing the outcome of the study alongwith possible solutions which the researcher finds appropriate within the framework of this study.

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 21<sup>st</sup>

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, policy makers, 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.

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 become 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*,<sup>8</sup> 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*,<sup>9</sup> 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

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<sup>8</sup> AIR 1979 SC 1868

<sup>9</sup> AIR 1969 Ori. 237

Ali in *Air India v. Nargesh Meerza and others*,<sup>10</sup> 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.

Article 23 of the Constitution prohibits traffic king 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.

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.

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<sup>10</sup> AIR 1981 SC 1829

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.

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

- (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".<sup>11</sup>*

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 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

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<sup>11</sup> 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.

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.

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,<sup>12</sup> 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.<sup>13</sup> Perhaps it was based on the notion of sound public policy and natural justice.<sup>14</sup> The relief emanates from

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<sup>12</sup> "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 (Sunday number) 1 September, 1996.

<sup>13</sup> Paras Diwan, The Modern Hindu Law (1976), p. 164.

<sup>14</sup> R.K. Agrawala, Matrimonial Remedies under Hindu Law, (1974), p. 10, Mohammad Shabbir, Muslim Person law and judiciary (1988) p.

the concept of 'consortium'<sup>15</sup> and was extended to both spouses,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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 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.<sup>19</sup>

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

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<sup>15</sup> A.A.A. Fyze, *Outlines of Muhammedan Law* (edn. 4<sup>th</sup>) p. 121.

<sup>16</sup> K.P. Saksena, *Muslim Law as Administered in India and Pakistan*, (1954), p. 207.

<sup>17</sup> *Kateeram Dokanee v. Mst. Gendhenee*, (1875) 23 Soth WR 178.

<sup>18</sup> *Supra* note 62.

<sup>19</sup> *Ibid.*

in this law.<sup>20</sup> 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 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.

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.<sup>21</sup> On independence, Indian Parliament passed the Dowry Prohibition Act in 1961, which was

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<sup>20</sup> *SC Selvaraj v. Mary*, (1958) 1 MLJ 289, *Ms. Jonden Diengdeh v. SS Chopra*, AIR 1985 SC 935.

<sup>21</sup> Pradyumna Arora; 'Pakistan: The Dowry and Bridal Gifts (Restriction) Act, 1976'. *Islamic and Comparative Law Quarterly* (Vol. II:1) 1982, p. 73.

amended in 1984. It applies to all communities. In 1967 the Pakistan 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.<sup>22</sup>

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."*<sup>23</sup>

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.

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<sup>22</sup> Paras Diwan: Notes & Comments, Dowry Prohibition Law, JILI (vol. 27: 4) 1985.

<sup>23</sup> Law Commission of India, Ninety-First Report (1983)

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.