

Part-III

**EMPOWERMENT OF WOMEN THROUGH LEGISLATION IN
POST-INDEPENDENT INDIA: EVALUATION OF
RELEVANT LEGISLATIONS**

Chapter-1:
Empowerment of Hindu Women in
Post-Independent India

Chapter-1

EMPOWERMENT OF HINDU WOMEN IN POST-INDEPENDENT INDIA

1.1 INTRODUCTORY REMARKS

At the time of Independence before the Constitution of India came into force, some reforms in the State of law were carried out by the British rulers at the instance of Indian social reformers like Raja Ram Mohan Roy. The concept of the women being dependent, powerless and needing a charitable consideration rather like dumb animal who on humanitarian grounds, must not be mistreated, was still holding ground. This is despite some great men and women who worked as equal and comrades and considered each other so, in the Freedom movement itself. It is observed that:

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 some legislations concerning women. Some significant ones are: Act of Woman's Legal Rights, 1952; the Suppression of Immoral Traffic in Women and Children Act, 1954; the Special Marriage Act, 1954; the Hindu Marriage and Divorce Act, 1956; the Hindu Minority and Guardianship Act, 1956; Intestate 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, 1961¹

¹ Neelanrt Upadhayay and Rekha Pandey: "Women in India-Past and Present", p. 41, First Published, 1990.

In post-Independence India, the Legislature took a more positive attitude in the matter of law reform and undertook to enact some of the measures which the British administrators were hesitant to undertake. The Hindu legal system was based on a rigid caste system. The caste system however, broke down, and came to be regarded as an anachronism, in course of time, as result of the release of new political and social forces. People began to think in a limited way in terms of a classless and casteless society. As a consequence, many old principles of Hindu law perpetuating the caste system needed to be done away with. The Hindu Marriage Validity Act, 1949, constituted a great step in this direction. It came to validate inter-caste marriages.² Before 1949, there was some confusion on the point and a few High Courts declared such marriages void.³ The Act of 1949 removed this confusion and declared such marriages as valid and thus sought to help in the consolidation and integration of the Hindu society. It was no doubt a step forward towards the evolution of a casteless society which is the great need of the day in India.

The Constitution of India came into force in 1950 guaranteeing Indian citizens and non-citizens certain basic human rights as fundamental Rights. Article 14 of the Constitution of India guaranteed every person, equality before the law and equal protection of law within India. Article 15 of the Constitution prohibited discrimination against any person on grounds of religion, race, caste, sex, place of birth or any of these. Article 15(3) state that nothing in this Article shall prevent the state from making any special provision for women and children.

² M.P. Jain: "Outlines of Indian Legal History", p. 603, 3rd Ed., 1972

³ *Pudiava v. Pavanasa*, ILR 1922 Mad 949; *lakshmi v. Kalian Singh*, 2 Bom. LR 128; *Padam Kumari*, ILR 1906 All. 458; *Gopikrishna v. Mt. Jaggo*, 63 IA 295.

Article 16(1) of Indian Constitution guaranteed equality of opportunity in matters of public employment for all citizens. Article 16(2) states that no citizen shall on grounds of sex, among other grounds, be ineligible for, or discriminated in respect of employment or office under the state. Under Article 19 of the Constitution the fundamental rights ensured that every citizen of India would be allowed to live, speak, write, work and travel, all over India, provided that these activities do not amount to criminal activity. It may be thought that these rights coupled with Articles 14, 15 and 16 would fully protect the rights of women. Article 25 of the Constitution allows freedom of religion has been interpreted to mean that religious custom, even if blatantly discriminating against women, will take precedence over other civil laws, particularly in two areas: 1. Marriage and the family structure, 2. Ownership of property.

1.2 HINDU MARRIAGE

The position of Hindu women in Post-Independence India under Hindu Law is improved. In a family she has the place of honour. A Hindu can not have more than one living wife. In 1955, Hindu Marriage Act was passed under which following relevant provisions have been made:

According to the Hindu Marriage Act, 1955, a marriage between two Hindus is void, if either party has a spouse living at the time of the marriage⁴ or the parties are within the degrees of prohibited relationship, or the parties to the marriage are sapindas to each other. The prohibition extends to the existence of a common lineal ancestor upto the three degrees on the mother's side and upto the five degrees

⁴ Sarla Mudgal (Smt.) President *Kalyani & Others v. Union of India & Others*, (1995) 3 SC 635 (648, 651).

on the father's side. However, the law recognizes custom which permits marriage within the prohibited degree. This will safeguard marriage permitted in southern India of first cousins or maternal uncle and niece. Where there is no such custom, the marriage is void.

Another important ground of marriage is age. However, a marriage performed in violation of the age requirements is still valid; it is neither void nor voidable. The only special provision applicable to women is the option of puberty. That is, the women, if married when a minor, can repudiate the marriage before she attains 18 years irrespective of whether the marriage is consummated or not.

The Hindu Marriage Act and the Child Marriage Restraint Act, 1929 provide for some punishment for such marriage. Section 18 of the former provides that anyone who procures a marriage for himself or herself in contravention of sec. 5(iii) of the Hindu Marriage Act 1955 may be punished with simple imprisonment of upto 15 days or fine extending upto Rs. 1000 or both.

Under the Child Marriage Restraint Act, 1929 if a male above 18 years and below 21 years marries a girl below 15 years he is liable for simple imprisonment and fine as specified under the Hindu Marriage Act, 1955. A male above 21 years of age marrying a girl below 15 years is punishable upto 3 months simple imprisonment and also liable to fine.

Some previously prohibited marital alliances are now recognized in law. inter-caste marriage is now valid.

Under the Hindu Marriage Act, marriages between a Hindu and non-

Hindu (outside the four main religious communities of Hindus) is not possible and such a marriage will be invalid. If performed in India such marriages will be valid under the Special Marriage Act, 1954.

A marriage brought about by force or fraud may be annulled by the party whose consent to the marriage has been obtained by fraud or force. For instance, if a girl is forced or fooled into marrying a man by the actions of her father, she may apply for a decree that the marriage is invalid. The petition being presented within one year of the discovery of fraud or cessation of force. The petitioner must not have with her consent lived with the respondent as wife after the discovery of fraud or cessation of force. A marriage may also be annulled when it is not consummated, or if either party is not capable due to either mental or physical infirmity or deficiency, to perform the marriage, i.e. coitus. If either party has been mentally incompetent to consent to the marriage at the time of its solemnization, being either lunatic or idiot, the marriage is voidable. If a woman is pregnant by a third party, i.e. not the bridegroom, and the groom is in ignorance of this at the time of marriage, the marriage is voidable. The difference between a void and a voidable marriage is:

1. A void marriage is considered never to have existed, whereas a voidable marriage requires the decree of a court to declare it so, without which the marriage is binding on both parties.
2. The wife in a void marriage can not claim maintenance but a wife in a voidable marriage can do so.
3. Neither party has any rights or duties to the other in a void marriage. In a voidable marriage, however, until a competent

court has declared it so, the couple owes each other the obligations of any normal marriage. Thus a fresh marriage may legally be performed if a marriage is void but not if it is voidable.

By the marriage laws amendment Act, 1976, the Hindu Marriage Act lays down that the children of annulled voidable marriages and children of void marriages (whether declared void or not) are legitimate children. This confers legitimacy on those marriages which are void under section 11 of the Hindu Marriage Act.

If the marriage is void for any other reason such as due to lack of proper ceremonies then such children will continue to be illegitimate. The children of such marriage are heirs to their parents alone.

Section 13 and 14 of the Hindu Marriage Act deal with divorce. Section 13 of the Act states that adultery and cruelty are each sufficient grounds for obtaining a divorce. Cruelty need not be physical, and apprehension of damage to body or mind or health is also termed cruelty under this section. Menial cruelty must be such that it has adverse effects on the petitioner's health, or can be proved to have such effects in future.

Divorce may be obtained if either spouse has deserted the petitioner for a continuous period of not less than two years immediately preceding the petition, if the respondent has converted to another religion or is of either incurably unsound mind or has been suffering continuously or intermittently from mental disorder so that the petitioner cannot reasonably be expected to live with him or her. Incurable or virulent leprosy, venereal disease in a communicable form and renunciation of

the entering any religious order are grounds for divorce or should one spouse be missing for a period of seven years, without those who should normally hear of his or her existence having knowledge of it. Petition for decree of divorce may be presented by either party if there is no presumption of cohabitation within one year of a judicial separation or of a decree for restitution of conjugal rights.

Prior to 1976, there were two additional grounds of divorce for wife under Section 13 (2) of the Hindu Marriage Act. Now two more have added and there are four grounds as given below; viz:

1. Remarriage of the husband during the existence of a 1st marriage i.e. a wife living. Any wife (former or latter) of the polygamous marriage may seek divorce on this ground.
2. Husband guilty of rape, sodomy and bestiality. After 1976 two more grounds were added.
3. No cohabitation after maintenance was granted.
4. Repudiation of Marriage by the wife if she was married before 15 years of age.

The repudiation must be before she attains 18 years of age.

If the parties have been living separately for one year and state that they are unable to live together and that they mutually agree to the divorce, the marriage is dissolved.

Petitions for divorce may not be filed in the first year of marriage unless the petitioner is suffering extreme hardship, due to the extreme depravity of the other partner. Even if the grounds for relief exist,

relief may not be granted if the grounds in any way take advantage of the petitioner's own wrong doing. Therefore, if both partners are adulterous, neither is eligible to file for divorce citing adultery as cause.

The petitioner may not file for relief on grounds he or she has condoned. If for example after suffering violence from a husband, a wife willingly engaged in sexual intercourse, she is considered to have condoned the violence and may not demand relief.

The right of husband or wife to demand the return of an absent spouse has been upheld time and again. Upon filing a petition that against the express wishes of one spouse, the other is living apart, with no reasonable opportunities or conducting a normal sexual married life, the absentee spouse may be given a court order to return to the marital home. Failure to comply for a period of one year from the date of order is sufficient ground for divorce.

There is demand for deletion of section 9, Hindu Marriage Act, which has not been accepted till date.

Judicial separation is a decree whereby a husband and wife are not required to cohabit. They remain legally bound in marriage in other respect. One year of judicial separation is sufficient ground for divorce.

Daughters have equal right as sons to their father's property. Daughters also have a share in the mother's property. They have a share in the ancestral property under Section 6 of the Hindu Succession Act. When unmarried, they have rights to shelter in the parental home,

maintenance according to the income and status of their family and the right to have their marriage expenses paid out of the assets of the joint family.

A married daughter has no right to shelter in her parents house, nor maintenance, charge for her being passed on to her husband. However, a married daughter has a right of residence if she is deserted, divorced or widowed.

A woman has full rights over any property that she has earned or that has been gifted or willed to her, providing she has attained majority. She is free to dispose of her property, gift or will as she thinks fit.

A married woman has exclusive right over her stridhan property. Unless she gifts it in part or wholly to anyone, she is the sole owner and manager of her assets whether earned, inherited or gifted to her.

Regardless of her income the wife is entitled to maintenance, support and shelter from her husband, or if her husband belongs to a joint family, then from the family.

On partition of a joint family estate, she is entitled to a share equal to any other heir. Similarly, upon the death of her husband she is entitled to an equal share of his portion, together with her children and his mother.

She is entitled to maintenance from children. She is also a class I heir. All property owned by her may be disposed by sale, will or gift as she chooses. In case she dies intestate, her children, inherit equally, regardless of their sex.

Only a Hindu may adopt another Hindu under certain conditions. No persons of any other religious persuasion are entitled either to adopt or to be adopted.

An adult Hindu either male or female may adopt a child of either sex provided that he or she has no child of the same sex. The following provisions made in the Hindu Adoption and Maintenance Act, 1956 must be observed.

A major Hindu male of sound mind can adopt. He may be a bachelor, widower, divorcee or married person. For a married Hindu male consent of wife is necessary except:

1. if the wife has ceased to be a Hindu.
2. has renounced the world.
3. if she has been declared by a court of competent jurisdiction to be of unsound mind.

A Hindu unmarried woman, widow or divorcee has capacity to adopt. But a married woman cannot adopt except:

1. if her husband has ceased to be a Hindu.
2. if he has renounced the world.
3. if he has been declared to be of unsound mind by a court of competent jurisdiction.

A son may be adopted only if the adopter has no living Hindu son, grandson or great grandson, through the male line of descent. A daughter may be adopted if there is no daughter in the family. In

case of adoption of a girl, it is not permitted if the adopter has a living Hindu daughter or a grand-daughter through his son.

Consent of the spouse is necessary to validate an adoption.

In case of an adoption of a person of the opposite sex to the adopter, the age difference must be at least 21 years. That is a woman adopting a male must be 21 years older than him and so with a man adopting a female.

A guardian can exercise the power of adoption only if:

1. Both parents are dead.
2. If parents have renounced the world.
3. Parents have been judicially declared to be of unsound mind.
4. If parents have abandoned the child.
5. If parentage of the child is not known as in the case of a founding or refugee child.

The term guardian includes De jure and De facto guardian. Thus a manager, secretary or any person incharge of an orphanage or a person who has brought up the child or under whose care the child is, can give the child in adoption with the permission of the court.

An adoption may occur only when the natural parents or guardians of the adoptee give over the adoptee to the adoptive parents and the adoptive parents accept the adoptee. Without the consent and participation of the natural parents or guardians, if there are no living or responsible parents, the adoption is held to be void. A valid adoption may not be cancelled by the adoptee, his or her natural parents or his

or her adoptive parents.

The adopted person subject to certain conditions has the same right to maintenance and inheritance as any natural child. Any children of the adopted child have the same status as natural grand-children.

Adoptive parents have the same rights to maintenance in case of age or disability as do natural parents, from the child. Property rights, during the lifetime or in disposal by will, remain with the parents, as per the Hindu Succession Act.

Natural parents have rights only upto the time of the adoption. They may exercise their rights in refusing to surrender the child of adoption. However, once the adoption has occurred, the natural parents have no rights over the child.

Adoption is not permitted except of Hindus by Hindus. In the event that an adult of any other religious persuasion desires to concern himself or herself with the upkeep and well-being of a child he or she may acquire legal guardianship of the said child through a court of law. The child does not acquire the status of adoptee. Inheritance of the guardian's assets by the child can be assured only by will. In case the guardian dies intestate, the inheritance will be by normal laws of inheritance, to members of the family related by blood.

Chapter-2:
Empowerment of Muslim Women
in Post-Independent India

Chapter-2

EMPOWERMENT OF MUSLIM WOMEN IN POST-INDEPENDENT INDIA

2.1 INTRODUCTORY REMARKS

As regards the position of the Muslim women under Muslim law is concerned the fact is that the Muslim law has not yet been codified. In a modern society, where at least in theory, the position of women is accepted as equal it is observed that the provisions, like in most other Personal Laws are grossly inadequate.

2.2 MUSLIM MARRIAGE

The Muslim marriage is a contract between two parties of different sexes who agree to cohabit on certain terms.

The ceremony of "*nikaah*" binds the two together, unless a divorce takes place, for life. In Sunni law, the ceremony must occur in the presence of two witnesses, if it is to be valid. The presence of witnesses is not a prerequisite in Shia law. Both parties must agree to be married though, in the case of the bride, silence is interpreted as consent. Divorce is an integral part of Muslim law, as is the provision for more than one wife. Though advised against, it is accepted in religion and in Indian law that a man may have upto four wives. If he marries a fifth time, while still being married to four other women, the marriage is not void, but irregular. It may be rectified by divorcing any one of the other wives at a date later than the performance of the fifth ceremony.

Mehr is the dower or form of bride price paid by the man to the woman he marries. It is meant to protect her in case of abandonment in favour of other women, divorce, or neglect by maintaining her. According to Sunni law, if the time and mode of payment have not been specified, it is deemed payable promptly, in part, and partly deferred, the proportion of each payment being regulated by various factors such as custom, amount of dower and status of the parties. Shia law, however, regards dower as payable promptly, unless otherwise specified.

Apart from cohabiting with her husband under all normal and acceptable conditions, and his right to demand obedience from her, a Muslim woman is bound to observe purdah in accordance with the social position of the parties and local custom.

She is entitled to maintenance from the husband in a manner suitable to his economic status, regardless of her own wealth. She is also entitled to an equal share of his company and equal treatment in all respects to his other wives. She is also entitled to dower and residence at his house. She does not lose her identity, but is at liberty to deal with her property independently.

Upon death or divorce, she is bound to observe *iddat*, for duration of three courses i.e. she may not marry or engage in sexual activity for three menses. In case she is pregnant, this period extends to the duration of her pregnancy or for four months and ten days, whichever is longer.

A *muta* marriage is fixed term marriage, which, to be valid require both the specification of the duration of the marriage and the payment

of a fixed sum as dower or *mehr*. In case the period is not specified, it may be assumed that the ceremony is binding in the same way as a "nikaah" or marriage for life. This form of marriage is practiced only by the Shiite Muslims. The parties have no mutual rights of inheritance though the children are legitimate and have full rights of inheritance from both parents. In case cohabitation occurs after the expiry of the period contracted, children are still accorded legitimacy.

The marriage of Amina, a minor girl of 10 Years age, with Shekh Yahya Al Sagish, an old person of 60-65 year's age is a glaring example of the exploitation of Indian women, which has been opposed by the Government Counsels and many women organizations all over the country.⁵

Being contractually limited in time, the marriage is automatically dissolved upon expiry of the contracted term. It may also be concluded at any time by the husband, who makes a gift of the term to the wife. If the marriage is consummated, the wife is entitled to the full dower even if the contract is prematurely dissolved by the husband, but if it is not consummated she is entitled only to half. The wife may leave the husband before the expiry of the term in which case she is entitled to a proportionate part of the dower. Even in the case of fulfillment of term or the existence of children, the wife has no right to maintenance. A woman married in the *muta* form is not entitled to maintenance under the Shia Law. But it has been held that she is entitled to maintenance as a wife under the provision of Sec. 125 of the Criminal Procedure Code.

⁵ See "India Today (Hindi)" Dated 15.9.91 , p.39, "Political and Law Times", December-January Combined Issue, Year-2, Issue-1, pp. 10-11.

Either party may terminate an irregular marriage either before or after consummation. Before consummation the wife has no legal status. After consummation the wife is entitled to dower either as specified or as suitable, whichever is less, and is bound to observe *iddat*, either on divorce or upon death. Though the children have full rights of inheritance there are no mutual rights of inheritance between husband and wife. The husband is not permitted to sue for restitution of rights in such a marriage nor may the wife sue for maintenance.

Irregular marriages are those where the prohibition is temporary. These include marriages contracted without witnesses, marriage with a fifth wife, with a woman undergoing *iddat*, with a woman of a prohibited religion i.e. who is Christian, Jew, or Hindu or one with such a husband, or a marriage with a woman prohibited by lawful conjunction. In all these cases, they are removed either with passage of time, as in the expiry of the *iddat* or by divorcing the wife who constitutes the obstacle, or by the conversion of one party to the Muslim religion.

Consanguinity, affinity and fosterage are the only grounds which make void a Muslim marriage. Fosterage is the relationship established by a woman nursing child to whom she has not given birth. In a void marriage, husband and wife have no claims whatsoever on each other, nor are the children granted any status in law. Women may not marry more than one man at any time. She is liable to criminal action under Indian Penal Code, Sec. 494. Nor may a marriage occur between a pregnant woman and a man who has not caused the pregnancy.

2.3 DIVORCE

A Muslim woman may sue for divorce in the event that her husband changes his religion:

According to the Dissolution of Muslim Marriages Act 1939 the following grounds of divorce are also available to the woman:

1. The husband is missing for a period of 4 years.
2. Husband failure to maintain the wife for a period of 2 years.
3. Imprisonment of the husband for a period of 7 years.
4. Husband's failure to perform marital obligations for a period of 3 years.
5. Husband's impotency.
6. Husband's insanity, leprosy or venereal disease.
7. Option of Puberty by wife
8. Cruelty by the husband.
9. Any other grounds, recognized by Muslim Law.

A wife can sue for divorce on the ground that her husband has falsely hanged her with adultery. Also, in case the contracted payments are not made by the man to his wife, the contract itself stands as a document for divorce.

1. Divorce by husband

The Word 'Talaq' means 'to release the wife from the contract of Marriage'.

The following are the forms of Talaq by husband:

- (i) Approved form or revocable form - Talaq Sunna.
 - (a) Ahsan-consists of one single pronouncement during the period of purity followed by abstinence can be revoked during the period of *iddat*.
 - (b) Hassan-consists of 3 successive pronouncements during 3 consecutive periods of purity. The 3rd pronouncement operates as a final and irrevocable dissolution of marriage.
- (ii) Disapproved or Revocable form of Talaq-Talaq-e-*Biddat*-3 pronouncements in a single sentence-triple divorce.
- (iii) Talaq-e-Tafwid—The husband delegates his own right of pronouncing divorce in favour of a 3rd person or his wife.

2. Divorce by Mutual Consent

Under Muslim law, a divorce may take place also by mutual consent of the husband and wife. It may take place any time whenever the husband and wife feel that it is impossible for them to live with mutual love and affection as is desired by God. A divorce by mutual consent of the parties is a unique feature of Muslim law. Under Hindu Law there was no such provision before 1976. At present Section 13-B of the Hindu Marriage Act, 1955 provides for the same. There are two forms of divorce by mutual consent: (i) *Khula* and (ii) *mubarat*.

(a) Khula

Literal meaning of the word *Khula* is, "to take off the clothes". In law, it means divorce by the wife with the consent of her husband on

payment of something to him. Before *Islam*, the wife had no right to take any action for the dissolution of her marriage. But in *Islam*, she is permitted to ask her husband to release her (as he puts off his clothes) after taking some compensation. *Quran* lays down about *Khula* in the following words:

*"..... and if you fear that they (husband and wife) may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband)."*⁶

In the leading case *Munshree Buzlul Raheem vs. Luteefutoon Nissa*,⁷ the Privy Council described a *Khula* form of divorce as under:

"A divorce by Khula is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and, the wife may, as the consideration, release her dynmahr and other rights, or make any other agreement for the benefit of the husband."

Thus it may be concluded therefore, that *Khula* is a divorce by common consent but the wife has to make the payment of some consideration to the husband because she takes the initiative for dissolution of the marriage such consideration may be in form of waiving the right to receive 'mahr'.

(b) Mubarat

Mubarat is also a divorce by mutual consent of the husband and wife. In *Khula* the wife alone is desirous of separation and makes the offer,

⁶ Holy Quran; Sura II, Ayath 229

whereas in *Mubarat* both the parties are equally willing to dissolve the marriage. Therefore, in *mubarat* the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce, by *Mubarat* is the willingness of both the parties to get rid of each other, therefore, it is not very relevant as to who takes the initiative. Another significant point in the *Mubarat* form of divorce is that because both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some consideration. Thus consideration may not be an essential feature in '*mubarat*' form of divorce.

Both *Khula* and *Mubarat* are divorces by common consent but in *Mubarat* no consideration passes from the wife to the husband. The divorce by *Mubarat* is very near to the provisions of divorce by mutual agreement under Section 24 of the Special Marriage Act, 1954 or under Section 13-B of the Hindu Marriage Act, 1955 (as amended in 1976). Like *Khula*, the parties must be competent also in the *Mubarat*; their consent must also be a free and voluntary.

2.4 PROPERTY RIGHTS OF MUSLIM WOMEN

Daughters

In inheritance, the daughter's share is equal to one half of the son's keeping with the concept that a woman is worth half a man.

She has, however, and has always had full control over this property. It is legally her to manage, control, and to dispose of, as she wishes in life or death.

⁷ (1861) 8 MIA 379

Though she may receive gifts from those whom she would inherit from, there should be no doubt that the gift is a means of circumventing the inheritance laws of one third of a man's share, since, under Muslim law, the shares of inheritance are very strict.

Daughters have rights of residence in parent's houses, as well as right to maintenance, until they are married. In case of divorce, charge for maintenance reverts to her parental family after the *iddat* period (approximately 3 months). In case she has children capable of supporting her, the charge falls upon them.

Wives

In Islamic law a woman's identity, though inferior in status to a man's is not extinguished in him when she marries.⁸ Thus she retains control over her goods and properties. She has a right to the same maintenance he gives to his other wives, if any,⁹ and may take action against him in case he discriminates against her.

She has a right to *mehr* according to the terms of the contract agreed to at the time of marriage.¹⁰

She will inherit from him to the extent of one eighth if there are children or one fourth if there are none. If there is more than one wife, the share may diminish to one sixteenth. In circumstances where there are no shares in the estate as prescribed by law, the wife may inherit a greater amount by will. A Muslim may dispose of one third of his property by will, though not to a sharer in the inheritance.

⁸ See Quran (Soore Bakar, II Para, Rukoo 28, Aiyat 228, and also see Soore Nisa, V Para, Rukoo 6, Aiyat 34).

⁹ See Quran, Soore Nisa, IV Para, Rukoo 1, Aiyat 3.

¹⁰ See Quran, Soore Nisa, IV Para, Rukoo 1, Aiyat 4.

Mothers

In case of divorce or widowhood, she is entitled to maintenance from her children. Her property is to be divided according to the rules of Muslim Law. She is entitled to inherit one sixth of her deceased child's estate.

Chapter-3:
Empowerment of Christian Women
in Post-Independent India

Chapter-3

EMPOWERMENT OF CHRISTIAN WOMEN IN POST-INDEPENDENT INDIA

3.1 INTRODUCTORY REMARKS

Now I shall discuss the various provisions of personal law relating to Christian women in India. Divorce laws safeguard the interests of a divorced wife. The Indian Divorce Act, 1869 deals with dissolution of a Christian marriage. The Indian Divorce Act, 1869 and the Indian Christian Marriage Act, 1872 thus should be read together treating the Indian Divorce Act, 1869 as a supplement to the Indian Christian Marriage Act, 1872. As both the Acts were considered out-dated, the government referred the matter to the Law Commission. In the 15th Report the Law Commission recommended some changes in these two Acts. The Ministry of Law prepared a formal Bill accordingly but referred the matter again to the Law Commission for eliciting public opinion thereon. The commission obtained public opinion and submitted 22nd Report in 1961 for thorough revision of the existing Acts. Accordingly, a bill entitled the Christian Marriage and Matrimonial Causes Bill was presented in the Parliament in 1962. However, when the parliament dissolved that Bill also lapsed.

3.2 CHRISTIAN MARRIAGE

Indian legislature had modernized many other family laws on marriage and divorce, but has left these Christian laws untouched. It is interesting to note that the legislature intended the Indian Courts to "act

and give relief under the Indian Divorce Act in conformity with "principles and rules" followed by the courts for Divorce and Matrimonial Causes in England (vide s.7). But then, the English Matrimonial Causes Act have since been overhauled quite a number of times. The principles currently followed by the English Courts on the basis of their thoroughly amended laws cannot be fitted in with the aforementioned antiquated statutory laws of India. This sometimes gives rise to awkward situations. In this connection the case of *R. Hemlatha v. R. Salyanandam*¹¹ may be cited. A Christian Wife prayed for divorce in the district court of Warangal on the ground of the husband's cruelty and desertion. Almost all the modern statutes incorporated these grounds for obtaining divorce. The district court of Warangal also granted divorce on these grounds. The special Bench of the Andhra Pradesh High Court pointed out that these two grounds entitled the wife to obtain a decree for judicial separation only and as such a decree for divorce could not be passed at all. On the other hand, in a similar case *Elveena v. Gopal*¹² a Christian wife obtained a decree on the ground of the husband's adultery and cruelty. The Full Bench at Chandigarh simply confirmed the decree without making any discussion on the point contained in s. 10 of the Indian Divorce Act that the adultery simpliciter by the husband would not entitle a wife a dissolution of marriage, though this (adultery by the wife) is an important weapon in the hand of the husband to get the marriage dissolved.

Under Section 10 of the Indian Divorce Act, 1869 a Christian Wife may present a petition to the District Court or to the High Court

¹¹ AIR 1979 AP 1.

¹² AIR 1979 P & H 4.

praying that her marriage may be dissolved on the grounds specified therein. According to this section a husband can get his marriage dissolved if he can prove that his wife has, since the solemnization of the marriage, been guilty of adultery. At the same time a wife who wants to get her marriage dissolved should necessarily prove her husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman or has been guilty of incestuous adultery, or of bigamy with adultery or of marriage with another woman with adultery or of rape, sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to divorce a *mensa et toto*, or of adultery coupled with desertion, without reasonable excuse for two years or upwards. So it is evident that this section is discriminatory towards women.

In a recent case¹³ the Hon'ble Supreme Court accepting the discriminatory nature of the section 10, has observed that:

"As far as the ground of adultery is concerned it is the husband who is in favourable position as against the wife, since it is not enough for the wife to prove adultery simpliciter on the part of her husband. To that extent, undoubtedly it is the wife who is discriminated against."

The Supreme Court further observed that "For the ground of exchange of profession of Christianity by husband, the wife has also to prove that the husband has married another woman. Since, however, the husband can seek dissolution of the marriage only on the ground of adultery, the husband is not at a disadvantage as against his wife

¹³ *Anil Kumar Mohsi v. Union of India and another*, (1994) 5 SCC 704 at 707.

because a mere marriage with another man whether after exchanging the profession of religion or not, would give a ground to the husband to seek dissolution of marriage. Thus even as far as this ground is concerned it is the wife who is at a disadvantage."

It is very unfortunate that in our Modern society equality to women is far from reality while the "cruelty" is also a ground of divorce in various personal laws and enactments it has not been made available to Christian spouses. It is wonderful that inspite of slogans of emancipation and amelioration of women by our leaders "Cruelty" as a ground for divorce has not been included in the Act.

Section 18 of the Act enables a Christian wife to get her marriage declared as null and void for the reasons contained in Section 19 such as the impotency of the husband at the time of marriage and at the time of institution of the suit, the prohibited degree of consanguinity or affinity of the parties etc. More over under Section 22 of the Indian Divorce Act, the wife is entitled to obtain a decree of judicial separation from her husband on the ground of adultery or cruelty or desertion without reasonable excuse for two years or upwards. If the husband has without reasonable excuse withdrawn from the society of the wife, the latter may, under Sec.32 of the Act, apply for the restitution of conjugal rights. Sec. 57 of the Act provides for the remarriage of a person whose marriage has been lawfully dissolved.

As per the provisions in Sections 36 and 37 of the Indian Divorce Act, Christian wife is entitled to claim alimony *pendente lite* during the matrimonial proceedings and permanent alimony after the decree of divorce, from her husband. Remarriage of the wife or conversion to

another religion are prejudicial to the interests of the wife.

According to section 19 of the Indian Christian Marriage Act, 1872, the father if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

It appears unjust in the modern age when the child marriages are discouraged every where. Thus, the child marriage must strictly be prohibited and relevant important provisions must be made in accordance with the provisions of The Child Marriage Restraint Act, 1929.

According to Section 61 of the Indian Christian Marriage Act, 1872, when, in respect to any marriage solemnized under Part VI, the conditions prescribed in section 60 have been fulfilled, the person licensed as aforesaid in whose presence the said declaration has been made shall, on the application of either of the parties to such marriage, and, on the payment of a fee of four anna, grant a certificate for the marriage.

The words "fee of four anna" appears to be obsolete and inadequate, and therefore, may be substituted by "proper fee reasonably fixed by the state government".

An important aspect to be considered while dealing with the legal status of Christian women is, no doubt, the succession laws applicable to Indian Christians. The Christians in India are governed by the

Indian succession Act, 1925 with regard to the matters of intestate and testamentary succession. But the Travancore Christian Succession Act and the Cochin.

Christian Succession Act, being the law for the time being in force, in the respective localities is saved by Section 29 (Z) of the Indian Succession Act. Therefore, in the matter of intestate succession the Christians of Travancore and Cochin are governed by their own succession laws.

As per Sections 15 and 16 of the Indian Succession Act, 1925, by marriage a woman acquires the domicile of her husband if she had not the same domicile before and a wife's domicile during marriage follows the domicile of her husband. In Sec. 20 it is clearly stated that no person shall by marriage, acquire any interest in the property of the person whom he or she marries or becomes incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

The provisions regarding the rights of a widow to inherit the property of her intestate husband is contained in Sec. 33 of the Indian Succession Act. As per the relevant section, if the intestate had left the widow and lineal descendants, $\frac{1}{3}$ of his property shall belong to his widow and the remaining $\frac{2}{3}$ shall go to his lineal descendants. If the intestate has left his widow and has no lineal descendants but has left persons who are of kindred to his, $\frac{1}{2}$ of his property shall belong to his widow and the other half to his kindred. If he has left none but his widow, the whole property shall belong to his widow.

Under the Indian Succession Act, 1925 there is no discrimination

between sons and daughters with regard to the distribution of the intestate father's property. The intestate's property (after deducting the Widow's share) is shared equally among his children. In case the intestate has no lineal descendants and if father is dead, his mother and sisters also are entitled to inherit his property as per Section 44 of the Act.

In the area of Travancore State, the Travancore Succession Act, 1916 governs the majority of the Christians in the state but this law is not applicable to the Christians in Neyyathinkara who follow the Marumakkathayam law. The Act is also not applicable in it's entirely to certain Latin Catholic Christians and protestant Christians living in Trivandrum and Quilon Districts. Similarly, the Cochine Christian Succession Act, 1921 is applicable to the Christians in the former Cochin State except in the case of the Tamil Christians in Chittoor who follow the Hindu Law and the Anglo-Indian and the Parrangi Communities. In other parts of the state of Kerala, the Indian Succession Act, 1925 is made applicable.

In fact, there is no substantial difference between the provisions of the Travancore and Cochin succession Acts. In both these enactments the status of women is inferior to that of men. There is evident and unjustifiable discrimination against women. This feature has in effect, degraded these enactments as the most out-dated pieces of legislation which needs thorough and drastic change. Mere modification is not sufficient but a fundamental change is called for.

Now the question for consideration is the rights of women as per these enactments. First, let us take the case of a widow. The Travancore Act

recognizes the widow as one of the heirs of her husband with a share equal to that of a son if there is a son or the lineal descendants of a son left by intestate, and equal to that of a daughter, when there are only daughters (Section 16). She gets $\frac{1}{2}$ of the estate when there are no lineal descendants of the intestate, who leaves only his father, mother, paternal grandfather or the lineal descendants of his father or paternal grand father (Section 17).

If there are none of these kindred left by the intestate, the widow gets whole of the estate (Section 18). The widow's rights in the estate of her husband obtained under Sections 16 and 17 (not under Section 18) is only a life interest, terminable by death or remarriage (Section 24).

In the absence of father or lineal descendants the mother of the intestate is also entitled to a share equal to that of a brother.

The most controversial feature of the Travancore and Cochin Christian Succession Acts relates to the right of daughter to the property of her intestate parents. Under Section 28 of the Travancore Act, the sons and their lineal descendants shall be entitled to have the whole of the intestate's property subject to the claim of the daughter for "Streedhanam" fixed at one fourth of the value of the share of a son or Rs. 5000 whichever is less. Any Streedhanam promised but not paid shall be a charge upon the intestate property. Section 5 of the Travancore Christian Succession Act defines "Streedhanam" thus : "Streedhanam means and includes any money or ornaments, or, in lieu of money or ornaments any property, movable or immovable, given or promised to be given to a female or, on her behalf, or her husband or to his parent or guardian by her father or mother, or, after the death of

either or both of them by anyone who claims under such father or mother, in satisfaction or her claim against the estate of the father or mother". According to Section 3 of the Cochin Christian Succession Act *Streedhanam* means any property given to a woman, or in trust for her to her husband, his parent, or guardian, in connection with her marriage, and in fulfillment of the term of a marriage treaty in that behalf. So the definition of *Streedhanam* as contained in these Acts, take it outside the ambit of the Prohibition of Dowry Act, according to which it is any property or valuable security given or agreed to be given at or before or any time after the marriage in connection with the marriage of the said parties (Section-2). This was clearly laid down in Kerala High Court's decision.¹⁴

The Cochin Act gives the daughter a share along with the sons, subject to the limitation that her share shall be one-third in value of that of a son [Section-20(b)]. Anyway it is high time for the Christians of Travancore and Cochin to see that immediate and necessary legislations are undertaken to provide equal shares to daughters along with sons in the property of their intestate parents.

Christian Law of India, in its various aspects has become too outdated and irrelevant to meet the needs of the present century. This is a branch of law which deserves more systematic and critical study and research. Infact it is for the Indian Christians to take the initiative to make a move in this direction and to see that their personal law is amended in such a way as to meet the needs of the present day.¹⁵

¹⁴ 1980 KLT 353.

¹⁵ See also article on "Legal Status of Christian Women in India" published in AIR February, 1996 (Journal Section) pp. 33-39.

Chapter-4:
Empowerment of Parsi Women in
Post-Independent India

Chapter-4

EMPOWERMENT OF PARSI WOMEN IN POST-INDEPENDENT INDIA

4.1 INTRODUCTORY REMARKS

Parsi women are discriminated against by laws which have no basis in the community's religious beliefs. It has been seen how the ownership and inheritance rights of Hindu and Muslim women are affected by their respective laws. The Parsis, a community with 90% literacy, a strong hold on the industrial and professional life of the country although they are one of its smallest minority communities, have among the most unjust inheritance laws in the country today. Which, finally only goes to prove the discrimination and gender biases do not disappear with "progressive education"?¹⁶

Like Hindu and unlike Muslim law, there are separate rules for the distribution of the assets of a male and a female. The son's share of the father's property is twice that of a daughter: the widow gets only as much as any of her sons.

If the intestate's parents survive him, then the father gets half the share of the son—that is the same as the daughter. But the mother gets only half the share of the daughter. The Parsi mother is in a worse position than the Hindu mother who under the 1956 Hindu Succession Act gets a share equal to that of the widow and the children.

When a Parsi woman dies intestate, leaving her husband and children,

¹⁶ "The Law and Indian Women": A study by the YWCA of India, Printed by Madhulika's, p. 34.

the property is divided equally among the widower and children. Thus, while the son is entitled to an equal share of the mother's property along with the daughter, the daughter is not entitled to the same right when she inherits the property of her father. Mothers and daughters then are the worst sufferers in this community.

4.2 PARSI MARRIAGE

A Parsi woman is afforded no protection against arbitrary decision either-for where as in Muslim law a father cannot disinherit his wife or daughter-he can only will away one eighth of his property according to his wishes—a Parsi male is not bound by any such restriction.

Women are discriminated against even in the final application of such unsatisfactory laws. Parsi law in India applies to three categories of Zoroastrians—persons de-seconded from the original Persian emigrants, born of Zoroastrian parents; children of Parsi fathers by non-Parsi. Women who have been admitted to the Zoroastrian religion; and finally Zoroastrians from Iran, permanently or temporarily residing in India.

Children of Parsi women married to non-Parsis have no rights, as under Parsi law they are not considered Parsi. There is no satisfying explanation for such gross bias.

Priests, Scholars and lay people, all that they can offer are unscientific conjectures about the superior hereditary genes of the male and the like.

The Bombay High Court in 1909 in the case of "*Sir Dinshaw M. Petit*

*v. Sir Jamesetji Jijibhai*¹⁷ held that the right of a non Parsi woman was to adopt the faith of her Parsi husband—it was assumed that a woman would have to accept the religious faith of her husband. In other words a Parsi woman who marries a non-Parsi would have to follow her husband's faith and bring up her children according to his wishes. The definition itself was arrived at with little debate, by an order of court. At the root of such discrimination itself lies the Parsi's fear of losing their distinctive ethnic identity. For theirs is a race which has survived in this country since the seventh century and whose religion was established 1300 years before Christianity. At present, however, they ran the risk of extinction.

Parsi personal law is also based on Hindu custom and the rules of English common law. The first Parsi migrants were allowed to stay in the kingdom of Jadi Rano on the west coast of India on the strict condition that they would adopt the language and some of customs of the State and that they would not convert this people to their faith.

Being so ancient, there is little documentation of legal system governing the Parsis when they first landed in India. But they took on Hindu customs and institutions like the panchayat for administration of their affairs. Priests had the final say in all religious matters.

With the colonization of the country by the British, the Supreme Court of Judicature said in 1773 that Muslims should be governed by Muslim law, Hindus by the *Shastras* and smaller communities like the Parsis should be governed by English civil law, as it was assumed that the latter's laws had no religious identity.

¹⁷ 11 Bom. LR 85 at 128.

This, however, applied only to the three Presidency towns of Bombay, Calcutta and Madras. Elsewhere the Diwani Adalats established by Warren Hastings in 1772 as the highest civil courts of the districts, continued to apply the personal laws of every community in matters of inheritance, marriage and religion on the basis of "Justice and equity". This sort of quality raised the expected problems, and women suffered in both town and country. In the presidency towns the English statute of distribution meant that Parsi widows got just one third of the estate and the residue was divided equally among the children and their descendents. The English common law rules prevailing at the time meant the married women had no right to hold or dispose of any property during coverture.

The mofussil Parsis, following Hindu custom, excluded Parsi women from a share in the estate of the male. They were given only rights to maintenance and adoption. This state of affairs continued till a prospective male heir challenged the testamentary powers of property disposal by a Parsi father, which according to the English statute of Mortmain allowed the latter, if he so desired, to donate his entire property to charity.

Finally, in 1955 after much discussion, a Parsi Law Association was created to make a thorough study of Parsi custom and put forward legislative proposals. Two statutes were enacted in 1965 namely The Parsi Marriage and Divorce Act and the Parsi Intestate Succession Act, 1936. The succession Act was re-enacted in Chapter III, Part V, of the Indian Succession Act, 1925, and finally, modified by an Amendment Act in 1939.

There were not women on any of the panels which made the legislative

recommendations. In fact, the final statutes were enacted by a Parsi Law Commission headed by an English judge of the Bombay High Court.

Whereas in 1939 these rules conferred better rights to women than existing Hindu and Muslim law, with the passage of time they have gone out of step with progressive social trends.

Why an educated, outwardly emancipated Parsi woman tolerate such inequity is hard to comprehend? Many of course were ignorant of the law until it actually applied to them. In the smaller towns of Gujarat, for instance, even today there have been recorded instances of Parsi women being deprived of their legitimate share in the estate of their fathers and husbands. They have accepted all simply because they are ignorant of the fact that the laws have changed now.

Parsi women also share the fear of extinction of community and most of them have resisted changes in their personal law. Those who have not too preoccupied with the trauma of "expulsion" from the community which is the fate of all those women who marry people of other religious denominations—to organize protest.

But the first time they did and they were successful. This was in 1981, when practising Zoroastrian women married to non-Parsis were denied the right vote in their community's local elections unless they submitted a written affidavit stating that they "practised" the Parsi faith. They appealed to the court to prevent such humiliation. As more Parsi women join the mainstream of dissent and protest and it is expected that they will find the support needed to stir their community from its present stagnancy.