



WOMEN AND LAW

By *Rishabh Shukla*

From *Indore Institute of Law*

ABSTRACT

Gender justice a bone of contention cover subject of wide variety and remains a key factor in prosperity of any civilization.

The research though purports to describe the transition which has taken place in law concerning women and at the same time contemplate the result on women per se. Each point is contextualized to depict its impact on contemporary time and state of rights conferred on women.

What usher in a change is of interest and mechanism which bring about change are pivotal in this research. Their bearing on contemporary times is also discussed in an elaborated manner.

Current legal principles are examined on touchstone of various societal aims and corresponding defects in laws which are plaguing society due to its notional value rather than actual as perceived.

History of personal law and its intimate relationship with women rights in contemporary times. How the British era influenced the legal system of India.

Transition in law concerning women on chronological basis is discussed. How the system existing before based there law on more coherent rationale then what exist today.

Changes in personal law post -independence are discussed specifically of hindus whose personal are overhauled completely and its effects on women are discussed at length. Change in economy and its impact on women

Segment dedicated on transition in law concerning women of minority community and current dynamics which concern them are also discussed.

And at last findings and opinion formed after completion of the topic.

INTRODUCTION

Women being equal constituent of human species remain a force to reckon for a flourishing society. It is this recognition through entitlement of rights and the legal footing on which women stands decides how progressive a society is.

To endow upon modern society of progressive and more towards approaching gender justice is erroneous assumption as a comparative study shows primitive culture and laws being more women oriented then what are today.

Sphere of law concerning women mainly comprises of social and economic rights and curing of infirmities. Specially in society such as Indian which is agrarian with a feudal concept of land system which mainly tramples upon women rights which emanates from a patriarchy system.

The patriarchy system gained a boost over the reign of British administration with evolution of legal principles on lines of women bias and promotion the ulterior motive to keep intact their rule.



Indian society pluralistic and diverse in culture also appears to differ in various rites for essential custom in one's life

In the coming chapters some of these points are dealt with in detail with subjects integral to law regarding women

To depict transition is main purpose as it has happened with its consequence.

WHAT HERALD A CHANGE IN LAW CONCERNING WOMEN

Mechanism which brings change in law is of particular interest in this chapter while the subject of women and law concerning them remains intricate of this aspect .a study of legal historical facts is necessary to chart out a course which is followed.

From historical perspective change in law with regard to mechanism can be segregated in two parts period of state intervention and period of non- state intervention that is period from when state came into operation for purpose of establishing and enforcing laws regarded today as personal and at that point of time as religious. whole point to postulate the transition by taking state intervention as a parameter is to depict transition in justice system and change in society state initiated law making and it's enforcement which are glaringly manifested today and to depict the pitfalls of such mechanism as is in today and the one which existed in former .

Period of non-state intervention dates back to primitive time inception of ancient civilization and law in this era emanated from vedas which considered as religious in scheme contained many principles for social

and economic regulation for society which is paramount to women across era.

Later in period of smriti and post smriti period laws were elaborately enumerated on subjects including marriage, property devolution, stridhan and other women oriented laws. Among one such prime importance and great reverence was of in smriti period and commentaries of vijaneshwar and jimuthvana in post smriti period.

Interesting point arise if epoch non-state intervention existed which authority did enforced the laws?

Answers lies in here to our both purpose of knowing which authority did enforced laws and our primary question of what usher in a change in law.

As laws in that epoch were in nature of acceptance. That is there was no authority which was determinate and obedience was owed to it. Reverence for law originated from divine authority which they wielded.

Duty was cast upon smritikars in former period and on commentators or nibandkars to expound law as per need of society. To initiate new legal reformation process for anything they perceived as something ought to be change several such instances are manifested.

Besides mechanism stated above there were several other authorities such as king and social organization of authority to outcast someone from society.

Coming to later epoch of state intervention which is of more importance to contemporary time as it laid down genesis of such system as is in operation today.



Inception of era starts with advent of English men and establishment of their rule in India. Until India was under the administration of east India company religious laws which included social and economic rights of women were left untouched it is after the crown took to reign directly over India that a clear practice was manifest to influence personal law of Indians.

The English method of legislating by definite authority and another to enforce it though that to come in effect required uniformity and rigidity in law enforced over all subject.

Corollary to the above proposition makes the authority solely responsible for ushering in change as to meet women their due. The basic principles of English legal authority in matters concerning women differed as their rhetoric was to promote women equality but was taken over by their ulterior motive to bolster patriarchy as can be seen in several instances which points to the English authorities had been in collusion with male patriarchs to promote their mutual interest. After india achieved freedom from the colonial rule new legal principles got laid for women empowerment under constitution and several other laws though it is under scrutiny as how much reformation has taken place with these new foundation.

In today context it can be said that several other players have also come into as to postulate before society what is required course to taken among them are women's right activists, NGO and many more such reformists

The English influenced legal system place onus on the modern legislature to meet the ends of women's cause and equal onus is also placed on the courts to enforce what are mandates to abolish women discrimination While studying both the epoch we come to as what precisely usher a change in law with to contemporary time.

IMPACT OF IMPERIALISTIC LAW AND POLICIES ON PREVALILING LAW IN INDIA

Impact of imperialistic policy is two pronged. First is on the legal order and societal circumstances which were existent before the start of English introduction of legal system to Indian society. Second is the one which tries describe the legal order created by English authorities have on today's regime of personal law.

Starting with the former era which existed before the establishment of legal order influenced by English legal system Hindu law being pluralistic at that point of time had applied exclusively to 3 level of hindu caste hierarchy 4th and last that is the shudras were regulated by thereown customs. That aspect is treated in the later part of the chapter. Another categorization in hindulaw it's application according to region likewise we have prominent schools such as mitakshara and dayabhaga school of hindu law.

Mainly differ in their law regarding succession. Except above area of law, the law was similar in every other field. It is pertinent here to note that law concerning women remained law in social and economic arena that is strictly personal laws



with this in mind personal law is approached from a women's perspective.

Starting with economic rights which are aligned or rather dwells in property rights which stood as property rights of women were divided in two shelves stridhana and property acquired by a woman by inheritance. While it is also been described the tinkering done by English authorities which was detrimental to woman's limited property rights.

stridhana is woman's property it is assigned different meanings by smritikars prominent among them is manu who defined stridhana.

He divided stridhana in six different types¹:-

- (1) Gifts made before the nuptial fire, explained by katyayanna to mean gifts made at the time of marriage before the fire which is the witness of the nuptial.
- (2) Gifts made at the bridal procession, that is, says katyayanna, while the bride is being laid from the residence of her parents to that of her husband.
- (3) Gifts made in token of love, that is, says katyayanna, those made through affection by her father-in-law and mother-in-law, and those made at the time of her making obeisance at the feet of elders.
- (4) Gifts made by the father;
- (5) Gifts made by the mother; and
- (6) Gifts made by the brother.

With every other development in stridhana was somewhere around these principles of manu. Till the time when English legislative authorities tinkered with it and amended it

as to detriment of Indian hindu women which is manifested from following points:

Stridhana which is exclusive women property and as such it devolved upon female heirs only of a female hitherto English law made male lineage an equal in stridhana.

Stridhana was later made limited to include minimal property in its purview and major part of it was amended so as to come under inheritance.

Above mentioned rules of smritis were applicable only to upper 3 levels of hindu caste hierarchy the last community which was shudras had their own law which was customary in nature which accorded to women more liberty. Regarding women almost in every part where they resided the custom for marriage was that they had monogamy system of marriage in which divorce was allowed though it was a consequence of economic necessity as women of shudra community were mainly wage who had the responsibility to keep intact the financial stability in house second marriage was allowed but before the termination subsisting marriage another radical custom as it had entail a more valid claim for a subsisting marriage to help the cause of a woman. Maintenance was a practice which was not present in shudras as economic viability was not sufficient to pay amends for a woman. With practice of second marriage among women been prevalent it was appropriate that there exist some rule on fulfillment of which second marriage can take place some logical principles were that spouse must remain absent from matrimonial home for considerable period minimum 7years , violence on perpetual basis inflicted on a

¹ Manu, IX, 194.



woman and even the termination of marriage on mutual consent was prevalent.

As for property devolution system in shudras women had their own share in property. In region of Malabar succession was based on matrilineal system. There are several other instances of equal share of property for women in shudra caste.

This explicitly explains the fact that laws were not applied any other rationale but according to the region where subject resided. One such incidence is of parsi community where parsi were accorded with status as state subjects after they accepted the stipulated local custom as binding on them.

Flip side of this entails some region where women were not conferred with even minimal economic and social rights, that is there rights with respect marriage and property is next to none. Instances where economic feudal system inherently patriarchal in nature had such customs. In Punjab to save which dominantly agricultural had this where a woman if her husband dies has marry somebody in blood relation to the deceased such was the position of women marital rights coming to their property rights they did not even had nominal property rights.

Pitfalls in legal frame work of the period which existed before the British influenced the Indian legal system is that legal order was to informal, to meet out justice in a fair and singular manner. Though principles were quite clear the second reason behind demolition of legal order was English administrators arbitrary whim at first when the crown took over to ring directly over India an assurance was given that there will be no interference with religious and

personal of British-indian subject this was a mere hoax. As to choose which subject could be included in personal law was to be decided by English authorities they gradually started legislating on such subjects as were necessary for their motive for viable and effective administration and to keep intact their sovereignty this is manifested by their enactment of Indian contract Act,1872 which at a point of time was included in personal law later they gradually encroached upon every other subject to be included in and legislated on.

While in later stage when the British government finally encroached upon laws which were strictly personal in nature by legislating upon various subjects which aim under a purview of personal law it started with named as object to eliminate or abolish various social issue such as sati system and then came to caste disability act which overhauled the whole legal order.

Transition put in by the then legislation purport to change the personal law by two ways which were as follow.

Firstly, it assured in the rigidity of the state intervention on pattern of English Legal System. Which meant that the law as to be more singular in nature or for that matter they must be uniform so they be specifically applicable to prescribed person. The rationale behind this preparation was that without these substantive work codes would find difficult to interpret and enforce the law. As is a historic fact that in the initial face court which included high court in presidency town found it difficult to adjudicate so they were aided by priest, bhramanpandit if parties involved were hindu and qazi in case of muslim, if in case



one party was muslim and other one was hindu law of defendant was applicable.

The second phase of transition which was put forth by the then indian legislature and laws were started applying personal laws foregrounding it on the basis of religion which have adverse effect till date. The previous principle to give effects to laws as per region was done away with. To adjudicate matters on personal laws including social regulation such as marriage laws, divorce, maintenance and economic regulation such as inheritance rights and rules of property dissolution.

The existing legal principle were translated in English which could help in codifying law duty was assign to Brahmins which colored them with inherent bias so as to cause of patriarchy system.

To fit in to the rigid mould of English legal system total overall of adjudication process was done which caused serious injury to the cause of justice especially for women in existing Indian society.

Another impact which English law had on the Indian legal is that for the first time certain acts was recognized criminal offence which were against women. This had several effect first is that such acts being offence was hard to establish which from women perspective was a hindrance to their justice delivery system and other is that it entail a deterrent effect on perpetrators as well as on future offenders retribution was also a thought of while designing punishment for acts against women.

TRANSITION IN LAW WOMEN WITH REGARD TO POST INDEPENDENCE ERA

Law in post-independence era was kicked off by laying down constitution of India as its prime legal code to govern the country. Constitution had serious impact on women's cause, some of them are enumerated below.

It guaranteed a fundamental right to equality which says "Prohibition of discrimination on grounds of religion, race, caste, sex or birth place."² Article 14 & 15 constitute right to equality while former embodies rule of law the latter place onus on law to disseminate equality on basis of gender of sex.

One sphere of rights which evolve in this period was right in political arena is to contest and importantly their quest to achieve their rights to vote and to elect which India gained voice through independence movement. In which luminaries such as Gandhiji, Sarojini Naidu, Pandit Jawaharlal Nehru voiced the opinion for more participation of women in political discourse and for their right in electing government.

Above mention rights explicitly talk about gender equality. There are several other rights which are expanded to further the cause of women.

Monumental work of transition which took place in this period was codification of hindu law which had its own effect as-

Firstly, was that it based codification of personal law on religion another was that it provided impetus communal voices and communal polarization in country.

Secondly, it prove to disadvantage of women belonging to every religion as the legal framework which had been retained had a English touch to it which inherently supported patriarchal system and prove to a disadvantage of women of all religion.

² Article 14, Constitution of India, 1950.



Though overlooking some of its lacuna there are some radical steps which purports to provide women their place in society through some social and economic reforms in law mainly in hindu law.

Let see what are the legal provision laid down by hindulaw and which among them stand out as to women empowerment in social and economic sphere of life.

As for personal law with regard to marriage transition done by codification of hindu law were some radical and many were conventional. The law concerning marriage as its existing presently :-

- (1) It treats marriage as sacrament entailing bondage or a union which is to persist forever.
- (2) The codification laid some rights or ceremonies which are pre-condition for a marriage to subsist.
- (3) The main lacuna in law is that it applies to a large number of people i.e. it treats many people as hindus which for other practical purpose treat themselves as non-hindu.

The problem stems in here because of the reason that the hindu law postulate the essential ceremonies which are to be performed. Those in reality are not even ceremonies of secondary nature in many sects in this bunch of hindus as specified by Hindu Marriage Act³. The effect of this flaw entails a detriment to women whose rights under a marriage are curtailed because of non-subsisting marriage. Loop holes aside some radical provision which the hindu marriage act brought in effect are as follows:-

- (1) Irretrievable breakdown of marriage- contemplation of marriage ought to break.
- (2) Instrument to terminate a marriage which cannot subsist.

Concept of divorce as introduced by marriage act give a big relief to hindu women. Though conceiving an idea as of divorce in a society where marriage was considered an unbreakable union was per se laudable but also timely, as it was well known fact that in Indian society social sphere of life is always a dominating one for woman, as such marriage has to seen in practicality. Though it was an alien concept but as seen after years of its operation it well suited in Indian society, in especially for Indian women.

For maintenance- the codified law provides or maintenance to be provided by husband to his estrange divorced wife in form of monthly alimony.

The most clearing reform for women was in legal rights in property. Abolition of prevailing law and codification paving way for new law relating to succession. The new law conferred substantial rights for women in respect of inheritance of property. Salient features of Hindu Succession Act 1956 are as follow:-

- (1) Equal rights of women in property
- (2) Abolition of limited right of women in property.
- (3) As for succession to property of intestate deceased husband women is given an equal share in property.
- (4) Women are entitle to equal share of property in their father's property.

³ Section 2, 1955.



(5) Women are conferred with status as first priority of coparcener

These were some radical provisions from a women reformative perspective. Now we will look at some provisions which had detrimental effect on prevailing rights of women which are as follows

Certain region of the then Indian society such as Malabar region where system of inheritance was matrilineal which means property devolved upon female heirs and other southern region area where same system of inheritance was followed was dealt a blow.

Apart from property rights economic domain of rights was also enlarged with mammoth advance in Indian economy which had certain effects on women rights regime which are, with a large industrial development underway women were expected to join the workforce with which the need of law in this regard arouse. With such demands many legislation got passed which had aspect of women right to them. Such as factories Act,1947.

With the advance in social development there develops new evils in process. Though the period of independence more autonomy for women yet they remained majorly in household where developed new distortions such as violence against women already prevailing practice of child marriage dowry death bride burning. For these social evils and grave issues concerning women legislative and judicial measures have taken.

TRANSITION IN LAW CONCERNING WOMEN OF MINORITY COMMUNITY

All this while in preceding chapters research was mainly centered on religious majority it

was apt address a chapter dealing with transition in law concerning women of minority sects. To start with, among minority muslims are prominent minority in India and the one to draw attention towards . Muslim law is regulated by shariat but it mainly contains ethical principles. It is fiqh which contains legal and jurisprudential aspect of islam, fiqh is body of law which consist of major sources of islammic law. Koran, sunna, Ijma and Qiyas Koran is divine revelation of prophet through caliph particularly through third caliph Osman it is the touchstone upon which every other principle is tested and forged after that. Sunna has many meanings but in contemporary times it means traditions and customs of schools. Third is Ijma which means consensus among legal school to carve out a new legal doctrine to cope with changing times. Qiyas is drawing new legal principle through making an analogy from Koran. There are other things which are not formal source of Islamic law yet are instrumental in its formation such as Fatawas and judicial decisions.

Coming to schools of muslim law they are divided under two heads sunni and shia which are further divided in hanafi, maliki, shafii and hanabli they come under sunni school while ithnaashari and ismaili school are of shia school of law.

Advent of Islamic law in India is of a later date then those who belief in islam religion as first migration to India of Islamic followers was through trade routes of Arabian sea to coast of Malabar they did not follow the shariat law. They followed the local customs of Malabar region. Islamic law came India through the sultanates of Afghan and Turkish rulers. The muslim



sultan who invaded were hanafis. They relied upon ullamas to be religious and legal arbitrators . the new sultanates followed the basic law of islam , the shariat , as interpreted by ullama in royal court. Qasi were appointed to adjudicate law.

Women’s right in muslim law are far more then what they are in hindu law starting with marriage in muslim law it is considered as a contract between two parties which had it’s own effects

Though there is a right of polygamy under muslim law yet if there exist already subsisting marriage contract another marriage cannot take place without termination. With marriage being a contract women has a Valid proof of marriage and there is no other requirement to be fulfilled like ceremonies or rites to make a valid marriage. Another safeguard for women under muslim law is that before a marriage certain amount is stipulated under the contract to be paid by husband in case of termination of marriage which is called mehar. There are several other rights which are briefed by ameerali⁴:

- 1 The husband will not contract a second marriage during the subsistence of the first;
- 2 The husband will not remove the wife from conjugal domicile without her consent;
- 3 The husband will not absent himself from the conjugal domicile beyond a certain period;
- 4 The husband and the wife will live in specified place;
- 5 certain amount dower will be payable immediately after marriage or within a stated period;

6 The husband will pay the wife a fixed sum of maintenance;

7 The husband will maintain the children of the wife from her former husband; and

8 The husband will not prevent her from receiving visits from her relations whenever she likes;

Rule regarding inheritance is not more than one third share can be given to a woman either through testamentary or intestate succession.

Transition in muslim law through legislation has not been much except those which included larger public interest change in muslim law in India is more by judicial interpretation in some landmark cases

In contemporary times there is opinion in general that to reduce the plight of women there must be an overhaul of personal law replacing them with a code which could be applicable on every one. Apart from fact that much would depend upon the substance that would it affect rights of women The idea entails one flaw for the minority community that is they would be at loss because what is manifest from various case till date is that to establish that a valid marriage subsists is the most contentious issue and by effectuating monogamy we jeopardize interest of woman whose task is to establish that she is the second or third wife which if not found valid will have its grave consequence on those women.

CONCLUSION

while writing at length about this topic which is so glaringly manifested to anyone. One comes across that is it inherent in nature that there always be a male dominant society and we come across of civilizations in which women had a say at the highest level.

⁴ DIWAN,P., Law of marriage and divorce , Allahabad : wadwa&company, p62



Changes are inevitable and must be made to curb infirmities which impede development of any particular. In consequence it also hinders development of whole society. To testify this a survey conducted in 2018 shows there exist extreme inequality in India which if cured can add upto 770 crore to annual GDP by 2025

Collective interest aside every human individual is entitle to fundamental right which must be conferred and be made to realize it effectively could add welfare in its real sense.

Institution which have contributed still now to women's cause must keep that spirit alive one such institution is judicial system which has contributed to women's cause irrespective of religion or caste.

Though transition has taken place it is safe to say there is much to be covered to it a equal society

