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GENDER INEQUALITY IN PERSONAL LAWS

- *Nandhini VP*

INTRODUCTION:

In India, the personal laws are under the heads of 'family law' which specifically deals with matters related to marriage, divorce, maintenance, custody, guardianship, succession, partition of Joint Family Property and so on.¹ Different personal laws exist in different religions, and they vary according to the customs and practices. During the ancient period, customs and religion were intertwined, and these rules led to the formation of a society.

The Muslim personal laws were brought during the Mughal period. During the British period, attempts were made to codify the personal laws and they also introduced a few laws such as the Indian Christian Marriage Act, 1872 and The Indian Divorce Act, 1869.

India being a patriarchal society, women faced inequality for centuries. Though the Indian Constitution guarantees gender equality under Article 15, women get fewer rights compared to men in most of the personal laws irrespective of the religion. Many reforms were made since a very long time in order to reduce the inequality, but it is still prevalent in the society.

EVOLUTION OF PERSONAL LAWS IN INDIA:

Personal laws can be defined as a set of laws that apply to a particular group of persons. They have been originating from the Quran and the Vedhas and they continue to evolve from time to time. The evolution of personal laws starting from the ancient period, the medieval period, and the period of British can be seen as follows:

1. Ancient period:

¹ Khushboo Dev, *Personal laws vis-à-vis Fundamental Rights, Part III of the Constitution*, CJP (19th March 2021), <https://cjp.org.in/personal-laws-vis-a-vis-fundamental-rights-part-iii-of-the-constitution/#:~:text=In%20India%2C%20personal%20laws%20deal,characterised%20as%20'family%20laws'>.

Ancient texts such as the *Vedas*, the two epics of *Puranas*, *The Bhagavat Gita*, *Ramayana* and *Mahabharata* laid the moral basis for the Hindu law. The *Vedic* sources were considered to be the oldest sources of law. *Dharmasutra* was considered to be the final stage of Hindu law which prescribed rules that governed all the four stages of life.² The teachings of religious leaders and conscience were also considered as sources of law in the religion.³ The sages and philosophers were considered to be semi divine beings for their philosophical speculation and far sightedness.⁴ Hindus considered law as an integral part of their religion. Also, law and religion were intertwined, and hence, at times, they were confused with one another.⁵

2. Medieval Period:

It was during the Mughal period that the laws relating to the Muslims emerged. The Quran, teachings of Prophet Mohammed, commentaries of Muslim law by ancient Muslim scholars, and Ijma were considered to be the primary sources for Muslim Personal Law.⁶ While Islamic public law was applicable to all the religions, the private laws in relation to marriage and inheritance was restricted to the Muslims and people of other religions were free to follow their respective laws.⁷ There was a clear demarcation between the public laws and the private laws in the Holy Quran.

3. British Period:

Initially, the British did not interfere with the personal laws of different religions as their primary motive was trade and commerce. With the plan of Hastings, the personal laws started undergoing a change where the administration of justice was given to the English Judges and Judgements were delivered with the consultation of Pandits and Maulvis.⁸ With these judgements and the doctrine of precedents, the personal laws were codified which established a system of delivering justice. In 1834, the First law commission was established where the

² Harrop A Freeman, *An Introduction to Hindu Jurisprudence*, Vol 8, No. 1, The American Journal of Comparative Law, pp. 29, 3. (1959) <https://www.jstor.org/stable/837163>

³ Id.

⁴ UC Sarkar, *Hindu Law: its character and evolution*, Vol 6 No. 2/3, Journal of the Indian Law Institute, pp. 213, (1964) <https://www.jstor.org/stable/43949804>

⁵ RP Choudhary, *Evolution of Personal Laws in India*, Vol 8, Issue 4, Pramana Research Journal, pp. 348, (2018) https://www.pramanaresearch.org/gallery/prj_r_a_10.pdf

⁶ Parameshwaran, L. (2020) *History of personal laws in India*, ipf. Available at: https://www.ipf.org.in/encyc/2020/11/13/2_02_27_53_History-of-Personal-Laws-in-India-Papers_1.pdf (Accessed: 27 May 2024).

⁷ Id.

⁸ *Supra* note at 6

personal laws were left untouched. With the third law commission, several reforms were made and several landmark legislations such as the Indian Divorce Act 1869, The Christian Marriage Act 1872, The Indian Majority Act and many others were enacted.⁹

After Independence, several personal laws were enacted which includes the Hindu Marriage Act 1955, The Special Marriage Act 1954, Hindu Adoption and Maintenance Act 1956, The Parsi Marriage and Divorce Act 1936 and many other personal laws were enacted.

DISCRIMINATORY ASPECTS IN PERSONAL LAWS:

The Indian Constitution guarantees equality in terms of gender under Article 15 which states that “*The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*”¹⁰ But discrimination is still seen against women in the society, and one of the places of discrimination is the personal laws. There are various provisions which are discriminatory in nature specially for women.

When it comes to marriage between Hindus, there exists a difference when it comes to the marriageable age for the woman and the man. Section 5 of the Hindu Marriage Act talks about the marriageable age for the bridegroom and the bride, which is completion of 21 years and 18 years.¹¹ According to the law commission, this difference in age leads to a stereotype that the age of men should be higher than women.¹² Also, child marriage is considered to be voidable under the Hindu Marriage Act 1955. Muslim marriages are a contract where the consent of the parties to marriage is required in order to constitute a valid marriage. There is no obligatory age, but the parties must attain puberty. It is similar to a contract of sale where the woman is considered to be a property.¹³ In a Muslim Marriage, *Mahr*, which is a gift, is to be given from the bride’s side, but no such rule exists in the groom’s side. This creates a difference in terms of gender.¹⁴

Maintenance refers to the quantum of money paid to the spouse when they can’t maintain themselves after the decree of divorce. Women being considered to be the weaker members of society, are the ones who mainly claim maintenance. Hence, men are treated in an unjust

⁹ *Supra* note at 6

¹⁰ INDIA CONST. Art 15(1)

¹¹ Hindu Marriage Act, 1955, §5(iv), No. 25, 1955 (India)

¹² Abhishek Tyagi, Gender Inequality in Personal Laws of Marriage in India, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).

¹³ Poonam Pradhan Saxena, *Matrimonial Laws and Gender Justice*, Vol no. 45, No. ¾, pp. 335, (344), (2003) <https://www.jstor.org/stable/43951868>

¹⁴ *Supra* Note at 12.

manner when it comes to the maintenance of men. While section 24 and 25 of Hindu Marriage Act 1955 recognizes maintenance of husbands,¹⁵ other laws such as the Special Marriage Act 1954 did not recognize the right of men to claim maintenance in cases where he could not maintain himself.¹⁶ Also, a man is obligated to maintain his wife irrespective of whether she works or not, but a woman is not obligated to maintain her husband due to the notion of women being weak. In Muslim law, women were deprived of maintenance rights. Men were required to maintain them only until the *iddat* period, because Muslim marriages are considered to be a contract and it ends with the *iddat* period.

When it comes to custody and guardianship, the father is considered to be the natural guardian of the child, and in the absence of the father, the mother is considered to be the natural guardian under the Hindu law. But under the Muslim law, women are never considered to be the natural guardian. When the father is absent, it is the grandfather and the other male members of the father's side. Also, a woman cannot adopt a child in her own capacity, if the husband is incapable to adopt. It was held in the case of *Malti Roy Chowdhury vs Sudhindranath Majumdar*¹⁷.

In regards to the property rights, women are never considered to be the coparceners of a family and the rights to inherit property goes to the son's grandson. This creates an inequality in terms of gender.¹⁸ If a woman has an inherited property from her husband and has no children, the rights to inherit the property goes to the husband's heirs. The same applies to the woman's self – acquired property.¹⁹ Widows can inherit property from her deceased husband, but it can be transferred to a third person through a will. It was held in the case of *Vimalben Ajitbhai Patel v. Vatslabeen Ashokbhai Patel and Ors*²⁰.

In order to address these issues of gender inequality, the government introduced several reforms.

REFORMS INTRODUCED TO REDUCE GENDER INEQUALITY:

In order to overcome this issue of gender inequality, several reforms have been introduced since the British period. During the period of British, Raja Ram Mohan Roy played an

¹⁵ Hindu Marriage Act 1955, §24, §25, No. 25, 1955 (India)

¹⁶ Ragha Sudhan S, *Gender Bias and maintenance laws in India*, pg. 10 (2023)
<https://ssrn.com/abstract=4316231>

¹⁷ A.I.R. 2007 Cal. 4: (2007) 1 Cal. L.T. 323 HC

¹⁸ Nishtha Jain, *Gender inequality in Hindu and Muslim personal laws in India*, Indian Journal for Law Management and Humanities, pg. 206, (2018)

¹⁹ *Id.*

²⁰ 2008 (4) S.C.C. 649.

important role in the abolition of various practices which were discriminatory against women. He played an important role in abolition of the practice of *sati*, in which the widow is required to die along with her husband. He also opposed child marriage and supported widow remarriage.²¹

Attempts were made in order to introduce a uniform age for men and women in marriage, where they aimed at increasing the marriageable age for women to 21. This was met with supporting and controversial opinions. The debate on the same is still going on between people. In the case of *Ashwini Kumar Upadhyay vs Union of India*,²² a petition was made to increase the marriageable age of women as it violated the fundamental rights and this gives time to develop their careers. The petition dismissed the petition stating that it was not with the court to decide this matter.

Through the case of *Shayara Bano vs Union of India*,²³ the practice of *talaq-e-biddat* which gave the power to a Muslim man to divorce his wife instantly by pronouncing the word *talaq* three times, was held unconstitutional. It was declared to be a criminal offence which would lead to a punishment of up to three years of imprisonment. Also, initially Muslim women were deprived of maintenance rights. Later, it was declared in the case of *Mohd Ahmed Khan vs Shah Bano Begum*²⁴, that Muslim women can claim maintenance under Section 125 of Criminal Procedure Code, 1973²⁵ even after *iddat* period.

After the amendment made in the Hindu Succession Act by 2005, wife of the deceased can become a coparcener and claim rights on the property equal to the sons. Also, daughters, either married or unmarried, have the right to reside and claim partition in the dwelling house equal to the sons.²⁶ With the amendment made through the personal laws (amendment) Act 2010, married women can adopt without the consent of the husband if he renounced the world, or ceased to be a Hindu, or declared by the Court with competent jurisdiction to be of unsound mind.²⁷

CONCLUSION:

²¹ Priya Soman, *Raja Ram Mohan Roy and the Abolition of Sati in India*, pg. no 75(80), Indian Journal of Humanities, Art, and social studies. <https://airccse.com/ijhas/papers/1216ijhas08.pdf>

²² *Ashwini Kumar Upadhyay vs Union of India*

²³ AIR 2018 SC (CIVIL) 1169

²⁴ 1985 AIR 945

²⁵ Code of Criminal Procedure, §125, Act no 2 of 1974 (India)

²⁶ Hindu Succession (Amendment) Act, §6, 2005 (India), https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00027_195630_1517807324239§ionId=29918§ionno=6&orderno=6

²⁷ Personal laws (Amendment) Act, No. 30 of 2010, (India)

Personal laws have been evolving since time immemorial, and it will continue to evolve as the society progresses. From being patriarchal, with abolition of various practices, to recognize the need for equality, the society has come a long way and it has yet a long way to go with the emergence of new ideologies and need for them.

Inequality is something which can't be eradicated completely, but it is in the citizens to ensure harmony between each one of them. The patriarchal mindset has been slowly changing and further attempts are made to reduce inequality.

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