



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

PERSONAL LAWS AND HUMAN RIGHTS OF WOMEN

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“The best thermometer to the progress of a nation is its treatment of its women”

SWAMI VIVEKANANDA

Human rights and fundamental freedoms are the birth rights of all human beings; their protection and promotion is the first responsibility of the State. Women’s right to non discrimination is most comprehensively set forth in the “Convention on the Elimination of All forms of Discrimination against Women(CEDAW). Adopted by the General Assembly in 1979 it has today more than 160 state parties including India, which became member in 1993. India became a member member of the convention on the Political Rights of Women even as early as 1961. In addition to these India is also a signatory to the International Covenant on Economic Social and Cultural Rights. Despite such a large framework the state of women is not encouraging around the world in general and India in particular.

Women have been the victims of non-uniform and unjust personal laws in India from time immemorial. The principle of equal rights of men and women has been incorporated in the Universal Declaration of Human Rights 1948. “All human beings are born free and equal in dignity and rights, they are endowed with reason and conscience and should act to one another in spirit of brotherhood”¹It further lays down that “everyone is entitled to all the rights and freedom set forth in this declaration, without distinction of any kind including sex”²

Personal laws are codified according to the customary law prevailing in each community. After colonization by the British, the imperial authority secularized areas of direct and immedia

1 Article 1, Universal Declaration of Human Rights 1948

2. Article 2 of Universal Declaration of Human Rights

political and economic importance. The sphere of private law was left untouched since it was an area that did not immediately affect the demands or interests of the colonizers. In the area of personal laws, custom and practice is an area of discrimination based on sex and religion. Consideration of race, religion, sex and caste are prevalent all over India today. An analysis of Supreme Court and various High Court judgments clearly shows the importance given by the judiciary and the state, from the perspective of Human Rights. The Supreme Court granted immunity and legitimacy to personal laws without recording any reason at all in spite of the equality provisions in the constitution and contrary to its decisions in public law to strike at discrimination and in the face of international law of human rights.

In Upanishad it is stated that “YATRA NARAYANTU PUJYANTE TATRA RAMANTHI DEVATA” meaning thereby, where ladies are worshiped, Gods would reside there. Even within the space for human rights promotion and protection there is a special need to emphasize on women’s rights since the realization of these rights differs from that of men. Various obstacles are there while attempting the implementation of the human rights of women. India’s culture was vastly influenced

due to Muslim rule and subsequently the British rule. The concept of human rights was well taken care of in the ancient Hindu Scriptures and it is a misconception to say that women are oppressed or suppressed. A married man was not allowed to do religious ceremonies without the presence of wife and most of the ceremonies were to be done together to attain salvation. Wife continued to be friend, advisor and philosopher to her husband and husband always regarded and followed the advice of the wife. Human values and human dignity were cherished throughout the ancient Hindu period, as could be seen from various scriptures.

Women and children have been the victims of non-uniform and unjust personal laws in India from time immemorial. Though at times they did enjoy considerable advantages.³ Law has been changing and it cannot remain static. Social Justice forms the basis of progressive stability in the society and human progress. Law should regulate the social norms but cannot control the social norms nor create new norm by itself. Family being an important segment of society, it is a social mandate that in order to protect a society, the family needs to be protected. In these circumstances personal laws have a definite role to play in protecting human rights, as the continuing oppression, exploitation, perpetuation, of injustice by the ‘haves ‘and ‘have not’s within and outside the family

3. In the Manusmriti women along with the Brahmanas were exempted from death penalty. See “Criminal Law” By P.S. Achuthan Pillai, 8th edn. Page 17

have become the order of the day. Several legislations were enacted to implement the provisions enunciated in the constitution. Still there are so much of lacunae left which are uncondusive for the implementation of human rights of women.

Hindu Marriage Act 1955 has brought out drastic changes in the customary law as well as sastric laws, applicable to Hindus. It also repealed various piece-meal legislations⁴ Section 5 of the Hindu Marriage Act provides the essential conditions of a valid marriage. The intention of the legislature is much to be appreciated. But the good intention of the legislature is totally watered down by virtue of section 11 and 12 of the Act which deals with void and voidable marriage. Section 11 of the Hindu Marriage Act does not declare the marriage void if there is a contravention of section.5 (ii). Again there is an anomaly in section.12 which renders a marriage voidable when there is contravention of the condition laid down in section.5(ii). Contravention of conditions laid down in clause (iii), (iv) and (v), no penalty is provided. From the point of view of protecting human rights it is suggested that these anomalies are to be rectified by bringing proper amendment.

The basis law of adoption among Hindus in India is the “The Hindu Adoption and Maintenance Act, 1956”, which contains no provision for inter-country adoption. Inter-country adoption in India was taking place by resorting to the provisions of the Guardians and Wards Act, 1890. The matter was brought before the Supreme Court in Lakshmi Kant Pandey V Union of India⁵ through a public Interest Litigation. In this case the Apex Court laid down the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents.

4. Hindu Marriage Disabilities Act 1946

Hindu widows Remarriage Act 1856

5. AIR 1984 SC

The Honorable Court also directed the central government to lay down detailed guidelines in this

regard. Govt. of India issued revised guidelines in 1995 which are in force as of now. Thus the law applicable to intercountry adoption in India came into existence through the judgment of the Hon'ble Supreme Court in 1984⁶ Till today there is no legislation to support it.

The dissolution of Muslim Marriage Act, 1939 has brought some solace to Muslim women. Divorce by Talak, and allowing a Muslim man to have four wives at a time, giving double share to male members in the property of the deceased would certainly defeat the equality principle enunciated under the constitution and may also result in violation of their human rights. In Shabano's case⁷ conflict situation between the right to equality and the right to freedom of religion was essentially a matter of gender justice involving the dignity of a Muslim woman and her right to claim protection under the secular law and the right to equality. In Shayara Bano V Union of India⁸, the Supreme Court held that the practice of Triple Talak is unconstitutional, and is not an essential religious practice. Subsequently enactment of The Muslim(Protection of Rights on Marriage)Act 2019 is a welcome approach, where the husband's unilateral pronouncement of tallak was made illegal.

The Indian Divorce Act(Amendment),2001 has brought in new provisions to remove disparities so as to provide the same grounds for both the spouses to avail matrimonial remedies, whose marriage are solemnized under the Indian Christian Marriage At 1872. However, the native Christian woman continues to get less than their male counterpart which needs to be set right.

It is really pity that when we are talking of globalization and liberalization, we are unable to provide adequate justice to women in India. Dowry deaths are quite common especially so when the state government has failed to appoint Dowry Prohibition Officers envisaged under section 8 of Dowry Prohibition Act 1961. When harassments exceed the limits, the last resort left for the woman is either divorce or in extreme cases to end her life. Here again the law fails her. Government must not only refrain from violating the human rights of women, but must work actively to promote and protect these rights. It is necessary for all individuals especially women in vulnerable circumstance to have full knowledge of their rights and access to legal recourse against violation of human rights.

6. Lakshmikanth Pandey V union of India , AIR 1984.SC

7.Mohammed Ahmed Khan V Shah Bano Begum, AIR 1985 SC 945

8.(2017) 9 SCC1

It is suggested that equality principle enunciated in our constitution must be uniform in providing remedial measures to women irrespective of religion, caste or creed and then only it is possible to uphold the human rights of women and they could live with dignity and peace.

“The conscience of social justice, the corner stone of our Constitution will be violated and soul of the scheme of chapter IX of the Code of Criminal Procedure, a secular safeguard of British Indian vintage against jetsam women and flotsam children, will be defiled if judicial interpretation sabotages the true meaning and reduces a benign protection into a damp squib”⁹.

9. Justice V.R. Krishna Iyer in Fuzlumbi V Khader Vali (1980) 4 SCC125,p 128