



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

WOMEN, MARRIAGE AND FAMILY: A COMPARATIVE ANALYSIS BETWEEN HINDU LAW AND MUSLIM LAW

Authored by - Dr. S. MANJULA¹

Assistant Professor (SG)

Tamil Nadu Dr. Ambedkar Law University, No.5, M.G.R.Salai, Perungudi, Chennai - 600 113.

MOBILE NO.: 8838038775

EMAIL ID: smanjulaprof@gmail.com

ABSTRACT

The Convention on the Elimination of All Forms of Discrimination Against Women is commonly referred to as the international bill of rights for women. It defines what constitutes discrimination against women and girls and sets out a comprehensive framework for tackling gender inequality. Article 1 of the Convention defines discrimination against women in which it has been stated that irrespective of marital status, both men and women should be treated equally. Article 16 states about marriage and family life in which it has been stated that States shall ensure that women have equal rights with men in relation to marriage and as parents, as well as in respect of other aspects of family life. According to the United Nations, India ratified CEDAW in July 1993 with two declarations. But the ratification of CEDAW by India did not reduce violence and discrimination against women because the international agreement was not legally implemented and enforced throughout Indian society. The personal laws of India are very much evident to understand the position of India for not taking a step forward to remove discrimination against women. Hence, this paper is an attempt to compare Hindu Law and Muslim Law with special reference to discrimination against women in the matters relating to marriage and family.

Keywords: Women, Marriage, Family, CEDAW, Hindu Law and Muslim Law.

¹Assistant Professor (SG), Tamil Nadu Dr. Ambedkar Law University, Chennai, email id. smanjulaprof@gmail.com, Mobile No.88380 38775.

INTRODUCTION:

“The best thermometer to the progress of a nation is its treatment of its women. There is no chance for the welfare of the world unless the condition of women is improved. Woman has suffered for aeons, and that has given her infinite patience and infinite perseverance.

The idea of perfect womanhood is perfect independence. There is no hope of rise for that family or country where there is no estimation of women, where they live in sadness².”

In India, where religious myths and traditional attitudes define virtues and vices, and these in turn condition popular imagination to form the social culture, the ideal and permissible cultural role of a woman becomes a contentious issue that can barely be assessed in uniform terms. Though care giving services can empower women if they are trained adequately, the scope of choices for career is often constrained by societal notions of what is ‘suitable’ for a woman and what is not. This is what defines the role of women in India, and how limited their contribution to society will be. The boy on the other hand has no such fetters tying down his choices. However, a careful observation validates the fact that patriarchy has had an upper hand in general in most traditional norms across the country. In this context, India with its sub-continental geographical expanse and its unique patchwork of regionally diverse cultures becomes a template for a special kind of gendered discrimination.

Life for the upper class women, educated women is different but no better. Despite their qualifications, what acts against them is a threat to their security while working outside their homes, travelling to universities and colleges. Right from jilted lovers seeking to teach their beloved a lesson for rejecting them through extreme means like acid attacks and rape, to men on the streets treating women with contempt through harassment and molestation for stepping out and holding equal positions – the story follows a similar narrative almost everywhere across the length and breadth of the country.

²The above quoted lines, famously uttered by a 19th century Indian monk Swami Vivekananda way before India woke up to its present status of being an independent and recognised nation-state, addresses an insight which informs the development discourse all over the world today.

HISTORICAL BACKGROUND OF THE STATUS OF WOMEN IN INDIA:

The status of Hindu women in India has been fluctuating. It has gone through several changes during various historical stages. Historically speaking, women in India have passed through two phases of their life – the period of subjugation and the period of liberation. At times she has been suppressed and oppressed and at times she is regarded as the deity of the home. From the Vedic age till today, her status and position has been changing with the passing of time.

Therefore, it is necessary to analyse the status of Hindu women in the various ages to assess her real position today.

Status of Women in Vedic Period:

The Rig-Vedic society was a free society. The Aryans evidently preferred male child to female child. However, females were as free as their male counterparts. Education was equally open for boys and girls. Girls studied the Veda and fine arts. Women never observed purdha in the Vedic period. They enjoyed freedom in selecting their mates. But divorce was not permissible to them. In the family, they enjoyed complete freedom and were treated as Ardhanginis. In domestic life women were considered to be supreme and enjoyed freedom. Home was the place of production. Spinning and weaving of clothes was done at home. Women helped their husbands in agricultural pursuits also. Husband used to consult his wife on financial matters.

The woman was regarded as having an equally important share in the social and religious life because a man without woman was considered as an inadequate person. She regularly participated in religious ceremonies with her husband. There were many scholars who composed hymns of Rig Veda³. Women had equal rights in social and religious fields but had limited rights in economic field.

Status of Women in the Epics:

Epic age, in the history of female freedom, may be regarded as a golden age. Women had been accorded an honourable status in the society. Most of the female characters of Ramayana and Mahabharata were well educated. The Ramayana illustrates the Hindu ideal women of India. In Mahabharata we find instances where women gave counsel and advice to men on social and

³ Lopamudra, Gargi and Maitreye were the pioneers among them. Lopamudra, the wife of Agasti rishi, composed two verses of Rig Veda.

religious issues. Women had an effective role in social and political life of the then society. In Ramayana, the wife was considered to be the soul of her husband and in Mahabharat, she was considered to be half part of her husband. A general survey of the Puranas reveals that the position of women declined in the corresponding age.

Status of Women in the Smritis:

The status of women in this period was declining drastically. We find a number of provisions in the Manu Smriti, which certainly go against her interests. Women are deprived of the Upanayana ceremony and thereby of education. Manu relegates her to an entirely subservient position. He preaches self-negation as the highest ideal of a wife. She is asked to serve and worship her husband even if he is not a person of all virtue and character. Since service and worship of the husband are the primary duties of a wife, by so performing she can hope to attain heaven.

Status of Women in Medieval Period:

In fact, the status of women started degenerating in the post-Vedic age because of the conception of purity and pollution and restrictions of inter-caste marriages. Child marriage had started in the Smriti age. During this period, a woman's husband was regarded as God. During the middle ages, the position of women in Hindu society further degenerated. A number of problems arose for Hindu women in the Mughal period.

The first Muslim invasion took place in India in the eighth century. During this period the position of women was on par with the Vedic period. India experienced a second Muslim invasion in the eleventh century when Mohammad Ghazni conquered India. From this period till the middle of the eighteenth century, when the British rule was established in the country the breakdown of social institutions, the vast migration of people and the economic depression in the country contributed to a general decline of social life, particularly among women. The 'Purdah' system was followed which resulted in seclusion of women. Education of women in whatever form came to be stopped. Child marriage was started. During this period the inhuman practice of 'Sati Pratha' was in vogue. Purdah Pratha, Sati Pratha, child marriage, girl killing, polygamy etc. were the main social evils of this period.

However, during the fifteenth century, the situation underwent some change. The Bhakti movement organised by Ramanujacharya during this period introduced new trends in the social

and religious life of Indian women⁴. The saints encouraged women to read religious books and to educate themselves. Although the Bhakti movement gave a new life to women, this movement did not bring any substantial change in economic status of women. Hence, women continued to hold low status in the society.

ROLE OF THE INDIAN FAMILY:

Family system in India was wholly governed by customary practice before codified laws. The customary practices prevailing at that time was entirely based on male dominance and the female members of that family were fully discriminated in almost all the walks of life. The women were treated inferior in all her positions as a mother, daughter, wife with the father, son, husband and the like. Even the changing situations and the enacted laws are not able to develop the position of women in India. The question that comes to mind naturally at this point is “why”? Despite all the progressive ideals defining the concept of the nation, why do women still suffer from such social attitudes? The answer surprisingly lies within the unit of an Indian family. In an Indian family in general, where there is a girl child and a boy child, it is interesting to note the different set of values that they are taught from their very childhood.

The girl is taught to be more homely, timid, submissive, obedient and in certain cases even taught to dream only of being a good wife, mother and homemaker (the ideal being one who does not raise her voice). Even in cases where she is given the chance to study further than school and complete college or university, she is taught to prefer gendered stereotypes for careers like “teacher”, “nurse”, etc., So, the change will have to be started from the family. The women should be respected and treated equally inside the family and that will be reflected positively outside also.

MARRIAGE UNDER HINDU LAW AND MUSLIM LAW:

Marriage is a sacred institution; it is the very foundation of a stable family and civilized society. There are, however, certain prerequisites and conditions for a valid marriage. All personal laws lay down certain conditions which need to be complied with to enter into or solemnize a legal marriage.

Under Hindu Law:

There are some conditions to be satisfied by the parties for entering into a valid Hindu Marriage⁵.

⁴The saints like Chaitanya, Nanak, Kabir, Meera, Ramdas and Tulsi stood for the right of women to religious worship.

⁵Sec 5 of the Hindu Marriage Act, 1955. A marriage may be solemnized between any two Hindus, if the following

The conditions which are prescribed under the Act of 1955, to some extent protect a Hindu woman from child marriage, bigamy, and consenting mind, even though there is a discrimination in the condition relating to age by fixing the differential age for bride and bridegroom. The Hindu Marriage Act, 1955 is also prescribing some matrimonial reliefs commonly for both the husband and wife. Hindu wives are given some exclusive grounds for divorce⁶. Apart from that, equal rights for claiming maintenance⁷ and custody of children⁸ is also provided by the Act of 1955. In spite of all these protections the position of women inside or outside the family is still inferior and pathetic. The reason behind this might be the influence of customary practices which are prevailing over the enacted personal laws. Their rights are suppressed within the family by giving them some roles like mother, wife and daughter etc.,

Marriage under Muslim Law:

Marriage or Nikah, according to Muslim Law, is 'defined to be a contract which has for its object the procreation and legalizing of children'. Thus a Muslim marriage is a contract and its object is (a) procreation, and (b) legalizing children. There is no formality nor any religious ceremony required for a marriage. Since, marriage in Islam is a contract, the usual conditions necessary to constitute a valid contract are to be fulfilled.

Conditions for Valid Marriage:

The essential requirements for a valid Muslim marriage are capacity to contract marriage, proposal and acceptance, and absence of any impediment to the marriage.

conditions are fulfilled, namely: i. Neither party has a living spouse at the time of the marriage;

ii. At the time of the marriage, neither party-

- a. Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
- b. Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- c. Has been subject to recurrent attacks of insanity;

iii. The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage;

iv. The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

v. The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

⁶Sec 13(2) of the Hindu Marriage Act, 1955.

⁷Secs.24 & 25 of the Hindu Marriage Act, 1955.

⁸Sec. 26 of the Hindu Marriage Act, 1955.

Capacity for Marriage:

Every Muslim who is of sound mind and who has attained puberty has the capacity to marry. Marriage of such person without his/her consent is void. Persons who not of sound mind or have not attained puberty can be contracted in marriage by their guardians. Further, a Muslim woman cannot marry any man who is not a Muslim. As to a man marrying a non-Muslim woman, while a Sunni Mohammedan if she is a Kitabia but a Shia Mohammedan cannot marry even a Kitabia. If the parties have become Muslim by conversion before the marriage, then there is no bar.

Proposal and Acceptance:

There should be a proposal ijab, and an acceptance qubul of the proposal. The proposal and acceptance has to be made either by or on behalf of the parties. This has to be done in the presence and hearing of two male, or one male and two female, witnesses who must be sane and adult Mohammedans. It is significant to note that the proposal and acceptance must both be expressed at one meeting; a proposal at one meeting and its acceptance at another does not constitute a valid marriage. There are some impediments for a valid marriage under Muslim law⁹. These impediments would render a marriage void, certain prohibitions are only relative in nature, and would render a marriage only as irregular. These are marriage with a fifth wife, marriage without proper witnesses, marriage when there is a difference of religion, unlawful conjunction, or

⁹ The following are the impediments or prohibitions to a valid Muslim marriage, viz.:

- i. A married woman cannot contract another marriage while her husband is alive and the marriage is subsisting. Such marriage is void.
- ii. The bar of consanguinity renders a marriage void. The following are the prohibited relationships of consanguinity, viz., a man cannot marry his:
 - a) Ascendants, for e.g., mother or grandmother, how highsoever;
 - b) Descendants, for e.g., daughter or grand-daughter, how lowsoever;
 - c) His sister, whether full, consanguine or uterine;
 - d) His niece or great niece, how lowsoever;
 - e) His aunt or great aunt, how highsoever, whether paternal or maternal.

Such marriage if contracted is void.

- iii. Marriage is also prohibited on ground of affinity. Thus, a man cannot marry:
 - a) His wife's mother, or grandmother, how highsoever;
 - b) His wife's daughter or grand-daughter, how lowsoever, if his marriage with his wife is consummated;
 - c) His father's wife or any other ascendant's wife; and
 - d) His son's or any other lineal descendant's wife.

Such marriage if contracted would be void.

- iv. Fosterage is another impediment to a valid Muslim marriage.

marriage with a woman undergoing iddat.

The conditions for a valid marriage under Muslim Law is more discriminatory towards women. The conditions are not strict enough to make the parties responsible from one another. Because the condition like, capacity to marry with relaxation of guardian presence for entering into the valid marriage even without fulfilling the condition will give a wide scope of discrimination against women. Because she has no scope for deciding about the marriage as she has to be under the control of the family which is headed by a male. So, her role for decision-making in the family is zero.

The matrimonial reliefs available for a Muslim women is also more discriminatory when compared to Hindu law. The husbands under Muslim law are having ample opportunities to divorce the wives without assigning any reasons and even without the intervention of the court. Polygamy permitted for the husband under Muslim law is causing faithlessness in marriage for the wife. Even after the marriage, she could not expect complete protection from the husband. Somehow, she will be getting protection because of the provision for 'Dower' under Muslim law.

Dower is the amount payable by the husband to the wife in consideration of the marriage. It may be prompt or deferred. Prompt dower is payable on demand unless otherwise stated at time of marriage, the entire dower is presumed to be prompt dower. This is so under the Shia Law. But under the Sunni Law it is usual to regard half as prompt dower and half as deferred dower but there is no hard and fast rule and the courts may treat a reasonable part of the entire dower as Prompt Dower. But dower in my opinion is degrading the women to some extent¹⁰. This plight of Muslim women is continuing even after the death of the husband and on the dissolution of marriage by way of observing the period of 'Iddat'

CONCLUSION:

Male and Female, the two basic components of our human society, depend upon each other and each one of them constitutes about half of the population. Over years sociologists and other scholars have tried to assess the problems faced by women and to study changes in their status around the globe in general and in Indian society in particular. We find that man and woman have

¹⁰ Masthan Sahib v. Assan Bibi, 23 Mad.371 (FB). The wife may refuse to consummate the marriage, until prompt dower is paid. Even after consummation, if prompt dower is not paid on demand, the wife may refuse further sexual intercourse. A suit by the husband for restitution of conjugal rights in such a case would be decreed conditionally, i.e., subject to the payment of the prompt dower within a time fixed by the court.

been established as the two wheels of a chariot. The status represents the position of individual in the group. The status of women refers to her position in the network of social role structure, privileges, rights and duties. It refers to her rights and duties in family and social life. The status of a woman is generally measured in the comparative amount of prestige and respect accorded to her with that of man. But in the Indian society where the customary practice is given more preference than the individual values. That is the reason why, we are having personal laws for various religious groups which in turn leads to discrimination.

The women in marriage and family life are suffering a lot and their plights are not addressed properly in spite of the existence of various laws for protecting them. The common reason for this might be that she has been tied traditionally and culturally with the complete responsibility of the family. When compared the position of women in Hindu law and Muslim law particularly the matters relating to marriage and family, the Hindu women are in a better position than the Muslim women. Enormous fundamental rights are guaranteed by the Indian Constitution to its citizens for leading their life with dignity. Even though, those rights are available for a woman as a citizen of this country, it has become quite impossible for a woman to lead a dignified life because of societal pressure. The Uniform Civil Code, which is given as one of the directives of the Indian Constitution, could have been a remedy for curbing the discrimination prevailing in all the personal laws in India.

