

# LIBERALISM, DEVELOPMENT AND HUMAN RIGHTS OF WOMEN

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## I. THE PROBLEM

Female population of our country constituted less than the male population according to 2001 census<sup>1</sup>. Sex ratio (females per 1000 males) was found to be 933 and the literacy percentage of the females was 54.16 as against 75.85 of the males<sup>2</sup>. Nearly 70% of the population living below the poverty line are women<sup>3</sup>. More than 90% women work in the informal sector where working conditions are poor and there are no legislative safeguards<sup>4</sup>. 89.5% of the female workers work in agricultural sector as landless labourers with no inheritance rights<sup>5</sup>. The harshness of the operational economic and social system vis-à-vis women is, indeed, quite perceptible.

Women in our society face harassment, deprivation and handicaps both in respect of person and property. The poor women engaged in various occupations as labourers mostly belonging to lower rung of the social ladder are quite vulnerable in this regard. The societal role in this respect is rooted in economic and social relations operational since hoary past. Consequently, women have been facing the problem of free and equal sharing of the material resources and comfort as well as the equality of treatment vis-à-vis men in family and individual relations. This brought about lop-sided societal relations and affected the developmental process, thus giving rise to the problem of balancing the interests of men and women belonging to various sections of the society. The effort in this paper is to view such a balancing in liberal perspective.

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<sup>1</sup> Female population was 49,57,38,169 as against male population 53,12,77,078. See, CENSUS OF INDIA 2001-Provisional Population totals – Paper (i) of 2001 (Series-10-Uttar Pradesh) pp.i and ii-iii.

<sup>2</sup> *Ibid.*

<sup>3</sup> See, Government of India, TENTH FIVE YEAR PLAN (2002-2007) Vol. II, p. 245.

<sup>4</sup> *Id.* at 247.

<sup>5</sup> *Id.* at 246.

## II. HISTORICAL AND PHILOSOPHICAL PERSPECTIVE

Historically, the position of women came to be degraded with the overthrowing of the traditional order of inheritance through the mother in the mother right gens in the hoary past. This was done by excluding descendants of the female members from the gens and transferring them to that of their father, thus allowing only the descendants of the male members to remain in the gens<sup>6</sup>. This gave rise to patriarchal society and the individual property relations.

Liberalism provides the philosophical base to individual property relations. Though, it involves questioning of the existing societal order based on conservatism, dictatorship, feudal hierarchical relations, class, race, caste and gender based discrimination, developmental process based on liberal thought has been evolutionary. In seeking to change property relations, it remained limited to distributive aspect alone without any basic change in production relations. Liberal philosophy may historically be linked to the questioning spirit of Socrates. It could not progress much in the cobweb of religious conservatism of the middle ages but the beginning of renaissance and scientific revolution in sixteenth and seventeenth centuries in western countries gave it a fillip. Reason questioned faith as the basis of human life and with it the basis of political formation of the society also came to be questioned. The monarchy had to face the onslaught of democratic forces and state's role in man's life came to be defined. Philosophers like John Locke<sup>7</sup> and Rousseau<sup>8</sup> redefined the theory of social contract expanding the individual freedom. The result was the documented development of human rights in Britain, France and U.S.A. viz. the Bill of Rights, 1689, The Declaration of the Rights of Man and of the Citizen, 1789 and the American Bill of Rights, 1791.

John Locke refutes Sir Robert Filmer's position that men are not naturally free because they are born in subjection to their parents. Filmer calls this authority of parents, Royal Authority – Fatherly Authority, Right of Fatherhood because God says, Honour Thy Father and Mother. Locke

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<sup>6</sup> See, Karl Marx and Frederick Engels, *SELECTED WORKS* (1949) Vol. II, p. 197.

<sup>7</sup> See, *TWO TREATISES OF GOVERNMENT* (reprinted with amendment 1964).

<sup>8</sup> See, *THE SOCIAL CONTRACT* (translated and introduced by Maurice Cranston, 1968 reprinted 1972).

objects to leaving of 'thy Mother' by Filmer and being content with half<sup>9</sup>. He also denies Filmer's observation that God at the creation gave the sovereignty to the Man over the woman, as being the Nobler and Principal Agent in Generation<sup>10</sup>. He is of the view that the condition of conjugal society did not give absolute sovereignty and power of life and death over wife to the husband and the ends of matrimony do not require any such power in the husband<sup>11</sup>. He, however, maintains that the relations of wife, children, servants and slaves are subordinate relations vis-à-vis Master of a Family<sup>12</sup>. This brings in contradiction in his theory.

Rousseau regards the family as the first model of political societies, the head of the state bearing the image of the father and the people the image of his children. All are born free and equal, according to him<sup>13</sup>. Like Filmer, Rousseau does not mention mother here alongwith the father. This is obviously reflective of the effect of patriarchal family relations where mother plays the subordinate role vis-à-vis father.

In the economic field, liberalism found its expression in the theory of *laissez faire* basically propounded by Adam Smith<sup>14</sup> advocating the policy of non-interference by the government in economic matters and leaving them to the individual decision of the businessman. However, the classical or bourgeois liberalism advocating the policy had to give way to democratic and social liberalism particularly with Benthamite utilitarianism<sup>15</sup>. The *laissez faire* state came to be gradually replaced by the welfare state which became concerned with the removal of poverty and providing of social security, educational and employment opportunities to men and women equally.

The change in the character of economy, state and liberal philosophy affected the women's movement too. In UK and other western countries,

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<sup>9</sup> See, John Locke, *supra* n. 7 at 162-163.

<sup>10</sup> *Id.* at 198.

<sup>11</sup> *Id.* at 339-340.

<sup>12</sup> *Id.* at 341.

<sup>13</sup> See, *supra* n. 8 at 50-51.

<sup>14</sup> See, *The Wealth of Nations* in Alan Bullock and Maurice Shock (ed.), *THE LIBERAL TRADITION – FROM FOX TO KEYNES* 25-28 (1956).

<sup>15</sup> Regarding the Principle of Utility, see, Jeremy Bentham, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 1-42 (Indian Economy Reprint 2004).

the traditional domestic roles and responsibilities of women – the prison of Victorian domestic ideology advocating different roles of men and women in the family – came to be challenged gradually from the late eighteenth century through the nineteenth and twentieth centuries by the feminists and Women's Liberation Movement in UK<sup>16</sup>. The liberal feminist writers<sup>17</sup> of the eighteenth and nineteenth centuries laid emphasis on equality between men and women in economic, social and political spheres. But the Radical feminist's main thrust of attack is on male domination which is at the basis of differences between men and women. Catherine Mackinnon lays emphasis on abortion in order to cope with structurally forced maternity which is a perpetuation of economic, domestic and sexual inequality<sup>18</sup>. In the same vein, Simone de Beauvoir emphasizes control of their reproductive capabilities by women<sup>19</sup>.

### III. POLICY PERSPECTIVE

Basic developmental policy of our country is provided by the constitutional and Plan documents. The constitutional policy of social justice has been unfolded in the Preamble and the Fundamental Rights and Directive Principles of State Policy. Specific developmental goals have been laid down in Article 39 which, inter alia, provides for distributing the ownership and control of material resources of the community, and for prohibiting the concentration of wealth and means of production to the common detriment. It also provides for securing equal pay for equal work to both men and women and for protecting health and strength of men, women and children. Besides, constitutional protection for women extends not only in the directions for just and humane conditions and for maternity relief (Article 42) but also in prohibiting discrimination, inter alia, on the ground of sex [Article 15 (1)]

<sup>16</sup> See, Madeleine Arnot, Miriam David and Gaby Weiner, CLOSING THE GENDER GAP: POST WAR EDUCATION AND SOCIAL CHANGE (1999) pp. 33-34 and 66-68.

<sup>17</sup> See, Mary Wollstonecraft, A VINDICATION OF THE RIGHTS OF WOMEN (1789); William Thompson, APPEAL OF ONE HALF OF THE HUMAN RACE, WOMEN, AGAINST THE PRETENSIONS OF THE OTHER HALF, MEN, TO RETAIN THEM IN POLITICAL AND THENCE CIVIL AND DOMESTIC SLAVERY (1825, 1983); John Sturat Mill, THE SUBJECTION OF WOMEN (1869) and Harriet Taylor, THE ENFRANCHISEMENT OF WOMEN (1851) quoted in Wayne Morrison, JURISPRUDENCE : FROM THE GREEKS TO POST-MODERNISM 486-488 (First Indian Reprint, 1997).

<sup>18</sup> See, Wayne Morrison, *supra* n. 17 at 488-493.

<sup>19</sup> THE SECOND SEX (1953) quoted in Wayne Morrison, *supra* n. 17 at 494-495.

and in empowering the state to make any special provision for women [Article 15 (3)].

So far as the plan policies are concerned, no separate policy for the welfare and development of women was laid down upto the Fifth Five Year Plan. The policies in respect of women were welfare oriented and overall developmental policy was lacking. It was in the Sixth Five Year Plan that the issue of women and development was taken up separately<sup>20</sup>. The Plan laid down three-fold strategy – of education, employment and health – and acknowledged the interdependence of these factors and their dependence on the total developmental process<sup>21</sup>. Acknowledging the women as the most vulnerable members of the family, the Plan adopted family as a unit of development<sup>22</sup>. However, the family centered developmental strategy had to be limited in scope. The thrust on education, health and employment of women continued in the Seventh<sup>23</sup> and Eighth<sup>24</sup> Plans. The Eighth Plan integrated the issues relating to women in the general developmental programmes so as to benefit the women<sup>25</sup>.

In contrast to welfare and development approaches of the earlier Plans, the approach of the Ninth Plan was the empowerment of women as the agents of social change and development<sup>26</sup>. The thrust was on creating an enabling environment for women to exercise their rights, both within and outside home, as equal partners along with men<sup>27</sup>.

The Tenth Plan continues the approach of the Ninth Plan in pursuing the National Policy for Empowerment (2001) through social and economic empowerment and gender justice, *inter alia*, in creating and enabling environment and eliminating all forms of gender discrimination and allowing women to enjoy *de jure* and *de facto* human, rights on par with men in all spheres – economic, social, political, civil, cultural etc<sup>28</sup>.

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<sup>20</sup> See, Government of India, SIXTH FIVE YEAR PLAN (1980-85) pp. 423-429.

<sup>21</sup> *Id.* at 424.

<sup>22</sup> *Ibid.*

<sup>23</sup> See, Government of India, SEVENTH FIVE YEAR PLAN (1985-90) Vol. II, pp. 325-328.

<sup>24</sup> See, Government of India, EIGHTH FIVE YEAR PLAN (1992-97) Vol. II, p. 391.

<sup>25</sup> *Id.* at 391-392.

<sup>26</sup> See, Government of India, NINTH FIVE YEAR PLAN (1997-2002) Vol. II, p. 321.

<sup>27</sup> *Ibid.*

<sup>28</sup> See, Government of India, TENTH FIVE YEAR PLAN (2002-2007) Vol. II, pp. 238-255.

It may however, be mentioned that the developmental policies of the different Plans in the name of welfare, development and empowerment are not isolated. The basic issue is the overall improvement in standards of living of women leading to a dignified life. Since societal development itself depends on property relations, development of women too is related with these relations. Development of specific groups of women or in specific areas can hardly lead to overall development of women. Implementation of policies, besides, facing the built-in hurdles of economic and social system like poverty, illiteracy, casteism and corruption, is also marred by elitism and politicking. Elitism has been the hallmark of planning in South Asian countries<sup>29</sup>. The contents of the various laws like land reforms laws, debt relief laws and personal laws depict ample political manoeuvring. The women in general, could not therefore benefit much. It is the women belonging to upper stratum who could obviously benefit from such a planning.

#### IV. LEGAL PERSPECTIVE

The protective legal frame work pertaining to women exists both at the national and international<sup>30</sup> levels. The legal system of our country is

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<sup>29</sup> See, Gunnar Myrdal, *ASIAN DRAMA, AN ENQUIRY INTO THE POVERTY OF NATIONS*, Vol. II 721 (1968).

<sup>30</sup> See, Declaration on the Elimination of Discrimination against Women (proclaimed by General Assembly Resolution 2263 (XXII) of 7 November 1967); Convention on the Elimination of all Forms of Discrimination against Women (Adopted by General Assembly Resolution 34/180 of 18 Dec. 1979 – Entry into force 3 Sept. 1981); Convention on the Political Rights of Women (opened for signature and ratification by General Assembly Resolution 640 (vii) of 20 Dec. 1952 – entry into force 7<sup>th</sup> July, 1954); Convention against Discrimination in Education (Adopted on 14<sup>th</sup> Dec, 1960 by the General Conference of the United Nations Educational, Scientific and Cultural organization – Entry into force 22 May 1962); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (opened for signature and ratification by General Assembly Resolution 1763 A(XVII) of 7<sup>th</sup> Nov, 1962 – Entry into force 9<sup>th</sup> Dec, 1964), Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (General Assembly Resolution 2018 (XX) of 1<sup>st</sup> Nov, 1965); Declaration on the Protection of Women and Children in Emergency and Armed Conflict (Proclaimed by General Assembly Resolution 3318 (XXIX) of 14<sup>th</sup> Dec, 1974); Convention (No.100) Concerning Equal Remuneration for Men and Women Workers for work of Equal Value (adopted on 29<sup>th</sup> June, 1951 by the General Conference of the International Labour Organization at its thirty-fourth session—entry into force 23<sup>rd</sup> May, 1953); Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation (adopted on 25<sup>th</sup> June, 1958 by the General Conference of the International Labour Organization at its forty-second session—entry into force 15<sup>th</sup> June, 1960).

rooted in the colonial past. The colonial legal system was status quoist in character and was not development or welfare oriented<sup>31</sup>. The post-independence legal system with declared constitutional goals based on social justice<sup>32</sup> took special care for welfare and development of women and their equal treatment with men<sup>33</sup>. However due to the nature of our economic and social system being feudal and caste-ridden, the operational system came to be characterized by conservatism. The legal measures pertaining to women in respect of person and property, though try to tackle the problems of women rooted in conservatism regarding the women as chattle, the personal laws remain grounded in traditionalism. It is this mind-set of treating women as chattle, which is basically responsible for criminal behaviour towards women in the form of rape, molestation, custodial and domestic violence and abortion of female foetuses<sup>34</sup>. This is no doubt violative of the dignity and freedom of women. The rape of a social worker in a village of Rajasthan led the Supreme Court to hold in *Vishaka case*<sup>35</sup> that this was violative of 'Right to life and Liberty' and right of 'Gender Equality' as also the right to practice any profession or to carry out any occupation, trade or business<sup>36</sup>. The Supreme Court also laid down certain guidelines in this case in order to ensure the prevention of sexual harassment of women in work places<sup>37</sup>. These guidelines, *inter alia*, include express prohibition of sexual harassment and its notifications, publication and circulation in appropriate ways; inclusion of rules/regulations prohibiting sexual harassment in the rules/regulations of Government and Public Sector bodies relating to

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<sup>31</sup> Although many laws came to be enacted during the tenure of four Law Commissions in the British period, they were merely regulatory in character e.g. The Code of Civil Procedure, 1859; The Code of Criminal Procedure, 1861, 1882 and 1898; The Indian Penal Code 1860, The Police Act, 1861; The Evidence Act 1872; The Indian Contract Act, 1872; The Negotiable Instruments Act, 1881 and The Transfer of Property Act, 1882.

<sup>32</sup> See, Preamble, Part III, and Part IV particularly Articles 38 and 39 [Clauses (b) and (c)].

<sup>33</sup> See, Articles 14, 15, 16, clauses (a) (e) and (f) of Article 39, 243-D and 243-T.

<sup>34</sup> It has been reported that in India about 10 million female foetuses may have been aborted over the past two decades according to a survey. See, THE TIMES OF INDIA, Lucknow, Jan. 10, 2006, p. 11.

<sup>35</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>36</sup> *Id.* at 3012.

<sup>37</sup> *Id.* at 3016-3017.

conduct and discipline and in the standing orders in respect of private employers; initiation of criminal proceedings and disciplinary action; and creation of complaints mechanism besides creating awareness and providing appropriate conditions<sup>38</sup>. The duty in this respect has been cast upon the employer or other responsible persons in such places. It is however, worth mentioning that the immediate cause for bringing the petition as a class action in this case was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The moot question is – how these guidelines are going to help the women social workers who work and live in feudal surroundings in villages. It may be pointed out that the penal law of our country already contains provisions against sexual harassment including rape<sup>39</sup> even then the cases of sexual harassment and rape continue to occur. The reason for such incidents have, therefore, to be searched in the economic and social conditions of the society and not in the inadequacy of the law as the Supreme Court has sought to do in this case<sup>40</sup>. No law can give protection to women if a society does not have built-in attitude of respecting a woman's dignity as a person and not viewing her merely as an object of lust and reproduction. Such a built-in attitude is traditionally lacking in our society.

The recently enacted 'The Protection of Women from Domestic Violence Act, 2005' should be seen in the background of economic and social relations operational in our society. The Act has knit the web of protection officers, police officers, service providers, magistrates and shelter homes for preventing domestic violence. Domestic violence against women being basically a consequence of patriarchal family relations, unemployment, poverty and illiteracy, can hardly be tackled effectively by complaint mechanism. Even the role of National Commission for Women and Human Rights Commission remains limited for the same reason.

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<sup>38</sup> *Ibid.*

<sup>39</sup> For instance, see The Indian Penal Code, 1960 – section 509 providing punishment for word, gesture or act intended to insult the modesty of a woman; section 354 providing punishment for assault or criminal force to woman with intent to outrage her modesty and sections 375 to 376D relating to rape. Also see, section 377 providing punishment for unnatural offences.

<sup>40</sup> According to the Supreme Court, the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places. See *supra* n. 35 at 3015-3016.

The discriminatory attitude towards women is more pronounced in religion based personal laws and behavioral pattern set for women<sup>41</sup>. Hindu law even perpetuates caste based discrimination as is clear from the following observation of the Supreme Court :

Hindu Law is clear on the subject that if a Shudra women is turned out of the house by her husband, or she willfully abandons him and is not pursued to be brought back as wife, a divorce infact takes place, sometimes regulated by custom, and then each spouse is entitled to rearrange his/her life in marriage, with other marrying partners<sup>42</sup>.

Section 7 of the Hindu Marriage Act, 1955 validates all customary rites and ceremonies, even the discriminatory ones against women, such as, giving of a girl in marriage to the boy as a chattle, thus affecting their human rights adversely. It is this concept of treating the girl as a chattel for purposes of marriage which forms the basis of the dowry system and determines the behavioural pattern of the spouses during the married life. In Altekar's view, as a consequence of regarding the women as chattle in pre-historic times, it was the bride's father and not the bridegroom's who was regarded as justified in demanding a payment at the time of marriage since the bride's family was deprived of her services<sup>43</sup>. He maintains that the dowry system is connected with the conception of marriage as a *dana* or gift. Since a religious gift is usually accompanied by a gift in cash or gold, the gift of the bride also was accompanied by a gift in cash or gold<sup>44</sup>. The bride being given in marriage as a gift has obviously to play a servient role along with her family members *vis-à-vis* her bridegroom who being the taker plays a dominant role along with his family members. This also explains the perpetuation of the dowry and the dowry crimes. It is these servient and

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<sup>41</sup> Manusmriti does not allow independence to women and instructs the men to keep the women in subjugation. There must always be man to protect the woman-father in childhood, husband in young age and son in old age and after the death of her husband. See, Dr. Chaman Lal Gupta (ed.), *MANUSMRITI* (in Hindi, 1991) pp. 191-192 and 325-326. Like wise, Kautilya instructs never to trust women. See, Sri Bhartiya Yogi (ed.), *KAUTILYA ARTHASHASHTRA* (in Hindi, 1988) p. 802.

<sup>42</sup> *M. Govindaraju v. K. Munisami Gounder*, AIR 1997 SC 10 at 11.

<sup>43</sup> See, A.K. Altekar, *POSITION OF WOMEN* 69 (1956).

<sup>44</sup> *Id.* at 71.

dominant roles of the wives and husbands respectively which necessitated dowry and gave rise to criminal behaviour by the husbands and their families on non-fulfillment of their greed. Though the Dowry Prohibition Act, 1961 provides for imposing penalty for giving or taking<sup>45</sup> and for demanding dowry<sup>46</sup>, the effect of section 3(1) providing for punishment and fine for giving or taking or for abetting the giving or taking of dowry is diluted by section 3(2). Section 3(2) exempts the presents listed as per rules even at the time of a marriage to the bride and bridegroom without any demand having been made in that behalf. However, in case of the presents made by or on behalf of the bride or any person related to the bride, such presents should be of customary nature and should not be of excessive value in view of the financial status of the person by whom or on whose behalf such presents are given. This validates the listed customary presents from the bride's family to the bridegroom and his family. The problem of dowry is, indeed, deep rooted in the social fabric of society. It is for this reason that the Supreme Court while directing the governments to devise means for creating honest, efficient and committed machinery for the purpose of implementation of the Dowry Act and the Rules *inter alia*, observed :

The conscience of the society needs to be fully awakened to the evils of the dowry system so that the demand for dowry itself should leave to loss of face in the society for those who demand it. We have no doubt that our young and enlightened women would rise to the occasion to fight the evil which tends to make them article of commerce. We also hope that our educated young males would refuse to be sold in the marriage market and come forward to choose their partners in life in a fair manner.<sup>47</sup>

Under sub section (2) of section 18 of the Hindu Adoptions and Maintenance Act, 1956, a Hindu wife is entitled to claim maintenance and live separately from her husband on certain grounds, *inter alia*, if he has any other wife living and if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere. But under

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<sup>45</sup> See, section 3(1).

<sup>46</sup> See, section 4.

<sup>47</sup> *In re : Enforcement and Implementation of Dowry Prohibition Act, 1961*, AIR 2005 SC 2375 at 2378-2379.

sub section (3) of Section 18, the wife is not entitled to separate residence and maintenance from her husband if she is unchaste (or ceases to be a Hindu by conversion to another religion). This indeed derecognizes the wife as a person.

The Adoptions and Maintenance Act is discriminatory against women in respect of adoption too. It allows a male Hindu to take a son or daughter in adoption and in case he has a wife living with the consent of his wife unless she has renounced the world or has ceased to be a Hindu or has been declared of unsound mind by the court<sup>48</sup>. But it does not so allow a married female to take a son or daughter in adoption. A married female can adopt only when her marriage has been dissolved or whose husband is dead or has renounced the world or ceased to be a Hindu or has been declared of unsound mind by the court<sup>49</sup>. This denotes that a married female can adopt only when she is in the state of 'unmarried female'. Likewise, the mother's right to give the child in adoption too is circumscribed. She may give the child in adoption if the father is dead or has incurred certain disabilities<sup>50</sup>. But the father can give in adoption with the consent of the mother unless the mother has incurred certain disabilities<sup>51</sup>.

Preference for male is also shown by the Hindu Minority and Guardianship Act, 1956 in respect of natural guardianship of a minor. According to section 6(a), the natural guardian of a Hindu minor in the case of a boy or unmarried girl is father, and after him the mother.<sup>52</sup>

However, the Supreme Court diluted its effect of gender-inequality by interpreting the word 'after' to mean 'in the absence of and not after the life time. The word 'absence' too was given broader connotation referring to the father's absence from the care of the minor's property or person for any reason whatever<sup>53</sup>.

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<sup>48</sup> See, the Hindu Adoptions and Maintenance Act, 1956, section 7.

<sup>49</sup> *Id.* section 8.

<sup>50</sup> *Id.* section 9(3).

<sup>51</sup> *Id.* section 9(2).

<sup>52</sup> Also see, section 7 conferring natural guardianship of an adopted son to the adoptive father and after him to the adoptive mother.

<sup>53</sup> See, *Githa Hariharan v. Reserve Bank of India*, AIR 1999 S C 1149 at 1152. Also see, *Jijabai Vithalrao Gajre v. Pathan Khan*, AIR 1971 S C 315.

Under Muslim Law, polygamy and one sided triple talaq<sup>54</sup>, do affect the dignity and freedom of women as also the gender equality adversely<sup>55</sup>. However, the permission for polygamy in Quran is with strict conditions<sup>56</sup> and there is no Quranic injunction or compulsion for polygamy as observed by the Supreme Court in *Javed v. State of Haryana*<sup>57</sup>:

The Muslim Law permits marrying four women. The personal law no where mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of religion.

Despite the enactment of the Dissolution of Muslim Marriages Act, 1939 giving Muslim women right to seek divorce on several grounds, Muslim

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<sup>54</sup> Dr. Asghar Ali Engineer maintains that triple divorce is not a Quranic injunction and the Prophet has also strongly disapproved of this form of divorce. He also points out that the validity of triple talaq is not accepted by Hanbali, Maliki, Ahle-Hadith and Shia Muslims. See *Who is for a common civil Code?* HINDUSTAN TIMES, New Delhi Aug. 3, 2003 p. 10. Also see, M.R. Zafar, *Unilateral Divorce in Muslim Personal Law*, in Tahir Mahmood (ed.), *ISLAMIC LAW IN MODERN INDIA*, (Indian Law Institute, New Delhi 1972), pp. 167-174; and B.R. Verma's *MOHAMMEDAN LAW IN INDIA AND PAKISTAN* revised by Justice B. Malik & R.B. Sethi (1978) pp. 192-5 and 192-6.

<sup>55</sup> In A.G. Noorani's view the Anglo-Mohammedan law on marriage and divorce now in force is oppressive to women and is contrary to Islam. See, *Keep the faith*, HINDUSTAN TIMES, New Delhi, July 30, 2003, p. 10. Similarly Swapan Das Gupta points out that the Muslim personal laws that operate in India violate the tenets of human rights and justice. See, *Ghetto blaster*, HINDUSTAN TIMES, New Delhi, Aug 4, 2003. p. 8. Recently The All India Shia Personal Law Board approved a model Nikahnama (marriage agreement) giving Shia women the right to seek divorce on the ground of physical or mental torture. In terms of Nikahnama, both husband and wife have the right to initiate divorce proceedings. See, Sumitra Deb Roy, HINDUSTAN TIMES, New Delhi, Nov 27, 2006 p. 1 and the TIMES OF INDIA, Lucknow, Nov 27, 2006, p. 1. However, Tahir Mahmood maintains that the said Nikahnama only states the basic principles of Shia Jafari law of conjugal rights. See, *Reform Friendly*, THE TIMES OF INDIA, Lucknow, Dec. 11, 2006, p. 5.

<sup>56</sup> Polygamy has been permitted in Quran only in particular circumstances and with rigorous and difficult conditions. See, Asghar Ali Engineer, *supra* n. 54.

<sup>57</sup> AIR 2003 S C 3057 at 3070.

husband's unilateral right to divorce solely based on his will remains unaffected. Exercise of his will by the husband in the form of triple talaq has the effect of dissolving the marriage without any decree of a judge even though such a will may be capricious and without just cause<sup>58</sup>.

Divorce gives rise to the problem of maintenance of women and children. Before the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 nullifying the *Shahbano case*<sup>59</sup>, the Supreme Court had been emphatic in holding that the divorced wife was entitled to a reasonable amount of maintenance under the personal law and the Criminal Procedure Code, 1973 (ss. 125-127)<sup>60</sup>.

The 1986 Act<sup>61</sup> has the effect of diluting the remedy available to the Muslim divorced woman in giving the divorced woman and her former husband an option to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973<sup>62</sup>. This means that the divorced woman can have remedy now either under personal law or under the Code but not under both. Since such an option to be governed by the provisions of the Code requires the declaration of both the parties, the divorced wife loses this remedy if her former husband does not agree to this. However, this does not affect the right of the children of Muslim parents to claim maintenance under section 125 of the Code. They are entitled to claim maintenance under the said section for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females

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<sup>58</sup> See, *Jahangir Khan v. Syed Abdur Rahman*, 20 ALJ 1923 All 128, 64 IC 943 quoted in Kashi Prasad Saxena, *MUSLIM LAW AS ADMINISTERED IN INDIA & PAKISTAN* (1963) p. 261.

<sup>59</sup> *Mohd. Ahmad Khan v. Shahbano Begam*, AIR 1985 S C 945. The Supreme Court in this case held that there is no conflict between the provisions of section 125 of The Criminal Procedure Code and those of Muslim personal law regarding Muslim husband's obligation to provide maintenance for her divorced wife unable to maintain herself. The divorced wife unable to maintain herself is entitled to take recourse to section 125 of the Code even after the expiration of the period of Iddat.

<sup>60</sup> See, *Bai Tahira v. Ali Hussain Fissalli Chotia*, AIR 1979 S C 362 and *Fuzlun bi v. K. Khadervali*, AIR 1980 S C 1730.

<sup>61</sup> The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been upheld in *Daniel Latifi v. Union of India*, AIR 2001 S C 3958.

<sup>62</sup> See, Muslim Women (Protection of Rights on Divorce) Act, 1986, section 5.

till they get married<sup>63</sup>. This right is not restricted, affected or controlled by divorced wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under section 3(1) (b) of 1986 Act<sup>64</sup>.

The debate about wearing of veil by Muslim women<sup>65</sup> is inextricably linked with the debate about traditionalism and modernism. The traditional concept about women is akin to the concept of chattel irrespective of religion they belong to. There has been dilution of such a concept in religious communities and societies where modern education has penetrated more.

It may be mentioned that the vast number of women could not benefit from the women specific welfare laws. The Maternity Benefit Act, 1961 having a limited applicability in agriculture does not cover vast number of women agricultural workers. Besides, they are paid unequally despite the applicability of the Equal Remuneration Act, 1976. Though women have been given inheritance rights in property<sup>66</sup> including agricultural land<sup>67</sup> along with men, they still face discrimination due to patriarchal norms.

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<sup>63</sup> *Noor Sabha Khatoon v. Mohd. Quasim*, AIR 1997 S C 3280 at 3285.

<sup>64</sup> *Ibid.*

<sup>65</sup> For instance, see Renuka Narayanan, *In the Spirit of Islam*, HINDUSTAN TIMES, New Delhi, Nov. 2, 2006, p. 10 and Sadia Dehlvi, *Hijab and the truth behind it*, HINDUSTAN TIMES, New Delhi, Nov. 5, 2006, p. 10. Also see Pervez Iqbal Siddiqui, *Veiled support for Shabana's stand*, THE TIMES OF INDIA, Lucknow, Oct. 30, 2006, p. 1.

<sup>66</sup> For instance, see, The Hindu Succession Act, 1956. sections, 8,9,10,14,15,16 and the Schedule. Section 23 which gave only right of residence to the female heir in the dwelling house and not to claim its partition unless the male heirs chose to divide their respective shares therein, has been omitted w.e.f. 9.9.2005. Likewise, section 24 debarring certain widows from inheriting the property if they remarried, has also been omitted w.e.f. 9.9.2005.

<sup>67</sup> For instance, see, the U.P. Zamindari Abolition and Land Reforms Act, 1950, sections 171,172 and 174 providing for succession in case of males and females separately with different heirs consonant with patriarchal norms. The interest of female inheriting property from a male bhumidar remains limited under section 172 of the Act as on her marriage or death or abandonment or surrender of the holding, the property reverts back to the last male bhumidar from whom she had inherited and devolves upon his nearest surviving heir under section 171 of the Act.

## V. CONCLUSION

The problems of women in our country are deep-rooted in the economic and social fabric. The liberal constitutional values could neither permeate the religion based family laws nor the societal values. Consequently, the process for development of women being based on individual property relations and liberal thought could not lessen the hold of patriarchal relations in the society much. Its beneficial effect, if any, remains limited to upper rung of the societal ladder. Various discriminatory laws and practices particularly based on religion continue to be operational affecting the human rights of women adversely. Even the welfare laws could not benefit the poor women due to political maneuvering and the built-in hurdles of poverty, illiteracy, caste-ridden and feudal nature of society and the operational patriarchal norms.