STATUS OF WOMEN AND THE LAW IN INDIA: AN ANALYSIS

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"Women have a far superior time than men in this world; there are far more things refused to them."

(Oscar Wilde)

INTRODUCTION

It is a well-known fact that women were deemed to be socially inferior, which was seconded by the shastric Hindu law. According to Manu, a woman does not have the privilege to be independent, as she is given care and protection during her childhood by her father, for the husband when she is young and also for her son during her advancing years. The general principle stated by Baudhayana regarding the incompetence of women was that she did not have proficiency or strength. However, by backing of exclusive texts, a certain number of female heirs were eligible to possess restricted inheritance.

The formation of independent India resulted in a shift in the social position of women. The Constitution proclaimed its objectives of affirming collective, radical and economic justice for the people, along with parity in social position and opportunity. Parity before the law and equal opportunity were brought under fundamental rights. Also, four enactments made during 1955-56 reduced the prejudice against women quite significantly in the Anglo-Hindu law.[1] The primary aim of these laws was to effectuate a shift in the social position of Hindu women on the ground of equality. For this paper, the phrase 'social change' means the headway made for the objective of realizing equality of women in India.

Social change by way of law rests upon 3 things: first, the legislatures who make the laws, judiciary to interpret the laws, and third, the implementation organizations which enforce the laws. Here, the most important thing is the interpretation of laws. A law created by the legislature may be made unproductive owing to interpretation by the judiciary. Likewise, even if there are inadequate legislations, the courts may be capable to enforce the rights of the people by reverting to constitutional doctrines.[2] In this paper, an attempt is made to determine to what extent the judicial procedure has supported or hindered social change

[1] 33, cited in P.V. Kane, History of Dharmasastra, vol. 2, pt. 1.

[2] "Law and Social Change in the New nations", 20 Comparative Studies in Society and History 3 (1978).

with regard to the meaning of legislations on two grounds. First is the interpretation made by the judiciary on the field of Hindu law with regard to three issues- bigamy, restoration of conjugal rights and bestowal of inheritance. The second is to determine to what extent the judiciary recognized the issues regarding the social position of women and were eager to introduce changes by reverting to constitutional doctrines.

STATUS OF WOMEN UNDER HINDU LAW

Before the passing of the Hindu Marriage Act 1955, monogamy was the decree for women. A male Hindu could have any number of wives. According to this Act, monogamy was issued as a directive for both men and women. Bigamy is a crime under the Indian Penal Code. However, the implementation of the statutes was hindered owing to the interpretations made by the judiciary. In the case of Bhaurao Shankar Lokhande v. State of Maharashtra,[3] the main argument of the plaintiffs was that it was mandatory for the tribunal to determine whether the second marriage had been executed with due respect to religious practices. The state viewed that this was not mandatory to constitute an offence under section 494 of the Indian Penal Code as to whether the second marriage would be legitimate.[4] If the arguments of the plaintiffs were approved, it would imply that the tribunal would most likely be unable to release the burden, because second marriages are seldom celebrated with the eagerness as that of the first one. Even then, misleading evidence regarding the exclusion of necessary ceremonies could effortlessly be presented by the accused. Giving importance to the language of section 494 the Supreme Court proclaimed that prima facie the words "whoever…marries" must mean "whoever…marries legitimately." It also stated:

"The fact that a man and woman existing as a married couple does not imply, at any instance, that they have acquired the status of husband and wife before the society."[5]

This proclamation vividly shows the utter disregard of the judicial procedure towards social issues. The court then reverted to deliberations related to the Hindu Marriage Act 1955. Under section 17 of this Act, the court stated that a marriage would be deemed illegitimate and punishable under the Indian Penal Code, if there exist two situations: firstly, if the marriage takes place after the enforcement of the Act, and secondly, if on the time of such marriage, either party has a spouse living during the time of such marriage.

[3] AIR 1966 SC 1564.
[4] The section provides: "Whoever, having a husband or wife, marries in which such marriage is illegal due to its occurrence during the life of such husband or wife, shall be punished with a jail term of seven years, and also be liable to fine."
[5] Supra note 4 at 1565.

The court granted the appeal and set aside the conviction. Definitely, a suspicion is raised that the court received the appreciation of its profession for its dependence on the Oxford Dictionary. Under the criminal law, it seems as if the judge is discharged from taking into account the function of laws or his role with regard to social change. In all cases under the heading of criminal law, the accused is usually the focal point. The social background and function of laws and the social status of the victim are disregarded.

The succeeding judgments only bolster the seclusion of the criminal law model from introducing any kind of social change. The case of Kanwal Ram v. Himachal Pradesh Administration[6] further reinforces this fact. In the case of Priya Bala v. Suresh Chandra,[7] the priest who effected the second marriage, made a statement that the marriage took place according to Hindu rites. Also, faith was bestowed on the statement given by the husband during an earlier proceeding, which stated that he married Sandhya Rani, the second wife, due to the misbehavior of the first wife. The Supreme Court stood firm by its position that the tribunal must affirm that the second marriage took place with due respect to mandatory ceremonies. With respect to its stand, Justice Vaidialingam made a statement:

"The High Court is of the opinion that the statement given in Example 2 is a statement of admission. We refuse to go further citing two causes: one being that the statement in Example 2 had not been presented before the defendant when he was under trial in accordance with Section 342 under Criminal Procedure Code, in order to provide a chance for him to describe the circumstances; and the other being that although the statement given in Ex. 2 was significant, it will not verify the fact that all the mandatory ceremonies required for constituting a marriage have taken place. In our opinion, the justification given by the High Court is largely appropriate."[8]

But when a case is not classified under criminal law, the judges are not that eager to exclude social aspects. Govindrao v. Anandibai[9] is a brilliant instance. Here one Govindrao ha his first marriage in 1934. He did not have any problems with his wife. In 1959, he had another marriage, this time with Anandibai, in accordance with Hindu practices. Facts proved that his second marriage was not opposed to the wishes of his first wife. Govindrao and his first wife expelled Anandibai from his home, and she resided with her parents thereafter. Anandibai proceeded to file a suit for maintenance under the Hindu Adoptions and Maintenance Act, 1956 but was unsuccessful as her marriage was deemed illegitimate. Afterwards, in 1972 she adopted a son and registered a suit for declaration that it was an illegal marriage and for maintenance under section 25 of the Hindu Marriage Act. The

[6] AIR 1966 SC 614.
[7] AIR 1971 SC 1153.
[8] Id. At 1157-58.
[9] AIR 1976 Bom 433.

suit for maintenance was allowed by the lower court, which was subsequently allowed by the district judge, albeit with few changes.

An important point of contention raised before the High court in favor of Govindrao was that during the time of her marriage, Anandibai was aware that the husband was still married to his first wife. So, the grant of maintenance would aid her to take benefit of her own wrong, which was barred under section 23 of the Hindu Marriage Act. Rebuffing the statement, Justice Kania viewed that it was due to poverty and the dreadful financial situation of Anandibai which forced her to marry the plaintiff.[10]

A less adamant judge would have fallen prey to the provisions regarding the unruly horse: public policy, or the maxim *ex turpi causa non oritur actio,* amongst others. But Justice Kania displayed an incredible perspective of social circumstances while giving the judgment.

This judgment shows that social realities do significantly affect the verdict given by courts, however there is no effort to frame a doctrine, theory or belief to provide guidance. But in the case of Ramesh Chander Kaushal v. Veena Kaushal,[11] Justice Krishna Iyer gave a forced statement of the doctrine behind the statutory progress in maintaining social change.

The special leave petition filed by Govindrao brought about two queries: (i) which ruling should prevail, and (ii) how could the amount of maintenance be determined under the provisions of Criminal Procedure Code. Justice Krishna Iyer began his statement with a famous quote of his:

"Social justice is a belligerent belief which invigorates legislative texts with radical meaning. The contentions in the Special Leave Petition are dismissed, and relevance of social justice is recognized as a significant aid to interpreting statutes". Afterwards, he said: "We acknowledge that the language of the section is a bit insignificant, but innovation in interpreting the provision removes all uncertainties. We, as judges, ought to be innovative even in interpretation."[12]

Going back to cases of bigamy, it is this innovation in interpretation which the judges have refused to inculcate while giving judgment.[13] The judgments on bigamy reveal that the people and courts garner compassion for bigamous marriages. The view that judges are compassionate may be unfair, but it is a fact.[14] We might as well recall that back in the day, newspapers all over the country revealed the bigamous marriage of two famous movie stars.

[10] AIR 1976 Bom 478.
[11] AIR 1978 SC 1807.
[12] Id. at 1808.
[13] Id. at 1811.
[14] J. Duncan M. Derett, A Critique of Modern Hindu Law 309 (1970).

The anger that aroused in some parts of the country is seconded by the weakness of the law in this field.

The interpretation given by the judiciary in previous judgments regarding the restoration of conjugal rights brings to light the different perspectives present in the judicial procedure while interpreting a statute which amends a previous law.

In accordance with section 9 of the Hindu Marriage Act, a party to a marriage is eligible to restore conjugal rights if the other party has withdrawn from the company of the affected spouse without valid reason. Some High Courts inculcated the constrained view that the statute does not intervene or rescind the customary roles of women in matters regarding obedience of women to their husbands. Moreover, other High Courts delved into the intention of the law to alter the customary roles on the ground of equality. The relevant question was whether a married woman could defy a plea for restoration of conjugal rights on account of her having a job somewhere else. Usually, even the right of a married woman to take up a job against the desire of her husband is also questioned. Consequently, it brings about a restriction in her quest for happiness. But before delving into these issues, it should be taken into account that previous judgments show that the parties in restitution cases belong to different sections of society and are not exclusive to the elite sections.

Generally, the restraining interpretation advocating the customary submissive role of a wife had been upheld by the High Courts of Punjab, Madhya Pradesh and Andhra Pradesh respectively. In Vuyyuru Pothuraju v. Vuyyuru Radha,[15] a division bench of the High Court of Andhra Pradesh stated:

"We view that it is the obligatory duty of the wife to accompany her husband wherever the husband resides. Her home is the home of her spouse. This is most likely the effect of the principles of Hindu Law."[16] Afterwards, the court held that:

"Several laws have been made to bring about a progress in the social position of women to bring them on par with men, but then we cannot disregard the doctrines of Hindu Law, which cannot be changed. It rests upon the legislature to modify the law in these aspects and bestow equal rights to women in all walks of life. We do not change the law, we can only interpret the law."[17]

Usually, the proposal favored by the rigid framers that it rests upon the legislatures to increase the scope of the provisions under equality. It is perplexing why more statutes are even required when Article 14 and 15 are already present. It is virtually not feasible under the Indian context. The primary focus of the legislators in India seems to be not legislation,

[15] AIR 1965 AP 407.
[16] Id. at 408.
[17] Ibid.

but politics. The several reports prepared by the Law Commission of India that were disregarded by the parliament further affirms this fact.

In Gaya Prasad v. Bhagwati,[18] by deeming that the husband was eligible for the restoration of conjugal rights, the High Court of Madhya Pradesh viewed:

"In a Hindu family, the wife's first obligation is to be obedient to her husband, and to stay under his care and protection. So, she is not eligible for living separately, unless she establishes that due to her husband's misbehavior or refusal to take care of her at his own residence or due to some other reasonable cause, she is forced to live in a separate residence."[19]

Also regarding the issue when the husband has less income and the wife, if she is permitted to work at a place away from the marital home, can significantly increase the family income, is not a valid reason to decline the wife's company to the husband. Under Hindu law, the implementation of such a course is not feasible.[20]

However, in another case, in N.R. Radhakrishnan v. N. Dhanalakshmi,[21] the Madras High Court was of the opinion that the enactments under Hindu law altered the customary roles of Hindu women and the anticipations regarding their submissive status. Nullifying the plea of the husband, the court affirmed that under the ancient Hindu law, the wife was under an obligation to be respectful to her husband. The judge stated:

"Legislative enactments such as the Hindu marriage Act have intervened upon the unqualified rights that was earlier bestowed upon the husband over his wife. The Court cannot interfere in every case and pass an order for restoration of conjugal rights, in case the wife distances herself from the company of her husband, unless she does the same with some rationality."[22]

Afterwards, he opined:

"It would seem that there is no provision under Hindu Law to view that the Hindu wife has no say in selecting the place of the matrimonial home. Article 14 of the Constitution assures parity before law and equal protection under the law to both husband and wife. Any provision giving a special right to the husband to choose the place of the matrimonial home with giving importance to the opinion of the wife would be contradictory to Article 14."[23]

[18] AIR 1966 MP 212
[19] Id. at 214.
[20] Id. at 215.
[21] AIR 1975 Mad 331.
[22] Id. at 332.
[23] AIR 1978 Del 301.

It might raise a question as to how the judgments in the field of restoration of conjugal rights will give rise to change. Yes, a woman is not required to conform to such an order. In a restricted view, it hinders the right of the husband to secure divorce on the reason of non-compliance to such an order. However, the judgments, by repudiating the customary roles of women, instills a change in the social mindset of the people, especially in a country like India. Therefore, the new roles of women do acquire legitimacy.

STATUS OF WOMEN UNDER MUSLIM LAW

Post-independence, India has done away with all influences of social justice, which holds true for Muslim women. The mindset of governments is not to introduce any reforms under Muslim law unless the community stakes a claim for it. Usually, the courts take a firm stand of non-interference regarding prejudice against women under Muslim law. This attitude is supported by eminent scholars. In general, a benefit is usually made out of this mindset of non-intervention, without admitting the pressures of realistic politics. Muslim law regarding marriage and divorce and '*waqf*' have been converted to 'supra fundamental rights'.[24] Therefore, the segregation of Muslim law and social justice is evident. To introduce reforms under Muslim law, they have to submit under the power of the dominant and privileged male members of the society by giving up their rights and privileges.

We find three judgments in the field of Muslim law which confidently tries to address the injustice suffered by Muslim women and help them in their long quest to achieve equal status in the society. The first case is that of Justice Dhavan, in Jtwari v. Asgharij.[25] The pertinent question before the court was whether the second marriage of the husband was a valid reason for the first wife to reside away from her husband and whether having a second wife would imply cruelty to the first wife. The husband, as expected, took the plea that the Quranic law permitted him to have four wives. He quoted the section on polygamy which meant that he was required to confine himself with the company of one wife if he was unable to give equal care to all of them. The judge opined that:

"Muslim law as implemented in India has regarded polygamy as a tradition to be endured but not accepted, and has not vested any fundamental right to a husband to force the first wife to share his company with the other wives in all situations."[26]

Coming to the question of whether having a second wife would imply cruelty to the first wife, Justice Dhavan viewed that cruelty would depend on the prevalent social circumstances. His opinion was that the burden would lie on the husband who has a second

[24] Mohammad Ghouse, "personal Laws and the Constitution of India"; in Tahir Mahmood, Islamic Law in Modern India 50 at 57 (1972).
[25] AIR 1960 All 684.
[26] Id. at 686.

wife to clarify his actions and validate that having a second wife did not imply cruelty to the first wife. This decision has incredible potentialities. The idea of cruelty as conceived by Justice Dhavan under the Dissolution of Muslim Marriages Act 1939 will empower a Muslim wife to attain divorce if her husband goes against her will and remarries.[27]

Under Muslim law, the husband has the autonomous power to attain divorce, but such a power is not bestowed upon the wife unless the husband explicitly gives his assent. Therefore, the judgment of Yousuf Sowramma has to be examined. In this case, the question was whether the wife was entitled for the restoration of conjugal rights. Meanwhile, the husband remarried. Justice Krishna Iyer decided to follow the viewpoint of Justice Tyabji of the Sindh High Court. He also laid emphasis of the custom of the Prophet regarding *Khoola.* It can be noticed instantly that the judge's choice regarding the viewpoint was affected by the objectives outlined in the Constitution. He stated:

"Another great benefit is that the Muslim woman returns back into her own self when the Prophet's words are satisfied, when almost equal rights are bestowed upon both spouses, when the 'talaq' procedure of instantaneous divorce is somehow complemented by the Khulaa device of deferred termination functioning under judicial observation. The social disparity between the genders would therefore be nullified and equivalent justice would be realized soon."[28]

The U-turn made by the government while framing the maintenance provisions in the Bill on the Code of Criminal Procedure in 1973 will be remembered in parliamentary history. Section 125 bestows right on a wife, the elderly and young children to attain an order of maintenance. The word 'wife' implies a 'divorced wife' also. Therefore, a remedy was created. Few Muslim members opposed it on the ground of tradition and that it intervened in their personal law. Despite the opposition of the Muslim members, draft sections 125-127 regarding maintenance was passed without leaving room for exceptions. The representatives of the Muslim community started a protest, which forced the government have a relook. The interpretation given by the house regarding draft section 127 was annulled. Thereafter, it provided situations whereby a magistrate can revoke the order of maintenance in support of a divorced woman.[29]

In the case of Bai Tahira v. All Hussain Fissalli,[30] the Supreme Court deliberated on the implication of section 127 of Code of Criminal Procedure. One pertinent question was

[27] AIR 1960 All 687.
[28] Id. at 270.
[29] S. 127(3)(b).
[30] AIR 1979 SC 362.

whether clause 3 of section 127 prevented the wife's right to secure maintenance. Justice Krishna Iyer, in his preface, stated that:

"Welfare legislations must serve as prompt delivery systems of the beneficial objectives pursued by the legislature and the beneficiaries should be the weaker sections of the society, like women living in poverty. The essence of Article 15(3) must be withheld. The Constitution is ubiquitous, and can affect the meaning and transform the values in every possible way."[31] So, he viewed that sections 125-127 of the Code must have a sympathetic essence to it, and held that misleading payments by way of traditional or personal law requisite would be taken into account while decreasing the rate of maintenance but can never be stopped altogether.

This judgment is an instance of judicial innovation to aid the neglected Muslim women. The dominant male members of the society did not pay heed to their troubles. The government failed to safeguard the rights of the poor women. A well-informed judge by interpreting the law achieved what the society and the government failed to deliver. Technically, the fault lies in sub-clause 3 of section 127, which speaks of nullifying the order and not for its revision, whereby another sub-clause seeks to revise the order of a magistrate. This judgment, in our eyes, tries to interpret the language of legislations keeping in mind the objectives contained in the Constitution.

CONCLUSION

The trends we have observed imply three tactics to interpret legislations which strive to bring about a reform in the long-standing laws. First, it is about the constricted construction. This tactic glorifies the customary roles of women unless explicitly amended by the statute. In England, the advent of constricted construction has been credited to the customary hostility of common law. No accurate explanation has been provided for the same.

Second, it is the flexible construction in the legislations which imply an overall interest in vesting equality of status on women. Consequently, it also removes the uncertainties and the loopholes.

Third, it is the dependence on the constitutional provisions regarding social equality and justice. Judges like Justice Krishna Iyer would not refrain to sidestep the customary rules of construction. The Supreme Court, in general, has carefully swerved to the second stance from the first.

[31] AIR 1979 SC 363.