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# Comparative Study of Personal Law in India

Volume: 7

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Issue: 4

Month: April

Year: 2020

P-ISSN: 2321-788X

E-ISSN: 2582-0397

Received: 04.02.2020

Accepted: 10.03.2020

Published: 01.04.2020

Citation:

Krishnaleela, S.  
“Comparative Study of  
Personal Law in India.”  
*Shanlax International  
Journal of Arts, Science  
and Humanities*, vol. 7,  
no. 4, 2020, pp. 121–127.

DOI:

<https://doi.org/10.34293/sijash.v7i4.2374>



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## Abstract

*A woman was considered less than a full human, an object to be transferred by her male guardian. Though the turn in rights and behavior hasn't quite corrected itself, women, possibly in a better place today than ever before -women are uniformly discriminated in India concerning all religions. Poly gamy forms a key basis for discrimination among Muslim women. In Christians, a wife can claim separation only on the adultery of the husband and his change of profession of Christianity to some other religion and marrying other women -There are different inheritance rules among the male and female Hindus. All this discrimination among the Indian women have to without any distinction be they Christian, Hindu, Muslim, Parsi, Sikh or Buddhist take what is best in all laws and frame a Uniform Civil Code - This article critically examines the uniform discrimination of women in India among Hindu, Muslim and Christian female marriage, Divorce and succession.*

**Keywords:** Discrimination, Marriage, Divorce, Maintenance, Inheritance, women

“There is no chance for the welfare of the world unless the condition of the woman is improved. It is not possible for a bird to fly on only one wing.”

- Swami Vivekananda

## Introduction

Law was an instrument to enhance our social order. Even western philosophy law maker did not give women a higher position. John Locke, Jacques Rousseau, are the followers Aristotle's Natural law argued that it was natural for a wife to be in subjection to her husband. A woman was considered less than a full human, an object to be transferred by her male guardian. Though the turn in rights and behavior hasn't quite corrected itself, women, possibly in a better place today than ever before. Fettered at home, disadvantaged of rights in society, and exposed to gender bias at the workplace, women have tolerated the burden of being the weaker sex all through history. There are low awareness and knowledge among women about their rights, and justifiably, they have shown a slight disposition to competition and threat of violation by their male relative preventing women from fighting for their inheritance rights. Several northern and western states women give up their claim over the ancestral property due to the custom of “haqtyag” or voluntary repudiation of rights. One there is no uniformity in inheritance laws, with various religious communities governed by their laws and different state-tribal were governed by their customary laws. In march 2019 shooting land prices in Haryana have seen a considerable rise in the number of women claiming their inheritance<sup>1</sup>.

The Applicability of personal laws in a country like India depends exclusively on religion. Hindus, Muslims, Christian, and Parsis are governed by their laws, respectively. Thus, different religion discusses changing rights on women in respect to personal matters like marriage, divorce, maintenance, and succession. Some personal laws are enacted. The remainders are legalized.

1 Thomson Reuters Foundation- Report 2019

The state may or may not be the ultimate source of their authority, but it has made them legally and socially authoritative and has given its authority to them. By personal law, it is meant that the rights given to women by their religion in addition to the rights given to them by legislation. If these rights given to women by their religion in compulsion had been perfect, there would have been no need to pass legislation conferring right. The religious laws and personal laws became interchangeable, and, in the process, it was forgetting met before the arrival of the British administrators. All aspect of the Hindus and Muslims were religious the common features of all other religion personal laws is that they give unsatisfactory and lesser rights to women.

The policy preserving personal laws for Hindus and Muslims in family matters was so sternly trailed to that the same was repeated by Cornwallis in the preamble to Regulation III of 1773 which acknowledged that the aim of the government was to preserve the Indian Shastras and the Quran in the matters to which the have been invariably applied” a Muslim is subject to Islamic sharia, a Jew to Halakhah, a Christian to cannon law and a Hindu to Dharmasasra. These personal laws ensure the secondary status of women within the family as well as the continued social and economic dependence of the women upon the male members of the family be their fathers, brothers, and son.

The so-called religious personal laws deny women even formal legal equality in personal relations. Women unfit for any independent existence and was the rule of ancient Hindu society. All around the world, discrimination against women persist much of in its blatant tolerated legal form. Discrimination based on sex range from the denial of women’s right to vote in Kuwait till 2005 and to the discrimination against women driving in Saudi Arabia till 2018. This article critically examines the uniform discrimination of women in India among Hindu, Muslim, and Christian females’ marriage, Divorce, and succession. This discrimination will be removed on application of uniform civil law<sup>2</sup>. Uniform civil law means which is commonly applied to all sects

of society. It does not mean only to force the one to leave their law. It should be a good legal framework in such matters as marriage, divorce, maintenance, and succession for all religious societies.

### **Discrimination against Women**

“From her father-son, or consort women never should be free for her

Wilful separation stains her husband’s family”<sup>3</sup>

According to Hinduism, a female was created by Brahma as part of the quality in creation to provide company to man and facilitate procreation progeny and continuation of family lineage. The girl is the property of the God of fire who entrusted the father with the responsibility of bringing up and to give there in gift to a virtuous person by invoking the fire god to witnesses the act of giving<sup>4</sup>. Hindus concept of marriage is divine, and the marriage bond is unbreakable, and even the death of husband cannot free the wife of the bond of marriage.

Islam is the first religion in the world which recognize woman as a legal entity and gave her all rights that man enjoyed Islam improved status of women by instituting rights of property, ownership, inheritance education marriage and divorce. The Quran came out with a radical declaration that men and women are equal, and women’s rights are equal to their duties.

The role of women in the church has forever been scrutinized and misunderstood, although many churches continue to refuse women certain rights. The period of 1960 and after that can be considered as the beginning of the women’s liberation movement in history, which advocates social, cultural, political, and religious equality of the gender.

Parsi women are discriminated against by-laws that have no basis in the community religious belief, and their inheritance laws are among the most unjust and their discriminated laws in the country. In India, there is no statutory law on marriage and divorce for the Jewish community. Marriage obligation and rights in Judaism are ultimately based on those appearing in the bible.

The role of Judaism is determined by the Hebrew bible the oral law by custom, and by non-religious

2 Article 44 of the Indian constitution says that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

3 Manu, V148 to 158

4 Rig Veda

cultural factor Jewish laws are not very gender-just laws for women marriage under different personal laws.

### **Marriage and Divorce under Different Personal Laws**

In the olden days, Hindus have married either the four approved marriages such as Bratima Arsha Cevia, Prajapathua or unapproved marriages such as Gandharva, Asura Rakshasa, Paisasa. Marriages are regulated and restricted by the various Acts such as the Special Marriage Act 1954, Widow Remarriage Act 1856 and the Hindu Marriage Act of 1955. Recently Bombay high court held that<sup>5</sup> “married women should be like Goddess Sita who left everything and followed her husband Lord Ram to the forest and stayed there for 14 years.”

Divorce was unknown to the laws of dharma as marriage was regarded as an indissoluble union of the husband and wife. The marriage ceremony “Sapthabathi or seven rounds,” which means union of husband and wife, is not only for this life, but for seven lives to come one after the other marriage is irrevocable. Every woman wants to know certain rights such as like Section 125 of the Criminal Procedure Code, 1973; a husband is not free from his duty to provide basic care like food, clothing, residence, medical treatment/attendance and education to his wife and children even though things turn sour between him and his wife. Every married Indian woman has a right to have remained her dignity and self- respect the same lifestyle as her husband and in-laws. It is also her right to be free of torture - mental and physical. Every wife has the right to live in the matrimonial house where her husband resides. Irrespective of whether it is a joint family house, an ancestral property, rented house, or a self-acquired house.

In Islam, marriage is, in fact, a flexible arrangement made through mutual consent. Marriage among Muslims is not a sacrament but purely a civil contract through solemnized with the recitation of certain verses from the Quran and must have credible witnesses to marriage from both the bride and groom’s side. Poly gamy forms a key basis for discrimination. Muslim personal law also makes it fair easier for

men than women to divorce all Muslim men have an absolute right to unilaterally divorce at will whereas Muslim women may only do so if men delicate them this right in the marriage contract while men’s right to divorce through talak is supposed to be subject to arbitration council review, experts said this rarely happens. Muslim personal law recognizes wives’ right to maintenance during the marriage, but upon divorce, maintenance without proper codification, Muslim women are much affected. There was no clear interpretation of the Quran without base, more fatwa goes against women. They always live in the most economically and socially depressed positions.

The marriage contract reduced be in written form like Kabinnama. But neither this contract is to be in writing nor need any religious ceremony. There must be some proposal and acceptance between the parties in the presence of witnesses is mandatory. But that nikah cannot be performed without the free consent of the bride. She has the right to agree or refuse the marriage. Triple talaq and unregulated Polygamy has often been the cause of attacks on otherwise quite progressive Islamic personal law. Polygamy may not be abolished completely but strictly regulated by Quran<sup>6</sup>. According to Islam, marriage is a civil contract. For avoiding the civil consequences of an unhappy marriage, divorce is permitted. Quran says, ‘either retain them with humanity or dismiss them with kindnesses. “Of the many things which God made permissible for man, the most displeasing to God is Divorce.”

14th July 2017, when shayara bano who had been married for 14 years saw a letter in the post from her husband, Rizwan Ahmed, she thought he must be asking her to return to him after he dropped her off at her parents’ home in Kashipur, Uttarkhand. But the letter just had three words: Talaq, Talaq, Talaq. It gives shock, and her world has become crumbled. Before that, she was forced by her husband to undergo half a dozen abortions and threatening her, but she obscured all with her. She filed the case in Supreme Court seeking a ban on triple talaq as it is practiced in India. The Apex court itself said that 6 Nanda Chiranjeevi Rao. “Presumption if marriage under Muslim law.” *Indian bar review*, vol. 39, no. 4, 2012, page 133. Equal Justice is humanly impossible with such warning polygamy cannot be practiced without proper regulation.

<sup>5</sup> Justice. Majumdar and Anoop Mohta

divorcing a Muslim woman by man through “Talaq ebidat” (Tribal Talaq) is unconstitutional. From this judgment one thing is for sure, though: The battle for gender equality still has a long way to go, and this is a minor victory along that path

The laws regulating solemnization of marriage among Indian Christian are the Christian Marriage Act 1872. Marriage, according to Christian tradition, is not merely a civil contract, nor is it purely a religious contract according to the law of nature. Likewise, Christian women could not find divorce on the grounds of adultery of her husband; it had to be coupled with brutality, inhuman, and sodomy. On the other hand, Christian husbands could simply declare their wives as adulteresses and divorce them.

Indian Divorce Act 1869 deals with divorce among Christian. The Christian law of divorce in India remained embedded in the principles of Victorian and vintage for more than a century and a quarter. As per Christianity, a Christian wife can claim separation only on the adultery of the husband and his change of profession of Christianity to some other religion and marrying other women.

The Parsi Marriage and Divorce Act 1936 govern all Parsi matrimonial relations in India Marriage is considered as a spiritual discipline. The Parsi Marriage and Divorce Act 1955 governs proceedings for Parsi in India. Judaism recognized the concept of no-fault divorce thousands of years ago. Jewish law permits divorce as an unfortunate necessity. Eminent Jurist Leila Seth in her essay emphasis the need for unification of personal law saying that we have a duty to the woman in India to do away with all discrimination between men and ladies and make a private law which will benefit all Indian women without distinction be they Christian, Hindu, Muslim, Parsi, Sikh or Buddhist take what’s best in all laws and frame a Uniform Civil Code.

### **Inheritance Laws under Different Personal Laws**

A Hindu Undivided Family consists of males and females. The married and unmarried daughters continued to remain as members of the other family. The male members are coparceners with the right of survivorship. More over one childless die or become religious ascetic shall divide property excepting stridhana. So, widows are excluded

from survivorship. However, the old rule has been repeated by the women’s Right to Property Act 1937 gives the right to the widow to claim a share in her husband coparcenary or self-acquired property gives the right to the widow to claim a share in her husband coparcenary or self-acquired property by way of partition from the other coparceners or sharers, but she cannot sell or alienate that property. A unique feature of the Hindu Succession Act, 1956 though not a cheerful one, is that it provides for 2 entirely different schemes of succession, supported the sex of the intestate. No other major succession law is trendy in India kind a provision parallel to the present and that they lay down one scheme and one set of heirs for all intestates. The reason for not providing a uniform scheme under Hindu law is linked closely to the emphasis on the conversation and protection of the property in the family of a male Hindu. The Hindu woman’s Right to Property Act 1937 was hailed as the opening of a fresh chapter in the history of Hindu woman’s rights to the property.

Tulassamma vs. Sesha Reddy, our Hon’ble Supreme Court decides that on the Hindu women over her property have been broken by this act, and her status has been brought on par with men. In this case, the trial court decreed the suit on the ground that the appellant had a limited interest in the property allotted to her by the respondent deceased husband’s brother. The appellant was entitled to maintenance out of the joint family property when she leased out her property. The respondent filed suit for declaration that she had no absolute right over the property. Instead, her right was only a limited interest. The contention of the appellant that she had become the full owner of the property by section 14 of the Hindu succession Act 1956 was upheld by the Supreme Court.

Throughout history, restrictions on Hindu women’s property rights have changed, and current laws governing these rights are more liberal than those ancient Hindu society. A Hindu daughter can claim her share, which is equal to her brother only in the testate property. Patriarchal Hindu society provided women with property known as Stridhana, and it mainly came from marriage gifts. In February 2018 honorable Supreme Court of India held that a daughter living or dead on the date of an amendment

would be entitled to the share in father's property. This implied that though the daughter wasn't alive on the date of amendment, her children could claim partition. Living daughter of living coparceners would be entitled to claim a share in the ancestral property.

The old concept of Stridhana is still very evident if we look at the content of sections 15 and 16. A woman under the patriarchal setup is visualized as having no permanent family of her own. She is born in her father's family, and remains there till she gets married, after that, she joins her husband's family. She stay in none of these families permanent. Even in her husband's family, within the event of a marital breakup, thanks to the death of the husband or maybe divorce, she will remarry and move out of this family and join the second husband. In contrast, the husband's family does not change with his marriage or remarriage or death of wife or divorce. The ability of the lady to plan and carry the property together with her, far away from the family from whose members she had inherited it, is given primary importance under Hindu law but isn't treated as of any consequence under the inheritance laws applicable to women belonging to the opposite religious communities. It appears surprising that the patriarchal setup is followed by all Indian families (excepting the matrilineal societies), irrespective of their religion, yet none of the other succession laws provide for separate schemes for male and female intestates.

An earlier look at sections 15 and 16 also reveals that not only is a separate scheme of succession provided in the case of a female intestate, but there is also further divergence linked with the source of acquisition of the property and on considerations of her legal status, and factors like whether she died leaving children or issueless. Concerning the categorization of heirs, in the case of a married woman, her blood relations are relegated to a very inferior placement in comparison to the entire category of the heirs of her husband.

Though Muslim woman is entitled to share in the ancestral property by personal law, yet hardly few get their share. The Muslim jurists gave much significance to the laws of inheritance, and they were never tired of repeating the saying of the prophet.

The Prophet said that learn the laws of inheritance and teach them to the people for they are one-half of useful knowledge, and modern authors have admired the system for its utility and formal excellence. McNaughton says that in these provisions, we find ample attention paid to the interests of all those whom nature places in the first rank of our affections, and indeed it is difficult to conceive any system containing rules more strictly just and equitable. The Muslim law of inheritance consists of two distinct elements, the custom of ancient Arabia and rules laid down by the Quran and the Founder of Islam. The Koranic reform came as a super structure upon the ancient tribal law. Many of the prevailing, social, and economic inequalities were corrected. For that reason Koran may be referred to as an amending Act.

The Parsis were the only group of people who demanded a separate legislation for succession. In March 1836, the Parsi community gave a representation of the fact that they were subject to serious disadvantages in the absence of any written laws for their people. The Third law commission in its report had held that the claim of Parsis to have a separate law was not borne out. The Parsis were not satisfied with this and, ultimately, in 1864, the Parsi law commission was appointed to resolve the issue, and consequently, a separate Act governing intestate succession among Parsis was enacted in 1865. The same was later incorporated in Sections 50 to 65 of the Indian Succession Act, 1925<sup>7</sup>. It is observed that the Parsi, a community with 90% literacy, a strong hold on the industrial and professional life of the country, although they are one of its smallest minority communities, have among the most unjust inheritance laws in the country today. This finally proves that discrimination and gender biases do not disappear with progressive education.

On a study of the above history, it can be comfortably concluded that it was the Parsi law which originally gave roots to the Indian Succession Act of 1925. Even though Christian woman has equal rights as per law, they rarely avail the provision, either due to ignorance or due to opposition from male heirs.

The Christian Law of Succession has an interesting background lying in Mary Roy's case.

<sup>7</sup> K B Agarwal, Family law in India, 2010, Kluwer Law International.

Intestate succession among Travancore-Cochin Christians has been subjecting of public debate ever since the decision of the Supreme Court of India, in the Mary Roy case. The decision seemingly created considerable confusion, not only among the members of the Christian community in Kerala but also among the lawyers.

Till the decision<sup>8</sup> of the Hon'ble Supreme Court, the Travancore Christians were governed by the provisions of the Travancore Christian Succession Act, 1916, and thus the Cochin Christians were by the other parts of India were governed by the provisions of the Indian Succession Act, 1925 with such exceptions as provided in the Act. In the times of the British government, there was no accurate system of legacy about the property of all the society. Even the Hindus, who got converted to Christianity, were not allowed to have any separate law of succession, and the Hindu law too ceased to apply to them once they were converted. This chaos gave birth to the enactment of the Indian Succession Act of 1865, which was not only applicable to the intestate succession of the Christians but to the Parsis as well. For the period of the determination of the Indian Succession Act, 1865, two more Acts were enacted, namely, the Travancore Christian Succession Act, 1916 and the Cochin Christian Succession Act, 1921, for the Christians of Travancore and Cochin.

An assessment of the succession rights of the Christians, Hindus, and Muslim women conveys the reality that only Christian women alone are disadvantaged to inherit a share of ancestral property. Moreover, we need to amend our Indian Succession Act 1925<sup>9</sup> and we have to follow the report.

- Sections 41 to 49 deserve to be changed to protect the interests of Christian women, especially in the case of the mother of a deceased intestate.
- It was suggested that Section 42, which weaves an archaic principle of giving superior status to man regarding access and owning the property, needs to be revisited and revised.
- Under the provisions of Section 46 of the Administration of Estates Act, 1925, even where brothers and sisters of the intestate are alive, the father and mother take the property. And more

relevant in our context is to note that they share equally, and if only one of them survives, he or she takes the whole share individually.

- One of the recommendations thus made in this report is to amend provisions of Section 42 to ensure that deceased intestate (leaving apart the half for the half for the deceased widow if living) succeeds the property in equal. Such change would constitute a positive step in ensuring that the law is fair and just towards Christian women.
- Section 43 does not treat the mother of the deceased intestate as having equal status as to the father, and the same is true also for Sections 44, 45, and 46. Accordingly, these sections should also be revisited and revised.
- Coming to Sections 47 and 48, it was reiterated what had been earlier recommended by the Law Commission in its 110th Report. As regards Section 47 it was noted, that the provisions of this section do not apply until there is at least one brother or sister alive, and the same is clarified by adding after the words, "nor mother" as appearing in the text of this section, the following words, "but has left a brother or a sister."

## Conclusion

India is a very big country stretches from the royal mountains of the Himalayas in the north to the cape of Kanyakumari in the south and forms the ice-covered mountains of Kashmir in the west to the hills of Assam and Mizoram in the east. It's more than 100 million populations consisting of people belonging to different races, religions, and color caste and creed. The highest majority of people reside in India is Hindus and a second largest minority of the Muslims there are many other ethnic as well as religious minorities like Christians Buddhists Parsis, Jains, Sikhs and Jews also reside here. Buddhists Jains and Sikhs have no personal laws of their own and are governed by the Hindu Code Bill. There were different personal laws for the various communities in matters of marriage, divorce adoption and inheritance. Under parsi law, daughters get half the share of the son as like the sharia law. The government settled a substantial amount of autonomy to personal law boards in constructing these laws. These religious communities co-exist

8 Mary Roy v. State of Kerala, AIR 1986 SC 1011

9 Law Commission Recommendation 247 Report

as part of one country, yet the personal laws differ from one religion to another. The reason is that the customs social usage and religious clarification of these communities as practiced in their personal lives depend hugely on the religion they were born in and that which they practice.

In the 21<sup>st</sup> century the demands of the women's movements were different. Changes are the only thing which becomes unchangeable. Their priorities have changed. Today education career is the right option to pull out the women from their cubed, cribbed, and confined life with economic independence.

For the benefit of entire women who reside within India, likes to frame legislation which applies to all without discrimination.

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