

The legislation as well as judicial pronouncement indicates that the mother is second choice to be guardian of the child. The Court thus often tends to maintain the status quo as far as the position of women is concerned.

While Hindu women got the right of inheritance in 1956⁵², The coparcenary⁵³ only admitted male members until 2005⁵⁴. Under the Hindu Succession Act, 1956, while the woman's property⁵⁵ ensuring it devolves on the heirs of the last male holder, in the absence of the woman's children, no such qualification is laid down in case of male succession.⁵⁶ Premising that the law is based on divine precept has led to severe resistance to reform.⁵⁷ Legislative reform would lead to certainty and uniformity.⁵⁸ Muslim marriage (nikah) is defined to be a contract which has for its object the procreation and the legalizing of children⁵⁹

A valid nikah must be performed in the presence of witnesses, the minimum requirement is, two male or one male and two females.⁶⁰ This requirement of witnesses leads us to the supposition that a woman is so inferior that two women equal one man. Mention may be made that Islam permits polygamy. This premise is further strengthened by reference to the inheritance laws where in the share of a Muslim man is generally double than that of a woman. In Muslim law, there are mandatory heirs with fixed share as laid down in the Quran. For example, the share of a wife (in absence of children) is one fourth of the property⁶¹ of the husband, whereas the husband in a like situation gets half the property. However, the Shariat has definitely placed women in a better position as compared to the customary laws in ancient Arabia, which excluded women from inheritance.⁶²

provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation. - In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

⁵¹ "While both the parents are duly bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be absent for the purposes of Sec. 6(a) 6(a) of Hindu Minority and Guardianship Act and Sec. 19(b) of Guardians and Wards Act."

⁵² 6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

⁵³ Coparcenary refers to equal rights in property that was restricted only to male members of the Hindu Undivided Family. It is a narrow body of persons within a joint family. Coparceners jointly inherit property and have unity of possession.

⁵⁴ S. 6 Devolution of interest in coparcenary property. -

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005⁵⁴, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, -

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004

⁵⁵ 15. General rules of succession in the case of female Hindus. - (2) Notwithstanding anything contained in sub-section (1), -

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

⁵⁶ S. 6 Devolution of interest in coparcenary property. -

The laws also grant man a plethora of ways to divorce a woman⁶³, but until the Dissolution of Muslim Marriages Act, 1939⁶⁴ intervened, women could divorce a man in a few ways, one of which was that he permitted her to divorce him.⁶⁵ The Act granted to Muslim women rights in *pari materia* with other women.⁶⁶ "Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook."⁶⁷ The triple talaq was abolished by Bangladesh before India.⁶⁸

British governance was responsible for the enactment of laws governing native Christians.⁶⁹ The Christians governed by Indian divorce Act which originally permitted a man to divorce a woman if she was guilty of adultery, whereas a woman had to prove adultery coupled with cruelty in order to obtain a divorce. The archaic legislation continued to be in force for decades. In *Ammini E.J. v. Union of India*⁷⁰ the Kerala High Court observed:

"...While Section 10 confers on the husband a right to get divorce on proof of adultery simpliciter the wife is obliged to prove either cruelty or desertion along with adultery to get a divorce... The Indian Divorce Act, 1869 and the Christian Marriage Act, 1872 are dated survivals with an anti-woman slant..."

⁵⁷ Mumtaz Ahmad, "The Muslim Family Laws Ordinance Of Pakistan." *International Journal on World Peace* 10, no. 3 (1993): 37-46. Accessed June 10, 2021. <http://www.jstor.org/stable/20751912>.

⁵⁸ A. Suneetha, "Muslim Women and Marriage Laws: Debating the Model Nikahnama." *Economic and Political Weekly* 47, no. 43 (2012): 40-48. Accessed June 10, 2021. <http://www.jstor.org/stable/41720299>.

⁵⁹ Hedaya, p.25.

⁶⁰ Ahmad A Mohammedan Law 26th Ed (2016) Central Law Agency

⁶¹ *ibid*

⁶² Mohd Altaf Hussain Ahangar, "Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal." *Arab Law Quarterly* 28, no. 2 (2014): 111-35. Accessed June 9, 2021. <http://www.jstor.org/stable/43294660>.

⁶³ Talak, *ila*, *zihar*.

⁶⁴ No 8 of 1939

⁶⁵ Talak –I – *tafweez* or *delegated talak*.

⁶⁶ 2. Grounds for decree for dissolution of marriage. —A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: —A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: —"

(i) that the whereabouts of the husband have not been known for a period of four years; (i) that the whereabouts of the husband have not been known for a period of four years;"

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years; (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;"

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards; (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;"

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;"

(v) that the husband was impotent at the time of the marriage and continues to be so; (v) that the husband was impotent at the time of the marriage and continues to be so;"

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease; (vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;"

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; (vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years\:" Provided that the marriage has not been consummated, Provided that the marriage has not been consummated,"

(viii) that the husband treats her with cruelty, that is to say, — (viii) that the husband treats her with cruelty, that is to say, —"

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or"

(b) associates with women of evil repute or leads an infamous life, or (b) associates with women of evil repute or leads an infamous life, or"

(c) attempts to force her to lead an immoral life, or (c) attempts to force her to lead an immoral life, or"

(d) disposes of her property or prevents her exercising her legal rights over it, or (d) disposes of her property or prevents her exercising her legal rights over it, or"

However, the change was brought about only in 2001.⁷¹ The Indian Succession Act as applicable to Christians discriminates between the parents of the propositus, the father excludes the mother, and siblings, whereas the mother inherits in the absence of the father and simultaneously with the brothers and sisters.⁷²

The Civil Code of Goa, is a Portuguese inherited legislation⁷³ applicable to all Goans. Unlike the rest of India, all Goans irrespective of religion are governed by this code which applies 'uniformly'. Under the Code, marriage is defined as a perpetual contract made between two persons of different sex with the purpose of legitimately constituting a family.⁷⁴ The regime of community of property applies by default if no other

is specified⁷⁵. Goa claims to have a uniform civil code,⁷⁶ while it is true that the Code treats the religions without bias, by applying to all goans irrespective of religion, it is patently male centric. The law insidiously promotes inequality between the spouses, for example, vide, the incapacity of married women in property matters⁷⁷. The wife may not except in cases which are specially authorized by law, acquire or dispose of assets or contract obligations, without the husband's permission.⁷⁸ However in the exceptional cases when the husband permits or is declared incompetent by court, the wife is the administrator of the couple's assets. It may be noted that this incapacity does not apply to household management.⁷⁹

e) obstructs her in the observance of her religious profession or practice, or (e) obstructs her in the observance of her religious profession or practice, or"

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran; (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;"

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law: (ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law:." Provided that—

(a) no decree shall be passed on ground (iii) until the sentence has become final; (a) no decree shall be passed on ground (iii) until the sentence has become final;"

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and"

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground. (c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

⁶⁷ Shayara Bano v Union of India (2017) 9 SCC 1

⁶⁸ Anees Ahmed. "Reforming Muslim Personal Law." *Economic and Political Weekly* 36, no. 8 (2001): 618-19. Accessed June 9, 2021. <http://www.jstor.org/stable/4410313>.

⁶⁹ Nandini Chatterjee, "Religious Change, Social Conflict and Legal Competition: The Emergence of Christian Personal Law in Colonial India." *Modern Asian Studies* 44, no. 6 (2010): 1147-195. Accessed June 10, 2021. <http://www.jstor.org/stable/40926527>.

⁷⁰ AIR 1995 Ker 252

⁷¹ 10 Grounds for dissolution of marriage. —

(1) Any marriage solemnized, whether before or after the commencement* of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent—

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.]

moved on the premise women had no rights independent of their husbands, and were treated as chattel or property. Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a theft of his property, for which he could proceed to prosecute the offender.

Till date legislation and precedent generally move on the premise that woman is some sort of inferior being, inferior in intellect and stamina, whose main purpose in life is child bearing⁹² or being subsidiary to man. This role of woman has been glorified

in scripture and folk lore. Reference may be made to Savitri rescuing Satyavan from death, to the adage that states "behind every successful man, there is a woman", to Pandora's Box.

It is high time we followed the CEDAW in letter and spirit, and become "aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women," which will result in a strong nation and a strong world.

⁹⁰ Joseph Shine v Union Of India 2018 SC 1676 re S.497 IPC- 497. Adultery. —Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

⁹¹ Tracy Hayes, "As A Man Is Rarely Adored By Another: Misogyny And The Homosocial In A Pair Of Blue Eyes." *The Hardy Society Journal* 15, no. 2 (2019): 43-48. Accessed June 9, 2021. <https://www.jstor.org/stable/48563538>.

⁹² Aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, (CEDAW)

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