

LAW & SOCIAL TRANSFORMATION – WITH SPECIAL REFERENCE TO INDIAN WOMEN & ITS IMPACT ON RULE OF LAW

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Abstract

Law is an instrument of social change. What kind of change is needed depends upon the society and society's power in implementing the same through the state. Rule of law has a great force that brings change in the society according to the law has a great force that brings change in the society according to the law framed. The transformation in morals of the society is brought by the law. Law must not be static. It must be flexible i.e. it must transform with the requirements of the society at large. A flexible federation is one where society must never suffer about the rigidity of law. The situation of women is worst since centuries in India society. We have opted for flexible federation. We have framed various kinds of protective legislations for women. We have used law as a medium of social change. The social change that has been initiated in Indian society is to such an extent that it has transformed the entire society, especially the status of women, position of women, rights of women, etc have changed drastically in Indian Society. Various customs wherein exploitation of women used to take place were abolished by the Government by passing specific legislations, various conventions of the United Nations pertaining to women are signed by the Government and necessary legislations are passed by the Government for smooth implementation of these conventions. The Supreme Court of India has used law as a dynamic instrument for bringing enormous proportions of social change in Indian Society. The present days laws of India are equivalent to that of developed countries of the world. Despite such tremendous social change, the situation that we notice in India is that law does not govern the morals of the society. It is the society that governs the law. The law in India is made flexible to the extent of social distortions. It has led to the failure of Rule of Law.

KEYWORDS: IPC - INDIAN PENAL CODE, ILO - INTERNATIONAL LABOUR ORGANIZATION, UN - UNITED NATIONS, UDHR - UNIVERSAL DECLARATION OF HUMAN RIGHTS, SITA - SUPPRESSION OF IMMORAL TRAFFIC ACT, ITPA - IMMORAL TRAFFIC PREVENTION ACT, NCRB - NATIONAL CRIME RECORDS BUREAU, DV ACT - DOMESTIC VIOLENCE ACT

INTRODUCTION

Law is a tool of social engineering. Social transformation is the outcome of sociological jurisprudence. Law is used to maintain the balance between various competing interests as well as conflicting interests. If the law succeeds in maintaining such balance it is said that the Rule of Law exists in the society. But if it fails to do so, we must say that there is no more prevalence of Rule of Law in the society. Women were exploited in various ways since centuries in Indian Society. These were sati system, bonded labor system, dowry system, female infanticide, sexual exploitations of various kinds, etc. Almost all of these exploitations which are called as traditional exploitations are abolished in India up to a sizeable extent. Up to this level we can say that the law is successful in changing the morals of the society. Up to this level whatever social transformation is imitated is successful. Indian society has progressed a lot and it is still progressing rapidly. The exploitations of women have increased in modern times as compared to traditional exploitations. New means, methods and techniques of exploitations of women are practiced in India Society. For, e.g. female infanticide problem is controlled by law. But it has acquired the new form of female feticide by the method of sex selection practiced with the help of ultra sonography machine. The number of births of female as compared to male is low and day-by-day the said number is decreasing. The custom of Sati is abolished by law but the number of women burnt alive resulting into dowry death have increased in India. The various kinds of exploitations have gained new forms. Here the law fails in changing the morals of the society. Here the law fails in changing the morals of the society. Here the law has failed in maintaining the balance between competing interest and conflicting interest. Thus, it is not an exaggeration to say that tremendous social transformation has taken place in Indian Society but at the cost of collapse of Rule of Law.

VARIOUS KINDS OF SOCIAL TRANSFORMATION AND ITS IMPACT ON RULE OF LAW

Various kinds of social transformation have taken place in India. It has its positive as well as negative impact on Rule of Law. These transformations and their impacts on Rule of Law can be studied by studying the following aspects:

1) ABOLITION OF BONDED LABOUR AND SLAVERY:

In India government claims that bonded labor and slavery are almost eradicated from India. For the purpose of removal of slavery, the then British Government in India passed a legislation called Indian Slavery Act, 1843. Besides this, penal provisions were made in The Indian Penal Code-IPC 1860 as under:

(a) Section-370⁸ - Buying or disposing of any person as a slave.—

Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

(b) Section 371⁹ Habitual dealing in slaves.—

Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with imprisonment for either description for a term not exceeding ten years, and shall also be liable to fine.

The International Labour Organization-ILO was founded in the year 1919. The League of Nations was formed in the year 1920. Due to the combined efforts of the ILO and the League of Nations forced labour convention came into existence in the year, 1930. In the year 1945. The United Nations – UN were formed. It has passed various conventions, covenants, Declaration, etc. for abolition of slavery, bonded labour, human trafficking, etc. These are The Universal Declaration of Human Rights – UDHR 1948, Slavery Convention, Abolition of Human Trafficking Convention, etc. India has passed the Bonded Labour (Abolition) Act, 1976.

The condition of women is critical in slavery and bonded labour system as compared to male counterparts. Despite such legal enactment, we still find incidents of slavery, bonded labour, Devdasi system, etc. in many parts of bonded.

The refined and modernized form of bonded labour or slavery is found in Governments jobs and private jobs especially contracted jobs of eleven months contract, two years contract, etc. The working hours, nature of work, etc. of contracted employees are same as that of permanent employees. But their salaries, emoluments, etc. are far less as compared to permanent employees. At the time of seeking job contracted employees sign a declaration that they agree with the terms and conditions of the job. Actually, nobody agrees with the discrimination done with them especially, when the nature of work, workload, etc. are same. Moreover, it violates the basic principal of equality enshrined in our constitution i.e. equal pay for equal work. The same system prevails even in education sector. The vidhyasahayak recruitments are done on the basis of fix pay for five years. The workload, nature of work, etc. are same as compared to permanent professors.

In private sector generally employees have to sign one or two years contract with the employer. The terms and conditions enshrined in many of these contracts are very rigid. These are once the recruitment is done; the recruit cannot leave the job till the duration of the contract. Especially, women have no right to become pregnant till the existence of contract. If the employees leave the job i.e. they resign during the pendency of the contract, then they have no compensate the employer. In some of the private sector units especially in fitness clubs a specific class of employees especially women have to take prior concerns of the employer regarding their marriage.

Thus, slavery and bonded labour both exists in our present day society in their modernized form. So far the law has been proved as effective tool in abolishing and controlling the traditional form of slavery and bonded labour. The modern forms of slavery and bonded labour have their perpetual existence in each and every sector of the Indian Economy. It is not only the failure of law but it is the failure of Rule of Law in changing the morality of the society.

2) PREVENTION OF PROSTITUTION:

Mumbai is the hub of Asia as far as sex workers and trade in human trafficking is concerned. In other words the largest sex industry in Asia is situated in Mumbai. Many innocent girls are kidnapped and forced into prostitution. Many amongst them are sold by their parents, relatives, etc. The Government of India has enacted

⁸ Indian Penal Code-IPC 1860, Bare Act, Current Publications, Mumbai, 2007 Edition, P.No.168

⁹ Id. on 1

The Immoral Traffic (suppression) Act, 1956 – SITa. The said act was substituted for The Immoral Traffic (prevention) Act, 1956 – ITPA. The said within 200 yards of public place. The buying and selling of minor for the purpose of prostitution is categorized as penal offences under the IPC. The relevant section for the said offences are – Section – 372¹⁰ – Selling minor for purposes of prostitution, etc.—

Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—

When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—

For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

Section 373¹¹ Buying minor for purposes of prostitution, etc.—

Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—“Illicit intercourse” has the same meaning as in section 372.

Besides the above section article 23 of the constitution of India prohibits traffic in Human beings and forced labour.

Article – 23¹² Prohibition of traffic in human beings and forced labour –

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them. The laws as well as the constitutional provisions are very clear regarding prostitution. In India, prostitution practiced privately is not considered illegal. But keeping of brothels, any public act of seduction, etc are considered illegal. But the number of cases of prostitution, human trafficking, Rev parties, etc are increasing in India.

As per the statistical data of The National Crime Records Bureau – NCRB, in the year 2016 as many as 22,955 victims of trafficking were identified.¹³ Among these, according to NCRB as many as 11,212 were subjected to forced labour, 7570 were exploited in sex trafficking, 3824 were exploited in unspecified manner and 349 victims were subjected to forced marriages.

The Government of India has set up Anti-Trafficking Units But the number of the said crime is still increasing. The acquittal rate for trafficking cases in the year 2015 was 65% which increased to 72% in the year 2016.¹⁴ In February, 2018, the Union Cabinet approved the Trafficking in persons (prevention, protection and rehabilitation) Bill. But the said bill has not become the act yet.

Media has quoted that – Delhi’s red-light area had become a hub for human trafficking, especially of girls, and alleging the involvement of police, politicians, and local government official. There were no reports of investigation into such cases. The consumption of psychotropic substances, prostitution, etc are carried out on large scale in Rev Parties. The numbers of Rev Parties are in increasing in India with the increase in shaping and controlling the morality of the society. Perhaps the Rule of Law has failed.

¹⁰ Id. on 1

¹¹ Ibid P.No. 168 & 169

¹² The Constitution of India, Bare Act, Universal Law Publishing Co., Ltd, Delhi, 2007 Edition, P.No.8 & 9

¹³ www.Asiatimes.com

¹⁴ <https://www.refworld.org>

3) PARTICIPATION OF WOMEN IN DEMOCRACY¹⁵

“The question is imposed on Indian Democracy regarding equality in participation of women in democratic affairs of the nation. According to the statistical data published in a Rajkot Daily Newspaper, Sandesh, the question is raised that where is the equality? In Rwanda there are 49 women amongst 80 seats in the Parliament. But in India amongst 542 seats in parliament only 18 are women. Indian politicians do demand vote from women but they do not give tickets to women for contesting election. The numbers of votes of women are increasing as compared to that of man. The said article indicates that in the year 1962, the voting done by women was 46.63% and that done by men was 63.31% In the 2014 Lok Sabha Elections the voting done by women was more as compared to men. Though we celebrate 8th March every year as international women Day, but we have failed to provide equality to women. In other words, our society is still male dominated society.”

“Law has failed to change the morality of the society i.e. a change wherein from a male domination to equality based society. Thus, it is not at all an exaggeration to say that the Rule of Law has failed in bringing equality.”

4) MATRIMONIAL OFFENCES:

There are various matrimonial offences taking place in our society since time immemorial. Few of these offences are discussed below.

Adultery

Adultery is a tradition found in Indian Society. In England adultery is not an offence. But due to prevailing tradition especially cultural beliefs in Indian Society, Britishers kept adultery under the category of penal offence in IPC section – 497 deals with adultery.

Section 497 Adultery¹⁶

“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.

At present the Supreme Court of India has partially struck down adultery by recognizing live-in-relationship as lawful.”

Polygamy

Polygamy was a custom in Indian society. But after the enactment of Hindu Marriage Act, it was considered as unlawful. Way back during British rule in India Ishwar Chandra Vidhyasagar presented a petition before the then British Government for passing legislation to prohibit polygamy. Section – 494 of IPC considers polygamy as offence.¹⁷

Section 494 Marrying again during lifetime of husband or wife.—

“Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

(Exception) —

“This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,”

“nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.”

The present situation is such that in Hindu society no one is allowed to marry again when a marriage is going on. But on the other hand live-in-relationship is permitted lawfully though the marriage is subsisting between the spouses. Indian society is mesmerized to adultery and polygamy to such an extent that it cannot be abolished from within the society by just the stroke of a pen. These customs have again entered into the society in the form of live-in-relationship. Forms are different and so as the name. Means are different but the achievement of goal is the same.

Marriage is the pious social institution on which the Hindu Law is founded. At present irretrievable breakdown of marriage i.e. divorce has increased in Indian Society. The quanta of live-in-relationship have increased in our

¹⁵ Sandesh Newspaper, Rjt Edition, Colum – wide Angle by JayeshThakrar, Dt.8/3/20 P.No.4

¹⁶ Supra Note-1 P.No.211

¹⁷ Ibid, P.No. 210 & 211

society. The norms of civilized society have changed. Previously, those persons who were called as characterless persons are now known as person of good character by the virtue of law.

In *Lata Singh Vs. State of Uttar Pradesh*¹⁸ “it was held that a girl who is a Major (i.e. who has attained majority) is independent to Marry a person whom she likes or she is entitled to live with anyone she likes. The expression entitled to live with anyone she likes. The expression ‘entitled to live with anyone she likes’ includes live-in-relationship. The great Indian culture and the expression entitled to live with anyone she likes’ both are contradictory aspects.”

The Government has enacted The Protection of Women Against Domestic Violence Act, 2005 also known as DV Act wherein women living under live-in-relationship are entitled to obtain maintenance. She is entitled to get maintenance under the presumption made as per sec-114 of The Indian Evidence Act. It is presumed that they live as husband and wife. Such presumption favours polygamy. Thus, it is the ultimate failure of Rule of Law in shaping the morality of the society.

5) ABSENCE OF UNIFORM CIVIL CODE:

Article-44 of The Indian Constitution¹⁹ which is one of the directives amongst the Directive Principles of the state policy has made it mandatory upon the state to enact Uniform Civil Code.

Article 44 Uniform civil code for the citizens-

The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

“Uniform civil code is necessary since the inception of the constitution. In *SarlaMudgal Vs. Union of India* the Supreme Court of India²⁰ directed the Government of India to frame Uniform Civil Code and to report the same before the Supreme Court. But the Government remained passive regarding it. Later on in *Lily Thomas Vs. Union of India*²¹ the Supreme Court clarified that the direction that was issued in the *SaralaMudgal* case was and obiter dicta and same was not legally binding on the Government.”

“It was held by the Supreme court in *Pannalal Bansilal Patil Vs. State of Andhra Pradesh* that enactment of the Uniform Civil Code is necessary for the unity of the nation All these multiple tractions of the supreme court indicates that the supreme court is itself not clear about the enactment of the said code.”²²

On one hand entry of women are permitted at various religious places like Sabrimala Temple, Aayupa Temple, etc but at the same time khaappanchayat still exists in India and many Indian Politicians favour it. Conversion of person from one religion to another to gain various advantages, etc can be solved by enacting uniform civil code. We have multiple laws regarding divorce because of existence of multiple religions. This problem can be solved by enacting uniform civil code.

The Rule of Law still lacks behind as the Uniform Civil Code has not been enacted since decades after the formation of the indigenous constitution. In absence of uniform civil code, the sufferings of women are more as compared to men.

(6) MARITAL RAPE – NOT YET RECOGNIZED

The term rape is defined in section 375 of the IPC It is as under:

Section- 375 Rape A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First — Against her will.

Secondly — Without her consent.

Thirdly — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly — With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The entire section does not give recognition to the consent of the wife regarding sexual intercourse with her husband many democracies of the world have recognized marital rape. But in India, the law does not give recognition to marital rape. It means marital rape is not an offence in India. But actually women all over the country demands for to be categorized as penal offence under the category of rape. It is because it innovates

¹⁸ AIR 2006 SC 2522

¹⁹ 1995-3 SCC 635

²⁰ <https://indiankanoon.org/doc/733037>

²¹ <https://indiankanoon.org/doc/63158859/>

²² AIR 1996 SC 1023

the substantial questions of inherent dignity and personal liberty of Indian women. The Rule of Law has failed in above all the issues in maintaining inherent dignity and personal liberty of women. It has failed at par to change the age old morals of the society. On the contrary society is changing the law as per its downtrodden morals.

CONCLUSION

The main function of rule of law is to change the morals of the society. The morals of the Indian society were extremely downtrodden as far as issues relating to the maintenance of inherent dignity and personal liberties of women are concerned. Besides above issues there are a plethora of issues that are faced by Indian women in this modern era. Our societies, especially society of orthodox and moral less people have made the law as their own puppet. The rule of law can be claimed in controlling traditional issues. But these traditional issuing have gained new character and newly advanced form in violating women's dignity and personal liberty. Thus, the entire concept of rule of law prevails in book. Practically, it is not found anywhere in existence. Failure of rule of law is directly associated with the failure of democracy, failure of democratic values, democratic principle, failure of constitutional machinery, etc. Thus, the notion of women's rights women's empowerment, etc becomes myth. The social standing of women is same as it was decades ago.