

Women, Religion and Law in India

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In the late 18th century when the British rule was established in Bengal, they wanted to govern people with their own laws. And what they meant by the own laws was the laws of every religion separately, such as the Sharia Law for Muslims and texts like Manusmriti for Hindus. But one of the noticeable features of almost every Religious/Personal Law was/ is that women have lesser rights than what the men have. These laws are of dual nature- on one hand, they present women as goddesses and on the other hand impose heavy restrictions on them. A women's social status according to these laws seems to depend on the mercy of men. Some of the practices under these laws were even sinful and patriarchal in nature. Therefore to raise the status of the women in the society several reforms such as the abolition of Sati practice, polygamy in Hindus and control on Devadasi took place. Insofar as the Sati practice is concerned, it refers to the practise of widow burning after her husband's death. To abolish it a campaign was started by Raja Ram Mohan Roy with the help of Christian missionaries which successfully led to the banning of Sati in 1829. Similarly, polygamy among Hindus was abolished by the Indian Penal Code, 1860² and Devadasi was controlled by the help of several acts in 1947.

These reforms though had a great impact, but they did not wipe out the discriminatory and patriarchal nature of the Religious Laws in all. Then why does India even after being independent and having a constitution of its own that applies to all, still continues to let the Religious Laws be in force. The reason may be that the makers of the Constitution knew, religion had a key role in the separation of the nation and wiping out the Religious laws of the communities may lead to further disintegration of the nation. Therefore, they decided to safeguard these laws by providing them with the constitutional protection and giving them the stature similar to that of a fundamental right³. But the paradox here is that the Constitution of India guarantees the right to equality to everyone, including women. Whereas the Religious laws to which it provides protection are not gender neutral. Then in case of conflict between the two what shall prevail is a big question. Should the nation compromise with the fundamental right of equality among all or should it overlook the protection it provides to the

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² The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860

³ Faisan Mustafa and Jagteshwar Singh Sohi, Freedom of Religion in India: Current Issues and Supreme Court Acting as a Clergy, Issue No. 4 of Volume 2017 BYU L.R. 915 , 955(2017)

Religious Laws? The courts in order to get the answer to this question turn towards the preamble, which is the basic structure of the Constitution. And what the preamble offers to its citizen is “Justice, social, economic and political; Liberty of thoughts, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual.”⁴The four values it promises are deemed to be in a particular order, that is to say, that Justice prevails over liberty, liberty over equality and so on. Does this mean that the Liberty of worship and faith is to be kept above the equality of status? Well, going by the current interpretations, the answer is No. As in the case of conflict that we are discussing the question of social Justice arises, which in turn prevails over the Liberty of worship and faith. Moreover, it is often argued that the preamble is not to be read in parts but as a whole, as the relationship between the values which it promises cannot be ignored. Going by this logic, liberty in the matters of worship, faith and belief must create a society with the equality of status among the citizens. So, interpreting the preamble in any manner gives us the same result that the right to equality must prevail over the Religious Laws. The aim of the preamble is to transform India by providing an environment of freedom to the side-lined such as Dalits and women. In case of conflict between the Religion and the Constitutional Morality, the constitutional morality is to be given importance. Though the Constitution recognises the religious faith and belief; but its main purpose is to encourage the liberty and dignity of individuals.

In order to understand how the conflict of Religion and rights of women is handled by the court, the cases such as Triple Talaq and that of Sabarimala Temple can be of immense help to us. The Sabarimala Temple is a temple of Lord Ayyappa, who is considered to be the child of Lord Shiva and Lord Vishnu. Though there are a number of temples of Lord Ayyappa in India, but what differs other temples from Sabarimala is the fact that the Lord resides here in the form of a Naishtika Bramhacharya, a celibate; therefore women between the age of 10-50 were not allowed to enter into it. The point of question here was that whether restricting the entry of women of a particular age into the temple amounts to discrimination. In an earlier case in this regard, *S. Mahendran v. The Secretary and Ors*⁵, the court upheld the ban on the women, claiming that the restriction was not on women as a class but only on women of a particular age group but a new case, *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*⁶ was brought up against the practice based on the fact that any discrimination

⁴INDIA CONST. Preamble

⁵ *S. Mahendran v. The Secretary and Ors.*, AIR 1993 Ker 42

⁶*Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*, Writ Petition (Civil) 373 of 2006

based on the biological features of an individual shall be deemed as unconstitutional. The Petitioner targeted the Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965⁷; which explicitly restricts the entry of women in a place of worship where according to the customs she is not allowed to enter. They pleaded that the Rule 3(b) violated the rights of women under Article 14, 15, 17, 51-A(e) of the Constitution of India as customs are subject to Article 13 of the Constitution. It was also contended that Article 25(1) of the Constitution states that, "...all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."⁸ wherein the term "all persons" includes women as well. Moreover, the morality as stated in Article 25 of the Constitution, has to be public or constitutional morality and not of a particular individual or a group in general. The case in hand was no different from the other cases based on religion. The Respondent claimed that the Constitution of India provided rights to every individual, then doesn't the deity have constitutional rights under Part- III of the Indian Constitution, doesn't he have the right to protect and preserve his celibacy. In response to the arguments advanced the Court decided that the fundamental rights of the women were violated and in regards to the rights of a deity the court held that, he is only a juristic person with limited rights and was not to be considered a person for the purpose of Part- III of the Indian Constitution. In order to come to a final decision, the court used the Essential Practice Test. Though the Religious Laws are protected by the Constitution itself, but it authorizes the Courts with the power to judge whether a particular practice is an essential part of the Religion or not; if the practice, as in the case in hand, is found not to be an essential part of the religion then it can be altered by the court. With the help of the essential practice test, the court assumes a reformatory role by cleansing the religion of the practices that are discriminatory or affect human dignity in any manner. Therefore, the court after looking at all the aspects of the case declared the ban on women of a particular age as unconstitutional with a 4:1 vote. The irony here was that the one judge that was in support of the ban, Indu Malhotra, was herself a woman.

The court prior to the case of Sabarimala Temple, where the conflict between the rights of women and Religious Laws was resolved, had a case with similar conflict in hand, the case of Triple Talaq also known as Talaq-e-biddat. Talaq among Muslims can be oral, written or even through the mail without the involvement of the judiciary. According to Islam, there are three ways by which a man can give Talaq to his wife unilaterally, then why was the constitutionality of only Talaq-e-biddat considered in the court of law. The answer to this

⁷Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, No. 7 of 1965 (India)

⁸INDIA CONST. art.25, cl.1.

question is that in the other two forms i.e. talaq-e-ahsan and talaq-e-hasan, the process of talaq is long, whereas in case of Talaq-e-biddat the talaq is instant as well as irrevocable, due to which the women are in a constant fear of being thrown out of the house creating a sense of insecurity and pressure on their minds. In order to challenge the constitutionality of Talaq-e-biddat the doors of the honourable court were knocked in the case of Shayara Bano v. Union of India⁹. The Petitioner in the given case with reference to the Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937¹⁰ claimed that the practice was merely a custom and according to the Act it should be done away with the problem with this approach was that Talaq-e-biddat was not a mere custom but a part of the Muslim personal/religious laws as that was the reason why every Islamic State once followed such a practice, and therefore neither can this practice be done away with under the Act nor under the Article 13 of the Constitution of India which excludes the personal laws from being a part of law in force. Other contentions advanced by the petitioner included that neither the Talaq-e-biddat is supported by the Quranic verses nor was it appreciated by the Prophet. Moreover, the other nations including those which have Islam as their state religion have done away with this practice by way of legislation. And that the schools of Sharia law, that recognize this practice consider it to be a patriarchal, sinful and irregular. Despite these arguments, the court was not satisfied enough to declare Talaq-e-biddat as unconstitutional. After which the petitioner argued that Talaq-e-biddat was violative of the fundamental rights of the women, being discriminatory, arbitrary and whimsical. But the question which arose here was, can fundamental rights be enforced in the matters between husband and wife where the state has no role to play. The response to this given by the petitioner was that private matters especially divorce in all other religions is obtained by a judicial forum. And the decisions given are considered to be *in rem*. Therefore can religion in a secular democracy be a reason to deny dignity and equal status only to Muslim women, making them weaker than the women following other faiths. The court after looking at all the aspects of the case exercised its jurisdiction under Article 142 of the Indian Constitution under which the court can give such orders as are necessary for doing complete justice¹¹ and ordered the Union to make legislation in this regard. The court, in this case, might have used the interpretation of keeping justice over liberty about which we have already discussed. The questions which might come in an individual's mind after this judgement is that, is India evolving and learning from other nations of the world or is this decision to be considered only an effect of the feminism wave. Also, is India on the way to

⁹ShayaraBano v. Union of India, Writ Petition (Civil) No. 118 of 2016

¹⁰ The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937 (India)

¹¹ INDIA CONST. art.142

create a better world by complying with the aims of Universal Declaration of Human Rights¹² and International Covenant on Economic, Social and Cultural Rights¹³ by eliminating discrimination against women? Whatever the answer to these questions may be but one thing is for sure that slowly and gradually India is improving the status of its women. And soon women in every sphere would have equal rights and dignity to that of men.

In order to create a society in which both, the Religious Laws and the rights of women can co-exist two solutions are possible. Either to bring controlled reforms in each and every religious law or to create a Uniform Civil Code for all. In case the first solution is used, the nation needs to make sure that though different communities may have different personal laws but the laws of every community must comply with the constitutional morality and validity. By morality, I mean not only about gender equality but a life with dignity. And in order to make sure that the laws of all the communities comply with the morality and validity of the constitution, the judiciary needs to act as a reformer by wiping out the fallacies from the religion and make it suitable according to the contemporary prudence. And in case the second solution of creating a Uniform Civil Code is considered, the problem is that it may create a sense of danger to the cultural identity in the mind of the people. Religion works on faith and not on logic. Therefore, it must be kept in mind that it is not the idea of removing discrimination, but the idea that this would be done by altering their religious laws, that affect the people. So, this solution can only work if we involve both the men and women of every religion to create a Uniform Civil Code as this can serve both our objectives. As by including both men and women, equality and dignity of women can be achieved whereas by including the people of every religion in creating the Civil Code, the threat to the cultural identity can also be overcome to a great extent. If these solutions prove to be successful, then India will be able to achieve its objective of providing the rights to women and also continuing with the Religious believes at the same time.

¹² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <https://www.refworld.org/docid/3ae6b3712c.html>

¹³ UN General Assembly, International Covenant on Economics, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol.993, p.3 available at <https://www.refworld.org/docid/3ae6b36c0.html>