VICTORY OF GENDER JUSTICE OVER RELIGIOUS HEGEMONY?

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Abstract:

Religion plays an important role in gender discrimination. The connotation of religion cannot be separated from law. Personal laws in India govern the nation along with its legislations. But problem arises due to the fact that personal laws are filled with fallacies and it has become difficult to apply such regulations during this modern era. There are two notions; laws changing according to society and society changing according to laws. Therefore, there lies a need that laws should be changed with dynamic society. Different aspects have been covered which needs attention of the legislature like imperfect status of transgender or position of live in relationships in society. Still in 21st century, women are treated as puppets with minimum possible respect. They are not given their rights but asked to follow their duties only! Both law and society is dynamic in nature and hence, such pressing needs must be catered to.

I. INTRODUCTION

> "*O lord why have you not given women the right to conquer her destiny?*
>
> *Why does she have to wait head bowed?*
>
> *By the roadside, waiting with tired, patience, hoping for miracle in the morrow*?"[1]

It is often said that the past holds up a mirror to the future; but the past is probably more relevant to explain the present for, only by pausing, looking back and reflecting will we be able to build an ideal future. This rings especially true for the Indian legal structure which is constantly evolving to remain relevant for modern times.

The international community has shown its concern for the human rights of women in a number of meetings and conferences. The Convention on the Elimination of All Forms of Discrimination

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[1] Rabindranath Tagore, on plight of women.

Against Women (CEDAW), adopted in 1979 by the UN General Assembly, is described as an international bill of rights for women. It forbids all forms of discrimination on grounds of gender as violative of fundamental freedoms and human rights. The Universal Declaration of Human Rights also makes explicit reference to equal protection of rights of men and women in its Preamble. Not only the Preamble, but, other provisions of the Constitution also seek to protect human rights. Despite all efforts, there lies a conflict between the personal laws and codified ones. Despite all developments, a survey released by Forbes clearly remarks that women are not only paid less but are discriminated on various grounds. [2]

II. CONFLICT UNRESOLVED?

Which aspects of the personal law system are problematic from a women's rights perspective and how can these problematic aspects be addressed and reformed?

At the time of independence these "Hindu" and "Mohammedan" laws were largely retained by the Constitution at the time of independence. Consequently, personal laws as they exist today have largely been drawn from the customs that were prevalent at the time of framing of constitution. So to prevent different customs of different religions, we needed personal laws. Even after independence, when Hindu Personal Law abolished polygamy, there was a violent public backlash where Hindu men threatened to convert to Islam because they felt that they were being stripped of their "customary rights" as they could marry single women after amendment in Hindu personal law. It is afterwards that the court intervened after filing of several cases before courts that a Hindu male cannot change his religion just for marring another woman.

While there is no denying that personal laws are against gender justice, the discourse of gender justice is often used by political parties to fill their vote-banks. Critics argue that what is required to address the issue is a total reconceptualization of personal laws to be based on democratic principles.

When personal laws are derived from scriptures, is religion the supreme legal authority for these laws? Through an analysis of a series of cases and contradictory judgments, Mandal commission concludes that, it is in fact the secular state that personal laws derive their authority from. Historically, Hindu

[2] *Available at*: https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/#65d2f3524b55 Last Accessed: 10.10.2019.

and Muslim personal laws have derived their authority from religious scripts but they are amended by the state to be at par with the provisions of the constitution.

The Law Commission Report in 2018 recommended that Parliament must focus on achieving gender equality within communities first, instead of between communities. "*This way some of the differences within personal laws, which are meaningful, can be preserved and inequality can be weeded out to the greatest extent possible*," it said.

III. FALLACIES IN PERSONAL LAWS: CHALLENGES

A lot of cleansing is required for oppressive religious practices. For obvious, the government was the first to praise its capability to get rid of evils faced by Muslim women on pretext of triple talaq. Which they have suffered since time immemorial. But just a decision of personal law of a particular religion does not send the message rightly especially when the country is governed by different personal laws along with grund norm altogether. Hence, this is the perfect time to remind government and courts of the number of personal laws which are derogatory and discriminatory between men and women. Such should be taken into consideration and repealed keeping aside the political gains out if such practices.[3]

> *"Shayara Bano's constitutional challenge to the practices of triple talaq, polygamy and nikah halala, currently before the Supreme Court, has raised a larger question: can the secular state be held liable for violations caused by the operation of religious personal law? Closely related to this is the fundamental issue of the constitutional status of personal laws: What is the origin of authority behind Indian personal laws? Is it religion or the legislative power of the secular state?"*[4]

The personal laws were made out in such a way that the criteria for everything is laid down verbatim and hence, such should be followed in that sense. Since, the society is dynamic and hence such criteria are longer valid as many more criteria have developed in the modern era which are still missing from such personal laws. There are two connotations "law according to society" and "society according to

[3] Personal Law Versus Gender Justice: Will A Uniform Civil Code Solve The Problem?, *Economic And Political Weekly*, https://www.epw.in/engage/article/personal-laws-versus-gender-justice-uniform-civil-code-solution?0=ip_login_no_cache%3D69a55ba3b6e5c9fba8b4ef16bcdaafb6.

[4] Saptarshi mandal, Do Personal Laws Get their Authority from Religion or the State—Revisiting Constitutional Status, *Economic and Political Weekly*, Volume 51, Issue No. 50, 10 Dec., 2016, https://www.epw.in/journal/2016/50/web-exclusives/do-personal-laws-get-their-authority-religion-or-state%E2%80%94revisiting.

law". People adhere to the law made for them because they are backed by sanctions and hence they fear punishment in case of violation. Whereas, with the change in times, the dynamic aspect need to be necessarily taken into consideration being the need of the hour. In a political climate such as the current one, respect for personal laws is critical for the government. Choosing one evil in one religion and then parading it so openly in the time of majority describe as beef-policing, history-tampering, cow-worshiping sends the wrong message. Every woman could be served better if government look at other discriminatory personal laws and accordingly draft legislation. What came to be known as "Hindu or Muslim law", were the byproduct of colonization focusing on complex process of rationalization rather than simple codification of religious commandments.[5]

- **Property: Women dying intestate**

Under the Hindu Succession Act, 1956 (applicable to Hindus, Buddhists, Jains and Sikhs), Section 15[6], the property of a woman who dies intestate goes to her children and husband. In their absence, it goes to the *heirs of the husband*. Only in the absence of such heirs can it be transferred to the mother and father of such a woman or in their absence to her father's heir. So if a Hindu woman dies intestate leaving no husband or children, the family of the husband has a right over her property before her parents. There is a non-obstante clause to Section 15 which states that if any estate is inherited by the Hindu woman from her father or mother, such property will devolve upon the heirs of her father. Likewise, if it is inherited from her husband or father-in-law, it goes back to the heirs of the husband. But all other property, in the absence of a husband or children, goes to the heirs of the husband. If these heirs also do not exist, the estate is passed to the "agnates" of the deceased and in the absence of agnates, to "cognates".

The language of the legislation, use of the word "husband" and "widow" depending on the gender of deceased spouse, agnates and cognates has been defined "wholly through males" which in totality is insensitive, sexist and results in many problems in the legislation.

[5] Cohn, Bernard S. (1996): "Law and the Colonial State in India," Colonialism and Its Forms of Knowledge: The British in India, New Jersey: Princeton University Press, Kugle, Scott Alan (2001): "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," Modern Asian Studies, Vol 35, No 2, pp 257–313, Bhattacharya-Panda, Nandini (2008): Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial India, New Delhi: Oxford University Press.
[6] Hindu Succession Act, 1956, Section 15.

Not only this but the entire Hindu Succession Act is discriminatory in nature. The property received by a woman from father or husband goes back to that line. At the first instance, when there are no heirs, the property goes to the heirs of the husband and not the woman's parents or siblings. The Bombay High Court declared Section 15 as *ultra vires* the constitution in *Mamta Dinesh Vakil vs Bansi S. Wadhwa*[7] and the matter is pending an appeal before a division bench. The legislature has failed to devise out and pass any law to repeal this provisions, despite recommendations from the Law Commission[8]. Then what is the impact left by Mamta Dinesh case on this discriminatory provision? What is the jurisdiction of this case? Does it apply to pan India? Such questions are still left unanswered and legislation or law remains silent on this point.

Under Indian Succession Act, 1925, applicable on Parsis, the person who dies intestate and without any lineal descendants, only half property passes to his widow whereas the other half passes on to the relatives kindred to him.

- **Property: At the time of Divorce**

Section 27, of Hindu Marriage Act, 1955[9] essentially requires that when the court is dividing any property during divorce, must be present 'at or about the time of marriage' and must 'belong jointly' to husband and wife. Conflicting decisions have been given by various high courts on what properties must be given to woman if the property is in the name of one party as it would not fall within the ambit of section 27. Supreme court has made serious efforts to give decision to provide benefits to women but such attempts are limited. This problem is quintessential of India, where the property is in the name of the husband regardless of the fact that women has contributed a share. Such share might not always be economic or in monetary form since women play a significant role in household chores and other activities whereas on the other hand different countries would recognize such contributions. There is currently no legislation in sight focused in amending this discriminatory clause and occasional attempts have not yet been successful in the past.

[7] Mamta Dinesh Vakil vs Bansi S. Wadhwa, 2012.
[8] *Available At*: http://lawcommissionofindia.nic.in/reports/report207.pdf, Last Accessed: 07.10.2019.
[9] Hindu Marriage Act, 1955, Section 27.

- **Impossibility of divorce under the Indian Divorce Act, 1869?**

The provisions of this relic of law governed divorces of Christian marriages till 2001. Section 10, of the Act[10], a woman could file a petition for divorce based on limited, Victorian grounds- like husband leaving Christianity to practice, profess or propagate another religion, "incestuous adultery", "bigamy with adultery", "adultery coupled with cruelty" or "rape, sodomy, bestiality" and no other reasonable ground was permitted. These grounds are not seen as valid ones in today's era. If this was not sufficient, a declaration of dissolution issued by a district court in compliance with Section 17 of this Act had to be reviewed by a full bench (at least a three-judge bench) of the high court[11]. The intention might have been to keep people in marriage irrespective of how unworkable it might have become over the years. This was considered as a part of the current personal law.

The Supreme Court in *Reynold Rajamani vs Union of India*[12] observed that while the court may interpret this provision as liberal as possible, it is constrained by the provision's words and it is for the legislature to enact any necessary changes. There were decisions of various high courts that lamented the provisions of the then Indian Divorce Act, 1869, and the Supreme Court in *Jorden Deindeh vs S.S. Chopra*[13] suggested amending the complete legislation.

It was in 2001 that the Indian Divorce (Amendment) Act, 2001 was amended and introduced a new Section 10 which introduced new and relatively more reasonable grounds of divorce equal for men and women, and also introduced a new Section 10A[14], which allowed for divorce by mutual consent (albeit with the requirement of a two-year period of separation, whereas other personal laws require a one-year period). Also, the requirement of confirmation of a district court decree by a high court full bench was also removed.

Even under the amended Act, the strange clause in marriage divorce petition continues to make "adulterer" or the "adulteress" a co-respondent. There used to be a clause before its amendment

[10] Indian Divorce Act, 1869, Section 10.
[11] Indian Divorce Act, 1869, Section 17.
[12] Reynold Rajamani vs Union of India, (1982) 2 SCC 474.
[13] Jorden Deindeh vs S.S. Chopra, (1985) 3 Supreme Court Cases 62.
[14] Mrs. Basanth Tirunagar, Enabling Justice To Christian Women In India – The Issue Of Divorce, http://www.manupatrafast.com/articles/popopenarticle.aspx?id=59a6ae72-53e3-4cd8-a620-38c292a1c6ee&txtsearch=subject:%20family%20law.

that even allowed a party to claim damages from the accused "adulterer". But fortunately, this was repealed by the 2001 amendment. Such provisions offer little dignity to legal proceedings. The legislature can also consider this law if it takes measures to rework on personal laws.

It is always questioned as to why Parsi daughters who marry non-Parsi men lost their property rights and non-Parsi wives of Parsi husbands are entitled to only half of the husband's property as per their Parsi personal law. Hindu daughters were deprived of joint heirship in parental property in accordance with the codes of Mitakshara, a school of Hindu law regulating succession. It was only after Lata Mittal (case filed in 1985) won a 20-year legal battle in the Supreme Court that Hindu daughters were given equal rights in the ancestral property.

There are countless provisions that should not be a part of the 21st century. The focus must be changed from a religion-based discourse to an equality and dignity based one. The legislature could perform well by looking at the personal laws, if it aims towards achieving gender parity.

> *"Contrary to belief, personal laws, including Muslim personal law, have undergone a lot of changes in the last 30 years through piecemeal amendments introduced by the legislature, but much more significantly through judicial interpretation in cases brought by people like Bano."*[15]

Hindu and Muslim personal laws have involved civil authority in number of ways and shaped by secular component to different extent. It is said that both are backed up religious scripture but have mainly originated due to 'sociopolitical considerations', which focusses on coercive power of the state to derive authority. It is unarguable that personal law validates itself from religion and not state. The important question is what religious or divine authority remains of a command, when it is statutory in nature and interpreted differently by state appointed judges in the courts? Justice Krishna Iyer remarked that

> *"Personal law so called is law by virtue of the sanction of the sovereign behind it and is, for the very reason, enforceable through Court. Not Manu or Muhammad but the Monarch for the time makes 'Personal law' enforceable."*[16]

[15] Subramanian, Narendra (2008): "Legal Change and Gender Equality: Changes in Muslim Family Law in India," Law and Social Inquiry, Vol 33, No 3, pp 631–672, Subramanian, Narendra, (2014): Nation and Family: Personal Law, Cultural Pluralism and Gendered Citizenship in India, Stanford: Stanford University Press.
[16] Assan Rawther v Ammu Umma, 1974 SCC OnLine Ker 92.

Hence, it is the state's authority which forms the basis for the personal law and hence there can be no reason why it cannot be subdued by the constitution, just like other laws or steps taken by the state.

IV. MUSLIM PROTECTION BILL: AIMLESS?

After a backlog of many cases such as Shah Bano Begam (1985), Danial Latifi (2001), Shamim Ara (2002) and finally Shayara Bano (2016), the Indian Parliament passed a Bill known as "The Muslim Women (Protection of Rights on Marriage) Bill, 2018". The Bill made "Talaq-ul-Biddat or Triple Talaq" in any form, i.e., spoken or written or by other means such as e-mail, SMS illegal and hence void.

Frailty of the Bill:

- Bill seeks to criminalize the practice of triple talaq but concept of marriage is of civil nature. Since marriage itself is a civil contract, the procedures to be followed on its breakdown should also be of civil nature.
- Bill is discriminatory in nature as Muslim men can be prosecuted and punished for three-year jail term particularly when in no other religion is there such prescribed punishment for uttering three words.
- Making the offence cognizable, there is removal of judicial oversight since the police have the authority of arresting the husband without permission of the court.
- This could be easily misused by females since police have authority to arrest husband without prior permission of court.
- Section 3 clearly declares talaq void implying that it cannot result in divorce, yet the Bill goes on to discuss post-divorce matters.
- Since talaq has been declared illegally void, the husband-wife relationship still persists which is ignored by the framers of the bill.
- Since, this does not result in divorce, then how a woman can ask for subsistence allowance?
- Virtual shutting of the doors on any possibility of reconciliation since the bill goes on discussing about maintenance and custody of child.
- The doctrine of proportionality has been ignored by the legislature while prescribing such harsh punishment.

- In the recent Supreme Court judgement, it was not opined by the court that triple talaq is to be criminally punished.
- It is just a piece of legislation rather than a kind of relief to the women as Some Muslim women's groups raised concerns about "maintenance" if the husband is sent to jail.
- The mutual divorce provision is missing in the proposed law and needs to be debated.

What could be done instead?

- Legislature could have invoked a secular law that already exists: Protection of Women from Domestic Violence Act (PWDVA), 2005.
- Parliament should have passed a law declaring utterance of the words "talaq, talaq, talaq" would amount to "domestic violence" as defined in the act.
- The act is conceived as a law that ensures speedy relief — ideally within three months — to an aggrieved woman
- While act is civil in nature, it has a reasonably stringent penal provision built into it.

V. LIVE IN RELATIONSHIPS: JUST?

There is no statute governing the rights and obligations of live-in partners, and for the status of children born out of such relation because earlier people were not ready to accept it as it was against their religious principles. With regard to the provision, the court interpreted the expression "relationship in the nature of marriage" and thus provisions of PWDVA are applicable to the individuals who are in live-in relations. Section 125 of CrPC was incorporated in order to avoid vagrancy and destitution for a wife/minor children/old age parents, and the same has now been extended by judicial interpretation to partners of a live-in relationship[17]. The Supreme Court held that women in live-in relationships are entitled equally to all the claims as available to a legally wedded wife[18]. On the legitimacy of children of live-in relationships, Supreme Court in Tulsa *v.* Durghatiya[19]

[17] Ajay Bhardwaj v. Jyotsna, 2016 SCC OnLine P&H 9707.
[18] (2011) 1 SCC 38, para 38.
[19] AIR 2008 SC 1193.

has held that a child born out of such relationship will no longer be considered as an illegitimate child. The important precondition for the same should be that the parents must have lived under one roof and cohabited for a significantly long time for the society to recognize them as husband and wife and it should not be a "walk-in and walk-out" relationship[20]. In case of Bharatha Matha *v.* R. Vijaya Renganathan[21], the Supreme Court held that a child born out of a live-in relationship may be allowed to inherit the property of the parents (if any) and therefore be given legitimacy in the eyes of law.

> "*With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today.*"
>
> — Honorable Justice A.K. Ganguly in Revanasiddappa *v.* Mallikarjun[22]

In a landmark case S. Khushboo *v.* Kanniammal[23], the Supreme Court held that a live-in relationship comes within the ambit of right to life under Article 21 of the Constitution of India.

In a landmark judgment[24] by the bench comprising of Justice M.Y. Eqbal and Justice Amitava Roy, the Supreme Court added that the woman in the relationship would be eligible to inherit the property after the death of her partner.

But there still lies a grey area because there is still no legislation despite many persuasive judgements given by supreme court. The Indian judiciary has played its role commendably but what about formulation of law? There are still many aspects which are untouched and number of cases of rape and fraud are on hike. Further, no rights are bestowed on men. Isn't it gender biased? Why only women and not men in case of property rights?

VI. TRANSGENDER: IMPERFECT STATUS?

Though equal rights have been provided by the supreme court to the third transgender, but still there is a lot to do. We are very far away in actual approach from the status provided to them. There are still lack of basic amenities like sanitation, clean drinking water, health facilities and many more. Delhi

[20] Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209: AIR 2010 SC 2933.
[21] AIR 2010 SC 2685.
[22] (2011) 11 SCC 1.
[23] (2010) 5 SCC 600.
[24] Dhannulal v. Ganeshram, (2015) 12 SCC 301.

High Court while giving judgement in Suresh Kaushal case[25] cited one of the reasons for not giving such people as their identity as the number of cases of HIV have increased. But they failed to understand that this could be one of the reasons because of lack of health and medicine facilities for such people.

Further the society, habitually accustomed to old customary rules and beliefs, they are not willing to accept them too soon. Such people are always shooed away from public laces despite knowing the fact that there were certain characters as third transgender in their great epics. It is further on them as how are they supposed to recognize themselves as it was clearly mentioned in NALSA V. UOI[26] that the psychological notion should prevail over the biological one. Such people are still not given space in the public area or parliament. There must be a representation of such minuscule minority. Also, there is lot of ambiguity in the term 'third gender' as it forces one to think, if the transgender are the third genders then who are supposed to be the first gender and second gender? Is it man who is first gender or woman?

Even Shashi Tharoor pointed out in his tweet that the transgender should be included within the ambit of offences of IPC like rape, stalking, sexual harassment etc. when the transgender bill was moved. He also explains that government has wrongly interpreted all persons with intersex variations as transgender.

There is no mention of reservation in the bill despite directives issued in NALSA judgement. The bill criminalizes the act of begging and enticing them for the same would lead to jail for 6 months to 2 years which makes them more prone and vulnerable because tans people at the end of the day resort to begging due to lack of employment opportunities.

VII. GENDER BIASED OR UNBIASED?

We are all talking about gender equality but sadly its far from reality when it comes to the Indian Constitution. True that there was a time when the government had to make constitutional provisions in the constitution for women in order to ensure equality, but sadly, some of these provisions are evidently unfair to men.

[25] Suresh Kumar Kaushal v. Naz Foundation, (2014) 1 SCC 1.
[26] National Legal Services Authority v. Union of India, (2014) 5 S.C.C. 438.

According to Hindu Succession Act, 1956 if the deceased has no will then spouse or children or mother will inherit the property and not father.

Under Hindu Adoption and Maintenance Act, 1956, the girl is entitled to the maintenance till the time she gets married whereas on the other hand man is entitled to compensation till the age of 18 years.

If a man or his family treats the women with cruelty then he can be thrown behind the bars eve without evidence under section 498 of IPC, 1860 and hence such provision can be misused[27].

According to section 354A of IPC, 1860 a man can be punished for sexual harassment[28] but what are the remedies for man in case of his sexual harassment? Why such have not been taken into consideration? Is that man can't be harassed or raped?

Under section 37 of Special Marriage Act, 1954 the wife is allowed to claim alimony and maintenance[29] and why not man? Ever wondered? And we say that our constitution protects the rights of everyone equally. How can everyone be protected with such biased and discriminatory provisions? What about the statistics of crimes against men?

VIII. CONCLUSION

The women of this era want equal rights with men. It is only with the unification of personal laws in the form of a uniform civil code consisting of fair, just and non-discriminatory provisions that the women will enjoy their human rights in letter and spirit. Not just Muslim, but even the Hindu code, which sought to create a uniform law governing all Hindus, is not uniform in some of the most fundamental aspects. The validity of a marriage is linked to the customs and ceremonies of the particular community which is different at different places; the inheritance rights of the members of the family is different for communities in Kerala and Tamil Nadu; the Hindu Minority and Guardianship Act, 1956 does not automatically apply to members of Scheduled Tribes; who is capable of being adopted also depends on the custom and usage which is different at different places.

The formulation of a uniform civil code would go a long way in improving the status of women in India. But it seems almost impossible because people are very rigid and orthodox when it comes to

[27] Indian Penal Code, 1860, Section 498.
[28] Indian Penal Code, 1860, Section 354A.
[29] Special Marriage Act, 1954, Section 37.

their religion. Religion hegemony has deprived people to apply their minds to the changing situations in the society. There are two aspects, law according to society and society according to law. Hence, the society must accept the dynamic changes taking place and must adhere to them.

The time has come to get rid of unjust provisions of personal laws which at the first place were formulated to cater to situations at the time of colonization. Since then many changes have taken place and it is the rule of nature that the changes will take place and hence, uniform laws should be prioritized.