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Right to marry vis-à-vis religious freedom - A Study

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Abstract
The question of religious freedom and the right to marry has been examined in this study. In the context of Muslim law permitting a person to marry (4) times and its impact on society has been studied. In the light of a right to marry upto (4) times is not a part of religion. Conclusion and suggestions have been made to point out the true nature of Muslim religious practice.

Keywords: Integral part of religion, Religious freedom, Freedom to profess, practice and propogate, Bigamy, Conversion, Judicial parameters, Monogamy, Social reform, Quranic text, Live-in-relationship

Introduction
In most of the service regulations governing the conduct of Government servants, they invariably provide that 'bigamy' [1] amounts to "misconduct" and the employee is exposed to disciplinary action and punished by way of removal / dismissal. In such cases, the employees take the defence of their religious practice and their religion permitting a second marriage. In Muslim religion, it allows a person to have (4) wives. In some cases, the second marriage is resorted to by married childless couple to beget a son. Dealing with such cases, the courts have held "Birth of a natural born son was not an essential and integral part of Hindu Religion. It was why the institution of adoption was created" [2].

Text of the article
The defence in such cases, as already stated, is the freedom of conscience and religion guaranteed as a Fundamental Right [3]. This freedom of conscience and of religion relates to the inner freedom of a person to mould his relations with his God in whatever mode he likes and worshipping God is left to be dictated by his own conscience [4]. This freedom guaranteed under Art 25 of the Constitution relates to freedom to hold or to entertain religious belief and this religious belief as may be approved by his Judgment and conscience attracts the protection of Art 25 [5] which also includes the freedom to profess, practice and propagate the religion.

Muslim law and marriage
With regard to Muslim Law permitting marrying four women, the Supreme Court ruled in Javed's case [6] as follows
"……. nowwhere the law mandates or dictates it as a duty to perform four marriages or marrying less than four or abstaining from procreating a child from each and every wife in case of permitted bigamy … would be irreligious or offence to the dictates of the religion".

Religious practices must yield to social welfare and reforms [7].

The freedom of conscience and religion is not absolute or un-qualified. It is subject to public order, morality, and health and to other provisions of Part III of the Constitution (F.R), all persons are equally entitled to freedom of conscience and the right to profess, practice and propagate religion of his choice. In other words, the State is empowered to put restrictions on the grounds specified in Art 25. So, when the rules regulating conditions of service prohibit 'bigamy', a civil servant can be punished for contracting a second marriage provided the second marriage is valid and in the case of an alleged second marriage with a women, whose husband is living, such a marriage is prohibited under the law governing the marriage, there can be no charge of 'Bigamy' as the second marriage is no marriage in the eye of law [8]. The power of the State to regulate the exercise of religious freedom has greatly helped the State to bring about social welfare or social reform.

Advantage of conversion
To have (4) wives is not an essential part of Muslim religion [9]. Persons often take advantage of 'conversion' to a particular religion which permits 'Bigamy' – for ex. Hindu converting to Islam to marry more than one wife. Courts have held that marrying after conversion when the marriage in the previous religion subsists is punishable, for the offence of bigamy, even if the new religion permits more than one marriage [10]. The person liable for such a marriage cannot complain of violation of his fundamental right under Art 21 [11] (which relates to right to life or personal freedom). Besides the departmental punishment by way of removal or dismissal, the liability for prosecution and punishment under Sec 494 IPC also exists. The departmental punishment by way of removal or dismissal is not held as shockingly disproportionate on established judicial parameters [12]. This punishment can be equally justified by the fact that second marriages ruin the lives of two women married and also the future of their children. Thus, such a marriage violates the right to life of the person concerned under Art 21 of the Constitution. Second marriage, under service regulations amount to 'misconduct', it violates Sec 494 of IPC and also does not violate Art 25 (FR) [13]. What is protected under Art 25 was the religious faith and not a practice, which may run counter to public order, health or morality [14].
Polygamy was not an integral part of religion and monogamy was a reform within the power of State under Art 25 [15].

Religious faith and religious practices

In Narasu Appa Mali's case [16] the court observed: "a sharp distinction must be drawn between 'religious faith' and belief from 'religious practices'. What the State protects is religious faith and belief.

"If religious practices run counter to public order, morality or public health or a policy of social welfare upon which the State has embarked, then the religious practices must give away before the good of the people and the State as whole".

Court observations

The court further observed [17]

1. The right of the State to legislate on questions of marriage cannot be disputed;
2. Marriage is undoubtedly a social institution –an institution on which the State is vitally interested;
3. Although, there may not be universal recognition of the fact, still a large opinion of the World today admits that monogamy is a very desirable and praiseworthy institution;
4. If the State compels Hindus to become monogamists, it is a measure of social reform and if it is so, the State is empowered to legislate with regard to social reform [18], notwithstanding the fact that it may interfere with a right of a citizen freely to profess;
5. What constitutes 'social reform' is a matter for legislatures to decide. It will be expressed by the legislatures which are constituted by the chosen representatives of the people in a democracy, who are supposed to be responsible for the welfare of the State – it is the will of the people and if they lay down the policy which a State should pursue such policy, when the legislatures in their wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the courts of law to sit in Judgment upon that decision. Such a legislation does not contravene Art 25 (1) of the Constitution.

The actual application of the above statement of law can be evidenced by the reform taken place in Hindu law such as Divorce (which is unknown to Hindu law) being provided. The ancient Hindu law considered as per Manu's text 'as neither by death nor by divorce a Hindu marriage can be dissolved'. This type of reform applies equally to Muslim personal law;

6. The State may bring about social reform by stages which may be either territorial or community-wise.

Conflicts between religious practices and law

In a series of decisions, the conflict between the religious practice and positive law made by the State is resolved.

Ratio in Badruddin case

In Badruddin Vs. Aisha Begum [19], it was held as follows

1. Though the personal law of Muslim permitted having as many as (4) wives, but it could not be said that having more than one wife is a part of religion;
2. Neither, it is obligatory by religion nor it is a matter of freedom of conscience; and
3. Any law in favour of monogamy does not interfere with the right to profess or practice and propagate, and thus no violation of Art 25 of the Constitution;

Ratio in Pathen's case

In R.A. Pathen's case [20] it was held as follows

1. A religious practice ordinarily connotes a mandate which a faithful must carry out;
2. What is permissive under the scripture cannot be equated with a mandate which may amount to religious practice; and
3. There is nothing in the extract of the Quranic text (cited before the court) that contracting plural marriages is a matter of religious practice amongst the Muslim. A bigamous marriage among Muslim is neither a religious practice nor a religious belief and certainly not a religious injunction – a mandate.

Ratio in Khursheed Ahmed case

In Khursheed Ahmed case [21], the Supreme Court held as follows

1. It may be permissible for Muslim to enter into four marriages with four women and for anyone whether a Muslim or person belonging to any of the community or religion or procreate as many children as he likes, no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one;
2. What is permitted or prohibited by a religion does not become a religious practice or a positive tenet of a religion;
3. A practice does not acquire the sanction of religion simply because it is permitted;
4. Even assuming the practice of having more wives than one, procreating more children than one, is a practice followed by any community or group of people, the same can be regulated or prohibited by legislature in the interests of public order morality, or health or by any law providing for social welfare and reform which the legislature clearly does.

Conclusion and recommendations

In conclusion, the following suggestions are made:

a. A law may be made comprehensively titled "prevention, suppression and control of polygamy and Bigamy Act to be made uniformly applicable to all religions. This law should also cover 'live-in-relationship,' where the person already married indulges in;
b. In the context of societal needs second marriages have to be dealt with severally (except in cases where the law permits such as divorced person etc) as it violates the right to life under Art 21 of the married women and their children;
c. With the limited resources, persons may not in a position to maintain the wives and children and also attend to their needs like education and to lead a life consistent with human dignity;
d. Such individuals who indulge in second marriage may be involved in bribery, as the income may not be sufficient to meet the domestic needs and if they are prosecuted and punished, his entire family will be on roads with no means to live;
e. Health care problems arise, if the women is married, is already suffering from AIDS which will destroy the entire family, as the women who becomes ready to marry a

person already married, may suffer from handicaps of several types and somehow desires to get married and

f. There may be many other problems which will act as preventive measure to the right to development of the family members.

It is therefore, necessary to provide a fundamental duty that, "no person shall marry for a second time (except in circumstances permitted by law) and any person contracting a second marriage shall be punished as prescribed by law".
Such persons who violate this fundamental duty must be made ineligible or suffer from disqualification to get employment, subsidy or other assistance from the State.

References

1. Bigamy is also an offence under Sec 494 of the Indian Penal Code and it provides that marriage with a person when already the earlier marriage submits and the other spouse is living. In other words, performing a second marriage.
2. State of Bombay vs. Narasu Appu Mali AIR 1952 Bombay. 84.
3. See Art 25 of the Indian Constitution.
4. Punjab Rao Vs. Meshram DP. AIR 1965 SC P.1179.
5. Ratilal Vs. State of Bombay AIR 1954 SC P.388.
6. Javed Vs. State of Haryana AIR 2003 SC P.3057.
7. Yajnapurudesji Vs. Muldas Bhudardas AIR 1966 SC P.1110.
8. Tanaji Bhandha Awale Vs. State of Maharashtra SLR Bombay. 1985; 1:459.
9. Javed Vs. State of Haryana AIR 2003 SC P.3057.
10. Lily Thomas Vs. Union of India AIR 2000 SC ` P.1650.
11. Ibid.
12. Khursheed Ahmed Vs. State of UP. See Para 11 of the Judgment AIR 2015 SC P. 1429.
13. Sarla Mudgal Vs. Union of India AIR 1995 SC P.1531.
14. See Note 9.
15. Ibid.
16. See Note 2.
17. Ibid.
18. See Art 25(2) (b) of the Constitution.
19. (1957) ALL LJ P.300.
20. Pathen RA, Vs. Director of Technical Education (1981) Labour & IC P.185.
21. See Note 12. See Para 60 of the Judgment.