International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawjournals.org
Volume 3; Issue 3; May 2017; Page No. 172-175

Personal laws and the religions freedom

Dr. Virender Sindhu

Assistant Professor in Law, UILMS, Gurugram, Haryana, India

Introduction

It has always been a point of debate that whether the State under its authority and power to regulate the secular activities associated with religion, can control or regulate certain practices which are associated with the personal laws of individuals. Apprehensions were raised at the drafting stage of the constitution and it was suggested by some members that there should be an omnibus clause in the present Article 25 stipulating that nothing in clause (2) would affect the right of any citizen to follow the personal laws of his community [1].

(a) Hindu Law

The reformation of Shastric Hindu Law in the light of prevailing concepts of ideal social norms started even during British rule with the policy of codification of laws. A number of legislations such as the caste Disabilities removal Act, 1850, the widows Remarriage Act, 1856, the Hindu Women's Rights to Property Act, 1937 and the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, were passed to bring in the concept of 'equality' and protection of oppressed classes and sections of the society and upgrading their social status.

After the enforcement of the Indian constitution, Parliament passed the Special Marriage Act, 1954 followed by the Hindu Code Consisting of four major legislations regulating the entire concept of Hindu Law.

In The Narasu Appamali Case [2], the Bombay High Court was approached in reference to the constitutional validity of State reforms affecting the personal laws. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 made it a penal offence for Hindus to contact bigamous marriage. The State had excluded Muslim from the purview of the Act in defence to their practice of polygamy. it was argued that the law discriminates, only on the ground of religion and therefore, hit by Article 15 (2), Hindus and Muslim in matters of punishment.

In other words [3], the social reform is restricted to Hindu society only and the Muslim were left out. The honourable court taking a cautious view, upheld the validity of the Act and laid down that polygamy is not an essential part of a Hindu religion. Moreover, it is to be seen by the State that it want to bring about the social reform stages by stages or by community wise or territorywise. Chief Justice M.C. Chagle of the Bombay High court observed [4]. One community might be prepared to accept and work social reform, another may not yet be prepared for it, and Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise [5]. The court further strengthened its stand by laying down that the two communities cannot be treated absolutely alike as both the communities are governed by their separate personal laws based upon their separate religions texts; both have different background and evolution; in Hindu society a marriage is a sacrament whereas in Muslim it is purely a contract and Article 44 of the Indian Constitution recognizes the existence of two separate and distinctive personal laws. Therefore, the receptivity of the two communities with regard to reforms differed and further among Hindus the polygamy is never recognized [6].

Justice Gajendragadkar, the then Judge of the Bombay High Court commented: [7] Article 44 of the Constitution is, in my opinion, very important.... This article says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. In other words, this article by necessary implication recognizes the existence of different codes applicable to the Hindus and Mohanmedans in matters of personal law and permits their continuance unless the State succeeds in its endeavour to secure for all the citizens a uniform civil code. The personal laws prevailing in the country owe their origin to scriptural texts. In several respects their provisions are mixed up with and based on considerations of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour must hereafter be to secure a uniform civil code throughout the territory of India [8].

In the Reynolds Case [9], a State law made the second marriage a criminal offence while the first spouse is living and prescribed punishment for the same. The appellant, in the case, was punished for attempting to take a second wife under the sanction and command of his religion. The Supreme Court of USA laid down that his punishment was ruled under the statute which prohibited bigamy. The court said that congress was deprived of all legislative powers over mere opinion but was left free to reach actions which were in violation of "Social Duties" or "Subversive of Good Social order."

In the Srinivasa Aiyer Case [10], the Madras High Court has upheld the constitutionality of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 and made it clear that after the passing of the Hindu marriage Act, 1955, the 'Hindu marriages' shall be monogamous as a rule and abolished polygamy and polyandry as a policy. Moreso, Section 11 declares a bigamous marriage as void ab initio and Section 17 of the Act read with Section 494 and 495 of the Penal Code prescribes punishment for the same. The court even did not

allow a prevalent culture of plural marriage in the region as an exception [11]. In the Ram Prasad Case [12], a similar issue came for discussion before the Allahabd High court. The petitioner, which challenging the constitutional validity of the U.P Government Servant Conduct rules questioned the monogam enforcement measures and contended that under the old Hindu scriptures and manuals, a person was allowed and permitted to go for a second marriage on failure of the first wife to bear a son, during her lifetime for procurement of a son (which was considered essential for 'pindadan' and the continuation of race and name of the Hindu family).

The practice, therefore, was claimed to be part of his religion protected by Article 25 (1). However, the court laid down that the Yajnyawalkya smriti only permitted second marriage for the purpose of a son, but at the same time, it also provided an option of adoption to fulfill the object, and therefore, the claimed practice could not be regarded as an integral part of religion [13]. In the Narasu Case [14], also, Chief Justice Chagla, was of the view that an adopted son, being an equally efficacious alternative to a natural son, the Hindu religion provided for the continuation of the line of a Hindu male within the framework of monogamy. To be more precise polygamy cannot be permitted for the aforesaid purpose among Hindus and the State could intervene to regulate the institution of marriage in the interest of society. Monogamy was the social fact of the institution of marriage and as such within the purview of the State's power of social reforms. Therefore, for the welfare, and protection of social interests, bigamy stands abrogated even if it is regarded as an integral part of the religion, as the legislature of a country is the best judge of what is necessary and expedient for the welfare or reform of a particular community at any particular stage [15].

So, in the Hindu Law, both the judiciary as well as the legislature have shown the desired interest for the purposes of reformation and it appears, the courts have laboured and taken the pains of providing some sort legal justifications whenever any practice, custom or usage is protested as religious one. There have been strong and active litigations to preserve and protect the aforesaid practices under the pretext of religious freedom but the courts, on most of the occasions, after careful scrutiny found them secular one and, therefore, permitted the state regulations to check or control these social evils or for providing for social reforms.

(b) Muslim Law

In the field of Muslim law, unfortunately, the post independence period has been marked by legislative unwillingness to experiment with or to introduce the reforms in the personal laws of Muslim due to fundamentalists pressures on parliament. The courts, however, have evaluated the reasoning for upholding the constitutionality of such measures in the province of Muslim personal laws also on the similar lines as in case of the Hindu law.

During the pre-independence period, however, it appears that the Muslim law too was invaded by the passage of the Wakf validating Act, 1913 & 1930, the Cutchi Mernons Act 1920,1942, the Wakf Act, 1923 & 1954, the Child Marriage Restraint Act, 1929, Shariat Act, 1959, the Durgah Khwaja Sahib Act, 1936 & 1955 and certain state laws like the Bombay prevention of ex-communication Act, 1949 and 1959 etc. [16] In The Badruddifl Case [17], the Allahabad High Court even made a remarkable observation in the field of reformation of Muslim personal Law. The court said:

> It may be that under the personal law of Muslims, a Muslim may have as many as four wives. But I do not think that having more then one wife is a part of religion. No authority was citied to show that it is obligatory a Musalman to have more than one wife [18].

Though the court has tried to evaluate the constitutionality of Muslim personal law but there is hardly any legislative activity since, 1950 to impose the reformation over the community opinion. The rigid approach of the fundamentalists of the Muslim community overpowered the state and central enactments. For example, the Muslim Personal Law (Shariat) Act, 1963, as amended by Kerala State, establishes supremacy of Muslim personal law over the new State rule go succession to agricultural land. The Orissa Mohammedan Marriages and Divorces Registration Act, 1949 keeps registration voluntary and therefore, effective, Similarly, the Dowry (prohibition) Act, 1961 which prescribes punishment for the dowry transactions expressly excludes. Mehar or dower from the purview of the Act [19].

The Cr.P.C. of 1973 which introduced a clause providing for the maintenance of a divorced wife also. This projected reform was vehemently criticized by the Muslims and 'their' mediamen on the ground that under Muslim Law a husband is bound to maintain ' divorced wife only during the period of idda and not thereafter. To be more precise, the Muslims were on their feet to raise their objections against the measure and called it as "an interference with the Islamic Law [20]. Ultimately, a clarification was provided in Section 127 of the code that the magistrate shall cancel his order if satisfied, that the customary rule were personal.

The orthodox Muslims recognized the special Marriage Act, 1954 as a rival legislation and wanted exemptions to Muslims under this Act also. They feel that a Muslim marrying under this Act commits a 'sin' and his marriage is unlawful in the eyes of 'Islam.' [21] The Government unconsciously, have accorded recognition to the Muslims unacceptance of the Act by distinguishing between Hindu and Muslims in the 1976 Amendment to the Act by which it is provided that only Hindus that they, while marrying under the Act may retain their personal law of succession; the ommission of Muslims suggesting that the government also does not expect any Muslims to marry under the Act. There is one field in which there is little opposition from Muslims quarters. i.e. The central and State laws for Wakf Administration. It is, perhaps so, because the Wakf Boards are to comprise of exclusively Muslims members [22].

But there are certain departures also (from the orthodox and traditional approaches) among Muslims. Mohd. Ghouse feels [23] that the Muslim Polygamy and divorce institutions are discriminatory against the Muslim woman on the only ground of her religion, for the Muslim personal law applies to only Muslims and a Muslim wife cannot unilaterally from Muslim religion. These institutions are, therefore, he maintains, violative of Article 14. He is, further critical of the of practies of polygamy and arbitrary divorce and considers these practices without any religions motivation and therefore misfounded. Though the basic and primary sources of Muslim law is undisputedly, the Quran and the Sunna but the relations and certain other things it regulates are, from no stand point

strictly religious [24] and are purely social or secular similicitor and therefore, the State can regulate the same. Neither polygamy and unilateral right to divorce nor non-maintenance of orphaned grand chi can be identified with Muslim Culture.

The Muslim law on these aspects does not also represent the moral reflected in quranic verses. To be precise, therefore, neither reforms nor replacement of Muslim personal law Vio1ates' or encroaches the religions or cultural rights of the Muslim against Article 25 and Article 29 (1) of the Indian constitution [25].

In the Shahulameedu Case [26], the Kerala High Court, while interpreting the rule relating to wife's maintenance contained in Section 488 (3) of the Cr. P.C. did not deny its benefit to the wife of a bigamous Muslim staying away from him after his second marriage. Specifically emphasizing the mandate of Article 44, Justice Iyer, the then Judge of the Kerala High Court remarked [27].

> "The Indian constitution directs that the State should endeavour to have a uniform civil code applicable to the entire Indian humanity, and indeed, when motivated by a high public policy, s. 488 of the Criminal procedure Code has made such a law, it would be improper for an Indian Court to exclude any section of the community born and bred upon Indian earth from the benefits of that law....

In the Shah Bano Case [28], the Apex Court delivered a "controversial" judgement while dealing with the right of a divorced Muslim wife to seek maintenance under Section 125 Cr. PC. The court laid down that Section 125 (1) (b) which defines wife as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Therefore, a divorced Muslim woman, so long as she has not remarried is a 'wife' for the purposes of Section 125 and the statutory right available to her under the this section is unaffected by the provisions of the personal law applicable to her [29]. The court further said that the explanation to the Second Proviso to Section 125 (3) confers upon the wife the right to refuse to live with her husband, if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that Section 125 oversides the personal law 'if there is any conflict between the two [30].

The court made it clear that the statements, in the textbooks viz. Mull's Mohammedan law (18th Edit.) and Tyabji's Muslim law (4th Edit) are inadequate to establish the proposition that the Muslim husband is not under a legal obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. Section 125 deals with cases in which a person who is possessed of sufficient means neglects or refuses to maintain amongst others, his Ife, who is unable to maintain herself. Since, the Muslim law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it cannot be said that the Muslim husband according to his personal law, is not under an obligation to provide maintenande, beyond the period of iddat, to has divorced wife who is unable to maintain herself. The true position is that if the divorced wife is able to maintain, her husband's liability to provide maintenance ceases with the expiration of the period of iddat. If, she is unable to maintain herself, she is entitled to take recourse to Section 125. Therefore, it can not be said that there is conflict between the provisions of Section 125 and those of the Muslim Personal law on the question of Article 44 of our constitution has remained a dead letter. It provides that the State shall endeavour [31].

The court further said, that it is also a matter of regret that Article 44 of our constitution has remained a dead letter. It provides that the State shall endeavour to secure for the citizens, a Uniform civil Code, throughout the territory of India. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim communally to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is lively to bell the cat by making gratutious concessions on the issue. It is the State which is charged with the duty of securing a Uniform civil code for the citizens of the country and, unquestionably it has legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand, the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered, when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code. Justice to all, is a far more satisfactory way of dispensing Justice than Justice from case to case [32].

The parliament, however, diluted the impact of this judgement by passing the Muslim women (Protection of Rights and divorce) Act, 1986 admist "strong protest and agitation" by the Muslim fundamentalists who claimed the judgement as "invasion of personal laws of Muslims" by the judiciary.

References

1. Bhartiya VP. Religion-Relationship and Constitutional Rights in India, 1987, 312.
2. State of Bombay V. Narasu Appamali Case, AIR, Bombay, 1952, 84.
3. Ibid., at 87.
4. Ibid.
5. Ibid
6. Ibid at 93.
7. Ibid., 91-92.
8. Ibid., at 92.
9. Reynolds v. US 98 US 145.
10. Srinivasa Aiyyer v. Saraswati Ammad, AIR. Mad. 1952, 193.
11. Ibid., See also HB. Singh v. State of Manipur, AIR, Mani, 1959, 20.
12. Ram Prasad V. State of UP. AIR, All. 1961, 334.
13. Ibid.
14. State of Bombay v. Narasu Appamali Case, AIR, Bombay, 1952, 84.
15. Supra, 1, 317.
16. Ibid. at 312.
17. Badruddifl V. Aisha Begum, 1957 ALJ 300.
18. Ibid at 301.

19. Supra, 1, 318.
20. Ibid., at 319.
21. Ibid.
22. Ibid.
23. Jasbir Mahmood ed. Islamic Law in Modern India, 1972, 56.
24. Ibid., at, 54.
25. Ibid., at, 55.
26. Shahulamudu v. Sikaida Bern KLT. 1970, 4.
27. Ibid at 9. See also Jacob Alice ed. Constitutional Developments since Independence. 1975, 659.
28. MA. Khan v. Shah Bano, AIR 1985 SC 945.
29. Ibid.
30. Ibid.
31. Ibid, at 946.
32. Ibid., at 954.