

Religion and Equality in Liberal Constitutionalism

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Abstract

Liberalism is the principle which protects individual citizens from the use of excessive powers by the state. It is, "the belief that it's the aim of politics to preserve individual rights and to maximize freedom of choice." Constitutionalism on the other hand refers to the, adherence to or government according to constitutional principles; also: a constitutional system of government. Hence the concept of Liberal Constitutionalism denotes a contract among individuals, who consent to limits on their autonomy insofar and only insofar as they are consistent with individualist principles. In simple words Liberal Constitutionalism refers to vesting of basic rights and liberty in the paramount law of the land being the Constitution so as to ensure that no individual, being an autocrat or dictator takes away these rights from the citizens by use of their arbitrary power.

The Right to Equality and Religion in various forms has been enshrined in Articles 14-17 and 25-28 respectively of Part III of the Indian Constitution dealing with the Fundamental Rights. Being able to follow a faith of choice and to be treated with utmost equality both in the eyes of law and fellow citizens is a liberty that has been given by the Indian Constitution. The concept of Religion and Equality may bring in conflicting scenarios and the laws of the land need to strike a fine balance between religious freedom and equality. This article aims to discuss contemporary trends in the context of changing societal outlook and the evolving thinking amongst the people of the country.

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Introduction

A country may have the ‘Constitution’ but not necessarily ‘Constitutionalism’. The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers, Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary.

The Indian Constitution is one such a text which highlights in its very preamble the accessibility of “Justice”, “Liberty of thought, expression, belief, faith and worship”, “Equality of status and opportunity; and to promote among them all” and “Fraternity”. This liberty and equality that the citizens enjoy is through the law and subject to limitations of the law which is common for all. The reason for such powers to be given to the Constitution is to ensure that the rights are vested with the citizens irrespective of the change in the political scenario of the Nation and no power exercised by these representatives who change from time to time, can curb what has been given to them in the form of Fundamental Rights by the supreme Constitution.

It is pertinent to note that in an evolving world, like many other aspects, the concept of equality and liberalism also morphs and matures to a different level, reminding us of Hegel’s dialectic approach of a circular motion albeit spiraling upward.

Various pronouncements in the recent past by the Judiciary like *K.Puttaswamy&Anr. v. Union of India*² which upheld right to privacy as a fundamental right, *ShayaraBano&Ors. v. Union of India & Ors.*³ which declared instant Triple Talaq as unconstitutional, *Abhiram Singh &Ors?v. C.D. Commachen (Dead) by L.Rs. and Ors.*⁴ in which the court while interpreting the Section 123(3) of the Representation of People’s Act, 1951 observed that no solicitation or appeal may be made on religious or caste grounds by any candidate, *Independent Thought v. Union of India & Ors.*⁵ which held that sexual intercourse even if consensual with a minor is rape irrespective of whether the accused is married to the victim or not, stand as testaments to the growth and broader interpretation of laws with the developing times.

²2017 (14) SCALE 375.

³AIR 2017 SC 4609.

⁴AIR 2017 SC401.

⁵AIR 2017 SC 4904.

Liberalism and Equality

Dr. Ambedkar observed that “The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity.” Liberty cannot be divorced from equality and vice versa, without equality, liberty would produce the supremacy of the few over the many.

Indian Constitution was the first one in the history to give voting rights to all citizens at one go by incorporating it in the text, unlike other countries which gave suffrage rights in a step by step-religion, caste, ethnicity and gender-based system. Right from the Pre-Independent era Indians wanted equality, they demanded for equality with their rulers and from then the ideology of equality has grown bounds.

The principles of equality are often thought to be mentioned merely in Article 14 of the Constitution; however it operates in a wider sphere and has been included in other provisions being Article 15, 16 and 17. It has been held in the case *Naz Foundation v. Government of NCT of Delhi*⁶ that Article 14 is the genus while Articles 15 and 16 are the species. Articles 14, 15, 16 and 17 are all components of a single code of constitutional guarantees supplementing each other.

All these provisions aim at recognizing and protecting the minority’s culture and identity. In this manner the Constitution lays down provisions for both protective discriminations as also affirmative action.⁷ However, the Indian constitution in Article 14 provides for right to equality, clearly limits it to right to equality before the law and equal protection under the laws in India. In Article 15, discrimination on grounds of religion, race, caste, sex or place of birth has been prohibited only in respect of State and also in public places of access. Even Article 16, which guarantees equality of opportunity in employment is specifically made applicable for the Government and not across all walks of life – especially in private domain. Article 17 goes on to specifically provide for “Untouchability” to be abolished and any practice of untouchability is completely forbidden. This complete abolition and prohibition has not been extended to all practices in general and in all other cases, is restricted only in the operation of the State and in public spaces. Further, even though law provides for equality as discussed above, there is huge crater in the process of implementation and to this day many people live without knowledge of their rights and methods to enforce them.

While this is so, Article 19 provides all with the right to freedom of association subject to reasonable restrictions on grounds of sovereignty, integrity of India, public order or morality. Articles 25-28 provides freedom to profess a religion of choice for all, subject again to certain

⁶2009 (160) DLT 277.

⁷Andhra Pradesh Public Service Commission v. Balaji Badhavath, (2009) 5 SCC 1.

reasonable restrictions on account of public order, morality, health etc. In religious beliefs, the emphasis of equality is subject to and subservient to the concept of religious traditions or codes, which the person seeks to follow, the moment one has chosen to exercise their freedom to that religion. Though it is accepted that such reasonable restrictions are necessary, they however hamper the expansion of the interpretation of laws into new avenues.

Religion and Equality

The term religion has not been defined in the Constitution and it is a term which is not capable of any precise definition. The Supreme Court⁸ has observed that “Religion is the belief which binds spiritual nature of men to super-natural being. It includes worship, belief, faith, devotion etc. and extends to rituals”. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it.

Religion and equality co-exists in a liberal constitutionalism, as it is the cornerstone of any liberal constitution to provide the right to freedom of religion while it preserves the right to equality too. The Indian Constitution has very aptly made provisions for protecting this right under Articles 25-28. However, at times these comes into a conflicting position and in this article, we seek to evaluate the contours of the concepts of religion and equality in liberal constitutionalism.

Equality needs to be interpreted in the contextual basis. For instance, there are many religious denominations where it is only a male who is ordained to be a priest (such as amongst some Jewish sects, Hindus). There are even cases where the religious beliefs lead to restriction of women into even some parts of the religious facilities such as prayer halls.

Abortion, whether permitted by law or not may have its own permissibility under the religious beliefs such as in the case of Catholic order. To take a case in point, there is a strong campaign by Catholics against abortion laws in the global scenario. While, the Catholics may have the right to their religious freedom, any action to curtail abortion law deprives people following other religions, which do not prohibit such abortion from the same, which is actually impinging into their freedom. Thus, the balance is more in favours of equality rather than religion in such a case. Religious denominations could have their own mechanisms to wean away their followers from abortions rather than affect it through a legal bar.

In the Indian context, the law on abortion has evolved over the years reflecting the changing social thinking and consequential impact on what is considered liberal. Until 1971, all

⁸P.M.A. Metropolitan v. Moran Mar Marthoma, AIR 1995 SC 2001.

induced abortions (exception being for saving the life of the mother) were considered illegal under the Indian Penal Code.

In 1971, the Medical Termination of Pregnancy Act came into being, which provided for induced abortions in select situations and scenarios. Though there are many western countries, which have moved further on and provides for legal abortions without any restrictions, in India, it is still a restricted phenomenon specifically considering that the matter of termination of pregnancy is often not based on the perceptions of the woman herself, rather cultural, religious, socioeconomic and societal pressures play a significant role in influencing her decision. Combined with this is the restriction placed on sex selective diagnosis and abortion, considering the significant socio – religious belief amongst a multitude of Indians to have preference to a male heir.

Every woman has the right to choose to terminate her pregnancy irrespective of her religious or communal background, within the stipulated period. Recently in case the Supreme Court⁹ held that a woman who's foetus was showing indications of down syndrome was allowed to terminate even after 26 weeks. It stated that “a woman has a sacrosanct right to her bodily integrity and it's her choice”. When the Judiciary is capable of taking such different approaches towards such issues the only obstacle is what the religion and community prescribes, else every person will be in parity with others whose religion doesn't prohibit them from such an act.

As discussed earlier emerging societal views leads to changing interpretations even within the religion, for instance even without any legal compulsion, recently the mosque in Kerala permitted women to enter it and even appointed a woman K.Jamida to lead the jumma prayers as the Imam. In a recent judgment the Court allowed women to enter a temple in Maharashtra which was not permitted earlier, in the Haji Ali Darga case the Bombay High Court observed that the state is under a positive constitutional obligation to ensure that there is no gender discrimination, however in the case *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors.*¹⁰ it was prohibited. Thus, it can be seen that changing societal outlook brings about varied interpretations of the provisions of the Constitution and laws.

Liberal constitutionalism needs to balance the religion and its effect and the concept of equality in the light of the societal maturity and outlook and accordingly needs to ensure that there is a fair balance, which ensures that the freedom of individuals and associations are not in any way undermining the capacity of other individuals to do likewise.

⁹*Savita Sachin Patil & Ors. v. Union of India & Ors.*, (2017) 13 SCC 436.

¹⁰(2017) 10 SCC 689.

Another case in point could be the Child Marriage Restraint Act, 1929 (also called as a Sarda Act) where the marriageable age for boys was 18 years and girls 15 years until 1978 when it was changed to 21 and 18 respectively. The Child Marriage Restraint Act also was limited in view of the fact that the marriage was not voidable once performed and cognizance of offence was not possible after one year of the solemnization of such child marriage. Only in 2006, The Prohibition of Child Marriage Act was passed to replace the earlier Act to address these issues.

Here, again we see how the changing social outlook and thinking is modifying the impact it has to the legal framework thereby, under the same context of the constitutional powers, the legal provisions are tweaked to render equality and freedom a balance in the contextual framework of societal changes.

Conflict and the Contemporary Trends

Within these varied promises under the constitution, at many junctions the right to religion and right to equality come into conflict from time to time.

To take up the different Succession Laws as a case study it will go to show that there is a huge gender bias in all the personal laws in the following ways in the Hindu Succession Act, 1956 being that the laws for intestate succession of a male intestate and a female intestate have been provided for separately. Secondly when it comes to female dying intestate the husband, sons and daughters (including the children of predeceased son or daughter) get the first preference while the heirs of the husband as in any step son, step daughter or wife get second preference instead of it devolving on the parents of the female intestate. Thirdly the property got from her parents be it mother or father shall revert to them, fair enough but when observed carefully the said property will only go to the heirs of the father and not mother even if the property had been her mother's. Fourthly it has to be observed that Father is placed in Second class of heirs. In the Islamic law daughters are given a share of only $1/3^{\text{rd}}$ of the property if a son is there. The son takes $2/3^{\text{rd}}$ of the share. Secondly the husband in case of his wife's death takes $1/2$ of the property when he has no lineal descendants and $1/4^{\text{th}}$ otherwise but in case of a male dying intestate the "wife or wives" get only a total of $1/8^{\text{th}}$ of the share if they have children else $1/4^{\text{th}}$ share. The Indian Succession Act, 1925 itself has disparity wherein the act lays down separate rules when it comes to intestate succession of Parsis and Christians. It has been viewed that the Indian Succession Act has totally omitted the scope for a mother to inherit in case of the intestate dying without widow or widower and lineal descendants. According to Section 42 in such a case if the father is alive he inherits the

property entirely leaving no share for the mother. Section 46 of this Act provides for the property to go to mother only when the deceased intestate has no living father, brother, sister or their children. This thinking is rooted into social thoughts of the earlier century and may not reflect current factual scenario. It is quite likely that the laws relating to Succession may get revisited in a broader and contemporary interpretation of the Constitutional rights of Equality.

Other cases in point are in respect of homosexual relationships, transgender rights, marriageable age and polygamy. It is to be observed that homosexual relationships have been described in various Hindu mythologies as well as the Bible, due to which this concept can be traced back to ancient times which makes it pertinent to analyze as to whether it is a new issue at all. People have only now come out in open to fight for such rights. The current trends may lead one to infer that it is indeed every person's right to choose their relationships and sexual orientation, when the Acts state that persons above the age of 18 and 21 for female and male respectively can get married, it should include in its purview homosexual relationships as the religious texts themselves support such acts. With respect to transgender rights there has been a phenomenal growth when it comes to the Legislature drafting bills and the Judiciary has held in cases¹¹ that the Fundamental Rights are applicable and available to the third gender, people transforming with male/ female binary should be legally recognized, public health and sanitation should be made available, socio-economic welfare and benefits must be provided. This is another area where changes could be seen in the coming years.

Similarly, polygamy in Hinduism is prohibited by the Hindu Marriage Act, 1955 but it is still prevalent in various parts of India and the Shariat Law permits a man to have four wives which in today's context is prima facie arbitrary and gender biased. This may be tested in the course of time.

It is not only about women but men face discrimination too. In cases of adultery when both the parties have consensual extra marital affair it's only the man who is punished, in cases of maintenance and alimony it is only the woman who is given the benefit, there have been very few reported rape and cruelty cases against men as it is evident from the laws that there might not be any remedies available. It is agreed that Article 15 states that women should be protected but such protective discrimination should be given only where the woman is subjected to abusive practices and not where the woman is an offender too.

Concluding Remarks

¹¹National Legal Services Authority v. Union of India & Ors., AIR 2014 SC 1863.

Constitution has remained the same in these aspects however how it is interpretation has changed drastically. Balance struck between religious requirements and equality gets modified with the change in social outlook. In effect religious freedom can provide certain restrictions so long as it is not extending and affecting the concept of equality in a wider perspective. Liberal Constitutionalism provides for a greater preponderance to equality over religion though this cannot be interpreted as a complete negation of religious beliefs and practices for the sake of equality.