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RELIGIOUS MINORITIES AND THE LAW IN SOCIAL TRANSFORMATION

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ABSTRACT:

This study explores the dynamic interplay between legal frameworks and social transformation concerning religious minorities. Investigating diverse global contexts, it examines how legal structures either contribute to inclusivity or perpetuate discrimination. By analysing the impact of legal reforms on the rights and freedoms of religious minorities, this research sheds light on the role of law in shaping broader societal attitudes. The study aims to provide insights into the complex relationship between legal systems, social change, and the experiences of religious minority communities in an ever-evolving world . The interaction between the law and social changes is a compelling area of study, particularly when examining the rights and experiences of religious minorities within diverse societies. In this exploration, we delve into the intricate dynamics that define the relationship between legal frameworks and the evolving social landscape for religious minorities. This inquiry aims to unravel the multifaceted impact of laws designed to protect religious minorities, shedding light on their role in influencing attitudes, fostering tolerance, and ultimately shaping the broader fabric of society. As we embark on this journey, it becomes evident that understanding the legal underpinnings is crucial for comprehending the transformative potential of these laws in the realm of social change.

Keywords: Social changes, Minority Religious law, changed Society, Equality, constitutional assembly.

DEFINITION:

1. Law changed Society: "Law changing the society", which means that the law of the land compels the society to be changed according to it.

2. Society changed the law: And secondly is "Society changes the law", as per its needs. It means law is made by the society according to its requirement by its democratic institution i.e. Legislative or by adopting custom and usage. When law changes the society it is the sign of beginning of the development of the society. When society changes law it is the sign of maturity of the society. We can cite the enthusiasm of the people in the matter of 'Nirbhaya' where the commonest of the common was talking on how the law must be, what must be the punishment etc. Here this compelled the government to consider the sentiments of the society and set up a commission to give suggestions and untimely the criminal law amendment bill came into existence. The change required in the society can be initiated by a single person also and this has been proved in India right from Raja Ram Mohan Roy; to Mahatma Phule, Mahatma Baseswar, and Mahatma Gandhi up to Anna Hazare.

Law as an instrument of social change: Definitions of law: - The laws are variously defined by the scholars.

1. ***Smmer***: According to Summer "Laws are actually codified mores".

2. ***Kant***: Kant defined it as "a formula which expresses the necessity of an action".

3. ***Krabble***: Krabble defines Law as "the expression of one of the many judgments of value which we human beings make by virtue of our disposition and nature".

4. ***Green*** : Green Arnold defined "Law is more or less systematic body of generalize rules. Balanced between the fiction of performance and the of change, governing specifically defined relationship and situations and employing force or the threat of force in defined and limited ways".

In India, the legal landscape concerning social changes for religious minorities is influenced by various constitutional provisions, acts, and court judgments.

Remarkable social changes:

1.Indian Slavery Acts – it was passed and it further declared it as an offence by sections 370, 371 of the Indian Penal Code 1860. Art 23 of the constitution of India protects tracfking of human being and forced labour as a part of fundamental rights. Though many attempts had been taken to curb the issue of bonded labour it could be effectively done only through the Act.

2. Abolition of Sati System Sati – meaning burning or burying live of widow along with the corpse of her husband. It was considered to be a great honor among Hindus to become a sati since ancient times. In 1812 Raja Ram Mohan Roy the Indian social reformer started against these practices. The practice could not be stopped by the society as it was considered as part of their customs and traditions. It was law which could control it on 4th Dec 1829. The practice was formally banned in Bengal presidency lands by governor lord William Bentinck by a regulation for declaring the practice of sati or of burning or burying Hindu widows as illegal and punishable by the criminal courts. In post independent India – sati was not curbed effectively. Legislature took serious steps by introducing a special law for the treatment of persons who abet sati and made it exemplary punishable unto death sentence under[566]. Now in most areas of India it is a forgotten system. These laws relating to sati, widow remarriage, child marriage were enacted due to public opinion. The laws made during colonial administration was out of ambit of sociological jurisprudence. They were interested in these legislations only due to various social reformers and public opinion. Widows Remarriage The Hindu society prevented remarriage of widows in order to protect their family's honour and property. It was the efforts of Ishwar Chandra vidyasagar who urged British to pass a legislation allowing Hindu women to remarry. In pursuance of this The Hindu Widow Remarriage Act was passed in 1856. Legalising the remarriage of Hindu widows and to provide legal safeguards against loss of certain forms of inheritance for remarrying a Hindu widow. Thus it empowered a Hindu widow to live a life.

3. Prohibition of Child Marriage: This practice of child marriage was vehemently seen in Indian society across various religious communities. Tough attempts were made by many reformers it turned futile until a law was enacted. The Hindu Child Marriage Restraint Act was substituted by[567]. It introduced child marriage prohibition and extended the power of family court to decide the matter under the Act. The act also enhanced the punishment upto two years rigorous imprisonment or with ne up to Rs 2 lakhs or with both.

4. Elimination of Child Labour : Preventing a child from enjoying his childhood is a grave crime. The Factories Act 1881 was one of its kind to prohibit employment of child below the age of 7years and working hours were limited. Very many legislations were made and manually we have[568]. Generalizes the age of child upto 14 years for the purpose of prohibition of child labour. The Act has also listed 17 prohibited

[566] The Commission of Sati Act, 1987
[567] The prohibition of Child Marriage Act 2006
[568] Child Labour (Prohibition and Regulation) Act 1986

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occupations and 65 processes in Schedules A & B. Right to free and compulsory education.

5.Right to education: In 1992 the honourable Supreme Court declared the right to free and compulsory education as a fundamental right in the ambit of 'Right to Life' under Art 21 of the constitution. In 2002 the constitution was amended by inserting Article 21A to implement the right to free and compulsory education of every child aged between 6 – 14 years and inserted fundamental duties of parent and guardian. In 2010 The Right of Children to Free and Compulsory Education Act 2009 was put in force with effect from 1st April to provide free and compulsory education from 1 to 8th standard to every child. Thus it can be seen that law protects the life of the children.

State of Madras v Champak Dorairajan[569]: The state Government passed an act mentioning the Reservations according to the castes into the admission of Medical and Engineering courses. It completely excluded the Brahmins. The Petitioners were Brahmins. They challenged the Validity of Act under Article 29(2).The Supreme Court struck down the Act holding that it was violating the provisions of Article 29(2).

S.P.Mittal v Union of India.[570]A society was founded International Cultural Township Aurobindo at Aurovilla Ashram near Pondicherry to propagate the Ideals(Moral) and Teach. The Government enquired into detail and found that the management of the society caused several atrocities and illegal acts including sexual and monetary issues. Thereafter the Central Government passed an Act[571] and took over the Ashram. The management contended under Article 29 the Central Government had no authority to bring such Act. The Supreme Court held that the act was not violative of the article 29 as the mismanagement was clear on the face of the record and further the Aurovillie or the Society were not religious values.

Rights of Minorities: i. The Minority people have the Right to protect their language, script and culture and to conserve the Same.(Article 29(1)

ii. The Minority people have the right to admission into any educational institution maintained by the state or receiving aid out of State funds.(Article.29(2)

iii. The Minorities have the Right to establish the educational institutions basing on religion or language of their choice.(article (30)(1).

iv. The Minorities have the right to administer the educational institutions basing on religion or language of their choice.(Article 30)(1)

v. The Minorities have the right to get compensation for the compulsory acquisition of any property of an educational institution established by them.(article 30 (1A)

vi. The Government shall not show any discrepancy in granting the aid to educational institutions established by minorities. Article 30(2). Article 30:(i) Right of minorities to establish an Educational Institution of their choice. (Ii) Right to administer the educational Institutions so establish by them.[572]

Right to Administer. The phrase "Right to administer" gives several meanings and rights I;e Management of the affairs of the institution; the Right to select and elect the managing body; the Right to choose the teachers; the Right to have their own medium of Instruction; the Right to use the property of the institution for its benefit Regulations.[573] The Management of the Institutions for the welfare of the minorities should follow the Rules and Regulations formed and prepared by the States or Centre in this regard from time to time but those regulation must be reasonable.

1. Education and Awareness: Promote educational programs that highlight

[569] (AIR 1951 SC 226)
[570] 1983 SC 1: (1983) 1 SCC 51: 1983 (1) SCJ 45: (1983) 1 SCR 729
[571] Emergency Provisions)Act 1980
[572] Article 30, Constitution of India
[573] Fundamental rights constitution of India

the diversity of religions, fostering understanding and tolerance among communities.

2. Inclusive Policies: Advocate for inclusive policies that protect the rights of religious minorities, ensuring equal opportunities and representation.
3. Interfaith Dialogue: Encourage dialogue between different religious communities to build bridges, dispel stereotypes, and foster mutual understanding.
4. Legal Protections: Work towards robust legal frameworks that explicitly prohibit discrimination based on religious beliefs and ensure the rights of religious minorities.
5. Media Representation: Promote accurate and positive portrayals of religious minorities in media to challenge stereotypes and reduce prejudice.
6. Community Engagement: Facilitate community-based initiatives that bring together people from diverse religious backgrounds for collaborative projects and activities.
7. Political Participation: Encourage the active participation of religious minorities in political processes, ensuring their voices are heard in decision-making.
8. Cultural Exchange Programs: Support programs that facilitate cultural exchanges between different religious communities, promoting shared values and understanding.
9. Economic Empowerment: Create opportunities for economic empowerment within religious minority communities, addressing socio-economic disparities.
10. International Cooperation: Engage in international collaborations and initiatives that address religious freedom and promote tolerance on a global

Minority Rights, Secularism and Social Cohesion

Secularism as a concept remained vague, at least until India's independence. The nationalist movement and questions related to minorities occasionally referred to the idea of secularism. Secularism before independence chiefly coincided only with the imagination of the Congress party's intelligentsia and elite leadership. It was mainly in response to the violent conflict between Hindus and Muslims that the Congress party had proposed the idea of secularism. However, secularism was not a dominant idea in public discussions affecting the prospects of harmony. Nehru and the Congress party's understanding of the term was influenced by the British thinker George Jacob Holyoake, who coined the term secularism in 1851.[574] Holyoake suggested secularism means 'development of free thinking, including its positive as well as negative sides. Secularists consider free thinking as a double protest- a protest against speculative error, and in favour of specific moral truth'.

The ideas of 'non-establishment' and 'non-separation' outlined in the Nehru Report and the Karachi Resolution were consistent with the Assembly's final approach of managing context-free and context-sensitive aspects of the constitution. Further, the Directive Principles in Part Three and Fundamental Rights in Part Four of the Indian Constitution specified the obligations and guidelines allowing the Indian state to keep up with the secular spirit. Put simply, an attempt was made to balance freedom of religion and the rights of religious minorities vis-à-vis the universalization of constitutional values. For example, Article 30[575], which guarantees the right of religious minorities to establish educational institutions and limits state intervention, and Article 29, which guarantees the right to maintain distinct

[574] Secularism in India.
[575] (Mahajan 2008, p. 309).

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cultures and provides a special provision allowing religious minorities to preserve their cultural existence, are compatible with the ideas of 'non-establishment' and 'non-separation'. Both articles—29 and 30—were added to the justiciable Fundamental Rights part of the Indian Constitution. The presence of these articles in the Fundamental Rights along with Article 32 ensured that any individual from any community could challenge in Courts of India any violation of Fundamental Rights on the part of the state. This guarantee ensured that minorities could maintain cultural and educational practices which were distinct from those of the majority community.

Moreover, apart from the cultural and educational rights endowed in Articles 29 and 30, the constitution provided an overarching guarantee to the right to freedom of religion, outlined in provisions from Articles 25 to 28. Interestingly, although Article 25[576] allowed 'all persons … to profess, practise and propagate religion', permitted the state to restrain 'economic, financial, political or other secular activity associated with religious practice', and provided for 'social welfare and reform' of Hindu religious institutions, whereas Article 26 guaranteed religious denominations, among other things, the freedom to manage their religious affairs. Article 27 exempts expenses incurred in 'payment for the promotion or maintenance of any particular religion or religious denomination'. Article 28 ensured that state resources, particularly monetary resources, would not be utilized in the promotion and propagation of any religion. Further, it also exempts individuals from taking part 'in any religious instruction that may be imparted in such institution or [attending] any religious worship that may be conducted in such institution or in any premises attached thereto on promotion of religious institutions'.

Despite the enriching context of debates and the subsequent formulation later enshrined in the constitution, there were instances that challenged the advancement of social cohesion through the constitutional arrangement. India's social cohesion was based on a de facto commitment to secularism and mutual tolerance on the part of majority and minority communities at the societal level. At the political level, social cohesion was ensured by de jure constitutionalizing through a special provision for religious, caste and linguistic minorities. Over the years since independence, the structures of the social cohesion model have come under attack at both the political and the constitutional levels. Politically, they have come under pressure from the mobilization of right-wing Hindutva forces to communalize the majority community.

1. Reflecting on the Indian Experience

The framers of the Indian Constitution were aware of the fact that 'Hindus constituted a majority and that in a framework of formal equality this [Hindu] community may come to dominate the political and cultural domain' The Constituent Assembly provided special safeguards for minorities against this eventuality, as discussed before. The safeguards were provided in the Fundamental Rights section of the Indian Constitution, and the responsibility to safeguard those rights was given to the judiciary. After independence, the judiciary was responsible for interpreting the constitution. Significantly, after independence many aspects concerning the religion of both the majority and minority were discussed comprehensively in the judicial sphere.

In the Indian experience, the interaction between the state, the judiciary and religion has been mostly pragmatic. Pratap Bhanu Mehta has outlined the states' response to religion as 'Janus-faced'. According to him, 'the states … can protect and acknowledge the importance of religious interests and at the same time exclude them from4[577]. Mehta's claim of a 'Janus-faced' attitude is also visible in the judiciary's approach to its engagement with

[576] Article 25 (Freedom of conscience and free profession, practice, and propagation of religion) Constitution of India

[577] [the] public sphere' (Mehta 2008, p. 31)

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religion. Judges have regularly referred to the sacred religious texts of different religions to develop a rationale for their verdicts in religious matters. Whether the subject matter was sacred to the majority or minority religious communities, the courts, in their role as interpreter of the constitution, have relied on the religious text for adjudicating in religious matters. The courts have not only interpreted the provisions of the constitution but also delved into the religious texts of the concerned community. One of the implications of the judiciary's discretion in interpreting the constitutional provision in association with religious texts was that faith-based issues and their relation to individuals or communities were eventually defined by the courts.

In addition to the approach of the courts, the Indian Constitution does not define religion explicitly. Discussing religious texts in constitutional matters has undermined legal principles. In addition, judges on the Supreme Court of India have referred extensively to their counterparts on the Australian and American courts. For example, the judges have often referred to the following definition of religion from a judgement of the High Court of Australia: 'There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance' [578]

By learning from the best practices used in courts around the globe, the Supreme Court of India devised its own pragmatic formulations to deal with religion in India. One such formulation adopted by the Supreme Court of India has been of distinguishing between the 'essential part of the practice of religion' and those assertive non-essential aspects of religion.21 The aforementioned formulation is based on the idea that religion in India constitutes certain fundamental elements that are integral to a particular religion. Based on the distinction between foundational elements of the religion and extraneous elements, the Supreme Court has tried to seek a balance between constitutional values and freedom to practise religion. Because of the classification between essential and non-essential elements, many provisions of personal law have been regularly challenged in the judiciary. In fact, it is important to note that 'the Constitution does not treat personal laws as religion though they may have been derived from it' The judicial classification of religion and borrowed understandings from different courts around the world after independence created further challenges for the Indian judiciary. These challenges were an outcome of the imperfect implementation of 'religious laws by a secular judiciary' [579]

Not only did the Supreme Court try to maintain a cordial relationship between religious values and legal principles, but it also attempted, in the immediate aftermath of independence, to accomplish the incomplete task of modernizing society by endorsing legal universalism. From the case of Shrirur Math to that of Shah Bano, the Court tried to harmonize aspects of religion with the Indian Constitution. The Court sought to secularize the irrational aspects of religion in India. Perhaps because of the judiciary's inclination towards universalization and secularization, the judges undermined the relevance of religion and overlooked the context-sensitivity of religious affairs in the legal discourse as realized by the Constituent Assembly. Moreover, the lack of expertise especially in the context of diversity in India—a country comprising followers of all major world religions—resulted in criticism and attacks from politicians and civil society as well. In due course, the judiciary's push towards universalization and parliament's emphasis on

[578] High Court of Australia 1943, Adelaide Co. Of Jehovah's Witnesses Inc. V. Commonwealth(P. 123).

[579] (Pal 2001, p. 32).

context-sensitivity led to the development of a strained relationship between the judiciary and parliament in India.

The lack of expertise was fairly visible in the judicial treatment of cases related to the Muslim minority in particular. For example, 'to examine Islamic law the judges turned to the Hedaya, a four-volume text whose authority was the result of the pruning and simplification of Islamic law through British colonial courts over a century. This text was pared down in the 1870 edition in the interests of cost and utility … In contrast, when considering Hindu law apart from references to original Sanskrit sources, the court chose to rely on Abinas Das's study of Rig Vedic culture and Pāṇḍuraṅga Kāṇe's work on the Dharmasastras. Both were nationalist scholars who had delved into ancient Indian history, motivated in part to recapture the glory of a lost civilization'[580]. Not only did judges lack expertise but they also tried to justify their judgements, which suggested reforms by citing the religious texts themselves. The Supreme Court's excess use of tradition and religion as the source of modernization undermined the legal–constitutional justification enshrined in the constitution. The Supreme Court in its judgements approached religious doctrines and constitution values as compatible with each other. Pratap Bhanu Mehta has called this approach 'judicial myth-making'[581]. Mehta argued that the Court in its rulings stressed that modernization is itself a project integral to most of the religions. Therefore, values enshrined in the Indian Constitution are compatible with religion. This approach by Supreme Court set the wrong precedents.

Because of the judiciary's many critical judgements over the years, the context of the debate on religion after independence gradually changed. Unlike the Constituent Assembly and the polity during independence, the courts after 1950 delved into questions pertaining to freedom of religion and special protection of religious minorities in a broader context, giving up the narrow framework of communalism by 1980s. The views on the protection of minorities as an obligation inherited from the Constituent Assembly changed to discussions where aspects of formal equality among religions were often debated. The special protection of minorities was not seen as an obligation based on the nation's depressing past but was meant to grapple with the conflict between legal pluralism and legal universalism. Rudolph and Rudolph have commented that 'conflict between legal pluralism and universalism were two positions between which Indian politics and law has vacillated'[582]. To understand this tension better, one important case is discussed in the next section. The case is helpful in evaluating the commitment of the social cohesion arrangement to sustain tension through debates on the rights of religious minorities and equality.

Shah Bano and the Idea of Minorities

The debates between legal pluralism and universalism in the Indian context evolved chiefly in the historical background to the Uniform Civil Code. The story of the UCC involves a parallel struggle for legal universalism and reaffirmation of legal pluralism in different phases of this story. The most noticeable chapter in this story, which determined the discourse between special protection of minorities and equality of religion in India, was the Shah Bano case in 1985. The case still stands out as a watershed judgement in the history of Indian politics, which transformed the discourse on minority rights and freedom of religion in the country. It was the Shah Bano case which led to 'the rise of Hindu nationalism and the articulation of Hindutva ideology in the 1980s and 1990s (and) lent new meaning and urgency to the tension between pluralism and universalism' .

[580] De 2018, p. 153
[581] (Mehta 2008, p. 327)
[582] (Hoeber Rudolph and Rudolph 2001, p. 3 7)

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The ***case of Mohammad Ahmed Khan v. Shah Bano Begum2***[583] popularly known as Shah Bano is one of the most discussed and publicized cases of the Indian Judiciary. In this case, the couple had been married to each other for forty-three years. They had three sons and two daughters. In April 1978, Mohammad Ahmed, who was a successful lawyer, divorced the sixty-two-year-old Shah Bano, who filed for maintenance under the 1973 Code of Criminal Procedure (CrPC) in the judicial magistrate court of Indore, Madhya Pradesh. The petition referred to CrPC provisions and demanded a monetary allowance. In his defence, the husband claimed that the petitioner was no longer his wife in accordance with divorce rules under Muslim personal law and hence that he was under no obligation to support her. Further, the defendant contended that he had already advanced a monthly maintenance of INR 200 for the subsequent two years under the provisions of iddat and had also submitted INR 3000 to the court under the provisions of mahr24. However, the judicial magistrate instructed Mohammad Ahmed to pay INR 25 monthly to Shah Bano. Unsatisfied with the magistrate's judgement, Shah Bano appealed to the Madhya Pradesh High Court, which increased the monthly alimony to INR 179.20.

In response, the defendant took the case to Supreme Court, where the Muslim Personal Law Board and Jamiyat Ulama-i-Hind (Association of Islamic Religious Scholars of India) were admitted as parties to the case. A constitution bench ruled that Shah Bano deserved an allowance under Section 125 of the CrPC and commented that the provision of financial support by the defendant did not contradict the Quran. In pronouncing the judgement, 'the Supreme Court took a decision regarding the priority between the right to maintenance under Section 125 of the CrPC and the Muslim personal law on the assumption that there was a conflict between the two laws. They said they wanted to set the question of priority to rest once and for all. They took upon themselves the task of giving effect to the objective of Article 44 [of the Indian Constitution][584]

Nonetheless, the Muslim community in general and Muslim men specifically opposed the judgement. The government of the day, led by Prime Minister Rajiv Gandhi of the Congress party, initially supported the judgement but later, due to protests by the Muslim community claiming the judgement was an attack on Muslim personal law, withdrew its support by passing the 1986 (MWPRDA)[585]. The central government retreated from its position on the judgement by ensuring that Section 125 of the CrPC did not apply to separate Muslim women. Hindu right-wing stakeholders immediately objected to the MWA act passed by the ruling Congress government. Later, the constitutionality of the MWA was also debated by legal scholars, activists and lawyers.

Suggestions

Incorporating anti-discrimination laws, protecting freedom of religion, and ensuring equal rights for religious minorities are crucial steps in fostering social changes. Legal frameworks should actively discourage discrimination based on religious beliefs, promoting a more inclusive and tolerant society. Education and awareness programs can complement legal measures, fostering understanding and respect for diverse religious backgrounds. Promoting inclusivity, education, and dialogue can empower religious minorities in social transformation. Encouraging diverse representation in decision-making processes fosters understanding and respect. Additionally, addressing systemic inequalities and ensuring legal protections can contribute to a more inclusive society.

[583] Hoeber Rudolph and Rudolph 2001, (p. 37).2,

[584] ' (Pal 2001, p. 32).

[585] Muslim Women's (Protection of Rights on Divorce) Act

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