# EQUALITY OF SEXES AS A HUMAN AND CONSTITUTIONAL RIGHT AND THE MUSLIM LAW

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## 1. Introduction

EQUALITY OF sexes is now recognized as a human right. In India equality before law is also a right protected under the Constitution. The purpose of this paper is to advocate implementation of the principle of equality of sexes under the Muslim personal law, as applicable in India.

### Equality of sexes as a human right

The concept of equality of sexes is no longer considered as a characteristic of a particular culture but as a universal principle and a human right. Article I of the Universal Declaration of Human Rights, 1948, states that "All human beings are born free and equal in dignity and rights." The importance of the status of women is also reflected in the resolution of the United Nations General Assembly passed unanimously on 7 November 1967.[1] It states that the full development of nations, the world's general welfare and the cause of peace require full equality of both sexes everywhere. The resolution in particular calls upon nations to take "all appropriate measures" to abolish any law or custom that discriminates against women.

### Equality of sexes and the Constitution

The letter and spirit of the Indian Constitution give a clear expression to equality of sexes. The preamble to the Constitution affirms the objective of achieving social and economic justice for the people. Article 14 in Part II of the Constitution declares the fundamental right to equality before law and equal protection of laws within the territory of India. And article 13(1) lays down that "All laws in force. . . .in so far as they are in-

1. U.N.G.A. Res. 2263 (XXII) 1957 Plen. Mtg. 22nd Session.

consistent with the provisions of this part shall to extent of such inconsistency, be void."

Notwithstanding the above provisions, the discriminatory personal laws which militate against the equal status of women with men continue to be in force because of narrow and doubtful judicial interpretations and neglect on the part of legislatures to enforce the concept of social justice in favour of women.

The judgments in *Narasu Appa*'s case[2] and *Dwarka Bai*'s case[3] indicate three arguments made in support of the discriminatory personal laws: first, that discrimination against women in the personal laws is beyond the purview of articles 13 and 14 as "laws in force" do not include personal laws: second, inequality of sexes in law can be upheld on the ground of reasonable classification; and third, that even if it is held that personal laws are covered by article 13 (i) their provisions permitting polygamy do not amount to a discrimination on the ground of sex only.

The view expressed in *Narasu Appa*'s case[2] that "laws in force" mentioned in article 13 (I) include only laws passed or made by a legislature or other competent authority was rejected by the Supreme Court in *Sant Ram* v. *Labha Singh*[4]. It was stated:

> There are two compelling reasons why custom or usage having in the territory of India the force of law must be held to be contemplated by the expression "all laws in force". Firstly, to hold otherwise would restrict the operation of the first clause in such a way that none of the things mentioned in the first definition would be affected by the fundamental rights. Secondly, it has to be seen that the second clause speaks of "laws" made by the state and custom or usage is not made by the state.[4a]

Further, it is submitted that any attempt to restrict the decision in *Sant Ram*'s case[4] to custom or usage only will give rise to serious confusion about the existing law.

*Dwarka Bai* v. *Nainan*[5] illustrates the resort to reasonable classification for upholding disparity, under personal laws, regarding the rights of men and women relating to divorce. This case will be of interest when considering the power of unilateral divorce vested in the husband under Muslim law. The parties in this case were Christians and it was contended that section 10 of the Indian Divorce Act, 1869 was unconstitutional in so far as it permitted the husband to get a divorce merely on the ground of adultery on the

2. A.I.R. 1952 Bom. 84.
3. A.I.R. 1953 Mad. 792.
4. A.I.R. 1965 S.C. 314.
4a. *Id.* at 316.
5. A.I.R. 1953 Madras 792.

part of the wife, but a wife was required to establish an aggravating circumstance like cruelty or desertion in addition to adultery. Panchapakesa Aiyar J. observed :

> I may add, however, that I consider that s. 10 as it stands, is not *prima facie* repugnant to articles 13 to 15 of the Indian Constitution. It appears to be based on a sensible classification and after taking into consideration the abilities of man and woman, the results of their acts and not merely based on sex, when alone it will be repugnant to the Constitution.

This, indeed, is a strange distortion of the American doctrine of reasonable classification which is followed in India. The view of Panchapakesa Aiyar J. in effect, regards a discrimination based on sex as a reasonable classification, which is not contemplated by the Constitution. If the reasoning in *Dwarka Bai*'s case[5] is correct, a rule which prescribes the payment of lesser wages to women for the same work would be legal. It should also be noticed that article 14 is absolute in its language and the concept of reasonable classification was developed by the courts. While the application of different laws to the Hindu, Muslim and Christian women may be valid on the ground of reasonable classification, it is submitted that a discrimination based between a Hindu male and a Hindu female, or a Muslim male and a Muslim female, cannot be upheld on the ground of reasonable classification.

In *State of Bombay* v. *Narasu Appa Mali*[6] a view was expressed that even if personal laws fell within the purview of article 13(I) of the Constitution, the provisions of personal laws permitting polygamy did not amount to a discrimination on the ground of sex only. There the accused who was convicted under the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, challenged his conviction as *ultra vires* of the Constitution. It was contended, *inter alia*, that personal laws which violated article 14, whether Hindu or Muslim, became void; but that the Act provided for punishment in the case of Hindus alone and therefore, offended the Constitution. The court held that the words "laws in force" in article 13 (1) did not include personal laws and that the article applied only to statutory laws. Further, it was stated that even if it be otherwise, polygamy under a personal law would not be invalid as it did not discriminate only on the ground of sex. Gajendragadkar, J. stated:[7]

> Even assuming that personal law was included (in the words "laws in force") the question still remains to be considered as to whether polygamy would be bad as contravening art. 15 (1) of the Constitution. It is urged that polygamy discriminates against women

6. A.I.R. 1952 Bombay 84.
7. *Id.* at 89.

> only on the ground of sex. This argument, in our opinion, overlooks the history of polygamy as a social institution. Polygamy is justified if at all on social, economic and religious grounds and hardly ever on grounds like sex. In the modern world polygamy may seem to be an anachronism and may seem to be based on outdated and outworn ideas. When, however, it is found recognized in any personal law, it is based on considerations which were very vital and compelling to those who believed and who still believe in the sanctity of their personal law. Therefore, it would be difficult to say that the institution of polygamy would constitute a discrimination against members of one sex only on the ground of their sex.

The above observations, it is submitted with respect, may be questioned. Equality, like the right to freedom of expression, is an individual right and where equality before law is violated the sanctity of a personal law is not a relevant consideration. As observed by Seervai :[8]

> Art. 14 confers a personal right by enacting a prohibition; and the only question which has to be determined when a violation of the right is alleged is to inquire whether the prohibition has been violated.

Second, the above reasoning ignores the fact that all types of discrimination in the world are entrenched in social, historical and economic factors and these rationalizations cannot render valid a discrimination. Third, freedom of religion in India is subordinated to social reform, and in India the promotion of equality of sexes is a measure of social reform. Further, article 25 protects the right to practise one's religion but not the discrimination sanctioned by the religion. As stated by the Supreme Court of United States in *Davis* v. *Beason*:[9]

> To call their advocacy (of bigamy and polygamy) a tenet of religion is to offend the common sense of mankind.... The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect but is distinguishable from the latter. The First Amendment to Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United

8. Seervai, *Constitutional Law of India*, 193-94 (1968).
9. (1889) 133 U.S. 333, 342 (emphasis added).

> States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, *not injurious to the equal rights of others*, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

Even if it is assumed that the decision in *State of Bombay* v. *Narasu Appa* is correct, it will create untold confusion. The first question that arises is whether the decision protects the institution of polygamy only or it is also applicable to other types of discriminatory rules. For example, in the law of succession a male heir is entitled to twice the share of a female heir of the same degree. Another important point which was not noticed is that in many areas *Sharī'a* happens to be the personal law of Muslims because enactments like the Sharī'at Act, 1937 recognize it as such. Are these enactments which recognize the Muslim personal law clothed with the immunity claimed by personal law? Or are they open to challenge if they infringe the fundamental rights? It would appear that when a person is governed by the *Sharī'a* by virtue of the Sharī'at Act, the provisions are open to judicial scrutiny as regards their constitutionality.

Thus, the constitutional validity of many rules of Muslim law which discriminate against women is open to doubt. The Supreme Court, as yet, did not have an opportunity to consider this question squarely. On the other hand the Parliament also failed to uphold the equal rights of Muslim women by passing an enabling legislation. Even if the Supreme Court responds adequately to the needs of social justice, dignity of the individual and the concept of equality, still a reform of Muslim law by judicial legislation is bound to be slow and halting. Therefore, there is a case for Parliament to take initiative in achieving equal status for Muslim women.

## II. Objections to the reform of Muslim law

Before considering the steps to remedy the existing position of women under the Muslim law, two oft-repeated arguments in favour of the *status quo* need to be examined: first, that adherence to Qur'anic law is a *sine qua non* of Muslim faith; second that the public opinion among the Muslims in India is not receptive to a change.

### Adherence to Qur'anic law

Whatever might have been the theory in this regard, in practice Muslims in many parts of the world have deviated from adhering to the laws of the *Qur'ān*. The dominance of *'ādat* law, and not of Muslim law, is a conspi-

cuous feature of the Indonesian legal institutions, even though Islam is the dominant religion there. Prins observes:[10]

> Now the most interesting issue of Indonesian *'ādat* law is that upto the present *Sharī'a* has not succeeded anywhere in wholly conquering the above mentioned sections of juridical life. Even the institutions of relationship, of matrimony and succession law did not become the unrivalled domain of *Sharī'a*.

In the Federation of Malaysia the Muslim law of succession is varied by customary law.[11] In some countries of Africa also, the *Sharī'a* failed to displace the customary laws in some regions.[12] Even in the strongholds of Islam, the existence of customary law contrary to the *Sharī'a* is noticed. In Morocco though Islam had taken deep roots for centuries, the usage proved stronger than the *Sharī'a* and the daughters did not inherit.[13] As pointed out by Coulson :[14]

> Nor was it only in outlying provinces of Islam, nor among those people whose conversion to the faith took place at a relatively late date, that *Sharī'a* law failed to supersede existing custom. Certain Arab tribes of the Yemen never relinquished their established customary law under which, *inter alia*, women did not enjoy any proprietary rights.

**Public opinion**

The second argument that is put forward is that the Muslim community in India is against any attempt to introduce a reform to provide for equality of sexes. It is submitted that this view is unsound. First, the right to equality like the right to freedom, is an individual right and is not subject to control by members of the community. Second, the concept that law follows public opinion is not valid in India. In a country where the majority of the people are illiterate whether weight should be attached to public opinion in measures relating to social reform is doubtful. On the other hand, in India, law has a different and a difficult role to play, namely, to mould public opinion and to foster new values. The abolition of *sati*, the Child Marriage Restraint Act, and eradication of untouchability—to mention only a few examples serve to illustrate the point. This experience

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10. Prins, 'Muslim Religious Law in Modern Indonesia', 1 *Die Welt Des Islam*, 283, 285 (N.S.)(1951).
11. Sheridan (ed.), *Malaya, Singapore and Borneo Territories : Development of their laws and Constitutions*, 393-94 (1961).
12. J. N. D. Anderson, 'Relationship between Islamic and Customary law in Africa', 12 *Journal of African Administration*, 228, (1960).
13. R. Levy, *The Social Structure of Islam*, 98 (1957).
14. N. J. Coulson, *A History of Islamic Law*, 137 (1964).

is not confined to India alone. In so far as the equality of sexes is concerned, in the contemporary Chinese[15] and Japanese[16] societies it was enforced and achieved because of the fact that the elite in these societies believed in it and not because there was a strong public opinion in favour of it.

### III. Trends in reform of Muslim law

In Islamic societies two distinct categories of reforms are noticed: first, a restricted reform *viz.*, while recognizing the need for reform a conscious effort is made to preserve the basis of the *Sharī'a* and not to alter it except to the extent necessary; second, a revolutionary reform *viz.*, to prefer the enactment of new codes on the model of continental codes, and thereby give a secular basis to the legal institutions.

**Restricted reforms**

The restricted approach was adopted in countries like Algeria, Egypt, Iraq, Pakistan and Morocco. The reformers in these countries put forward claims for competence to effect changes on Islamic principles. For instance, the Pakistani Marriage Commission sought the justification for reforms in *ijtihād*. Coulson observes that "the whole approach of the Pakistani Commission constitutes an outright and fundamental denial of the doctrine of the infalliable consensus."[17] Such rationalizations of reformers basically reflect the compulsive forces of policy-needs to suit the altered social conditions. But the modernists in attempting to advance theological justifications for their reforms are justly open to the attack that they are usurping a function which does not legitimately belong to them. The contradictions inherent in the approach of modernists who seek to effect reforms within the scope of the *Sharī'a* have been brought out in the following observation of Schacht:[18]

> On the one hand, the modernists are inclined to deny the religious, Islamic character of the relevant sections of Islamic law; in denying this, they come near to accepting by implication, though hardly ever explicitly, the concept of a secular law, even concerning those

15. Article 96 of the Constitution of the Peoples Republic of China states:
> Women in the Peoples Republic of China enjoy equal rights with men in all spheres of political, economic, cultural, social and domestic life. Although the Civil Code of the Republic of China promulgamated in 1932 envisaged equal rights for women, it is difficult to say to what extent they were in force owing to the unstable political conditions.

16. Article 24 of the Constitution of Japan declares :
> With regard to choice of spouse, property rights, inheritance, choice of domicile and other matters pertaining to marriage and family, laws shall be enacted from the standpoint of dignity and essential equality of sexes.

17. Coulson, 'Reform of Family Law in Pakistan', 7 *Studia Islamica* 135, 137 (1957).
18. Schacht, 'Problems of Modern Islamic Legislation', 12 *Studia Islamica* 99, 119 (1960).

> subject-matters which have been treated in the *Qur'ān*. On the other hand they do not disdain to use somewhat arbitrary and forced interpretations of the *Qur'ān* and of the other traditional sources of Islamic law, whenever it suits their purpose.

To put the matter in a nutshell:[19]

> As long as the present attitude of the majority of Muslim thinkers, and a great majority of individual Muslims, towards ancient Arabian law, as endorsed by the *Qur'ān* persists, the improvements which have been suggested and in part been carried out, can be nothing but palliatives.

It should be pointed out that in none of the Muslim countries equality of sexes in the law was accomplished by means of restricted reform keeping the general framework of Islamic law.

**Revolutionary reform**

The second approach is characterized by that of Turkey where Kamal Aturk replaced the law based on the *Sharī'a* with a new code drawn on the basis of the Swiss Civil Code. Though apparently a drastic measure it is a logical approach. At the outset the question occurs: what were the factors that give rise to the reception of a foreign legal system? Kubali states:[20]

> In Turkey, the process of reception, which dates from the middle of the nineteenth century, is determined by two cultural factors closely linked to each other by a causal relation, namely, the *modernization* or more precisely the *westernization* and the *secularisation* of Turkish customs and institutions.

Professor Timur's account of the reasons that led Turkey to favour the reception of a foreign code in place of *Sharī'a* serves to illuminate the socio-legal context of the reception. He says:[21]

> In the first place, the *Qur'ān* must be considered as a great book for all time. But we must frankly ask ourselves why it became necessary in legal matters to create and develop three other sources of Moslem law. Although certain rules and provisions set by sources other than the *Qur'ān* are obviously general principles of justice and equity, with a high degree of objectivity, a considerable

19. *Id.*at 106.
20. Kubali, 'Modernization and Secularization as Determining Factors in Reception in Turkey', 9 *International Science Social Bulletin*, 65 (1957).
21. Timur, 'The place of Islamic Law in Turkish Law Reform' 6 *Annales De Faculte De Droit Istanbul* 75, 77 (1956).

majority of them are essentially and primarily regulations necessitated by the social nature and structure of the Arab community of that time. This structure of the Arab community was largely responsible for Mohammed's acquisition of a position which was not restricted to spiritual domain only, but called for his indispensable guidance and teachings relating to the sphere of everyday relationships between individuals, and necessarily embracing legal concerns and principles.... It is essential to admit the fact that aside from the *Qur'ān* proper and a few of the Traditions, the remaining two sources of Moslem jurisprudence were essentially created to meet the needs of the community existing during and after Mohammed's era. But it is a postulate of social sciences that no society remains unchanged through time, and it is bound to go through a series of metamorphosis which naturally involve and bring about modifications in value judgments.

### IV. The Indian scene : an evaluation

A distinction is to be drawn between unicultural and polycultural societies, that is, countries where there is a preponderance of adherents to the Muslim faith and those where Islam constitutes one of the religions followed by the people and the Muslims do not constitute a majority. Generally speaking, in the former public policy seeks to accommodate, as far as possible, the *Sharī'a*;[21a] whereas in the latter the public policy entrenches itself upon egalitarian principles and upon secular foundations. The Civil Code of the Republic of China serves to illustrate the trends in polycultural societies.

As early as 1914 two Muslim scholars in India expressed their views on the question of reform of Muslim law to suit the modern conditions. Khuda Baksh emphasised the role of the Prophet as a reformer in the Arab society and stated that the *Qur'ān* should not be regarded as an obstruction to progress. He observed :

> Nothing was more distant from the Prophet's thought than to fetter the mind or to lay down fixed, immutable unchanging laws for his followers. The *Qur'ān* is a book of guidance to the faithful, and not, to be sure, an obstacle in the path of their social, moral, legal and intellectual progress.[22]

Again :

> It was never the intention of the Prophet—and no enlightened

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21a. D. Bonderman, 'Modernization and Changing Perceptions of Islamic Law', 81 *Harvard Law Review*, 1169, 1193 (1968).

22. Khuda Baksh, 'The Spirit of Islam' in *Essays : Indian and Islamic*, 20 (1912).

> Muslim believes that it ever was—to lay down immutable rules, or to set up a system of law which was to be binding upon humanity apart from considerations of time and place and the growing necessities arising from changed conditions.[23]

Abdur Rahman, on the other hand, while recognizing the need for reforms, interpreted the Qur'anic verses and traditions so as to agree with his ideas of modern legislation on family law and succession.[24] In this regard, it is hard to deny the force of the following statement of Schacht:

> This implies, of course, that the Muslim scholars for more than a thousand years, should have misunderstood the correct meaning of those 'sources' of Islamic law, and Abdur Rahman's whole method is unacceptable to an historian.[25]

More recently Fyzee called for a reinterpretation of Islam on the basis of the following principles:[26] (1) study of history of religions, (2) comparative religion of the semetic races, (3) study of semetic languages and philology, (4) separation of law from religion, (5) re-examination of *Sharī'a* and *kalam* and (6) reinterpretation of cosmology and scientific facts. Whether such a reinterpretation of the *Qur'ān* will necessarily result in the acceptance of the principle of equality of sexes is a matter for conjecture. However, for our purposes the fourth principle enunciated by Fyzee, namely, separation of law from religion is of importance. He says:

> Today in Islam this is the greatest difficulty, *Sharī'a* embraces both law and religion. Religion is based upon spiritual experience; law is based upon the will of the community as expressed by its legislature, or any other law making authority. Religion, is unchangeable in its innermost kernal.... But laws differ from country to country, from time to time. They must ever seek to conform to the changing pattern of society.[27]

Thus, the opinion of scholars, practical considerations, the experience of progressive countries and the ideals laid down in the Constitution of India lead to the conclusion that reforms in Muslim law in general, and equality of women in particular could only be achieved by the displacement of legal institutions based on the *Sharī'a* by new institutions having their foundation on secular principles taking into account the existing social conditions in India. But the attainment of this ideal presents formidable

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23. Khuda Baksh, 'Thoughts on the Present Situation', *supra* note 21 at 284.
24. Cited in Schacht, *supra* note 22 at 106.
25. *Supra* note 22 at 105.
26. Fyzee, 'Reinterpretation of Islam', *The Islamic Review*, 13-14, 1960.
27. *Id.* at 11.

problems in view of the general illiteracy of the people, the age-old traditions and the political consideration in a democratic system. The revolutionary approach of Turkey needs a strong enforcing machinery and in the present social and political conditions in India it is impracticable to adopt it. The experiment of the Special Marriage Act, 1954 shows that a reform in this regard whose application rests on individual option is not very useful. This leaves legislation and the judicial or constitutional technique, or a combination of both, as the possible methods of reform.

To guard against undue delay in the realization of goals, it is submitted that the technique adopted in West Germany in relation to equality of spouses may be followed. In that country, the Basic Laws of 1949 laid down that all legal provisions inconsistent with the principle of equality of sexes would be abrogated by April 1, 1953. Though legislation was not undertaken for the purpose, the courts complied with this constitutional requirement by superseding all the laws conflicting with it.[28] It is suggested that legislation should be introduced to the effect that notwithstanding any custom, text, rule, or interpretation of law, any rule in the personal law applicable to Muslims which is inconsistent with the principle of equality of sexes shall be void after a specified period. Such a provision will become positive law *ipso facto* after the expiry of the specified period, and any constitutional shelter of reasonable classification, it is submitted, will not be available. Thereby the dangers inherent in the legislative inaction can be checked to a large extent.

If the government, fearing political repercussions fails to take legislative steps, as is likely to be, the courts can give effect to the human right regarding equality of sexes in particular cases arising before it.

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28. Rheinstein, 'The Law of Family and Succession' in *The Modern World*, 34-36, (1965).