Gender, Equality, and the Predicaments of Faith

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In the context of the rise of the global right, feminist debates on gender and sexual rights can and have at times slipped into a left and right ideological divide. In reflecting on the ways in which gender equality has been addressed in the context of Indian constitutional law over the past two decades, what emerges is a more complex picture. Issues of gender and sexuality have been enmeshed in the legacies of colonial interventions, including liberal imperial feminism, as well as anti-colonial nationalist movements, where they have been central to the articulation of national identity. This backdrop continues to inform the ways in which women's rights are taken up and addressed in Indian constitutional law. In the contemporary moment, the predicaments of faith have become central in the context of Hindu Right wing nationalism that has advanced its agenda in and through rights discourse, including gender equality, rather than in opposition to them.[1]

Landmark Decisions on Gender Equality

In recent times, an avalanche of landmark decisions on gender equality and sexual rights have been cascading off the benches of the higher judiciary in India.[2] The Indian Supreme Court has recognized the right to sexual autonomy by setting out the guidelines for sexual harassment in the workplace;[3] recognized a sex worker's right to be free from sexual violence;[4] decriminalized adultery[5] and all consensual sex between adults, including same-sex couples;[6] recognized the rights of trans-persons;[7] held that sex with child brides is rape;[8] expanded women's reproductive rights;[9] and upheld the right to equal entitlements between female and male army officers.[10]

A further set of cases reveals the central role that gender and gender equality play in shaping the content and contours of faith in law. Allowing women access to temples[11] and dargahs (Sufi shrines)[12], upholding interreligious marriage,[13] and holding that divorce via triple talāq is unconstitutional[14] are among the historic decisions by the courts affecting women's rights. These decisions are providing feminists and progressives alike with a sense of achievement and forward movement. Women's rights seem to be emerging from the long shadow of a colonial past partly characterized by oppressive male dominance.

Normative Limits

Nevertheless, a close reading of some of these decisions reveals how gender equality does not emerge as an unequivocally progressive ideal. Instead, the decisions suggest that gender equality is being shaped

[1] The issue of cast is not addressed in this blog but remains equally significant.
[2] This blog draws on a longer discussion in Ratna Kapur and Brenda Cossman, Gender Equality Redux, 16(1) *National Law School of India Journal* (2022):58–65.
[3] *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.
[4] *Budhadev Karmaskar vs State of West Bengal* (2011) 10 SCC 277.
[5] Joseph Shine v. Union of India, (2019) 3 SCC 39.
[6] Navtej Singh v Union of India (2109) 1 SCC (CRI) 1.
[7] National Legal Services Authority of India v. Union of India (2014) 5 SCC 438.
[8] Independent Thought v. Union of India, (2017) 10 SCC 800.
[9] *Sarmishtha Chakraborty vs Union of India* (2018) 13 SCC 339; *Meera Santosh Pal vs Union of India*, (2017) 3 SCC 462.
[10] *Secretary, Ministry of Defence vs Babita Puniya* (2020) SCC Online 200; *Aparna Bhat vs The State of Madhya Pradesh* (2021) SCC 230.
[11] Indian Young Lawyers Association v. The State of Kerala, (2019) 11 SCC 1.
[12] Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust, (2016) 5 AIR Bom R 660.
[13] Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.
[14] Shayara Bano v. Union of India, (2017) 9 SCC 1.

against a normative ideal of gender as well as Hindu majoritarianism that limits the progressive impact of these decisions. At one level, there has been a sea change in the approach to gender discrimination over the past three decades. The cases reflect how women's rights have been increasingly framed within the discourse of gender justice and dignity. The differences between women and men — so significant in earlier jurisprudence dismissing equality claims – do not come into play. The protectionist approach that once seemed so entrenched in the judicial decisions has at times given way to a more substantive vision of women's equality. Courts have repeatedly disavowed the idea of women as frail and in need of protection, a vision that was used to justify differential – and discriminatory – treatment.

At another level, the struggles around gender and gender equality in postcolonial India remain caught within the complex histories of anti-colonial nationalism and contemporary hyper-masculine, anti-minority, right-wing politics. Despite the judicial promotion of women's rights, the discourse within which these rights have been protected often remains problematic. The judicial approach to questions of gender remains, at best, divided; the shift to a more substantive vision is anything but unanimous. This division was glaringly evident in a recent split verdict in the Delhi High Court on whether the marital rape exception that still exists in Indian law violated the right to equality and right to life provisions of the Constitution or whether sex in marriage was distinct from sex in other relationships on the grounds that the former carries a legitimate expectation of sex. The decision reproduced the very gendered norms that gender equality is intended to challenge and address.[15]

On a darker note, the Supreme Court itself refused to follow the guidelines and principles it had set out for workplace harassment when one of its own stood accused of sexual harassment. The case involved a sitting Chief Justice of the Indian Supreme Court, Ranjan Gogoi, who alleged that the complaint against him was part of a "larger conspiracy to destabilise the judiciary."[16] He was exonerated in a closed-door proceeding by a three-judge panel without according the complainant due process and in the process impugning her character. The two cases attest to the intransigence of dominant gender and cultural norms, the persistence of the myth that women are not to be believed, and the social construction of women as less legible, less entitled subjects of law.

Gender Equality and the Predicaments of Faith

The judicial approach to women's rights also remains deeply problematic in the intersectional context of gender equality and religion. In several cases, equality has been pitted against religion; yet the way in which this plays out depends in part on the religion at issue: Hindu or Muslim. The discourse of equality has played an important role in the discourse of the Hindu Right that heads the current government and its understanding of secularism through which it seeks to advance its vision of India as a Hindu Nation. It adopts a formal approach to equality based on sameness in treatment to argue in favor of treating all women the same. This position translates into treating all Muslim women the same as Hindu women, with the majority used as the (Hindu) norm against which others (Muslims) are judged.[17] Secularism, understood as the equal treatment of all religions, requires that all religious communities be treated the same, but once again, the norm against which others are judged is the majority Hindu norm.[18] Any special treatment of religious minorities – such as accommodating their personal laws – is seen as a form of appeasement and a violation of the constitutional guarantees of equality and secularism.

This vision of formal equality and secularism has played out with the judiciary all too willing to wade

[15] *Farhan v State and Another* .W.P.(C) 284/2015, judgment dated 11.05.2022 (amongst others).
[16] India Today (2019) "CJI-Led Bench Holds Hearing on Sexual Harassment Charges against CJI Ranjan Gogoi," 20 April.
[17] Ratna Kapur, "Gender and the 'Faith'in Law: Equality, Secularism, and the Rise of the Hindu Nation" *Journal of Law and Religion* (2020) : 1–25.
[18] Brenda Cossman and Ratna Kapur, "Secularism's Last Sigh? The Hindu Right, the Courts, and India's Struggle for Democracy." 38.1 *Harvard International Law Journal* (1997): 113–170.

into the rights of Muslim women. In these cases, religion is immediately suspect, with Islam cast as oppressive and barbaric, particularly in its treatment of women. Most recently, this opposition played out in the triple *talaq* decision. In 2017, a constitutional challenge was brought by a Muslim woman to the divorce practice of triple *talaq*, which immediately brings an end to the marriage. The petitioner argued that the law violated her constitutional rights to equality, life and liberty. The Supreme Court considered whether the practice of triple *talaq* was essential to Islam and thereby protected by the fundamental right to freedom of religion enshrined in the Constitution. In short, the majority of the Court said no, triple *talaq* was not essential to religion and was therefore not protected within the freedom of religion, and yes, it violated the rights to equality of Muslim women. Many hailed the judgment as a decisive victory for Muslim women's rights. Others have expressed concern about the way in which the decision plays into the political agenda and discourse of the Hindu Right. Throughout the judgment, the Muslim woman is repeatedly referred to in protectionist language, represented as a long-suffering victim who needs to be rescued either by the courts or the legislature. There are repeated references to the "plight" and "suffering" of Muslim women who experience a worse fate compared to women of other faiths. While in some contexts, the courts have moved away from the protectionist discourse, in relation to Muslim women and the opposition between equality and religion it has not.

The triple *talaq* case suggests that these equality "wins" need to be seen within the broader context of the court's willingness to intervene in the sphere of religion when the particular religion (read Islam) is itself suspect. Consider the intermarriage case. While upholding the right of a woman to marry whomsoever she chooses, the Supreme Court subjected the right and choice of a Hindu woman who converted to Islam to marry a Muslim man to intense scrutiny.[19] She was subjected to surveillance by the National Intelligence Agency to investigate fears that the woman could be recruited by ISIS in Syria and become a threat to the nation. In subjecting the rights of a Muslim woman to such strict surveillance, the Court not only comprised her equality rights, but it also positioned her at the lower end of a gender hierarchy and determination of who constitutes a legitimate, loyal citizen-subject deserving of rights. The paternalism that manifests in this decision remains present in many cases addressing women's rights, and the shadow figure of the liberal – now Hindu – saviour continues to loom large in cases dealing with women's rights.

Contrast the cases involving Muslim women with those involving Hindu women. The Supreme Court stuck down a ban on a menstruating woman's right to worship at the Sabarimala shrine in the southern state of Kerala;[20] In the case, the equality rights of women were seen through the lens of freedom of religion – not in contrast to it. The Supreme Court ultimately vindicated the rights of women to access the temple, but it did so without denigrating religion. It overruled a lower court decision that held there was no discrimination because women were "different" and that when religion and equality clash, religion should be protected: "the deity does not like young ladies entering the precincts of the temple." The majority ruling struck down the ban on several grounds, including that it violated the right to equality of women and undermined Hindu women's rights to worship at the shrine, contrary to their fundamental rights to freedom of religion under the Constitution (Article 25). "Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practise and profess one's religion (. . .) Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality."[21] But, in its judgments, the Court did not so much oppose equality and religion as read equality into religion. The then Chief Justice, Dipak Misra, for example, wrote: "In

[19] *Shafin Jahan vs. Ashokan KM and Ors*. (2018) 16 SCC 408.
[20] *Indian Young Lawyers Association (IYLA) vs The State of Kerala* (2019) 11 SCC.
[21] Ibid at ¶ 96 (Misra C.J.).

no scenario, can it be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple." Equality is not opposed to the Hindu religion; rather it is part of it, reflected in separate decisions in the same case that similarly approach the issue as the equal access of women to the fundamental rights of freedom of religion. This position is not a pitting against, but a reading of the right of freedom of religion as equally guaranteed.

On one hand, the case is a victory for Hindu women that did not reinforce the opposition between equality and religion. In multiple opinions, the Court avoided the conflict between gender equality and the majority religion. But it is important to keep in mind the distinction the Court draws in the treatment between Hindu and Muslim women and their respective religions. By reiterating the exemplariness of Hinduism in not discriminating against women's rights to worship, the Hindu faith comes out unscathed, rather unlike the Court's treatment of Islam. The case also produced a significant backlash, with a storm of protests against the local state government's attempt to enforce the decision; protests supported by the Hindu Right. While the Hindu Right favors equal treatment of Muslim women with Hindu women, they are not equally enthusiastic about treating Hindu women the same as Hindu men.

Upon closer analysis, each case remains embedded in dominant gender sexual and religious arrangements that reproduce rather than challenge the existing normative order thereby limiting their transformative impact. The normative content of gender equality is shown to reflect characteristics of Hindu male majoritarianism including monogamy, heteronormativity, chastity or purity and gender dualism. Furthermore, the judiciary's approach to secularism sets up gender equality in opposition to religion, an opposition that is particularly evident when the religion in question is Islam. The conception also triggers anxiety when gender equality is posited as an antidote to gender discrimination within the majority religion.

The cases speak to how the deeper structural and systemic issues that impact gender equality remain tethered to normative understandings of gender, sex, religion and the very identity of the postcolonial nation. They also indicate how intersectional politics in relation to the religious 'Other' woman can itself become a technology of gender discrimination and Hindu majoritarianism, replicating the very violence this concept was intended to remedy. There remains an urgent need for constitutional advocacy and judicial interventions to be better informed by the historical and political legacies that structure gender equality and the work that gender has done in law in the context of the colonial encounter and the current discourses of right-wing nationalism. Such an understanding would generate greater awareness about the perils and promises of a rights-focussed agenda and help to more cautiously navigate the interlocking systems of power, politics and histories that structure this agenda.

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