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Whether Apostasy to Islamism is a Violation of the Fundamental Right of the Partner

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ABSTRACT

This paper discusses the question commonly raised if the husband converts his religion to Islamism with the intention of having multiple wives although according to the Indian Constitution, a person has the right to convert to any religion any number of times as per his desire. If such an act is done by the husband will the fundamental rights of the wife? As per the provisions of the Hindu Marriage Act, 1955 such conversions by the husband will be a violation of the fundamental rights of the wife as it was her right to be the only partner for her spouse.

Keywords: Apostasy, Islamism, Fundamental Rights, Violation, Spouse Rights

HINDU MARRIAGE ACT, 1955

According to the Hindu Marriage Act 1955, a person is considered to be a Hindu if he practices any of its forms or developments, including a Virashaiva, a Lingayat, or a follower of the Brahma, Prarthana, or Arya Samaj as described in section 2.

According to section 5 of the Hindu marriage act 1955, there are certain conditions for a Hindu marriage. Only if these conditions are satisfied a Hindu marriage can be solemnised. The conditions are,

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party

(a) is incapable of giving valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving valid consent, has been suffering from a mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of ⁴ [twenty-one years] and the bride, the age of ⁵ [eighteen years] at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits a marriage between the two;

(v) the parties are not sapindas of each other unless the custom or usage governing each of them permits marriage between the two

The first essential condition for a valid marriage is that neither party should have a spouse living at the time of marriage. Monogamy is the voluntary union for the life of one man with one woman to the exclusion of all others.

The expression 'spouse' used here means a lawfully married husband and wife. Before a valid marriage can be solemnized both parties to such marriage must be single.

The expression neither party has a spouse living depicts that the spouse must not be alive at the time of marriage and that the word spouse means a spouse in the eye of law. If the spouse is alive at the time of marriage that could bar the remarriage of a person.

If at the time of performance of the marriage rites or ceremonies, one or other of the parties had a spouse living and either marriage had not already been set aside by the court, later marriage is no marriage at all as the marriage is not dissolved with the filing of a petition for divorce and it subsists until a final decree for divorce is passed. Being in contravention of the condition laid down in the clause it is void ab initio.

Case law: SAMBIREDDY v. JAYAMMA (1972 AP 156 FB)

In this case, it was held that section 5(i) read with section 17 of the Hindu Marriage Act 1955 rendering a bigamous marriage void is not ultra vires the constitution on the ground that it contravenes articles 14, 15 or 25(1) of the constitution of India.

Also, according to Hindu Marriage act 1955, a Hindu male cannot change his religion and accept Islam in order to marry more than one wife.

Case Law: SARALA MUDGAL v. UNION OF INDIA (1955 3 SCC 635)

In this case it was observed that Muslim law cannot be misused by a Hindu male and Hindu Marriages does not automatically dissolve apostasy. The husband violates the provision of Hindu Marriage act 1955 and he is covered by section 494 of the Indian penal code.

SHANTHI DEO VARMA v. KANCHAN PRASAD (AIR 1991 SC 816)

For this case the court held that by fact that parties were living like husband and wife with oral evidence to that effect, it cannot be proved that they were validly married and religious evidence ceremonies were duly performed. A Hindu male cannot change his religion and accept Islam in order to marry more than one wife

According to the Hindu Marriage Act 1955, there can be only one wife for a man, but according to Muslim law there can be more than one wife and a maximum of 4 wives for a man.

This is clearly not encouraged by Hindus.

When a Hindu man and a Hindu woman get married it is under the promise and understanding that the husband will not have another wife as their marriage is being solemnized under the Hindu Marriage act 1955.

POLYGAMY

Polygamy is a practice whereby a person has more than one spouse at a time.

Polygamy In Ancient India

In ancient India, polygamy and polyandry were somewhat prevalent, however the public opinions may differ. Polygamy in ancient India was a matter of personal choice, status symbol and at times social, moral and religious obligation.

In the traditional sense, Marriage in Hinduism was mainly meant for progeny and carrying out duties that are obligatory in accordance to the dharma of a person, so that the four major aims of human life could be attained and realized. Even if polygamy served these ideas, the Hindu law books did not refrain any Hindus from its practice.

However, certain rules and restrictions were laid down for its practice. However, the same rule was not prescribed for in case of men. This book also suggests that

If a man's wife drinks alcohol, is sickly, cantankerous, barren, wastes money, quarrelsome, begets only female children, or is hostile to men, then he may take another wife.

In Islam, polyandry is completely prohibited, whereas limited polygyny is permitted.

Polygamy In Modern India

In modern times, the Hindu Marriage Act of 1955, which is applicable to a majority of Indians, prohibits the practice of polygamy and declares the marriage to be void if either of the partners has a living spouse at the time of marriage.

However, in certain communities, polygamous marriages still exist even though its extent is not known.

It also stated that the Husbands of women without children are more likely to have multiple wives than women who have at least one child.

Sections 494 and 495 of the Indian Penal Code, 1860 prohibited polygamy for Christians.

The Hindu Marriage Act was drafted in 1955 which prohibited the marriage of a Hindu whose spouse was still alive.

Hence polygamy became illegal in India from 1956, uniformly to all of the citizens except for that of Muslims since they are permitted to have a maximum of four wives; for Hindus in Goa and along the western coast, where bigamy is legal.

A polygamous Hindu marriage is null and void, while the punishment specified in sections 494 and 495 is applicable.

Polygamy In Muslim Law

Muslims in the country are subject to the terms of Muslim Personal Law Application Act (Shariat) of 1937, interpreted by the All India Muslim Personal Law Board.

Still, many Hindus, Buddhists, and certain tribes practice it all over the country, declining the laws as such by not following them.

Muslims are not rejected from practicing their religion and Muslims in India are in favor of Muslim Personal law interpreted by the All India Muslim Personal Law board.

However, a Supreme court judgment in February 2015 stated that "Polygamy was neither an integral nor the fundamental part of the Muslim religion, and monogamy is a reform within the power of the State under Article 25 of the Indian Constitution.

CONCLUSION

Any Indian citizen has the rights to convert into any religion and any number of times as per his desire. But although he has been given such a right he cannot convert into any religion without the consent of his wife, especially to Islamism with the intention to have many wives as the Muslim Law provides men to have a maximum of 4 wives. This would be considered a violation of the fundamental right of the wife as she was promised that she would be his only wife during the solemnization of their marriage according to the Hindu Marriage Act, 1955. And if he converts into another religion and ceases to be a Hindu the wife can file for divorce against her husband for such an act.

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