Women in the Law
Analysing Recent Developments

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In the recent years, the Indian judiciary has, without any doubt, helped women make significant strides in their long and hard struggle for an equal place in the law. However, it is important to reflect on how these decisions shape the discourse around women’s place as equal citizens, and what they may mean for future legal battles.

Analysing the state of women’s rights in India is no mean feat, as struggles for gender equality have been fought for centuries, and are not likely to conclude even in the course of the coming 50 years. It is, however, critical to periodically reflect on how those tasked with upholding women’s rights in the largest democracy in the world are shaping these struggles. Recent years leading up to 2019 witnessed the judiciary, both high courts as well as the Supreme Court, engaging with arguably controversial issues, especially those lying at the intersection of non-discrimination and religious freedoms, and on most occasions, taking a view to aid uplifting the state of women’s rights in the country.

Women and Religion

The Bombay High Court’s decision dated 26 August 2016 (the “Haji Ali” case), allowing women to enter the sanctum sanctorum of the Haji Ali dargah, was in some ways the first of the many progressive judgments that the judiciary has hailed for in the recent years (Dr Noorjehan Safi Niaz and Others v State of Maharashtra and Others 2016). The Bombay High Court opined that the Haji Ali Dargah Trust was a public charitable trust, open to all public. Once a public character is attached to a place of worship, the court held, fundamental rights under Article 14 (equality before law), Article 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) and Article 25 (freedom of conscience and free profession, practice and propagation of religion) of the Constitution would come into play. The court found the practice of disallowing women from entering into the sanctum sanctorum to be a violation of the above-mentioned fundamental rights. While the Haji Ali Dargah Trust appealed against the decision in the Supreme Court, they soon conceded (Rajgopal 2016).

In a subsequent decision dated 22 August 2017 (the “triple talaq” case), the Supreme Court struck down the practice of talaq-e-biddat, more commonly known as triple talaq, for being violative of Article 14 of the Constitution which requires laws to be reasonable and non-arbitrary (Shayara Bano v Union of India and Others 2017). The Court held the practice to be manifestly arbitrary as it is instant and irrevocable, and leaves no room for reconciliation between the husband and wife, allowing a man to whimsically end a marital tie. The verdict was celebrated widely as it concluded countless Muslim women’s struggle against the oppressive practice which had for long been considered “good in law though bad in theology” (Shayara Bano v Union of India and Others 2017; Wire 2017).

In the subsequent decision dated 28 September 2018 (the “Sabarimala” case) as well, the Supreme Court found the temple’s practice of disallowing women of menstrual age as being violative of their fundamental right under Article 25 which “equally” entitles everyone to freely practise religion (Indian Young Lawyers Association and Others v The State of Kerala and Others 2018). The Court further held that the right under Article 25 has nothing to do with gender or certain physiological factors specifically attributable to women, and is equally available to both men and women of all age groups. Justice D Y Chandrachud even went so far as to liken the practice to untouchability (which is expressly prohibited under Article 17 of the Constitution), due to notions of “purity and pollution” associated with menstruation.

The obvious commonality in these cases was that they tested the boundaries of the constitutional protection for religious freedom. Also critical to the court’s analysis in each of these cases was the long established test of whether the impugned practices were an “essential” or “integral part” of the religion in question (Commissioner of Police and Others v Acharya Jagdishwarananda Avadhuta and Others 2004). This was relevant as any constitutional protection...
of religious freedoms of those in support of the impugned practices is limited to aspects which are essential or integral to the religion, such that the absence of the practice in question would alter the very nature of the religion. In each of the cases, therefore, the finding that the practice in question was not an essential or integral part of the religion was an important tipping point.

‘Love Jihad’ and Adultery Case
In the famous case of Hadiya (formerly Akhila Ashokan), which came to be known as the “love jihad” case, the Supreme Court went to great lengths to uphold the decision of a 24-year-old woman to convert to Islam and marry a man of her choosing (Shaflin Jahan v Asokhan K M and Others 2018). The Court sharply criticised the paternalistic approach taken by the Kerala High Court when declaring her marriage with a Muslim man as null and void. The Court noted that constitutional freedoms of an individual could not be made subservient to patriarchal social mores, as had been done by the high court when rendering a decision in favour of the petitioner (Hadiya’s father). The high court’s approach, it appears, was motivated by the growing fear around “love jihad,” which right-wing forces allege is being practised in several states, including Kerala, even though no evidence supporting any such practice has been found (Wire 2018).

In a decision dated 27 September 2018 (the “Adultery” case), where the constitutionality of substantive and procedural provisions relating to adultery was challenged, the Court found the provisions unconstitutional (Joseph Shine v Union of India 2018). The Court also went to great lengths to highlight that in the garb of protectionism, the impugned provisions led to the subordination of women, reflecting an evolving understanding of gender justice. It found that instead of punishing the act itself, the impugned provision punished the proprietary interest of a married man in his wife. Further, the Court also emphasised on sexual autonomy of a woman, regardless of marital status, being a constitutionally guaranteed freedom.

There is no doubt that the judiciary has, through these decisions, set laudable precedents for gender justice in India. However, the judicial approach in deciding these cases is not entirely free from criticism. Although the Supreme Court’s decisions in the Triple Talaq and Sabarimala cases were principally in favour of women, a closer reading of the judgments reveals that the Court’s findings were based on grounds other than the fact that the impugned practices treated women (or certain women) as inferior citizens.

In the triple talaq case, for instance, the Court’s rationale for finding the practice unconstitutional was that it was manifestly arbitrary and illogical, and hence violative of Article 14. The Court did not express clear views on whether the practice discriminates against women on grounds of sex, while giving only men the right to avail of triple talaq. In the Sabarimala case too, a majority of the judges shied away from opining on whether the practice was in violation of Articles 14 and 15, but rather focused their attention on the right to religious freedom, under Article 25, of women aged between 10 and 50 years.

Despite the fact that the petitioners in the cases raised arguments on the basis of Articles 14 and 15, the majority refrained from expressing any clear views on the same. One may argue that the Supreme Court’s approach may have been a strategic one, trying to uphold women’s rights without ruffling too many feathers or opening floodgates for gender discrimination litigation. However, shying away from opining on the implication of the impugned practices vis-à-vis Articles 14 and 15 exposes the judgments to being read selectively, and somewhat curtails their usefulness in supporting future litigants in their challenges against discriminatory practices, particularly in non-religious contexts.

No Single Voice
Yet another pattern that emerges from the above verdicts is the judges’ inclination to render separate opinions when giving their decisions. This approach becomes problematic in cases where even though a majority of the judges arrive at a common conclusion, they arrive at the said conclusion using different rationales. In the triple talaq case, for instance, the Court held the impugned practice to be unconstitutional by a slim majority of three out of five judges. A detailed reading of the opinions of the three judges, arguably the “majority opinion,” shows that the judges hardly spoke in a common voice when invalidating triple talaq. While Justice R F Nariman and Justice Uday Umesh Lalit found the practice to be unconstitutional for being manifestly arbitrary and therefore violating Article 14, Justice Kurian Joseph focused on how an Islamic practice, which is contrary to the Quran, could not enjoy constitutional protection (Mandal 2017; Shayara Bano v Union of India and Others 2017).

Similar patterns highlighting lack of consistency in the principles applied in opinions that together constitute the “majority opinion” can also be found in the Sabarimala case and the Adultery case. Although the concern here with absence of a single voice may seem only for argument’s sake at first, it has wider implications. The judges’ inability to speak in one voice becomes critical when one attempts to distil the ratio decidendi (the
reasoning which forms the basis of a particular decision). The ratio decidendi is the principle that a case establishes, and comprises the precedent which lower courts, and indeed smaller benches of the same court, are bound to follow when deciding future cases with similar facts or issues.

The judges’ tendency in the above cases to resort to varying rationales to arrive at the same conclusion makes it difficult to understand what principles have been laid down by the court. This lack of clear principles is likely to, in turn, make it challenging for future litigants to place reliance on these landmark decisions in pursuing their legal battles against discriminatory practices.

### Many Facets of Law

While it is certainly worth celebrating the largely consistent progressive approach taken by the judiciary, it is worth noting that Supreme Court judgments are merely one source of “law” in the country. Worth equal (arguably, more) attention are the initiatives, both legislative and otherwise, taken by governments in championing the cause of women’s rights. Further, it is of utmost importance that the judiciary’s positive contributions to the women’s rights discourse are not conflated with those of the incumbent government, given that not only does the judiciary operate separately from the government, but in most cases those who challenge legislative provisions on constitutional grounds are adversaries to governments.

Although a thorough analysis of the incumbent government’s performance on gender issues is outside the scope of this article, it is worth noting that the criticisms are not few. While some have faulted the Modi government for not delivering adequately on any of its promises on women’s rights and safety in its 2014 manifesto, others have levelled more specific criticisms on the implementation of particular government initiatives aimed at enhancing gender equality in the country (Johari 2019; Menon 2019; Rath 2018).

Of relevance to the discussion is also the Modi government’s emphasis on Muslim Women (Protection of Rights on Marriage) Bill, 2017. One of the most consistent legislative efforts by government on “gender issues,” the bill was introduced and passed in the Lok Sabha on 28 December 2017, months after the Supreme Court verdict on triple talaq. Lack of adequate support in the Rajya Sabha to make it a law led the government to promulgate (more than once) the bill as an ordinance (prs 2019). Given the polarised political landscape in India, however, it comes as no surprise that the repeated re-promulgation of the ordinance has attracted sharp criticism from various quarters for being less about women’s rights (which, arguably, already stood protected after the Supreme Court verdict) and more about punishing Muslim men (Das 2019; Rajgopal 2018).

### On Reflection

There is no doubt that the courts’ recent decisions have helped women in the country in their fight to establish a truly equal status for themselves. By calling out oppressive practices and striking them down for treating women as subordinate citizens, the courts have indeed paved the way for future legal challenges against discriminatory practices, whether in the context of women’s religious freedoms or otherwise. It is, however, important to not lose sight of the larger picture. The National Crime Records Bureau continue to reveal shockingly high rates of crimes against women, and a recent poll deemed India to be the world’s most unsafe country for women (NCRB 2016; Thomson Reuters Foundation 2018). Despite developments in law, therefore, the ground reality leaves much to be desired. One can only hope that a better place for women in the law will in due course result in a better reality for women in all spheres.

### REFERENCES

1. The Union of India’s stance in the Triple Talaq case, however, was unusual. The dissenting opinion, it appears, even relied on the Union of India’s support for the petitioner’s cause when exercising its extraordinary powers under Article 142 of the Constitution, in essence ordering the legislature to look into the matter in a time-bound manner. See Shayara Bano v Union of India (2016).

### CASES CITED


Das, Krishna N (2019): “The Union of India’s stance in the Triple Talaq case, however, was unusual. The dissenting opinion, it appears, even relied on the Union of India’s support for the petitioner’s cause when exercising its extraordinary powers under Article 142 of the Constitution, in essence ordering the legislature to look into the matter in a time-bound manner. See Shayara Bano v Union of India (2016).”


Openings at EPW

The Economic and Political Weekly (EPW) is seeking to hire dynamic candidates for its digital team. EPW is in the process of revamping its digital presence using innovative formats to communicate research and academic content and aims to utilise its vast archives to drive public debate, discourse, and engagement.

Please take a look at the positions open below.

Digital Strategy Editor
The Digital Strategy Editor will be involved in all matters pertaining to the EPW website and will take key decisions about innovating editorial content. The position involves working closely with the Digital Editor and liaising with subject experts, the design team, as well as the technology and business teams.

Requirements:
- A master's degree in social sciences or media management from a reputed institution
- Five years' experience in a digital news outlet, with previous roles reflecting experience in project management and coordination between editorial and business teams
- Experience with online publishing, SEO, SMM, digital marketing and strategy

Digital Assistant Editor
The Digital Assistant Editor will be responsible for curating EPW's archival content to provide insights into current debates. They will also be responsible for commissioning articles and special features, as well as reviewing and editing articles and other content.

Requirements:
- A master's degree in the humanities or social sciences
- At least three years' experience in web publishing, including editing, reviewing and commissioning

Digital Editorial Assistant
The Digital Editorial Assistant will be involved in digital content production for the EPW website. They will primarily be responsible for curating EPW's archival content relevant to the current news cycle. They will also be responsible for monitoring and enhancing EPW's social media presence.

Requirements:
- A master's degree or equivalent in the humanities, social sciences, journalism, or allied subjects
- At least one year's experience in online publishing, digital media or news outlets
- Knowledge of social media platforms and experience in tracking audience analytics, ad boosting, promotions, and metrics

Digital Research Associate
The Digital Research Associate will be involved in digital content production for the EPW website. Freshers are welcome to apply.

Requirements:
- A bachelor's degree in the humanities, social sciences, or allied disciplines
- Knowledge of social media platforms, experience in tracking audience analytics, ad boosting, promotions and metrics is preferred

Product Manager
The Product Manager will oversee EPW's digital transition and presence. The role is critical to building a subscriber base, driving engagement, and increasing revenue across print and digital modes.

Requirements:
- A postgraduate degree in Business Administration or equivalent from a reputed institution
- At least three years' experience in a similar role in a media organisation
- End-to-end product management experience in the media industry
- Background in global media and product management with an understanding of academic publications
- A solid understanding of delivering products and services across desktop and mobile platforms is a prerequisite

Business Manager
The Business Manager will look after EPW's digital operations. The candidate is expected to design business models to address the wider digital publishing community. They will define key metrics to monitor and measure the effectiveness of features and functions of EPW's digital publishing platform. They will also actively seek and identify new business opportunities and partnerships towards increasing digital revenues.

Requirements:
- A postgraduate degree in Business Administration or equivalent from a reputed institution. In lieu of either, work experience in similar roles will be considered.
- At least 3+ years' experience in digital product management
- Knowledge of Google Analytics and Google Suite

Digital Fellowship
The Digital Fellowship is an opportunity for young scholars to experience innovative practices in research and communications in the digital media space. EPW invites applications from candidates with an interest in exploring digital media, research communication, social media for change, and academic writing. The fellows will be involved in:
- Working with the digital editorial team to ideation and execution of products for the web
- Supporting the organisation's social media presence
- Organising the EPW archives through digital curation projects

Fellows will be paid a fixed stipend during the course of the fellowship and will receive a certificate of experience on completion. Freshers from both undergraduate and postgraduate programmes are welcome to apply.

Graphic Designer
The Graphic Designer will work with the digital editorial team to break down the components of EPW articles, design, recreate and redesign them for a digital audience. They will be responsible for designing UI, UX changes for the website and to provide support for social media campaigns.

Requirements:
- Undergraduate degree in design or a related field with at least three years experience or a postgraduate degree with a year of similar work experience
- Proficiency in Adobe Suite and ability to conceptualise templates and layouts for infographics
- Familiarity with HTML, CSS and D3 is a plus

Please visit www.epw.in/openings to see more detailed job descriptions for each role.

How to apply
The last date for receipt of applications for all positions listed above is 31 May 2019

All applications must be emailed to appointments@epw.in with the subject line: [EPW Digital 2019-Position you're applying for]

The digital application dossier must include:
- A cover letter describing your interest in and specific plans for EPW's web presence
- An updated CV, including the names of two academic/professional references. (Kindly do not send reference letters at this point. We will contact the referees, as necessary.)
- One writing sample (for the Digital Fellowship programme only)

Please note that incomplete applications or applications that are not sent in the prescribed format will not be processed.

Only shortlisted candidates will be contacted. The interview for the shortlisted candidates will be conducted either through Skype and/or in person in Mumbai. The selected candidates would be required to work out of our Mumbai office at the earliest. Work experience may influence remuneration.

We give preference to candidates from marginalised backgrounds who meet our requirements.