

## DEVELOPMENT OF FEMINIST JURISPRUDENCE IN INDIA VIA HADIYA CASE

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### *Abstract*

*In the history of humankind 'equality' and 'freedom' evaded women in comparison to men. Women always suffered subordinate status and were assigned a purely functional role in every society or civilization of the world. Over the period, this unequal status of women being offensive to human dignity and human rights steered to develop feminist jurisprudence. This research paper reflects the perspective of feminist jurisprudence with reference to individual freedom of women, its expansion under various issues and state's duty to protect women individual freedom and to empower them. This paper deals with individual freedom, feminist jurisprudence as developed through Hadiya case.*

**Keywords:** *Equality, Freedom, Feminist jurisprudence, Human dignity, Human rights*

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Hon'ble Chief Justice of India Dipak Misra in Hadiya case remarked, that in their collective experience spanning many years, they had not come across a case like the Hadiya one. Justice Misra said they would have dealt with more than a 100 habeas corpus petitions in the various High Courts they had presided over, but the Hadiya case was unique.

*The court was balancing its concerns for Ms. Hadiya's autonomy as an individual to make her own choice and the court's power to explore further, how she made the choice based on the National Investigation Agency's material claiming she was indoctrinated by a well-oiled network in Kerala, which was into radicalisation. We are concerned about the cherished value of liberty of an individual,"* Justice D.Y. Chandrachud observed about the court's initial doubts about the parameters it should follow in a case like this where an adult's choice was under question before a court.”<sup>1</sup>

*“When the liberty of a person is illegally smothered and strangled and the State or a private person throttles his/her choice, the signature of life melts and living becomes a bare subsistence. That is fundamentally an expression of acrimony, which gives indecent burial to the individuality of a person and refuses to recognize the other's identity. That is reflection of cruelty, which the law does not countenance.”*<sup>2</sup>

The narrative of Hadia case is a bit different; state being the facilitator of enjoyment of fundamental rights helped the cause of father who endeavored immensely in not allowing his daughter to make her own choice in respect of faith and marrying a person of his own choice. The whole idea revolves around the patriarchal autocracy. The high court annulled the marriage, which was set aside by the Supreme Court holding the individual liberty. The initial judgement passed by the Kerala High court stating that a girl of 24 years is weak and vulnerable, capable of being exploited. The court exercised its parens patriae jurisdiction in order to take care of welfare of the girl of her age. The basic duty that the court presumed in this case was to see the safety of the girl whether she is in safe hands. Further court ordered that the marriage between Hadiya and Shafia Jahin is null and void. Hadiya continued to remain against her will in the compulsive confinement at the home of her father in pursuance of the directions of the Kerala High Court. There are two serious concerns that emerge from the judgment of the Kerala high court .The first is that high court transgressed the limits of its

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<sup>1</sup> Available at: <http://www.thehindu.com/news/national/hadiya-case-is-a-unique-challenge-sc/article21011529.ece> (Accessed on 09.04.2018)

<sup>2</sup> *Shafin Jahan v. Asokan K.M. & Ors.* MANU/SC/0340/2018

jurisdiction in issuing a declaration annulling the marriage of Shafin Jahan and Hadiya in course of hearing a habeas corpus petition.

In a free democratic country once a person becomes major, he/she can marry whomsoever he/she likes. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/he is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of *parens patriae*. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father.<sup>3</sup>

The schism between Hadiya and her father may be unfortunate. However, it was no part of the jurisdiction of the High Court to decide what it considered to be a 'just' way of life or 'correct' course of living for Hadiya. She has absolute autonomy over her person. Hadiya and Shafin Jahan are adults. Under Muslim law, marriage or *Nikah* is a contract. Muslim law recognizes the right of adults to marry by their own free will.

The conditions for a valid Muslim marriage are:

- (i) Both the individuals must profess Islam;
- (ii) Both should be of the age of puberty;
- (iii) There has to be an offer and acceptance and two witnesses must be present;
- (iv) Dower and Mehar; and Absence of a prohibited degree of relationship.

A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction Under Article 226 ought not to have embarked on the course of annulling the marriage. The Constitution recognizes the liberty and autonomy, which inheres in each individual. This includes the ability to take decisions on aspects, which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to

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<sup>3</sup> *Soni Gerry v. Gerry Douglas* MANU/SC/0166/2018:(2018) 2 SCC 197

choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences.

Article 16 of the Universal Declaration of Human Rights underscores the fundamental importance of marriage as an incident of human liberty:

Article 16 (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right to marry a person of one's choice is integral to Article 21 of the Constitution.

The Constitution guarantees the right to life. This right cannot be taken away except through a law, which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.

In *Justice K.S. Puttaswamy v. Union of India*<sup>4</sup>, this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality:

*“The autonomy of the individual is the ability to make decisions on vital matters of concern to life... The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.”*

The High Court, in the present case, has treaded on an area, which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at twenty-four, Hadiya “*is weak and vulnerable, capable of being exploited in many ways*”. The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases. The concern of this Court in intervening in this matter is as much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism, which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction *parens patriae* do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices, which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty bound not to swerve from the path of upholding our pluralism and diversity as a nation.

Feminist jurisprudence is a philosophy of law based on the political, economic and social equality of sexes. Feminist jurisprudence a term coined as recently as 1978 has completely

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<sup>4</sup> MANU/SC/1044/2017:2017 (10) SCC 1

disrupted the conventional model of jurisprudence.<sup>5</sup> It now holds a significant place in law and legal thought and influences many debates on sexual and domestic violence, inequality at the workplace and gender based discrimination around the world. Voice has been raised in India also, to demand individual's recognition as independent human beings by women associations. The constitution of India ensures every person to have Right to 'life and personal liberty' (under Article 21) free from all encroachments unsustainable in law. Justice P. N. Bhagwati, in *Maneka Gandhi case* (1978) observed expression Right to 'life and personal of liberty' encompasses within it all those variety of rights of a person which go to constitute personal liberty of a person and some additional protection under Article 19 of the constitution of India. Personal Liberty. The constitution of India in principle is giving a special status to women and having model of gender justice.

"Hadiya's life has been narrativised by her father, judiciary, and the Sangh Parivar. Each of them has conspired to denude her autonomy and individuality. In common perception, Hadiya is perceived through the many narratives that have been constructed about her. She is denied the freedom to represent herself. Even common individuals have been complicit in this misrepresentation and misrecognition that Hadiya is going through.

Social media has seen many speculations about both Hadiya and Shafin. The basic premise of Hadiya's conversion has incited immense secular anxiety. Why should any woman choose to convert to any religion, since all religions encourage patriarchy? Why did Hadiya have to convert before getting married, isn't this a loss of autonomy?

All these speculations come in the way of giving solidarity to Hadiya. Owing to secular idiosyncrasies, we are unable to comprehend Hadiya's act of conversion and the consequent cruelty being meted out to Hadiya by her father and even the Indian state. We are unable to fathom why a woman would choose to convert to another religion"<sup>6</sup>

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<sup>5</sup> McClain, LC.1992

<sup>6</sup> Available at: <https://feminisminindia.com/2017/11/09/hadiya-representation-many-lives/> (Accessed on 09.04.2018)