Religious Rights Versus Women's Rights in India

Concluding Note of the Two-Part Series

India is known for its cultural diversity globally. And a major credit for the rich cultural asset that we possess goes to the women in the country. And yes, one must not forget the might of Goddesses our country has ever since! However, there are several ironical stories as well which one can definitely not ignore. Amongst several such citations, there are a few that have a critical relation to the laws the country has.

Certain religious customs in India dictate women's access terms to place of worship. Part 1 of this Article focused on the struggles of a Parsi woman, to be allowed entry into the Parsi Fire Temple *(hereinafter referred to as Goolrukh's case)*. While a Constitution Bench of the Supreme Court is to pass a final order in Goolrukh's case, the Supreme Court is to constitute another 5-judge bench to look into the ban of entry of women aged 10 – 50 years, into the famous Ayyapa Swamy Tempe at Sabarimala *(hereinafter referred to as the 'Sabarimala case')*.

Customs that prohibit women from entering places of worship ought to be challenged in court or even be declared irrelevant by an appropriate form of legislation, as they discourage women on the basis of regressive practices that are patently unconstitutional. In the Sabarimala case, the Temple Board had argued and the Kerala High Court also *upheld* that young women should not offer worship as the temple deity is a *Brahmachari* (a celibate), for whom women are a source of deviation![1]

In Goolrukh's case, a Parsi woman was excommunicated from her faith and disallowed entry into the Fire Temple on a self-assumed premise that women ought to take on the religion of their husband, implying that women cannot have their own religious stance!

An astonishing thought remains that in both the cited cases, both High Courts gave precedence to the consideration of a religious institution's rights and a religious custom's "essential character" over the right to equality and non-discrimination – the rights of women to be treated with dignity and with equal participation in society.

Equal rights and dignity of women are subverted in upholding the right of religious institutions, on account of the fact that much importance is given by Courts to the identification of 'essential practices of religion'. Instead, what is necessary is an effort to identify the customs that are discriminatory and derogatory towards women and hold them in violation of the rights mentioned in our Constitution. This may be done by recognizing customs within the definition of 'law' as per Article 13(3)(a) of the Constitution and hence be declared void as per Article 13(1), when found in derogation of Fundamental Rights (hereinafter referred to as 'the test for laws in force').

There are two judgments that are relevant to the discussion of a 'test for laws in force'. In the case of *Noorjehan v. State of Maharashtra*[2], the Bombay High Court, adjudicating a challenge to the ban on women's entry into the sanctum sanctorum of the Haji Ali Dargah, held that women be allowed unhindered entry into the famous shrine. The Bombay High Court held that Articles 14,15 and 25 of the Constitution would come into play once a public character is attached to a place of worship, on which account a religious trust cannot discriminate on the entry of women under the guise of 'managing the affairs of religion' under Article 26.[3] However, the Bombay High Court did not decide on customs having force of law under Article 13(3)(a), for the simple reason that the respondent itself did not plead the existence of any custom on the basis of which women were denied entry.[4]

Even the Supreme Court in the recent Triple Talaq judgment[5], failed to apply the 'test for laws' in force so as to hold that the practice of triple talaq falls under Article 13(3)(a), which must be voided under Article 13(1).[6],

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[1] *Para 41, S. Mahendran v. the Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors. AIR 1993 Ker 42*
[2] *2016 (5) ABR 660.*
[3] *Ibid note 1, Para 36.*
[4] *Id, Para 19.*
[5] *Shayaro Bano v. Union of India & Ors., (2017) 9 SCC 1*
[6] *Justice Kurian did not concur with Justices Nariman and U.U. Lalit in holding that triple talaq is a custom having force of law.*

Justice Nariman and Justice U.U. Lalit did indeed apply the test for laws in force to recognize the custom of Triple Talaq as falling within Article 13(3)(a), they held it unconstitutional on the narrower ground of it being "manifestly arbitrary" as against Article 14.

Justice Kurien, on the other hand, did not at all delve into the violation of women's rights under Articles 14 or 15 of the Constitution and declared the practice of triple talaq as unconstitutional for being opposed to the tenets of the Holy Quran - squarely applying the Supreme Court ruling in *Shamim Ara v. State of U.P.*[7]

The majority ruling in the Triple Talaq judgment, which constitutes a milestone victory for women, is oddly divergent in its reasoning. While Justice Kurien followed the doctrine of precedent under Article 141 in applying the ratio of *Shamim Ara*, Justices Nariman and U.U. Lalit applied the doctrine of "manifest arbitrariness" which is new to Indian jurisprudence and hence, hardly backed by precedent.

Women's religious rights have seen slow reforms, yet there is no strong, cohesive effort by courts to declare discriminatory religious customs as unconstitutional. For instance, while there is a growing awareness[8] of the role of women priestesses, there is only an old Supreme Court judgment that recognizes a Hindu female's hereditary right to succeed to the priestly office of a pujari, which does so, only in the narrow context of the administrative responsibilities of such office.[9] There is no recognition of her equal right or ability to perform sacred rituals as a pujari.

It is imperative that courts lay down uniform standards that leave no doubt about the unconstitutionality of discriminatory and regressive religious customs. The stress on Article 26(2) and even Article 25 may be misplaced – Article 13(3)(a) is widely worded to include ordinance, order, bye-law, rule, regulations, notification, *custom or usage…* within the definition of laws in force. The recognition of religious customs and usages as laws in force will ensure that those in derogation of Fundamental Rights are struck down as per Article 13(1) of the Constitution.

Two separate Constitution Benches of the Supreme Court are soon to give judgment on Parsi women's religious rights (Goolrukh's case) and on women's entry into the Ayyapa Swamy Temple (Sabarimala case). These matters should be seen as an opportunity to uniformly apply the 'test for laws' in force: declare religious customs as laws in force under Article 13(3)(a) and clean the country of customs that are discriminatory and derogatory towards women and in violation of their Fundamental Rights.

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[7] *Para 26 of Justice Kurien's ruling. Justice Kurien heavily relied on and ruled in terms of Shamim Ara v. State of U.P., (2002) 7 SCC 518. Hereinfter referred to as 'Shamim Ara'.*

[8] *The Hindu, "Wife, Mother, Lawyer, Priest". Published on August 11, 2015. Accessible at: http://www.thehindu.com/opinion/op-ed/wife-mother-lawyer-priest/article7522954.ece; The Logical Indian, "First Woman Priest Performs Marriage Without Kanyadan". Published on March 14, 2018. Accessible at: https://thelogicalindian.com/awareness/first-woman-priest-performs-marriage-without-kanyadaan/; DailyO, "India Would be a Fairer Place if it had more Hindu Women Priests". Published on January 30, 2016. Accessible at: https://www.dailyo.in/politics/right-to-pray-happy-to-bleed-shani-shingnapur-haji-ali-sabarimala-women-priests/story/1/8736.html.*

[9] *Raj Kali Kuer v. Ram Rattan Pandey, 1955 SCR (2) 186*