

Paris women identity crisis: A case of deemed conversion questioning the autonomous status of women

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Women don't mortgage her to a man by marrying him under special marriage act. - CJI, *Goolrokh M. Gupta v. Burjor Pardiwala President and Others.*²

Introduction

Zoroastrian is one of the world's oldest monotheistic religions founded by Prophet Zarathustra, when he received enlightenment from Ahura Mazda, the wise Lord in ancient Iran, around 3500 years ago.³ They migrated to Indian from Iran around 8th and 10th centuries, and according to the analysis of Parsi account on migration, they arrived between 716CE and 936CE on the coast of Gujarat. The religion revealed by the wise lord is based on the moral choices human make in their lifetime. Its religious text mentions the good and the evil existing in the society and how this dual nature exists in every individual. If a person acts in good faith, it attracts Ahura Mazda's divine power upon him but if a person acts evil, he enters into a state of spiritual death.⁴

Parsis are the descendants of Zoroastrian, a small ethno-religious community settled in India to preserve their culture, due to the outcome of fierce Islamic persecution in Persia on a group of devout.⁵ They differ from Iranian Zoroastrians with respect to their arrival in India as the former arrived in Gujarat around 1,373 years ago whereas the latter arrived around the 19th century.⁶ The Parsis are remarkably one of the most educated communities in India and since their arrival they have contributed immensely to India's success. From scientist HJ Bhabha to legendary businessman JRD Tata, Parsi community has time and again proved to be one of

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²2013(2) RCR (Civil) 91: MANU/GJ/1005/2012.

³*Zoroastrianism at Glance*, BBC (June.29, 2018), <http://www.bbc.co.uk/religion/religions/zoroastrian/>.

⁴Soonit Taraporevala, *Who are Zarathustra?*, THE SOUTH ASIA.COM (July.01, 2018),

<http://www.the-south-asian.com/april2001/Who%20was%20Zarathustra.htm>.

⁵John R. Hinnells, *Parsi Communities*, ENCYCLOPEDIA IRANICA (July.1, 2018), <http://www.iranicaonline.org/articles/parsi-communities-i-early-history>; Jyoti Shelar, *The conflict within: Parsis and gender rights*, THE HINDU (July.1, 2018),

<https://www.thehindu.com/news/cities/mumbai/the-conflict-within-parsis-and-gender-rights/article18520582.ece>.

⁶Padmaja Shastri, *The conflict within: Parsis and gender rights*, TIMES OF INDIA (July.1, 2018),

<https://timesofindia.indiatimes.com/city/pune/What-sets-Zoroastrian-Iranis-apart/articleshow/572604.cms>.

the most progressive communities and it is also known for their contribution in Indian Business Industry.⁷ They are either Gujarati or English speaking but their native language is Avestan.⁸ They worship fire temples, as they believe fire symbolizes god's purity and wisdom.⁹

The Curious Case of Vanishing Community

The Parsi community in the recent past has faced problems like the decreasing population and according to the census of 2011; their population has dipped to 22% from 69,601 in 2001 to 57,264 in 2011.¹⁰ There are different reasons for this trend. Firstly, the major incurring problem is the birth rate of Parsis that has been drastically dropped below the replacement level. According to the data collected by Parzor Foundation, a community organization mandated by UNESCO, there were just 195 births and 950 deaths of Parsis in the year of 2013.¹¹ The total fertility rate among the Parsis in Bombay was 4.41% in 1881¹², declining to a drastic 0.94% in 1999.¹³ Secondly, socio-economic factors, such as endogamous marriage in the community, or a large number of women are not ready to marry or choosing to marry.¹⁴ India's vulture crisis, started in the 1980s had a real time impact on the community as traditionally they don't bury or cremate their dead; instead, corpses are laid out in a Dakhma, or Tower of Silence, for carrion birds to consume.¹⁵ But the extinction of vulture population meant the bodies will decline slowly.¹⁶ This system of exposure to scavenger birds is called as Dokhmenashini which originated in Persia. According to their mythology, the soul's cosmic transition is aided by the vulture's mystic eyes, and the feeding of one's dead body to the culture is considered as the last act of charity by the devout.¹⁷ This essay is an attempt to

⁷Navroz: *Here are a few interesting facts about the Parsi community*, THE ECONOMIC TIMES (July.1,2018), <https://economictimes.indiatimes.com/slideshows/nation-world/navroz-here-are-a-few-interesting-facts-about-the-parsi-community/parsi-community-in-india/slideshow/60102868.cms>.

⁸*Ibid.*

⁹ArianeSherine, *Zoroastrianism needs to adapt its archaic laws – or die*, THE GUARDIAN (July.1,2018), <https://www.theguardian.com/commentisfree/belief/2013/dec/08/zoroastrianism-adapt-archaic-laws-die-parsi>.

¹⁰*Parsi population dips by 22 per cent between 2001-2011*, INDIA TODAY (July.2, 2018), <https://www.indiatoday.in/pti-feed/story/parsi-population-dips-by-22-per-cent-between-2001-2011-672889-2016-07-25>.

¹¹Dr. Shernaz Cama, *WHY JIYO PARSIS?*, THE UNESCO PARSIS ZOROASTRIAN PROJECT (July.2, 2018), <https://unescoparzor.com/>.

¹²L Visaria, *Demographic transition among Parsis*, 9(43) EPW, 1881, 1828-32 (1974).

¹³S. Unisa, et al., *Demographic transition or demographic trepidation? The case of Parsis in India*, 43(1) EPW 61, 61-65 (2008).

¹⁴*Ibid* at 11.

¹⁵JyotiShelar, *The conflict within: Parsis and gender rights*, THE HINDU (July.1, 2018), <https://www.thehindu.com/news/cities/mumbai/the-conflict-within-parsis-and-gender-rights/article18520582.ece>.

¹⁶*Ibid.*

¹⁷Sapur F Desai, *Death in the city: How a lack of vultures threatens Mumbai's 'Towers of Silence'*, THE GUARDIAN (July.2, 2018), <https://www.theguardian.com/cities/2015/jan/26/death-city-lack-vultures-threatens-mumbai-towers-of-silence>.

address the existing gap created by socio-economic factors that is the inter-marriage and other restrictions of Parsi women created by the doctrine of Coverture in the Zoroastrian community, questioning the identity of women at the same time affecting her autonomy.

Autonomy according to Black Law's Dictionary, autonomy is defined as an individual's capacity of self-determination.¹⁸ Autonomy, in recent decades have notion of self-determination including within it self-monitoring and self-regulation. Discourse on women's autonomy always subsumed within the other discourses such as rights and representation because Indian society still doesn't treat women as autonomous subjects. In India context, autonomy can be contemplated as women's demand for just and equal rights. These demands for rights such as right to vote or education developed in demands for legal rights. In 1950 and 60s a lot of reformation took place to uplift the condition of women from the marginalized society. But later it was realized that these reformation wasn't enough and it affected different women differently. In 1970s, when women demanded Uniform Civil Code, concept of autonomy backfired as their rights were considered in opposition to that of the community. Coming back to this date, recently the Supreme Court of India held Triple Talaq or Talaq- e-biddat as unconstitutional by 3:2 majority as it lacked legal sanctity.¹⁹ This case be considered as landmark judgment given by the multi-faith constitutional bench because it will be considered as precedent which will not only help the Muslim women in understanding their rights given to them but it will also end the arbitrary practice going on from centuries. And the guidelines given by the court will have the effect of law till the time the government decides to propound a bill on this. Triple Talaq was a discriminatory practice recognized and enforced under section 2 of the Shariat Act of 1937 taking the form of statutory provision covered under article 13(1) and thereby no longer a personal law to remain free of the fetter of the fundamental rights.²⁰ This discriminatory practice was going on from centuries which violates article 14, 15, 21 and 25 of the Constitution of India. This landmark judgment indicates that there are still personal laws prevailing in India that are discriminatory against women but no cognizance is taken over it, such as Parsi Personal laws which takes away rights of women when they marry under Special Marriage Act outside their community. Something very interesting about Parsi community is the sex-ratio which is 1,050 females per

¹⁸Autonomy, *Black law Dictionary* (10th ed. 2014).

¹⁹Omar Rashid, *Who is ShayaraBano, the triple talaq crusader*, THE HINDU (July.2,2018), <https://www.thehindu.com/news/national/who-is-shayara-bano-the-triple-talaq-crusader/article19611402.ece>.

²⁰KrishnadasRajagopal, *Supreme Court sets aside instant 'talaq'*, THE HINDU (July.2, 2018), <https://www.thehindu.com/news/national/supreme-court-sets-aside-instant-triple-talaq/article19538599.ece>.

1,000 males, much more than the average sex-ratio in India according to the 2011 census.²¹ Even after having such outstanding sex-ratio, this community has somewhere acquired the Indian stereotype when it comes to gender inequality. According to the Gujarat high court(HC) in the judgment of Goolroth,²² doctrine of coverture comes into play when women marries outside her community to a non-Parsi and by which woman's religion merges with that of her husband, which automatically forfeits her natural rights. Here are two questions before us; firstly, whether a Parsi woman by marrying under Special Marriage Act (SMA) is a case of deemed conversion or not. Secondly, whether the religious trust's has adopted a consistent approach in deciding not to allow a woman who marries outside her community to visit the religious places and perform other funeral ceremonies. Both the questions can be answered by looking at the recent controversy wherein an aggrieved Parsi woman knocked the doors of HC to later realize that it wasn't fruitful.

Deemed Conversion: The Controversy of Religious Identity Crisis

The recent case involves an aggrieved Parsi woman; Goolrookh, who married a non-Parsi under SMA, 1954. She petitioned the HC in 2012, pleading to be allowed to retain her rights as a natural Parsi because of the very fact that she married under SMA. The woman especially emphasized on the right to visit the tower of silence or Dakhma when her parents die and cited various examples of her friends and relative who were not allowed to visit tower of silence at the time of their parent's death. This practice is only for women but when it comes to men, they have the impunity in this regard.²³ The respondents, trustees of Anjuman Parsi trust of Valsad, Gujarat which contended against the petitioner presented a rigid stance stating that if a woman marries a non-Parsi she forfeits all her natural rights given to her by the religion. The woman contended that the trust ignored the law of the land, and this practice is unrecognized in the religious text, scriptures moreover it violates article 14 and 25 of the Constitution of India. The main arguments presented by the respondents were that the Zoroastrians define marriage as a sacred endogamous institution which recognizes union of both the spouses who are born Parsi Zoroastrian and professes Zorasthi religion.²⁴ There is no other union recognized by Zoroastrian Parsis. The court arrived at the judgment with 2:1 majority stating a woman ceases to be a Parsi forfeiting her rights immediately, if she marries outside her community and the child born out of the wedlock will also not be recognized as

²¹ *Census 2011: Sikhs, Jains have the worst sex ratio*, DNA (July.2, 2018), <http://www.dnaindia.com/india/report-census-2011-sikhs-jains-have-the-worst-sex-ratio-2161061>.

²² *Ibid* at 1.

²³ *Ibid* at 1, Para 5.

²⁴ *Ibid* at 1, Para 8.

Parsi even if the child has been Navjoted or performed the ritual by which one is induced to the Zoroastrian religion.²⁵The respondents submitted ,when a Parsi woman marries outside her community she ceases to be a Parsi and, she loses her Zoroastrian father and family's religious identity irrevocably and this is irrespective of the fact whether she chooses her husband's religion or not. This is called doctrine of coverture and it is best described by great English jurist William Blackstone:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a feme-covert under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.

This doctrine is one of the main reasons for discrimination and because of the application of this doctrine in the religious ceremonies of Zoroastrian Parsis, after marriage, the name of the Parsi woman is recited with the religious title of the husband only. But one needs to understand that doctrine of coverture is basically a case of deemed conversion, as said by the HC in Goolrokh case, which has no standing in law. According to the Webster's Comprehensive dictionary, religion is a belief that binds a spiritual man to a supernatural religious being that involves a feeling of dependence and responsibility, together with the feeling and practices generating automatically out of that belief. Article 25 of the Constitution of India uses the word 'propagates' which is merely an expression of freedom but it is still in question whether the right to propagate includes 'right to conversion' or not. The drafters of the Indian constitution used the word conversion at the time of drafting the constitution but in the final draft the word was replaced by propagate as it was recommended by the sub-committee on Minorities headed by M. Ruthnaswamy. In *Stainislaus Rev. v. State of MP*²⁶, the court held that right to propagate one's religion includes right to expose the person to the tenets of that faith, or communicate a person's belief to another person , but it would not include the right to 'convert' another person to the faith of the former because the latter is equally entitled to freedom of conscience, and this term precedes the word propagate in the article meaning nobody can force a person to convert until and unless the person chooses to

²⁵Zoroastrian Rituals: Navjote/Sudre-Pooshi (Initiation), AVESTA ZOROASTRIAN ARCHIVES (July.2, 2018),

<http://www.avesta.org/ritual/navjote.htm>.

²⁶AIR 1977 SC 908.

convert.²⁷ This means that deemed conversion has no place in the constitution of India and this makes the judgment of the Gujarat High Court erroneous.

Inconsistent Approach of the Religious Trust

The respondents, trustees of Valsad trust claimed that Parsi woman married to non-Parsi and Parsi man married to non-Parsi woman are categorized under a different class based on intelligible differentiation that allows exclusion of women if she marries outside her community and non-exclusion of men if they also marry outside their community. The distinction has been going on from centuries as claimed by the respondents having reasons based on history. These restrictions are what the community believes and has been following traditionally going on from centuries but without a reasonable justification and there can never be any justification when it comes to discrimination on the basis of gender. These restrictions bar Petitioner's entry to the temple or to perform funeral rites of her parents is not consistent as this wholly depends on the priest or the religious trust with no evidence available. The respondents produced material evidences in the court of law to refute this argument of the petitioner. But according to a resident of Kolkata, Prochy Mehta's daughter Sanaya married a Hindu and their children were allowed to visit the Anjuman Atash Adaran, the only fire temple in the city until a new Priest was induced.²⁸ Justice Nariman in the landmark case of Triple Talaq maintained in the majority judgment that the practice of Triple Talaq was merely permissive and not an absolute and essential religious practice. It is manifestly arbitrary and doesn't enjoy protection under article 25 of the constitution of India. Merely because a practice has continued for long, that by it can't make it valid to go on in the progressive society.

Zoroastrian Personal Laws: can it be Challenged against Fundamental Right Violation?

Indian courts have always been inconsistent when it comes to interfering with the Personal Law and they have adopted a 'Play-Safe' approach maintaining personal laws can't be tested against the touchstone of Fundamental Rights. Bombay High Court in the case of *State of Bombay v Narasu Appa Mali*²⁹, was of the view that personal laws are not laws under article 13(3)(a) of the Indian Constitution without making any distinction between statutory or non-

²⁷*Ibid.*

²⁸Jyoti Shelar, *The conflict within: Parsis and gender rights*, THE HINDU (May. 22, 2017), <https://www.thehindu.com/news/cities/mumbai/the-conflict-within-parsis-and-gender-rights/article18520582.ece>.

²⁹*State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84 (India).

statutory laws.³⁰ The reason why the court has followed this approach is because the involvement of judiciary in this matter will encroach upon the right bestowed to the legislature essentially known as legislative prerogative.³¹ This was also accepted by the apex court in the case of Ahmedabad Women Action Group v Union of India³², wherein the court stated that making laws is a prerogative of legislature and it should be maintained by them only.³³ But the recent approach of the apex court has shifted on the very basis that law is dynamic and it should be subjected to change and adaptation. This new approach enables the court to strike down any particular statutory provision or harmoniously interpret with fundamental rights.³⁴ This kind of activist approach of the apex court³⁵ signifies the change in the approach of the apex court towards personal laws. Personal laws can be considered as custom or usage having the force of law under the definition of law in article 13(3)(a) of the Constitution of India. The drafters of the Constitution didn't restrict the article under the principle of Expressio Unius Exclusio Alterius meaning 'one excludes the other and its present application' because they didn't wanted to restrict the article's scope to not include personal laws at all.³⁶ Under article 13, law or law in force can invalidate the all laws that are in derogation with part III of the Constitution. Law in force under 13(3) (b) can be defined as: "laws in force includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

Now the point of interest here is, law in force mentions the word 'include' that makes the definition enumerative and broadens the scope to include the ordinary meaning and also the meaning not expressly mentioned.³⁷ If we accept the reasoning given in the Narasu case³⁸ that article 13(1) includes statutory law only then there has to be a clear distinction between law and personal laws. The court in this case ignores the reasoning that the judiciary has played a significant role in molding the personal laws and from time to time the judiciary has used its

³⁰FLAVIA AGNES, PERSONAL LAWS:IN THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 909 (1st ed. 2016).

³¹*Ibid.*

³²(1997) 3 SCC 573.

³³*Ibid.*

³⁴ T Sareetha v. T. VenkataSubbaiah, AIR 1983 AP 356; Ammini EJ v Union of India, AIR 1995 Ker 252; Mary Sonia Zacharia v. Union of India; Daniel Latifi v Union of India ,(2001) 7 SCC 525.

³⁵Pragati Varghese v. Cyril George Verghese, AIR 1997 Bom 349; Debra Clare Seymour v. Pradeep Arnold Seymour,(2002) 98 DLT 34; ShamimAra v. State of Uttar Pradesh, (2002) 7 SCC 518.

³⁶Union of India v. BC Nawn, 1972 84 ITR 526 Cal.

³⁷ P. Kasilingam v. PSG College of Technology 1995 AIR 1395, 1995 SCC Supl. (2) 348.

³⁸*Ibid* 48.

of judiciary review to create checks and balances on the laws that are derogatory to the right given to the citizens under Part III of the Constitution. Hence, even the Parsis laws are covered under the interpretation of law in force under article 13 and would be subjected to the violation of fundamental rights. According to article 372, the existing law should be in consonance with article 13 which states that a law should not violate the fundamental law.

Risk to the Autonomy of Women

The Personal laws violates right to freedom of religion because if you cease to be a Parsi and it won't allow one to perform funeral ceremonies then it somewhere bars the women to marry men outside their community. This decision by the court violates the rule of law by discriminating against a woman on the basis of religion under article 14 of the constitution of India. The court by holding that a woman's religion is that of her husband locates the identity of the woman in her family and not in her as an individual and this very fact risks the autonomy of the woman.³⁹ It also violates article 25 of the Constitution which says 'all persons' shall have freedom of practice religion of their own choice. The court was completely ignorant in determining what exactly constitutes the religious identity of Parsi women. The very right of human right of self-determination is violated when the court connects the identity of women completely with that of his husband, ignoring that women are firstly individuals exercising the right of Choice, and freedom. Zoroastrian Parsis being a minority community feels the need to preserve their culture and integrity but in no way by discriminating women this can be fulfilled. The court in the case of Saifuddin v Koicha⁴⁰ held that it is permissible to deny a religion the power of excommunication and thereby empowering the views of Individuals over the views of religious leaders.

The decision of the court also challenges inter-religious marriage by providing the reasoning that it is not recognized under personal laws but the SMA which is legislation in 1872 for the first time recognized the validity of special marriage act and by the amendment in 1954, it was made clear that religion doesn't play a role under section 4 of the act. The court cited the shift from the legislation of SMA, 1872 under which both the parties have to make a declaration that they don't profess any particular religion at the time of marriage to now when no party has to renounce their religion to marry under the amended act.⁴¹The SMA of 1954 is seen as a statutory alternative for couples who choose to retain their identity in an inter-religious marriage. There seems to be conflict between communitarianism and individualism

³⁹Goolrokh Gupta v. BurjorPardiwala, SLP(C) 18889/2012.

⁴⁰AIR 1953 Bom183 :(1953) 55 BOMLR 1.

⁴¹*Ibid* at 57.

but both works in harmony and the autonomy of the individual can't exceed the identity of an individual in the community.

Faith a Core part of Right to Life with Dignity

Article 21 of the Constitution reads as-

“No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

This article guarantees right to life with dignity and personal liberty to all the persons as it is based on the premises that human are born with some inalienable rights that can't be taken away from them. According to Justice PN Bhagwati:

“Right to life includes right to live with human dignity and all that goes along with it, namely , the bare necessity of life such as adequate nutrition, clothing and shelter over their head.”⁴²

Under this article, various courts including the apex court has interpreted article 21 to include faith as a core part of person's being and identity.⁴³ The respect of person's faith is covered under the right to dignity, protected under article 21.⁴⁴ So, the Parsi women have the right the faith of her choice as the basic right need to live life with dignity.

Doctrine of Coverture: Essential Practice or just Permissive?

The court by denying a woman her right to be present at the tower of silence at the time of her parents' death or to restrict the entry in the temple violates article 25 that professes the freedom of religion including the rights to perform duties. Petitioner had a choice to either convert and then marry or marry under SMA and the petitioner decided to marry under SMA because she wanted to retain her religious identity. Decision in favor of women will not only uphold her right to religion but also will absolve the identity crisis she has to go through. This will help in establishing the paradigm shift that is much needed when the community itself is in minority. Section 19 of the SMA states that if a person professing the Hindu, Buddhist, Sikh or Jain religion under SMA, it is deemed to affect his severance from such family but there are no such existing provisions applicable on a person professing any other religions like Islam, Christianity or Zoroastrian.⁴⁵ This meaning that the statutory provision's scope is limited to these four religions only.

Present Status of Goolrokh Case

⁴²Francis Coralie v. Delhi, AIR 1981 SC 746, 753:(1981) 1 SCC 608(India).

⁴³Noise Pollution (V), In re, (2005)5 SCC 733(India).

⁴⁴*Ibid.*

⁴⁵*Ibid* at 1, Para 23.

The Parsi woman knocked the doors of the apex court under article 136 by filing Special Leave Petition, after been denied justice from the High Court. The case was fought by Indira Jaising, known for her feministic views as well as strong command in law. This case was dealt by the Constitutional bench headed by Chief Justice of India, Deepak Mishra which not only chastised the lower court for ignoring the plea of the aggrieved women and but also held the practice of the community is a violation on the grounds of morality. The constitutional bench allowed the inter-faith woman to perform the funeral ceremonies of her parents at the time of death. Supreme Court stated that the law doesn't sanction the concept of doctrine of coverture.

Conclusion

We are living in 21st century which is known for its globalization and women empowerment but we are still stuck on laws made at the time of colonialism which is onset on the outlook of patriarchy. The judgment of the Supreme Court is important for the soon to be diminished community on many grounds such as it can be a ray of hope for the dwindling Parsis if the community allows inter-religions marriages that will not only save the community but it will also help in preserving the culture of the Zoroastrian Parsis. Now it is upon the legislature to bestow its thoughtful consideration on the community especially on the Parsis women as they have been facing discrimination since the time they have migrated in India. Also the Indian courts needs to adopt a consistent approach when it comes to interference in the Personal Law of different religions. Lastly, the identity of women can only be measured by the level of autonomy she enjoys in a society and it can never be measured in relation to her father or husband because we live in the democratic country and the Constitution will always prevail over other things.