Abstract: Human rights of women (Cook: 1997) have remained as the contested terrain in the polarities (Gusfield: 2001) of tradition and modernity. Whether the speed of development has resolved the contest or has it facilitated modernity to weaken the tradition in issues of freedom and human rights- is a much debated issue in Asia. Scholarly debates on Asian traditional practices including political incarnation of caste (Lloyd: 1965) and pastoral practices (Kreutzmann: 2013), among others, demonstrate how modernity serves the tradition. Despite India’s reservation to culturally contentious Articles 5 and 16 of CEDAW, Indian judiciary has responded to the said polarity in a mosaic manner. Often in blissful ignorance of global feminist legal theories, and rarely, to one’s surprise, cutting through the confusion of human rights and family values among others, Indian judiciary has attempted the re-definition of gender relations. It is especially so in the participation of women in public sphere roles of religion, juxtaposed against the tenets of tradition. With the Kerala High Court’s judgment in S. Mahendran v. The Secretary, Travancore Devaswom (the Sabarimala Case) of 1991 as the focal point, the authors propose to address the legal and constitutional dimensions of gender-discrimination under religious customs in India. The case revolves around the legal and constitutional validity of a custom which prohibits the entry of women in the age group of 10 to 50 to a very famous Hindu Temple. Further, the paper will contrast the case with subsequent dissent judicial responses on the related issues.

Key words: Sabarimala Case, Gender equality, religious customs, personal law, human rights of women, CEDAW, Indian judicial response

I. Introduction

Human rights under the aegis of United Nations have delineated women’s and children’s human rights, guiding member-states to ensure their protection. Further, these rights have been enlisted and articulated in the Post-Beijing conference context. Despite the adoption of CEDAW in 1979, and many countries having passed reservations, the ratification and implementation are far from complete. [2]

While addressing the reservations in particular and human rights of women in general, culture has been identified as the main site of struggle. Many cultural practices such as child marriages, suri, dowry and female genital surgery have dehumanized women since ages. These practices across the world have originated in and are perpetuated through culture. [3] Thus, women’s human rights have remained as the contested terrain in the polarities of tradition and modernity. Many emerging economies including India have identified and celebrated the primacy of fundamental rights in the Constitution. These fundamental rights have been rendered synonymous with human rights.

Against this background, whether the speed of development has resolved the contest or has it facilitated modernity to weaken the tradition in issues of freedom and human rights- is a much debated issue in Asia and India [4]. Scholarly debates on Asian traditional practices include political incarnation of caste [5] and pastoral practices [6] among others. Another research dwells on the reincarnation of caste in Indian IT industry [7] demonstrate how modernity serves the tradition. These debates have dwelt on the continuation of tradition despite the tension with modernization as in case of multiple riders keeping family ties at the expense of safety on a two-wheeler or the market choices confronting the dress code [8]. Although the future of such and other traditions is a question, no exclusive study exists either on the legal or judicial response or on gender as an issue in this tradition-modern polarity or co-existence.

Despite a forward-looking rights agenda, India being poised for growth, its Human Development indicators are a problem. This is a matter of concern as UNDP has used rights-situation, as one such indicator. The current formulation of development in Asian countries equalized development with modernization paradigm. India as a
nation, has always viewed development with continuation of tradition. Customary practices as the fulcrum and symbols of tradition have co-existed with modernization influences. Aforementioned exclusionary practices such as caste and gender segregation require to be revisited as human dignity is non-negotiable.

Gender as a differentiator has become a subjective tool of discrimination and isolation. It is a marker of development, more so in underdevelopment. Equality as a value and as part of rule of law in the sphere of gender has to work through the rationale of historical compensatory argument, difference but equal notion and by creating alternative judicial discourses scuttling such entrenched practices. In terms of being a comprehensive goal, gender justice is a scheme of protection from exploitation and denial. It is about participation in decision-making in all spheres, finding equitable solutions in family and society, desisting from stereotyping of gender roles. It aims at elimination of multifold discrimination, to protect every individual as a right-bearing autonomous being. [9]

Gender inequality is addressed in a comprehensive and global manner in the International Bill of Rights for Women i.e. CEDAW (Convention on Elimination of All forms of Discrimination Against Women, 1979). Gender equality envisaged within the global human rights framework here has influenced several domestic statutes and decisions, thereby providing an antidote against the patriarchal exclusion and exploitation in both private and public spheres. [10]

After establishing concepts and the link between modernization and human rights, the authors would connect the Indian Constitution around the analysis of cases which brought the tension between human rights and custom as a facet of tradition to the fore. While deciding such cases, the judiciary has acted in a mosaic manner, either in perpetuating the coexistence of tradition - modernity polarity or in synthesizing justice within this polarity by being under the influence of modern and objective world human rights view.

II. The Human Right of Gender Equality and Constitutionality of Custom

The founding fathers of the Indian Constitution were mindful of the fact that most of the religious customs were having the force of law with voluntary compliance by the community for centuries, in India. Many such customs would not be consistent with the natural, basic and inherent rights guaranteed by the Constitution. Hence, they explicitly made such customs subject to judicial review on the ground of their inconsistency with fundamental rights. Article 13 (2) of the Indian Constitution, which is a key to open the chapter on fundamental rights, provides that the State shall not make any ‘law’ which either takes away or abridges any of the fundamental rights guaranteed under Part III and to the extent of such contravention, law be void. Article 13 (3) (a) of the Indian Constitution defines the expression ‘law’ for the purposes of the applying the fundamental rights and it includes, inter alia, ‘custom’. Although Article 13 (2) has a prospective effect as in it basically applies to post-Constitution law. The expression “custom” used in Article 13 (3) (a) includes pre-Constitution custom for the simple reason that State cannot enact a custom. ‘A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality is entitled to exercise specific rights against certain other persons in the same locality’. [11]

In Sant Ram v. Labh Singh [12], it was contended before the Indian Supreme Court that Article 13 (1), which declared all the pre-Constitution “laws in force” to be void to the extent of their inconsistency with fundamental rights, did not include customs. A reference was made to the definition of “laws in force” provided under Article 13 (3) (b) which included laws made by legislature or any competent authority before the commencement of the Constitution. The Supreme Court held that the expression “laws in force” under Article 13 (3) (b) was inclusive definition and it did not restrict the scope of the word “law” used in Article 13 (3) (a) which included “custom”, but merely amplifies it. Thus, it brought such customs within the scope of judicial review. Most of the religious customs, recognized by law, originated in the patriarchal society and in effect, caused discrimination against women. Customs which have particularly institutionalized inequality against women in the public sphere by exclusion or non-inclusion or hostility are, by and large, inconsistent with the egalitarian principles enshrined under the International Bill of Rights for Women i.e. CEDAW (Convention on Elimination of All forms of Discrimination Against Women, 1979). Article 5 (a) of the CEDAW specifically provides as below:

“States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Emphasis supplied).

One such discriminatory Hindu custom, which prohibits the entry of women in the age group of 10 to 50 from entering a very famous Hindu Temple in South India-Lord Ayappa Temple at Sabarimala-has been the subject matter of public debate and judicial scrutiny.

III. Sabarimala Custom and the mosaic Judicial Approach towards Gender Equality

Sabarimala is a famous Hindu temple situated in State of Kerala and it is dedicated to Lord Ayyappa. Interestingly, the temple is open even to the non-Hindus (excluding women in the age group of 10-50) unlike

[9] Shashikala Gurpur et al., American International Journal of Research in Humanities, Arts and Social Sciences, 8(1), September-November, 2014, pp. 01-09
some other prominent temples in India. It is situated on a hilltop and a journey to the temple is required to be taken through dense forest. The pilgrims are required to observe ‘votive abstinence’ (Vratham) for 41 days to purify the mind and the soul before visiting the temple. The devotees are expected to refrain from consuming meat, alcohol, and abstain from sex, anger and coarse language.

As Lord Ayyappa is a celibate (Bramacharī), the devotees are also required to observe celibacy (Brahmacharyam). “Only girls below the age of 10 and ladies above the age of 50 are permitted to climb up the hills to Sabarimala………Ladies in the age group from 10 year to 50 years are not allowed to make pilgrimage from Pamba to Sabarimala”. [13]

Srikanth and Manoj C V, the former trustees of Travancore Dewaswom Board, in their book ‘Sabarimala: Its Timeless Meaning’ have cited the following reasons for evolution of the custom:

“…A major discipline this pilgrimage involves is forty one days of continence, physically and mentally. During this period many pilgrims even maintain minimum contacts with their homes and stay in special prayer halls along with other pilgrims…………Firstly, the women of the age group having the menstrual cycle will not be able to engage themselves in intense spiritual discipline for a long period prescribed for the Sabarimala pilgrimage. Secondly their presence in large numbers during the pilgrimage may naturally defeat the effort of the pilgrims to control their sexual urge which is the most important part of the austerities of this pilgrimage. Sabarimala pilgrimage gives the common man a rare occasion for self-discipline and an opportunity to gain inner strength and harmony…..” [14]

The Sabarimala custom reflects a patriarchal, retrogressive and medieval mindset which is unquestionably inconsistent with the modern philosophy of gender equality recognized under CEDAW. India is a State Party to the Convention. As per Article 2 (d) of the Convention it is bound to, ‘refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation’ (Emphasis supplied).

Notwithstanding the soundness/merit of the religious logic/justification behind the custom, the larger question is whether such a discriminatory practice is immune from the egalitarian norm laid down by Article 15 (1) of the Indian Constitution. It provides that State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex and place of birth or any of them. Moreover, Article 25 of the Indian Constitution envisions a secular polity in which freedom of religion is made subordinate to other fundamental rights, public order, health and morality. In this regard, Kavita Krishnan observes:

“The Sabarimala issue has revealed the contradictions in our secular polity- with gender marking the deepest fault-line. It is up to the progressive political forces and civil society groups to demand that the state stop colluding with gender discrimination in the name of “custom”[15].

The Sabarimala Temple is managed by ‘Travancore Dewaswom Board’, and it is an autonomous body constituted under the Travancore Cochin Hindu Religious Institutions Act XV of 1950. As per Amendment made in the Act in 2007, among the members one shall be a woman and one shall be a person belonging to Scheduled Caste or Scheduled Tribe. “The woman member and scheduled Caste/Tribe member shall be nominated by the Hindus among the council of Ministers and the other member shall be elected by the Hindus among the Members of the Legislative Assembly of the State of Kerala. The term of the President and Members is for a period of two years.” [16] It is indeed ironic that even the ‘woman member’ of the Managing Trust herself is not able to enter the sanctum sanctorum of the temple. As the ‘Travancore Dewaswom Board’ is regulated by the Kerala Government, it is “State” within the meaning of Article 12 of the Indian Constitution and hence fundamental rights, including right to equality, can be enforced against the Board.

In the focal case, S. Mahendran v. The Secretary, Travancore Dewaswom Board, Thiruvananthapuram, the Kerala High Court entertained a public interest litigation filed by one Mr. S. Mahendran. The Petitioner complained that young women were trekking Sabari hills and offering prayers at the Sabarimala Shrine contrary to the customs and usages followed in the temple. He sought a suitable direction from the court to the Kerala Government and the Travancore Dewaswom Board.

The court formulated the following 3 questions for its consideration:-

1. Whether woman of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas (rituals) conducted in the temple;

2. Whether the denial of entry of that class of woman amounts to discrimination and violative of Articles 15, 25 and 26 of the Constitution of India, and

3. Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman to the temple?

The court accepted the contention of the petitioner that the restriction imposed on woman of a particular age group from entering the temple is a matter of religion and a matter of religious faith under Article 26 (b) of the Indian Constitution. It was held that a religious denomination or organization enjoyed complete autonomy in the matter of deciding as to what rites and ceremonies were essential according to the tenets of the religion and no outside authority had any jurisdiction to interfere with the decision of such religious denomination.
The Hindu custom was sought to be defended on the ground that the deity at Sabarimala was in the form of a Brahmachari (a celibate) and even the slightest deviation from celibacy and austerity observed by the deity should not be caused by the presence of young women. The court also ruled that the custom was not discriminatory based on what seems a purposive interpretation by adopting a narrow technical ground, an inherent antinomy within the fundamental rights provisions. It was opined, “the entry in Sabarimala temple is prohibited only in respect of women of a particular age group and not women as a class” (Emphasis supplied).

In 1991, the court issued a direction to the Travancore Devaswom Board not to permit women above the age of 10 and below the age of 50 to trek the holy hills of Sabarimala in connection with the pilgrimage to the Sabarimala temple and from offering worship at Sabarimala Shrine during any period of the year. A direction was also issued to the Government of Kerala to render all necessary assistance, inclusive of police and to ensure that the direction issued to the Devaswom Board was implemented and complied with.

The Honorable High Court has reinforced the prevailing practices despite Article 25 (2) (b) of the Indian Constitution and despite the interpretative malleability or plasticity of the provisions towards social reform in their overall big design. The said provision authorizes the State to make any law providing for social welfare and reform or thrashing open of Hindu religious institutions of a public character to all classes and sections of Hindus. This provision has an overriding effect over the right of any religious denomination to manage its own affairs guaranteed under Article 26 (b). A religious custom, although it is covered by Article 26 (b), can be regulated by any law made by the State with a view to bring social reform or social welfare or for thrashing open of Hindu religious institutions of a public character to all classes (including women).

Section 3 of the to the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965, which is enacted in furtherance of the power conferred on the State under Article 25 (2) (b) of the Constitution, provides that no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship (meant for Hindus), or from worshipping or offering prayer there at, or performing any religious service. (Emphasis supplied). It is amply clear that this provision read with Article 15 (1) of the Constitution prohibits any discrimination against women and renders any religious custom, institutionalizing such discrimination, void.

The Kerala High Court cited a rule (Rule 3) made by the Government of Kerala under Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965 which prohibited the persons enumerated therein from entering or offering worship in any place of public worship including women at such time during which they are not by custom and usage allowed to enter a place of public worship. The High Court should have declared such a rule as ultra vires as it is inconsistent with the very object of Section 3 of the said Act as well as Article 15 (1) of the Constitution.

Against this backdrop, the following comment of Kirsten K. Davis, about the judicial approach relating to sex-based discrimination in India are pertinent:

“…..the potential for a strict review of sex-based classifications in India has been diminished because the Indian analysis appears to operate on the assumption that women have particular “sensitivities,” “peculiarities,” and “handicaps” that readily establish an additional ground for sex-based discrimination, thereby requiring the court to make a “reasonableness” analysis of the discriminatory law.”[17]

The Kerala High Court judgment mirrors this assumption either by sweeping reading of class as a group without dwelling on the reasonableness of sub-class of certain age group within such class. Although it is the hue of the same color, the lack of deeper analysis has reinforced the questionable assumption and exclusion which thwart human rights.

The next phase occurred in 2006. A team led by noted astrologer P Umnikrishna Panicker conducted a four-day “devaprasnam” (a ritual to invoke god) at the Sabarimala temple. It projected that there were signs of a woman having entered the sanctum sanctorum of the temple. Subsequently, one famous film actress from the State of Karnataka, Jaimala, made a public disclosure that she had entered the temple in 1987 and she was pushed into the sanctum sanctorum by the surging crowd. Later, it was alleged that the whole episode was part of a conspiracy to earn fame for Panicker. A criminal case was then filed against Panicker, his assistant Reghupathy and Jaimala for hatching a conspiracy and hurting religious sentiments of the people of the state. [18] However, in July 2012, the Kerala High Court quashed the charges against the accused Jaimala on the ground of insufficiency of the evidence to prove the case.

Thereafter, in August 2006, after the Jaimala controversy out, the Indian Young Lawyers Association and five other women lawyers challenged the validity of Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 which prevents the women, at such time during which they are not by custom and usage allowed to enter a place of public worship, from entering the Sabarimala Temple. In March 2008, a bench comprising Justice S B Sinha and Justice V S Sirpurkar of the Supreme Court referred the matter to a 3-judge bench to decide. Surprisingly, the Kerala Government, which had not filed appeal against the decision of Kerala High Court upholding the ban in 1991, filed an affidavit in the Supreme Court and said that it was not fair to disallow a section of women from entering Sabarimala temple and denial of entry to women of a
particular age group surely affected public right and it was a matter of public interest. [19] The matter is currently pending for consideration by the Supreme Court.

The authors surmise that the Supreme Court could dwell on the constitutional validity of the impugned *sahabrimula* custom as void in the light of two very significant judgments relating to the customary law vis-à-vis gender equality which reflect modernized traditions. The Madurai bench of Madras High Court in a landmark judgment delivered on 1 September 2008 in *Pinniyakkal v. The District Collector, Madurai* [20] has held that a woman can inherit the position of hereditary *poojari* (priest) after the death of her father even if there was no male successor. The petitioner, Pinniyakkal, was daughter of a *poojari* (performing *poojas*; worship/rituals) at *Arulmigu Durgai Amman Kovil* (Temple of deity *Durga*) situated in *Nulluthevanpatti* Village of Madurai District in the State of Tamil Nadu. Around the year 2004, he became sick and due to his old age he could not perform *poojas* properly, so he made his daughter (Pinniyakkal) to perform *poojas*. He died in November 2006, leaving behind Pinniyakkal as his only legal heir. Some villagers prevented her from performing the rituals in the temple as they believed that a woman could not perform *poojas* as a priest and the right to do so should go to the legal heir of any other priest of the temple. Thereafter, one other priest of the temple Mr. Vasudevan usurped the right to perform *poojas*. Then, Pinniyakkal filed a civil suit in the District Court seeking declaration that she was the lawful *poojari* of the temple and to restrain Mr. Vasudevan from interfering with her right.

During the pendency of the civil suit, a tense situation was created in the village and the *Tahsildar* (Additional District Magistrate) had to intervene. In the peace committee meeting convened by the *Tahsildar*, under the Code of Criminal Procedure, a resolution was passed with the support of 89% of the villagers saying that the charge to maintain the temple should be handed over to Mr. Vasudevan. Pinniyakkal filed a writ petition in the High Court to challenge the legality of the said decision of the executive magistrate to convene such a meeting and encroaching on the right of the petitioner.

The High Court declared that in the absence of any order from the civil court, the *Tahsildar* was duty bound to maintain the *status quo* and the resolution passed by the villagers in the presence of the *Tahsildar* was held to be illegal. The Court also observed that:

“It is ironical that when the presiding deity of the temple was an “Amman” in a female form, objections are being raised against a woman in performing *poojas* in such temples. Even in Vedic times it is recorded that women had performed *poojas* and rituals. Fortunately the present temple is not trapped under any *agama sastras*. [21] The sub-cultural deities established in the Southern parts of India are freed from the norms of *Manu Smiritis* [22] and hence the women being subordinated to home making alone was not warranted. As said by a great philosopher the women hold half the sky and for the human progress we must walk with our two legs. The altars of the God must be made free from gender bias. Only then the constitutional mandate under Articles 15 and 51A (c) will become a reality.”

Recently, the Delhi High Court in a Landmark judgment of *U. N. Bhardwaj v. Y. N. Bhardwaj* [23] struck down a Hindu religious custom, by virtue of which only male descendants of the priest family were entitled to the proceeds of the *Bari* (turn or rotation rights) since they were entitled to perform the *puja* and other rituals in Shri Kalkaji Temple in Delhi, as it was discriminatory against the female heirs of the priest family. It was contended before the High Court that the right to offer *puja* (rituals/worship) and participate in *Baris*, through exclusive *puja* by the male members entitled to perform worship was an integral part of the temple's customs and religious practices. Reliance was placed on Article 26 (b) of the Indian Constitution which guarantees the right to the religious denominations to regulate their own affairs. It was argued that such customs, which were integral or essential for the practice of the faith of the denomination, could not be regulated by law.

The Delhi High Court held that by virtue of constitutional mandate under Article 15 (1), which prohibits discrimination on the ground of sex, the Court was under an obligation to avoid the odium of a gender discriminatory interpretation, to any law, which denies property rights to women. Justice S. Ravindra Bhat in his scholarly judgment observed that:

“This Court does not wish to recollect the various treaties and International covenants to which India is a signatory, assuring equal treatment of women, and guaranteeing elimination of all forms of discrimination. If one keeps the underlying principles of those international covenants and the guarantee of equality held out by our Constitution, in mind, it would be anachronistic and regressive to affirm the plaintiff's contention that the discriminatory practice of excluding female heirs from the benefits of property rights to which *Baris* are attached - which appears to have existed all this while should be continued. Such is not the mandate of law; such is not the custom or practice of any denomination, as claimed.” [24]

These two judgments demonstrate the changing landscape of human rights of women in India. By demolishing blind spots in the customs and challenging stereotypes, these judgments have center-staged the symbolic and material, substantive and formal equality of women. Such judicial responses paint a very optimistic future for modernization of rights discourse and human development. They have synthesized the essence of modernity to re-write the political right of public sphere participation and economic right to property amidst the cultural contests.
IV. Pre-Constitution tribal customs and Judicial Response

The Indian Supreme Court in Madhu Kishwar v. State of Bihar [25] refused to apply fundamental rights to customs denying right of intestate succession to scheduled tribe women by excluding female line of succession. The existing statutory mechanisms relating to Hindus, Muslims and Christians do not apply to different tribes in India, who are governed by their own customs. The Court was expected to declare such discriminatory customs violative of equality clauses of the Constitution on the ground that these customs were contrary to Article 15 (1) which prohibits discrimination based on sex. Unfortunately, the Court engaged in extensive comparison with the existing statutory personal laws applicable to other communities (which may also be discriminatory against women) for the purpose of determining whether the tribal custom was discriminatory on the ground of sex. The constitutional validity of the customs could have been decided independently on their own merit. Apparently, the Court seems to have optimistically passed on its constitutional duty in favour of the legislature to remove the gender-discrimination. The cautious comment follows:

“In the face of the divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elistic approach or on equality principle, by judicial activism, is difficult and mind-boggling effort”. (emphasis supplied)

Indian Supreme Court, in this comment, distinguishes tribal customs from personal laws. The authors dwell on personal law in the next segment. What shocks is that despite its great tradition and impressive record on human rights issues, the court termed principles of gender-equality enshrined under the Constitution as “elistic” in an attempt to keep tribal identity and autonomy intact. Is tribal custom infallible against human rights and constitutionalism?

In comparison, recently in 2004, a South African Constitutional Court while deciding a group of cases, declared a ‘customary’ law of succession which excluded female children, wives and sisters in distribution of the property of the deceased persons as violative of constitutional right of gender equality. [26] The Indian Courts could adopt similar approach, towards religious customs in a manner more consistent with the modern and reformative ideas incorporated in CEDAW and as the ultimate guardians of constitutionalism.

V. Whether Un-codified Personal Law is ‘Custom’ under Article 13 (3) (a)?

In India, the matters like marriage, divorce, inheritance, adoption and guardianship have been regulated by non-codified religion-specific Personal Law Systems. These may either be reformed by way codification by the appropriate legislature (Central or State) or entirely repealed and standardized in the form of a Uniform Civil Code by the Union Parliament. By virtue of entry 5 of List III (Concurrent List) of the VII Schedule of the Constitution, the legislative power to make laws for reforming/modifying the “personal laws” has been conferred on both, the State Legislatures and the Union Parliament”. However, entry 5 of List III has been subjected to the power of the Union Parliament to make ‘Uniform Civil Code’ throughout the territory of India under Article 44 of the Constitution.

As pointed out by a distinguished German Scholar, Dieter Conrad, “….all the traditional personal laws date back to times when patriarchal notions prevailed; and all these laws, though in varying respects and degrees, provide an inferior status for women”. [27]

Further, as Yuksel Sezgin states,

“Personal status systems have always been manipulated to preserve traditional male privileges by institutionalizing discriminatory characteristics and gender-unequal interpretations of major religious traditions. Thus, all personal status systems, whether based on Muslim, Jewish, or Hindu laws, constructed through andro-centric readings of sacred texts and traditions, have come to discriminate heavily against women in familial matters such as marriage and divorce.” [28]

The religious customs and religion-based un-codified personal law system prevailing in India are no exception to these universally-acknowledged views. They are inconsistent with the egalitarian principles in CEDAW and also the Indian Constitution, which prohibits the State from discriminating against women as a class.

The question whether pre-constitution personal laws could be classified as “custom” under Article 13 (3) (a) of the Indian Constitution or as “laws in force” under Article 13 (3) (b) and subjected to constitutional scrutiny was raised before the Bombay High Court in State of Bombay v. Narasu Appa Mali. [29] In this case the constitutional validity of a pre-constitution statute, the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 which provided for the prevention of bigamous marriages among Hindus within the State of Bombay, was challenged. Section 5 of the Act declared that if any Hindu person contracted a bigamous marriage, such a person would be punished with imprisonment for a term which could extend to seven years and fine. However, the provision had been made subject to any law, custom or usage to the contrary. The Act was challenged as contravening the fundamental rights guaranteed under Articles 14, 15 and 25 of the Constitution.

It was contended on behalf of the petitioner that polygamy was a recognized institution according to Hindu religious practice. The State sought to defend the Act under Article 25 (2) (b) which protected any existing law providing for social welfare and reform from the operation of Article 25(1) guaranteeing the freedom of
religion. It was also contended by the petitioner that polygamy was prevalent and permissible among Muslims living in the State of Bombay and yet the Muslims could marry more than one wife with impunity while a Hindu doing the same was made liable to severe penalty. It was urged that the State of Bombay, by this legislation, had discriminated between Hindus and Muslims only on the ground of religion and hence the Act was violative of equality clauses under Article 14 and 15 (1) of the Constitution. According to the petitioner, by reason of the Constitution, the Muslim personal law which permitted polygamy had become void as a Muslim man was permitted to have more than one wife whereas a Muslim woman was restricted to one husband and therefore the very institution of polygamy discriminated against women only on the ground of sex. It was submitted that the impugned Act prohibited polygamy only among the Hindus and excluded Muslims, hence it was discriminatory. The petitioner placed reliance on Article 13 (1) which provided that all “laws in force” in the territory of India immediately before the commencement of this Constitution, in so far as they were inconsistent with the provisions of Part III (fundamental rights), should, to the extent of such inconsistency, be void.

The Bombay High Court pointed out that so far as the constitutional validity of any post-Constitution law was concerned, the definition of the expression “law” as given under Article 13 (3) (a) would apply, whereas for determining the Constitutional validity of any pre-Constitution law, the definition of the expression “laws in force” as given under Article 13 (3) (b) would apply. The Court conceded that as the definition of “law” under 13 (3) (a) included custom/usage and as the State cannot make custom and usage, the definition would also apply to pre-Constitution custom/usage for its inconsistency with fundamental rights. However, the Court made a distinction between pre-Constitution custom/usage and pre-Constitution personal law and held that Custom or usage was deviation from personal law and not personal law itself. Therefore, the Court refused to read personal laws under both the expressions-‘law’ and ‘laws in force’ used in Article 13 (2) creating an impression that the framers of the Constitution did not intend to apply fundamental rights to the personal laws. In support of its proposition, the Court referred to Section 113 of the Government of India Act, 1915 which dealt with the law to be administered by the High Courts in matters of inheritance and succession to lands and it required the High Courts to decide according to the personal law or custom to which the defendant was subjected to. According to the Bombay High Court, a clear distinction was made out between a ‘custom’ and a ‘personal law’ by this pre-Constitution Act. The Court held that the scheme of the Constitution, had left the personal law to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform Code.

The assumption made by the court is debatable: that the expression “laws in force” includes only those laws passed or made by the Legislature or other competent authority before the Indian Constitution came into existence. This does not include pre-Constitution personal laws. One must note that the expression “laws in force” has also been used by Article 372 of the Constitution. It authorizes the continuance in force of the existing laws even after the commencement of the Constitution. If pre-Constitution personal laws are not “laws in force” within the meaning of Article 372, they should have ceased to operate after the commencement of the Indian Constitution on 26th January, 1950. The wording used in defining the expression “laws in force” under Article 13 (3) (b) and Article 372 is identical. It is a clear pointer that the framers of the Constitution did not exclude the personal laws from the operation of fundamental rights guaranteed by the Constitution. Had they intended to do so, they would have expressly carved out an exception either under Article 13 or Article 372.

It is also pertinent to know that the Supreme Court inBuilders Supply Corporation v. Union of India [30] has now clarified that the expression “laws in force” used in Article 372 includes not only statutory law but also custom, usage and even common law of England. The principles applied by the Supreme Court in giving liberal interpretation to Article 372 ipso facto apply to the interpretation of Article 13 (3) (b). The Court seems to have ignored the fact that the definition of “laws in force” is inclusive definition and it does not automatically exclude the personal laws from its ambit, whereas they are presumed to be part of the expression “laws in force” used in Article 372.

Later, the Supreme Court in Ahmedabad Women Action Group v. Union of India [31] reiterated the views expressed by the Bombay High Court in Narsu Appa Mali’s Case and refused to declare Muslim Personal Law principles as unconstitutional; as violative of fundamental rights under Article 14 and 15 of the Indian Constitution. The said principles allow polygamy and permit Muslim man to give unilateral talaq (divorce) to his wife without her consent & without resort to judicial process.

On the one hand, the Indian Courts have adopted a hands-off approach towards the un-codified, pre-constitution personal laws, which discriminate against women, whereby women in same situation with similar woes are treated differently. On the other hand, the politically-driven, vote bank-conscious executive has not taken any initiative to adopt a Uniform Civil Code which would go a long way in removing the gender-discrimination. Although the Hindu Personal Law has been upgraded and codified to a great extent by way of series of enactments like Hindu Marriage Act, 1955, Hindu Succession Act, 1956 and Hindu Adoption and Maintenance Act, 1956; such laws also have the potential for making discrimination against Hindu women. In comparison, the Muslims in India are still being governed by the un-codified Personal Law System to a large extent. The State has refrained from using its legislative power under entry 5 List III to reform the Muslim Personal Law
and bring it in tune with the Constitutional philosophy of gender-equality. The reasons for such cautious approach towards reforming the personal laws or making a uniform civil code seem to be political. For the same reasons, India while ratifying CEDAW made a declaration that, notwithstanding anything in Articles 5(a) and 16(1) of the Convention, it shall abide by and ensure those provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent. According to Dieter Conrad, “…this policy, however, bypasses the vital question: who represents the community and who is entitled to speak for it?” The vagueness of this international commitment by Indian State leaves ample scope for politicization of issue of reforming personal laws towards fulfillment of the Constitutional promise and commitment towards gender equality. The feeble voices of the Women’s Groups are often muzzled by more traditional, fundamental and hard-liner political groups representing the religious community.

In a bold judicial response, Justice Thottathil B. Radhakrishnan of Kerala High Court made a historical departure from such merry-go-round in a very recent decision of Haseena Mansoor v. State of Kerala. [32] It held that Article 15(1) prohibits gender discrimination and therefore, no ground referable to any custom, usage or personal laws, contrary to equality principle enshrined in the Constitution could be enforced, more particularly, in relation to secular matters. (Emphasis supplied). In the instant case, a petition had been filed by a Muslim lady and minor children of an employee of the Kerala State Electricity Board, who died-in-harness. The respondent refused to pay death-cum-retirement gratuity due to the minor children, to the surviving parent (mother). The denial was on the basis of a rule that the share of such benefit due to minor children should be paid to the surviving parent ‘except when the surviving parent happens to be a Muslim lady’. The petitioner lady challenged the Constitutional validity of the said rule on the ground of Article 14 and 15 (1) of the Indian Constitution. The respondent argued that the impugned provision had been made to be in consonance with the Muslim Personal Law. The court held the impugned provision to be un-Constitutional.

The decision paves the way for a new debate, although contrary to the prevailing view of the Supreme Court’s view on the realization of gender-equality enshrined under the Indian Constitution. Technically, the High Court judgment may be condemned as per-in-curium judgment by the critics, but it will certainly afford an opportunity to the Supreme Court to correct its past inconclusive trajectory. It will cut through the clutter of competing views which refused to apply the Constitutional principles of gender equality to un-codified personal laws. However, it is predicated upon appeal or on an honest, ground reality check.

VI. Conclusion

The Sabarimala Case finds another relevant judicial response in the context that even though Article 15 (1) of the Constitution prohibits discrimination based solely on ‘sex’, it impliedly permits discrimination based on sex coupled ‘with some other reason’. In Raghubans Saudagar Singh v. Punjab (AIR 1972 P&H 117), the Punjab & Haryana High Court upheld an order from the State Governor making the women ineligible to posts in men’s jail on the ground that when the peculiarities of sex, added to a variety of other factors and considerations, form a reasonable nexus for the object of classification, then the bar of Arts. 15 and 16(2) could not be possibly attracted. This advantageous outcome requires to be expanded in future into a metric of objective parameters.

The Kerala High Court, in S. Mahendran v. The Secretary, Travancore Devaswom Board, probably applied the same rationale while upholding the validity of a religious custom, which prohibited the women of fertile age capable of menstruation from entering the Sabarimala shrine. It reflects the traditional stereotype of woman as ‘temptress’, who is blamed for arousing sexual desire in men, including a divine male deity! The males have been absolved from any responsibility for controlling their own behaviour under such bizarre religious customs. Similarly, in applying the Constitutional provisions dealing with gender equality to the religion-specific un-codified personal laws, the Courts have adopted a policy of non-interference with religious matters. Article 25 specifically makes the freedom of religion subject to other fundamental rights under part III of the Indian Constitution including right against sex-discrimination. The personal laws are not immune from the judicial scrutiny on the touchstone of fundamental rights guaranteed by the Supreme Lex. The Court has somewhat stopped shy of resolving the dilemma, in an apathetic manner.

The reform possibility is paralyzed by the lack of political will to review customs or personal laws by the legislature which imposes a greater responsibility on the Constitutional courts to apply rigorous standards of judicial scrutiny for removal of injustice against the women. The judges, who do not have a direct political accountability, can take the risk of pronouncing unpopular decisions debunking tradition & advancing modernity reflecting changing times, in the larger interest of the society, thereby send ethical reminders to the political class to respond.

Thus, every judicial response in such cases is the jugglery or acrobat between tradition and modernity synthesizing justice between their polarities. On such uncertain terrain, many shifts in the judicial approach as reflected in the latest judgments of various High Courts in cases of Pinniyakkal, U. N. Bhardwaj and Haseena Mansoor have rendered clarity and sounded the power of justice work. Thus, there is a modernist departure into clarity from clinging to traditionalist maneuver between polarities. Perambulating the constitutional provisions, with innovative tools of interpretation and analysis, the judicial responses have ushered rationality of modernity...
to diagnose and remedy the tradition which precluded women from public sphere and from politico-socio-economic and protected women’s rights. However, the response of the Supreme Court is a much awaited result removing the riddle or uncertainty to bid adieu to the traditional approach.

References

[12] AIR 1964 SC 314
[20] 2008 (3) TLNJ 640 (Civil)
[21] Hindu treatise on temple management
[22] One of the most authoritative of the books of the Hindu code in India
[24] Ibid, Para 35
[29] AIR 1952 Bom 84
[31] (1997) 3 SCC 573