IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

SUO MOTU WRIT PETITION (CIVIL) NO. 2 OF 2015

IN THE MATTER OF:-

In Re: Muslim Women's Quest for Equality …Petitioner

VERSUS

Jamiat Ulama-i-Hind & Ors. …Respondents

AND
IN THE MATTER OF:-

WRIT PETITION (CIVIL) NO. 118 OF 2016

Shayara Bano …Petitioner

VERSUS

Union of India &Ors. …Respondents

WRITTEN SUBMISSIONS ON BEHALF OF ALL INDIA MUSLIM PERSONAL LAW BOARD

1. That the aforementioned matters came up for hearing before this Hon'ble Court on February 16,2017 and this Hon'ble Court was pleased to direct all parties to file their written submissions on or before March 30,2017.

2. That accordingly, the All India Muslim Personal Law Board (hereinafter referred to as 'AIMPLB' or 'the Board' or 'the Respondent Board'), which has been impleaded as Respondent No. 3 in Suo Motu Writ Petition No. 2 of 2015 and as Respondent No. 8 of Writ Petition (Civil) No. 118 of 2016, is putting forth its submissions in respect of the issues arising in the present matter.

3. That the Respondent Board wishes to address the following questions: -

   A. Whether the present petitions are maintainable?

   B. Whether the Muslim Personal Laws can be tested as being violative of Part III of the Constitution?

C. Whether the Court of law can interpret religious scriptures of any religious denomination contrary to the interpretation put on it by the religious books and authorities, held authentic by such denomination?

D. Whether the impugned principles of Muslim Personal law, i.e. Triple Talaq in one sitting, halala and polygamy, form an essential part of the religion of Islam as interpreted by four schools of Muslim Personal Law viz. Hanafi, Hanbali, Shafa'i and Maliki; and therefore intra vires the Constitution of India?

E. Whether the provisions of the Muslim Personal laws sought to be reviewed by way of the present Petitions are protected by Articles 25 and 26 read with Article 29 of the Constitution of India?

F. Whether International instruments to which India is party/signatory or domestic practices of foreign countries can have a bearing on the issues in the present petition?

4. **Whether the present petitions are maintainable?**

I. Present petitions seek to enforce fundamental rights against private parties

4.1 At the outset, it is submitted that the present Petitions are not maintainable as the Petitioners seek to enforce Fundamental Rights against private parties. It is submitted that the protection guaranteed by the Articles 14, 15 and 21 is intended to be available against the-Legislature and the Executive and not against private individuals. It is submitted that in the present case, the Petitioners are seeking judicial orders which are completely outside the purview of Article 32. Private Rights cannot be enforced against individual citizens under Article 32(1).

II. Issues arising in the present petition concern legislative policy

4.2 In any event the issues raised by the way of the Present Petitions are matters of legislative policy and fall outside the sphere of the judiciary. This Hon'ble Court has already taken the view in several cases including the cases reported in *Krishna Singh v. Mathura Ahir* (1981) 3 SCC 689, *Maharishi Avadesh v. Union of India* (1994) Suppl. (1) SCC 713, *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125 and *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573, wherein identical questions had been raised, that such questions do not fall within the ambit of judicial review.

4.3 The questions being examined by the Hon'ble Court in the present matter have already been examined by this Court in *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573 (*AWAG Case*). In that case, *inter alia* the following issues were considered by this Hon'ble Court: -

(i) Whether Muslim Personal Law which allows Polygamy is void as offending Articles 14 and 15 of the Constitution.

(ii) Whether Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, is void as it offends Articles 13, 14 and 15 of the Constitution.

(iii) Whether the mere fact that a Muslim Husband takes more than one wife is an act of cruelty

4.4 While considering the above issues this Hon'ble Court declined to entertain the abovementioned issues stating that these were matters wholly involving issues of State Policies with which the Court will not ordinarily have any concern. The Hon'ble Court also held that these issues are matters which are to be dealt with by the legislature.

4.5 Even prior to the decision in *AWAG Case*, this Hon'ble Court in the case of *Maharshi Avadhesh v. Union of India*, 1994 Supp (1) SCC 713 had taken a similar view. In that case a petition under Article 32 of the Constitution of India was filed seeking: -

(i) A writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India.

(ii) To declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 Fundamental Rights and Articles 44, 38, 39 and 39-A of the Constitution of India.

(iii) To direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection.

4.6 This Hon'ble Court while dismissing the Writ Petition observed that- "*These are all matters for legislature. The Court cannot legislate in these matters."*

5. **Whether the Muslim Personal Laws can be tested as being violative of Part III of the Constitution?**

I. Whether the expression 'Law in force' used in Article 13(1) includes 'Personal Law'?

5.1 Justice Chagla in *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 84), observed as follows:

> *"16. That this distinction is recognised by the Legislature is clear if one looks to the language of S. 112, Government of India Act, 1915. That section deals with the law to be administered by the High Courts and it provides that the High Courts shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject. Therefore, a clear distinction is drawn between personal law and custom having the force of law**. **This is a provision in the Constitution Act, and having this model before them the Constituent Assembly in defining "law" in Art. 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This, in our opinion, is a very clear pointer to the intention of the Constitution-making body to exclude personal law from the purview of Art. 13.** There are other pointers as well. Article 17 abolishes untouchability and forbids its practice in any form. Article 25(2)(b) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Now, if Hindu personal law became void by reason of Art. 13 and by reason of any of its provisions contravening any fundamental right, then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravened Arts. 14 and 15. This clearly shows that only in certain respects has the Constitution dealt with personal law. **The very presence of Art. 44 in the Constitution recognizes the existence of separate personal laws, and Entry No. 5 in the Concurrent List gives power to the Legislatures to pass laws affecting personal law. The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is made with regard to it and leave it to the Legislatures in future to modify and***

improve it and ultimately to put on the statute book a common and uniform Code*. Our attention has been drawn to S. 292, Government of India Act, 1935, which provides that all the law in force in British India shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and S. 293 deals with adaptation of existing penal laws. There is a similar provision in our Constitution in Art. 372(1) and Art. 372(2). It is contended that the laws which are to continue in force under Art. 372(1) include personal laws, and as these laws are to continue in force subject to the other provisions of the Constitution, it is urged that by reason of Art. 13(1) any provision in any personal law which is inconsistent with fundamental rights would be void.* ***But it is clear from the language of Arts. 372(1) and (2) that the expression "laws in force" used in this article does not include personal law because Art. 373(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment, and surely it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community.*** *Although the point urged before us is not by any means free from difficulty, on the whole after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in Art. 13(1)."*

5.2 Further, Justice Gajendragadkar in *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 84), observed as follows:

"The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topics falling under personal law in item 5 in the Concurrent List—List III. This item deals with the topics of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law and yet the expression "personal law" is not used in Art. 13, because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal

laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Art. 13(1) at all."

5.3 This view has been confirmed by this Hon'ble Court in *Ahmedabad Women Action Group v. Union of India,* (1997) 3 SCC 573. In view of the position that provisions of personal laws cannot be challenged by the reason of fundamental rights, it is submitted that this Hon'ble Court cannot consider the constitutional validity of the principles of Muslim Personal law relating to Triple Talaq in one sitting, *halala* and polygamy.

II. Present petitions are misconceived as they are based on incorrect understanding of the Muslim Personal law as followed by four schools of Sunni Persuasions, namely Hanafi, Shafi'i, Maliki and Hanbali.

5.4 It is further submitted that the present petitions are misconceived as they are based on incorrect understanding of the Muslim Personal law as followed by four schools of Sunni Persuasions, namely Hanafi, Shafi'i, Maliki and Hanbali. It is relevant to note that the issue concerning *Triple Talaq* has already been decided by this Hon'ble Court in the case of *Shamim Ara v. State of UP*, (2002) 7 SCC 518 wherein this Hon'ble Court has placed explicit measures to check the pronouncement of *Triple Talaq* by the husband by laying the down test of "*reasonable cause*" and "*prior reconciliation*". The principles laid down in *Shamim Ara* are the law as declared by this Hon'ble Court and as such a binding precedent. In view of the ratio of the decision in *Shamim Ara,* the validity of Triple Talaq in one sitting is not *res integra,* the law in this respect has already been declared by this Hon'ble Court unless it is reviewed/re-considered by this Hon'ble Court.

5.5 Further the concept of *"halala"* is misunderstood by the Petitioners/Opponents. It is submitted that when a Muslim woman is divorced, she is prohibited from marrying her former husband unless she has an intervening marriage with another man, this concept of intervening marriage is distortedly called *Nikah halala* by the Petitioners/Opponents. There is no concept of "*nikah halala*" in Islamic Jurisprudence. Further, this concept of *"halala*" is grossly misunderstood, it is submitted that this procedure needs to be followed only if the woman has been divorced from her first husband by way of *Triple Talaq*. In the other nine forms of separation, the process of *Halala* is not a precondition for the woman to marry her former husband. Further, the intervening marriage of the woman

should happen in usual course, with the solemn intention of living with the subsequent husband, and the consequent separation should also be under natural course due to his death or divorce. In fact, there are unequivocal and unambiguous Hadiths of the Prophet Muhammad (PBUH) where mock marriages and mock divorces is reported to be a cause of curse from the Almighty Allah. It is in the said Hadiths that the reference to the term "*Halala*" is found, though it is not mentioned in the Noble Quran. Whereas in any case, the term "*Nikah Halala*" is not found even in Hadith. The Hadith of the Prophet Muhammad (Peace be upon Him) in condemning "Halala" are as follows:

> *"Allah's curse is on the one who makes a contract or agreement for Halala (Both the one who carries out Halala and the one who it is done for." (Sunan al Darami / Mishkat al Masabih)*
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> *"Allah has cursed the muhallil (one who marries a woman and divorces her so that she can go back to her first husband) and the muhallal lahu (first husband)."*

6. **Whether the Court of law can interpret religious scriptures of any religious denomination contrary to the interpretation put on it by the religious books and authorities, held authentic by such denomination?**

6.1 The preamble of the Constitution clearly enshrines values of liberty of thought, expression, belief, faith, worship. Further, Article 25 of the Constitution, guarantees freedom of conscience and freedom to profess, practice and propagate religion. Article 25 guarantees individual freedom of conscience subject to public order, morality and health and to the other provisions of the third part of the Constitution. Article 26 of the Constitution grants freedom to every religious denomination or any section thereof to manage its own affairs "in matters of religion". Interpreting the aforesaid Articles, this Hon'ble Court in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282, 1954 SCR 1005 has held that those Articles protect the essential part of religion and further that when a question arises as to what constitutes essential part of religion, the same should primarily be ascertained with reference to the Doctrines of that religion itself.

6.2 This Hon'ble Court in *Krishna Singh v. Mathura Athir* (1981) 3 SCC 689, has held that the Part III of the Constitution does not touch upon the personal laws of the parties. This Hon'ble Court also observed that the High Court in applying the personal laws of the

parties could not introduce its own concepts of modern times but should enforce the law as derived from recognized and authoritative sources. It is submitted that since Part III of the Constitution does not touch upon the personal laws of the parties, this Hon'ble Court cannot examine the question of constitutional validity of the impugned principles of Muslim Personal law, i.e. Triple Talaq in one sitting, *halala* and polygamy as followed by four schools of Sunni Persuasions, namely Hanafi, Shafi'i, Maliki and Hanbali.

6.3 Even the Hon'ble Bombay High Court in *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 84) had observed that the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution as they were aware that these personal laws needed to be reformed in many material particulars and they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and accordingly they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, personal laws do not fall within Article 13(1) and consequently cannot be challenged on the ground of being violative of Part III of the Constitution of India.

6.4 This view has been affirmed by this Hon'ble Court in *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573. In view of the position that provisions of personal laws cannot be challenged by the reason of fundamental rights, it is submitted that this Hon'ble Court cannot consider the constitutional validity of the impugned principles of Muslim Personal law, i.e. Triple Talaq in one sitting, *halala* and polygamy as followed by four schools of Sunni Persuasions, namely Hanafi, Shafi'i, Maliki and Hanbali.

6.5 Additionally, it is submitted that personal laws do not derive their validity on the ground that they have been passed or made by a legislature or other competent authority. The foundational sources of personal law are their respective scriptural texts. The Mohammedan Law is founded essentially on the Holy Quran and sources based on the Holy Quran and thus it cannot fall within the purview of the expression "*laws in force*" as mentioned in Article 13 of the Constitution of India, and hence its validity cannot be tested on a challenge based on Part III of the Constitution.

6.6 As averred above, it is these foundational principles which are the basis of Muslim Personal Law and like any other religion, they are peculiar to Islam and cannot be challenged on the ground of being violative of Part III of the Constitution of India.

6.7 The Hon'ble High Court of Bombay, in *Narasu Appa Mali's Case* (*Supra*) has clarified that Article 13 of the Constitution of India does

not provide for “personal laws”. It has been clarified that the words “a custom or usage” in Article 13(3) cannot subsume personal laws. A Custom or usage is distinct from Personal Law and many a time, exceptions to personal laws. This is further supported by the fact that Entry 5 in List III expressly mentions the phrase ‘personal law’ which implies first, that the omission in Article 13(3)(a) was conscious and secondly, that the intention of the Framers was to leave it to the legislature to reform personal laws and not subject them to scrutiny by the judiciary. Further, Section 112 of the Government of India Act, 1915, one of the models that were before the Constituent Assembly in the drafting of the present Constitution used both the phrases custom and usage and personal law separately. The latter phrase was however, omitted in later drafts. Moreover, if personal laws were open to scrutiny under Article 13, both Article 17 and Article 25(2) (b) would be rendered redundant. This is because the evils that these Articles aim to curb would anyway be remediable as a violation of fundamental rights.

6.8 It is therefore submitted that since Part III of the Constitution does not touch upon the personal laws of the parties, this Hon’ble Court cannot examine the question of constitutional validity of the impugned principles of Muslim Personal law, i.e. Triple Talaq in one sitting, *halala* and polygamy as followed by four schools of Sunni Persuasions, namely Hanafi, Shafi'i, Maliki and Hanbali.

6.9 Therefore, Constitutional scheme clearly provides that judiciary which is one of the important organs of the State shall not lay down religion for any religious denomination or section thereof and whenever the Court is confronted with any religious issues, it will look to the religious books of a particular denomination held sacred by it. In other words, there is no scope for the Court to import its own views while dealing with the religious questions or scriptures or beliefs of any religious denomination. In fact the Courts have consistently resisted the temptation to embark on hazardous adventure to interpret religious scriptures.

I. Courts ought to apply the principle of judicial restraint, and should not deal with the issue of constitutional interpretation unless such an exercise is but unavoidable

6.10 It is submitted that this Hon’ble Court in *Shabnam Hashmi v. Union of India* (2014) 4 SCC 1, this Hon’ble Court has held that, Personal law would always continue to govern any person who chooses to submit himself to such law until such time that the vision of a Uniform Civil Code is not achieved. This Court further held that, it was a well settled principle of judicial restraint that required that the

Courts to not deal with issues of constitutional interpretation unless such an exercise was but unavoidable.

6.11 It is submitted that in the present matters also, all Muslims do have a choice of submitting themselves to Personal law or non-denominational law, for instance a Muslim marriage can be registered under Section 15 of the Special Marriage Act,1954 if the parties so desire, such registration will take the marriage out of the purview of Muslim Personal Law and the relationship of the parties would then be governed by the provisions of the Special Marriage Act,1954. A similar provision can be seen in the Muslim Women (Protection of Rights on Divorce) Act, 1986, Section 5 of which gives the parties an option to be governed by Section 125 and 128 of the Code of Criminal Procedure, 1973. Thus, the parties always have the option of choosing whether their marriage should be governed by Muslim Personal Law or other non-denominational laws.

6.12 Thus, in such circumstances when it is open for all Muslims to choose to be governed by either their own personal law or a non-denominational law, this Hon'ble Court ought to exercise judicial restraint and should not prevent any Muslim from following or deviating from his own personal law which he himself has chosen to submit himself to.

II. Islam treats the relationship of marriage in substance a civil contract bearing spiritual and moral overtones and undertones:

6.13 It is submitted that Shariat laws aim for life long relationship among husband and wife and provide for all possible means to prevent break down of a marriage. It regards Talaq (Dissolution of Marriage) as the last resort. Shariat regards marriage as devotion and reward is promised on all activities incidental to marriage so that Muslims consider it with due respect as any other worshiping activity. Unlike other personal laws, Shariat law does not keep marriage indissoluble or compel husband and wife to stay in marriage despite all unbearable hurdles from either side of marriage.

6.14 Like the parties negotiate *Mehr* before entering into matrimonial relationship, they are free to decide upon mutually agreed upon terms about following the procedure of Talaq within the permitted larger Islamic Sharia stating that they shall be governed by the School of Islamic law which does not recognize three pronouncements of Talaq coming into effect instantaneously, if pronounced in one sitting.

6.15 In other words, the parties to marriage in Islam have always had the choice of agreeing upon the procedure of divorce, as permitted. However, if the parties follow a particular school of Islamic thought,

in absence of any thing contrary to that school, the parties' rights and obligations shall be governed as per the school they belong to. No one shall be permitted to import a principle of another school to justify the validity of provision of a separate school of thought of Islam.

7. **Whether the impugned principles of Muslim Personal law, i.e. Triple Talaq in one sitting, *Halala* and Polygamy, form an essential part of the religion of Islam as interpreted by four schools of Muslim Personal Law viz. Hanafi, Hanbali, Shafa'i and Maliki; therefore *intra vires* the Constitution of India?**

I. ***Re* Triple Talaq**

7.1 It is submitted that in Islam, essentially, divorce is undesirable, without a valid and compelling ground and that it is permissible only when it is wholly unavoidable. It is submitted that though pronouncement of Triple Talaq in one go is undesirable but irrevocably effective. According to four schools of Sunni Persuasions, namely Hanafi, Shafi'i, Maliki and Hanbali, the number of pronouncements are not linked with one or more sessions. It is the number of times '*Talaq'* is pronounced that effectuates Talaq. If one does so twice, it will count as two, and if thrice, then it will count as three pronouncements, which will dissolve the marriage with immediate effect. The Quran itself declares, that:-

> *"Divorce is twice; then either to retain in all fairness, or to release nicely. It is not lawful for you to take back anything from what you have given them, unless both apprehend that they would not be able to maintain the limits set by Allah. Now, if you apprehend that they would not maintain the limits set by Allah, then, there is no sin on them in what she gives up to secure her release. These are the limits set by Allah. Therefore, do not exceed them. Whosoever exceeds the limits set by Allah, then, those are the transgressors."*
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> [Surah-Al- Baqarah 2:229]

7.2 Imam Bukhari, an Islamic scholar who authored one of the most authentic (*sahih*) hadith collections, interprets the abovementioned verse in the sense that Triple Talaq becomes effective, since three pronouncements complete the process of divorce and the third pronouncement terminates the marriage with immediate effect. His chapter heading runs thus: "*The stance of those who take the Quranic statement: 'Divorce can be pronounced twice, then either honorable retention or kind release', to mean that Triple Talaq becomes effective*." (Bukhari, 2, 791)

7.3 In view of the above, it is clear that though pronouncement of talaq thrice at one go is undesirable but in view of the aforesaid verse of the Holy Quran, it is clear that three pronouncements, howsoever they may be made result in valid dissolution of marriage. Thus, once three pronouncements of divorce are made, the marriage dissolves and the woman becomes unlawful or *haram* to the man who had pronounced divorce.

7.4 It is further submitted that the Holy Quran mandates every follower of Islam to obey Allah and the Messenger [i.e. the Apostle of Allah (PBUH)] (Surah-Al-Nisa 4:59, Surah-Al-Anfal 8:20). Further, the Holy Quran also clarifies that when Allah and his Messenger have decided a matter, the believers cannot defer from the said decision, in fact if the believer ignores the said decision and follows a course of his own choice, he is said to have strayed away in manifest error (Surah-Al-Ahzab 33:36). It has also been stated in the Holy Quran that the believer is bound to accept the command of the Messenger and is bound to avoid whatever the Messenger forbids (Surah-Al-Hashr 59:7). Thus, it is an integral part of the religion of Islam that all Muslims must abide by the decision of Allah and his Messenger, and when the Messenger has directed the followers to do a certain thing they are duty bound to do it.

7.5 It is submitted that there have been instances at time of the Prophet (PBUH) where the Prophet has though reprimanded the Husband for resorting to an undesirable method of pronouncing divorce by way of Triple Talaq, but has also thereafter ensured separation between the parties, even when the Husband was repenting and willing to take the wife back in marriage. Some of these instances, as stipulated in the Hadiths, are provided below: -

a) When Abu Hafs resorted to Triple Talaq, the Prophet (PBUH) held it as valid. All the three pronouncements were made with a single word, as is specified by Daraqutni (Daraqutni, Kitab Al- Talaqwa Al- Khulawa Al- Aiyla, 4, 12, Hadith number 3922).

b) Anas recounts on Muadh's authority: "*We heard the Prophet (Pbuh) saying: O Muadh, whoever resorts to bidaa divorce, be it once, twice, or thrice, we will make his divorce effective*" (Daraqutni, 2, 444, Kitab al- Talaqwa Al- Khulawa al- Aiyla, Hadith number 4020, Al- Sunan Al- Kubra lil Nasai, Kitab Al- Khulawa al- Talaq, Hadith number 14932).

c) When Abdullah Ibn Umar divorced his wife once while she was having menses. The Prophet (Pbuh) asked him to retain his wife saying: "*You acted against Sunnah." Abdullah ibn Umar asked: "Had I resorted to Triple Talaq then, could I*

retain her?" The Prophet (Pbuh) replied: "*No. Such an action on your part would have been a sin*" (Sunan Bayhaqi, 7, 334, Hadith number: 14955).

d) Similarly, yet another instance is of Aishah Khathmiya, who was Hasan's wife. Hasan pronounced upon her Triple Talaq. After her waiting period (Iddat) when he sent her a gift, she said: "*This is a very small gift from the beloved from whom I have been separated."* On learning this, Hasan broke into tears, saying: "*Had I not heard from my grandfather the prohibition about such a woman, I would have taken her back in marriage. He commanded that if one has pronounced Triple Talaq upon his wife, even if she is menstruating or in one go, he cannot remarry her, unless she marries another person.*" (Al- Sunan Al- Kubra lil Bayhaqi, Hadith number 14492).

7.6 There is no hadith of the Prophet (PBUH) stating that pronouncement of triple talaq in one instance/sitting is not valid or ineffective, rather, in view of a direct command of the Prophet (PBUH) (Messenger), no Muslim can be said to have any choice in the matter and thus even though Triple Talaq in one go is an undesirable form of divorce, the dissolution of marriage thereafter is incumbent.

7.7 Further, as mentioned above, the Holy Quran ordains that once three pronouncements of *talaq* are made, the wife becomes unlawful or Haram to her former husband, unless the process of *halala* takes place in its natural course. The pronouncement of third talaq and its irrevocability is explicitly given in Quran (Surah-Al-Baqarah 2:230). In such circumstances, it is forbidden for the former husband to take the wife back into marriage again, unless she marries another person of her choice and such marriage comes to an end owing to death or by divorce. Therefore, there is no bar upon her to marry yet again with person of her choice and this time she may out of her own free will agree to marry her former husband. The objective is to enable a divorcee woman to remarry out of her own free will and choice. The rule also achieves the objective of protecting a divorcee (on whom triple talaq is pronounced) from being forced into marital relation with anyone particularly by former husband who may be in a position to apply force upon her and restrain her from marrying another person of her choice; a peculiar threat of male chauvinism dominant in male dominated society. So far as the rule also serves the other object of removing taboo upon widow remarriages as there is a clear indication that in the event of the second marriage of a divorcee to another person of her choice ending in the death of her second husband, she is free to remarry out of her own free will with her former husband.

7.8 Any deviation from such a Quranic injunction would be going against the *ipsissima verba* of Almighty himself and such an act would be going against the very integral practice of Islam and would be disregarding the precise directions of Allah and also his messenger, Prophet (PBUH), which is nothing but a sin and as per the Holy Quran (Surah-Al-Ahzab 33:36), such an action would show that the believer has strayed away from the religion in manifest error.

7.9 Furthermore, as ordained by the Holy Quran, all Muslims are bound to accept the command of the Messenger and are bound to avoid whatever the Messenger forbids (Surah-Al-Hashr 59:7) and when the Prophet has categorically directed separation of parties after Triple Talaq in one go and has ruled that if the former husband takes the woman back into marriage, he will be committing a sin (Sunan Bayhaqi, 7, 334, Hadith number: 14955), then no believer has a choice to take the woman back into marriage after pronouncing Triple Talaq and such an act is nothing but a sin. Moreover, the consequences of committing such a sin would be far more adverse as the children born out of such a relationship would be illegitimate and their rights of inheritance in his putative father's estate would also be questionable.

7.10 In view of the aforementioned, if this Hon'ble Court holds that Triple Talaq in one sitting is not a valid form of effecting a divorce, then that would amount to re-writing the Holy Quran itself, which is nothing but the *ipissima verba* of the Almighty himself and is the entire genesis of Islam. Such an alteration of the specific verses of the Holy Quran would actually amount to altering the very essence of the religion of Islam.

7.11 It is submitted that the Holy Quran provides a comprehensive way of life for each Muslim and it is nothing but the direct word of Allah himself and any modification/dilution in the text of this Holy Book would amount to erasing the very basis of the entire religion of Islam, which is not permissible in view of the protection guaranteed by Article 25 of the Constitution of India. If such casual denunciation of the verses of the Holy book is permitted, then soon the religion of Islam would cease to exist.

7.12 Accordingly, it is submitted that though Triple Talaq in one sitting is an unusual mode of divorce in Islam, it cannot be declared to be invalid in the light of the direct verses of the Holy Quran and categorical command of the Messenger of Allah.

II. ***Re* Halala**

7.13 The concept of *"halala"* is misunderstood by the Petitioners/ Opponents. It is submitted that when a Muslim woman is divorced,

she is prohibited from marrying her former husband unless she has an intervening marriage with another man, this concept of intervening marriage is distortedly called "*nikah halala"* by the Petitioners/Opponents. There is no concept of "*nikah halala*" in Islamic Jurisprudence. Further, this concept of *"halala*" is grossly misunderstood, it is submitted that this procedure needs to be followed only if the woman has been divorced from her first husband by way of *Triple Talaq*. In fact, out of nine permissible forms of separation/talaq/divorce, eight forms of separation/talaq/divorce put no bar to take wife back into the marriage. However, there is only one form i.e. irrevocable tripe talaq wherein Shariat law bars taking wife back into the marriage unless the divorce wife enters into second marriage as per her choice and free will with another man. Further, the intervening marriage of the woman should happen in usual course, with the solemn intention of living with the subsequent husband, and the consequent separation should also be under natural course due to his death or divorce. It is relevant to mention that none of the schools of Islamic Jurisprudence validate, approve or advocate any marriage which is solemnized with the ulterior motive of by passing the irrevocable effect of *Triple Talaq.* In fact, there are unequivocal and unambiguous Hadiths of the Prophet Muhammad (PBUH) where mock marriages and mock divorces are reported to be a cause of curse from the Almighty Allah. It is in the said Hadiths that the reference to the term "*Halala*" is found, though it is not mentioned in the Noble Quran. Whereas in any case, the term "*Nikah Halala*" is not found even in Hadith. The Hadith of the Prophet Muhammad (Peace be upon Him) in condemning "*Halala*" are as follows:

> *"Allah's curse is on the one who makes a contract or agreement for Halala (Both the one who carries out Halala and the one who it is done for." (Sunan al Darami / Mishkat al Masabih)*
>
> *"Allah has cursed the muhallil (one who marries a woman and divorces her so that she can go back to her first husband) and the muhallal lahu (first husband)."*

7.14 It is pertinent to note that even though the term *halala* has not been mentioned in the Holy Quran, this condition of *halala* has been specifically provided in the Holy Quran (Al- Baqarah 2:230) and that it is mandatory for all believers to follow the diktat of the Holy Quran (Surah-Al-Nisa 4:59, Surah-Al-Anfal 8:20) and no deviation therefrom is permitted (Surah-Al-Ahzab 33:36 and Surah-Al-Hashr 59:7). Consequently, if the former husband, who had effected divorce by pronouncing Triple Talaq, takes his ex-wife back into marriage *halala* taking place in its natural course, he will be

committing a sin, the consequences of which would be far more disastrous. It is reiterated that the children born out of such a relationship would be illegitimate and their rights of inheritance in his putative father's estate would also be questionable.

7.15 It is further reiterated that since *halala* has been specifically provided in the Holy Quran (*Surah- Al- Baqarah* 2:230), which is nothing but the *ipissima verba* of the Almighty himself, any alteration or denunciation thereof, would mean disregarding the specific verses of the Holy Quran which would actually amount to altering the very essence of the religion of Islam, which is not permitted.

III. *Re Polygamy*

7.16 Coming to polygamy, it is submitted that the Quran, Hadith and the consensus view allow Muslim men to have up to 4 wives at a time. Though polygamy is permitted, it is not obligatory or encouraged; rather, jurists regard monogamy as a better practice in usual conditions. However, Polygamy meets social and moral needs and the provision for it stems from concern for women. The policy of Islam is to discourage Polygamy but not to prohibit it. Islam encourages monogamy but does not make it mandatory.
The Quran lays down this permission thus:-

> *"If you fear that you will not do justice to the orphans, then, marry the women you like, in twos, in threes and in fours. But, if you fear that you will not maintain equity, then (keep to) one woman, or bondwomen you own. It will be closer to abstaining from injustice." [Surah-Al-Nisa, 4:3]*

7.17 All jurists therefore maintain that one may have up to four wives. However, this permission is tied up with justice to all. Only he who can treat all his wives equally in fulfilling his obligations to them may have more than one wife.

7.18 There is a severe warning for him who does not treat his wives justly. The Prophet (PBUH) cautioned: "*If one has two wives and does not treat them justly, he will appear on the Day of Judgment as one afflicted with paralysis."* (*Al-Mustadraklil Hakim, Kitab Al-Nikah,* Hadith number: 2759)

7.19 Muslim jurists maintain that one should rest content with a single wife. The Quran, no doubt, allows taking more than one wife. However, it does not prescribe it as something mandatory, or even desirable. Yet, since polygamy is endorsed by primary Islamic sources, it cannot be dubbed as something prohibited. This is because, as per the Holy Quran, if something has been declared as lawful by the Almighty then no one else can prohibit it (Surah- Al-

Tahrim, 66:1). The Quran proclaims: "*O Prophet, why do you ban (on yourself) something that Allah has made lawful for you, seeking to please your wives? And Allah is Most-Forgiving, Very-Merciful"* [Surah- Al-Tahrim, 66:1]

7.20 The aforesaid verse forbids that a lawful thing should be declared as unlawful by anyone. When even the Prophet (PBUH) did not have this privilege, no one else can prohibit something lawful. Elsewhere, the Quran says: Say, *"Who has prohibited the adornment Allah has brought forth for His servants, and the wholesome things of sustenance?"* [Surah-Al-Araf 7:32]. One is thus not authorized to forbid what Allah has made lawful

7.21 Thus, it is clear from the above that something declared lawful by the Quran and Hadith, even if it be not something desirable, cannot be forbidden by State or by judicial pronouncement, for it amounts to denying people their due. Thus, when the Quran categorically permits polygamy, and also directs that the practices permitted by the almighty cannot be forbidden by anyone else, not even the Prophet (PBUH), in such circumstances, disallowing or forbidding polygamy would actually amount to flagrant disregard of the Holy Quran and would lead to alteration of the verse of the Holy Book , which is the foundation of the religion of Islam and the essence of which cannot be diluted by modifying or supplanting a different view than what has been prescribed by the Almighty himself. It is reiterated that the Courts ought not to supplant their own views in place of the verses of the Holy Quran, particularly when the practices ordained by the Holy Quran are essential part of the religion of Islam as Quran provides a comprehensive way of life for each Muslim and it is nothing but the direct word of Allah himself.

7.22 In view of the above, it is submitted that Talaq, Halala and Polygamy are all an integral part of religion of Sunni Muslims following four schools of thought provided by the Holy Quran and thus being essential to the religion of Islam are protected by virtue of Articles 25, 26 and 29 of the Constitution.

7.23 It is quite manifest that the evolving legal culture in India recognizes sexual relationship by a man outside his marriage. Under the Protection of Women from Domestic Violence Act, 2005, a live-in relationship is recognized and the woman who is in a live-in relationship is given rights of maintenance and residence. The legal provisions clearly reflect the moral/normative standards prevalent in the society, that being the case, a man taking more than one wife through marriage cannot be stigmatized as immoral.

8. Whether the provisions of the Muslim Personal laws sought to be reviewed by way of the present Petitions are protected by Articles 25 and 26 read with Article 29 of the Constitution of India?

8.1 It is submitted that the issue of Muslim Personal Law is a cultural issue which is inextricably interwoven with religion of Islam. Thus, it is the issue of freedom of conscience and free profession, practice and propagation of religion guaranteed under Article 25 and 26 read with Article 29 of the Constitution of India.

8.2 The protection of Article 25 and 26 is not limited to matters of doctrine or belief, but it extends to the acts done in pursuance of religion.

8.3 It is submitted that the principles of marriage and divorce differ in each religion. Each religion views these principles in a different context and therefore the principles in each religion are unique and peculiar to that particular religion only. In such circumstances, one cannot look at the validity of the principles of one religion or judge them as being unequal with the rights in another religion because the principles in each religion are peculiar to only that religion and these principles have been cloaked with the protection under Article 25, 26 and 29 so as to preserve the uniqueness of each religion.

8.4 It is submitted that this Hon'ble court in *Syedna Taher Saifuddin Saheb v. State of Bombay*, 1962 Supp (2) SCR 496 had held that the protection of Articles 25 and 26 was not limited to matters of doctrine or belief but they extended also to acts done in pursuance of religion and therefore contained a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. It was also held that what constituted an essential part of religion or a religious practice had to be decided by the Courts with reference to the doctrine of a particular religion and included practices which are regarded by the community as a part of its religion.

9. Whether International instruments to which India is party/signatory or domestic practices of foreign countries can have a bearing on the issues in the present petition?

I. *Re International Conventions*

9.1 It is submitted that this issue has arisen because of the prevailing misconception that Islam discriminates against women. Most of the International Conventions cited by other parties relate to general resolutions/declarations of women rights for upliftment of status of women in the Society.

9.2 Before the advent of Islam, women had very few rights, if any. The practice of female infanticide was rampant and it was not uncommon for small girls to be buried alive during times of scarcity. Islam spread a revolutionary message at that time and uplifted the status of women in the society. Islam put an end to female infanticide and forbade the practice. The Holy Quran also provided for equality of sexes in stature and worship. In fact the Prophet Mohammed's wife, Khadija was herself a financially independent businesswoman.

9.3 Further, Islam was the first religion in the world to give property rights to women. In Europe, until the 19th Century women did not have the right to own property. While Britain was perhaps the first country to give property rights to women by passing the Married Women Property Act in 1860, more than 1400 years ago, the right was clearly established in Muslim Personal Law. Furthermore, Islam was the only religion at that time which provided women to choose their life partner.

9.4 Additionally, during the reign of Caliph Umar, women participated in law making. In fact in the most authentic collection of Hadith, Hadith Bukhari, a section is devoted to the participation of women not only in public affairs, but in the battlefield too. (*Al-Sunan Al-Kubra lil Bayhaqi*, *Kitab Al-Nikah,* Hadith number: 14336)

9.5 These are only a few examples of the propagation of equal status of women in Islam. Coming to the present-day conventions, the main allegation that has been made is with respect to Convention on the Elimination of all forms of Discrimination against Women (CEDAW), United Nations Universal Declaration of Human Rights (UDHR), International Covenant of Economic, Social & Cultural Rights,1966 and International Covenant of Social & Political Rights,1966.

9.6 With regard to the ratification of CEDAW, it is submitted that India has made certain declarations and reservations to CEDAW. These declarations/ reservations were first made upon signature and then confirmed upon ratification. The first declaration made by India, was with a view to protecting the cultural/religious practices of the various minorities including Tribes in India. The declaration reads as follows:-

> *"i) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."*

9.7 Thus, in view of the above, it is clear that India has itself committed that it will not interfere with the personal affairs of any community without the initiative and consent of the concerned community itself. Accordingly, this positive obligation imposed upon itself by India, cannot be ignored while looking at the provisions of CEDAW. It is therefore submitted that since there has been no request or initiative by the members of the Muslim Community for change, modification or amendment of its personal laws pertaining to marriage, divorce and maintenance, such policy change cannot be thrusted upon them in the name of social reform.

9.8 It has been stated by the Union of India that UDHR, International Covenant of Economic, Social & Cultural Rights, 1966 and International Covenant of Social & Political Rights, 1966 lay stress on equality between men and women. It is submitted that Islam always considered men and women equal, this is substantiated by the following:-

a) In Islam both, the male and the female are equal in terms of their humanity. Islam does not categorize women, for instance, as the source of evil in the world for some & original sin that caused Adam (PBUH) to be dismissed from Paradise, or to be the cause of evil in the world by setting loose a Pandora's box of vices, as reflected in some fables. The following verses from the Holy Quran depict the underlined equality between men and women:-

> *"O men, fear your Lord who created you from a single soul, and from it created its match, and spread many men and women from the two. Fear Allah in whose name you ask each other (for your rights), and fear (the violation of the rights of) the womb-relations. Surely, Allah is watchful over you.***"** [Surah-Al-Nisa 4:1]
>
> "*Does man presume that he will be left unchecked? Was he not an ejaculated drop of semen? Then he became a clot of blood, then He created (him) and made (him) perfect, and made from him two kinds, male and female. Has He no power to give life to the dead?"* [Surah- Al- Qiyamah 75:36-40]

b) Thus as is evident, Allah illustrated in the verses that he created both sexes from one single source. There is no difference between the two sexes in terms of qualifications in humanity, and each complements the other as the two genders of the species. Islam has abolished and abrogated all the previous unjust laws that demoted women as inferior in quality and nature. The Prophet of Allah (PBUH) said:

“Verily, women are the twin halves of men.”
[Abu Dawood #234, Tirmidhi #113 & others]

c) Further, in equal religious duties and rituals are required from both women and men. Testimony of Faith (Shahaadah), Prayer (Salah), Obligatory Charity (Zakah), Fasting (Saum), and Pilgrimage (Hajj) are equally required of both genders. In some cases the requirements are a bit easier on women to alleviate their special cases of hardship.

d) Both males and females have similar rewards for obedience and penalties for disobedience in this world and hereafter. As stated by Allah in the Holy Qur'an:

“Whoever, male or female, has acted righteously, while being a believer, we shall certainly make him live a good life, and shall give such people their reward for the best of what they used to do.” [Surah -Al-Nahl16:97]

“*Surely, Muslim men and Muslim women, believing men and believing women, devout men and devout women, truthful men and truthful women, patient men and patient women, humble men and humble women, and the men who give Sadaqah (charity) and the women who give Sadaqah, and the men who fast and the women who fast, and the men who guard their private parts (against evil acts) and the women who guard (theirs), and the men who remember Allah much and the women who remember (Him) – for them, Allah has prepared forgiveness and a great reward”*[Surah -Al-Ahzab33:35]

e) Women have the same moral obligations and are entitled to the same general rights as men in guarding chastity, integrity and personal honour and respect, etc. No double standards are allowed. For instance, those who falsely accuse a chaste woman of adultery or fornication are publicly punished, just as if a man is slandered. Allah, the Exalted, states in the Holy Qur'an:

“Those who accuse the chaste women (of fornication), but they do not produce four witnesses, flog them with eighty stripes and do not accept their any evidence any more. They are the sinners” [Surah-Al-Nur 24:4]

f) Women are equally qualified and allowed to engage in financial dealings and property ownership. According to Islamic law women can own, buy, sell and undertake any financial transaction without the need for guardianship, and

without any restrictions or limitations - a situation unheard of in many societies until modern times.

g) Islam indicates that a man who honours, respects and deals with women justly and integrally, possesses a healthy and righteous personality, whereas a man who mistreats them is an unrighteous and unrespectable man. Prophet Mohammed (PBUH) said:

> *The most complete believer is the best in character, and the best of you is the best to his womenfolk.* [Tirmidhi #1162 and verified]

h) Islam entitles women to the same rights as men in terms of education and cultivation. Prophet Mohammed (PBUH) said, as reported and authenticated by the scholars of prophetic traditions:

> *Seeking knowledge is compulsory for each and every Muslim (i.e. both male and female).* [Ibn Majah #224 al-Baihaqi and verified]

i) Muslim scholars unanimously hold that the word Muslim when used in revealed scriptures includes both male and female. Thus, Islam entitles women to the same right of education in order to understand the religious and social obligations, and obligated them both to raise their children in the best manner, in accordance with the right Islamic guidance. Of course, women have certain obligations in bringing up their children that commensurate to their abilities and men have complementary obligations to finance, protect and maintain according to their added responsibilities in the family unit. The Prophet (PBUH) said:

> *"Whoever takes care of two girls until they reach puberty, he and I will come on the Day of Resurrection like this."* [Muslim #2631]

The Messenger of Allah (peace be upon him) then joined his fingers to illustrate this.

j) Men and women have similar obligations and responsibilities to reform and correct the society to the best of their capability. Men and women shoulder the responsibility of enjoining good and forbidding evil equally, as Allah, the Exalted, states in the Holy Qur'an:

> "*The believers, male and female, are friends to each other. They bid virtue and forbid vice and establish Salah and pay Zakah and obey Allah and His*

Messenger. Those are the ones whom Allah will bless with mercy. Surely, Allah is Powerful, Wise." [Surah -Al-Tawbah9:71]

k) Men and women have set and determined rights to receive their fair share of wealth, just as they are obliged to give Zakah (Obligatory Charity) according to the set calculation. All Muslim scholars unanimously agree upon this. A woman has her set share of inheritance, which was a right unthinkable in many societies. Allah (The Almighty) says in the Holy Quran that:

"For men there is a share in what the parents and the nearest of kin have left. And for women there is a share in what the parents and the nearest of kin have left, be it small or large__a determined share." [Surah- Al-Nisa4:7]

l) A woman, just like a man, can give someone the right of seeking refuge and security among the Muslims [Bukhari #3008]. This is also proven by the famous story of Um Hani' ('Mother of Hani') when she gave protection to a polytheist who sought refuge with her on the day of the conquest of Makkah after her relative threatened to kill that person (for some past enmity) so the Messenger of Allah (Peace be Upon Him) said,

"We protect and give asylum to whomever you give asylum O Um Hani". [Bukhari #350]

9.9 Thus, in view of the above, it is submitted that it is a misconception that the Muslim personal laws particularly laws relating to marriage and divorce discriminate against women; in fact it was one of the first religions to grant equal rights to women. This is also evident from the following verse:

"So, their Lord answered their prayer: "I do not allow the labour of any worker from among you, male or female, to go to waste. You are similar to one another." [Quran, Surah-Al-Imran *3:195*]

9.10 *Islam* recognizes the hard facts of nature. There are differences in physical, mental and psychological qualities, inclination and abilities of two genders namely male and female. The Policy of Islam to achieve equality between two genders is to adjust the rights conferred and obligations imposed on the two genders and achieve equilibrium of rights and obligations on men and women. Islam does not believe in mathematical equality between the sexes but believes in establishing equilibrium between rights and obligations between

men and women and achieve equality between them. Allah, the Exalted and Almighty, says in the Holy Qur'an:

> *“And from every thing We have created pairs of twos, so that you may heed” [Surah-Al- Dhariyat 51:49]*

9.11 Thus in view of inherent differences between a man and a woman, Islam distributes the duties between a man and a woman, in a way that the role of one complements the role of other. Consequently, since the duties of men and women are earmarked, their rights are underlined by the personal laws.

a) The United Nations Universal Declaration of Human Rights states that marriage shall be entered into only with free and full consent of the intending spouses. Likewise, Islam protects women’s freedom to choose her own marriage partner and describes the marital relationship as one of “affection and mercy.” The Qur'an states:

> *"And it is among His signs that He has created for you wives from among yourselves, so that you may find tranquility in them, and He has created love and kindness between you. Surely in this there are signs for a people who reflect”* [Surah-Al-Rum 30:21]

b) There are ample examples in the Sunnah, practices of the Prophet, where the Prophet protected a woman’s right to choose her own spouse and even nullified the agreement if forced against her will. Ibn Abbas reported that a girl came to the Messenger of God, Muhammad, and she reported that her father had forced her to marry without her consent. The Messenger of God gave her the choice, between accepting the marriage or invalidating it. In another version, the girl said:

> *"Actually I accept this marriage but I wanted to let women know that parents have no right [to force a husband on them].”* [Ibn Maja, No. 1873]

c) The Qur'an (Surah-Al-Nisa4:21) refers to marriage as a *mithaq*, i.e. a solemn covenant or agreement between husband and wife, and enjoins that it be put down in writing. Since no agreement can be reached between the parties unless they give their consent to it, marriage can be contracted only with the free consent of the two parties. The Prophet (PBUH) said:

> *"The widow and the divorced woman shall not be married until their consent is obtained, and the virgin*

shall not be married until her consent is obtained" (Al-Bukhari).

This aspect is greatly emphasized by Imam Bukhari. He, in fact, gave one of the chapters in his Sahih the significant title:

"When a man gives his daughter in marriage and she dislikes it, the marriage shall be annulled."

d) She enjoys property and inheritance rights. She can also conduct her own separate business. [Quran, Surah-Al-Nisa *4:7*]

e) The dowry in Islam is a gift from a husband to his wife. [Quran, Surah-Al-Nisa *4:4*]

f) A Muslim widow is allowed to remarry, and her remarriage is the responsibility of the Muslim society. [Quran, Surah-Al-Baqarah *2:234*]

g) In Islam, re-marriage of a widow has been greatly emphasized. At the same time, it has also been often stated that people, who bring up orphans, are very dear to Allah (swt). This should give a very good idea, as to what is the reward for someone who gets married to a widow and supports her children from her deceased husband.

h) A giver of maintenance to widows and poor is like a giver in the way of Allah (swt), an utterer of prayers all night and fasting during the day. [Bukhari]

i) "*I and the person, who brings up an orphan, will be like this in Heavens,*" said Prophet Muhammad (sa), and he put his index and middle finger together. [Bukhari]

9.12 As averred above, Islam has been one of the first religions to grant these rights to women. In fact, most of the religions in India are till date still struggling with the evils like female infanticides, exploitation of widows, dowry problems, when Islam had clear laws to counter such problems as far as in 629 AD–632 AD. In fact even the right of a woman to seek divorce was first recognized in Islam only. Muslim Women have rights to seek divorce under Muslim Personal Law, in the form of *Khula* or *Faskh*.

9.13 It is submitted that all the international conventions which have been cited by the other parties focus only on the issue of equality of women, uplifting their status and the cause of gender justice. In view of the aforementioned, it is clear that Islam was the first religion to grant equal status to women and that was almost around 1400 years ago before any nation of the modern world acknowledged these

rights. Further, in view of the division of roles of a man and a woman as per the Holy Quran, both the man and the woman have been given roles which complement each other and thus their rights and liabilities have also been balanced accordingly. Thus, it cannot be said that Muslim Personal Law has not provided equal status to women and that India has failed to keep up with any of its international obligations in relation to gender justice due to the prevailing Muslim Personal Laws.

9.14 It is submitted that reference to international covenants/instruments in the context of women's right under Islam is inappropriate. Article 1 of ICESCR and Article 27 of ICCPR recognize group rights for development of culture as well as religious identity of the minorities even if the reference to the international instruments are to be made then in that event the same must be read holistically and the just equilibrium is to be achieved between rights of individual and rights of group enshrined in such instruments. It is submitted that Muslim Personal Law achieves the just balance between group rights and individual rights and there is no conflict as such. For easy reference the said Articles are stated below:

Article 1 of ICESCR,

> "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*."

Article 27 of ICCPR,

> "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*

9.15 Even Article 4(2) of the U.N. General Assembly Resolution on Declaration on the Rights of the persons belonging to National or Ethnic religious and linguistic minorities 1992 provides that, *"States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national laws and contrary to international standards. Thus, it is clear that every section of the Indian citizen has a right to conserve and develop their culture and family laws based on religion and therefore is immune from State interference."*

9.16 Moreover, Universal Declaration on Cultural Diversity, 2001 reaffirms that culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs and thus India, being a signatory to the same must also give due regard to the cultural uniqueness of Muslim Personal Laws which are a part of their religious and cultural identity.

9.17 It is submitted that there is an universal urge to preserve one's identity. In India with its vast size and its people professing and practicing different ethnicity, belonging to different religions, it is but natural to expect different groups of people to have the urge to preserve their identity and there is distinction between cultural, religious, regional and linguistic identity. In fact, the preservation of culture being the basic feature of the fundamental right guaranteed under the Indian Constitution, any interference with the same would lead to violation of Constitutional principles.

i. *Re Foreign Laws*

9.18 Muslim Personal Law as followed by Indian Muslims is based on four schools of Sunni persuasion and thus, changes made in other countries following myriad schools of law, belonging to different sects and cultures cannot serve as a guide for bringing about changes to the Shariah law in our country. The changes to Muslim Personal law which is contrary to or inconsistent with the Holy Quran and other sources based on it would be in direct conflict with the religious freedom guaranteed to Muslims, who follow the Shariah law as per their faith.

9.19 Pertinently, the alleged changes/reforms in Muslim Personal laws in foreign regimes are not relevant. It is relevant to mention that the practices under challenge are essential part of religion of Sunni Muslims pursuing four schools. However, changes, if any, can be brought about by legislatures within Constitutional parameters. In fact this principle has been elaborated by this Hon'ble Court in Riju Prasad Sarma v. State of Assam (2015) 9 SCC 461(at page 497):

> *"…But in a pluralist society as existing in India, the task of carrying out reforms affecting religious beliefs has to be left in the hands of the State. This line of thinking is supported by Article 25(2) which is clearly reformist in nature. It also provides scope for the State to study and understand all the relevant issues before undertaking the required changes and reforms in an area relating to religion which shall always be sensitive. While performing judicial functions strictosensu, the Judiciary cannot and should not be equated with other organs*

of State—the Executive and the Legislature. This also fits in harmony with the concept of separation of powers and spares the judiciary or the courts to dispassionately examine the constitutionality of State action allegedly curbing or curtailing the fundamental rights including those under Articles 25."

9.20 Additionally, parliamentary democracy and separation of powers between the executive, legislature and the judiciary are a part of the basic structure of the Constitution of India. In view of the foregoing, it is clear that the changes sought through this Hon'ble Court in Muslim Personal laws on the aegis of the laws of foreign countries are thus in conflict with the principles of democratic principles as enshrined in the Constitution of India, as the impugned principles of Muslim Personal Law can be changed, if at all only by way of legislative process and in consonance with the purpose and the spirit of Parliamentary Democracy and Constitutional parameters.

9.21 It is humbly submitted that Courts must not indulge in areas concerning state policy and as aptly put by Judge Koopmans, *"Democracy and human rights are, empirically speaking, closely connected; protection of one at the expense of the other therefore always runs the risk of being counterproductive… if we want to retain democracy, the courts should face their share of job"* [Koopmans, "*Legislature and Judiciary: Present Trends"* in New Perspectives for Common Law of Europe 337 (1978)]. Besides, in the land mark case of *Dennis vs. U.S.* 330 U.S .48 (1950), Justice Frankfurter had observed:

"Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardised when Courts become embroiled in the passions of the day, and assume primary responsibility in choosing between competing political, economic, and social pressures".

9.22 In any event, changes made by foreign countries in Muslim Personal Law, their understanding of the Muslim Personal Law cannot be the basis of interpretation by this Hon'ble Court. Merely because several other nations have carried out an amendment in their laws, cannot be the basis for this Hon'ble Court to supplant foreign laws into Indian context by surpassing the democratic legislative process.

9.23 Thus, any interference with Muslim laws would be stepping into the domain of the Legislature. Further, in *Asif Hameed vs. The State of J&K*, (AIR 1989 S.C. 1899) this Hon'ble Court observed:

> *"Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. The legislature, executive, and judiciary have to function within their own spheres demarcated in the Constitution. No organ can usurp the function of another. -- While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint."*

9.24 In view of the aforesaid, it is humbly submitted that this Hon'ble Court ought not to venture into the area of changing Personal laws by following the trend in several other countries. It is pertinent to note that any change or reform that comes with the backing of legislature takes due care of diverse cultural background, sensitivity and sensibility of the stakeholder community and thus is in spirit adheres to both the principles i.e. the principle of democracy and the principle of separation of powers. It is important to note that changes in other countries, with a distinct socio- cultural and even legal back ground must not be applied in Indian context, without appreciating the distinct nature of the Indian society, as doing so shall not only destroy the democratic legislative process underlined in the Constitution of India but it shall also be great injustice to the followers of Islam in our nation.

Filed by

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