BEFORE THE SUPREME COURT OF INDIA

In W.P. (C) No. 118 of 2016

Shayara Bano ...Petitioner

versus

Union of India & Ors. ...Respondent

In the matter of:

Bebak Collective in I.A _____/2016

AND

Centre for Study of Society and Secularism in I.A _____/2016

WRITTEN SUBMISSIONS ON BEHALF OF INTERVENORS

BEBAK COLLECTIVE

AND

CENTRE FOR STUDY OF SOCIETY AND SECULARISM

BY SR. ADV. MS. INDIRA JAISING

11.05.2017

1. BEBAAK COLLECTIVE & CSSS

1.1. The filing of the present writ petition was followed by the filing of, *inter alia*, two intervention applications – one by Bebaak Collective and another by Centre of Study of Society and Secularism.

1.2. *Bebaak Collective* is an organisation registered under the Societies Registration Act, 1860 through Ms. Hasina Khan who has been associated with the women's movement for two decades now, closely working with Aawaz-E-Niswaan and associated with Bebaak Collective for the past three years. Bebaak Collective came into being through three years of collective initiative by autonomous women's groups from across different states in our country who work with Muslim women's issues. These groups are as follows: Parvaaz (Ahmedabad), Janvikas (Ahemdabad), Sahiyar (Vadodara), Aawaz-E-Niswaan (Mumbai), Muslim Mahila Manch (Nagpur), Pehchaan (Dehradun), Muhim (Farrukabad). Bebaak Collective is committed to the cause of furthering the rights of Muslim women and to this end recently organised a National Convention of Muslim women: Sadak se Sansad Tak in New Delhi in the end of February 2016. The convention had a participation of around 500 Muslim women from all over the country and several issues came up in the convention including polygamy and triple talaq. Bebaak Collective is actively approaching different ministries of the Central Government putting forth the demands and concerns of Muslim women on the issue of marriage and talaq and in April 2016 has intervened in the above writ petition to bring voices of Muslim women to the forefront.

1.3. *Centre of Study of Society and Secularism (CSSS)* is a society registered under the Societies Registration Act, 1860 and filed an intervention application in the above said writ petition through it's Director Mr. Irfan Engineer. CSSS is engaged in promoting a just and peaceful society where all individuals respect each others' religio-cultural views, diversity, uphold the dignity of all and ensure social justice and development for empowerment of the most deprived and marginalized since its inception in May 1993. CSS has organized various seminars on: Communal Harmony in Delhi to commemorate 125th birth anniversary of Mahatma Gandhi, the Status of Minorities in South Asia, the Uniform Civil Code, Personal Law and Gender Justice. CSSS conducts research on various topics including "A Critical Analysis of Fatwas Issued on Muslim Women", "Secularism in India", "Jihad", "Gateway to Peace", and publishes a quarterly journal, "Indian Journal of Secularism" which contains a wide range of articles, research papers with focus on secular and communal problems from the historical, political economic, cultural and sociological perspectives. CSSS in the course of it's work has become conversant with issues relating to Muslim Law in matters of marriage and divorce and concurs with the contents of the present petition on Constitutional Law.

1.4. Both Intervenors, Bebaak Collective and CSSS, seek to bring all personal laws, regardless of their origin and belongingness to a religion, within the purview of judicial review.

2. MEANING OF PERSONAL LAWS.

2.1. There is no definition of personal laws in the Constitution, except that there is a reference to it in Entry 5, List III, which reads as:

5. 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.

2.2. In the aforesaid matters, Muslims were governed by the Sharia before the commencement of the Constitution by virtue of The Muslim Personal Law (Sharia) Application Act 1937. The said Act was the "law in force" within the meaning of Article 13(3)(b), and Article 372 of the Constitution of India.

2.3. A reading of Entry 5 makes it clear that personal law is law regulating marriage and divorce, infants and minors, adoption, wills, intestacy and succession, joint family property and partition etc. The subject matter of personal laws is what is commonly described as Family Law, and disputes relating to family law are now adjudicated by Family Courts set up under the Family Courts Act 1984. The Act has jurisdiction of a District Court in respect of any suit or proceeding between parties to a marriage for decree of nullity, or of restitution of conjugal rights or judicial separation or dissolution of marriage, or a suit relating to the validity of marriage or matrimonial status. Explanation to Section 7 and Section 7(1) of the Family Courts Act 1984 read as:

"*Jurisdiction. - (1) Subject to the other provisions of this Act, a Family Court shalla. have and exercise all the jurisdiction exercisable by any district Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and b. be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be. such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.*

Explanation *-The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely:*
a. a suit or proceeding between the parties to a marriage for decree of a nullity marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
b. a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
c. a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
d. a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
e. a suit or proceeding for a declaration as to the legitimacy of any person;

f. a suit or proceeding for maintenance;
g. a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor."

2.4. Hence it can be said that Personal Laws deal with family law and the law of succession etc. Family law relates to the organization and regulation of social institutions such as marriage, divorce, child custody, inheritance etc. Hence personal laws are laws regulating social institutions and not laws dealing with religion as such.

2.5. The consequences of the breakdown of marriage are civil in nature since they alter the status of a woman in relation to her succession rights, marriage, rights of residence in the matrimonial home, maintenance and custody of children.

2.6. Status is defended as belonging to particular class of persons to whom the law assigns peculiar legal capacity or incapacity or both. It determines the rights duties, privileges, powers, liabilities and immunities to which a person is subject to. These Rights and liabilities form the basis of decisions before any court including a Constitutional Court.

2.7. The issue in the present petition is not about any particular religion or any particular practice, but it is about the centrality of Part III of the Constitution in the lives of the Indian citizens, irrespective of religion, region, caste or gender. To say that personal laws, which govern a large part of an individual's life, including marriage and divorce, succession and inheritance, adoption, and guardianship, amongst others is outside the purview of fundamental rights is to make a mockery of the Constitution.

3. WHETHER THE "RULE OF DECISION" BEFORE A COURT CAN BE VIOLATIVE OF FUNDAMENTAL RIGHTS INCLUDING ARTICLES 14, 15 AND 21 OF THE INDIAN CONSTITUTION.

3.1. The question that arises for consideration is, whether a "rule of decision" can be challenged on the ground that they violate fundamental rights. It is submitted that no "rule of decision" can violate Part III of the Constitution nor be applied by the courts in any dispute before it.

3.2. It has been argued that personal law pertains to relations between private individuals and that the State has nothing to do with them, hence they cannot be subject to Part III of the Constitution. In this regard, it must be noted that Section 2 of the Sharia Act of 1937 is directed to the Courts and mandates the Court to apply the Sharia as the **"rule of decision"**. Hence it is not a private matter between the parties but is a matter of public law.

3.3. Section 2 of The Muslim Personal (Sharia) Law Act, 1937 reads as follows:

"Section 2 Application of Personal law to Muslims:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

3.4. In any event, this Court vide a two judge bench in ***Charu Khurana v. Union of India***, 2015 (1) SCC 192, while holding that the rule prohibiting women make-up artists and hair dressers from becoming members of registered make-up artists' and hair dressers' association is violative of Articles 14 and 15 as it discriminates based on sex and is opposed to gender justice, also held that the Registrar under the Trade Unions Act cannot certify bye laws of a union registered with it which excluded women from the membership of a profession, held as follows in **Paras. 46 and 50**:

"These bye-laws have been certified by the Registrar of Trade Unions in exercise of the statutory power. Clause 4, as is demonstrable, violates Section 21 of the Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21-A, has only fixed the age. It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood."

"From the aforesaid enunciation of law, the signification of right to livelihood gets clearly spelt out. A clause in the bye-laws of a trade union, which calls itself an Association, which is accepted by the statutory authority, cannot play foul of Article 21."

3.5. The question that arises is whether the Court recognise and enforce as a "rule of decision" any law which violates Part III of the Constitution. It is submitted that no Court can recognise or enforce a law that is in violation of Part III of the Indian Constitution. It is submitted that no Court can adopt "a rule of decision" which violates Fundamental Rights.

3.6. Moreover, the State in recognising such personal laws as being "the rule of decision" brings them within the ambit of 'laws' and 'laws in force' under Article 13.

Interpretation of Article 14

3.7. This article guarantees equal protection OF law and equality BEFORE law. It imposes an obligation on the State to prevent non state actors from discriminating against women.

3.8. The Court should interpret Article 14 also in light of contemporary UDHR jurisprudence on the following UDHR provisions:

UDHR

Preamble

Whereas recognition of the inherent dignity and ***of the equal and inalienable rights of all members of the human family*** *is the* ***foundation of freedom, justice and peace in the world,***

.....

*Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and i****n the equal rights of men and women*** *and have determined to promote social progress and better standards of life in larger freedom*

.....

UDHR

Article 1.

All human beings *are born free and* ***equal in dignity and rights.*** *They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

UDHR

Article 2. ***Everyone*** *is entitled to* ***all the rights and freedoms set forth in this Declaration,*** *without distinction of any kind, such as race, colour,* ***sex****, language,* ***religion****, political* ***or other opinion,*** *national or social origin, property, birth or* ***other status.***

.....

UDHR

Article 7. *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to* ***equal***

protection against any discrimination in violation of this Declaration *and against any incitement to such discrimination.*

The right to equality ***should be read as applying to all human conduct***, ***no exceptions to daddy or hubby.***

3.9. It is the Court's historic responsibility today to **widen, not narrow the right to equality** because the inter-dependent and indivisible rights to EQUALITY AND FREEDOM are the spirit of the age, the spirt of the Constitution and the spirit of the future.

3.10. CEDAW defines discrimination as follows in Article 1:
"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

3.11. Further Article 2 of CEDAW mandates that:

"*States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:*
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) 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;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women."

3.12. India has no reservation to Article 2 and hence the said Article can be used to interprets what amounts to discrimination within the meaning of Articles 14 and 15.

Violation of Fundamental Rights

3.13. It is submitted that the impugned Section 2 is violative of the fundamental rights of Muslim women guaranteed under Articles 14, 15, and 21, in as much as it gives recognition to the impugned practices.

Triple Talaq violates Articles 14 and 21

3.14. The impugned practice of *talaq-e-bidat* is violative of the right to equality of Muslim women guaranteed under Articles 14 and 15 to the extent that a Muslim man exercises power to declare a unilateral divorce and the Muslim woman has no control over such an unilateral, arbitrary, extra-judicial divorce and her marital staus.

3.15. It is submitted that marriage, being a matter of status, its termination, which has civil consequences, must be declared by a competent court of law alone and not by one of the parties to the marriage, namely, the husband unilaterally.

3.16. Despite the safeguards provided by this Hon'ble Court in ***Shamim Ara vs. State of U.P.*** (2002) 7 SCC 518, wherein a valid talaq must be preceded with a reasonable cause, and an attempt at reconciliation by two arbiters, one from each side of the married parties, it is our humble submission that unilateral divorce *per se* is arbitary and discriminatory, and therefore violative of Articles 14 and 15 of the Constitution. The scales are still unequal, and a woman has no judicial recourse, once the reconciliation fails between the two parties. This Hon'ble Court in ***National Legal Services Authority vs Union of India*** (2014) 5 SCC 438 at para 61 observed that "*Equality includes the full and equal enjoyment of all rights and freedom. Right to Equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes.*"

3.17. It is submitted that the impact of such practice of *talaq-e-biddat* is that Muslim women lose their right to residence, are driven to claim maintainance and custody of their children in a court of law, which is often denied to her at the stage of unilateral divorce. This violates their right to life and dignity guaranteed under Article 21 of the Constitution of India. The Allahabad High Court in ***Hina vs. State of UP*** Writ - C No. - 51421 of 2016 /(2016) SCC OnLine All 994 (Paras. 9-10) held that *"The instant divorce (Triple Talaq) though has been deprecated and not followed by all sects of muslim community in the country, however, is a cruel and the most demeaning form of divorce practised by the muslim community at large. Women cannot remain at the mercy of the patriarchal setup held*

under the clutches of sundry clerics having their own interpretation of the holy Quoran."

3.18. It is further submitted that marriage is a contract that entails change in life and a commitment that two people make to each other, out of natural love and affection, to share and care for each other. The rights conferred by virtue of the marriage are legitimacy of children, custody of children, right to reside in matrimonial home. It stands to reason that if that contract has to be terminated, it must be done with good reason and with due regard to the rights of both the parties to the marriage and by a judicial forum.

3.19. In this unilateral form of divorce, Muslim women do not have an equal role in participating in the decision that vitally concerns them. Especially, Muslim women who are homemakers lose social and financial stability, as they no longer receive any support from the husband or family of husband, besides *mehr,* which often is a nominal sum.

3.20. It is an established position in law that when scrutinising the constitutional validity of a provision, the effect or impact of a law must also be looked into. Legislation should not only be assessed on its proposed aims but also on its implications and effects. In this regard, the following decisions may be noticed:

i. Punjab Province v. Daulat Singh AIR 1946 PC 66 (Pg.74): "*Beaumont J. holds that in applying the terms of sub-s. 1 of s. 298, it is necessary for the court to consider the scope and object of the Act which is impugned, so as to determine the ground on which such Act is based. Their Lordships are unable to accept this as the correct test. In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in s. 298, sub-s. 1, but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of sub-s. 1.*"

ii. State of Bombay v. Bombay Education Society (1955) 1 SCR 568 : AIR 1954 SC 561 (Para. 16) :*"The object or motive attributed by the learned Attorney-General to the impugned order is undoubtedly a laudable one but its validity has to be judged by the method of its operation and its effect on the fundamental right guaranteed by Article 29(2). A similar question of construction arose in the case of Punjab Province v. Daulat Singh [(1946) LR 73IA 59] . One of the questions in that case was whether the provision of the new Section 13-A of the Punjab Alienation of Land Act was ultra vires the Provincial legislature as contravening sub-section (1) of Section 298 of the Government of India Act, 1935, in that in some cases that*

section would operate as a prohibition on the ground of descent alone. Beaumont, J. in his dissenting judgment took the view that it was necessary for the Court to consider the scope and object of the Act which was impugned so as to determine the ground on which such Act was based, and that if the only basis for the Act was discrimination on one or more of the grounds specified in Section 298 sub-section (1) then the Act was bad but that if the true basis of the Act was something different the Act was not invalidated because one of its effects might be to invoke such discrimination."

iii. R.C. Cooper v. UOI AIR 1970 SC 564 (Para. 49): *"…If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights."*

iv. Bennett Coleman v UOI AIR 1973 SC 106 (Para. 42): *"The ruling of this Court in Bank Nationalisation case was this:*

"… The correct approach should be to enquire what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restrictions. …Courts have to protect and guard fundamental rights by considering the scope and provisions of the Act and its effect upon the fundamental rights. The ruling of this Court in Bank Nationalisation case is the test of direct operation upon the rights. By direct operation is meant the direct consequence or effect of the Act upon the rights..."

3.21. It is further submitted that in assessing constitutional validity, Courts may take into consideration subsequent events and circumstances, which were non-existent at the time that the law was enacted. The law although may be constitutional when enacted but with passage of time, the same may be held to be unconstitutional in view of the changed conditions. [See: ***John Vallamattom v Union of India*** (2003) 6 SCC 611 at paras 33, 34, 35 and 36]

3.22. Talak-e-biddat may have had its peculiar reasons for its origin in the 2nd century in Islam, but the same reason no longer holds good in the 21st century. With lapse of time, especially after the advent of the Constitution in 1950, it has become arbitrary, unreasonable and violative of the doctrine of equality, and thus ought to be struck down.

Nikah-halala violates Articles 14, and 21

3.23. It is submitted that the impugned practice of *nikah-hala* is in violation of Articles 14, and 21 that guarantee the right to gender justice, dignity and personal autonomy of a Muslim woman who wants to remarry her former husband.

3.24. It is submitted that such impugned practice of *nikah-hala* is regressive and violates the dignity of Muslim women who wish to remarry their former husbands who divorced them through the mode of *talaq-e-biddat* or triple talaq. It has the effect of stereotyping women as property of her fomer Muslim husband as she has to pay the price the pronunication of *talaq-e-biddat* by her former husband by marrying another man and consummating such marriage before she can marry her former husband.

3.25. The impugned practices violate the right to dignity guaranteed under Article 21 of the Constitution of India. It is contended that talaq-e-biddat subjects Muslim women to great indignity and inhumanity, since it puts them at the mercy of their husbands, who may divorce them on any whim or fancy. This practice makes them vulnerable to all kinds of physical, sexual, emotional and economic abuse, thereby denying them their right to live with dignity and self-respect. Again, few decisions may be noted:

i. Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors (1981) 1 SCC 608 (Paras. 6, 8): *"Principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person." "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings..... Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."*

ii. Anuj Garg v. Hotel Association 2008 (3) SCC 1 (Paras. 36, 39, 40, 41- 43, 45-46, 51): "*The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims.*" "*Gender equality today is recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe.*" "*. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.*" "*Therefore, one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general*

ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of state." "The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means."

iii. Charu Khurana v. Union of India 2015 (1) SCC 192 (Paras. 2, 4, 7, 9, 51-52):*"the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other"..."""Lord Denning in his book Due Process of Law has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom-develop her personality to the full-as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals." "The Court observed that when there is violation of gender justice and working woman is sexually harassed, there is violation of the fundamental rights of gender justice and it is clear violation of the rights Under Articles 14, 15 and 21 of the Constitution."*

3.26. It is stated that both talaq-e-bidat and nikah halala violate the fundamental right to autonomy and self-determination guaranteed under Article 21 of the Constitution. Having no control over the one's marital status, wherein one may be unilaterally divorced at any moment, totally denudes the woman of her agency as well as decision-making power vis-à-vis her own marriage. There can be no more injustice than to be constantly at the fear of being unilaterally divorced, with no judicial recourse available. The limitations that get being imposed, owing to this practice, on a woman's autonomy, liberty and freedom, cannot even be fathomed. No civilized society should subject even one individual, let alone a significant section of its population, to a life of this indignity and unfairness.

3.27. It is further submitted that marriage among Muslims is admittedly a contract and hence it cannot be dissolved in a unilateral manner. It is submitted that any rule of law or custom or contract that permits unilateral termination of a marriage contract affecting the status of a woman is unconscionable and against public policy and void within the meaning of Section 23 of the Indian Contract Act, 1872:

i. Central Inland Water Transport Corpn. v. Brojo Nath Ganguly (1986) 3 SCC 156 (Para. 89) "*Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us*

by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal."

Impugned Practices violate Article 15

3.28. It is submitted that to the extent that the impugned practices can be exercised unilaterally by the husband alone, they are violate of Article 15 and the discrimination is based on sex alone. It is also discriminatory since it has a disparate impact on women alone. The impact of unilateral triple talaq is to render the wfie instantly homeless, being driven out of the matrimonial home for no reason other than that the husband has pronounced a unilateral talaq. It also renders her vulnerable to economic destitution driving her to lengthy litigation for a just and fair maintenance.

3.29. This Court in Daniel Latifi v. UOI (2001) 7 SCC 740 (Para. 20) noted that women contribute to the generation and accumulation of household assets and contribute with their labour and hence, it would be unjust and unfair to deny them post divorce maintenance which is just and fair for life:

"In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our

society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life — a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question."

3.30. In ***National Legal Services Authority vs. Union of India*** (supra) (para 63), it was categorically observed that "*Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender-based discrimination.*"

3.31. It is therefore submitted that the said impugned practices violate Article 15 being based on sex alone.

Muslim Personal Law has got statutory *imprimatur*

3.32. Be that as it may, by virtue of the *Muslim Personal Law (Shariat) Application Act*, 1937, which is an "Act to make the provision for the application of Muslim Personal Law (Shariat) to Muslims", it can be argued that Muslim Personal Law has got statutory *imprimatur*. Through this Act, Muslim Personal Law, i.e., Shariat is being made applicable to the Muslims in India.

3.33. Section 2 of The Muslim Personal (Sharia) Law Act, 1937 reads as follows:

"Section 2 Application of Personal law to Muslims:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

3.34. In effect, in areas explicitly mentioned above, including dissolution of marriage, which is inclusive of 'talaq', ila, zihar, lian, khula and mubaraat, Shariat shall apply. It is noted that the term 'talaq' includes talaq-e-biddat.

3.35. The statutory flavour of the 1937 Act was recognised by the Delhi High Court in ***Masroor Ahmed v. State (NCT of Delhi) and Anr*** [(2007) ILR 2 Delhi 1329], wherein it was held that "*this provision requires the court before which any question relating to, inter-alia, dissolution of marriage is in issue and where the parties are muslims to apply the muslim personal law (shariat) irrespective of any contrary custom or usage. This is an injunction upon the court (See: C. Mohd. Yunus v. Syed Unnissa (1962) 1 SCR 67). What is also of great significance is the expression-'dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat. This gives statutory recognition to the fact that under muslim personal law, a dissolution of marriage can be brought about by various means, only one of which is talaq*."

3.36. This decision was affirmed by the Supreme Court in many cases, including ***Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori*** (2014)10SCC736.

3.37. It is submitted that The Muslim Personal (Sharia) Law Act, 1937, by virtue of being a statute, which not being repealed, remains in force after the coming into force of the Constitution and falls under the definition of "laws in force" under Article 13(3)(b) read with Article 13(1) and Article 372 of the Indian Constitution. Thus, the Act can be challenged under Article 32 for being violative of fundamental rights to equality, non-discrimination, dignity and life guaranteed under Articles 14, 15 and 21 of the Constitution, although the actual content of the Sharia remains uncodified.

3.38. It is further submitted that there can be no governing Muslim Personal Law in relation to marriage and divorce outside the framework of Muslim Personal Law (Shariat) Application Act, 1937 and to that extent, the claim that the imugned practices are part of Muslim Personal Law is nothing but a claim that the impugned practices are protected under the Muslim Personal Law (Shariat) Application Act, 1937. The said law is therefore capable of constitutional challenge.

4. INTENTION OF THE 1937 ACT

4.1. It has been argued that the Muslim Personal Law (Shariat) Application Act, 1937 was enacted only to overrule discriminatory customary practices, especially relating to inheritance by women, and to make Muslim Personal Law applicable to Muslims in India by excluding customs and that the intention was not to ever codify the Sharia. Even while admitting that the intention of the Act was to exclude custom, the Act further mandated that the Sharia would be "the rule decision" thus making the Sharia applicable by Statute. Thus, it becomes "laws in force" within the meaning of Article 13(1) read with Article 13(3)(b). Even otherwise, personal law is " law" within the meaning of Article 13.

5. INTENTION OF CONSTITUTION MAKERS

5.1. It has been further argued that the intention of the Constitution makers was to grant protection to personal laws. It is submitted that as has been shown in the course of arguments, repeated attempts were made in the Constituent Assembly to exempt personal law from the operation of Part III, or from the ambit of Article 44, which were emphatically rejected. It was the explicit intention of the Constitution makers to subject personal laws to State regulation.

5.2. The drafters of the Constitution. As Dr. B.R. Ambedkar famously said, *"The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters, we will come to a stand still…After all, what are we having this liberty for? We are having this liberty in order to reform our social system which is so full of inequities, so full in inequities, discrimination and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State."* [See: Constituent Assembly Debates, Vol. VII, 4th November, 1948 to 8th January, 1949]

5.3. It is the bounden constitutional duty of this Apex Court to protect the precious fundamental rights of individuals, especially those of the minority communities. In a constitutional democracy, no law, which is imposed on individuals and which is enforced by the State, can be immune from the test of fundamental rights. India is not a theocracy. There is no place of religious law here. The only law that can be applied is the law that passes the test of constitutionality. No personal law is bigger than the Constitution. Not even the law derived from 'GOD'. It is not our case that only Muslim Personal Law requires reform. It is very much our case that all personal laws require reform and have to clear the test of fundamental rights. Without clearing the hurdle of fundamental rights, no law can be enforced by the State that has a bearing on individual rights.

5.4. It is submitted that the issue of personal laws was debated vigorously by the Constituent Assembly, particularly in the context of Uniform Civil Code ('UCC') (Article 35 in the Draft Constitution) and Fundamental Right to Religion. During the debate on UCC, four members from the Muslim community sought to introduce amendments to the Directive Principle on UCC. Mr. Mohamad Ismail Sahib from Madras pointed out that "*the right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and this provision should really be made amongst the statutory and justiciable fundamental*

rights. It is for this reason that I along with other friends have given amendment to certain other articles going previous to this, which I will move at the proper time. Now the right to follow personal law is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people." [See: supra] Similar concerns were raised by other three Members.

5.5. While rejecting these amendments/concerns, Dr. Ambedkar noted that "*my first observation would be to state that members who put forth these amendments say that the Muslim personal law, so far as this country was concerned, was immutable and uniform through the whole of India. Now I wish to challenge that statement. I think most of my friends who have spoken on this amendment have quite forgotten that up to 1935 the North-West Frontier Province was not subject to the Shariat Law. It followed the Hindu Law in the matter of succession and in other matters, so much so that it was in 1939 that the Central Legislature had to come into the field and to abrogate the application of the Hindu Law to the Muslims of the North-West Frontier Province and to apply the Shariat Law to them. That is not all. My honourable friends have forgotten, that, apart from the North-West Frontier Province, up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu Law in the matter of succession. In order to bring them on the plane of uniformity with regard to the other Muslims who observed the Shariat Law, the Legislature had to intervene in 1937 and to pass an enactment applying the Shariat Law to the rest of India.*" [See: supra]

5.6. On another occasion during the debates, Dr. Ambedkar observed that "*…if such a saving clause was introduced into the Constitution, it would disable the legislatures in India from enacting any social measure whatsoever. The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters, we will come to a stand still…After all, what are we having this liberty for? We are having this liberty in order to reform our social system which is so full of inequities, so full in inequities, discrimination and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State. Having said that, I should also like to point out that all that the State is claiming in this matter is a power to legislate. There is no obligation on the State to do away with personal laws. It is only giving a power. Therefore, no one need to be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute to enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christian or by any other community.*" [See: supra]

5.7. Thus, it is crystal clear from the debates that the Constituent Assembly categorically rejected the contention that the personal laws were exempt from State regulation. It was the explicit intention of the Constitution makers to subject personal laws to State regulation. In this regard, it is submitted that the 'State' includes both legislative and judicial intervention.

5.8. As is evident from Entry 5, List III (Concurrent List) in the Schedule 7 of the Constitution, which states "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", both the Union and the State Legislatures are empowered to enact laws in this regard. It bears no reason that though Parliament and States can pass laws on personal laws, but the same personal laws are not subject to judicial scrutiny. In any case, while interpreting the codified personal laws, i.e., statutes, the Courts do interpret even the uncodified personal laws, often in a substantive way. In this context, to say that personal laws are outside the purview of the judicial review is legally flawed and inconsistent.

6. PLURAL LEGAL SYSTEMS

6.1. The Indian State recognises plural legal systems for different communities, in the matter of personal laws, that is, marriage, divorce, inheritance etc. This is evident form Article 44, hence we do not dispute that different religious communities have different laws. It is not the contention of the intervenors that there should be only one common civil code for all communities, but rather that each such personal law must meet the test of Constitutional validity and be non discriminatory based on sex and must not violate Articles 14 or 15. Article 44 reads as:

"*Uniform Civil Code for citizens: The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.*"

6.2. However, the question for determination here is, when a personal law based on religion conflicts with a provision in the Constitution, which law will prevail? It is submitted that the Constitution has supremacy over all laws, be they laws in relation to marriage, divorce or inheritance, be they codified or uncodified, customary of statutory, or what has come to be known as "personal laws". All personal laws, Hindu, Muslim, Christian or Parsi are capable of being challenged on the touchstones of violation of fundament rights.

6.3. In this context attention is invited to a speech delivered by former Judge of this Court Justice Ruma Pal , where she takes the view that personal laws are subject to judicial review. The intervenors are in respectful agreement with her views.

6.4. There is noting inconsistent in having a separate and distinct system of personal laws and at the same time, ensure that the recognised law is subject to the Constitution of India.

7. INTERPRETATION OF ARTICLE 25

7.1. It has been argued that personal law is a matter of faith and belief and thus protected by Article 25 of the Constitution, hence the issue is, does the law relating to marriage and divorce, constitute religion and hence is protected by Article 25? Article 25 reads as:

"Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus

Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

7.2. On a plain reading of Article 25, the right to freedom of conscience is subject to public order, morality, health and the other provisions of the Constitution in Part III. The right must therefore be so interpreted that no right in the Constitution negates the other. Article 25 cannot therefore be allowed to trump the rights under Articles 14 and 15. They must be harmoniously construed so as to give effect to both. Any derogation from Article 14 cannot be justified with reference to Article 25.

7.3. Articles 14 and 15 must be read harmoniously with Article 25, one cannot cancel out the other on the ground that it is protected under Part III.

7.4. Articles 14 and 15 of the Constitution are not subject to any restrictions, the right to non discrimination is immediately enforceable and cannot await progressive implementation.

7.5. The Constitution has to be harmoniously interpreted to protect Articles 14 and 15 on one hand, and Articles 25 and 26 on the other, without destroying either. It is submitted that a cardinal principle of interpretation of Constitution is that all provisions of the Constitution must be harmoniously construed so that there is no conflict between them. It is therefore submitted that Articles 14, 15, 25 on one hand, and Article 26 on the other hand must be harmoniously construed with each other, to prevent discrimination against women and to give effect to the right of Muslim community to practice their religion.

7.6. A five judge bench of this Hon'ble Court in **Sri Venkataramana Devaru and others v. State of Mysore, 1958 SCR 895/ AIR 1958 SC 255** (Devaru case), while acknowledging that the right to restrict entry to the temple to Gowdas Saraswath Brahmins is a part of the right to manage religious affairs, held that the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Article 26 (b) of the Constitution is subject to Madras Temple Entry Authorisation Act, 1947 that throws open a Hindu public temple to all classes and sections of Hindus. It stated that the right to enter a temple

and worship are matters of religion in **Paras. 29, 32** in the following words:

"*And lastly, it is argued that whereas Art. 25 deals with the rights of individuals, Art. 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to thatdenomination, that would remain unaffected by Art. 25(2)(b). This contention ignores the true nature of the right conferred by Art. 25(2)(b). That is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Art. 25(1) or against a denomination under Art. 26(b). The fact is that though Art. 25(1) deals with rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b). The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as therule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Art. 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25(2)(b) will prevail. While, in the former case, Art. 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26(b). We must accordingly hold that Art. 26(b) must be readsubject to Art. 25(2)(b)."*

7.7. A two judge bench of this Hon'ble Court in ***Adi Saiva Sivachariyargal Nala Sangam and Ors. v. The Government of Tamil Nadu and Ors.,*** AIR 2016 SC 209, while holding that appointments of Archakas will have to be made in accordance with the Agamas but subject to constitutional principles, also held in **Paras. 3 and 36** that Article 26 is subject to 25(2)(b) and constitutional legitimacy supersedes all religious beliefs.

7.8. Article 25 itself recognises the difference between "religion", which is a matter of faith/belief and "*economic, financial, political, and other secular activity which may be associated with religious practices*". It is therefore critical to understand the difference between "religion" and "*activity, which may be associated with religious practice*".

7.9. The Constitution neither defines nor specifies the scope of religion. The Preamble of the Constitution uses the phrase "'iberty of thought, expression, **belief, faith and worship**." It is submitted that the words of the Preamble may be used to interpret the scope and ambit of Article 25(1), which guarantees the freedom of conscience, and free profession, practice and propagation of religion. This right is also circumscribed in the manner described in the Article. An example of the restriction on the

right to propagate religion is to be found in the anti-conversion laws, made in the interest of public order.

7.10. In any event, this Court has held that what is protected under Article 25 is the essential attributes of a religion and not every religious practice which is not integral to the religion.

7.11. It is submitted that personal laws relating to marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition pertain to activities, which may be associated with religious practice, and may even have religious origins in their form and content, but this does not make them essential parts of religion. Such activities can be and have been regulated by the State.

Marriage and divorce are matters of secular nature and can be regulated by the State

7.12. It is submitted that marriage and divorce are matters of secular nature and can be regulated by the State. They do not fall within the domain of Articles 25 and 26 of the Constitution. This can be discerned from the following decisions:

i. Abdur Rahim Undre v. Padma Adbur Rahim Undre AIR 1982 Bom 341 (Para. 23) :*"In Mohammedan Law Marriage is a Civil Contract. Hence so far as relationship flowing from contract of marriage is concerned, including its dissolution, the area and field is secular in nature."*

ii. Sarla Mudgal v. Union of India (1995) 3 SCC 635 (Para.33): *"…Marriage, succession and like matters of a secular character…"*

iii. John Vallamattom v. Union of India (2003) 6 SCC 611 (Para. 44): "*it is not a matter of doubt that marriage, succession and the like matters of secular character ..."*

7.13. It is submitted that this Hon'ble Court, time and again, has acknowledged the difference between secular and religious activities in context of interpretation of Articles 25 and 26 and has held that the State can regulate secular matters and secular matters of religion are not protected under the said Articles, as evident from the following:

i. Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan 1964 1 SCR 561: AIR 1963 SC 1638 (Paras. 58-60): *"In this connection, it cannot be ignored that what is protected under Articles 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Article 25(1) or Article 26(b) has been contravened.... If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the right guaranteed by Article 25(1) and Article 26 (b) cannot be contravened."*
"It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not,

may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day-to-day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Articles 25(1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion.…If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Article 25(1) and Article 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Article 25(1) or Article 26(b). This aspect of the matter must be borne in mind in dealing with true scope and effect of Article 25(1) and Article 26(b).”“A distinction must always be made between a practice which is religious and a practice in regard to a matter which is purely secular and has no element of religion associated with it. Therefore, we, are satisfied that the claim made by the denomination that the Act impinges on the rights guaranteed to it by Article 25(1) and 26(b) must be rejected.”

ii. Sri Sri Sri Lakshmana Yatendrulu & Ors. v. State of A.P. & Anr. (1996) 8 SCC 705 (Paras. 11, 43, 44):

“The Act only regulates secular activities of the mathadhipathi in spending the Padakanukas and that too in his own interest. Therefore, the regulations are permissible under Article 25 of the Constitution”

“Questions relating to administration of properties relating to math or specific endowment are not matters of religion under Article 26(b). They are secular activities though connected with religion enjoined on the Mahant.”

“Section 50 of the Act which is corresponding provision in the predecessor Act of 1966 requires the mathadhipathi to maintain accounts in the manner prescribed therein which is a secular activity on the part of a mathadhipathi. The intervention of the legislature in that behalf is in the interest of the math itself. He is, therefore, enjoined to maintain accounts in the regular course of the administration and maintenance of the math. Operation of Section 50 is, therefore, a permissible statutory intervention under Articles 25(2)(a) and 26(b) and (d) of the Constitution.”

7.14. The impugned practices are not protected by article 25, article 26 or article 29 of the constitution of india.

7.15. The right to practice religion under Article 25 is subject to other fundamental rights. It reads as: *"(1) Subject to public order, morality and health, and to other provisions of this part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propogate religion"*

7.16. It is submitted that the impugned practices are not protected under Article 25 as they violate the rights of Muslim women guranteed under Articles 14, 15 and 21 of the Constitution of India.

i. Bijoe Emmanuel and Ors. v. State of Kerala and Ors (1986) 3 SCC 615 (Para.19):*"We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated ' with religious practice; or (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Thus while on the one hand, Article 25(1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Article 25(1). therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practise or to provide for social welfare and reform. It is the duty and function of the Court so to do."*

ii. Sarla Mudgal v. Union of India (1995) 3 SCC 635 (Para.33): *"…Marriage, succession and like matters of a secular character…" cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration…"*

iii. A S Naryana Deekshitulu v. State of AP 1996 (9) SCC 548 (Para.5):*"…Though Agamas prescribed class discriminatory placement for worship in the temples, it became obsolete after the*

advent of the Constitution of India which, by Articles 14 15 17 25 and 26, prohibits discrimination on grounds only of caste, class, sect etc."

iv. John Vallamattom v. Union of India (2003) 6 SCC 611 (Para. 44): "*it is not a matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution."*

v. Adi Saiva Sivachariyargal Nala Sangam and Ors. vs. The Government of Tamil Nadu and Ors. (2016) 2 SCC 725 (para 36): "*That the freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also would hardly require reiteration. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part-III of the Constitution. Sub-article (2) is an exception and makes the right guaranteed by Sub-article (1) subject to any existing law or to such law as may be enacted to, inter alia, provide for social welfare and reforms or throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(b) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health and as held by this Court subject to such laws as may be made Under Article 25(2)(b). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right it is in conformity with public order, morality and health and in accord with the undisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.*"

8. INTERPRETATION OF ARTICLE 26

8.1. It is submitted that the right of religious denominations to manage their own religious affairs guaranteed under Article 26 is subject to morality. Article 26 reads as: *"(1) Subject to public order, morality and health, every religious denomination or any section thereof shall have the right – …(b) to manage its own affairs in matters of religion."*

8.2. It is submitted that the word "morality" shall be read to mean constitutional morality which includes gender justice, right to non discrimination, dignity and personal autonomy of women, at the very least. It is submitted that the impugned practices run counter to constitutional morality and thus cannot be protected under Article 26 of the Constitution. In ***Manoj Narula v. Union of India*** 2014 (9) SCC 1 (Paras. 74-76), this Hon'ble Court held that "*the Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr. Ambedkar had, throughout the Debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said: - "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic." "The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality"*

8.3. It is submitted that the right under Article 26 is subject to constitutional goals of securing equality and dignity:

i. Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P 1997 (4) SCC 606 (Para. 27): "*The denomination sect is also bound by the constitutional goals and they too are required to abide by law; they are not above law. Law aims at removal of the social ills and evils for social peace, order, stability and progress in an egalitarian society. …In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore, consciously denounces all forms of supernaturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are antithesis to secularism which seeks to contribute in some degree to the process of secularisation of the matters of religion or religious practices. For instance, untouchability was believed to be a part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17.*"

It is therefore submitted that to recognise *talaq-e-biddat* or *nikah–halala* goes counter to constitutional morality of equality and gender justice and is liable to be declared unconstititonal.

9. INREPETATION OF ARTICLE 29

9.1. Article 29 reads as: "*Protection of interests of minorities: (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same"*

9.2. It is submitted that the word "culture" in the said Article msut be read *ejusdem generis* with the words "language and script" and cannot include within it personal laws The Respondent Board cannot in one breath claim that triple talaq is part of their religion and in the other breath claim the protection of the right to conserve culture.

9.3. In any event, a cultural practice which goes contrary to Articles 14 and 15 and 21 cannot be preserved, but on the contrary, must be abolished. Several examples can be found of practices justified as being based on religion and culture that have been abolished on being found contrary to the prevailing ethos of prevailing norms of civilised society including the abolition of Sati and child marriage.

9.4. It is submitted that the impugned practices that violate the fundamental rights of equality, life and dignity cannot be held to be protected under Article 29 of the Constitution of India as being part of "culture". On an harmoinous interpretation of Articles 14, 15, 21 on one hand, and Article 29 on the other hand, it is submitted that only culture that does not violate the indispendable right to equality and life can be preserved as a matter of right.

10. MINORITY RIGHTS NOT AFFECTED BY JUDICIAL REVIEW OF PERSONAL LAWS

10.1. Even before the commencement of the Constitution in 1950, the Courts in British India were adjudicating disputes pertaining to marriage, divorce, inheritance in disputes *inter se* between members of the same community including Hindus, Muslims, Christians, based on the personal laws applicable to them since the rule of decision had been the personal law applicable to them and on justice equity and good conscience. It can hardly be suggested that after the coming into force of the Constitution in 1950, the Constitutional Courts in India do not have the power to adjudicate on issues of marriage and divorce, which form an integral part of personal laws of the community, in accordance with the fundamental rights guaranteed under the Constitution.

10.2. Be that as it may, it is totally irrelevant whether personal law is based on custom or religion, or codified or un-codified, if it is law and "the rule of decision", it can be challenged under Part III.

10.3. It has been argued that this is an issue of minority rights, and the Court has no power to interfere with the faith of millions of people of this country. It is submitted that the Petitioners before this Court are part of the same minority community, and in fact, a minority within that minority community. The Petitioners are Muslim women who are agitating their fundamental right to equality, dignity and non-discrimination guaranteed under the Constitution. The Court cannot shut its doors in the name of protecting the rights of minorities ignoring the rights of women within that minority. The Petitioners and many other Muslim women are part of that community who want freedom from the unjust and arbitrary practice of talaq-e-biddat.

10.4. In the course of arguments, reliance was placed on Articles 371A and 371G of the Constitution relating to special provision for Nagaland and Mizoram. There is no provision similar to those articles for personal laws. There is nothing to prevent a court from declaring a particular custom as unconstitutional. Hence, there is no immunity form constitutional scrutiny by courts.

10.5. It was also argued that under Hindu laws, like Hindu Marriage Act (HMA) or Dowry Prohibition Act there are provisions saving customary practices in those laws, despite codification of dissolution of marriage in HMA. It is submitted that while custom can be saved under Section 29, only such custom as is not contrary to public policy is saved and all customary provisions are subject to challenge under Article 13.

11. INTERNATIONAL PRACTICE

In this regard, guidance can be had from the Constitutional Courts of other counties. The Constitution of South Africa contains Article 211, which protects tribal customs but at the same time states that such custom has to be consistent with the Constitution. Although the Indian Constitution has no such provision, Article 32 guarantees judicial review of all laws including personal laws and has the same effect as Article 211 of the South Africa constitution.

12. EXTRA JUDICIAL DIVORCE IS UNCONSTITITONAL

12.1. It is submitted that divorce alters the civil status of a married woman and can leave her destitute. In all other communities, divorce can only be obtained by a judicial forum since it is a decision in *rem* and alters the legal status of a person and cannot be given by private parties, nor can any *fatwa* be issued recognising a unilateral *talaq*. Allowing one party to a marriage to give a unilateral private talaq is against public policy and is required to be declared unconstitutional. No person's status resulting in adverse civil consequence for a person can be altered by a private person. The grant of divorce is a judicial function and can only be granted by a court of law. The function of granting a divorce cannot be performed by any private person and all such divorces are null and void in law allowing the woman to retain her status as a married woman. In contrast to unilateral *talaq*, a Muslim woman is

required to approach a court of law to obtain a divorce on stated grounds under the Dissolution of Muslim Marriages Act 1939 and for that reason also, the said impugned practcie of *talaq* discriminates between Muslim men and Muslim women and must be declared unconstitutional.

12.2. It has been argued that if all forms of talaq are struck down, then what is the recourse available to a Muslim man to divorce his wife? There is no unilateral divorce available to him. He can seek dissolution through mubaraat, i.e., divorce by mutual consent, or even through *Khula*, at the instance of the wife.

12.3. It is submitted that this court held while discussing the legal validity of *fatwa*s that they have no legal validity.

i. Vishwalochan Madan v. Union of India & Ors (2014) 7 SCC 707 (Para.15): "*The object of establishment of a Muslim court may be laudable but we have no doubt in our mind that it has no legal status. It is bereft of any legal pedigree and has no sanction in laws of the land. They are not part of the corpus juris of the State. A fatwa is an opinion, only an expert is expected to give. It is not a decree, nor binding on the court or the State or the individual. It is not sanctioned under our constitutional scheme…the Muslim Court was neither created nor sanctioned by any law made by competent legislature..no institution which derives its strength from religion or is religiously sanctioned or sanctioned by religious or personal law, may act or issue directions (such as fatwa) as it is in violation of basic human rights and faith cannot be used as a dehumanising force.*"

12.4. It is submitted that this Hon'ble Court, as the highest Constitutional Court of this country, is under an obligation to protect the fundamental rights of Muslim women, even if it has to venture into the sphere of uncodified personal law. This Hon'ble Court in ***NALSA*** has held that "*Article 21 has been incorporated to safeguard those rights and and a constitutional court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance* (para 53)" It further held that "*the basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status*" (para 98).

12.5. For the reasons aforesaid, it is submitted that the Petition must be allowed, and this Hon'ble Court must struck down the practices of talaq-e-biddat and nikah halala, for being violative of Part III of the Constitution. This Hon'ble Court, being a Constitution Bench, should overrule the Bombay High Court decision in *Narasu Appu*, precisely on the basis that personal laws, whether codified or uncodified, are not outside the purview of the Constitution. They have to exist within the constitutional parameters, and subject to Part III of the Constitution. This is the case and time for this Hon'ble Court to undo the wrong done in Narasu Appu, almost 70 years back. India has long moved ahead. Our judiciary should move ahead too.

Date: 20.05.2017 **DRAWN BY**: **Meher Dev, Advocate**

Amritananda Chakravorty, Advocate

Place: New Delhi **SETTLED BY**: **Ms. Indira Jaising, Senior Advocate**

FILED BY: **Advocate on Record Purushottam Sharma Tripathi**