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

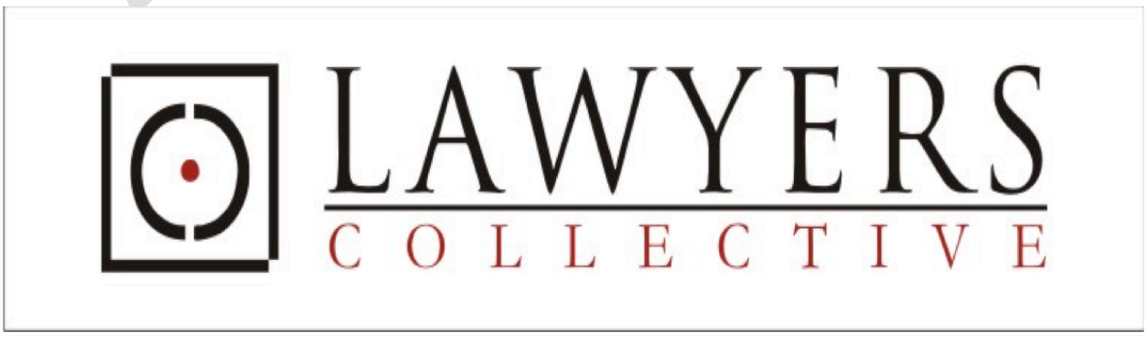
WRITTEN SUBMISSIONS ON BEHALF OF INTERVENORS

BEBAK COLLECTIVE

AND

CENTRE FOR STUDY OF SOCIETY AND SECULARISM

BY SR. ADV. MS. INDIRA JAISING



INDEX OF ISSUES

1. PERSONAL LAW IS "LAW" AND "LAW IN FORCE" WITHIN THE MEANING OF ARTICLE 13 OF THE CONSTITUTION OF INDIA

1.1. It is submitted that the basic defining feature of the expression "law" is that it is binding on citizens, is recognised by the State as law and enforceable by the State.

1.2. Personal Law has no precise definition. It has been provided fairly workable though not comprehensive definitions by different authors, the Privy Council, High Court, Supreme Court, and pre-constitution legislations as follows:

i. *A.M Bhattacharjee* [Matrimonial Laws and the Constitution: 2ed., Eastern Law House (2017) at Pgs. 4-7]: " *Personal Laws may be defined as that body of laws which apply to a person or to a matter solely on the ground of his belonging to or its being associated with a particular religion.*"

ii. *Mulla* [Principles of Hindu Law, 15ed., at Pg.88] has described Personal Law as "*the Laws and customs as to succession and family relations*".

iii. *Cheshire* [Private International Law, 4ed., at Pg.150]: Personal Law is the Law determining the questions affecting status and that "*broadly speaking, such questions are those affecting family relations and the family property*".

1.3. *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84: In the Bombay decision in Narasu Appa Mali, the question which squarely arose for consideration before the High Court was "*whether the personal laws applicable to the Hindus and the Muslim are laws in force within the meaning of Art. 13(1) of the Constitution*" and must, in order to survive Art. 372(1) and Art. 13(1), satisfy the requirements of Arts. 14, 15 and other Articles of Part III. Both Chief Justice Chagla and Justice Gajendragadkar in their separate, though concurring, judgments answered the question in the negative. It is submitted that the said judgment has been wrongly decided to the extent that it holds that "personal laws" are not law and laws in force within the meaning of Article 13 of the Constitution of India on the following grounds and for the following reasons:

i. The Bombah High Court reasoned that Article 372(2) gives to the President the power to modify laws in force and it was not the intention of the Constituton to give to the President the power to modify personal laws.

It is submitted that the Supreme Court has interpreted "laws in force" to include not only statutory laws but also the entire gamut of common laws of the land. Hence "personal laws must be incuded in the expression "laws in force". It has been held by the Supreme Court in a series of decisions, viz., Sant Ram v Labh Singh AIR 1965 SC 314, *Builders Supply Corporation v Union of India AIR 1965 SC 1061*, *and Superintendent & Remembrancer of Legal Affairs v Corporation of Calcutta AIR 1967 SC 997* that the expression "law in force" includes not only enactments of the Indian legislatures *but the entire gamut of Common law of the land* which was being administered by the Courts. Hence, it is submitted that personal laws must be held to be included within the

definition of "laws in force" in Article 13 as also in Article 372 of the Constitution.

ii. The Bombay High Court fuher held that Article 44 mandates the State to secure for citizens a uniform civil code, and the State thus recognises the continuance of personal laws.

It is submitted that whereas it may be that the State does recognise the continuance of personal laws, it does not follow from that that the laws are not "laws in force" or that that they are constitutionally valid, on the contrary the very act of recognition makes them "law" and "laws in force" subject to the discipline of the Constitution.

iii. The Bombay High Court also held that the existence of Article 17 shows that untouchability was part of Hindu Personal Laws and it was specifically prohibited. Thus, according to the Bombay High Court there would have been no need for Article 17 at all if personal laws were part of "law" and "laws in force" in Article 13.

With respect, it is submitted that several jurists have recognised the flaw in this reasoning in that the conclusion does not follow from the premise. It is submitted that all constitutions over the world have some amount of repetition more so as a measure to lay out fundamental rights in as detail as possible. CJI Chandarchud in *Special Courts Bill Reference 1979 1 SCC 380* has stated that some amount of repetitiveness or overlapping is inevitable in a constitution like ours. Article 13(1) itself was held to be found unecessary by the Supreme Court in *A.K Gopalan AIR 1950 SC 27(34*), by jurists like D.Basu and Servai. By that logic,Article 15(3) may also seem to be unecessary to the extent it refers to children and provides a saving caluse for state legislation specially for children as Article 15(1) does not in any case prohibit discrimination based on age and thus no saving case clause is required. Hence, the mere fact that one aspect of Hindu law is specifically mentioned in Article 17, cannot lead to the conclusion that all personal law is not law within the meaning of Article 13 of the Constitution of India.

iv. Thereafter, the Bombay High Court held that in Section 112 of the Governemnt of India Act 1915, the expression "personal laws" and "custom" are used separately, and since Article 13 is modeled on Section 112 of the GOI Act 1915 and hence the expression "personal laws" has been consciously omitted form Artcle 13 of the Constitution. Learned authors have pointed out that the Court failed to notice Section 292 of the Government of India Act 1935 which was analogous to Article 372 of the Cosntitution both of which laws used the expression "laws in force".

Section 292 reads as:

"Existing law of India to continue in force:

Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

There are several judgments which while interpreting the expression "laws in force" in Article 372 have held that the expression includes statutory and non statutory laws.

Naresh Chandra Bose vs. S.N. Deb; *AIR 1956 Cal 222;* the Calcutta High Court held that while reading Explanation I it has to remembered that Article 372 uses the word *'includes'* the obvious implication being that in the first the definition is not exhaustive. Even so, as is evident from a comparison of the terms of Article 366(10) and Article 372(1), while *'existing law'* as defined in Article 366(10) is limited to statute law or law embodied in ordinances, orders, bye-laws, rules and regulations, *"all the laws in force" in' Article 372(1) is not so limited and extends even to customary law, personal law like the Hindu and Mahommedan law, being thus much more comprehensive than 'existing law' as defined in Article 366(10).* It follows from this that *'existing law'* as defined there is a part of 'all the law in force' in Article 372(1) and Explanation I of Article 372 by using the word *'includes'* in defining it extends rather than restricts its meaning.

Moreover, the Bombay High Court failed to notice the judgment of the Federal Court in *United Provinces v Atigua Begum AIR 1941 FC 16 (31)*, which held while construing the analogous expression "law in force" in s. 292 of the Government of India Act 1935, observed that the expression "*applies not only to statutory enactments then in force, but to all laws, including even personal laws, customary laws and case laws"*

Personal laws have been statutorily enacted in relation of marriage and succession. A.M Bhattacharjee in his book Matrimonial Laws and the Constitution: 2ed., Eastern Law House (2017) at Pg. 56 notes that: *"The Indian Christian Marriage Act 1872 and the Divorce Act 1896, containing the law relating to marriage and divorce of the Christians, the Parsi Marriage and Divorce Act 1936, containing the law relating to marriage and divorce among the Parsi Zoroastrians, the Dissolution of Muslim Marriage Act 1939, consolidating and clarifying the provisions of Muslim Law relating to suits for dissolution of marriage by women married under the Muslim Law, are obviously Personal Laws. Personal Laws do not cease to be so in spite of their statutory codification and, therefore, it was too broad a proposition to hold that all Personal Laws were beyond the reach of Art. 372(1) or 372(2). But accepting that by the expression "Personal Laws" the learned Judges meant only the non-statutory personal laws, as Hindu Law, by and large, then was and the Muslim Law still is, it is difficult, if not impossible, to understand why the expression "laws in force" shall not include the non-statutory personal laws also."*

v. The learned judges also did not recognise personal laws as "customary laws" and hence held that personal law cannot come within the meaning of Article 13(3)(a).

It is submitted that personal laws are to an extent based on customary law.

A.M. Bahttacharjee points out that David Pearl [Text Book on Muslim Law, 1970 at Pg, 204] states that laws in Quran were evidently piecemeal, superseding some, but not near a majority of pre-Islamic

customarly laws. Abdur Rahim [Muhammadan Jurisprudence, Tagore Law Lectures, 1911, Pg. 136-137] notes that "*those customs and usages of the people of Arabia which were not expressly repealed during the life time of Prophet, are held to have been sanctioned by the law-giver by his silence.*" Fyzee has approved this view. [Outlines of Muhammedan Law. 4ed., Pg. 6-7] Markby in his work Elements of Law, 5ed., Pg. 52 has noted that certain amount of the old Arabian customs was no doubt assumed by Mahommed and "*has always remained in force though not expressly recognized.*"

The author also points out that the Punjab Laws Act in S. 5(b), The Oudh Laws Act in S. 3(2)(b) have clearly directed application of Hindu and Muslim Law and refered to them as law as has been modified by custom. He therefore points out and rightly that if personal laws are modified by custom then logical corollary is that they are also to an extent based on custom.

It is submitted that the impugned practices are in any event customs and thus admittedly fall under the definition of law under Article 13 and thus can be challenged under Article 32 in case of violation of fundamental rights.

Further various High Courts have also held custom and personal law to be inextrcably linked.

For the reasons aforesaid it is submitted that Narasu Appa Mali case is wrongly decied and is not binding on this Supreme Court.

1.4. *In Krishna Singh v. Mathura Ahir* 1981 3 SCC 689 /AIR 1980 SC 707 (712): A two-Judge bench of the Supreme Court ruled that "*Part III of the Constitution does not touch upon the personal laws of the parties*".

i. It is submitted that the Bench however, in declaring the Personal Laws to be untouched by the provisions of Part III of the Constitution has not spelt out any reasons for such view.

ii. A.M Bhattacharjee in his book Matrimonial Laws and the Constitution: 2ed., Eastern Law House (2017) notes that:
"*The observation of the Supreme Court excluding Personal Laws from the impact of Part III of the Constitution in Krishna should be limited to the context in which it was made. The question before the Court related to succession to property purchased by a Hindu ascetic as the head in a religious institution. The property was purchased out of the offerings made to him by devotees. There is no statutory provision which deals with the definition or status of an ascetic as far as succession is concerned. At least the Hindu Succession Act 1956 does not – possibly because on becoming an ascetic there would be "an absolute abandonment by him of all secular property and a complete and final withdrawal from earthly affairs" and the statute deals with matters temporal. It was in that context that the court held that "succession to the office of the mahant or mathadhipathi or pandara sannadhi is to be regulated by the custom of the particular institutions" and that therefore*

Part III of the Constitution did not touch upon the personal laws of the parties before the court. In fact High Courts in Avadesh v Shiv Kumar AIR 1985 All 104 and in Bhakti Ballabh v Bhakti Hriday 1994 2 CLJ 435 have understood the ratio of case as laying down the law only on the status and succession to the property of an ascetic…If the decision in Krishna Singh is not construed in this restricted manner it must be considered to be no longer good law in view of the subsequent decision of a Bench of three judges of the Supreme Court in C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami 1996 8 SCC 525 (533) which has clearly laid down that "Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Art. 13 if they violate fundamental rights".

1.5. It is submitted that Personal Laws of Muslims having being enforced by the Sovereign State of India by a series of legislations such as the Muslim Personal Law Shariat Application Act 1937, are inherently equated to commands of the State and amenable to challenge if they violate fundamental rights. Thus, to the extent the impugned practices are recognized by the State, they are amenable to challenge.

1.6. It is submitted that the following case laws have rightly differed from Narsu Appa Mali case of and have held personal laws to be falling in the definition of "laws in force" and thus amenable to challenge under Article 32 for violation of fundamental rights:

i. Re Smt. Amina, AIR 1992 Bombay 214: Paras 4-10, 12, 23: *"According to my study of the subject, 'personal laws' are 'law' and 'laws in force' under Article 13 of the Constitution of India and are enforceable in Courts subject to provisions of the Constitution and not otherwise. Even customs and usages having the force of law are void if found inconsistent with any of the fundamental rights guaranteed by the Constitution. It could not be the intention of founding fathers of our Constitution to create any immunity in favour of personal laws…We have seen that there is no difference between the expression 'existing law' and 'law in force' and consequently. Personal law would be 'existing law' and 'law in force'. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them."*

ii. Sheo Kumar Dubey vs. Sudama Devi; AIR 1962 Pat 125, Para 11: "*These definitions of 'law' and laws in force' are thus comprehensive enough to include even custom or usage having the force of law. Therefore, customary law is clearly embraced by those definitions. Accordingly, if this customary law of pre-emption is in conflict with Part III of the Constitution, more particularly, as urged in this appeal, is inconsistent with the provisions of Article 19(1)(f) of the Constitution, it may be struck down as void"*

iii. Saumya Ann Thomas v. UOI and Mr. Thomas, WP(C).No. 20076 of 2009(R) Para. 18 & 23-24*: "a piece of personal law cannot be assailed on the ground that it offends the fundamental rights guaranteed under Part-III of the Constitution. Art.13 has no application whatsoever in such a situation, contends the learned ASGI…We have serious doubts about the proposition that a piece of personal law - whether statutory or precedent recognised or otherwise, will not be law or law in force within the meaning of Art.13 of the Constitution. This would go against the fundamental and core constitutional values as also the scheme of Art.13 of the Constitution…We find no reason, in a secular republic, to cull out "personal law" alone and exempt the same from the sweep of Art.13 and Part III of the Constitution."*

iv. Kunhimohammed vs. Ayishakutty, (2010) 2 KLT 71: Para. 45-46 *"It is perhaps more unfortunate that the courts have not so far tackled the bull by the horns and had not tested the constitutional validity of these stipulations which get the mandate for enforcement under the provisions in the Muslim Personal Law (Shariat) Application Act, 1937…Personal Law is also, according to us, 'law'. It is 'existing law' and 'law in force' as contemplated by the constitutional provisions. Such stipulations in personal law cannot be out of bounds for Art. 13 of the Constitution. Any stipulation of personal law which offends the fundamental right to equality and life under Arts. 14 and 21 of the Constitution will also have to be declared void under Art. 13."*

v. Hina vs. State of UP; Writ - C No. - 51421 of 2016 /(2016) SCC OnLine All 994, Paras. 9-10:*" Personal laws, of any community, cannot claim supremacy over the rights granted to the individuals by the Constitution. I would not like to say anything further for the reason that the Supreme Court is seized with the matter."*

1.7. For all the reasons aforesaid, personal law is "law" and constitutes "laws in force" within the meaning of Article 13 and Article 372 of the Constitution of India and capable of challenge on the ground of violation of fundamental rights.

2. MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937 ADMITTEDLY BEING A STATUTE, IS "LAW IN FORCE" WITHIN THE MEANING UNDER ARTICLE 13(3)(B) AND ARTICLE 372, THUS CAN BE CHALLENGED UNDER ARTICLE 32 FOR VIOLATION OF FUNDAMENTAL RIGHTS. THIS PETITION IS THEREFORE MAINTAINABLE.

2.1. It is submitted that The Muslim Personal (Sharia) Law Act, 1937 by virtue of being a statute falls under the definition of "laws in force" under Article 13(3)(a) and Article 372 of the Indian Constitution and thus can be challenged under Article 32 for being violative of fundamental rights of equality and life.

2.2. 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)."

2.3. The said Act not being repealed remains in force after the coming into force of the Constitution and is hence "law in force" within the meaning of Artice 13 and Article 372.

2.4. It is submitted that the said seciton gives bindng force to Muslim Personal Law/Sharia Law enforable by the State and the Courts and is hence "law" within the meaning of Article 13. Being so, it is capable of challenge although the actual content of the Sharia remains uncodified. After the passing of The Muslim Personal (Sharia) Law Act, 1937, it is irrelevant whether the said law is codified or uncodified customary or non customary, based on religion or otherwise, since it is the said Act which gives it the character of " law in force" and recognition by the Sate. It must therefore pass the test of Articles 14,15 and 21 of the Constitution of India.

2.5. It is 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.

i. Mary Sonia Zachariah v. Union of India, 1995 (1) KLT 644 FB Para 39: *"So long as the infringed provisions are part of an Act, it must pass the test of constitutionality even if the provision is based upon religious principles."*

3. TALAQ-E-BIDDAT AND NIKAH-HALALA (IMPUGNED PRACTICES) THAT ARE CLAIMED TO BE A PART OF MUSLIM PERSONAL LAW AND PROTECTED BY SECTION 2 OF MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937 (IMPUGNED SECTION) VIOLATE THE FUNDAMENTAL RIGHTS OF MUSLIM WOMEN UNDER ARTICLES 14, 15 AND 21 OF THE CONSTITUTION OF INDIA AND THEREFORE ARE VOID.

3.1. It is submitted that the impugned section 2 is violative of the fundamental rights of Muslim women Articles 14, 15, and 21 in as much as it gives protection to the impugned practices.

3.2. The impugned practcie of talaq-ul/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 unilateral arbitrary extra judicial divorce and her marital staus.

3.3. It is submitted that marriage being a matter or 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.

3.4. It is submitted that the impact of such practice of *talaq-ul/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.

i. Hina vs. State of UP; Writ - C No. - 51421 of 2016 /(2016) SCC OnLine All 994, Paras. 9-10:*"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."*

3.5. Further it is 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.

3.6. 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 home-makers 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.

3.7. It is submitted that the said law is exfacie discriminatory in that it is a right to act in an arbitrary manner conferred on a husband to the detriment of his wife and must be declared unconstitutional as being discriminatory based on sex. While judging the constitutionality of a law, this Court must not only look at the text of the law but also its disparate outcome on women.

3.8. 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.

3.9. It is submitted that such impugned practice of *nikah-hala* is regressive and violates both 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.

3.10. The impugned practices violate the right to dignity guaranteed under Article 21 of the Constitution of India

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."*

3.11. It is submitted that the impugned Section 2 to the extent to which it recognizes discriminatory impugned practices is liable to be declared unconstitutional.

3.12. India is party to the Convention on Elimination of All Forms of Discrimination Against Women (**CEDAW**). CEDAW mandates all State parties to overcome, dismantle and refrain from promoting gender discrimination. Discrimination against women based on sex and religion is in direct contrast with the CEDAW mandate of achieving substantive equality.

i. Article 1 of CEDAW prohibits discrimination based on sex and Article 2 (c) and (f) mandate State Parties including India 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", and to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

ii. Particularly, Article 16 of the CEDAW mandates the State Parties including India to provide for equal protection and equal rights to men and women in matters relating to marriage and divorce. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women. Article 16(1) CEDAW read as:*"(a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution;.."*

4. THE IMPUGNED PRACTICES PERTAIN TO MATTERS OF MARRIAGE AND DIVORCE INCLUDING RIGHT TO MAINTENANCE, ALIMONY AND CUSTODY OF THE CHILDREN AND ARE SECULAR ACTIVITIES RESULTING IN CIVIL CONSEQUENCES FOR WOMEN, AFFECTING THEIR STATUS AS MARRIED WOMEN AND HENCE IN THE EVENT OF THEIR BEING DISCRIMINATORY ARE CAPABLE OF BEING CHALLENGED ON THE TOUCH STONE ON THE ARTICLE 14,15 AND 21 OF THE CONSTITUTION OF INDIA .They are NOT PROTECTED BY ARTICLE 25, ARTICLE 26 OR ARTICLE 29 OF THE CONSTITUTION OF INDIA.

4.1. It is submitted that marriage and divorce are matters of secular nature and can be regulated by the State .

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

ii. 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 ..."*

iii. Abdur Rahim Undre vs. 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."*

4.2. It is submitted that the Supreme Court time and again has acknowledged the difference between secualr 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 proetected under the said Articles:

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. S.R. Bommai vs. Union of India; *AIR 1994 SC 1918; "The state has the power to legislate on religion including personal laws and secular affairs of temples and mosques, and other places of worship. State has the power to decide what does and what does not constitute a religion for all practical purposes."*

iii. 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."

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

4.4. 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"*

4.5. 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.*"

4.6. 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."*

4.7. It is submitted that the word "morality" shall be read to mean constitutional morality which includes gender justice, right to non discrimiantion, 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.

i. Manoj Narula v. Union of India, 2014 (9) SCC 1, Paras. 74-76:"*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"*

4.8. 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.

4.9. 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"*

4.10. 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 proteciotn of the right to conserve culture.

4.11. 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.

4.12. It is submitted that the impugned practices that violate the fundamental rights of eqaulity, 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.

5. EXTRA JUDICIAL DIVORCE IS UNCONSTITITONAL

5.1. 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.

5.2. 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."

5.3. In a similar manner to recognise unilateral *talaq* would be to deny to women the protection of the home that they helped to build, and render them homeless. The intervention of the Courts will ensure that the divorce is granted for just cause and on terms which are fair to women. Only such a law would meet the requirements of the Constitution of India.

5.4. For the reasons aforesaid, it is submitted that the Petition must be allowed.

Date: 30.03.2017 **DRAWN BY**: **Advocate Meher Dev**

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

FILED BY: **Advocate on Record Gautam Talukdar**