



## GENDER JUSTICE AND HUMAN RIGHTS WOMENS'S RIGHTS IS INCOMPLETE WITH OUT UNIFORM CIVIL CODE

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### ABSTRACT

Gender justice is a constitutional goal contemplated by the framers. One of the declared fundamental duties contained in Part IV<sup>1</sup>, is to ensure that women are not subjected to derogatory practices which impact their dignity. <sup>2</sup> Gender equality and dignity of women are non-negotiable. People of India have in exercise of their sovereign will as expressed in Preamble, adopted the democratic ideals which assures the citizen the dignity of the individuals as a means to the full evolution and expression of his personality.<sup>3</sup> Right to life includes the right to live with human dignity and all that goes along with it<sup>4</sup>.

However, it is a harsh reality that women have been ill-treated in every society for ages an India is no exception. The irony lies in fact that in our country where women are worshipped as shakti, the atrocities are committed against her in all sections of life. She is being looked down as commodity or as a slave, she is not robbed of her dignity and pride outside her house but she also faces ill-treatment and other atrocities within the four walls of her house. They are discriminated at

two levels, firstly they suffer because of their gender and secondly due to grinding poverty. This paper examines the Supreme Court verdict which could pave way and help for the implementation of Uniform Civil Code in order to ensure and achieve the constitutional goal contemplated by the framers under the head of Fundamental Duties in the Indian Constitution.

### [1] INTRODUCTION

The Supreme Court (hereinafter referred as SC) ruling in Shayara Bano and others v. Union of India (hereinafter referred as U.O.I) and others<sup>5</sup>, that arbitrary personal laws cannot seek refuge under the 'Freedom of Religion' right and that 'Equality before Law' is supreme, is likely to be a valuable touchstone for the Law Commission while handling contentious issues under the Uniform Civil Code (hereinafter referred as UCC).

With SC upholding the dignity of Muslim women by abolishing the discriminatory triple talaq, similar gender justice may be on the anvil for Christian and Hindu women. In light of the triple talaq judgment that has now criminalised the practice among the Muslim community, there is a need to examine the politics that guide the practice and reformation of personal laws in India. *Personal Laws in India present a situation where abolishing them in the interest of gender justice also inadvertently benefits the reactionary side.*

<sup>1</sup> INDIA CONST. part IV.

<sup>2</sup> INDIA CONST. art. 51A, cl (e).

<sup>3</sup>A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (India).

<sup>4</sup> INDIA CONST. art. 21.

<sup>5</sup> Writ Petition (C) No. 118 of 2016.



## [2] PERSONAL LAW IS “LAW” AND “LAWS IN FORCE” UNDER ART 13

Personal Law has the character of being binding on those to whom it applies and is enforced by State; hence it is law u/A 13. Personal Laws may be defined as that body of laws which apply to a person or to a matter solely on ground of his belonging to or its being associated with a particular religion.<sup>6</sup> Mulla<sup>7</sup> has described it as “*the Laws and customs as to succession and family relations*”. It is the law determining questions affecting status and broadly speaking, such questions are those affecting family relations and family property.<sup>8</sup> There is no reason, in a secular republic, to cull out personal law alone and exempt it from the sweep of Art.13 and Part III.<sup>9</sup> Personal laws cannot claim supremacy over rights granted to individuals by Constitution.<sup>10</sup>

### [2.1] NARASU APPA MALI CASE IS BASED ON FALLACIOUS REASONING

In *Narasu Appa Mali*<sup>11</sup>, it was observed that personal laws were not included in expressions 'law' or 'law in force' as defined in Art 13. This judgment has been criticised by notable authors. With great reverence to learned Judges, this reasoning appears to be totally incorrect.<sup>12</sup>

Art 372(2) gives to the President power to modify laws in force and it was not the intention of Constitution to give to the President power to modify personal laws. This reasoning is fallacious as SC has interpreted “laws in force” to include not only statutory laws but also the entire gamut of common laws of the land. It has been held by SC in a series of decisions<sup>13</sup> that “law in force” includes not only enactments of Indian legislatures *but that part of common law of the land* which was being administered by Courts. Hence, personal laws must be held to be included within “laws in force” in Art 13 as also in Art 372.

Laws which are to continue in force u/A 372(1) include personal laws and these laws are to continue in force subject to other provisions of Constitution. Federal Court in *United Provinces v. Atiqua Begum*<sup>14</sup>, while construing the analogous expression “law in force” in s. 292 of Government of India Act 1935, observed that expression “applies not only to statutory enactments then in force, but to all laws, including even personal laws, customary laws and case laws.” While reading Explanation I, it has to be remembered that Art 372 uses the word ‘includes’, obvious implication being that the definition is not exhaustive.<sup>15</sup>

<sup>6</sup>A.M BHATTACHARJEE, MATRIMONIAL LAWS AND THE CONSTITUTION 4-7 (Eastern Law House, 2d ed., 2017) .

<sup>7</sup>MULLA’S, PRINCIPLES OF HINDU LAW 88 (15th ed., 1982).

<sup>8</sup>G.C. CHESHIRE, PRIVATE INTERNATIONAL LAW 150 (Clarendon Press, 4th ed., 1952).

<sup>9</sup>Saumya Ann Thomas v. UOI, WP(C). No. 20076 of 2009(R) (Paras. 18 & 23-24) (India).

<sup>10</sup>Hina v. State of UP, (2016) SCC Online All 994 (Paras. 9-10) (India).

<sup>11</sup>State of Bombay v. NarasuAppaMali , AIR 1952 Bom 84 (India).

<sup>12</sup>H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 401-403 ( Universal Law Publishing, 4th ed., 2015).

<sup>13</sup>Sant Ram v. Labh Singh AIR 1965 SC 314, (Para.4) (India), Builders Supply Corp. v. UOI, AIR 1965 SC 1061 (Para.20) (India), Superintendent & Remembrancer of Legal Affairs v. Corporation of Calcutta AIR 1967 SC 997, (Paras. 21-22) (India).

<sup>14</sup>AIR 1941 FC 16 421( India).

<sup>15</sup>Naresh Chandra Bose v. S.N. Deb AIR 1956 Cal 222 (Para.6) (India).



Moreover, expression “personal laws” appears in Entry 5 List III making it clear that State can enact legislation in relation of personal laws. If State has power to enact legislation for personal law, there is no reason why it law cannot be subjected to judicial scrutiny under Part III. The learned judges also did not recognise personal laws as “customary laws” and hence held that personal law cannot come within Art 13(3)(a). Personal laws are to an extent based on customary law. Punjab Laws Act<sup>16</sup> and Oudh Laws Act<sup>17</sup> have clearly directed application of Hindu and Muslim Law and referred to them as law as has been modified by custom.<sup>18</sup> References may be made to Mulla's Principles of Hindu Law<sup>19</sup>. In case of Mohammedan Law also, custom is well recognised source and foundation of personal law. Did the Constitution framers intend that customary law should operate subject to Art 13 but not personal laws of which one of the major sources is custom? The answer to the question is too obvious. Constitution framers did not intend to exclude personal laws from ambit of Art 13.

Traditional personal laws are held to be subject to customary laws. If customs and usages having force of law are subject to fundamental rights, there is no reason why traditional personal law should not yield to fundamental rights.<sup>20</sup> There is no difference

between expression “existing law” and “law in force” and thus, personal law would be “existing law” and “law in force”.<sup>21</sup>

### [2.1.1] CONTRARY VIEW OF THE CONSTITUTIONAL COURTS

In *Krishna Singh*<sup>22</sup> SC ruled: “Part III of Constitution does not touch upon the personal laws of the parties”. It is submitted that the Bench however, in declaring Personal Laws to be untouched by provisions of Part III, has not spelt out any reasons for such view. To that extent, judgement of the court is not binding.<sup>23</sup>

In a subsequent decision, it was held: “Personal laws are derived not from the Constitution but from religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Art. 13 if they violate fundamental rights.”<sup>24</sup>

It is of considerable significance to refer to *A. R. Antulay v. R.S.Nayak*,<sup>25</sup> where it was held that Court could not pass an order or issue a direction which would be violative of FRs of citizens. It appears to be the modern trend of juristic thought that expression “State” as defined in Art 12 of Constitution includes judiciary also. Personal laws are not made by legislature but are enforced by Courts. The questions to be asked is as to whether Court can be asked to enforce a provision of

<sup>16</sup> S.5(b) The Punjab Laws Act, 1872(Act IV of 1872) (India).

<sup>17</sup> S. 3(2)(b) The Oudh Laws Act, 1876 Act No.18 OF 1876 [AS ON 1956] (India).

<sup>18</sup> A.M Bhattacharjee, Matrimonial Laws and the Constitution, (2d ed., Eastern Law House 2017).

<sup>19</sup> S.T DESAI, PERSONAL LAW 56, (16th ed.,).

<sup>20</sup> Sant Ram v. Labh Singh , AIR 1965 SC 314 (India).

<sup>21</sup> Constitutional Law of India 677 (Universal Law Publishing Co., 4th ed.).

<sup>22</sup> Krishna Singh v. Mathura Ahir, 1981 3 SCC 689 (Para.17) (India).

<sup>23</sup> State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139 Para 41 (India).

<sup>24</sup> C. MasilamaniMudaliar v. Idol of Sri Swaminathaswami , 1996 8 SCC 525 (Para.15) (India).

<sup>25</sup> AIR 1988 SC 1531(India).



personal law which appears to be repugnant to FRs. Personal laws shall have to yield to FRs and all laws, whether made by legislature or otherwise, must necessarily conform to Part III.

### **[2.1.2] ART 225 OF THE CONSTITUTION OF INDIA**

Art 225 of Indian Constitution spells out the jurisdiction of High Courts. The expression “Subject to the provisions of the Constitution” and “the jurisdiction of, and the law administered in, any existing High Court” indicates that jurisdiction of the HC and the law administered by the HC is subject to provisions of Constitution. “Law administered” by HC includes Muslim laws declared by Privy Council and Federal Courts as such laws were being administered by the High Courts. Thus, all such laws are subject to provisions of Indian Constitution including Part III.

### **[2.2] SHARIAT ACT FALLS UNDER THE DEFINITION OF “LAWS IN FORCE”**

The Muslim Personal (Shariat) Law Act, 1937 by virtue of being a statute falls under definition of “laws in force” u/A 13(3)(a) and 372 and thus can be challenged u/A 32 for being violative of fundamental rights. Muslim Personal Law is now enforced by application of the Act<sup>26</sup>, and is a “law in force” within Arts. 13 and 372. Thus, such law is amenable to challenge if they violate FRs to the extent the impugned practices are recognized by State in the Act.

The Act not being repealed remains in force after the coming into force of Constitution

<sup>26</sup> S.2, Muslim Personal Law (Shariat) Application Act 1937 (India).

and is hence “law in force” within Arts. 13 and 372. S.2 gives binding force to Muslim Personal Law enforceable by State and Courts and is hence “law” within Art.13. Being so, it is capable of challenge although actual content of Shariat remains uncoded. After passing of the Act, it is irrelevant whether said law is codified or uncoded, customary or non-customary, since it is the said Act which gives it the character of “law in force” and recognition by State. So long as the infringed provisions are part of an Act, it must pass test of constitutionality even if the provision is based upon religious principles.<sup>27</sup> It must therefore pass the test of Arts. 14, 15 and 21.

### **[2.3] IMPUGNED PRACTICE IS VIOLATIVE OF FUNDAMENTAL RIGHTS**

The Constitution of India is the supreme law of the land and there is nothing beyond the Constitution. According to the *Kelson's pure law theory* the Constitution of India is the Grand Norm means, it is at the top and there is nothing beyond that.

No law whether made by a legislature or Judge-made, customary or otherwise, can be enforced by any Court in our country if it is inconsistent with or repugnant to guarantee of fundamental rights unless expressly saved under a specific provision<sup>28</sup> of Constitution itself. HCs and the SC have also held that after the advent of Constitution, customs and usages have to bow down to constitutional values of equality and dignity for all. Similarly, personal laws too have to bow

<sup>27</sup> Mary Sonia Zachariah v. Union of India, 1995 (1) KLT 644 FB (Par.39) (India).

<sup>28</sup> INDIA CONST. arts 31A, 31B and 31C.



down to constitutional values.<sup>29</sup>The impugned practice, which practically treats women like chattel is not harmonious with modern principles of human rights and gender equality. Section 2<sup>30</sup> is violative of rights of Muslim women guaranteed u/A 14, 15 and 21 in as much as it gives protection to impugned practice.

### **[2.3.1] INSTANTANEOUS TRIPLE TALAQ IS VIOLATIVE OF ART 14**

The practice of triple talaq is infested with the malady of inequality which goes against equality enshrined in Art 14. A woman has as much right to her freedom to develop her personality to the full as a man. When she marries, she does not become husband's servant but his equal partner. Neither is above the other or under the other. They are equals.<sup>31</sup>

### **[2.3.2] INSTANTANEOUS TRIPLE TALAQ IS VIOLATIVE OF ART 15**

#### **A. Discrimination on basis of sex**

The impugned practices can be exercised unilaterally by the husband alone and it has a disparate impact on women alone, they are violative of Art 15 and the discrimination is based on sex alone. A Muslim husband can give divorce to his wife by simply uttering the word thrice where he is not responsible for providing any reasons for it, whereas a Muslim wife has to file a petition in competent court to get a divorce and also liable to provide reasonable grounds for the divorce.

#### **B. Discrimination on basis of religion**

<sup>29</sup>Panch Gujar Gaur Brahmans v. Amar Singh, AIR 1954 Raj 100 (Para.15) (India), N. Adithayan v. Travancore Devaswom Board (2002) 8 SCC 106 (Para.18) (India).

Women belonging to any individual religious denomination cannot suffer a significantly inferior status in society, as compared to women professing some other religion. Muslim women are placed in a position far more vulnerable than their counterparts, who profess other faiths as they are still subject to the Shariat Act, which is silent on triple talaq, nikah halala and polygamy.

### **[2.3.3] INSTANTANEOUS TRIPLE TALAQ IS VIOLATIVE OF ART 21**

The right of a woman to human dignity, social esteem and self-worth are vital facets of the right to life under Art 21. The impugned practice is in violation of Art 21 that guarantees the right to dignity and personal autonomy of a Muslim woman who wants to remarry her former husband who divorced her through *talaq-e-biddat*.

### **[3] THE PRACTICE OF TALAQ-E-BIDDAT IS UNCONSTITUTIONAL**

The impugned practice is unconstitutional. It does not enjoy any protection u/A 25, 26 and 29 and it is violative of International conventions to which India is a signatory.

### **[3.1] IMPUGNED PRACTICE IS NOT PROTECTED U/A 25, 26 AND 29**

The Impugned practice is not protected u/A 25, 26 and 29. *Firstly*, it is a secular activity resulting in civil consequences for women and hence is capable of being tested on touchstone of Arts. 14, 15 and 21. *Secondly*, it is also not a part of Islamic culture.

<sup>30</sup> Section 2, The Muslim Personal (Shariat) Law Act, 1937 Act No. 26 of 1937 (India).

<sup>31</sup>Charu Khurana v. Union of India, 2015 (1) SCC 192 (India).



**[3.1.1.] IMPUGNED PRACTICE IS NOT PROTECTED UNDER ARTICLES 25 AND 26**

*Firstly*, it is not an essential part of Islam. *Secondly*, it is violative of Fundamental Rights. *Thirdly*, it is contrary to morality. *Fourthly*, State can introduce social reforms by virtue of Art. 25 (2)(a).

**[3.1.1.A] NOT AN ESSENTIAL PART OF ISLAMIC RELIGION**

The protection u/A 25 and 26 of Constitution is with respect to religious practice which forms an essential and integral part of religion. This caution is necessary, otherwise even purely secular practices will be clothed with religious sanction and may claim to be treated as religious practices within meaning of Art. 25.<sup>32</sup> Certain practices, even though regarded as religious, may have sprung from merely superstitious beliefs and may be only extraneous and unessential accretions to religion itself. Such practices are not protected and can be abrogated.<sup>33</sup> What constitutes an essential part of a religion or religious practice has to be decided by courts on basis of evidence adduced with reference to doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.<sup>34</sup> What is permitted or not prohibited by a religion does not become a positive tenet of a religion.<sup>35</sup>

*From the above discussion, following ingredients of an “essential religious practice” emerge:*

- *It should be religious and not secular in nature*
- *It should be sanctioned by the tenets of the said religion*
- *It should be regarded by the community as a part of its religion.*

**AA. MARRIAGE AND CONNECTED MATTERS ARE SECULAR IN NATURE**

*Marriage and divorce are not religious in nature, and thus are not protected u/A 25 and 26. Marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined u/A 25 and 26 of Constitution.<sup>36</sup> Even though some religions lay down sacramental formalities for celebration of marriage or an obligation to marry for maintenance of lineage, modern societies regard it only as a secular activity. So regarded, it would come u/A 25(2) (a), and be liable to state regulation in the interest of general public.<sup>37</sup> As regards Muslim community, an additional reason why law of marriage and divorce cannot be regarded as integral part of religion is that while Hindu scriptures regard marriage as sacramental and indissoluble, Muslim marriage is regarded as matter of contract<sup>38</sup> and subject to divorce; and rules of conduct are contained in Quoran, according to exigencies of time.<sup>39</sup> In Mohammedan Law, Marriage is Civil Contract. So far as relationship flowing from contract of marriage is concerned, including*

<sup>32</sup>*Durgah Committee Ajmer v. Syed Hussain Ali*, AIR 1961 SC 1402 (India).

<sup>33</sup> *Commissioner, Hindu Religious Endowments v. LaxmindraSwamiar*, AIR 1954 SC 282 (India).

<sup>34</sup> *H.H. Srimad Swami v. State of Tamil Nadu* , AIR 1972 SC 1586 (India).

<sup>35</sup>*Javed v. State of Haryana*, (2003) 8 SCC 369 (India).

<sup>36</sup>*Sarla Mudgal v. UOI*, 1995 SCC (3) 635(India).

<sup>37</sup> 3 *DURGA DAS BASU*, COMMENTARY ON THE CONSTITUTION OF INDIA, 3499 (8th ed., 2008).

<sup>38</sup>*Abdul Kadir v. Salima*, (1886) 8 All. 149 at 154 (India).

<sup>39</sup> 1 *AMEER ALI*, THE PRINCIPLES OF MOHAMEDAN LAW 8-9, (Allahabad Law Emporium 1983).



its dissolution, the area and field is secular in nature.<sup>40</sup>

**AB.TRIPLE TALAO IS NOT SANCTIONED BY QUORAN OR SHARIAT**

The Practice of Triple Talaq is not sanctioned by the Quoran or Shariat. Moreover, it does not form an essential part of Muslim law.

**EVOLUTION OF THE CONCEPT**

Triple talaq commands neither the sanctions of holy Quran nor the approval of Prophet<sup>41</sup>. It was permitted by Hazrat Umar on account of certain peculiar situation. It was however a mere administrative measure to meet an emergency situation and not to make it a law permanently.<sup>42</sup> But unfortunately, Hanafi Jurists later on at the strength of this instant administrative order of Caliph declared this form of divorce valid and also gave religious sanction to it. It must have suited the needs of his own time, but in modern times it has resulted in great deal of harm. Much inconvenience is being felt by the Muslim community so far as this law is applied in India.

**SANCTITY AND EFFECT OF TALAO-E-BIDDAT**

Both *ahsan talaq* or *hasan talaq* have legal recognition under all *fiqh* schools, *Sunni* or *Shia*.

Triple *talaq* is classed as *biddat* (an innovation). It is accepted by all schools of law that *talaq-e-bidaat* is sinful.<sup>43</sup> “Bad in theology but valid in law”<sup>44</sup> is often used in this context. The fact remains that it is considered to be sinful. It is definitely not recommended by any school. It is not even considered to be a valid divorce by *Shia* schools.<sup>45</sup> There are views even amongst the *Sunni* schools that triple *talaq* pronounced in one go would be regarded as only as one *talaq*. This innovation may have served a purpose at a particular point of time, but if it is rooted out, such a move would not be contrary to any basic tenet of Islam or Quran or any ruling of Prophet.

**AGAINST THE BASIC TENETS OF QUORAN**

There is no *Quranic* basis to establish that three divorces on a single occasion will amount to an irrevocable divorce. Prophet despised divorce and described marriage as *Summat*. The view that Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions.<sup>46</sup> The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. It says: “*If they (namely, women) obey you, then do not seek a way against them.*”<sup>47</sup> It is a popular fallacy that a

<sup>40</sup>Abdur Rahim Undre v. Padma Adbur Rahim Undre, AIR 1982 Bom 341 (Para. 23) (India).

<sup>41</sup> Once the Prophet was informed about a man who had pronounced three divorces at one time. He got up in anger, saying, “Is sport being made of the Book of Allah while I am (yet) among you? Reported by an ‘Nasal’”.

<sup>42</sup>AQIL AHMAD, TEXTBOOK OF MOHAMMEDAN LAW 174-175 (Central Law Agency, Allahabad, 2007).

<sup>43</sup>MULLA’S PRINCIPLES OF HINDU LAW 261-262 ( LexisNexis, 21st ed., 2013).

<sup>44</sup>Sarabai v. Rabiabai, (1906) ILR 30 Bom 537 (India).

<sup>45</sup> With regard to triple talaq, Fyzee comments: “Such a talaq is lawful, although sinful, in Hanafi law; but in Ithna ‘Ashari and the Fatimid laws it is not permissible’154.

<sup>46</sup> A. Yousuf Rawther v. Sowramma, AIR 1971 Kerala 261 (India).

<sup>47</sup> (Quran IV:34).



Muslim male enjoys, under Quranic law, unbridled authority to liquidate the marriage.<sup>48</sup> Muslim law as applied in India has taken a course contrary to the spirit of what the Prophet or Holy Quran lay down and the same misconception vitiates the law dealing with wife's right to divorce.<sup>49</sup>

Quoran lays down only two kinds of divorces. Third form i.e. Talaq-ul-Biddat, is considered to be the most sinful, innovated form of divorce as it is against the letter and spirit of Quran and was disallowed by Prophet himself.<sup>50</sup> Islamic law gives to the man faculty of dissolving the marriage; but in absence of serious reasons, no man can justify a divorce, either in eye of religion or law.<sup>51</sup> The instructive Quoranic verses<sup>52</sup> do not require any interpretative exercise. They are unambiguous as far as talaq is concerned. Holy Quran has attributed sanctity and permanence to matrimony. In extremely unavoidable situations, *talaq* is permissible. But an attempt for reconciliation and if it succeeds, then revocation are Quranic essential steps before it attains finality.<sup>53</sup> In triple talaq, this door is closed. Hence, it is against basic tenets of Holy Quran.

### **LAW REGARDING TRIPLE TALAO AS LAID DOWN BY THE COURTS**

The correct law of *talaq* as ordained by the Holy Quran, is that it must be for a reasonable cause and preceded by an attempt of reconciliation between husband and wife by two arbiters. If attempts fail, 'talaq' may be effected.<sup>54</sup> An attempt at reconciliation is an essential condition precedent to '*talaq*'.<sup>55</sup> The attempt at reconciliation recommended under the *shariat*, has been assigned a key role by the Supreme Court.<sup>56</sup> *Talaq-ul-biddat* i.e. giving an irrevocable manner without allowing the period of waiting for reconciliation or without allowing will of Allah to bring about reunion by removing differences, runs counter to mandate of holy Quran and has been regarded as by all under Islam *sinat* to be sinful.<sup>57</sup> In *ShayaraBano v. UOI*, 5-judge Bench has held the practice to be unconstitutional. What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.<sup>58</sup>

What is morally beautiful that must be done; that is law or Shariat and nothing else can be law.<sup>59</sup> In Quoran, there is no trace that the 'three divorce' pronounced at one occasion would be treated as three divorce on irrevocable footing. Quran only provides procedure for pronouncing *talaq* and every possible attempt must first be made for

<sup>48</sup> A. Yousuf Rawther v. Sowramma, AIR 1971 Kerala 261 (India).

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Sura LXV of the Quran, Sura IV, versus 128/130;

Sura II, versus 229/232; and Sura IV, verse 35.

<sup>53</sup> Shamim Ara v. State of Uttar Pradesh, (2002) 7 SCC 518 (India).

<sup>54</sup> Mst. Rukia Khatun v. Abdul Khaliqul Laskar, (1981) 1 Gau. L.R. 375, para 11 (India).

<sup>55</sup> Sri Jiauddin v. Mrs Anwara Begum, (1981) 1 Gauhati Law Reports 358 (India).

<sup>56</sup> Shamim Ara v. State of Uttar Pradesh, (2002) 7 SCC 518 (India).

<sup>57</sup> Rahmattullah V. State of U.P., II (1994) DMC 64 (India).

<sup>58</sup> ShayaraBano v. UOI, [2017 SCC OnLine SC 963](#) (para 57) (India).

<sup>59</sup> ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 10, (5th ed., 2008).



reconciliation before completion of the prescribed period. Thus, Triple talaq goes against the very spirit of procedure of divorce as laid down in Quran as well as Hadiths as it is a final divorce in which no opportunity is given for reconciliation. It was an exception rather than a rule. In no manner it is a part of Quoranic Shariat.

No person's status resulting in adverse civil consequence can be altered by a private person. Grant of divorce is a judicial function and can only be granted by a court of law. Women cannot remain at the mercy of patriarchal setup held under clutches of sundry clerics having their own interpretation of Quoran. <sup>60</sup>Faith cannot be used as dehumanizing force.<sup>61</sup> Whatever may be status of Fatwa during British Rule, it has no place in independent India under our Constitutional scheme. It has no legal sanction and cannot be enforced by any legal process.<sup>62</sup>

It has been specifically held by the SC in *Shamim Ara v. State of Uttar Pradesh*<sup>63</sup> that in the practice of *talaq-e-biddat*, there are usually no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the *talaq*. It has to be particularly noted that conclusion by the Bench in Shamim Ara is made in agreement with the view of the HCs.<sup>64</sup> In the light of such specific findings as to how triple talaq is bad in law on account

of not following the Quranic principles, it cannot be said that there is no ratio decidendi on *talaq-e-biddat* in Shamim Ara. This judgment has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to tenets of Holy Quran.

### **B. MUSLIM THEOCRATIC STATES HAVE UNDERTAKEN REFORMS**

The fact that *a large number of Muslim countries or countries with an overwhelmingly large Muslim population where Islam is the State religion, have undertaken extensive reforms in this area and have regulated divorce law*, goes to establish that practice in question cannot be regarded as integral to practices of Islam or essential religious practice. The Arab States<sup>65</sup>, Southeast Asian countries<sup>66</sup> and even India's neighbours Pakistan, Bangladesh and Sri Lanka have enacted legislations against the practice, either banning or regulating it.

- In **Algeria**, where Islam is the official religion, divorce cannot be established except by a judgment of the court preceded by an attempt at reconciliation.<sup>67</sup>
- In **United Arab Emirates**, where Islam is the official religion, if a husband divorces his wife after consummation of a valid marriage by his unilateral action, she will be entitled to compensation besides maintenance for Iddat.<sup>68</sup>
- **Moroccan Family Code (Dooudawana), 2004**, put husband and wife on equal

<sup>60</sup>Hina vs. State of UP, (2016) SCC Online All 994 (Paras. 9-10) (India).

<sup>61</sup>Aaqil Jamil v. State Of U.P., APPLICATION U/S 482 No. - 11716 of 2017 (India).

<sup>62</sup> Vishwa Lochan Madan Vs. Union of India, (2014) 7 SCC 707 (India).

<sup>63</sup>(2002) 7 SCC 518 Para 15 (India).

<sup>64</sup> Supra, footnote 28.

<sup>65</sup> Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, UAE, and Yemen.

<sup>66</sup> Indonesia, Malaysia, and the Philippines.

<sup>67</sup>Law 84-11 of 1984 as amended in 2005.

<sup>68</sup>Law of Personal Status 2005, Federal Law No.28 of 2005: Article 140 (1).



footing. Neither of them can pronounce divorce unilaterally except under judicial supervision.

- **Indonesia, Iran and Tunisia** have de-recognized husband's right to unilateral divorce by legislating that all divorce must go through a Court.
- In **Bangladesh and Pakistan**, where Islam is the official religion, the practice of *talaq-e-biddat* is done away with by way of an Ordinance<sup>69</sup> and divorce is carried out by intervention of an arbitration council. Contravention of the procedure is punishable.
- Incidentally, **Sri Lanka** too, which has a significant Muslim minority (like India), has adopted a model of laws that effectively abolished Triple Talaq.

### [3.1.1.B] VIOLATIVE OF FUNDAMENTAL RIGHTS

On a plain reading of Arts 25 and 26, the right to freedom of conscience is subject to public order, morality, health and the other provisions of the Constitution in Part III. Art 25 cannot be allowed to surpass rights u/A 14, 15 and 21. A cardinal principle of interpretation of Constitution is that all provisions of Constitution must be harmoniously construed so that there is no conflict between them. Arts. 14, 15 and 21 must be read harmoniously with Art 25 and 26 to prevent discrimination against women and to give effect to right of Muslim community to practice their religion. One cannot cancel out the other on the ground that it is protected under Part III.

<sup>69</sup>Ordinance VIII of 1961 amended by Ordinance 114 of 1985: Section 7.

<sup>70</sup>Bijoe Emmanuel and Ors. v. State of Kerala, (1986) 3 SCC 615 (Para.19) (India).

Whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the FR 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 or to provide for social welfare and reform.<sup>70</sup>

### [3.1.1.C] CONTRARY TO MORALITY

The rights guaranteed u/A 25 and 26 are subject to morality. "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. By reason of being violative of these values, impugned practice runs counter to the very notion of constitutional morality and thus cannot be protected u/A 25 and 26. The right u/A 25 and 26 is subject to constitutional goals of securing equality and dignity. The denomination sect is also bound by the constitutional goals.

### [3.1.1.D] STATE CAN INTRODUCE SOCIAL REFORMS UNDER ART. 25 (2)(A)

The freedom u/A 25 is not absolute. The Article itself permits a legislation in interest of social welfare and reform. Marriage is the foundation of family and in turn of society without which no civilisation can exist.<sup>71</sup> Marriage, succession and like matters cannot be brought within the guarantee enshrined u/A 25, 26 and 27.<sup>72</sup> They may be associated with religious practice, and may even have religious origins in their form and content,

<sup>71</sup>SarlaMudgal v. UOI, 1995 SCC (3) 635 (India).

<sup>72</sup>Ibid.



but are not essential parts of religion. Even if it were so, they would be subject to state regulation in interest of public order, morality and health.<sup>73</sup> Marriage is a social institution and therefore, an object of social reform and that to effectuate social reform<sup>74</sup>, the legislature, under the Constitution, can interfere with religious practices, such as polygamy even though the parties are Muslims.<sup>75</sup>

### **[3.1.2.] THE IMPUGNED PRACTICE IS NOT PROTECTED UNDER ARTICLE 29**

The word “culture” in Art. 29 (1) must be read *ejusdem generis* with “language and script” and cannot include within it personal laws. In any event, a cultural practice which goes contrary to Arts. 14, 15 and 21 cannot be preserved, and 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 or norms of civilised society including the abolition of Sati and child marriage. On a harmonious interpretation of Arts. 14, 15, 21, and Art. 29 on the other hand, it is submitted that only culture that does not violate the indispensable right to equality and life can be preserved as a matter of right. It is, therefore, submitted that the impugned practice cannot be held to be protected under Art. 29 as being part of “culture”.

### **[3.2] THE PRACTICE IS IN CONFLICT WITH INTERNATIONAL CONVENTIONS**

In cases involving violation of human rights, courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.<sup>76</sup> In the absence of domestic law occupying the field, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and human dignity in Arts. 14, 15 and 21 of Constitution of India.<sup>77</sup> It is now an accepted rule of judicial construction that regard must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them. Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women<sup>78</sup>. India has ratified various international conventions<sup>79</sup> and human rights instruments<sup>80</sup> committing to secure equal rights of women. CEDAW<sup>81</sup> mandates all State parties to overcome, dismantle and refrain from promoting gender discrimination. Discrimination<sup>82</sup> against women based on sex and religion is in direct contrast with the mandate of achieving substantive equality. The practice of *talaq -e-*

<sup>73</sup> Cf. State v. Bhimsing, (1951) 6 DLR 174 (175) (Bom) (India).

<sup>74</sup> State of Bombay v. NarasuAppa Mali, AIR 1952 Bom 84 (India).

<sup>75</sup> Srinivasa v. Saraswati, AIR 1952 Mad 193 (India).

<sup>76</sup> Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625 (India).

<sup>77</sup> Vishakha v. State of Rajasthan, AIR 1997 SC 3011 (India).

<sup>78</sup> INDIA CONST. art. 15, cl(3).

<sup>79</sup> International Convention on Civil and Political Rights (1976), art. 26, International Covenant on Economic, Social and Cultural Rights (1976), art. 2.

<sup>80</sup> Universal Declaration on Human Rights 1948.

<sup>81</sup> Convention on Elimination of All Forms of Discrimination Against Women (1993).

<sup>82</sup> Convention on Elimination of All Forms of Discrimination Against Women (1993) art. 1.



*biddat* is absolutely violative of CEDAW.<sup>83</sup> It is submitted that it was rendered impermissible as soon as India accepted to be a signatory to international conventions with which it was in clear conflict. By not barring it, and knowingly allowing it to be followed, India is seen as persisting in what international community considers abhorrent.

#### **[4] CONCLUSION**

The Constitution declares that DPSPs are “fundamental in the governance of country”<sup>84</sup>. It imposes social obligations on Governments to apply DPSPs while making and implementing policies. Art.38 r/w 44 of Constitution incorporates an obligation on State to secure a social order for promotion of welfare of people and expects from State to secure a UCC for all citizens of India. It is the FR of every one to live with human dignity, free from exploitation. The right to live with human dignity enshrined in Art.21, derives its life breath from DPSPs<sup>85</sup>. In *Mohini Jain*<sup>86</sup>, right to education was declared as FR. It was till then a DPSP. Art.44, though not legally enforceable, still carries the moral weight of the Constitution.

Art.44 does not violate the FR to freedom of religion u/a 25 and 26, stating that subject to public order, morality and health, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. Matters of personal law are subject to restriction by the State in the

larger interest of society.<sup>87</sup> Uniform Civil Code is not violative of the personal law of any religion. ‘Personal law’ is neither synonymous nor coextensive with ‘religion’.

Object behind the implementation of a UCC is to effect integration of country. It brings together all communities on matters which are governed by diverse personal laws but do not form essence of any religion. Court must not adopt a doctrinaire approach which might choke all beneficial legislations.<sup>88</sup>

Different treatment for any religious group is violative of ICCPR and Declaration on the Rights to Development adopted by the world conference on Human Rights. Parliament should frame UCC without further delay, divesting religion from social relations and personal law.<sup>89</sup> Another important fact which is always ignored in the clamour of reactionaries against UCC is that there already exists a State which has such a Code. If Goa can have UCC, then why not the rest of the country? Such a paradox should not exist in a single country.

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<sup>83</sup>Art. 2 (c), 2 (f) and Art. 16 (1) (c).

<sup>84</sup>INDIA CONST. art. 37.

<sup>85</sup>*Bandhua Mukti Morcha v. UOI*, (1997) 10 SCC 549 (India).

<sup>86</sup>*Mohini Jain vs. State Of Karnataka*, 1992 AIR 1858, 1992 SCR (3) 658 (India).

<sup>87</sup>*Durgah Committee v. Hussain*, AIR 1961 SC 1402 (1415) (India).

<sup>88</sup>*Lachmandas Kewalram v. State of Bombay*, AIR 1952 SC 235 (India).

<sup>89</sup>*Satyabrata Chawdhuri*, “A Common Civil Code: It is a Constitutional Obligation” 10, THE TRIBUNE, 30 July 2003.