Reportable

IN THE SUPREME COURT OF INDIA

Original Civil Jurisdiction

Writ Petition (C) No. 118 of 2016

Shayara Bano ... Petitioner

versus

Union of India and others ... Respondents

with

Suo Motu Writ (C) No. 2 of 2015

In Re: Muslim Women's Quest For Equality

versus

Jamiat Ulma-I-Hind

Writ Petition(C) No. 288 of 2016

Aafreen Rehman ... Petitioner

versus

Union of India and others ... Respondents

Writ Petition(C) No. 327 of 2016

Gulshan Parveen ... Petitioner

versus

Union of India and others ... Respondents

Writ Petition(C) No. 665 of 2016

Ishrat Jahan ... Petitioner

versus

Union of India and others ... Respondents

Writ Petition(C) No. 43 of 2017

Atiya Sabri ... Petitioner

versus

Union of India and others ... Respondents

J U D G M E N T

Jagdish Singh Khehar, CJI.

Index

Part-1.

The petitioner's marital discord, and the petitioner's prayers:

1. The petitioner-Shayara Bano, has approached this Court, for assailing the divorce pronounced by her husband – Rizwan Ahmad on 10.10.2015, wherein he affirmed "…in the presence of witnesses saying that I gave 'talak, talak, talak', hence like this I divorce from you from my wife. From this date there is no relation of husband and wife. From today I am 'haraam', and I have become 'naamharram'. In future you are free for using your life …". The aforesaid divorce was pronounced before Mohammed Yaseen (son of Abdul Majeed) and Ayaaz Ahmad (son of Ityaz Hussain) – the two witnesses. The petitioner has sought a declaration, that the 'talaq-e-biddat' pronounced by her husband on 10.10.2015 be declared as *void ab initio*. It is also her contention, that such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as, the Shariat Act), be declared

unconstitutional. During the course of hearing, it was submitted, that the 'talaq-e-biddat' (-triple talaq), pronounced by her husband is not valid, as it is not a part of 'Shariat' (Muslim 'personal law'). It is also the petitioner's case, that divorce of the instant nature, cannot be treated as "rule of decision" under the Shariat Act. It was also submitted, that the practice of 'talaq-e-biddat' is violative of the fundamental rights guaranteed to citizens in India, under Articles 14, 15 and 21 of the Constitution. It is also the petitioner's case, that the practice of 'talaq-e-biddat' cannot be protected under the rights granted to religious denominations (-or any sections thereof) under Articles 25(1), 26(b) and 29 of the Constitution. It was submitted, that the practice of 'talaq-e-biddat' is denounced internationally, and further, a large number of Muslim theocratic countries, have forbidden the practice of 'talaq-e-biddat', and as such, the same cannot be considered sacrosanctal to the tenets of the Muslim religion.

2. The counter affidavit filed by respondent no.5 – the petitioner's husband – Rizwan Ahmad, discloses, that the 'nikah' (marriage) between the petitioner and the respondent was solemnized on 11.04.2001, as per 'Shariat', at Allahabad. It was submitted, that the petitioner – Shayara Bano, performed her matrimonial duties intermittently, coming and leaving the matrimonial home from time to time. The

matrimonial relationship between the parties resulted in the births of two children, a son – Mohammed Irfan (presently about 13 years old) studying in the 7th standard, and a daughter – Umaira Naaz (presently about 11 years old) studying in the 4th standard, both at Allahabad.

3. It is the case of the respondent–husband, that the petitioner-wife, left her matrimonial home on 9.4.2015 in the company of her father – Iqbal Ahmad and maternal uncle – Raees Ahmed, as well as children – Mohammed Irfan and Umaira Naaz, to live in her parental home. The respondent claims, that he continued to visit the petitioner, for giving her maintenance, and for enquiring about her well being. When the husband met the wife at her parental home in May and June 2015, she refused to accompany him, and therefore, refused to return to the matrimonial home. On 03.07.2015, Rizwan Ahmad, asked the father of Shayara Bano to send her back to her matrimonial home. He was informed by her father, after a few days, that the petitioner was not inclined to live with the respondent.

4. On 07.07.2015 the father of the petitioner, brought the two children – Mohammed Irfan and Umaira Naaz to Allahabad. The husband submits, that both the children have thereafter been in his care and custody, at Allahabad. It is the assertion of the husband, that the petitioner's father had given

him the impression, that the petitioner would be inclined to return to Allahabad, consequent upon the husband's care and custody of both children, at the matrimonial home.

5. It is claimed by the respondent-husband, that he made another attempt to bring back the petitioner-wife from her parental home on 09.08.2015, but Shayara Bano refused to accompany him. It is submitted, that Rizwan Ahmad was opposed in the above endeavour, both by the petitioner's father and her maternal uncle.

6. Finding himself in the above predicament, Rizwan Ahmad approached the Court of the Principal Judge, Family Court at Allahabad, Uttar Pradesh, by preferring Matrimonial Case No.1144 of 2015 with a prayer for restitution of conjugal rights. The petitioner-Shayara Bano, preferred Transfer Petition (C) No. 1796 of 2015, under Section 25 of the Code of Civil Procedure, 1908, read with Order XXXVI-B of the Supreme Court Rules, 1966, for the transfer of Matrimonial Case No.1144 of 2015, filed by the respondent-husband (seeking restitution of conjugal rights) pending at Allahabad, Uttar Pradesh, to the Principal Judge, Family Court, Kashipur, Uttarakhand. In the above transfer petition, the wife *inter alia* asserted as under:

> ""2.3 The Petitioner who hails from Kashipur, Uttarakhand is unemployed and her father is a government employee. The only source of income is the Petitioner's father who has a low income and despite

this the Petitioner during the time of marriage had made arrangements beyond their capacity. But soon after the marriage the Respondent husband started demanding for additional dowry and made unreasonable demands for a car and cash.

2.4 The Petitioner who rightfully denied the demands of the Respondent was tortured and physically abused by the Respondent and his family. She was often beaten and kept hungry in a closed room for days. The family of the Respondent administered her with medicines that caused her memory to fade. Due to the medicines she remained unconscious for long hours.

Xxx xxx xxx

2.6 On 09.04.2015, the Respondent attempted to kill the Petitioner by administering medicines. These medicines on inspection by a doctor on a later date were revealed to cause loss of mental balance after regular consumption. The Respondent brought the Petitioner to Moradabad in a critical near-death condition with the intention of abandoning her if his dowry demands were not fulfilled.

2.7. Thereafter on 10.04.2015 the Respondent called the parents of the Petitioner to Moradabad to take their daughter. The parents of the Petitioner requested him to come to Kashipur to meet and settle the issue. He refused to go to Kashipur and said that they should come and take their daughter or fulfil his demands for more dowry. He demanded Rs.5,00,000/- (Rupees Five Lakh Only).

2.8. Due to the unreasonable demands and the torturous behaviour of the Respondent husband, the Petitioner's parents came to Moradabad to take her and she was forced to stay with her parents after 10.04.2015.

xxx xxx xxx

2.13 The Respondent has filed for restitution despite the fact that he himself had asked the Petitioner wife's father to either fulfil his dowry demands or to take the Petitioner back to her maternal home and in pursuance of the same had drugged the Petitioner and had left her in Moradabad."

7. It is the case of the respondent-Rizwan Ahmad, that in view of the above averments of the petitioner-Shayara Bano, he felt that his wife was not ready for reconciliation, and therefore,

he withdrew the suit (-for restitution of conjugal rights), preferred by him at Allahabad, and divorced the petitioner-Shayara Bano, by serving upon her a 'talaq-nama' (deed of divorce) dated 10.10.2015. The text of the 'talak-nama', is reproduced below:

"Deed of Divorce

Dated 10.10.2015

Madam,

Shayra Bano D/o Iqbal Ahmad.

Be it clear that I Rizwan Ahmed married with you without any dowry to spend a peaceful and happy marital life. After marriage you came in my marital tie. From the relation between you and me two issues namely Irfan Ahmad aged about 13 years and Kumari Humaira Naz @ Muskan aged about 11 years were born who are receiving education living under my guardianship. With a great sorrow it is being written that you, just after 6 months of marriage, with your unreasonable and against Sharia acts started to pressurize me to live separately from my parents. I, in order to keep you happy and as per your wish started to live at a rented house at Mohalla Ghausnagar and while working as a clerk under a builder tried my level best to spend peaceful marital life with you and children. However, you, in an unreasonable manner and against Shriah continued to create problem and quarrel in house on regular basis. When you were asked the reason in a very affectionate manner about two years ago, you had put a condition that now when your other relatives are not with you in such situation come with me to my parents' house and live further life there. I being a person from a self-respecting family refused to live as 'son in law living at in-laws house'. Then you, under the influence of your parents, continued to fake various mental and physical pains and continued to behave life a mental patient. When tried to know the reason then you after much difficulty told that you had

med with a serious accident before marriage. I for the sake of my children and you tolerated that. I became despondent from your persistent demand of living at your parental house and your being of stubborn nature, your giving threat of implicating in false case and threat of inflicting injury to yourself and of consuming poison and implicating me in false case on that count given on daily basis and complained about the same to your paternal uncle but your father replied that whenever you do such acts sleeping pills be given to you. I found this very baffling, upon asking your father told that since the time before your marriage you had been under treatment for mental ailment. I ignored such a big incident and the information received about you. Resultantly you became audacious in your behavior. When reported all these things to your father, your father told me that this is the time of children's holidays you be sent to your parents' house with children. You take them back after the atmosphere is changed and summer vacations are over. Acting on the words of your father I left you at your parents' place along with children and while going, you took away gold jewelry given by me including a gold neck set of two Tolas, gold bangles of one and a half Tola, two gold rings of half Tola and cash Rs.15,000/-. I continued to visit you enquiring your wellbeing and giving you expenses from time to time. That in the month of May and June when I tried to bring you then you gave excuses and pleas. I continued to make repeated attempts between May to July to bring you back but ultimately on 03.07.2015 you clearly refused to return and on 07.07.2015 you father brought both the children at Allahabad Railway Station and left them there informing me and gave threat on phone that either you will come here and live or shall perform the role of father and mother of both the children. In this regard when I enquired from you then you also refused to return in clear words and said to the extent that you raise the children and forget me or separate from me to bring another mother for the children. On this also I could not satisfy myself, whereupon I filed a suit for bringing you back. After receiving notice, out of the blues you threatened me on phone that I will soon file a case and will tell you how a son in law is kept at the in-laws house. Being fed up with your unreasonable conduct and against Sharaih acts I found it better to separate from you, therefore, I on 8.10.2015 applied for dismissal of the suit for bringing you back and now I, in my full senses and in

the presence of marginal witnesses, release you from my marriage in the light of Shariah through tripel talaq by uttering 'I give talaq', 'I give talaq', 'I give talaq'. From today the relation of husband and wife forever ends between you and me. After today you are unlawful for me and I have become unlawful for you. You are free to spend your life the way you want.

Note: So far is the question of your dower (Mehr) and expenses of waiting period (iddat) that I am paying through demand draft no.096976 dated 06.10.2015 drawn at Allahabad Bank, Karaili, Allahabad Branch, which comprises a sum of Rs.10,151 towards payment of dower and Rs.5,500/- towards the expenses of waiting period which I am sending along with this written deed of divorce, you kindly take paid to accept the same.

Dated 10.10.2015

Witnesses:-

1. Mohd. Yaseen, s/o Abdul Majid, R/o J.K. Colony, Ghaus Nagar, Karaili, Allahabad;
2. Ayaz Ahmed S/o Imtiyaz Hussain R/o G.T.B. Nagar, Karaili Scheme, Allahabad

Sd/ Hindi Rizwan Ahmed
(Rizwan Ahmed)
S/o Iqbal Ahmed
Ghaus Nagar, Karaili, Allahabad"

8. Based on the above, the case of the respondent-husband is, that he had pronounced 'talaq' in consonance with the prevalent and valid mode of dissolution of Muslim marriages. It was submitted, that the pronouncement of divorce by him, fulfils all the requirements of a valid divorce, under the Hanafi sect of Sunni Muslims, and is in consonance with 'Shariat' (Muslim 'personal law').

9. It is also the submission of the respondent-husband, that the present writ petition filed by the petitioner-wife under

Article 32 of the Constitution of India, is not maintainable, as the questions raised in the petition are not justiciable under Article 32 of the Constitution.

10. Keeping in view the factual aspect in the present case, as also, the complicated questions that arise for consideration in this case (and, in the other connected cases), at the very outset, it was decided to limit the instant consideration, to 'talaq-e-biddat' – triple talaq. Other questions raised in the connected writ petitions, such as, polygamy and 'halala' (-and other allied matters), would be dealt with separately. The determination of the present controversy, may however, coincidentally render an answer even to the connected issues.

Part-2.

The practiced modes of 'talaq' amongst Muslims:

11. Since the issue under consideration is the dissolution of marriage by 'talaq', under the Islamic law of divorce, it is imperative, to understand the concept of 'talaq'. In this behalf, it is relevant to mention, that under the Islamic law, divorce is classified into three categories. Talaq understood simply, is a means of divorce, at the instance of the husband. 'Khula', is another mode of divorce, this divorce is at the instance of the wife. The third category of divorce is 'mubaraat' – divorce by mutual consent.

12. 'Talaq', namely, divorce at the instance of the husband, is also of three kinds – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. The petitioner's contention before this Court is, that 'talaq-e-ahsan', and 'talaq-e-hasan' are both approved by the 'Quran' and 'hadith'. 'Talaq-e-ahsan', is considered as the 'most reasonable' form of divorce, whereas, 'talaq-e-hasan' is also considered as 'reasonable'. It was submitted, that 'talaq-e-biddat' is neither recognized by the 'Quran' nor by 'hadith', and as such, is to be considered as sacrosanctal to Muslim religion. The controversy which has arisen for consideration before this Court, is with referenc to 'talaq-e-biddat'.

13. It is necessary for the determination of the present controversy, to understand the parameters, and the nature of the different kinds of 'talaq'. 'Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband, followed by a period of abstinence. The period of abstinence is described as 'iddat'. The duration of the 'iddat' is ninety days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of 'iddat' is of three lunar months (in case, the wife is not menstruating). If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked. Therefore, 'talaq-e-ahsan' is revocable. Conversely, if there is no

resumption of cohabitation or intimacy, during the period of 'iddat', then the divorce becomes final and irrevocable, after the expiry of the 'iddat' period. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh 'nikah' (-marriage), with a fresh 'mahr'. 'Mahr' is a mandatory payment, in the form of money or possessions, paid or promised to be paid, by the groom or by the groom's father, to the bride, at the time of marriage, which legally becomes her property. However, on the third pronouncement of such a 'talaq', the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been dissolved (either through 'talaq' - divorce, or death), can the couple remarry. Amongst Muslims, 'talaq-e-ahsan' is regarded as – 'the most proper' form of divorce.

14. 'Talaq-e-hasan' is pronounced in the same manner, as 'talaq-e-ahsan'. Herein, in place of a single pronouncement, there are three successive pronouncements. After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure is mandated to be followed, after the expiry of the first month (during which marital ties have not been resumed). 'Talaq' is pronounced again. After the second pronouncement

of 'talaq', if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is significant to note, that the first and the second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, 'talaq' pronounced by the husband becomes ineffective, as if no 'talaq' had ever been expressed. If the third 'talaq' is pronounced, it becomes irrevocable. Therefore, if no revocation is made after the first and the second declaration, and the husband makes the third pronouncement, in the third 'tuhr' (period of purity), as soon as the third declaration is made, the 'talaq' becomes irrevocable, and the marriage stands dissolved, whereafter, the wife has to observe the required 'iddat' (the period after divorce, during which a woman cannot remarry. Its purpose is to ensure, that the male parent of any offspring is clearly identified). And after the third 'iddat', the husband and wife cannot remarry, unless the wife first marries someone else, and only after her marriage with another person has been dissolved (either through divorce or death), can the couple remarry. The distinction between 'talaq-e-ashan' and 'talaq-e-hasan' is, that in the former there is a single pronouncement of 'talaq' followed by abstinence during the period of 'iddat', whereas, in the latter there are three pronouncements of 'talaq', interspersed with abstinence. As

against 'talaq-e-ahsan', which is regarded as 'the most proper' form of divorce, Muslims regard 'talaq-e-hasan' only as 'the proper form of divorce'.

15. The third kind of 'talaq' is – 'talaq-e-biddat'. This is effected by one definitive pronouncement of 'talaq' such as, "I talaq you irrevocably" or three simultaneous pronouncements, like "talaq, talaq, talaq", uttered at the same time, simultaneously. In 'talaq-e-biddat', divorce is effective forthwith. The instant talaq, unlike the other two categories of 'talaq' is irrevocable at the very moment it is pronounced. Even amongst Muslims 'talaq-e-biddat', is considered irregular.

16. According to the petitioner, there is no mention of 'talaq-e-biddat' in the Quran. It was however acknowledged, that the practice of 'talaq-e-biddat' can be traced to the second century, after the advent of Islam. It was submitted, that 'talaq-e-biddat' is recognized only by a few Sunni schools. Most prominently, by the Hanafi sect of Sunni Muslims. It was however emphasized, that even those schools that recognized 'talaq-e-biddat' described it, "as a sinful form of divorce". It is acknowledged, that this form of divorce, has been described as "bad in theology, but good in law". We have recorded the instant position at this juncture, because learned counsel for the rival parties, uniformly acknowledge the same.

Part-3.

The Holy Quran – with reference to 'talaq':

17. Muslims believe that the Quran was revealed by God to the Prophet Muhammad over a period of about 23 years, beginning from 22.12.609, when Muhammad was 40 years old. The revelation continued upto the year 632 – the year of his death. Shortly after Muhammad's death, the Quran was completed by his companions, who had either written it down, or had memorized parts of it. These compilations had differences of perception. Therefore, Caliph Usman - the third, in the line of caliphs recorded a standard version of the Quran, now known as Usman's codex. This codex is generally treated, as the original rendering of the Quran.

18. During the course of hearing, references to the Quran were made from 'The Holy Quran: Text Translation and Commentary' by Abdullah Yusuf Ali, (published by Kitab Bhawan, New Delhi, 14th edition, 2016). Learned counsel representing the rival parties commended, that the text and translation in this book, being the most reliable, could safely be relied upon. The text and the inferences are therefore drawn from the above publication.

(i) The Quran is divided into 'suras' (chapters). Each 'sura' contains 'verses', which are arranged in sections. Since our determination is limited to the validity of 'talaq-e-biddat', within the framework of the Muslim 'personal law' – 'Shariat',

we shall only make a reference to such 'verses' from the Quran, as would be relevant for our above determination. In this behalf, reference may first be made to 'verses' 222 and 223 contained in 'section' 28 of 'sura' II. The same are reproduced below:

"222. They ask thee
Concerning women's courses.
Say : They are
A hurt and a pollution :
So keep away from women
In their courses, and do not
Approach them until

They are clean.
But when they have
Purified themselves,
Ye may approach them
In any manner, time, or place
Ordained for you by God.
For God loves those
Who turn to Him constantly
And he loves those
Who keep themselves pure and clean.

223.Your wives are
As a tilth unto you ;
So approach your tilth
When or how ye will ;
But do some good act
For your souls beforehand ;
And fear God,
And know that ye are
To meet Him (in the Hereafter),
And give (these) good tidlings
To those who believe."

TThe above 'verses' have been extracted by us for the reason, that the Quran mandates respectability at the hands of men – towards women. 'Verse' 222 has been interpreted to mean, that matters of physical cleanliness and purity should be

looked at, not only from a man's point of view, but also from the woman's point of view. The 'verse' mandates, that if there is danger of hurt to the woman, she should have every consideration. The Quran records, that the action, of men towards women are often worse. It mandates, that the same should be better with reference to the woman's health, both mental and spiritual. 'Verse' 223 postulates, that sex is as solemn, as any other aspect of life. It is compared to a husband-man's tilth, to illustratively depict, that in the same manner as a husband-man sows his fields, in order to reap a harvest, by choosing his own time and mode of cultivation, by ensuring that he does not sow out of season, or cultivate in a manner which will injure or exhaust the soil. So also, in the relationship towards a wife, 'verse' 223 exalts the husband, to be wise and considerate towards her, and treat her in such manner as will neither injure nor exhaust her. 'Verses' 222 and 223 exhort the husband, to extend every kind of mutual consideration, as is required towards a wife.

(ii) Reference is also necessary to 'verses' 224 to 228 contained in section 28 of 'sura' II of the Quran. The same are extracted below:

> "224. And make not
> God's (name) an excuse
> In your oaths against
> Doing good, or acting rightly,
> Or making peace
> Between persons;

For God is one
Who heareth and knoweth
All things.
225. God will not
Call you to account
For thoughtlessness
In your oaths,
But for the intention
In your hearts;
And He is
Oft-forgiving
Most Forbearing.
226. For those who take
An oath for abstention
From their wives,
A waiting for four months
Is ordained;
If then they return,
God is Oft-forgiving,
Most Merciful.
227. But if their intention
Is firm for divorce,
God heareth
And knoweth all things.
228. Divorced women
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according
To what is equitable;
But men have a degree
(Of advantage) over them
And God is Exalted in Power
Wise."

'Verse' 224, has a reference to many special kinds of oaths practised amongst Arabs. Some of the oaths even related to matters concerning sex. These oaths caused misunderstanding, alienation, division or separation between husbands and wives. 'Verses' 224 to 227 are pointed references to such oaths. Through 'verse' 224, the Quran ordains in general terms, that no one should make an oath – in the name of God, as an excuse for not doing the right thing, or for refraining from doing something which will bring people together. The text relied upon suggests, that 'verses' 225 to 227 should be read together with 'verse' 224. 'Verse' 224 is general and leads up to the next three 'verses'. These 'verses' are in the context of existing customs, which were very unfair to married women. Illustratively, it was sought to be explained, that in a fit of anger or caprice, sometimes a husband would take an oath – in the name of God, not to approach his wife. This act of the husband, it was sought to be explained, deprives the wife of her conjugal rights, and yet, keeps her tied to the husand indefinitely, inasmuch as, she has no right to remarry. Even if this act of the husband, was protested by the wife, the explanation provided is, that the husband was bound – by the oath in the name of God. Through the above verses, the Quran disapproves thoughtless oaths, and at the same time, insists on a proper solemn and

conscious/purposeful oath, being scrupulously observed. The above 'verses' caution husbands to understand, that an oath in the name of God was not a valid excuse – since God looks at intention, and not mere thoughtless words. It is in these circumstances, that 'verses' 226 and 227 postulate, that the husband and wife in a difficult relationship, are allowed a period of four months, to determine whether an adjustment is possible. Even though reconciliation is recommended, but if the couple is against reconciliation, the Quran ordains, that it is unfair to keep the wife tied to her husband indefinitely. The Quran accordingly suggests, that in such a situation, divorce is the only fair and equitable course. All the same it is recognized, that divorce is the most hateful action, in the sight of the God.

(iii) 'Verses' 229 to 231 contained in 'section' 29 of 'sura' II, and 'verses' 232 and 233 included in 'section' 30 of 'sura' II, as also 'verse' 237 contained in 'section' 31 in 'sura' II, are relevant on the issue of divorce. The same are extracted below:

> "229. A divorce is only
> Permissible twice: after that,
> The parties should either hold
> Together on equitable terms,
> Or separate with kindness.
> It is not lawful for you,
> (Men), to take back
> Any of your gifts (from your wives),
> Except when both parties
> Fear that they would be
> Unable to keep the limits
> Ordained by God.

If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others)
230.So if a husband
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided
They feel that they
Can keep the limits
Ordained by God.
Such are the limits
Ordained by God,
Which He makes plain
To those who understand.
231.When ye divorce
Women, and they fulfil
The term of their ('Iddat')
Either taken them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If any one does that,
He wrongs his own soul.
Do not treat God's Signs
As a jest,
But solemnly rehearse
God's favours on you,
And the fact that He

Send down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well acquainted
With all things."

A perusal of the aforesaid 'verses' reveals, that divorce for the reason of mutual incompatibility is allowed. There is however a recorded word of caution – that the parties could act in haste and then repent, and thereafter again reunite, and yet again, separate. To prevent erratic and fitful repeated separations and reunions, a limit of two divorces is prescribed. In other words, reconciliation after two divorces is allowed. After the second divorce, the parties must definitely make up their mind, either to dissolve their ties permanently, or to live together honourably, in mutual love and forbearance – to hold together on equitable terms. However, if separation is inevitable even on reunion after the second divorce, easy reunion is not permitted. The husband and wife are forbidden from casting aspersions on one another. They are mandated to recognize, what is right and honourable, on a collective consideration of all circumstances. After the divorce, a husband cannot seek the return of gifts or properties, he may have given to his wife. Such retention by the wife is permitted, only in recognition that the wife is economically weaker. An exception has been carved

out in the second part of 'verse' 229, that in situations where the freedom of the wife could suffer on account of the husband refusing to dissolve the marriage, and perhaps, also treat her with cruelty. It is permissible for the wife, in such a situation, to extend some material consideration to the husband. Separation of this kind, at the instance of the wife, is called 'khula'. 'Verse' 230 is in continuation of the first part of 'verse' 229. The instant 'verse' recognizes the permissibility of reunion after two divorces. When divorce is pronounced for the third time, between the same parties, it becomes irreversible, until the woman marries some other man and he divorces her (or is otherwise released from the matrimonial tie, on account of his death). The Quranic expectation in 'verse' 230, requires the husband to restrain himself, from dissolving the matrimonial tie, on a sudden gust of temper or anger. 'Verse' 231 provides, that a man who takes back his wife after two divorces, must not put pressure on her, to prejudice her rights in any way. Remarriage must only be on equitable terms, whereupon, the husband and wife are expected to lead a clean and honourable life, respecting each other's personalities. The Quranic message is, that the husband should either take back the wife on equitable terms, or should set her free with kindness.

(iv) The 'verses' referred to above need to be understood along with 'verses' 232 and 233, contained in 'section' 20 of 'sura' II, of the Quran. The above two 'verses' are extracted below:

"232. When ye divorce
Women, and they fulfil
The term of their ('Iddat'),
Do not prevent them
From marrying
Their (former) husbands,
If they mutually agree
On equitable terms.
This instruction
Is for all amongst you,
Who believe in God
And the Last Day.
That is (the course Making for) more virtue
And purity amongst you,
And God knows,
And ye know not.
233. The mothers shall give suck
To their offspring
For two whole years,
If the father desires
To complete the term.
But he shall bear the cost
Of their food and clothing
On equitable terms.
No soul shall have
A burden laid on it
Greater than it can bear.
No mother shall be
Treated unfairly
On account of his child,
An heir shall be chargeable
In the same way.
If they both decide
On weaning,
By mutual consent,
And after due consultation,
There is no blame on them.
If ye decide
On a foster-mother
For your offspring,

There is no blame on you,
Provided ye pay (the mother)
What ye offered,
On equitable terms.
But fear God and know
That God sees well
What ye do."

A perusal of the above 'verses' reveals, that the termination of the contract of marriage, is treated as a serious matter for family and social life. And as such, every lawful advice, which can bring back those who had lived together earlier, provided there is mutual love and they can live with each other on honourable terms, is commended. After following the above parameters, the Quran ordains, that it is not right for outsiders to prevent the reunion of the husband and wife. 'Verse' 233 is in the midst of the regulations on divorce. It applies primarily to cases of divorce, where some definite rule is necessary, as the father and mother would not, on account of divorce, probably be on good terms, and the interest of children must be safeguarded. Since the language of 'verse' 233 is general, the edict contained therein is interpreted, as applying equally to the father and mother, inasmuch as, each must fulfil his or her part, in the fostering of children.

(v) The last relevant 'verse' in 'sura' II of the Quran, is contained in 'section' 31, namely, 'verse' 237. The same is reproduced below:

"237. And if ye divorce them
Before consummation,

But after the fixation
Of a dower for them,
Then the half of the dower
(Is due to them), unless
They remit it
Or (the man's half) is remitted
By him in whose hands
IIs the marriage tie;
And the remission
(Of the man's half)
Is the nearest to righteousness.
And do not forget
Liberality between yourselves.
For God sees well
All that ye do."

In case of divorce before consummation of marriage, it is recognized, that only half the dower fixed needed to be refunded to the wife. It is however open to the wife, to remit the half due to her. And likewise, it is open to the husband to remit the half which he is entitled to deduct (and thus pay the whole dower amount).

19. Reference is also necessary to 'verses' 34 and 35, contained in 'section' 6, as well as, 'verse' 128 contained in 'section' 19, of 'sura' IV. All the above verses are extracted below:

"34. Men are the protectors
And maintainers of women,
Because God has given
The one more (strength)
Than the other, and because
They support them
From their means.
Therefore the righteous women
Are devoutly obedient, and guard
In (the husband's) absence
What God would have them
guard.

As to those women
On whose part ye fear
Disloyalty and ill-conduct,
Admonish them (first),
(Next), refuse to share their beds,
(And last) beat them (lightly);
But if they return to obedience,
Seek not against them
Means (of annoyance):
For God is Most High,
Great (above you all).
3. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things."
Section 19, Sura IV
"128.If a wife fears
Cruelty or desertion
On her husband's part,
There is no blame on them,
If they arrange
An amicable settlement
Between themselves;
And such settlement is best;
Even though men's souls
Are swayed by greed.
But if ye do good
And practice self-restraint
God is well-acquainted
With all that ye do."

The Quran declares men as protectors, and casts a duty on them to maintain their women. In order to be entitled to the husband's support, the Quran ordains the women to be righteous, and to be devoutly obedient to the husband, even in his absence. 'Verse' 34, extends to the husband the right to

admonish his wife who is either disloyal, or ill-conducts herself. Such admonition can be by refusing to share her bed, and as a last resort, even to beat her lightly. Thereafter, if the woman does not return to obedience, the husband is advised not to use means of annoyance against her. 'Verse' 35, sets out the course of settlement of family disputes. It postulates the appointment of two arbitrators – one representing the family of the husband, and the other the family of the wife. The arbitrators are mandated to explore the possibility of reconciliation. In case reconciliation is not possible, dissolution is advised, without publicity or mud-throwing or by resorting to trickery or deception. 'Verse' 128 provides for divorce at the instance of the wife – 'khula'. It provides for a situation where, the wife fears cruelty or desertion on her husband's part. In such a situation, her desire to seek an amicable settlement, cannot be treated as an aspersion on her. The couple must then settle to separate, on most amicable terms. The husband is cautioned not to be greedy. He is required to protect the wife's economic interest. In case of disputation between the couple, for economic reasons, the Quran ordains, that sanctity of the marriage itself, is far greater than any economic interest, and accordingly suggests, that if separation can be prevented by providing some economic consideration to the wife, it is better for the husband

to make such a concession, than to endanger the future of the wife and children.

20. The last relevant 'verses' – 1 and 2, are contained in 'section' 1 of 'sura' – LXV. The same are reproduced below:

> "1. Prophet! When ye
> Do divorce women,
> Divorce them at their
> Prescribed periods,
> And count (accurately)
> Their prescribed periods:
> And fear God your Lord:
> And turn them not out
> Of their houses, nor shall
> They (themselves) leave,
> Except in case they are
> Guilty of some open lewdness,
> Those are limits
> Set by God: and any
> Who transgresses the limits
> Of God, does verily
> Wrong his (own) soul:
> Thou knowest not if
> Perchance God will
> Bring about thereafter
> Some new situation.
> 2.Thus when they fulfil
> Their term appointed,
> Either take them back
> On equitable terms
> Or part with them
> On equitable terms;
> And take for witness
> Two persons from among you,
> Endued with justice,
> And establish the evidence
> (As) before God. Such
> Is the admonition given
> To him who believes
> In God and the Last Day.
> And for those who fear
> God, He (ever) prepares
> A way out,"

'‘Verse’ 1 above, it may be noticed, has reference to the Prophet Muhammad himself. It is addressed in his capacity as teacher and representative of the community. It endorses the view, that of all things permitted, divorce is the most hateful in the sight of the God. Even though, the ‘verse’ provides for divorce, it proscribes the husband from turning out his wife/wives from his house. It also forbids the wife/wives, to leave the house of their husband, except when they are guilty. Those who transgress the above limitation, are cautioned, that they are committing wrong to their own souls. Reconciliation is suggested, whenever it is possible. It is recommended at every stage. The first serious difference between the spouses is first to be submitted to a family counsel, on which both sides are to be represented. The ‘verse’ requires the divorce to be pronounced, only after the period of prohibitory waiting. ‘Dower’ has to be paid, and due provisions have to be made, by the husband, for many things on equitable terms. On each aspect, there is to be consideration. Reconciliation is recommended till the last moment. The message contained in ‘verse’ 2 is, that everything should be done fairly, and all interests should be safeguarded. It is ordained, that the parties should remember, that such matters affect the most intimate aspect of their lives, and therefore, have a bearing even in the spiritual kingdom. It is therefore, that the ‘verses’

extracted above, impress on the parties, to fear God, and ensure that their determination is just and true.

21. The understanding of the 'verses' of the Quran, is imperative in this case, because the petitioner and those supporting the petitoner's case contend *inter alia*, that 'talaq-e-biddat', is not in conformity with the unambiguous edicts of the Quran, and therefore, cannot be considered as valid constituents of Muslim 'personal law'.

Part-4.

Legislation in India, in the field of Muslim 'personal law':

22. It would be relevant to record, that 'personal law' dealing with the affairs of those professing the Muslim religion, was also regulated by custom or usage. It was also regulated by 'Shariat' – the Muslim 'personal law'. The status of Muslim women under customs and usages adopted by Muslims, were considered to be oppressive towards women. Prior to the independence of India, Muslim women organisations condemned customary law, as it adversely affected their rights, under the 'Shariat'. Muslim women claimed, that the Muslim 'personal law' be made applicable to them. It is therefore, that the Muslim Personal Law (Sharait) Application Act, 1937 (hereinafter referred to, as the Shariat Act), was passed. It is essential to understand, the background which resulted in the

enactment of the Shariat Act. The same is recorded in the statement of objects and reasons, which is reproduced below:

> "For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law."

23. Sections 2, 3 and 5 of the Shariat Act are relevant and are extracted hereunder:

> "2 Application of personal law to Muslims.- Notwithstanding any customs 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. Power to make a declaration.- (1) Any person who satisfies the prescribed authority-
(a) that he is a Muslim, and
(b) that he is competent to contract within the meaning of section 11 of the Contract Act, 1872 (9 of 1872), and
(c) that he is a resident of the territories to which this Act extends,
may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the provisions of this section, and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

xxx xxx xxx

5. Dissolution of marriage by Court in certain circumstances.-The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (Shariat)."

A close examination of Section 2, extracted above, leaves no room for any doubt, that custom and usage, as it existed amongst Muslims, were sought to be expressly done away with, to the extent the same were contrary to Muslim 'personal law'. Section 2 also mandated, that Muslim 'personal law' (Shariat) would be exclusively adopted as "... the rule of decision ..." in matters of intestate succession, special property of females, including all questions pertaining to "... 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, gifts, trusts and trust properties, and wakfs …". Section 3 added to the above list, "… adoption, wills and legacies …", subject to the declaration expressed in Section 3.

24. It is relevant to highlight herein, that under Section 5 of the Shariat Act provided, that a Muslim woman could seek dissolution of her marriage, on the grounds recognized under the Muslim 'personal law'. It would also be relevant to highlight, that Section 5 of the Shariat Act was deleted, and replaced by the Dissolution of Muslim Marriages Act, 1939.

25. In the above context, it would be relevant to mention, that there was no provision in the Hanafi Code, of Muslim law for a married Muslim woman, to seek dissolution of marriage, as of right. Accordingly, Hanafi jurists had laid down, that in cases in which the application of Hanafi law caused hardship, it was permissible to apply the principles of the Maliki, Shafii or Hanbali law. This position was duly noticed in the introduction to the 1939 Act, as well as, in the statement of its objects and reasons. Be that as it may, the alternatives suggested by the Hanafi jurists were not being applied by courts. Accordingly, in order to crystalise the grounds of dissolution of marriage, by a Muslim woman, the 1939 Act,

was enacted. The statement of objects and reasons of the above enactment is relevant, and is accordingly extracted hereunder:

> ""There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances.
>
> The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafii or Hambali Law".
>
> Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill (now see section 2 of the Act), a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called "Heelatun Najeza" published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki Law which under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who have put their seals of approval on the book.
>
> As the Courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above mentioned principle is called for in order to relieve the sufferings of countless Muslim women.
>
> One more point remains in connection with the dissolution of marriages. It is this. The Courts in British India have held in a number of cases that the apostasy of a married Muslim woman ipso facto dissolves her marriage. This view has been repeatedly challenged at the bar, but the Courts continue to stick to precedents created by rulings based on an erroneous view of the Muslim Law. The Ulemas have issued Fatwas supporting non-dissolution of marriage by reason of wife's apostasy. The Muslim community has, again and again, given expression to its supreme dissatisfaction with the view held by the Courts. Any number of articles have been appearing in the press demanding legislation to rectify the mistake committed by

the Courts; hence clause 5 (now see section 4) is proposed to be incorporated in this Bill.
Thus, by this Bill the whole Law relating to dissolution of marriages is brought at one place and consolidated in the hope that it would supply a very long felt want of the Muslim Community in India".

26. The Dissolution of Muslim Marriages Act, 1939 provided, the grounds on which a Muslim woman, could seek dissolution of marriage. Section 2 of the enactment is reproduced below:

"2. Grounds for decree for dissolution of marriage.—A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:—
(i) that the whereabouts of the husband have not been known for a period of four years;
(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
(v) that the husband was impotent at the time of the marriage and continues to be so;
(vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;
(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:
Provided that the marriage has not been consummated;
(viii) that the husband treats her with cruelty, that is to say,—
(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
(b) associates with women of evil repute or leads an infamous life, or
(c) attempts to force her to lead an immoral life, or
(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or
(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;
(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:
Provided that—
(a) no decree shall be passed on ground (iii) until the sentence has become final;
(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

27. We may record here, that the Dissolution of Muslim Marriages Act, 1939, is irrelevant for the present controversy on account of the fact, that the issue in hand does not pertain to the dissolution of marriage at the behest of a Muslim wife (but pertains to the dissolution of marriage, at the behest of a Muslim husband). The provisions of the instant enactment are relevant, to understand the submissions advanced by learned counsel, representing the petitioners, as also the respondents, based on their individual perspectives.

Part-5.

Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States:

28. 'Muslim Law in India and Abroad', by Tahir Mahmood and Saif Mahmood (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012 edition), records the following position about the abrogation of the practice of 'talaq-e-biddat' as a means of divorce, through statutory enactments, the world over. The countries which have abolished 'talaq-e-biddat' have been divided into Arab States, Southeast Asian States, and Subcontinental States. We have maintained the above classifications, in order to establish their factual positions. Firstly, to demonstrate that the practice was prevalent across the globe in States having sizeable Muslim populations. And secondly, that the practice has been done away with, by way of legislation, in the countries referred to below.

A. Laws of Arab States

(i) Algeria: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

> Code of Family Law 1984
> Law No.84-11 of 1984 as amended in 2005
> "Article 49. Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months."

(ii) Egypt: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Law of Personal Status 1929

Law 25 of 1929 as amended by Law 100 of 1985

"Article 1. A Talaq pronounced under the effect of intoxication or compulsion shall not be effective.

Article 2. A conditional Talaq which is not meant to take effect immediately shall have no effect if it is used as an inducement to do some act or to abstain from it.

Article 3. A Talaq accompanied by a number, expressly or impliedly, shall not be effective except as a single revocable divorce.

Article 4. Symbolic expressions of talaq, i.e., words which may or may not bear the implication of a divorce, shall not effect a divorce unless the husband actually intended it."

(iii) Iraq: Is a theocratic State, which declares Islam to be its official religion. The majority of Iraq's Muslims is Shias. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1959

Law 188 of 1959 as amended by Law 90 of 1987

"Article 35. No divorce shall be effective when pronounced by the persons mentioned below:

(a) one who is intoxicated, insane or imbecile, under duress, or not in his senses due to anger, sudden calamity, old age or sickness;

(b) a person in death-sickness or in a condition which in all probabilities is fatal and of which he actually dies, survived by his wife."

xxx xxx xxx

Article 37. (1) Where a Talaq is coupled with a number, express or implied, not more than one divorce shall take place.

(2) If a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that.

xxx xxx xxx

Article 39. (1) When a person intends to divorce his wife, he shall institute a suit in the Court of Personal Status requesting that it be effected and that an order be issued therefor. If a person cannot so approach the court, registration of the divorce in the court during the period of Iddat shall be binding on him.

(2) The certificate of marriage shall remain valid till it is cancelled by the court."

((iv) Jordan: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1976
Law 61 of 1976

"Article 88. (1) Talaq shall not be effective if pronounced under intoxication, bewilderment, compulsion, mental disorder, depression or effect of sleep.

(2) 'Bewildered' is one who has lost senses due to anger or provocation, etc., and cannot understand what he is saying.

xxx xxx xxx

Article 90. A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.

xxx xxx xxx

Article 94. Every divorce shall be revocable except the final third, one before consummation and one with consideration.

xxx xxx xxx

Article 98. Where an irrevocable Talaq was pronounced once or twice, renewal of marriage with the consent of parties is not prohibited."

(v) Kuwait: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Personal Status 1984
Law 51 of 1984

"Article 102. Talaq may be effected by major and sane men acting by their free will and understanding the implications of their action. Therefore Talaq shall not take effect if the husband is mentally handicapped, imbecile,

under coercion, mistake, intoxication, fear or high anger affecting his speech and action.

xxx xxx xxx

Article 109. If a Talaq is pronounced with a number (two, three) by words, signs or writing, only one Talaq shall take effect."

(vi) Lebanon: Is a secular State. Muslims constitute its majority, which is estimated to be 54% (27% Shia, and 27% Sunni). On the issue in hand, it has enacted the following legislation:

Family Rights Law 1962
Law of 16 July 1962

"Article 104. A divorce by a drunk person shall have no effect.

Article 105. A divorce pronounced under coercion shall have no effect."

(vii) Libya: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Family Law 1984
Law 10 of 1984 as amended by Law 15 of 1984

"Article 28. Divorce is termination of the marriage bond. No divorce will become effective in any case except by a decree of a competent court and subject to the provision of Article 30.

Article 29. Divorce is of two kinds – revocable and irrevocable. Revocable divorce does not terminate the marriage till the expiry of Iddat. Irrevocable divorce terminates the marriage forthwith.

Article 30. All divorces shall be revocable except a third-time divorce, one before consummation of marriage, one for a consideration, and those specified in this law to be irrevocable.

Article 31. A divorce shall be effective only if pronounced in clear words showing intention to dissolve the

marriage. Symbolic or metaphorical expression will not dissolve the marriage.

Article 32. A divorce pronounced by a minor or insane person, or if pronounced under coercion, or with no clear intention to dissolve the marriage, shall have no legal effect.

Article 33. (1) A divorce meant to be effect on some action or omission of the wife shall have no legal effect.

(2) A divorce given with a view to binding the wife to an oath or restrain her from doing something shall have no legal effect.

(3) A divorce to which a number is attached, by express words or a gesture, shall effect only a single revocable divorce, except when it is pronounced for the third time.

xxx xxx xxx

Article 35. The marriage may be dissolved by mutual consent of the parties. Such a divorce must be registered with the court. If the parties cannot agree on the terms of such a divorce, they shall approach the court and it will appoint arbitrators to settle the matter or reconcile them.

xxx xxx xxx

Article 47. A divorce must be pronounced in a court and in the presence of the other party or his or her representative. The court shall before giving effect to a divorce exhaust all possibilities of reconciliation."

((viii) Morocco: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 2004
Law 70.03 of 2004

Article 79. Whoever divorces his wife by Talaq must petition the court for permission to register it with the Public Notaries of the area where the matrimonial home is situate, or where the wife resides, or where the marriage took place.

Article 80. The petition will mention the identity of spouses, their professions, addresses, number of children, if any, with their age, health condition and educational status. It must be supported by a copy of the marriage

agreement and a document stating the husband's social status and financial obligations.

Article 81. The court shall summon the spouses and attempt reconciliation. If the husband deliberately abstains, this will be deemed to be withdrawal of the petition. If the wife abstains, the court will notify her that if she does not present herself the petition may be decided in her absence. If the husband has fraudulently given a wrong address for the wife, he may be prosecuted at her instance.

Article 82. The court will hear the parties and their witnesses in camera and take all possible steps to reconcile them, including appointment of arbitrators or a family reconciliation council, and if there are children such efforts shall be exhausted within thirty days. If reconciliation takes place, a report will be filed with the court.

Article 83. If reconciliation attempts fail, the court shall fix an amount to be deposited by the husband in the court within thirty days towards payment of the wife's post-divorce dues and maintenance of children.

xxx xxx xxx

Article 90. No divorce is permissible for a person who is not in his senses or is under coercion or provocation.

xxx xxx xxx xxx

Article 92. Multiple expressions of divorce, oral or written, shall have the effect of a single divorce only.

xxx xxx xxx

Article 123. Every divorce pronounced by the husband shall be revocable, except a third-time divorce, divorce before consummation of marriage, divorce by mutual consent, and divorce by Khula or Talaq-e-Tafweez.

(ix) Sudan: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law on Talaq 1935

Judicial Proclamation No.4 of 1935

"Article 1. A divorce uttered in a state of intoxication or under duress shall be invalid and ineffective.

Article 2. A contingent divorce which is not meant to be effective immediately and is used as an inducement or threat shall have not effect.

Article 3. A formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce.

Article 4. Metaphorical expressions used for a divorce shall have the effect of dissolving the marriage only if the husband actually meant a divorce."

(x) Syria: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

CCode of Personal Status 1953

Law 59 of 1953 as amended by Law 34 of 1975

"Article 89. No divorce shall take place when the man is drunk, out of his senses, or under duress. A person is out of his senses when due to anger, etc. he does not appreciate what he says.

Article 90. A conditional divorce shall have no effect if not actually intended and used only as an inducement to do or abstain from doing something or as an oath or persuasion.

xxx xxx xxx

Article 92. If a divorce is coupled with a number, expressly or impliedly, not more than one divorce shall take place.

xxx xxx

xxx

Article 94. Every divorce shall be revocable except a third-time divorce, one before consummation, a divorce with a consideration, and a divorce stated in this Code to be irrevocable.

xxx xxx xxx

Article 117. Where a person divorces his wife the court may, if satisfied that he has arbitrarily done so without any reasonable cause and that as a result of the divorce the wife shall suffer damage and become destitute, give a decision, with due regard to the husband's financial condition and the amount of wife's suffering, that he should pay her compensation not exceeding three years'

maintenance, in addition to maintenance payable during the period of Iddat. It may be directed to be paid either in a lump sum or in instalments as the circumstances of a case may require.

((xi) Tunisia: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its

majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1956
Law 13-8 of 1956 as amended by Law 7 of 1981

"Article 31.(1) A decree of divorce shall be given: (i) with the mutual consent of the parties; or (ii) at the instance of either party on the ground of injury; or (iii) if the husband insists on divorce or the wife demands it. The party causing material or mental injury by the fact of divorce under clauses (ii) and (iii) shall be directed to indemnify the aggrieved spouse.

(2) As regards the woman to be indemnified for material injury in terms of money, the same shall be paid to her after the expiry of Iddat and may be in the form of retention of the matrimonial home. This indemnity will be subject to revision, increase or decrease in accordance with the changes in the circumstances of the divorced wife until she is alive or until she changes her marital status by marrying again. If the former husband dies, this indemnity will be a charge on his estate and will have to be met by his heirs if they consent to it and will be decided by the court if they disagree. They may pay her in a lump sum within one year from the former husband's death the indemnity claimable by her.

Article 32 (1) No divorce shall be decreed except after the court has made an overall inquiry into the causes of rift and failed to effect reconciliation.

(2) Where no reconciliation is possible the court shall provide, even if not asked to, for all important matters relating to the residence of the spouses, maintenance and custody of children and meeting the children, except when the parties specifically agree to forgo all or any of these rights. The court shall fix the maintenance on the basis of all those facts which it comes to know while attempting reconciliation. All important matters shall be provided for in the decree, which shall be non-appealable but can be reviewed for making additional provisions.

(3) The court of first instance shall pass orders in the matters of divorce and all concerning matters including the compensation money to which the divorced wife may be entitled after the expiry of Iddat. The portions of the decree relating to custody, maintenance, compensation, residence and right to visit children shall be executed immediately."

((xii) United Arab Emirates: Is a theocratic State, as the Federal Constitution declares Islam to be the official religion. The Constitution also provides for freedom of religion, in accordance with established customs. Muslims of the Shia sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law of Personal Status 2005
Federal Law No.28 of 2005

"Article 140(1). If a husband divorces his wife after consummation of a valid marriage by his unilateral action and without any move for divorce from her side, she will be entitled to compensation besides maintenance for Iddat. The amount of compensation will be decided with due regard to the means of the husband and the hardship suffered by the wife, but it shall not exceed the amount of one year's maintenance payable in law to a woman of her status.

(2) The Kazi may decree the compensation, to be paid as a lump sum or in instalments, according to the husband's ability to pay."

(xiii) Yemen: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Decree on Personal Status 1992
Decree 20 of 1992

"Article 61. A divorce shall not be effective if pronounced by a man who is drunk, or has lost his senses, or has no power of discernment, if this is shown by his condition and action.

xxx xxx xxx

Article 64. A divorce to which a number is attached, whatever be the number, will effect only a single revocable divorce.

Article 65. The words saying that if the wife did or failed to do something she will stand divorced will not effect a divorce.

Article 66. The words that if an oath or vow is broken it will effect a divorce will not dissolve the marriage even if the said oath or vow is broken.

Article 67. A divorce can be revoked by the husband during the Iddat period. After the expiry of Iddat, a direct remarriage between them will be lawful.

xxx xxx xxx

Article 71. If a man arbitrarily divorces his wife without any reasonable ground and it causes hardship to her, the court may grant her compensation payable by the husband not exceeding maintenance for one year in accordance with her status. The court may decide if the compensation will be paid as a lump sum or in instalments."

B. Laws of Southeast Asian States

(i) Indonesia: The Constitution of Indonesia guarantees freedom of religion among Indonesians. However, the Government recognizes only six official religions – Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

(a) Law of Marriage 1974
Law 1 of 1974

"Article 38. A divorce shall be effected only in the court and the court shall not permit a divorce before attempting reconciliation between the parties. Divorce shall be permissible only for sufficient reasons indicating breakdown of marriage.

xxx xxx xxx

Article 41. In the event of a divorce both the parents shall continue to be responsible for the maintenance of their children. As regards custody of children, in case of a dispute between them the court shall take a decision. Expenses of maintenance and education shall be primarily the father's liability, but if he is unable to discharge this liability the court may transfer it to the mother. The court may also

direct the former husband to pay alimony to the divorced wife."

(b) Marriage Regulations 1975

Regulation 9 of 1975

"Article 14. A man married under Islamic law wanting to divorce his wife shall by a letter notify his intention to the District Court seeking proceedings for that purpose.

Article 15. On receiving a letter the court shall, within thirty days, summon the parties and gather from them all relevant facts.

Article 16. If the court is satisfied of the existence of any of the grounds mentioned in Article 19 below and is convinced that no reconciliation between the parties is possible it will allow a divorce.

Article 17. Immediately after allowing a divorce as laid down in Article 16 above the court shall issue a certificate of divorce and send it to the Registrar for registration of the divorce.

xxx xxx xxx

Article 19. A divorce may be allowed on the petition of either party if the other party:

(a) has committed adultery or become addict to alcohol, drugs, gambling or another serious vice;

(b) has deserted the aggrieved party for two years or more without any legal ground and against the said party's will;

(c) has been imprisoned for at least five years;

(d) has treated the aggrieved party with cruelty of an injurious nature;

(e) has been suffering from a physical deformity affecting conjugal duties, or where relations between the spouses have become too much strained making reconciliation impossible."

(ii) Malaysia: Under the Constitution of Malaysia, Islam is the official religion of the country, but other religions are permitted to be practiced in peace and harmony. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Islamic Family Law Act 1984

Act 304 of 1984

"Article 47. (1) A husband or a wife who desires a divorce shall present an application for divorce to the court in the prescribed form accompanied by a statutory declaration containing (a) particulars of the marriage and the name, ages and sex of the children, if any, of the marriage; (b) particulars of the facts giving the court jurisdiction under Section 45; (c) particulars of any previous matrimonial proceedings between the parties, including the place of the proceedings; (d) a statement as to the reasons for desiring divorce; (e) a statement as to

whether any, and if so, what steps have been taken to effect reconciliation; (f) the terms of any agreement regarding maintenance and habitation of the wife and the children of the marriage, if any, and the division of any assets acquired through the joint effort of the parties, if any, or where no such agreement has been reached, the applicant's proposals regarding those matters; and (g) particulars of the order sought.

(2) Upon receiving an application for divorce, the court shall cause summons to be served on the other party together with a copy of the application and the statutory declaration made by the applicant, and the summons shall direct the other party to appear before the court so as to enable it to inquire whether or not the other party consents to the divorce.

(3) If the other party consents to the divorce and the court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one Talaq before the court.

(4) The court shall record the fact of the pronouncement of one Talaq and shall send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(5) Where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall as soon as possible appoint a Conciliatory Committee consisting of a religious officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the Committee.

(6) In appointing the two persons under sub-section (5) the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.

(7) The court may give directions to the Conciliatory Committee as to the conduct of the conciliation and it shall conduct it in accordance with such directions.

(8) If the Committee is unable to agree or if the court is not satisfied with its conduct of the conciliation, the court may remove the Committee and appoint another Committee in its place.

(9) The Committee shall endeavour to effect reconciliation within a period of six months from the date of its being constituted or such further period as may be allowed by the court.

(10) The Committee shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it thinks fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(11) If the Conciliatory Committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children of the marriage, if any, regarding division of property and other matters related to the marriage.

(12) No advocate and solicitor shall appear or act for any party in any proceeding before a Conciliatory Committee and no party shall be represented by any person other than a member of his or her family without the leave of the Conciliatory Committee.
(13) Where the Committee reports to the court that reconciliation has been effected and the parties have resumed their conjugal relationship, the court shall dismiss the application for divorce.
(14) Where the Committee submits to the court a certificate that it is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the court shall advise the husband to pronounce one Talaq before the court, and where the court is unable to procure the presence of the husband before the court to pronounce one Talaq, or where the husband refuses to pronounce one Talaq, the court shall refer the case to the Hakams [arbitrators] for action according to section 48.
(15) The requirement of sub-section (5) as to reference to a Conciliatory Committee shall not apply in any case (a) where the applicant alleges that he or she has been deserted by an does not know the whereabouts of the other party; (b) where the other party is residing outside West Malaysia and it is unlikely that he or she will be within the jurisdiction of the court within six months after the date of the application; (c) where the other party is imprisoned for a term of three years or more; (d) where the applicant alleges that the other party is suffering from incurable mental illness; or (e) where the court is satisfied that there are exceptional circumstances which make reference to a Conciliatory Committee impracticable.
(16) Save as provided in sub-section (17), a Talaq pronounced by the husband or an order made by the court shall not be effective until the expiry of the Iddat.
(17) If the wife is pregnant at the time the Talaq is pronounced or the order is made, the Talaq or the order shall not be effective until the pregnancy ends."

(iii) Philippines: Is a secular State. Christians constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Muslim Personal Law 1977
Decree No.1083 of 1977
"Article 46. (1) A divorce by Talaq may be effected by the husband in a single repudiation of his wife during her Tuhr [non-menstrual period] within which he has totally abstained from carnal relations with her.
(2) Any number of repudiations made during one Tuhr [non-menstrual period] shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed Iddat.
(3) A husband who repudiates his wife, either for the first or second time, shall have the right to take her back within the Iddat period by

resumption of cohabitation without need of a new contract of marriage. Should he fail to do so, the repudiation shall become irrevocable.

xxx xxx xxx

Article 85. Within seven days after the revocation of a divorce the husband shall, with the wife's consent, send a statement thereof to the Circuit Registrar in whose records the divorce was previously entered.

xxx xxx xxx

Article 161. (1) A Muslim male who has pronounced a Talaq shall, without delay, file with the Clerk of the Sharia Circuit Court of the place where his family resides a written notice of such fact and the circumstances attending thereto, after having served a copy to the wife concerned. The Talaq pronounced shall not become irrevocable until after the expiration of the prescribed Iddat.

(2) Within seven days from receipt of notice the Clerk of the Court shall require each of the parties to nominate a representative. The representatives shall be appointed by the court to constitute, with the Clerk of the Court as Chairman, an Agama [religious scholars] Arbitration Council which shall try and submit to the court a report on the result of arbitration on the basis of which, and such other evidence as may be allowed, the court will pass an order.

(3) The provisions of this Article will be observed if the wife exercises right to Talaq-e-Tafweez.

xxx xxx xxx

Article 183. A person who fails to comply with the requirements of Article 85, 161 and 162 of this Code shall be penalized by imprisonment or a fine of two hundred to two thousand Pesos, or both."

C. Laws of Sub-continental States

(i) Pakistan & Bangladesh: Are both theocratic States, wherein Islam is the official religion. In both countries Muslims of the Sunni sect constitute the majority. On the issue in hand, it has the following legislation in place:

Muslim Family Laws Ordinance 1961
Ordinance VIII of 1961 amended in Bangladesh by Ordinance 114 of 1985
(Bangladesh changes noted below relevant provisions)

"Section 7. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

[Bangladesh: ten thousand taka]
(3) Save as provided in sub-section (5), a Talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.
(4) Within thirty days of the receipt of notice under sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration council shall take all steps necessary to bring about such reconciliation.
(5) If the wife be pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period mentioned in sub-section (3) or of pregnancy, whichever is later, ends.
(6) Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this section from re-marrying the same husband without any intervening marriage with a third person, unless such termination is for the third time so effective."

(ii) Sri Lanka: Is a secular State. Buddhists constitute its majority. On the issue in hand, it has the following legislation in place:

Muslim Marriage and Divorce Act 1951
Act 6 of 1951 as amended by Act 40 of 2006
"Section 17 (4) Save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith.
(5) In the case of each such marriage, the duty of causing it to be registered is hereby imposed upon the following persons concerned in the marriage; (a) the bridegroom, (b) the guardian of the bride, and (c) the person who conducted the Nikah ceremony connected with the marriage.
Section 27. Where a husband desires to divorce his wife the procedure laid down in Schedule II shall be followed."
(2) Where a wife desires to effect a divorce from her husband on any ground not referred to in sub-section (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Schedule III shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure.

29. 'Talaq-e-biddat' is effective, the very moment it is pronounced. It is irrevocable when it is pronounced.

Part-6.

Judicial pronouncements, on the subject of 'talaq-e-biddat':

30. Rashid Ahmad v. Anisa Khatun[1].

(i) The facts: The primary issue that came to be adjudicated in the above case, pertained to the validity of 'talaq-e-biddat' pronounced by Ghiyas-ud-din, a Sunni Mohomedan of the Hanafi school, to his wife Anisa Khatun – respondent no.1. The marriage of the respondent with Ghiyas-ud-din had taken place on 28.08.1905. Ghiyas-ud-din divorced her on or about 13.09.1905. Ghiyas-ud-din pronounced triple talaq, in the presence of witnesses, though in the absence of his wife – Anisa Khatun. Respondent no.1 – Anisa Khatun received Rs.1,000 in payment of 'dower' on the same day, which was confirmed by a registered receipt. Thereafter, Ghiyas-ud-din executed a 'talaqnama' (decree of divorce) dated 17.09.1905, which narrates the divorce. The 'talaqnama' is alleged to have been given to Anisa Khatun – respondent no.1.

(ii) The challenge: Anisa Khatun – respondent no.1, challenged the validity of the divorce, firstly, for the reason, that she was not present at the

[1] AIR 1932 PC 25

time of pronouncement of divorce. And secondly, that even after the aforestated pronouncement, cohabitation had continued and subsisted for a further period of fifteen years, i.e., till the death of Ghiyas-ud-din. In the interregnum, five children were born to Ghiyas-ud-din and Anisa Khatun. According to Anisa Khatun, Ghiyas-ud-din continued to treat Anisa Khatun – respondent no.1, as his wife, and the children born to her, as his legitimate children. It was also the case of respondent no.1, that the payment of Rs.1,000, was a payment of prompt dower, and as such, not payment in continuation of the 'talaq-e-biddat', pronounced by Ghiyas-ud-din.

(iii) The consideration: While considering the validity of the 'talaq-e-biddat' pronounced on 13.09.1905, and the legitimacy of the children born to Anisa Khatun, the Privy Council held as under:

> "15. Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective: Baillie's Digest, 2nd edn., p. 208; Ameer Ali's Mohammedan Law, 3rd edn., vol. ii, p. 518; Hamilton's Hedaya, vol. i, p. 211.
> 16. The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas-ud-din treated Anisa Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant No. 1 and respondent pro forma No. 10, who are brothers of Ghiyas-ud-din, but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.
> 17. While admitting that, upon divorce by the triple talak, Ghiyas-ud-din could not lawfully remarry Anisa Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgment of their legitimacy by Ghiyas-ud-din, subsequent to the divorce, raised the presumption that Anisa Fatima had in the interval

married another, who had died or divorced her, and that Ghiyas-ud-din had married her again, and that it was for the appellants to displace that presumption. In support of this contention, they founded on certain dicta in the judgment of this Board in Habibur Rahman Chowdhury v. Altaf Ali Chowdhury L.R. 48 I.A. 114. Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of Mahomedan marriage by acknowledgment of a son as a legitimate son is as follows: "It must not be impossible upon the face of it, i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than evidential value. It raises a presumption of marriage – a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not juris et de jure, it is, like every other presumption of fact capable of being set aside by contrary proof.

18. The legal bar to re-marriage created by the divorce in the present case would equally prevent the raising of the presumption. If the respondents had proved the removal of that bar by proving the marriage of Anisa Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the respondents might then have had the benefit of the presumption, but not otherwise.

19. Their Lordships are, therefore, of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of his appeal and their costs in the High Court. Their Lordships will humbly advise His Majesty accordingly."

(iv) The conclusion: The Privy Council, upheld as valid, 'talaq-e-biddat' – triple talaq, pronounced by the husband, in the absence and without the knowledge of the wife, even though the husband and wife continued to cohabit for 15 long years thereafter, wherefrom 5 offsprings were born to them

31. Jiauddin Ahmed v. Anwara Begum[2], (Single Judge judgment, authored by Baharul Islam, J., as he then was).

[2] (1981) 1 Gau.L.R. 358

(i) The facts: The respondent – Anwara Begum had petitioned for maintenance, under Section 125 of the Code of Criminal Procedure. Her contention was, that she had lived with her husband for about 9 months, after her marriage. During that period, her marriage was consummated. Anwara Begum alleged, that after the above period, her husband began to torture her, and even used to beat her. It was therefore, that she was compelled to leave his company, and start living with her father, who was a day labourer. Maintenance was duly granted, by the First Class Magistrate, Tinsukia. Her husband, the petitioner – Jiauddin Ahmed, contested the respondent's claim for maintenance, before the Gauhati High Court, on the ground that he had divorced her, by pronouncing divorce by adopting the procedure of 'talaq-e-biddat'.

(iii) The challenge: It is in the above circumstances, that the validity of 'talaq-e-biddat', and the wife's entitlement to maintenance came to be considered by the Guahati High Court, which examined the validity of the concept of 'talaq-e-biddat'.

(iv) The consideration: (a) The High Court placed reliance on 'verses' 128 to 130, contained in 'section' 19, of 'sura' IV, and 'verses' 229 to 232, contained in 'sections' 29 and 30 of 'sura' II, and thereupon, referred to the commentary on the above verses by scholars (Abdullah Yusuf Ali and Maulana Mohammad Ali) and the views of jurists (Ameer Ali and Fyzee), with pointed reference to 'talaq', which was narrated as under:

> "Islam tried to maintain the married state as far as possible, especially where children are concerned, but it is against the restriction of the liberty of men and women in such vitally important matters as love and family life. It will check hasty action as far as possible and leave the door

to reconciliation open at many stages. Even after divorce a suggestion of reconciliation is made, subject to certain precautions against thoughtless action. A period of waiting (Iddat) for three monthly courses is prescribed, in order to see if the marriage conditionally dissolved is likely to result in issue. But this is not necessary where the divorced woman is a virgin. It is definitely declared that women and men shall have similar rights against each other.

Yusuf Ali has further observed:

"Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with a reconciliation between) are allowed. After that the parties must unitedly make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and for-bearance to 'hold together on equitable terms, 'neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage''.

Yusuf Ali proceeds:

"All the prohibitions and limits prescribed here are in the interests of good and honourable lives for both sides, and in the interests of a clean and honourable social life, without public or private scandals..."

* * * *

"Two divorces followed by re-union are permissible; the third time the divorce becomes irrevocable, until the woman marries some other man and he divorces her. This is to set an almost impossible condition. The lesson is: if a man loves a woman he should not allow a sudden gust of temper or anger to induce him to take hasty action...

If the man takes back his wife after two divorces, he must do so only on equitable terms, i.e. he must not put pressure on the woman to prejudice her rights in any way, and they must live clean and honourable lives, respecting each other's personalities..."

The learned Commentator further observes :

"The termination of a marriage bond is a most serious matter for family and social life. An every lawful device is approved which can equitably bring back those who have lived together, provided only there is mutual love and they can live on honourable terms with each other. If these conditions are fulfilled, it is no right for outsiders to prevent or hinder re-union. They may be swayed by property or other considerations."

(b) The High Court also placed reliance on 'verse' 35 contained in 'section' 6, of 'sura' IV, and again referred to the commentary on the above 'verse' (by Abdullah Yusuf Ali), who had interpreted the same as under:

"An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognise this plan in their legal system. It is a pity that

Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties, and would be able, with God's help, effect a real reconciliation."

Maulana Mohammad Ali has commented on the above verse thus:

"This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belonging to the wife's family and the other to the husband's. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

The same learned author commenting on the above verse (IV: 35) in his the Religion of Islam has observed:

"From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."

Fyzee denounces talaq as "absurd and unjust". Abdur Rahim says:

"I may remark that the interpretation of the law of divorce by the jurists, specially of the Hanafi School, is one flagrant instance where because of literal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject."

12. Mohammad Ali has observed:-

"Divorce is thus discouraged:

'If you hate them (i.e. your wives) it may be that you dislike a thing while Allah has placed abundant good in it." Remedies are also suggested to avoid divorce so long as possible:

"And if you fear a breach between the two (i.e. the husband and the wife), then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them.

It was due to such teachings of the Holy Quran that the Holy Prophet declared divorce to be the most hateful of all things permitted....The mentality of the Muslim is to face the difficulties of the married life along with its comforts and to avoid disturbing the disruption of the family relations as long as possible, turning to divorce only as a last resort."

The learned author has further observed:

"The principle of divorce spoken of in the Holy Quran and which in fact includes to a greater or less extent all causes, is the decision no longer to live together as husband and wife. In fact, marriage itself is nothing but an agreement to live together as husband and wife and when either of the parties finds him or herself unable to agree to such a life, divorce must follow. It is not, of course, meant that every disagreement between

them would lead to divorce; it is only the disagreement to live any more as husband and wife...”
He then refers to the condition laid down in Sura IV verse 35.
The learned author proceeds:
"The 'shiqaq' or breach of the marriage agreement may also arise from the conduct of either party; for instance, if either of them misconducts himself or herself, or either of them is consistently cruel to the other, or, as may sometimes happen there is incompatibility of temperament to such an extent that they cannot live together in marital agreement.
The 'shiqaq' in these cases is more express, but still it will depend upon the parties whether they can pull on or not. Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off. At first sight it may look like giving too much latitude to the parties to allow them to end the marriage contract thus, even if there is no reason except incompatibility of temperament, but this much is certain that if there is such disagreement that the husband and the wife cannot pull together, it is better for themselves, for their offspring and for society in general that they should be separated than that they should be compelled to live together. No home is worth the name wherein instead of peace there is wrangling; and marriage is meaningless if there is no spark of love left between the husband and the wife. It is an error to suppose that such latitude tends to destroy the stability of marriage, because marriage is entered into as a permanent and sacred relation based on love between a man and a woman, and divorce is only a remedy when marriage fails to fulfill its object."
With regard to the husband's right of pronouncing divorce the learned author has found;
"Though the Holy Quran speaks of the divorce being pronounced by the husband, yet a limitation is placed upon the exercise of this right."
He then refers to the procedure laid down in Sura IV Verse 35 quoted above, and says :
"It will be seen that in all disputes between the husband and the wife, which it is feared will lead to a breach, two judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other, failing which divorce is to be effected. Therefore, though it is the husband who pronounces the divorce, he is as much bound by the decision of the judges, as is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two judges and their decision is binding.....The Holy Prophet is reported to have interfered and disallowed a divorce pronounced by a husband, restoring the marital relations (Bu. 68: 2). It was no doubt matter of procedure, but it shows that the authority constituted by law has the right to interfere in matters of divorce."
The learned author has further observed:
"Divorce may be given orally, or in writing, but it must take place in the presence of witnesses.”

(iv) The conclusion: Based on the Quranic verses referred to above, the High Court concluded as under:

> "13. A perusal of the Quranic verses quoted above and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J. (ILR 30 Bom. 537) that "the whimsical and capricious divorce by the husband is good in law, though bad in theology". These observations have been based on the concept that women were chattal belonging to men, which the Holy Quran does not brook. Costello, J. In 59 Calcutta 833 has not, with respect, laid down the correct law of talaq. In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected.
>
> xxx xxx xxx
>
> 16. In the instant case the petitioner merely alleged in his written statement before the Magistrate that he had pronounced talaq to the opposite party; but he did not examine himself, nor has he adduced any evidence worth the name to prove 'talaq'. There is no proof of talaq, or its registration. Registration of marriage and divorce under the Assam Muslim Marriages and Divorces Registration Act, 1935 is voluntary, and unilateral. Mere registration of divorce (or marriage) even if proved, will not render valid divorce which is otherwise invalid under Muslim Law."

A perusal of the conclusion recorded by the High Court, through the above observations, leaves no room for any doubt, that the 'talaq-e-biddat' pronounced by the husband without reasonable cause, and without being preceded by attempts of reconciliation, and without the involvement of arbitrators with due representation on behalf of the husband and wife, would not lead to a valid divorce. The High Court also concluded, that the petitioner – Jiauddin Ahmed, had mainly alleged that he had pronounced talaq, but had not established the factum of divorce by adducing any cogent evidence. Having concluded, that the marriage between the parties

was subsisting, the High Court upheld the order awarding maintenance to the wife – Anwara Begum.

32. Must. Rukia Khatun v. Abdul Khalique Laskar[3], (Division Bench judgment, authored by Baharul Islam, CJ., as he then was).

(i) The facts: Rukia Khatun was married to Abdul Khalique Laskar. The couple lived together for about 3 months, after their marriage. During that period, the marriage was consummated. Rukia Khatun alleged, that after the above period, her husband abandoned and neglected her. She was allegedly not provided with any maintenance, and as such, had been living in penury, for a period of about 3 months, before she moved an application for grant of maintenance. The petitioner's application for maintenance filed under Section 125 of the Code of Criminal Procedure, was rejected by the Sub-Divisional Judicial Magistrate, Hailakandi. She challenged the order rejecting her claim of maintenance, before the

[3] (1981) 1 Gau. L.R. 375

Gauhati High Court. The respondent-husband – Abdul Khalique Laskar, contested the claim for maintenance by asserting, that even though he had married the petitioner, but he had divorced her on 12.4.1972 by way of 'talaq-e-biddat', and had thereafter even executed a talaknama. The husband also asserted, that he had paid dower to the petitioner. The claim of the petitioner-wife for maintenance was declined on the ground, that she had been divorced by the respondent-husband.

(ii) The challenge: It is in the above circumstances, that the validity of the divorce pronounced by the respondent-husband, by way of 'talaq-e-biddat', and the wife's entitlement to maintenance, came up for consideration.

(iii) The consideration: The Gauhati High Court recorded the following observations in respect of the validity of 'talaq' pronounced by the respondent-husband, on 12.4.1972.

> "7. The first point to be decided, therefore, is whether the opposite party divorced the Petitioner. The equivalent of the word 'divorce' is 'talaq' in Muslim Law. What is valid 'talaq' in Muslim law was considered by one of us (Baharul Islam, J. as he then was) sitting singly in Criminal Revision No. 199/77 (supra). The word 'talaq' carries the literal significance of 'freeing' or 'the undoing of knot'. 'Talaq' means divorce of a woman by her husband. Under the Muslim law marriage is a civil contract. Yet the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriagetic, Islam recognizes the necessity in exceptional circumstances of keeping the way open for its dissolution.
>
> There has been a good deal of misconception of the institution of 'talaq' under the Muslim law. From the Holy Quran and the Hadis, it appears that though divorce was permitted, yet the right could be exercised only under exceptional circumstances. The Holy Prophet is reported to have said: "Never did Allah allow anything more hateful to Him than "divorce." According to a report of Ibn Umar, the Prophet said: "With Allah the most detestable of all things permitted is divorce". (See the Religion of Islam by Maulana Muhammed Ali at page 671).

In the case of Ahmed Kasim Molla v. Khatun Bibi reported in ILR Cal 833, which has so long been regarded as a leading case on the law of divorce, Justice Costello held:

“Upon that point (divorce), there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the mere recent decisions of the Courts. I regret that I have to come to the conclusion that at the law stands at present, any Mohamedan may divorce his wife at his mere whim and caprice.”

Following Macnaghten, J. who held: "there is no occasion for any particular cause for divorce, and mere whim is sufficient," and Batchelor, J, in case of Sarabai v. Babiabai (ILR 30 Bombay 537) Costello, J. held:—

“It is good in law, though bad in theology.”

Ameer Ali, in his Treatise on Mahomedan Law has observed:

“The Prophet pronounced talaq to be a most destable thing before the Almighty God of all permitted things.

If 'talaq' is given without any reason it is stupidity and ingratitude to God.”

The learned Author in the same book has also observed

“The author of the Multeka (Ibrohim Halebi) is more concise. He says-‘The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws, upon himself the divine anger, for 'the curse of God', said the Prophet, 'rests on him who repudiates his wife capriciously.”

In ILR Madras 22, a Division Bench of the Madras High Court, consisting of Munro and Abdur Rahim, JJ., held:

“No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband.”

What Munro and Abdur Rahmim, JJ. in ILR 30 Madras 22 precisely held was that impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband. The emphasis was that a talaq would be valid only if it is effected in accordance with the Muslim Law.

In ILR 5, Rangoon 18, their Lordships of the Privy Council observed:

“According to that law (the Muslim Law), a husband can effect a divorce whenever he desires.”

But the Privy Council has not said that the divorce need not be duly effected or that procedure enjoined by the Quran need not be followed.

8. It is needless to say that Holy Quran is the primary source and is the weightiest authority on any subject under the Muslim Law. The Single Judge in Criminal Revision No. 199/77 in his judgment quoted the relevant verses of the Quran, to deal with divorce. We need not refer to all

the Verses. It will be sufficient if we refer to only one of them, which is Sura IV verse 35. It reads:

"If ye fear a breach
Between them twain,
Appoint two arbiters
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things."

From the verse quoted above, it appears that there is a condition precedent which must be complied with before the talaq is effected. The condition precedent if when the relationship between the husband and the wife is strained and the husband intends to give 'talaq' to his wife he must chose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may call down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give 'talaq'. The 'talaq' must be for good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret.

Maulana Mohammad Ali, an eminent Muslim jurist, in his Religion of Islam, after referring to, and considering, the relevant verses on the subject has observed:

From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."

The learned Jurist also has observed:

"Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off."

9. Costello, J. in ILR 59 Calcutta 833 (supra) considered the judgments of Munro and Abdur Rahim, JJ. in ILR 33 Mad. 22 (supra) and of the Privy Council in ILR 5, Rangoon 18, (supra) but he preferred the opinions of Machaghten and Batchalor, JJ. in ILR 30 Bombay 537 (supra). The reason perhaps is, as observed by Krishna Ayer, J. (now of the Supreme Court) in the case of A. Yusuf Rowther v. Sowramma, reported in AIR 1971 Kerala 261:

"Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a Culture law is largely the formalised and enforceable expression of a community's culture norms-cannot be fully understood by alien minds."

10. Krishna Ayer, J., in AIR 1971 Kerala 261 (supra) has further observed:

"The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions... Indeed, a deeper study of the subject disclosed a surprisingly rational, realistic and modern law of divorce.... ....."

The learned Judge has further observed:

"It is a popular fallacy that a Muslim male enjoys, under the Quranic law, Unbridled Authority to liquidate the marriage. The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them' (Quran IV: 34)"

(iv) The conclusion: Based on the above consideration above, the High Court recorded the following conclusion:

"11. In our opinion the correct law of 'talaq' as ordained by Holy Quran is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. In our opinion the Single Judge has correctly laid down the law in Criminal Revision No. 199/77 (supra), and, with respect the Calcutta High Court in ILR 59 Calcutta 833 and the Bombay High Court in ILR 30 Bombay 537 have not laid down the correct law."

A perusal of the consideration extracted above, when examined closely, reveals that the High Court listed the following essential ingredients of a valid 'talaq' under Muslim law. Firstly, 'talaq' has to be based on good cause, and must not be at the mere desire, sweet will, whim and caprice of the husband. Secondly, it must not be secret. Thirdly, between the pronouncement and finality, there must be a time gap, so that the passions of the parties may calm down, and reconciliation may be possible. Fourthly, there has to be a process of arbitration (as a means of reconciliation), wherein the arbitrators are representatives of both the husband and the wife. If the above ingredients do not exist, 'talaq' – divorce would be invalid. For the reason, that the 'talaq-e-biddat' – triple talaq

pronounced by the respondent-husband – Abdul Khalique Laskar, did not satisfy all the ingredients for a valid divorce, the High Court concluded that the marriage was subsisting, and accordingly held the wife to be entitled to maintenance.

33. Masroor Ahmed v. State (NCT of Delhi)[4], (Single Bench judgment, authored by Badar Durrez Ahmed, J., as he then was).

(i) The facts: Aisha Anjum was married to the petitioner – Masroor Ahmed, on 02.04.2004. The marriage was duly consummated and a daughter was born to the couple (-on 22.10.2005). It was alleged by the wife – Aisha Anjum, that the husband's family threw her out of her matrimonial home (-on 08.04.2005), on account of non-fulfilment of dowry demands. While the wife – Aisha Anjum was at her maternal home, the husband – Masroor Ahmed filed a case for restitution of

[4] 2008 (103) DRJ 137

conjugal rights (-on 23.03.2006), before the Senior Civil Judge, Delhi. During the course of the above proceedings, the wife returned to the matrimonial home, to the company of her husband (-on 13.04.2006), whereupon, marital cohabitation was restored. Once again there was discord between the couple, and Masroor Ahmed pronounced 'talaq-e-biddat', on 28.08.2006. The wife – Aisha Anjum alleged, that she later came to know that her husband – Masroor Ahmed, had divorced her by exercising his right of 'talaq-e-biddat', in the presence of the brothers of Aisha Anjum, in October 2006. And that, the husband had lied to the Court, (and to her, as well) when he had sought her restitution, from the Court, by making out as if the marriage was still subsisting. It was her claim, that she would not have agreed to conjugal relations with him, had she known of the divorce. And therefore, her consent to have conjugal relations with Masroor Ahmed, was based on fraud committed by him, on her – Aisha Anjum. She therefore accused Masroor Ahmed, for having committed the offence under Section 376 of the Indian Penal Code, i.e., the offence of rape. She also claimed maintenance from her husband, under Section 125 of the Criminal Procedure Code. During the pendency of the above proceedings, the parties arrived at an amicable settlement on 1.9.2007.

(ii) The challenge: The position expressed by the High Court in paragraph 12 of the judgment, crystalises the challenge. Paragraph 12, is reproduced below:

"12. Several questions impinging upon muslim law concepts arise for consideration. They are:-

(1) What is the legality and effect of a triple talaq?

(2) Does a talaq given in anger result in dissolution of marriage?

(3) What is the effect of non-communication of the talaq to the wife?

(4) Was the purported talaq of October 2005 valid?

(5) What is the effect of the second nikah of 19.4.2006?"

(iii) The consideration: While considering the legality and effect of 'talaq-e-biddat', the High Court recorded the following consideration:

"Sanctity and effect of Talaq-e-bidaat or triple talaq.
24. There is no difficulty with ahsan talaq or hasan talaq. Both have legal recognition under all fiqh schools, sunni or shia. The difficulty lies with triple talaq which is classed as bidaat (an innovation). Generally speaking, the shia schools do not recognise triple talaq as bringing about a valid divorce[5]. There is, however, difference of opinion even within the sunni schools as to whether the triple talaq should be treated as three talaqs, irrevocably bringing to an end the marital relationship or as one rajai (revocable) talaq[6], operating in much the same way as an ahsan talaq."

(iv) The conclusion: Based[7] on[8] the[9] consideration recorded above, the High Court arrived at the following conclusions:

"26. It is accepted by all schools of law that talaq-e-bidaat is sinful[10]. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression - bad in theology but valid in law - is often used in this context. The fact remains that it is considered to be sinful. It was

---

5 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. p. 154. Ameer Ali notes: The Shiahs and the Malikis do not recognise the validity of the talak-ul-bid'at, whilst the Hanafi and the Shaf'eis agree in holding that a divorce is effective, if pronounced in the bid'at form, though in its commission the man incurs a sin. p. 435. These statements may not be accurate as to the views of Malikis and Shaf'eis, but it is universally recognized that the above-mentioned Shi'a schools do not find triple talaq to be a valid form of divorce.

6

7

8

9

10

deprecated by prophet Muhammad[11]. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by shia schools. There are views even amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history[12] but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.

27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc."

A perusal of the conclusions recorded by the High Court would reveal, that triple talaq pronounced at the same time, is to be treated as a single pronouncement of divorce. And therefore, for severing matrimonial ties finally, the husband would have to complete the prescribed procedure, and thereafter, the parties would be treated as divorced.

34.[13] Nazeer v. Shemeema[17], (Single Bench judgment, authored by A. Muhamed Mustaque, J.).

(i) The facts: Through the above judgment, the High Court disposed of a number of writ petitions, including three writ petitions, wherein husbands

11
12
13
14
15
16
17

had terminated their matrimonial alliance with their spouses, by pronouncing 'talaq-e-biddat' – triple talaq. Their matrimonial relationship having come to an end, one or the other or both (-this position is unclear, from the judgment) spouses approached the passport authorities, to delete the name of their former spouse, from their respective passports. The passport authorities declined to accept their request, as the same was based on private actions of the parties, which were only supported by unauthenticated 'talaq-namas' (deeds of divorce). The stance adopted by the passport authorities was, that in the absence of a formal decree of divorce, the name of the spouse could not be deleted. By passing interim directions, the High Court ordered the passport authorities, to correct the spouse details (as were sought), based on the admission of the corresponding spouse, that their matrimonial alliance had been dissolved.

(ii) <u>The challenge</u>: Even though the authenticity and/or the legality of 'talaq-e-biddat', did not arise for consideration before the High Court, it noticed "….Though the issue related to triple talaq does not directly crop up in these writ petitions calling upon this Court to decide the validity of triple talaq, this Court cannot ignore while granting a relief based on admission, the fact that direction of this Court would result in greater or lesser extent of injustice if it remains oblivious to the repercussions of the repudiation of marriage by volition of individual…..". The High Court therefore, embarked on the exercise of examining the validity of 'talaq-e-biddat'.

(iii) <u>The consideration</u>: The High Court took into consideration texts by renowned scholars, as for instance, from "Sharia" by Wael B. Hallaq,

“Sharia Law, An Introduction” by Mohammad Hashim Kamali, “Qur’an: The Living Truth” by Basheer Ahmad Mohyidin, “Muslim Law in India And Abroad” by Dr. Tahir Mahmood, “The Lawful and the Prohibited in Islam” by Sheikh Yusuf al-Qaradawi, from the Urdu book “Hikmatul Islam” by Moulana Wahidul Khan. The High Court also took into consideration Quranic verses (all of which have been, extracted above). The High Court even took note of the two judgments of the Gauhati High Court (referred to above), besides other High Court judgments, and thereupon, observed as under:

> “12. This case only symptomize the harsh realities encountered by women belonging to Muslim community, especially of the lower strata. It is a reminder to the court unless the plight of sufferers is alleviated in a larger scheme through legislation by the State, justice will be a distant dream deflecting the promise of justice by the State "equality before the law". The State is constitutionally bound and committed to respect the promise of dignity and equality before law and it cannot shirk its responsibility by remaining mute spectator of the malady suffered by Muslim women in the name of religion and their inexorable quest for justice broke all the covenants of the divine law they professed to denigrate the believer and faithful. Therefore, the remainder of the judgment is a posit to the State and contribution for settlement of the 'legal vex' which remains unconcluded more than four decades after this court's reminder in Mohamed Haneefas' case (supra).
>
> 13. The State is constitutionally obliged to maintain coherent order in the society, foundation of which is laid by the family. Thus sustenance or purity of the marriage will lay a strong foundation for the society, without which there would be neither civilisation nor progress. My endeavour in this judgment would have been over with the laying of correct principles related to triple talaq in Qur'anic perspective to declare the law and to decide the matter. However, I find the dilemma in this context is not a singular problem arisen demanding a resolution of the dispute between the litigants by way of adjudication. But rather it require a State intervention by way of legislation to regulate triple talaq in India. Therefore, settlement of law relating to talaq is necessary and further discussion is to be treated as an allude for the State to consider for possible reforms of divorce Law of Muslim in this Country. The empirical research placed herein justifies such course of action to remind the State for action. It is to be noted, had the Muslim in India been governed by the true Islamic law, Penal law would have acted as deliverance to

sufferings of Muslim women in India to deter arbitrary talaq in violation of Qur'anic injunction.

xxx xxx xxx

15. This takes me to the question why the State is so hesitant to reforms. It appears from public debate that resistance is from a small section of Ulemas (scholars within the society) on the ground that Sharia is immutable and any interference would amount to negation of freedom of religion guaranteed under the Constitution. I find this dilemma of Ulema is on a conjecture of repugnancy of divine law and secular law. The State also appears as reluctant on an assumption that reforms of religious practice would offend religious freedom guaranteed under the Constitution of India. This leads me to discuss on facets of Islamic law. I also find it equally important to discuss about the reforms of personal law relating to triple talaq within the constitutional polity, as the ultimately value of its legality has to be tested under the freedom of religious practices."

(iv) The conclusion: In the background of the above consideration, the High Court held as under:

"The W.P.(C) 37436 of 2003 is filed by the husband alleging that the triple talaq pronounced by him is not valid in accordance with Islamic law. Therefore, proceedings initiated before the Magistrate under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and consequent order will have to be set aside. This case depicts the misuse of triple talaq, wife appears to have accepted the talaq and moved the Magistrate court on a folly created by husband. There are innumerable cases as revealed from the empirical data referred in the research in which neither party are aware of the procedure of talaq according to the personal law. This Court under Article 226 of the Constitution of India is not expected to go into the disputed questions of fact. The entire exercise in this judgment is to alert the State that justice has become elusive to the Muslim woman and the remedy thereof lies in codification of law of divorce. This court cannot grant any relief to the writ petitioner as the true application of the law to be considered in a given facts is upon the Court trying the matter. It is for the subordinate court to decide whether there was application of Islamic law in effecting divorce by triple talaq. Therefore, declining jurisdiction, this writ petition is dismissed.

W.P.(C) Nos. 25318 & 26373 of 2015 and 11438 of 2016
In these Writ Petitions question of validity of triple talaq does not arise. However this question was considered in larger perspective for the reason that if court grant any relief based on admission of the parties as to the repudiation of marriage by triple talaaq, that would amount to recognition of a triple talaq effected not in accordance with law, as this court has no mechanism to find out the manner in which talaq is effected. The Court cannot become a party to a proceedings to recognise

an ineffective divorce in the guise of directions being given to passport authorities to accept the divorce. The legal effect of such divorce has to be probed by a fact finding authority in accordance with the true Islamic law. Stamp of approval being given by the court by ordering passport authority to accept divorce effected not in accordance with the law, will create an impression that court transgressed its limits while directing a public authority to honour an act which was done not in accordance with law. Though in these Writ Petitions, considering the urgency of the matters, this court granted interim order directing the passport authorities to act upon the request of the petitioners. Considering the large number of similar reliefs sought before this court in various Writ Petitions, this court is of the view that the issue can be resolved only through a larger remedy of codification of law in the light of the discussion as above. In the light of interim order, these Writ Petitions are disposed of.

Conclusion:
Courts interpret law and evolve justice on such interpretation of law. It is in the domain of the legislature to make law. Justice has become elusive for Muslim women in India not because of the religion they profess, but on account of lack of legal formalism resulting in immunity from law. Law required to be aligned with justice. The search for solution to this predicament lies in the hands of the law makers. It is for the law makers to correlate law and social phenomena relating to divorce through the process of legislation to advance justice in institutionalized form. It is imperative that to advance justice, law must be formulated without any repugnance to the religious freedom guaranteed under the Constitution of India. It is for the State to consider the formulation of codified law to govern the matter. Therefore, I conclude by drawing attention of those who resist any form of reform of the divorce law of Muslim community in India to the following verses of Holy Quran. (Chapter 47:2)
"And those who believe and do good works and believe in that which is revealed unto Muhammad - and it is the truth from their Lord-He riddeth them of their ill deeds and improveth their state."
"Thus we display the revelations for people who have sense" (Chapter 30:28)
The Registry shall forward the copy of this judgment to Union Law Ministry and Law Commission of India."

A perusal of the conclusions drawn by the High Court reveals, that the practice of 'talaq-e-biddat', was deprecated by the Court. The Court however called upon the legislature, to codify the law on the issue, as would result in the advancement of justice, as a matter of institutional form.

Part-7.

The petitioner's and the interveners' contentions:

35. On behalf of the petitioner, besides the petitioner herself, submissions were initiated by Mr. Amit Singh Chadha, Senior Advocate. He invited this Court's attention to the legislative history in the field of Muslim 'personal law' (-for details, refer to Part-4 – Legislation in India, in the field of Muslim 'personal law'). It was submitted, that all fundamental rights contained in Part III of the Constitution were justiciable. It was therefore pointed out, that the petitioner's cause before this Court, was akin to such rights as were considered justiciable. The practice of 'talaq-e-biddat', according to learned counsel, permitted a male spouse an unqualified right, to severe the matrimonial tie. It was pointed out, that the right to divorce a wife, by way of triple talaq, could be exercised without the disclosure of any reason, and in fact, even in the absence of reasons. It was submitted, that a female spouse had no say in the matter, inasmuch as, 'talaq-e-biddat' could be pronounced in the absence of the wife, and even without her knowledge. It was submitted, that divorce pronounced by way of triple talaq was final and binding, between the parties. These actions, according to learned counsel, vested an arbitrary right in the husband, and as such, violated the equality clause enshrined in Article 14 of the Constitution. It was submitted, that the Constitution postulates through the above article, equality before the law and equal protection of the laws. This right, according to learned counsel, was clearly denied to the female spouse in the matter of pronouncement of divorce by the husband by adopting the

procedure of 'talaq-e-biddat'. Further more, it was submitted, the Constitution postulates through Article 15, a clear restraint on discrimination, on the ground of sex. It was submitted, that 'talaq-e-biddat' violated the aforesaid fundamental right, which postulates equality between men and women. Learned counsel relied on the decisions of this Court in Kesavananda Bharati v. State of Kerala[18], and Minerva Mills Ltd. v. Union of India[19] to contend, that it was the duty of courts to intervene in case of violation of any individual's fundamental right, and to render justice. It was also submitted, that the rights of the female partner in a matrimonial alliance amongst Muslims, had resulted in severe gender discrimination, which amounted to violating their human rights under Article 21 of the Constitution. Learned counsel accordingly sought intervention, for grave injustice practiced against Muslim wives.

36. Mr. Amit Singh Chadha, learned senior counsel, then placed reliance on the Jiauddin Ahmed[2], and the Rukia Khatun[3] cases (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'). Based on the above judgments, it was submitted, that courts of this country had not found favour with the practice of triple talaq, in the manner prevalent in India. It was contended, that 'talaq-e-biddat' should not be confused with the profession, practice and propagation of Islam. It was pointed out, that 'talaq-e-biddat' was not sacrosanctal to the profession of the Muslim religion. It was accordingly submitted, that this Court had an indefeasible right, to intervene and

18

19

render justice. In order to press his claim based on constitutional morality, wherein the petitioners were claiming not only gender equality, but also the progression of their matrimonial life with dignity, learned senior counsel placed reliance on Manoj Narula v. Union of India[20], wherein this Court observed as under:

> "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 realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic."
> [Constituent Assembly Debates, 1948, Vol. VII, 38.]
> 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…"

In continuation with the instant submission, it was also the contention of learned senior counsel, that Articles 25, 26 and 29 of the Constitution, did not in any manner, impair the jurisdiction of this Court, to set right the apparent breach of constitutional morality. In this behalf, the Court's attention was invited to the fact, that Article 25 itself postulates, that the freedoms contemplated thereunder, were subject to the overriding principles

---

20

enshrined in Part III – Fundamental Rights, of the Constitution. This position, it was submitted, was affirmed through judgments rendered by this Court in John Vallamattom v. Union of India[21], Javed v. State of Haryana[22], and Khursheed Ahmad Khan v. State of Uttar Pradesh[23].

37. Learned senior counsel also drew our attention to the fact, that a number of countries had, by way of express legislations, done away with the practice of 'talaq-e-biddat'. It was submitted, that even when talaq was pronounced thrice simultaneously, the same has, by legislation, been treated as a single pronouncement, in a number of countries, including countries which have declared Islam as their official State religion. It was accordingly contended, that had 'talaq-e-biddat' been an essential part of religion, i.e., if it constituted a core belief, on which Muslim religion was founded, it could not have been interfered with, by such legislative intervention. It was accordingly suggested, that this Court should have no difficulty whatsoever in remedying the cause with which the petitioners had approached this Court, as the same was not only violative of the fundamental rights enshrined in the Constitution, but was also in contravention of the principle of constitutional morality emerging therefrom.

38. Last of all, it was contended, that it is nobody's case before this Court, that 'talaq-e-biddat' is a part of an edict flowing out of the Quran. It was submitted, that triple talaq is not recognized by many schools of Islam.

21

22

23

According to learned counsel, all concerned acknowledge, that 'talaq-e-biddat' has all along been treated irregular, patriarchal and even sinful. It was pointed out, that it is accepted by all schools – even of Sunni Muslims, that 'talaq-e-biddat' is "bad in theology but good in law". In addition, it was pointed out, that even the Union of India had affirmed before this Court, the position expressed above. In such situation, it was prayed, that this Court being a constitutional court, was obliged to perform its constitutional responsibility under Article 32 of the Constitution, as a protector, enforcer, and guardian of citizens' rights under Articles 14, 15 and 21 of the Constitution. It was submitted, that in discharge of the above constitutional obligation, this Court ought to strike down, the practice of 'talaq-e-biddat', as violative of the fundamental rights and constitutional morality contemplated by the provisions of the Constitution. It was commended, that the instant practice of 'talaq-e-biddat' should be done away with, in the same manner as the practice of 'Sati', 'Devadasi' and 'Polygamy', which were components of Hindu religion, and faith. Learned counsel concluded his submissions by quoting from the Constitutional Law of India, by H.M. Seervai (fourth edition, Volume 2, published by N.M. Tripathi Private Ltd., Bombay), wherein in clause 12.60, at page 1281, the author has expressed the following view:

> "12.60 I am aware that the enforcement of laws which are violated is the duty of Govt., and in a number of recent cases that duty has not been discharged. Again, in the last instance, blatant violation of religious freedom by the arbitrary action of religious heads has to be dealt with firmly by our highest Court. This duty has resolutely discharged by our High Courts and the Privy Council before our Constitution. No greater service can be done to our country than by the Sup. Ct. and the High Courts discharging that duty resolutely, disregarding popular clamour

and disregarding personal predilections. I am not unaware of the present political and judicial climate. But I would like to conclude with the words of very great man "never despair", for when evil reaches a particular point, the antidote of that evil is near at hand."

39. Mr. Anand Grover, Senior Advocate, represented Zakia Soman – respondent no.10. Respondent no.10 was added as a party respondent on 29.6.2016, on the strength of an interlocutory application filed by her. Learned senior advocate, in the first instance, invited our attention to the various kinds of 'talaq' practiced amongst Muslims (-for details, refer to Part-2 – The practiced modes of 'talaq' amongst Muslims). It was submitted, that 'talaq-e-ahsan' and 'talaq-e-hasan' were approved by the Quran and the 'hadith'. It was submitted, that 'talaq-e-biddat' is neither recognized by the Quran, nor approved by the 'hadith'. With reference to 'talaq-e-biddat', it was asserted, that the same was contrary to Quranic prescriptions. It was submitted, that the practice of 'talaq-e-biddat' was traceable to the second century, after the advent of Islam. It was asserted, that 'talaq-e-biddat' is recognized only by a few Sunni schools, including the Hanafi school. In this behalf, it was also brought to our notice, that most of the Muslims in India belonged to the Hanafi school of Sunni Muslims. It was submitted, that even the Hanafi school acknowledges, that 'talaq-e-biddat' is a sinful form of divorce, but seeks to justify it on the ground that though bad in theology, it is good in law. In India 'talaq-e-biddat', according to learned counsel, gained validity based on the acceptance of the same by the British courts, prior to independence. It was submitted, that the judgments rendered by the British courts were finally crystallized, in the authoritative pronouncement by the Privy Council in the

Rashid Ahmad case[1]. It was pointed out, that thereafter, 'talaq-e-biddat' has been consistently practised in India.

40. The first contention advanced at the hands of learned senior counsel was, that after the adoption of the Constitution, various High Courts in India had the occasion to consider the validity of 'talaq-e-biddat', exercised by Muslim men to divorce their wives. And all the High Courts (which had the occasion to deal with the issue) unanimously arrived at the conclusion, that the same could not muster support either from the Quran or the 'hadith'. In this behalf, the Court's attention was drawn to the various judgments of High Courts including the High Court of Gauhati in the Jiauddin Ahmed case[2] – by a Single Bench, and by the same High Court in the Rukia Khatun case[3] – by a Division Bench. By the Delhi High Court in the Masroor Ahmed case[4] – by a Single Bench, and finally by the Kerala High Court in the Nazeer case[5] – by a Single Bench (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'). It was submitted, that the High Courts were fully justified in their opinions and their conclusions. It was pointed out, that despite the aforesaid judgments, Muslim husbands continued to divorce their wives by 'talaq-e-biddat', and therefore, an authoritative pronouncement on the matter was required to be delivered, by this Court. Based on the decisions relied upon, it was submitted, that a Muslim husband, could not enjoy arbitrary or unilateral power to proclaim a divorce, as the same does not accord with Islamic traditions. It was also contended, that the proclamation of talaq must be for a demonstrated

reasonable cause, and must proceed by an attempt at reconciliation by two arbiters (one each, from the side of the rival parties). In order to affirm the aforesaid position, learned counsel placed reliance on Shamim Ara v. State of U.P.[24], to assert, that this Court approved the judgments referred to above. It was accordingly asserted, that this Court has already recognized, the Quranic position as recorded in verses 128 to 130 of 'sura' IV and verses 229-232 of 'sura' II, and also, 'verse' 35 of 'sura' IV. These verses, according to learned senior counsel, declare the true Quranic position on the subject of divorce (-for details, refer to Part-3 – The Holy Quran – with reference to 'talaq'). Learned counsel heavily relied on the decision rendered by the Delhi High Court in the Masroor Ahmed case[4], and by the Kerala High Court in the Nazeer case[5] to bring home his contention, that 'talaq-e-biddat' was wholly unjustified and could not be recognized as a valid means of divorce in the Muslim community. It was the vehement submission of learned counsel, that the legal position being canvassed on behalf of the petitioners, clearly emerged from the judgments referred to above, and should be treated as the foundation, for adoption and declaration by this Court. It was therefore prayed, that triple talaq as was being practiced in India, be declared unsustainable in law.

41. It was also contended by learned senior counsel, that the settled principles applicable in all common law jurisdictions including India was that courts do not test the constitutionality of laws and procedures, if the issue arising between the parties can be decided on other grounds. It was

[24]

submitted, that only when the relief being sought, cannot be granted without going into the constitutionality of the law, only then courts need to enter the thicket of its constitutional validity. Learned counsel invited the Court's attention, to the judgment of this Court in State of Bihar v. Rai Bahadur Hurdut Roy Moti Lal Jute Mills[25], wherein this Court refused to test the constitutional validity of certain provisions, by holding as under:

> "7. On behalf of the appellant Mr Lal Narain Sinha has contended that the High Court was in error in holding that the proviso to Section 14A violates either Article 20(1) or Article 31(2) of the Constitution. He has addressed us at length in support of his case that neither of the two articles is violated by the impuged proviso. On the other hand, the learned Solicitor-General has sought to support the findings of the High Court on the said two constitutional points; and he has pressed before us as a preliminary point his argument that on a fair and reasonable construction, the proviso cannot be applied to the case of the first respondent. We would, therefore, first deal with this preliminary point. In cases where the vires of statutory provisions are challenged on constitutional grounds, it is essential that the material facts should first be clarified and ascertained with a view to determine whether the impugned statutory provisions are attracted; if they are, the constitutional challenge to their validity must be examined and decided. If, however, the facts admitted or proved do not attract the impugned provisions there is no occasion to decide the issue about the vires of the said provisions. Any decision on the said question would in such a case be purely academic. Courts are and should be reluctant to decide constitutional points merely as matters of academic importance.
>
> xxx xxx xxx
>
> 19. In view of this conclusion it is unnecessary to consider the objections raised by the first respondent against the validity of the proviso on the ground that it contravenes Articles 20(1) and 31(2) of the Constitution.. …"

In the context of 'personal law', it was submitted, that in Shabnam Hashmi v. Union of India[26], the Court had recently refused to examine the constitutional validity of 'personal laws', when the issue could be plainly decided on the interpretation of the concerned statute. It was therefore

---

25

26

contended, that through a purely interpretative exercise, this Court should declare 'talaq-e-biddat' as illegal, ineffective and having no force in law, in the same manner as the Gauhati High Court and the Delhi High Court, have previously so held. It was submitted, that the same declaration be given by this Court, by an interpretation of 'personal law', as would incorporate the ingredients of the permissible and acceptable modes of talaq into 'talaq-e-biddat'.

42. In the present determination, learned senior counsel submitted, that it would be essential to recognize the existence of distortions in the 'hadiths'. It was pointed out, that it was by now well settled, that there were various degrees of reliability and/or authenticity of different 'hadiths' (reference in this behalf was made to – Principles of Mohomedan Law by Sir Dinshaw Fardunji Mulla, LexisNexis, Butterworths Wadhwa, Nagpur, 20th edition). It was the contention of learned senior counsel, that the All India Muslim Personal Law Board (hereinafter referred to as, the AIMPLB), had relied on 'hadiths', that were far removed from the time of the Prophet. It was submitted, that they were therefore far less credible and authentic, and also distorted and unreliable, as against the 'hadiths' taken into consideration in the judgments rendered by the High Courts (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'). It was pointed out, that the AIMPLB had relied upon a later 'hadith' (that is, Sunan Bayhaqi 7/547). It was pointed out, that when compared to the 'hadith' of Bhukahri (published by Darussalam, Saudi Arabia), the 'hadith' relied upon by the AIMPLB appeared to be a clear

distortion. It was also submitted, that the 'hadith' relied upon by the AIMPLB, was not found in the Al Bukhari Hadiths, and as such, it would be inappropriate to place reliance on the same. As against the submissions advanced on behalf of AIMPLB, it was pointed out (in rejoinder), that Sahih Muslims believe, that during the Prophet's time, and that of the First Caliph Abu Baqhr and the Second Caliph Umar, pronouncements of 'talaq' by three consecutive utterances were treated as one. Reference in this behalf was made to "Sahih Muslim" compiled by Al-Hafiz Zakiuddin Abdul-Azim Al-Mundhiri, and published by Darussalam. Learned senior counsel also invited this Court's attention to "The lawful and the prohibited in Islam" by Al-Halal Wal Haram Fil Islam (edition – August 2009), which was of Egyptian origin. It was pointed out, that Egypt was primarily a Sunni Hanafi nation. It was submitted, that the text of the above publication, clearly showed, that the practice of instant talaq was described sinful, and was to be abhorred. Reference was also made to "Woman in Islamic Shariah" by Maulana Wahiduddin Khan (published by Goodword Books, reprinted in 2014), wherein it is opined, that triple talaq pronounced on a singular occasion, would be treated as a single pronouncement of talaq, in terms of the 'hadith' of Imam Abu Dawud in Fath al-bari 9/27. It was submitted, that the views of the above author, were also relied upon by the Delhi High Court in the Masroor Ahmed case[4]. Reference was also made to "Marriage and family life in Islam" by Prof. (Dr.) A. Rahman (Adam Publishers and Distributors, New Delhi, 2013 edition), wherein by placing reliance on a Hanafi Muslim scholar, it was expressed that triple talaq was

not in consonance with Quranic verses. Reliance was also placed on "Imam Abu Hanifa – Life and Work" by Allamah Shiblinu'mani's of Azamgarh, who founded the Shibli College in the 19th century. It was submitted, that Abu Hanifa himself ruled, that it was forbidden to give three divorces at the same time, and whoever did so was a sinner. Based on the aforestated submissions, it was the pointed contention of learned senior counsel, that there was no credibility in the position adopted by the AIMPLB, in its pleadings to demonstrate the validity of the practice of 'talaq-e-biddat'.

43. Based on the above submissions, it was contended, that the judgment rendered by the Privy Council in the Rashid Ahmad case[1] with reference to the validity of 'talaq-e-biddat' needed to be overruled. Since 'talaq-e-biddat' cannot be traced to the Quran, and since the Prophet himself deprecated it, and since 'talaq-e-biddat' was considered sinful by all schools of Sunni Muslims, and as invalid by all the Shia Muslim schools, it could not be treated to be a part of Muslim 'personal law'. It was asserted, that triple talaq was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. Learned senior counsel solicited, that this Court in order to resolve the present dispute, declare that the pronouncement of triple talaq by a Muslim husband, in order to divorce his wife, would be treated as a single pronouncement of talaq, and would have to follow the procedure of 'talaq-e-ahsan' (or, 'talaq-e-hasan') in accordance with the Quran, so as to conclude a binding dissolution of marriage by way of 'talaq', in terms of Muslim 'personal law'.

44. Ms. Indira Jaising, Senior Advocate, was the third counsel to represent the cause of the petitioners. She entered appearance on behalf of respondent no.7 – Centre for Study of Society and Secularism, which came to be added as a party respondent vide an order dated 29.6.2016. It was the contention of learned senior counsel, that the term 'personal laws' had not been defined in the Constitution, although there was reference to the same in entry 5 of the Concurrent List of the Seventh Schedule. Learned counsel referred to Article 372 of the Constitution which mandates, that all laws in force, in the territory of India immediately before the commencement of the Constitution, "shall" continue in force until altered or repealed or amended by a competent legislature (or other competent authority). It was submitted, that on personal issues, Muslims were governed by the Muslim 'personal law' – Shariat. It was contended, that even before, the commencement of the Constitution, the Muslim Personal Law (Shariat) Application Act, 1937 enforced Muslim 'personal law', and as such, the Muslim 'personal law' should be considered as a "law in force", within the meaning of Article 13(3)(b). It was pointed out, that the instant position made the legal position separate and distinct from what ordinarily falls in the realm of 'personal law'. It was also highlighted, that a reading of entry 5 in the Concurrent List of the Seventh Schedule, leaves no room for any doubt, that 'personal law' necessarily has to have nexus, to issues such as marriage and divorce, infants and minors, adoptions, wills, intestacy and succession, joint family property and partition, etc. It was contented, that 'personal law' could therefore conveniently be described as family law, namely, disputes relating

to issues concerning the family. It was pointed out, that such family law disputes, were ordinarily adjudicated upon by the Family Courts, set up under the Family Courts Act, 1984. The matters which arise for consideration before the Family Courts are disputes of marriage (namely, restitution of conjugal rights, or judicial separation, or dissolution of marriage), and the like. Based on the above backdrop, it was submitted, that it could be safely accepted that 'personal law' deals with family laws and law of succession such as marriage, divorce, child custody, inheritance, etc.

45. Based on the foundation recorded in the preceding paragraph, it was submitted, that the question in the present controversy was, whether "rule of decision" (the term used in Section 2, of the Shariat Act) could be challenged, on the ground that the same was violative of the fundamental rights postulated in Part III of the Constitution? It was the pointed contention of learned counsel, that no "rule of decision" can be violative of Part III of the Constitution. It was acknowledged (we would say – fairly), that 'personal law' which pertained to disputes between the family and private individuals (wherein the State has no role), cannot be subject to a challenge, on the ground of being violative of the fundamental rights enshrined in Part III of the Constitution. It was submitted, that insofar as Muslim 'personal law' is concerned, it could no longer be treated as 'personal law', because it had been statutorily declared as "rule of decision" by Section 2 of the Shariat Act. It was therefore asserted, that all questions pertaining to Muslims, 'personal law' having been described as "rule of

decision" could no longer be treated as private matters between parties, nor can they be treated as matters of mere 'personal law'. It was therefore contended, that consequent upon the inclusion/subject of the question of "...dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat,...", amongst Muslims in the statute book, the same did not remain a private matter between the parties. And as such, all questions/matters, falling within the scope of Section 2 aforementioned, were liable to be considered as matters of 'public law'. Learned senior counsel therefore asserted, that no one could contest the legitimacy of a challenge to 'public law' on the ground of being violative of the provisions of the Constitution. In support of the aforesaid foundational premise, learned senior counsel placed reliance on Charu Khurana v. Union of India[27], to contend that 'talaq-e-biddat' should be considered as arbitrary and discriminatory, under Articles 14 and 15, in the same manner as the rule prohibiting women make-up artists and hair dressers from becoming members of registered make-up artists and hair dressers association, was so declared. It was also pointed out, that discrimination based on sex was opposed to gender justice, which position was clearly applicable to the controversy in hand. Insofar as the instant aspect of the matter is concerned, learned counsel placed reliance on the following observations recorded in the above judgment:

> "46. 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

[27]

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.

xxx xxx xxx

50. 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."

46. Learned senior counsel, thereupon attempted to express the same position, through a different reasoning. It is necessary to recall, that the question posed for consideration is, whether this Court should accept "rule of decision" under Section 2 of the Shariat Act – as "laws in force" within the meaning of Article 13 of the Constitution, and thereby, test the validity thereof, on the touchstone of the fundamental rights enshrined in Part III of the Constitution? It was the fervent contention of learned senior counsel, that all questions falling for consideration within the meaning of the term "rule of decision" had necessarily to be treated as "laws in force". Thus, it was submitted, that such laws were to be in consonance with the provisions of Part III – Fundamental Rights, of the Constitution. Insofar as the challenge to the constitutional validity of 'talaq-e-biddat' is concerned, learned senior counsel, adopted the submissions advanced by other learned counsel.

47. Learned senior counsel, then placed reliance on the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10.12.1948, to contend that the preamble thereof recognised the inherent dignity of the entire human family, as equal and inalienable. It was submitted, that the charter provides for equal rights to men and women. It was submitted, that Article 1 thereof provides, that all human beings were born free and equal, in dignity and rights. Referring to Article 2, it was submitted, that there could be no distinction/discrimination on the basis *inter alia* of sex and/or religion. It was submitted, that it was this Court's responsibility to widen, and not to narrow, the right of equality contained in the aforestated Declaration. The Court's attention was also drawn to the International Convention on Economic, Social and Cultural Rights (ICESCR), which provided for elimination of all forms of discrimination against women. The instant convention was adopted by the United Nations General Assembly on 10.04.1979. It was submitted, that the International Convention bill of rights for women, was instituted on 3.9.1981, and had been ratified by 189 States. It was pointed out, that India had also endorsed the same. It was submitted, that Article 1 thereof defines "discrimination", as discrimination against women on the basis of sex. Referring to Article 2, it was submitted, that all State parties who ratified the above convention, condemned discrimination against women in all its forms, and agreed to eliminate discrimination against women by following the principle of equality amongst men and women, in their national Constitutions, as well as, other legislations. It was submitted, that

Article 2 of the convention mandates, that all States would take all steps to eliminate discrimination against women – by any person, organisation or enterprise. It was submitted, that insofar as the present controversy is concerned, the provisions of the above declarations and conventions can be relied upon, to test the validity of 'talaq-e-biddat', by treating it as "rule of decision" and for that matter, as law in force (on the touchstone of Articles 14, 15 and 21 of the Constitution). It was further submitted, that in any case, the practice of 'talaq-e-biddat', clearly violated the norms adopted by the declaration, and conventions.

48. It was acknowledged, by learned senior counsel, that India recognises a plural legal system, wherein different religious communities are permitted to be governed by different 'personal laws', applicable to them. It was submitted, that there could be no dispute, that different religious communities can have different laws, but the laws of each religious community must meet the test of constitutional validity and/or constitutional morality, inasmuch as, they cannot be violative of Articles 14 and 15 of the Constitution. Viewed in the above context, it was submitted, that even though matters of faith and belief are protected by Article 25 of the Constitution, yet law relating to marriage and divorce were matters of faith and belief, were also liable to be tested on grounds of public order, morality and health, as well as, on the touchstone of the other provisions of Part III of the Constitution. Therefore, on a plain reading of Article 25, according to learned senior counsel, the right to freedom of conscience was subject to public order, morality, health, and the other provisions contained

in Part III of the Constitution. And as such, according to learned counsel, the said rights must be so interpreted, that no 'personal law' negates any of the postulated conditions contained in Article 25 of the Constitution itself. It was submitted, that Articles 14 and 15 of the Constitution were not subject to any restrictions, including any restriction under Article 25 or 26 of the Constitution. It was contended, that the cardinal principle of interpretation of the Constitution was, that all provisions of the Constitution must be harmoniously construed, so that there remained no conflict between them. It was therefore submitted, that Articles 14 and 15 on the one hand, and Articles 25 and 26 on the other, must be harmoniously construed with each other, to prevent discrimination against women, in a manner as would give effect to equality, irrespective of gender. It was contended, that it was totally irrelevant whether 'personal law' was founded on custom or religion, or was codified or uncodified, if it is law and "rule of decision", it can be challenged under Part III of the Constitution.

49. Learned senior counsel, also expressed a personal view on the matter, namely, that divorce altered the status of married women, which can leave her destitute. It was asserted, that for all other communities in India, divorce could only be obtained from a judicial forum. And, a judgment and decree of divorce, was a decision *in rem,* which alters the legal status of the concerned person, as against the whole world. It was submitted, that for all other communities in India, divorce was not a matter between the private parties, to be settled on their own. Nor could any 'fatwa' be issued, recognising unilateral 'talaq'. It was submitted, that for

one party alone, the right to annul a marriage, by a unilateral private 'talaq', was clearly against public policy, and required to be declared as impermissible in law, and even unconstitutional. In this behalf, it was contended, that no person's status could be adversely altered so as to suffer civil consequences (for the concerned person – the wife in this case) by a private declaration. It was submitted, that annulment of the matrimonial bond was essentially a judicial function, which must be exercised by a judicial forum. Any divorce granted by way of a private action, could not be considered as legally sustainable in law. And for the instant additional reason, it was submitted, that unilateral talaq in the nature of talaq-e-biddat, whereby, a Muslim woman's status was associated with adverse civil consequences, on the unilateral determination of the male spouse, by way of a private declaration, must be considered (-and therefore, be held) as clearly unsustainable in law.

50. Mr. Salman Khurshid, Senior Advocate, appearing as an intervener, submitted, that for searching a solution to a conflict, or for the resolution of a concern under Islamic law, reference had first to be made to the Quran. The availability of an answer to the disagreement, from the text of the Quran, has to be treated as a final pronouncement on the issue. When there is no clear guidance from the Quran, reference must be made to the traditions of the Prophet Muhammad – 'sunna', as recorded in the 'hadiths'. If no guidance is available on the issue, even from the 'hadiths', reference must then be made to the general consensus of opinion – 'ijma'. If a resolution to the dispute is found in 'ijma', it should be considered as a final

view on the conflicting issue, under Islamic law. It was submitted, that the precaution that needed to be adopted while referring to 'hadiths' or 'ijma' was, that neither of the two can derogate from the position depicted in the Quran.

51. Learned senior counsel, then invited our attention to different kinds of 'talaq', including 'ila', 'zihar', 'khula' and 'mubaarat'. It was emphasised, that the concept of 'talaq-e-biddat' (also described as irregular talaq), was based on the limit of three talaqs available to a man, namely, that a man can divorce the same wife (woman) three times in his life time. The first two are revocable within the period of 'iddat', whereas, the third talaq was irrevocable. Learned senior counsel, then invited the Court's attention to verses from the Quran (-for details, refer to Part-3 – The Holy Quran, with reference to 'talaq'). However, during the course of his submissions, learned senior counsel emphasized the fact, that mere repetition of divorce thrice in one sitting, would not result in a final severance of the matrimonial relationship between spouses. In order to support his above contention, reliance was placed on the following traditions, from Sunna Muslim:

> "i. [3652] 1 – (1471) It was narrated from Ibn 'Umar that he divorced his wife while she was menstruating, at the time of the Messenger of Allah 'Umar bin Al-Khattâb asked the Messenger of Allah about that and the Messenger of Allah said to him: "Tell him to take her back, then wait until she has become pure, then menstruated again, then become pure again. Then if he wishes he may keep her, or if he wishes he may divorce her before he has intercourse with her. That is the 'Iddah (prescribed periods) for which Allah has enjoined the divorce of women."
> ii. [3673] 15 – (1472) It was narrated that Ibn 'Abbâs said: "During the time of the Messenger of Allah it, Abü Bakr and the first two years of 'Umar's Khjlâfah, a threefold divorce (giving divorce thrice in one sitting) was counted as one. Then 'Umar bin Al-Khattâb said : 'People have become hasty in a matter in which they should take their time. I am thinking of holding them to it.' So he made it binding upon them."

iii. [3674] 16 – (…) Ibn Tawüs narrated from his father that Abü As-Sahbâ' said to Ibn 'Abbâs: "Do you know that the threefold divorce was regarded as one at the time of the Messenger of Allah iW and Abü Bakr, and for three years of 'Umar's leadership? "He said: "Yes".
iv. [3675] 17 – (…) It was narrated from Tawüs that AN As-Sahbâ' said to Ibn 'Abbâs: "Tell us of something interesting that you know. Wasn't the threefold divorce counted as one at the time of the Messenger of Allah and Abü Bakr?" He said: "That was so, then at the time of 'Umar the people began to issue divorces frequently, so he made it binding upon them.
v. "Mahmud-b, Labeed reported that the Messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said, 'Are you playing with the Book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; shall I not kill him."
vi. According to an Hadith quoted by M. Mohammed Ali in Manual of Hadeth p. 2861 from Masnad of Imam Ahmad bin Hanbul 1:34, the procedure during the time of Prophet and the caliphate of Abu Bakr, and the first two years of Hazrat Umar was that divorce uttered thrice was considered as one divorce. The Umar said, "people had made haste in a matter in which that was moderation for them, so we may make it take effect with regard to them. So he made it take effect to them." The Holy Quran is however very clear on the point that such a divorce must be deemed to be a single divorce.
vii. There is another tradition reported by Rokanah-b. Abu Yazid that he gave his wife Sahalmash an irrevocable divorce, and he conveyed it to the Messenger of Allah and said: by Allah, I have not intended but one divorce. Then messenger of Allah asked Have you not intended but one (divorce)? Rokana said: By Allah, I did not intend but one divorce. The Messenger of Allah then returned her back to him. Afterwards he divorced her for second time at the time of Hadrat Omar and third time at the time of Hadrat Osman.
viii. The Quranic philosophy of divorce is further buttressed by the Hadith of the Prophet wherein he warned, 'of all things which have been permitted, divorce is the most hated by Allah'. The Prophet told his people: "Al-Talaqu indallah-I abghad al-mubahat", meaning "Divorce is most detestable in the sight of God; abstain from it."
ix. [2005] 43 – (867) It was narrated that Jâbir bin 'Abdullâh said: "When the Messenger of Allah delivered a Khutbah, his eyes would turn red, his voice would become loud, and his anger would increase, until it was as if he was warning of an attacking army, saying: 'The enemy will attack in the morning or in the evening.' He said: 'The Hour and I have been sent like these two,' and he held his index finger and middle finger up together. And he would say: 'The best of speech is the Book of Allah, the best of guidance is the guidance of Muhammad, and the worst of matters are those which are newly-invented, and every innovation is a going astray.' Then he would say: 'I am closer to every believer than his own self. Whoever leaves behind wealth, it is for his family; whoever

leaves behind a debt or dependants, then the responsibility of paying it off and of caring for them rests upon me.
x. [2006] 44 – (…) Jâbir bin 'Abdullâh said: "In the Khutbah of the Prophet on Friday, he would praise Allah, then he would say other things, raising his voice…" a similar Hadith (as no.2005).
xi. [4796] 59 – (1852) It was narrated that Ziyâd bin 'Ilâqah said: "I heard 'Arfajah say: 'I heard the Messenger of Allah say: "There will be Fitnah and innovations. Whoever wants to divide this Ummah when it is united, strike him with the sword, no matter who he is."
xii. [4797] (…) A similar report (as no.2796) was narrated from 'Arfajah from the Prophet, except that in their Hadith it says: "…kill him"."

Based on the above, it was submitted, that in terms of the clear message in the Quran, the acts and sayings of the Prophet Muhammad are to be obeyed. Therefore, when the aforementioned 'hadiths' are available stating in clear terms, that the Prophet Muhammad, considered the pronouncement of three divorces in one sitting as one, that should be given due expression. It was the contention of learned senior counsel, that it is reported, that when once news was brought to the Prophet Muhammad, that one of his disciples had divorced his wife, by pronouncing three talaqs at one and the same time, the Prophet Muhammad stood up in anger and declared that the man was making a plaything of the words of God, and made him take back his wife. The instance, which is supported by authentic support through available text, according to learned senior counsel, was sufficient by itself, to dispose of the present controversy.

52. It was also submitted, that even if one examines the deeds of the Prophet Muhammad's companions, it was quite clear from the 'hadiths', that the same were followed during Caliph Abu Bakr's time, and also during the first two years of Caliph Umar. But thereafter, only to meet an exigency, Caliph Umar started accepting the practice of pronouncing three

divorces in one sitting, as final and irrevocable. Insofar as the instant aspect of the matter is concerned, learned senior counsel narrated the following background:

> "(a) Caliph Umar, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose.
> (b) When the Arabs conquered Syria, Egypt, Perisa, etc. they found women there much better in appearance as compared to Arabian women and hence they wanted to marry them. But the Egyptian and Syrian women insisted that in order to marry them, they should divorce their existing wives instantaneously, by pronouncing three divorces in one sitting.
> (c) The condition was readily acceptable to the Arabs, because they knew that in Islam divorce was permissible only twice in two separate period of tuhr and its repetition in one sitting was considered un-Islamic, void and not effective. In this way, they could not only marry these women, but also retain their existing wives. This fact was reported to the second Caliph Hazrat Umar.
> (d) The Caliph Umar then, in order to prevent misuse of the religion by the unscrupulous husbands decreed, that even repetition of the word talaq, talaq, talaq at one sitting, would dissolve the marriage irrevocably. It was, however, a mere administrative measure of Caliph Umar, to meet an emergency situation, and not to make it a legally binding precedent permanently."

53. It was also the contention of learned senior counsel, that Hanafi jurists who considered three pronouncements at one sitting, as amounting to a final divorce explained, that in those days people did not actually mean three divorces but meant only one divorce, and other two pronouncements were meant merely to emphasise the first pronouncement. But in the contemporary era, three pronouncements were made with the intention to effect three separate and distinct declarations, and hence, they were not to be counted as a singular announcement. This interpretation of the Hanafi jurists, it was submitted, was generally not acceptable, as it went against the very spirit of the Quran, as well as, the 'hadith' which enjoin, that in

case of breach between husband and wife, it should be referred to the arbitration, and failing an amicable settlement, a divorce was permissible, subject to a period of waiting or 'idaat', during which a reconciliation was also to be attempted, and if successful, the husband could take back his wife. The main idea in the procedure for divorce, as laid down by Islam, it was submitted, was to give the parties an opportunity for repproachment. If three pronouncements are treated as a 'mughallazah' – divorce, then no opportunity is available to the spouses, to retrieve a decision taken in haste. The rule of 'talaq-e-biddat', it was pointed out, was introduced long after the time of the Prophet. It was submitted, that it renders the measures provided for in the Quran against hasty action ineffective, and thereby deprives people of a chance to change their minds, to retrieve their mistakes and retain their wives.

54. Based on the above submissions, it was contended, that though matters of religion have periodically come before courts in India, and the issues have been decided in the context of Articles 25 and 26 of the Constitution. Raising concerns over issues of empowerment of all citizens and gender justice, it was submitted, had increased the demand on courts to respond to new challenges. The present slew of cases, it was pointed out, was a part of that trend. It was submitted, that the Supreme Court could not refuse to engage itself, on the ground that the issues involved have political overtones or motives, and also because, they might pertain to a narrow constitutional permissibility. It was contended, that to refuse an invitation to examine broader issues such as whether 'personal laws' were

part of 'laws in force' under Article 13, and therefore, subject to judicial review, or whether a uniform civil code should be enforced, would not be appropriate. It was submitted, if the immediate concern about triple talaq could be addressed, by endorsing a more acceptable alternate interpretation, based on a pluralistic reading of the sources of Islam, i.e., by taking a holistic view of the Quran and the 'hadith' as indicated by various schools of thought (not just the Hanafi school), it would be sufficient for the purpose of ensuring justice to the petitioners, and others similarly positioned as them.

55. In support of his above submissions, learned senior counsel placed reliance on legislative changes with reference to 'talaq-e-biddat' all over the world (-for details, refer to Part-5 – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). Reliance was also placed on judicial pronouncements, rendered by different High Courts with reference to 'talaq-e-biddat' (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'), so as to conclude, that triple talaq pronounced at the same time should be treated as a single pronouncement of divorce, and thereafter, for severing matrimonial ties, the husband would have to complete the prescribed procedure provided for 'talaq-e-ahsan'/'talaq-e-hasan', and only thereafter, the parties would be treated as divorced.

56. While advancing his aforesaid contention, there was also a note of caution expressed by learned senior counsel. It was pointed out, that it was

not the role of a court, to interpret Muslim 'personal law' – Shariat. It was asserted, that under Muslim 'personal law', the religious head – the Imam would be called upon, to decipher the teachings of the Quran and the 'hadiths' in case of a conflict. And thereupon, the Imam had the responsibility to resolve issues of conflict, not on the basis of his own views, but by reading the verses, namely, the Quran and the 'hadiths', and to determine therefrom, the correct interpretation. It was submitted, that the role of a court, not being a body well versed in the intricacies of faith, would not extend to an interpretation of either the Quran or the 'hadiths', and therefore, 'talaq-e-biddat' should also be interpreted on the touchstone of reasonableness, in tune with the prevailing societal outlook.

57. Ms. Nitya Ramakrishna, Advocate, appeared on behalf of respondent no.11 (in Writ Petition (C) No.118 of 2016) - Dr. Noorjehan Safia Niaz, who was impleaded as such, by an order dated 29.6.2016. It was submitted by learned counsel, that 'talaq-e-biddat' was a mode of divorce that operated instantaneously. It was contended, that the practice of 'talaq-e-biddat', was absolutely invalid even in terms of Muslim 'personal law' – 'Shariat'. It was submitted, that it was not required of this Court to strike down the practice of 'talaq-e-biddat', it was submitted, that it would suffice if this Court merely upholds the order passed by the Delhi High Court in the Masroor Ahmed case[4], by giving a meaningful interpretation to 'talaq-e-biddat', which would be in consonance with the verses of the Quran and the relevant 'hadiths'.

58. It was also asserted by learned counsel, that Islam from its very inception recognized rights of women, which were not available to women of other communities. It was pointed out, that the right of divorce was conferred on Muslim women, far before this right was conferred on women belonging to other communities. It was asserted, that even in the 7th century, Islam granted women the right of divorce and remarriage. The aforesaid legal right, according to learned counsel, was recognized by the British, when it promulgated the Shariat Act in 1937. It was submitted, that through the above legislation all customs and usages contrary to the Muslim 'personal law' – 'Shariat', were unequivocally annulled. It was therefore contended, that while evaluating the validity of 'talaq-e-biddat', this Court should be conscious of the fact, that the Muslim 'personal law' – 'Shariat', was a forward looking code of conduct, regulating various features in the lives of those who professed the Muslim religion.

59. It was also submitted, that the Quran did not recognize 'talaq-e-biddat'. It was pointed out, that the Prophet Muhammad considered only two forms of divorce to be valid, namely, 'talaq-e-ahsan' and 'talaq-e-hasan'. Despite there being numerous schools of Muslim jurisprudence, only two schools recognized 'talaq-e-biddat' as a mode of divorce. It was submitted, that none of the Shia schools recognized triple talaq, as a valid process of divorce between spouses. Insofar as 'talaq-e-biddat' is concerned, it was asserted, that the Quran does not approve instantaneous talaq. During the process of initiation of divorce and its finalization, it is necessarily to have a time lag and a timeline. It cannot

be instantaneous. It was pointed out, that the time lag is the period of 'iddat' for determining whether the wife is pregnant or not, i.e., for ascertaining the wife's purity. But the time line, is for adopting arbitration, to probe the possibility of reconciliation. 'Talaq-e-biddat', according to learned counsel, was a subsequent improvisation, that had crept into the Hanafi school of Sunnis. It was asserted, that the British judges prior to independence, made a huge blunder by upholding 'talaq-e-biddat' – triple talaq. Learned counsel placed reliance on a number of judgments rendered by different High Courts, culminating in the recent judgments of three High Courts (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat').

60. Based on the above, it was asserted, that 'talaq-e-biddat' could not be considered as a valid mode for severing matrimonial ties under the Muslim 'personal law' – 'Shariat'. In view of the above submissions, and on a reiteration of the submissions advanced by learned counsel who had entered appearance prior to her, it was submitted, that the clear preponderance of judicial opinion after independence of India has been, that Muslim 'personal law', does not approve 'talaq-e-biddat', and therefore, in terms of the Muslim 'personal law', this Court should declare 'talaq-e-biddat', as unacceptable in law, and should also declare it as unconstitutional.

61. Dr. Rajan Chandra and Mr. Arif Mohd. Khan, Advocates, appeared on behalf of the Muslim Women Personal Law Board. It was their contention, that it has been acknowledged by all concerned, including the

AIMPLB, that 'talaq-e-biddat' was derogatory to the dignity of women, and that, it breaches the concept of gender equality. It was submitted, that the above position could easily be remedied through judicial intervention. In this behalf, our attention was drawn to Article 13 of the Constitution, which mandates, that all laws in force in the territory of India (immediately before the commencement of the Constitution), as were inconsistent with the Fundamental Rights contained in Part III of the Constitution, were to the extent of such inconsistency, to be treated as void. The above declaration, it was pointed out, had to be expressed through legislation, by the Parliament, and in case the Parliament was reluctant in bringing out such a legislation (-presumably, for political considerations), it was the bounden duty of this Court, to declare such existing laws which were derogatory to the dignity of women, and which violated the concept of gender equality, as void, on account of their being in conflict with the fundamental rights contained in Part III of the Constitution. Both learned counsel, invited our attention to the legislative march of events commencing from the enactment of the Shariat Act in 1937, by the British rulers of India, who took upon themselves, extreme cudgels to initiate the grant of appropriate rights to women. As also, the enactment of the Dissolution of Muslim Marriages Act, 1939 (again during the British regime), whereby, Muslim women were conferred with a right to divorce their husbands, on eight distinct grounds. It was submitted, that the protection of Muslim women's rights, which needed to have continued even after independence, had remained stagnant, resulting in insurmountable sufferings to the Muslim women, specially in

comparison with women of other faiths. One of the grounds of such suffering, it was pointed out, was surely 'talaq-e-biddat' – triple talaq, which has been a matter of substantial furore and outcry at the hands of Muslim women. During the course of hearing, our attention was drawn to fundamentals of Islam from the Quran (-for details, refer to Part-3 – The Holy Quran – with reference to 'talaq'), and 'hadiths'. Views of Imams on 'fiqh' and 'hadith' and other relevant texts were referred to (as were also relied upon by learned counsel who appeared before them – and have been duly referred to above), to contend that triple talaq had never been accepted as a valid means of divorce, even under the Muslim 'personal law'. Adopting the submissions of learned counsel, who had already assisted this Court on behalf of the petitioners, it was submitted, that this Court should declare 'talaq-e-biddat', as unconstitutional and violative of Articles 14 and 15 of the Constitution.

62. The learned Attorney General for India – Mr. Mukul Rohatgi commenced his submissions by contending, that in this case, this Court has been called upon to determine, whether the practice of 'talaq-e-biddat' was compatible with contemporary constitutional morality and the principles of gender equality and gender equity guaranteed under the Constitution. In the context of the above debate, it was submitted, that the pivotal issue that needed to be answered was, whether under a secular Constitution, Muslim women could be discriminated against, merely by virtue of their religious identity. And/or whether Muslim women, could be relegated to a status significantly more vulnerable than their counterparts

who professed other faiths - Hindu, Christian, Zoroastrian, Buddhist, Sikh, Jain, etc.. In other words, the fundamental question for determination by this Court, according to learned Attorney General was, whether in a secular democracy, religion can be a reason to deny equal status and dignity, to Muslim women.

63. In the above context, it was pointed out, that the fundamental right to equality guaranteed under Article 14 of the Constitution, manifested within its fold, equality of status. Gender equality, gender equity and gender justice, it was submitted, were values intrinsically entwined in the guarantee of equality, under Article 14. The conferment of a social status based on patriarchal values, or a social status based on the mercy of the men-folk, it was contended, were absolutely incompatible with the letter and spirit of Articles 14 and 15 of the Constitution. The rights of a Muslim woman to human dignity, social esteem and self-worth, it was submitted, were vital facets of a woman's right to life with dignity, under Article 21 of the Constitution. It was submitted, that gender justice was a constitutional goal of overwhelming importance and magnitude, without accomplishing the same, half of the country's citizenry, would not be able to enjoy to the fullest - their rights, status and opportunities. Reference was also made to clause (e) of Article 51-A of the Constitution, which is extracted below:

> "(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;"

It was accordingly asserted, that Muslim women could not be subjected to arbitrary and unilateral whims of their husbands, as in the case of divorce by triple talaq amongst Shia Muslims belonging to the Hanafi school.

64. It was submitted, that gender equality and the dignity of women, were non-negotiable. These rights were necessary, not only to realize the aspirations of every individual woman, who is an equal citizen of this country, but also, for the larger well being of society and the progress of the nation, one half of which is made up by women. It was submitted, that women deserved to be equal participants in the development and advancement of the world's largest democracy, and any practice which denudes the status of an inhabitant of India, merely by virtue of the religion he/she happens to profess, must be considered as an impediment to that larger goal. In this behalf, reliance was placed on C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil[28], wherein a 3-Judge Bench of this Court observed as under:

> "15. It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S.R. Bommai v. Union of India [(1994) 3 SCC 1] this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps

28

should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. 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 Article 13 if they violate fundamental rights. Right to equality is a fundamental right….

16. The General Assembly of the United Nations adopted a declaration on 4-12-1986 on "The Development of the Right to Development" in which India played a crusading role for its adoption and ratified the same. Its preamble recognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfilment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic, social and political rights.

17. Article 1(1) assures right to development an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6(1) obligates the State to observance of all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub-article (2) enjoins that … equal attention and urgent consideration should be given to implement, promotion and protection of civil, political, economic, social and political rights. Sub-article (3) thereof enjoins that:

"State should take steps to eliminate obstacle to development, resulting from failure to observe civil and political rights as well as economic, social and economic rights. Article 8 casts duty on the State to undertake, … necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources … and distribution of income."

Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

18. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally,

socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights."

Reference was also made to Anuj Garg v. Hotel Association of India[29], wherein it was submitted, that this Court had emphasized on the value of gender equality, and the need to discard patriarchal mindset. For arriving at the above conclusion, it was submitted, that this Court had relied upon international jurisprudence, to strike down a law which debarred women from employment on the pretext that the object of the law was, to afford them protection. The Court held that "it is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy (of the women)". The Court also quoted from a judgment of the U.S. Supreme Court where discrimination was rationalized "by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage...". Reference was also made to Vishaka v. State of Rajasthan[30], wherein, in the context of protection of women against sexual harassment at the workplace, this Court underlined the right of women to a life with dignity. Additionally, our attention was drawn to the Charu Khurana case[15], wherein it was concluded, that the "sustenance of gender justice is the cultivated achievement of intrinsic human rights and that there cannot be any discrimination solely on the ground of gender." The learned Attorney General also cited, Githa Hariharan v. Reserve Bank of India[31], wherein this Court had the occasion to interpret the provisions of the Hindu Minority and Guardianship Act,

29

30

31

1956. It was submitted, that this Court in the above judgment emphasized the necessity to take measures to bring domestic law in line with international conventions, so as to eradicate discrimination of all forms, against women. It was submitted, that Articles 14, 15 and 21 consituted an inseparable part of the basic structure of the Constitution. These values – the right to equality, non-discrimination and the right to live life with dignity, it was emphasized, formed the bedrock of the Constitution. Gender equality and dignity for women, it was pointed out, was an inalienable and inseparable part of the basic structure of the Constitution. Since women transcend all social barriers, it was submitted, that the most fundamental facet of equality under the Constitution was gender equality, and gender equity.

65. The learned Attorney General also pointed out, that a large number of Islamic theocratic countries and countries with overwhelmingly large Muslim populations, had undertaken significant reforms including the practice of triple talaq. These societies had accepted reform, as being consistent with the practice of Islam (-for details, refer to Part-5 – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). The paradox was that, Muslim women in India, were more vulnerable in their social status as against women even in predominantly Islamic States, even though India is a secular country. It was submitted, that the position of Indian Muslim women was much worst, than Muslim women who live in theocratic societies, or countries where Islam is the State religion. It was contended, that the

impugned practice was repugnant to the guarantee of secularism, which it was pointed out, was an essential feature of the Constitution. Perpetuation of regressive or unjust practices in the name of religion, it was submitted, was anathema to a secular Constitution, which guarantees non-discrimination on grounds of religion. It was also submitted, that in the context of gender equality and gender equity, the larger goal of the State was, to strive towards the establishment of a social democracy, where each one was equal to all others. Reference in this behalf was made to the closing speech on the draft Constitution on 25th November, 1949, of Dr. Ambedkar who had stated: "What we must do is not to be attained with mere political democracy; we must make out political democracy and a social democracy as well. Political democracy cannot last unless there lies on the base of it a social democracy." A social democracy has been described as "A way of life which recognizes liberty, equality and fraternity as principles of life". It was therefore submitted, that in order to achieve social democracy, and in order to provide social and economic justice (envisaged in the preamble), namely, goals articulated in the fundamental rights and directive principles, and in particular, Articles 14, 15, 16, 21, 38, 39 and 46, had to be given effect to. In the instant context, the learned Attorney General placed reliance on Valsamma Paul v. Cochin University[32], and drew the Court's attention to the following:

> "16.The Constitution seeks to establish secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis,

32

therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: S.R. Bommai v. Union of India, (1994) 3 SCC 1 and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult. In State of Karnataka v. Appu Balu Ingale & Ors., AIR (1993) SC 1126 this Court has held in paragraph 34 that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seemless web of life. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the act with its interpretive armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law.…"

The learned Attorney General then submitted, that in paragraph 20 of the Valsamma Paul case[20], it was noted, that various Hindu practices which were not in tune with the times, had been done away with, in the interest of promoting equality and fraternity. In paragraph 21 of the above judgment, this Court had emphasized the need to divorce religion from 'personal law'. And in paragraph 22, a mention was made about the need to foster a national identity, which would not deny pluralism of Indian culture, but would rather preserve it. Relevant extracts of the aforesaid judgment relied upon during the course of hearing, are reproduced herein below:

"21. The Constitution through its Preamble, Fundamental Rights and Directive Principles created secular State based on the principle of equality and non-discrimination striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr. K.M. Munshi contended on the floor of the Constituent Assembly that "we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation" (Vide: Constituent Assembly Debates, Vol. VII 356-8).

22. In the onward march of establishing an egalitarian secular social order based on equality and dignity of person, Article 15(1) prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it. Indian culture is a product or blend of several strains or elements derived from various sources, in spite of inconsequential variety of forms and types. There is unity of spirit informing Indian culture throughout the ages. It is this underlying unity which is one of the most remarkable everlasting and enduring feature of Indian culture that fosters unity in diversity among different populace. This generates and fosters cordial spirit and toleration that make possible the unity and continuity of Indian traditions. Therefore, it would be the endeavour of everyone to develop several identities which constantly interact and overlap, and prove a meeting point for all members of different religious communities, castes, sections, sub-sections and regions to promote rational approach to life and society and would establish a national composite and cosmopolitan culture and way of life."

66. It was also asserted, that patriarchal values and traditional notions about the role of women in society, were an impediment to the goal for achieving social democracy. In this behalf it was contended, that gender inequity impacts not only women, but had a ripple effect on the rest of the community, preventing it from shaking out of backwardness and partaking to the full, liberties guaranteed under the Constitution. Citizens from all

communities, it was submitted, had the right to the enjoyment of all the constitutional guarantees, and if some sections of society were held back, it was likely to hold back the community at large, resulting in a lopsided development, with pockets of social backwardness. According to the learned Attorney General, this kind of lopsided development was not in the larger interest of the integrity and development of the nation. It was submitted, that secularism, equality and fraternity being the overarching guiding principles of all communities, must be given effect to. This would move the entire citizenry forward, guaranteeing to women equal rights, and at the same time, preserving diversity and plurality.

67. It was the emphatic assertion of the learned Attorney General, that freedom of religion was subservient to fundamental rights. It was contended in this behalf, that the words employed in Article 25(1) of the Constitution, which conferred the right to practice, preach and propagate religion were "subject to the provisions of this Part", which meant that the above rights are subject to Articles 14 and 15, which guarantee equality and non-discrimination. In other words, under India's secular Constitution, the right to freedom of religion was subject to, and in that sense, subservient to other fundamental rights – such as the right to equality, the right to non-discrimination, and the right to life with dignity. In this behalf reference was made to Sri Venkataramana Devaru v. State of Mysore[33]. In this judgment, it was submitted, that this Court considered the meaning of the phrase "subject to the provisions of this Part" in Article 25(1) to

[33]

conclude, that the other provisions of the Part would "prevail over" and would "control the right conferred" by Article 25(1).

68. In the above context it was also submitted, that the freedom of religion, expressed in Article 25 of the Constitution was, not confined to the male gender. Article 25 is extracted below:

> "25. 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."

It was highlighted, that it was also necessary to note, that Article 25(1) provides that "all" persons were "equally" entitled to the freedom of conscience, and the right to profess, practice and propagate religion. This, according to the learned Attorney General, should be understood to mean, that the rights conferred by this article were equally available to women, and were not confined to men alone. Therefore, it was contended, that any patriarchal or one sided interpretation of religion (or a practice of religion), ought not to be countenanced.

69. It was emphasised by the learned Attorney General, that it was necessary to draw a line between religion *per se,* and religious practices. It

was submitted, that the latter were not protected under Article 25. "Religion", according to the learned Attorney General, has been explained by this Court in A.S. Narayana Deekshitulu v. State of A.P.[34], as under :

> "86. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.
> 87. In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc., even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be predominant in the matter of religion; to others, rituals or ceremonies may be

34

predominant facets of religion; and to yet another class or persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets or religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or regulating any activity – economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters or religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence – factual or legislative or historic – presented in that context is required to be considered and a decision reached."

In order to support the above view, the Court's attention was also drawn to the Javed case[10], wherein this Court observed as under :

"49. In State of Bombay v. Narasu Appa Mali [AIR 1952 Bom 84:53 Cri LJ 354] the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) was challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held:

"A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

50. Their Lordships quoted from American decisions that the laws are made for the governance of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is a recognized institution according to Hindu religious practice, Their Lordships stated in no uncertain terms:

> "The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(*b*) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

It was further submitted, that practices such as polygamy cannot be described as being sanctioned by religion, inasmuch as, historically polygamy prevailed across communities for several centuries, including the ancient Greeks and Romans, Hindus, Jews and Zoroastrians. It was pointed out, that polygamy had less to do with religion, and more to do with social norms of that time. In the Quran as well, it was contended, it appears that the prevalence (or perhaps, rampant practice) of polygamy in pre-Islamic society, was sought to be regulated and restricted, so as to treat women better than they were treated in pre-Islamic times. It was submitted, that the practice of polygamy was a social practice rather than a religious one, and therefore, would not be protected under Article 25. It was sought to be explained, that 'talaq-e-biddat' was similarly a practice never clearly recognized, nor was it seen with favour, and needed to be examined in the background of the above narrated historic position.

70. In order to be able to seek interference, with reference to the issue canvassed, and in order to surmount the legal object in advancing his contentions, the learned Attorney General pointed out, that there was an apparent misconstruction, which had led to the conclusions drawn by the

Bombay High Court, in State of Bombay v. Narasu Appa Mali[35]. It was submitted, that 'personal laws' ought to be examined, in the light of the overarching goal of gender justice, and dignity of women. The underlying idea behind the preservation of 'personal laws' was, to safeguard the plurality and diversity among the people of India. However, the sustenance of such diverse identities, according to the learned Attorney General, cannot be a pretext for denying women their rightful status and gender equality. It was submitted, that 'personal law' was a part and parcel of "law" within the meaning of Article 13. And therefore, any such law ('personal law') which was inconsistent with fundamental rights, would have to be considered void. It was further submitted, that the interpretation of the Bombay High Court in the Narasu Appa Mali case[23], to the effect that Article 13 of the Constitution, would not cover 'personal laws' warranted reconsideration. Firstly, it was contended, that a reading of the plain language adopted in Article 13 would clearly establish that 'personal law', as well as customs and usages, were covered within the scope of "law". Article 13 reads as under:

> "13. Laws inconsistent with or in derogation of the fundamental rights.-
> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

35

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

It was submitted, that the meaning of "law" as defined in clauses (2) and (3) of Article 13 is not exhaustive, and should be read as if it encompassed within its scope, 'personal law' as well. It was submitted, that under clause (2) of Article 246 of the Constitution, Parliament and State Legislatures had the power to make laws, also on the subject enumerated in entry 5 of the Concurrent List in the Seventh Schedule, pertaining to "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." Since the subjects expressed in entry 5 aforementioned, were relatable to 'personal law', therefore, 'personal law', according to the learned Attorney General, was liable to include law within the meaning of sub-clause (a) of clause (3) of Article 13 of the Constitution. The observations of the Bombay High Court in the Narasu Appa Mali case[23], it was contended, were contrary to the plain language of Article 13. Secondly, it was submitted, the plain language of Article 13(3)(a) which defines "law" as including "any...custom or usage having in the

territory of India the force of law", left no room for any doubt, on the issue. It was pointed out, that the observations in the Narasu Appa Mali case[23], were in the nature of *obiter,* and could not be considered as the ratio of the judgment. Further more, the said judgment, being a judgment of a High Court, was not binding on this Court. Without prejudice to the above, according to the learned Attorney General, the said practices under challenge had been incorporated into the Muslim 'personal law' by the Shariat Act. It was reasoned, that the Shariat Act, was clearly a "law in force", within the meaning of Article 13(3)(b). It was submitted, that the petitioner has challenged Section 2 of the aforesaid Act, insofar as it recognises and validates the practices of triple talaq or talaq-e-biddat (nikah halala and polygamy). Therefore, even assuming (for the sake of argument), that these practices do not constitute customs, the same were nonetheless manifestly covered by Article 13.

71. It was acknowledged, that the legal position expressed in the Narasu Appa Mali case[23] had been affirmed by this Court, on various occasions. Rather than recording the learned Attorney General's submissions in our words, we would extract the position acknowledged in the written submissions filed on behalf of the Union of India, in this matter, below:

> "(e) Pertinently, despite this ruling that was later followed in Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689 and Maharshi Avdhesh v. Union of India, (1994) Supp (1) SCC 713, the Supreme Court has actively tested personal laws on the touchstone of fundamental rights in cases such as Daniel Latifi v. Union of India, (2001) 7 SCC 740 (5-Judge Bench), Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 (5-Judge Bench), John Vallamatom v. Union of India, (2003) 6 SCC 611

(3-Judge Bench) etc. Furher, in Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, (1996) 8 SCC 525, ..."

However, reference was nevertheless made to the Masilamani Mudaliar case[16], wherein, it was submitted, that this Court had adopted a contrary position to the Narasu Appa Mali case[23] and had held, "But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the constitutional goal." It was also asserted, that this Court had further held, "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 Article 13 if they violate fundamental rights." It is significant to note, that this case concerned the inheritance rights of Hindu women. In view of the aforesaid, it was submitted, that the observations in the Narasu Appa Mali case[23], that 'personal law' was not covered under Article 13, was incorrect and not binding upon this Court.

72. It was also contended, that the Constitution undoubtedly accords guarantee of faith and belief to every citizen, but every practice of faith could not be held to be an integral part of religion and belief. It was therefore submitted, that every sustainable (and enforceable) religious practice, must satisfy the overarching constitutional goal, of gender equality, gender justice and dignity. It was asserted, that the practice of 'talaq-e-biddat', could not be regarded as a part of any "essential religious practice", and as such, could not be entitled to the protection of Article 25.

The test of what amounts to an essential religious practice, it was submitted, was laid down in a catena of judgments including Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt[36], wherein this Court held as under:

> "20. The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b). What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as "Jehova's Witnesses". This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security Regulations of the State. The legality of the action of the Government was questioned

36

by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that Section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations (Vide Adelaide Company v. Commonwealth, 67 CLR 116, 127). These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery."

Reference was then made to Ratilal v. State of Bombay[37], wherein it was observed as under:

"13. Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of Jamshed ji v. Soonabai [33 Bom 122] and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad baj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose. "If this is the belief

37

of the community" thus observed the learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community,—a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(b) of our Constitution."

Our attention was also drawn to Qureshi v. State of Bihar[38], wherein this Court held as under:

"13. Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Article 25(1). That article runs as follows:

"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, practice and propagate religion."

After referring to the provisions of clause (2) which lays down certain exceptions which are not material for our present purpose this Court has, in Ratilal Panachand Gandhi v. The State of Bombay [(1954) SCR 1055, 1062-1063] explained the meaning and scope of this article thus:

"Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and section also violates the fundamental rights of the petitioners ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people."

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

"That the petitioners further respectfully submit that the said impugned guaranteed under Article 25 of the Constitution in-as-much as on the

38

occasion of their Bakr Id Day, it is the religious practice of the petitioners' community to sacrifice a cow on the said occasion. The poor members of the community usually sacrifice one cow for every 7 members whereas it would require one sheep or one goat for each member which would entail considerably more expense. As a result of the total ban imposed by the impugned section the petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran, and practised by all Muslims from time immemorial and recognised as such in India."

The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition. No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamilton's translation of Hedaya Book XLIII at p. 592 that it is the duty of every free Mussulman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats. So there may be an economic compulsion although there is no religious compulsion. It is also pointed out that from time immemorial the Indian Mussalmans have been sacrificing cows and this practice, if not enjoined, is certainly sanctioned by their religion and it amounts to their practice of religion protected by Article 25. While the petitioners claim that the sacrifice of a cow is essential, the State denies the obligatory nature of the religious practice. The fact, emphasised by the respondents, cannot be disputed, namely, that many Mussalmans do not sacrifice a cow on the Bakr Id Day. It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous

recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."

Learned Attorney General also cited, State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat[39], and placed reliance on the following observations:

"22. In State of W.B. v. Ashutosh Lahiri [(1995) 1 SCC 189] this Court has noted that sacrifice of any animal by Muslims for the religious purpose on BakrI'd does not include slaughtering of cows as the only way of carrying out that sacrifice. Slaughtering of cows on BakrI'd is neither essential to nor necessarily required as part of the religious ceremony. An optional religious practice is not covered by Article 25(1). On the contrary, it is common knowledge that the cow and its progeny i.e. bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makar Sankranti and Gopashtmi. A good number of temples are to be found where the statue of "Nandi" or "Bull" is regularly worshipped. However, we do not propose to delve further into the question as we must state, in all fairness to the learned counsel for the parties, that no one has tried to build any argument either in defence or in opposition to the judgment appealed against by placing reliance on religion or Article 25 of the Constitution."

Finally, our attention was invited to Sardar Syedna Taher Saifuddin Saheb v. State of Bombay[40], wherein it was observed as under:

"60. But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform". To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Article 25(2)(*b*), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Article 25(1) and the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Article 25(1) for two reasons: (*1*) To read the saving as covering

39

40

even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom — a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform". (*2*) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Article 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform."

73. It was pointed out, that in the counter-affidavit dated August 2016, filed on behalf of the Muslim Personal Law Board, i.e., respondent no.3 to this petition, the practices of triple talaq (as well as, 'nikah halala' and polygamy) have been referred to as "undesirable". It was accordingly submitted, that no "undesirable" practice can be conferred the status of an "essential practice", much less one that forms the substratum of the concerned religion.

74. It was asserted on behalf of the Union of India, that the Indian State was obligated to adhere to the principles enshrined in international covenants, to which it is a party. India being a founding member of the United Nations, is bound by its Charter, which embodies the first ever international agreement to proclaiming gender equality, as a human right in its preamble, and reaffirming faith in fundamental human rights, through the dignity of the human person, by guaranteeing equal rights to men and women. It was submitted, that significantly, the United Nations Commission on the Status of Women, first met in February, 1947, with 15 member States – all represented by women, including India (represented through Shareefah Hamid Ali). During its very first session, the Commission

declared its guiding principles, including the pledge to raise the status of women, irrespective of nationality, race, language or religion, to the same level as men, in all fields of human enterprise, and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law. (United Nations Commission on the Status of Women, First Session, E/281/Rev.1, February 25, 1947). It was submitted, that the Universal Declaration of Human Rights, 1948, the International Covenant of Economic, Social and Cultural Rights, 1966 and the International Covenant of Social and Political Rights, 1966, emphasized on equality between men and women. The other relevant international instruments on women which were brought to our notice, included the Convention on the Political Rights of Women (1952), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1955), Universal Declaration on Democracy (1997), and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999). It was submitted by the learned Attorney General, that the Government of India ratified the Vienna Declaration and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 19-6-1993. The preamble of CEDAW reiterates, that discrimination against women violated the principles of equality of rights and respect for human dignity. And that, such inequality was an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of

their country. It was emphasized that such inequality, also hampered the growth of the personality from society and family, and made it more difficult for the full development of potentialities of women, in the service of their countries and of humanity. Article 1 of the CEDAW, it was pointed out, defines discrimination against women, while Article 2(b) enjoins the State parties to pursue elimination of discrimination against women, by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women". Clause (c) of Article 2 enjoins the ratifying States, to ensure legal protection of the rights of women, and Article 3 of the CEDAW enjoins the States to take all appropriate measures to ensure full development and advancement of women, for the purpose of guaranteeing to them, the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. It was further submitted on behalf of the Union of India, that the equality principles were reaffirmed in the Second World Conference on Human Rights, held at Vienna in June 1993, as also, in the Fourth World Conference on Women, held at Beijing in 1995. It was pointed out, that India was a party to this convention and other declarations, and was committed to actualize them. It was asserted, that in the 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation, were condemned.

75. Last of all, the Attorney General pointed out, the prevailing international trend all around the world, wherein the practice of divorce through 'talaq-e-biddat', has been statutorily done away with (-for details,

refer to Part-5 – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). On the basis of the submissions noticed above, it was contended, that it was extremely significant to note, that a large number of Muslim countries, or countries with a large Muslim populations such as, Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt, Iran and Sri Lanka had undertaken significant reforms and had regulated divorce law. It was pointed out, that legislation in Pakistan requires a man to obtain the permission of an Arbitration Council. Practices in Bangladesh, it was pointed out, were similar to those in Pakistan. Tunisia and Turkey, it was submitted, also do not recognize extra-judicial divorce, of the nature of 'talaq-e-biddat'. In Afghanistan, divorce where three pronouncements are made in one sitting, is considered to be invalid. In Morocco and Indonesia, divorce proceedings take place in a secular court, procedures of mediation and reconciliation are encouraged, and men and women are considered equal in matters of family and divorce. In Indonesia, divorce is a judicial process, where those marrying under Islamic Law, can approach the Religious Court for a divorce, while others can approach District Courts for the same. In Iran and Sri Lanka, divorce can be granted by a Qazi and/or a court, only after reconciliation efforts have failed. It was submitted, that even Islamic theocratic States, have undergone reform in this area of the law, and therefore, in a secular republic like India, there is no reason to deny women, the rights available all across the Muslim world. The fact that Muslim countries have undergone extensive reform, it was submitted, also

establishes that the practice in question is not an essential religious practice.

76. In the circumstance aforesaid, it was submitted, that the practice of 'talaq-e-biddat' cannot be protected under Article 25(1) of the Constitution. Furthermore, since Article 25(1) is subject to Part III of the Constitution, as such, it was liable to be in consonance with, and not violative of the rights conferred through Articles 14, 15 and 21 of the Constitution. Since the practice of 'talaq-e-biddat' clearly violates the fundamental rights expressed in the above Articles, it was submitted, that it be declared as unconstitutional.

77. It is also necessary for us to recount an interesting incident that occurred during the course of hearing. The learned Attorney General having assisted this Court in the manner recounted above, was emphatic that the other procedures available to Muslim men for obtaining divorce, such as, 'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared as unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat'. In this behalf, the contention advanced was, that just as 'talaq-e-biddat', 'talaq-e-ahsan' and 'talaq-e-hasan' were based on the unilateral will of the husband, neither of these forms of divorce required the availability of a reasonable cause with the husband to divorce his wife, and neither of these needed the knowledge and/or notice of the wife, and in neither of these procedures the knowledge and/or consent of the wife was required. And as such, the other two so-called approved procedures of divorce ('talaq-e-ahsan' and 'talaq-e-hasan') available to

Muslim men, it was submitted, were equally arbitrary and unreasonable, as the practice of 'talaq-e-biddat'. It was pointed out, that submissions during the course of hearing were confined by the Union of India, to the validity of 'talaq-e-biddat' merely because this Court, at the commencement of hearing, had informed the parties, that the present hearing would be limited to the examination of the prayer made by the petitioners and the interveners on the validity of 'talaq-e-biddat'. It was contended, that the challenge to 'talaq-e-ahsan' and 'talaq-e-hasan' would follow immediately after this Court had rendered its pronouncement with reference to 'talaq-e-biddat'. We have referred to the incident, and considered the necessity to record it, because of the response of the learned Attorney General to a query raised by the Bench. One of us (U.U. Lalit, J.), enquired from the learned Attorney General, that if all the three procedures referred to above, as were available to Muslim men to divorce their wives, were set aside as unconstitutional, Muslim men would be rendered remediless in matters of divorce? The learned Attorney General answered the querry in the affirmative. But assured the Court, that the Parliament would enact a legislation within no time, laying down grounds on which Muslim men could divorce their wives. We have accordingly recorded the above episode, because it has relevance to the outcome of the present matter.

78. Mr. Tushar Mehta, learned Additional Solicitor General of India, endorsed all the submissions and arguments, advanced by the learned Attorney General. On each aspect of the matter, the learned Additional

Solicitor General, independently supported the legal propositions canvassed on behalf of the Union of India.

Part-8.

The rebuttal of the petitioners' contentions:

79. The submissions advanced on behalf of the petitioners, were first of all sought to be repudiated by the AIMPLB – respondent no.8 (hereinafter referred to as the AIMPLB). Mr. Kapil Sibal, Senior Advocate, and a number of other learned counsel represented the AIMPLB. In order to lay down the foundation to the submissions sought to be canvassed on behalf of the respondents, it was asserted, that ceremonies performed at the time of birth of an individual, are in consonance with the religious norms of the family to which the child is born. And thereafter, in continuation each stage of life during the entire progression of life, is punctuated by ceremonies. It was pointed out, that even the act of adoption of a child, in some other family, has religious ceremonies. In the absence of such religious rituals, adoption is not valid. It was submitted, that religious observances manifest an important fundamental position, in the life of every individual. Such religious observances, according to learned counsel, include the manner in which members of a community were required to dress. Insofar as the Muslim women are concerned, reference was made to 'burqa' or 'hijab' worn by women, whereby women veil themselves, from the gaze of strangers. All these observances, are matters of faith, of those professing the religion. It was asserted, that those who profess the Muslim religion, follow the edicts expressed in the Quran. It was submitted, that matrimony, is like any

other stage in an individual's life. It has to be performed, in consonance with the ceremonies relating thereto. So also, if a married couple decides to part ways, by way of divorce. It was pointed out, that express religious ceremonies are observed even on an individual's death. It was submitted, that all issues including custody and guardianship of children, maintenance, dower, gifts and such like issues, were matters guided by the faith of the people, associated to their religion. How property has to be distributed, upon divorce and/or at the time of death, is also governed by faith. It was submitted, that questions of inheritance and succession, were likewise dealt with in consonance with the edicts of the individual's religion. All these issues, it was submitted, were matters of religious faith.

80. It was pointed out, that the personal affairs referred to in the foregoing paragraph, fall in the realm of 'personal law'. This assertion, was sought to be demonstrated, by placing reliance on the definition of the term 'personal law' in Blacks Law Dictionary (10th edition, 2014), as follows:

> "The law that governs a person's family matters, regardless of where the person goes. In common law systems, personal law refers to the law of the person's domicile. In civil-law systems, it refers to the law of the individual's nationality (and so is sometimes called lex patriae)."

Reference was also made to the definition of the term 'personal law' in 'Conflict of Laws 188' (7th edition, 1974) by R.H. Graveson, who defined the term as under:

> "The idea of the personal law is based on the conception of man as a social being, so that those transactions of his daily life which affect him most closely in a personal sense, such as marriage, divorce, legitimacy, many kinds of capacity, and succession, may be governed universally by that system of law deemed most suitable and adequate for the purpose …"

Based on the cumulative definition of the term 'personal law', it was submitted, that the evolution of the matters of faith relating to religious practices, must necessarily be judged in the context of practices adopted by the concerned community, with reference to each individual aspect of 'personal law'. It was conceded, on behalf of the AIMPLB, that 'personal laws' were *per se* subservient to legislation, and as such, 'personal laws' were liable to be considered as mandatory, with reference to numerous aspects of an individual's life, only in the absence of legislation.

81. Even though it was acknowledged, that legislation on an issue would override 'personal law' on the matter, it was pointed out, that in the absence of legislation 'personal laws' in the Indian context, could not be assailed on the basis of their being in conflict with any of the provisions contained in Part III of the Constitution – the Fundamental Rights. It was submitted, that in the absence of statutory law, religious practices and faith, constituted the individual's (belonging to a community) right to profess the same. In order to substantiate his contention, that a challenge to 'personal law' could not be raised on the anvil of Articles 14, 15 and 21 of the Constitution, learned senior counsel, placed reliance on the Narasu Appa Mali case[23]. Learned senior counsel, also placed reliance on Shri Krishna Singh v. Mathura Ahir[41], wherein this Court arrived at the conclusion, that the rights of 'sudras' (the lowest amongst the four Hindu castes – members of the workers caste), as were expressed by the Smriti (-refers to a body of Hindu texts, traditionally recorded in writing) writers,

---

41

were invalid because they were in conflict with the fundamental rights guaranteed under Part III of the Constitution. It was submitted, that both the above judgments were considered by this Court in Ahmedabad Women Action Group v. Union of India[42], wherein, the legal position recorded in the above judgments was confirmed. It was pointed out, that there was a clear distinction between 'law' and 'law in force', thus far interpreted by this Court with reference to Article 13 of the Constitution. It was asserted, that read along with Article 372 – which mandates, that all laws in force in the territory of India, immediately before the commencement of the Constitution, would continue to remain in force, until altered, repealed or amended by a competent legislature or other competent authority. It was submitted, that to affect a change in 'personal law', it was imperative to embark on legislation, as provided for through entry 5 of the Concurrent List in the Seventh Schedule, which provides – "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." It was therefore urged, that 'personal laws' *per se* were not subject to challenge, under any of the provisions contained in Part III of the Constitution.

82. It was contended, that the expression 'custom and usage' in Article 13 of the Constitution, would not include faith of religious denominations, embedded in their 'personal law'. Insofar as the instant aspect of the

42

matter is concerned, reference was also made to Section 112 of the Government of India Act, 1915, wherein a clear distinction was sought to be drawn between 'personal laws' and 'customs having force of law'. Section 112, aforementioned is extracted hereunder:

> "112. Law to be administered in cases of inheritance and succession. – The high courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in maters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject."

It was pointed out, that in framing Article 13, the choice of the words "custom and usage" and the exclusion of the expression "personal law" needed to be taken due note of. It was submitted, that the Constituent Assembly was aware of the use of the term 'personal law' (-which it consciously used in entry 5 of the Concurrent List, in the Seventh Schedule) and the term 'customs and usages', which the Constituent Assembly, employed while framing Article 13 of the Constitution. It was pointed out, that the above position was consciously highlighted by a Full Bench of the Andhra Pradesh High Court in the Youth Welfare Federation case[43]. It was submitted, that if the term 'personal law' was excluded from the definition 'law in force' deployed in Article 13, then matters of faith having a direct relationship to some religious denomination (matters of 'personal law'), do not have to satisfy the rights enumerated in Articles 14, 15 and 21 of the Constitution. In the above view of the matter, it was contended, that the

43

challenge raised on behalf of the petitioners on the basis of the provisions contained in Part III – Fundamental Rights, needed to be summarily rejected

83. Having presented the aforesaid overview of the constitutional position Mr. Kapil Sibal, learned senior counsel, endeavoured to deal with the concept of 'talaq' in 'Shariat' – Muslim 'personal law'. Learned senior counsel pointed out, that religious denominations in India with reference to Islam were divided into two categories – the Sunnis, and the Shias. It was pointed out, that Sunnis were again sub-divided into religious denominations/schools. The four prominent Sunni schools being – Hanafi, Malaki, Shafei and Hanbali. It was submitted, that a fifth school/denomination had emerged later – Ahl-e-Hadith. It was pointed out, that in India 90% of the Muslims amongst the Sunnis, belonged to the Hanafi school. It was submitted, that Shia and the other denominations of the Sunnis comprised a very small population of Muslims in India.

84. Learned counsel emphasized, that the three forms of talaq – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat' referred to by the petitioners, during the course of hearing, were merely depicting the procedure which a Muslim husband was required to follow, to divorce his wife. It was pointed out, that none of these procedural forms, finds a reference in the Quran. It was asserted, that none of these forms is depicted even in the 'hadith'. It was acknowledged, that 'hadiths' declared talaq by itself, as not a good practice, and yet – recognized the factum of talaq, and its legal sanctity. It was submitted, that talaq was accepted by

all believers of Islam. It was therefore contended, that it was absurd for the petitioners to have submitted that the Quran alone, provided the details with reference to which, and in the manner in which, talaq could be administered. It was therefore asserted, that a close examination of the challenge raised by the petitioners would reveal that talaq as a concept itself was not under challenge at the hands of the petitioners. It was pointed out, that truthfully the petitioners were merely assailing the course adopted by Muslim men, in divorcing their wives through the 'talaq-e-biddat' procedure.

85. Learned counsel acknowledged the position adopted on behalf of the petitioners, namely, that Islam represents (i) what is provided for in the Quran, (ii) what was stated and practiced by the Prophet Muhammad from time to time, and (iii) what was memorized and recorded in the 'hadiths' which through centuries of generations, Muslim belief represents what the Prophet Muhamad had said and practiced. It was asserted, that the afore-stated parameters represent Islamic law being practiced by Mulsims over centuries, which had become part of the religious faith of various Muslim denominations/schools. This ambit of recognized practices, according to learned counsel, falls within the sphere of Muslim 'personal law' – 'Shariat'.

86. Learned senior counsel then attempted to highlight various verses from the Quran, to substantiate his contention. The same are set out hereunder:

> "i. Whatever 'Allah has passed on to His Messenger from the people of the towns is for Allah and for the Messenger, and for the kinsmen and the orphans and the needy and the wayfarer, so that it may not circulate only between the rich among you. And whatever the Messenger gives

you, take it, and whatever he forbids you from, abstain (from it). And fear Allah. Indeed Allah is severe in punishment. (Quran, Al-Hashr 59:71)
ii. O you who believe, obey Allah and His Messenger, and do not turn away from Him whn you listen (to him). (Quran, Al-Anfal 8:20)
iii. We did not send any Messenger but to be obeyed by the leave of Allah. Had they, after having wronged themselves, come to you and sought forgiveness from Allah, and had the Messenger prayed for their forgiveness, they would certainly have found Allah Most-Relenting, Very-Merciful (Quran, Al-Nisa 4:64)
iv. That is because they were hostile to Allah and His Messenger; and whoever becomes hostile to Allah and His Messenger, then, Allah is severe at punishment. (Quran, Al-Anfal 8:13)
v. It is not open for a believing man or a believing woman, once Allah and His messenger have decided a thing, that they should have a choice about their mattr; and whoever disobeys Allah and His messenger, he indeed gets off the track, falling into an open error. (Quran, Al-Ahzab 33:36)
vi. Whoever breaks away with the Messenger after the right path has become clear to him, and follows what is not the way of the believers, we shall let him have what he chose, and We shall admit him to Jahannam, which is an evil place to return. (Quran, Al-Nisa 4:115)"

In addition to the above, reference was also made to the Quran with respect to triple talaq. The same are set out hereunder:

"i. Divorce is twice; then either to retain in all fairness, or to release nicely. It is not lawful for you to take back anything from what you have given them, unless both apprehend that they would not be able to maintain the limits set by Allah. Now, if you apprehend that they would not maintain the limits set by Allah, then, there is no sin or them in what she gives up to secure her release. These are the limits set by Allah. Therefore, do not exceed them. Whosoever exceeds the limits set by Allah, then, those are the transgressors. (Quran, Al-Baqarah 2:229)
ii. Thereafter, if he divorces her, she shall no longer remain lawful for him unless she marries a man other than him. Should he too divorce her, then there is no sin on them in their returning to each other, if they think they would maintain the limits set by Allah. These are the limits set by Allah that He makes clear to a people who know (that Allah is alone capable of setting these limits. (Quran, Al-Baqarah 2:229 and 230)
iii. When you have divorced women, and they have reached (the end of) their waiting period, do not prevent them from marrying their husbands when they mutually agree with fairness. Thus, the advice is given to everyone of you who believes in Allah and in the Hereafter. This is more pure and clean for you. Allah knows and you do not know. (Quran, Al-Baqarah, 2:232)

iv. O Prophet, when you people divorce women, divorce them at a time when the period of Iddah may start. And count the period of Iddah, and fear Allah, your Lord. Do not expel them from their houses, nor should they go out, unless they come up with a clearly shameless act. These are the limits prescribed by Allah. And whoever exceeds the limits prescribed by Allah wrongs his own self. You do not know (what will happen in future); it may be that Allah brings about a new situation thereafter. (Quran, Al-Talaq, 65:1)"

In order to demonstrate the complete picture, learned senior counsel invited the Court's attention to the statements attributed to the Prophet Mohamad with reference to talaq which, according to learned counsel, would have a bearing on the determination of the controversy in hand. The same are extracted as under:

"i. Salmah bid Abi Salmah narrated to his father that when Hafs bin Mughaira resorted to Triple Talaq, the Prophet (Pbuh) held it as valid. All the three pronouncements were made with a single word so the Prophet (Pubh) separated her from him irrevocably. And it didn't reach to us that the Prophet (Pubh) rebuked him for that (Daraqutni, Kitab Al-Talaq wa Al-Khula wa Al-Aiyla,5/23, Hadith number:3992)

ii. Amas recpimts pm Muadh's authority: "I heard the Prophet (Pbuh) sying : O Muadh, whoever resorts to bidaa divorce, be it one, two or three. We will make his divorce effective. (Daraqutni, 5/81. Kitab al-Talaq wa Al-Khulawa aI-Aiyala, Hadith number: 4020)

iii. (When Abdullah Ibn Umar divorced his wife once while she was having menses. The Prophet (Pbuh) asked him to retain his wife saying, O Ibn e Umar, Allah Tabarak wa taala didn't command like this: "You acted against Sunnah. And sunnah is that you wait for Tuhar then divorce at every purity period. He said so Prophet (Pbuh) Ordered me so I retained her. Then he said to me: When she becomes pure divorce at that time or keep (her) So Abdullah ibn Umar asked: "Had I resorted to Triple Talaq then, could I retain her?" The Prophet (Pbuh) replied: "No, she would be separated from you and such an ction oyour part would have been a sin" (Sunan Bayhaqi, 7/547, Hadith number: 14955).

iv. Aishah Khathmiya was Hasan bin Ali's wife. When Ali was killed and Hasan bin Ali was made caliph. Hasan bin Ali visited her and she congratulated him for the caliphate. Hasan bin Ali replied, "you have expressed happiness over the killing of Ali. So you are divorced thrice". She covered herself with her cloth and said, "By Allah I did not mean this". She stayed until her iddat lapsed and she departed. Hasan bin Ali sent her the remaining dower and a gift of twenty thousand dirhams. When the messenger reached her and she saw the money she said "this is a very small gift from the beloved from whom I have been separated".

When the messenger informed Hasan bin Ali about this he broke into tears saying, "Had I not heard from my father reporting from my grandfather that the Prophet (Pbuh) said that whoever pronounced triple talaaq upon his wife, she will not be permitted to him till the time she marries a husband other than he, I would have taken her back. (AI-Sunan AI-Kubra Iil Bayhaqi, Hadith number: 14492)

v. Uwaymar Ajlani complained to the Prophet (Pbuh) that he had seen his wife committing adultery. His wife denied this charge. In line with the Quranic command, the Prophet (Pbuh) initiated "a proceeding for the couple. Upon the completion of the process, Uwaymar said: "If I retain her, I Will be taken as a liar". So in the Prophet's presence, and without the Prophet's command, he pronounced Triple Talaq. (Sahi al-Bukhari Kitab al-Talaq, Hadith number: 5259)"

87. Having dealt with the verses from the Quran and the statements attributed to the Prophet Muhammad, learned senior counsel invited the Court's attention to 'hadiths', in relation to talaq. The same are extracted below:

"(i) Of all the things permitted by Allah, divorce is the most undesirable act. (Sunan Abu Dawud, Bad Karahiya al-Talaq, Hadith no: 2178).

(ii) If a person who had pronounced Triple Talaq in one go was brought to Caliph Umar he would put him to pain by beating and thereafter separate the couple. (Musannaf ibn Abi Shaybah, Bab man kara an yatliq aI rajal imratahuu thalatha fi maqad wahadi wa ajaza dhalika alayhi. Hadith number: 18089.

(iii) Alqama narrated from Abdullah that he was asked about a person who pronounced hundred divorces to his wife. He said three made her prohibited (to him) and ninety seven is transgression (Musannaf ibn Abi Shayba, Kitab al-Talaq, bab fi al rajal yatlaqu imratahuu miata aw alfa. Hadith number: 18098)

(iv) A man met another playful man in Medinah. He saidk, "Did you divorce your wife? He said, "Yes". He said, "How many thousand? (How many? He replied: thousand). So he was presented before Umar. He said so you have divorced your wife? He said I was playing. So he mounted upon him with the whip and said out of these three will suffice you. Another narrator reports Umar saying: "Triple Talaq will suffice you" (Musannaf Abd al-Razzaq, Kitab al-talaq, Hadith number 11340).

(v) Abdullah Ibn Umar said: "Whoever resorts to Triple Talaq, he disobeys his Lord and wife is alienated from him." (Musannaf ibn Abi Shayba, Kitab aI-Talaq, Hadith no: 18091).

(vi) Imran Ibn Hussain was asked about a person who divorced his wife by Triple Talaq in single session. He said that the person had disobeyed his Lord and his wife had become prohibited to him. (Musannaf Ibn Abi Shayba, Hadith no: 18087)

(vii) If one tells his wife with whom he did not have conjugal relations: Triple Talaq be upon you it will be effective. For he divorced her while she was his wife. Same holds true for his wife with whom his marriage was consummated." (Al-Muhadhdhab, 4/305)
(viii) Chapter heading runs thus: "The sance of those who take the Quranic statement: 'Divorce can be pronounced twice, then either honourable retention or kind release; to mean that Triple Talaq becomes effective. (Bukhari, 3/402)"

88. Based on the factual position recorded in the previous three paragraphs, it was submitted, that this Court should not attempt to interpret the manner in which the believers of the faith had understood the process for pronouncement of talaq. It was pointed out, that matters of faith should best be left to be interpreted by the community itself, in the manner in which its members understand their own religion. This, according to learned counsel, was imperative in view of the absolute contradictions which clearly emerge from a collective perusal of the submissions advanced on behalf the petitioners, as also, those canvassed on behalf of the respondents. It was submitted, that different scholars have applied different interpretations. It was also pointed out, that the interpretations relied upon on behalf of the petitioners, were mostly of scholars who did not belong to the Sunni faith, and were therefore irrelevant, for the determination of the interpretation of the believers and followers of the Hanafi school of Sunni Muslims. One of the scholars relied upon, according to learned senior counsel, was a disciple of Mirza Ghulam Ahmed (the founder of the Quadini school), who declared himself to be the Prophet, after the demise of the Prophet Muhammad. It was pointed out, that Quadini's disciple was Mohammed Ali. And, the interpretations relied upon by different High Courts (-for reference, see Part-6 – Judicial

pronouncements, on the subject of 'talaq-e-biddat'), in recording their conclusions, were based on views attributed to Mohammed Ali. It was submitted, that Mohammed Ali is not recognized by all Muslims, and as such, it would be a travesty of justice if his utterances were to be relied upon and followed, contrary to the faith of Muslims (–especially Muslims belonging to Hanafi school). Having expressed the aforesaid overview, learned senior counsel highlighted from individual judgments of the High Courts (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat') and pointed out, that the reliances on various 'hadiths' recorded therein were not appropriate in the background projected above.

89. Having made the above submissions, learned senior counsel attempted to pointedly approach the subject of 'talaq-e-biddat' – triple talaq. In this behalf it was reiterated, that talaq was in three forms – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. It was pointed out, that none of these forms of talaq are referred to either in the Quran, or the 'hadith'. It was submitted, that the aforesaid three forms of talaq, have been so categorized by Islamic scholars. It was pointed out, that what was common in all the forms of talaq, was the finality thereof, in the matter of severance of the matrimonial tie between the husband and wife. Another commonness was also pointed out, namely, that 'talaq-e-ahsan', if not revoked, attain finality; that 'talaq-e-hasan' if likewise not revoked, is treated as final; and that 'talaq-e-biddat' – triple talaq at the time of its pronouncement, is considered as final. It was submitted, that all

kinds/forms of talaq when administered three times became irrevocable. Yet again, it was reiterated, that the petitioners before this Court were not challenging the finality of talaq, they were merely challenging the procedure adopted by the Muslim husbands while administering 'talaq-e-biddat', which has the immediate consequences of finality.

90. In the context expressed in the preceding paragraph, it was sought to be highlighted, that Imam Abu Hanifa did not himself record his own understanding what the Prophet Muhammad had said. It was pointed out, that he had two disciples – Abu Yusuf and Imam Mohammed. It was submitted, that Imam Abu Yusuf in his book "Ikhtilaaf Abi Hanifah wabni Abi Laila" (first edition, 1357) stated the following on the triple talaq:

> "i. If the man said to his wife, "Your matter is in your hand:, she said, "I have divorced myself three times". Abu Haneefah (may Allah be pleased with him) says: "If the husband intends three times, then it is three."

Reference was also made to the writings of Imam Abu Mohammed in his book entitled "Al-Mautta" (first volume), wherein he asserted as under:

> "i. Muhammad says: So we follow this that if she chooses her husband then it will not be counted a divorce, and if she chooses herself then it is accorfding to what her husband intended, if his intention is one hen it will be counted one irrevocable (Baainah) divorce, and if his is three it will be three divorces. This is the saying of Abu Hanifah."

91. Reference was also made to writings with respect to 'talaq-e-biddat' by scholars of other schools. In this behalf, the Court's attention was invited to the following:

> "(i) Most of the Ulema take the innovative divorce as effective (Baday al-sanay, fasl Hukum Talaq-al Bidaa, Kitab al-Talaq, 3/153).
> (ii) What do you think about the effectiveness of pronouncing divorce thrice upon one's pregnant wife either in one go or in three different sessions, Imam Malik replied in the affirmative. (AI-Mudawwana, 2/68)

(iii) The validity of triple talaq is also endorsed by all Ahl Al Sunnah jurists. Allama Ibn Quda ma adds that: "This view is attributed to Abdul/ah ibn Abbas. The same stance is shared by most of the successors and later scholars." (AI-Mughni Ii Ibn Qudama, 10/334)
(iv) The Book, Sunnah, and the consensus view of classical authorities is that Triple Talaq is effective, even if pronounced in one go. The act in itself is, however, a sin." (Ahkam al-Quran Iil Jassas, 2/85)
(v) Imam Shafe'I (of Shafe'I School) has stated as follows in his book entitled as Al-Umm (fifth volume):
If he says you are divorced absolutely, with the intention of triple divorce then it will be considered triple divorce and if he intends one it will be considered one divorce and if he says you are divorced with the intention of three it will be considered three. (page 359)
(vi) Mauffaqud Din Abi Muhammed Abdillah Ben Ahmed Ben Muhammed Ben Qudamah Al-Muqaddasi Al-Jammaili Al-Dimashqi Al-Salihi Al-Hanbali (of the Hanbali School) in his book entitled as Al-Mughni (tenth volume) has stated as follows:
Ahmed said: If he says to wife: Divorce yourself, intending three, and she has divorced herself thrice, it will be considered three, and if he has intended one then it will considered one. (page 394)
(vii) Allama Ibn Qudama, a Hanbali jurist is of the view that if one divorces thrice with a single utterance, this divorce will be effective and she will be unlawful for him until she marries domeone else. Consummation of marriage is immaterial. The validity of Triple Talaq is also endorsed by all Ahl Al Sunnah juristics. Allama Ibn Qudamma adds that: "This view is attributed to Abdullah ibn Abbas, Abu Huraira, Umar, Abdullah ibn Umar, Abdullah ibn Amr ibn Aas, Abdullah ibn Masud, and Anas. The same stance is shared by most of the successors and later scholars."" (Al-Mughni li Ibn Qudama, 10,334)".

92. Based on the 'hadiths' depicted in the foregoing, and in the paragraphs preceding thereto, it was submitted, that for the Hanafi school of Sunni Muslims 'talaq-e-biddat' – triple talaq was a part and parcel of their 'personal law', namely, a part and parcel of their faith, which they had followed generation after generation, over centuries. That being the position, it was submitted, that 'talaq-e-biddat' should be treated as the constitutionally protected fundamental right of Muslims, which could not be interfered with on the touchstone of being violative of the fundamental

rights, enshrined in the Constitution – or for that matter, constitutional morality propounded at the behest of the petitioners.

93. Learned senior counsel reiterated, that judicial intereference in the matter of 'personal law' is not the proper course to be adopted for achieving the prayers raised by the petitoners. Reference was made by a large number of Muslim countries across the world (-for details, refer to Part-5 – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States), which had provided the necessary succor by legislating on orthodox practices, which were not attuned to present day social norms. It was submitted, that in all the countries in which the practice of 'talaq-e-biddat' has been annulled or was being read down, as a matter of interpretation, the legislatures of the respective countries have interfered to bring in the said reform.

94. In order to fully express the ambit and scope of 'personal law', and to demonstrate the contours of the freedom of conscience and free profession, practice and propagation of religion propounded in Article 25, learned senior counsel placed reliance on the Constituent Assembly debates. Interestingly reference was, first of all, made to Article 44 of the Contitution, which is extracted below:

> "44. Uniform civil code for the citizens.- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

It is necessary to notice, that during the Constituent Assembly debates, the present Article 44 was numbered as draft Article 35. During the course of the Constituent Assembly debates, amendments to draft Article 35 were

proposed by Mohamed Ismail Sahib, Naziruddin Ahmad, Mahboob Ali Beg, Sahib Bahadur and Pocker Sahib Bahadur. Relevant extract of their amendments and their explanations thereto are reproduced below:

> "Mr. Mohamad Ismail Sahib (Madras: Muslim): Sir, I move that the following proviso be added to article 35:
> "Provided that any group, section or community of people shall not be obliged to give up its own personal lawin case it has such a law."
> The right of a group or a community of people to followand adhere to its own personal law is among the fundamentalrights and this provision should really be made amongst thestatutory and justiciable fundamental rights. It is for thisreason that I along with other friends have given amendmentsto 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 wayof life of those people who are following such laws; it ispart of their religion and part of their culture. Ifanything is done affecting the personal laws, it will betantamount to interference with the way of life of thosepeople who have been observing these laws for generationsand ages. This secular State which we are trying to createshould not do anything to interfere with theway of life and religion of the people. The matter ofretaining personal law is nothing new; we have precedents inEuropean countries. Yugoslavia, for instance, that is, thekingdom of the Serbs, Croats and Slovenes, is obliged undertreaty obligations to guarantee the rights of minorities.The clause regarding rights of Mussulmans reads as follows:
> "The Serb, Croat and Slovene State agrees to grant tothe Mussulmans in the matter of family law and personalstatus provisions suitable for regulating these matters inaccordance with the Mussulman usage."
> We find similar clauses in several other Europeanconstitutions also. But these refer to minorities while myamendment refers not to the minorities alone but to allpeople including the majority community, because it says,"Any group, section or community of people shall not beobliged" etc. Therefore it seeks to secure the rights of allpeople in regard to their existing personal law.
> Again this amendment does not seek to introduce anyinnovation or bring in a new set of laws for the people, butonly wants the maintenance of the personal law already existing among certain sections of people. Now why do peoplewant a uniform civil code, as in article 35? Their ideaevidently is to secure harmony through uniformity. But Imaintain that for that purpose it is not necessary toregiment the civil law of the people including the personallaw. Such regimentation will bring discontent and harmonywill be affected. But if people are allowed to follow theirown personal law there will be no discontent ordissatisfaction. Every section of the people, being free tofollow its own personal law will not really come in conflictwith others.

Mr. Naziruddin Ahmad: Sir, I beg to move:
"That to article 35, the following proviso be added, namely: -
Provided that the personal law of any community which has been guaranteed by the statue shall not be changedexcept with the previous approval of the community ascertained in such manner as the Union Legislature maydetermine by law."
In moving this, I do not wish to confine my remarks tothe inconvenience felt by the Muslim community alone. I would put it on a much broader ground. In fact, eachcommunity, each religious community has certain religious laws, certain civil laws inseparably connected withreligious beliefs and practices. I believe that in framing a uniform draft code these religious laws or semi-religious laws should be kept out of its way. There are several reasons which underlie this amendment. One of them is that perhaps it clashes with article 19 of the Draft Constitution. In article 19 it is provided that `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. In fact, this is so fundamental that the Drafting Committee has very rightly introduced this in this place. Then in clause(2) of the same article it has been further provided by way of limitation of the right that `Nothing in this article shall affect the operation of any existing law or preclude the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'. I can quite see that there may be many pernicious practices which may accompany religious practices and they may be controlled. But there are certain religious practices, certain religious laws which do not come within the exception in clause (2), viz. financial, political or other secular activity which may be associated with religious practices. Having guaranteed, and very rightly guaranteed the freedom of religious practice and the freedom to propagate religion, I think the present article tries to undo what has been given in article 19. I submit, Sir, that we must try to prevent this anomaly. In article 19 we enacted a positive provision which is justiciable and which any subject of a State irrespective of his caste and community can take to a Court of law and seek enforcement. On the other hand, by the article under reference we are giving the State some amount of latitude which may enable into ignore the right conceded. And this right is not justiciable. It recommends to the State certain things and therefore it gives a right to the State. But then the subject has not been given any right under this provision. Submit that the present article is likely to encourage testate to break the guarantees given in article 19.
I submit, Sir, there are certain aspects of the Civil Procedure Code which have already interfered with our personal laws and very rightly so. But during the 175 years of British rule, they did not interfere with certain fundamental personal laws. They have enacted the Registration Act, the Limitation Act, the Civil Procedure Code, the Criminal Procedure Code, the Penal Code, the Evidence Act, the Transfer of Property Act, the Sarda Act and various other Acts. They have been imposed gradually as

occasion arose and they were intended to make the laws uniform although they clash with the personal laws of particular community. But take the case of marriage practice and the laws of inheritance. They have never interfered with them. It will be difficult at this stage of our society to ask the people to give up their ideas of marriage, which are associated with religious institutions in many communities. The laws of inheritance are also supposed to be the result of religious injunctions. I submit that the interference with these matters should be gradual and must progress with the advance of time. I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the State to make the Civil Code uniform is in advance of the time. As it is, any State would be justified under article 35 to interfere with the settled laws of the different communities at once. For instance, there remarriage practices in various communities. If we want to introduce a law that every marriage shall be registered and if not it will not be valid, we can do so under article 35. But would you invalidate a marriage which is valid under the existing law and under the present religious beliefs and practices on the ground that it has not been registered under any new law and thus bastardize the children born?

This is only one instance of how interference can go too far. As I have already submitted, the goal should be towards a uniform civil code but it should be gradual and with the consent of the people concerned. I have therefore in my amendment suggested that religious laws relating to particular communities should not be affected except with their consent to be ascertained in such manner as Parliament may decide by law. Parliament may well decide to ascertain the consent of the community through their representatives, and this could be secured by the representatives by their election speeches and pledges. In fact, this may be made an article of faith in an election, and a vote on that could be regarded as consent. These are matters of detail. I have attempted by my amendment to leave it to the Central Legislature to decide how to ascertain this consent. Submit, Sir, that this is not a matter of mere idealism. It is a question of stern reality which we must not refuse to face and I believe it will lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country. What the British in 175 years failed to door was afraid to do, what the Muslims in the course of 500 years refrained from doing, we should not give power to testate to do all at once. I submit, Sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy.

Mahbood Ali Baig Sahib Bahadur: Sir, I move that the following proviso be added to article 35:

"Provided that nothing in this article shall affect the personal law of the citizen."

My view of article 35 is that the words "Civil Code" do not cover the strictly personal law of a citizen. The Civil Code covers laws of this kind: laws of property, transfer of property, law of contract, law of evidence etc.

The law as observed by a particular religious community is not covered by article 35. That is my view. Anyhow, in order to clarify the position that article 35 does not affect the personal law of the citizen, I have given notice of this amendment. Now, Sir, if for any reason the framers of this article have got in their minds that the personal law of the citizen is also covered by the expression "Civil Code", I wish to submit that they are overlooking the very important fact of the personal law being so much dear and near to certain religious communities. As far as the Mussalmans are concerned, their laws of succession, inheritance, marriage and divorce are completely dependent upon their religion.

Shri M. Ananthasayanam Ayyangar: It is a matter of contract.

Mahboob Ali Baig Sahib Bahadur: I know that Mr.Ananthasayanam Ayyangar has always very queer ideas about the laws of other communities. It is interpreted as contract, while the marriage amongst the Hindus is a Samskara and that among Europeans it is a matter of status. I know that very well, but this contract is enjoined on the Mussalmans by the Quran and if it is not followed, marriage is not a legal marriage at all. For 1350 years this law has been practised by Muslims and recognised by all authorities in all states. If today Mr. Ananthasayanam Ayyangar is going to say that some other method of proving the marriage is going to be introduced, we refuse to abide by it because it is not according to our religion. It is not according to the code that is laid down for us for all times in this matter. Therefore, Sir, it is not a matter to be treated so lightly. I know that in the case of some other communities also, their personal law depends entirely upon their religious tenets. If some communities have got their own way of dealing with their religious tenets and practices, that cannot be imposed on a community which insists that their religious tenets should be observed.

B. Pocker Sahib Bahadur (Madras: Muslim): Mr. Vice-President, Sir, I support the motion which has already been moved by Mr. Mohamed Ismail Sahib to the effect that the following proviso be added to article 35: -

"Provide that any group, section or community of people shall not be obliged to give up its own personal law in casein has such a law."

It is a very moderate and reasonable amendment to this article 35. Now I would request the House to consider this amendment not from the point of view of the Mussalman community alone, but from the point of view of the various communities that exist in this country, following various codes of law, with reference to inheritance, marriage, succession, divorce, endowments and so many other matters. The House will not that one of the reasons why the Britisher, having conquered this country, has been able to carry on the administration of this country for the last 150 years and over was that he gave a guarantee of following their own personal laws to each of the various communities in the country. That is one of the secrets of success and the basis of the administration of justice on which even the foreign rule was based. I ask, Sir, whether by the freedom we have obtained for this country, are we going to give up that freedom of conscience and that freedom of religious

practices and that freedom of following one's own personal law and try or aspire to impose upon the whole country one code of civil law, whatever it may mean, - which I say, as it is, may include even all branches of civil law, namely, the law of marriage, law of inheritance, law of divorce and so many other kindred matters?

In the first place, I would like to know the real intention with which this clause has been introduced. If the words "Civil Code" are intended only to apply to matters procedure like the Civil Procedure Code and such other laws which are uniform so far as India is concerned at present well, nobody has any objection to that, but the various civil Courts Acts in the various provinces in this country have secured for each community the right to follow their personal laws as regards marriage, inheritance, divorce, etc. But if it is intended that the aspiration of the State should be to override all these provisions and to have uniformity of law to be imposed upon the whole people on these matters which are dealt with by the Civil Courts Acts in the various provinces, well, I would only say, Sir, that it is a tyrannous provision which ought not to be tolerated; and let it not be taken that I am only voicing forth the feelings of the Mussalmans. In saying this, I am voicing forth the feelings of ever so many sections in this country who feel that it would be really tyrannous to interfere with the religious practices, and with the religious laws, by which they are governed now.

xxx xxx xxx

If such a body as this interferes with the religious rights and practices, it will be tyrannous. These organisations have used a much stronger language than I amusing, Sir. Therefore, I would request the Assembly not to consider what I have said entirely as coming from the point of view of the Muslim community. I know there are great differences in the law of inheritance and various other matters between the various sections of the Hindu community. Is this Assembly going to set aside all these differences and make them uniform? By uniform, I ask, what do you mean and which particular law, of which community are you going to take as the standard? What have you got in your mind in enacting a clause like this? There are the mitakshara and Dayabaga systems; there are so many other systems followed by various other communities. What is it that you are making the basis?

Is it open to us to do anything of this sort? By this one clause you are revolutionising the whole country and the whole setup. There is no need for it.

Sir, as already pointed out by one of my predecessors in speaking on this motion, this is entirely antagonistic tithe provision made as regards Fundamental Rights in article19. If it is antagonistic, what is the purpose served by clause like this? Is it open to this Assembly to pass by one stroke of the pen an article by which the whole country is revolutionised? Is it intended? I do not know what the framers of this article mean by this. On a matter of such grave importance, I am very sorry to find that the framers or the draftsmen of this article have not bestowed sufficiently serious attention to that. Whether it is copied from

anywhere or not, I do not know. Anyhow, if it is copied from anywhere, I must condemn that provision even in that Constitution. It is very easy to copy sections from other constitutions of countries where the circumstances are entirely different. There are ever so many multitudes of communities following various customs for centuries or thousands of years. By one stroke of the pen you want to annul all that and make them uniform. What is the purpose served? What is the purpose served by this uniformity except to murder the consciences of the people and make them feel that they are being trampled upon as regards their religious rights and practices? Such a tyrannous measure ought not to find a place in our Constitution. I submit, Sir, there are ever so many sections of the Hindu community who are rebelling against this and who voice forth their feelings in much stronger language than I am using. If the framers of this article say that even the majority community is uniform in support of this, I would challenge them to say so. It is not so. Even assuming that the majority community is of this view, I say, it has to be condemned and it ought not to be allowed, because, in a democracy, as I take it, it is the duty of the majority to secure the sacred rights of every minority. It is a misnomer to call it a democracy if the majority rides rough-shod over the rights of the minorities. It is not democracy at all; it is tyranny. Therefore, I would submit to you and all the Members of this House to take very serious notice of this article; it is not a light thing to be passed like this.

In this connection, Sir, I would submit that I have given notice of an amendment to the Fundamental Right article also. This is only a Directive Principle."

The above stated amendments proposed to draft Article 35 were opposed by K.M. Munshi and Alladi Krishnaswami Ayyar. Relevant extracts of their responses are reproduced below:

Shri K. M. Munshi (Bombay: General): Mr. Vice-President, I beg to submit a few considerations. This particular clause which is now before the House is not brought for discussion for the first time. It has been discussed in several committees and at several places before it came to the House. The ground that is now put forward against it is, firstly that it infringes the Fundamental Right mentioned in article 19; and secondly, it is tyrannous to the minority.

As regards article 19 the House accepted it and made it quite clear that-"Nothing in this article shall affect the operation of any existing law or preclude the State from making any law (a) regulating or restricting"-I am omitting the unnecessary words-"or other secular activity which maybe associated with religious practices; (b) for social welfare and reforms". Therefore the House has already accepted the principle that if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament

to make laws about it without infringing this Fundamental Right of a minority.

It must also be remembered that if this clause is not put in, it does not mean that the Parliament in future would have no right to enact a Civil Code. The only restriction touch a right would be article 19 and I have already pointed out that article 19, accepted by the House unanimously, permits legislation covering secular activities. The whole object of this article is that as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt may be made to unify the personal law of the country.

A further argument has been advanced that the enactment of a Civil Code would be tyrannical to minorities. Is it tyrannical? Nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a Civil Code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. But I go further. When the Shariat Act was passed or when certain laws were passed in the Central Legislature in the old regime, the Khojas and Cutchi Memons were highly dissatisfied.

They then followed certain Hindu customs; for generations since they became converts they had done so. They did not want to conform to the Shariat; and yet by legislation of the Central Legislature certain Muslim members who felt that Shariat law should be enforced upon the whole community carried their point. The Khojas and Cutchi Memons most unwillingly had to submit to it. Where were the rights of minority then? When you want to consolidate a community, you have to take into consideration the benefit which may accrue to the whole community and motto the customs of a part of it. It is not therefore correct to say that such an act is tyranny of the majority. If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority, has to submit to the Civil Code. It is not felt to be tyrannical to the minority. The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand. Take for instance the Hindu Law Draft which is before the Legislative Assembly. If one looks at Manu and Yagnyavalkya and all the rest of them, I think most of the provisions of the new Bill will run counter to their injunctions. But after all we are an advancing society. We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If however the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. This is what is emphasised by this article.

Now look at the disadvantages that you will perpetuate if there is no Civil Code. Take for instance the Hindus. We have the law of Mayukha applying in some parts of India; we have Mithakshara in others; and we have the law-Dayabagha in Bengal. In this way even the Hindus themselves have separate laws and most of our Provinces and States have started making separate Hindu law for themselves. Are we going to permit this piecemeal legislation on the ground that it affects the personal law of the country? It is therefore not merely a question for minorities but it also affects the majority.

I know there are many among Hindus who do not like a uniform Civil Code, because they take the same view as the honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession etc. is really apart of their religion. If that were so, you can never give, for instance, equality to women. But you have already passed a Fundamental Right to that effect and you have an article here which lays down that there should be no discrimination against sex. Look at Hindu Law; you get any amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, you cannot pass a single law which would elevate the position of Hindu women to that of men. Therefore, there is no reason why there should not be a civil code throughout the territory of India.

xxx xxx xxx

Shri Alladi Krishanaswami Ayyar (Madras: General): Mr. Vice-President, after the very full exposition of my friend the Honourable Mr. Munshi, it is not necessary to cover the whole ground. But it is as well to understand whether there can be any real objection to the article as it runs.

"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

xxx xxx xxx

Now, my friend Mr. Pocker levelled an attack against the Drafting Committee on the ground that they did not know their business. I should like to know whether he has carefully read what happened even in the British regime. You must know that the Muslim law covers the field of contracts, the field of criminal law, the field of divorce law, the field of marriage and every part of law as contained in the Muslim law. When the British occupied this country, they said, we are going to introduce one criminal law in this country which will be applicable to all citizens, be they Englishmen, be they Hindus, be they Muslims. Did the Muslims take exception, and did they revolt against the British for introducing a single system of criminal law? Similarly we have the law of contracts governing transactions between Muslims and Hindus, between Muslims and Muslims. They are governed not by the law of the Koran but by the Anglo-Indian jurisprudence, yet no exception was taken to that. Again, there are various principles in the law of transfer which have been borrowed from the English jurisprudence.

Therefore, when there is impact between two civilizations or between two cultures, each culture must be influenced and influence the other

culture. If there is a determined opposition, or if there is strong opposition by any section of the community, it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.

Now, again, there are Muslims and there are Hindus, there are Catholics, there are Chistians, there are Jews, indifferent European countries. I should like to know from Mr.Pocker whether different personal laws are perpetuated in France, in Germany, in Italy and in all the continental countries of Europe, or whether the laws of succession aren't co-ordinated and unified in the various States. He must have made a detailed study of Muslim jurisprudence and found out whether in all those countries, there is a single system of law or different systems of law.

Leave alone people who are there. Today, even in regard to people in other parts of the country, if they have property in the continent of Europe where the German Civil Code or the French Civil Code obtains, the people are governed by the law of the place in very many respects. Therefore, it is incorrect to say that we are invading the domain of religion. Under the Moslem law, unlike under Hindu law, marriage is purely a civil contract. The idea of a sacrament does not enter into the concept of marriage in Muslim jurisprudence though the incidence of the contract may be governed by what is laid down in the Koran and by theater jurists. Therefore, there is no question of religion being in danger. Certainly no Parliament, no Legislature will be so unwise as to attempt it, apart from the power of the Legislature to interfere with religious tenets of peoples. After all the only community that is willing to adapt itself to changing times seems to be the majority community in the country. They are willing to take lessons from the minority and adapt their Hindu Laws and take a leaf from the Muslims for the purpose of reforming even the Hindu Law. Therefore, there is no force to the objection that is put forward to article 35. The future Legislatures may attempt a uniform Civil Code or they may not. The uniform Civil Code will run into every aspect of Civil Law. In regard to contracts, procedure and property uniformity is sought to be secured by their finding a place in the Concurrent List. In respect of these matters the greatest contribution of British jurisprudence has been to bring about a uniformity in these matters. We only go a step further than the British who ruled in this country. Why should you distrust much more a national indigenous Government than a foreign Government which has been ruling? Why should our Muslim friends have greater confidence, greater faith in the British rule than in a democratic rule which will certainly have regard to the religious tenets and beliefs of all people?

Therefore, for those reasons, I submit that the House may unanimously pass this article which has been placed before the Members after due consideration."

Before the amendments were put to vote, Dr. B.R. Ambedker made the following observations:

> The Honourable Dr. B. R. Ambedkar: Sir, I am afraid I cannot accept the amendments which have been moved to this article. In dealing with this matter, I do not propose to touch on the merits of the question as to whether this country should have a Civil Code or it should not. That is a matter which I think has been dealt with sufficiently for the occasion by my friend, Mr. Munshi, as well as by Shri Alladi Krishnaswami Ayyar. When the amendments to certain fundamental rights are moved, it would be possible for me to make a full statement on this subject, and I therefore do not propose to deal with it here.
>
> My friend, Mr. Hussain Imam, in rising to support the amendments, asked whether it was possible and desirable to have a uniform Code of laws for a country so vast as this is. Now I must confess that I was very much surprised at that statement, for the simple reason that we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are the Negotiable Instruments Acts: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it.
>
> Coming to the amendments, there are only two observations which I would like to make. 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.

I am also informed by my friend, Shri Karunakara Menon, that in North Malabar the Marumakkathayam Law applied to all-not only to Hindus but also to Muslims. It is to be remembered that the Marumakkathayam Law is a Matriarchal form of law and not a Partriarchal form of law.

The Mussulmans, therefore, in North Malabar were up to now following the Marumakkathyam law. It is therefore no use making a categorical statement that the Muslim law has been an immutable law which they have been following from ancient times. That law as such was not applicable in certain parts and it has been made applicable ten years ago. Therefore if it was found necessary that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindus, law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community.

My second observation is to give them an assurance. I quite realise their feelings in the matter, but I think they have read rather too much into article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future parliament may make a provision byway of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat law which should be applied to Mussulmans who wanted that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors. It would be perfectly possible for parliament to introduce a provision of that sort; so that the fear which my friends have expressed here will be altogether nullified. I therefore submit that there is no substance in these amendments and I oppose them."

When the matter was put to vote by the Vice President of the Constituent Assembly, it was resolved as under:

> "Mr. Vice-President: The question is:
> "That the following proviso be added to article 35:
> `Provided that any group, section or community or people shall not be obliged to give up its own personal law in case it has such a law'."
> The motion was negatived."

Based on the Constituent Assembly debates with reference to draft Article 35, which was incorporated in the Constitution as Article 44 (extracted above), it was submitted, that as expressed in Article 25(2)(b), so also the debates of Article 44, the intent of the Constituent Assembly was to protect 'personal laws' of different communities by elevating their stature to that of other fundamental rights, however with the rider, that the legislature was competent to amend the same.

95. Sequentially, learned senior counsel invited our attention to the Constituent Assembly debates with reference to Article 25 so as to bring home his contention, that the above article preserved to all their 'personal laws' by elevating the same to the stature of a fundamental right. The instant elevation, it was pointed out, was by incorporating Articles 25 and 26 as components of Part III – Fundamental Rights, of the Constitution. It would be relevant to record, that Article 25 as it now exists, was debated as draft Article 19 by the Constituent Assembly. It was pointed out, that only one amendment proposed by Mohamed Ismail Sahib and its response by Pt. Laxmikanta Mitra would bring home the proposition being canvassed, namely, that 'personal laws' were inalienable rights of individuals and permitted them to be governed in consonance with their faith. The

amendment proposed by Mohamed Ismail Sahib and his statement in that behalf before the Constituent Assembly, as is relevant for the present controversy, is being extracted hereunder:

> "Mr. Mohamed Ismail Sahib: Thank you very much, Sir, forgiving me another opportunity to put my views before the House on this very important matter. I beg to move:
> "That after clause (2) of article 19, the following new clause be added:
> '(3) Nothing in clause (2) of this article shall affect the right of any citizen to follow the personal law of the group or the community to which he belongs or professes to belong.'"
> Sir, this provision which I am suggesting would only recognise the age long right of the people to follow their own personal law, within the limits of their families and communities. This does not affect in any way the members of other communities. This does not encroach upon the rights of the members of other communities to follow their own personal law. It does not mean any sacrifice at all on the part of the members of any other community. Sir, here what we are concerned with is only the practice of the members of certain families coming under one community. It is a family practice and in such cases as succession, inheritance and disposal of properties by way of wakf and will, the personal law operates. It is only with such matters that we are concerned under personal law. In other matters, such as evidence, transfer of property, contracts and in innumerable other questions of this sort, the civil code will operate and will apply to every citizen of the land, to whatever community he may belong. Therefore, this will not in any way detract from the desirable amount of uniformity which the state may try to bring about, in the matter of the civil law.
> This practice of following personal law has been there amongst the people for ages. What I want under this amendment is that that practice should not be disturbed now and I want only the continuance of a practice that has been going on among the people for ages past. On a previous occasion Dr. Ambedkar spoke about certain enactments concerning Muslim personal law, enactments relating to Wakf, Shariat law and Muslim marriage law. Here there was no question of the abrogation of the Muslim personal law at all. There was no revision at all and in all those cases what was done was that the Muslim personal law was elucidated and it was made clear that these laws shall apply to the Muslims. They did not modify them at all. Therefore those enactments and legislations cannot be cited now as matters of precedents for us to do anything contravening the personal law of the people. Under this amendment what I want the House to accept is that when we speak of the State doing anything with reference to the secular aspect of religion, the question of the personal law shall not be brought in and it shall not be affected.

xxx xxx xxx

The question of professing, practising and propagating one's faith is a right which the human being had from the very beginning of time and that has been recognised as an inalienable right of every human being, not only in this land but the whole world over and I think that nothing should be done to affect that right of man as a human being. That part of the article as it stands is properly worded and it should stand as it is. That is my view.

Another honourable Member spoke about the troubles that had arisen as a result of the propagation of religion. I would say that the troubles were not the result of the propagation of religion or the professing or practicing of religion. They arose as a result of the misunderstanding of religion. My point of view, and I say that that is the correct point of view, is that if only people understand their respective religions aright and if they practise them aright in the proper manner there would be no trouble whatever; and because there was some trouble due to some cause it does not stand to reason that the fundamental right of a human being to practise and propagate his religion should be abrogated in any way."

The response of Pt. Laxmikanta Mitra is reproduced below:

"Pandit Lakshmi Kanta Mitra (West Bengal: General): Sir, I feel myself called upon to put in a few words to explain the general implications of this article so as to remove some of the misconceptions that have arisen in the minds of some of my honourable Friends over it.

This article 19 of the Draft Constitution confers on all person the right to profess, practise and propagate any religion they like but this right has been circumscribed by certain conditions which the State would be free to impose in the interests of public morality, public order and public health and also in so far as the right conferred here does not conflict in any way with the other provisions elaborated under this part of the Constitution. Some of my Friends argued that this right ought not to be permitted in this Draft Constitution for the simple reason that we have declared time and again that this is going to be a secular State and as such practice of religion should not be permitted as a fundamental right. It has been further argued that by conferring the additional right to propagate a particular faith or religion the door is opened for all manner of troubles and conflicts which would eventually paralyse the normal life of the State. I would say at once that this conception of a secular State is wholly wrong. (By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronise or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. In other words in the affairs of the State the professing of any particular

religion will not be taken into consideration at all.) This I consider to be the essence of a secular state. At the same time we must be very careful to see that this land of ours we do not deny to anybody the right not only to profess or practise but also to propagate any particular religion. Mr. Vice-President, this glorious land of ours is nothing if it does not stand for lofty religious and spiritual concepts and ideals. India would not be occupying any place of honour on this globe if she had not reached that spiritual height which she did in her glorious past. Therefore I feel that the Constitution has rightly provided for this not only as a right but also as a fundamental right. In the exercise of this fundamental right every community inhabiting this State professing any religion will have equal right and equal facilities to do whatever it likes in accordance with its religion provided it does not clash with the conditions laid down here."

In addition to the above, it is only relevant to mention, that the amendment proposed by Mohamed Ismail Sahib was negatived by the Constituent Assembly.

96. While concluding his submissions Mr. Kapil Sibal, learned Senior Advocate, focused his attention to the Muslim Personal Law (Shariat) Application, 1937 and invited our attention to some of the debates which had taken place when the Bill was presented before the Legislative Assembly. Reference is only necessary to the statements made by H.M. Abdullah and Abdul Qaiyum on the floor of the House. The same are extracted hereunder:

"Mr H. M. Abdullah (West Central Punjab: Muhammadan): Sir, I beg to move: "That the Bill to make provision for the application of the Moslem Personal Law (Shariat) to Moslems in British India, as reported by the Select Committee, be taken into consideration."
The object of the Bill, as the House is already aware, is to replace the customary law by the Shari at law in certain matters where the parties to a dispute are Muslims. By doing so, it also helps the weaker sex as it enables women to succeed to the ancestral property and to claim dissolution of marriage on certain grounds. After explaining the object of the Bill briefly, it gives me great pleasure to say that the Bill has met with a unanimous support from the Select Committee except in one or two points. Objection has been taken to the words "or Law" in clause 2 of the Bill by Messrs Mudie, Muhammad Azhar Ali and Sir Muhammad

Yarnin Khan in their minutes of dissent. As there is an amendment on the agenda for the omission of these words, I shall deal with it when it is moved. Meanwhile, I would confine my remarks to the modifications suggested by the Select Committee. The main changes made by it are two, one relating to the exclusion of the agricultural land from the purview of the Bill, and the other concerning the amplification of the word "divorce". As succession to agricultural land is an exclusively provincial subject under the Government of India Act, 1935, it had, much against my wish, to be excluded from the Bill. Having regard to the different forms of dissolution of marriage recognised by the Shariat, it was considered necessary to provide for all of them. In order to implement the provisions in this respect, a new clause 3 has been inserted in the Bill empowering the District Judge to grant dissolution of marriage on petition of a married Muslim woman on certain grounds. These changes have been introduced in the interest of the females who, in such matters, are at present at the mercy of their husbands.

I am sure that these wholesome changes will be supported by the House. In addition to the above, the Select Committee have made a few other amendments which are fully explained in the report, and I need not take the time of the House in dilating upon them. I hope that the Bill in its present form will meet with the approval of the whole House.

Sir, I move.

Mr Deputy President (Mr Akhil Chandra Dattas): Motion moved: "That the Bill to make provision for the application of the Moslem Personal Law (Shariat) to Moslems in British India, as reported by the Select Committee, be taken into consideration."

Mr Abdul Qaiyum (North-West Frontier Province: General): Sir, I am in sympathy with the objects which this very useful Bill aims at. There is a great awakening among the Muslim masses, and they are terribly conscious of their wretched condition socially, politically and economically. There is a desire in the 107 108 Appendix B community for an advance in all these directions. The feelings of the Muslim community have been expressed in public meetings throughout the length and breadth of this country. This feeling, I have great pleasure in stating, is not merely confined to males but it has spread to the females also, and for the first time the Muslim women in India have given expression to their strong feelings against the dead hand of customary law which has reduced them into the position of chattels. Sir, these feelings have been expressed by various organisations of Muslim women throughout India. A representative body of Muslim Ulema like the Jamait-ulUlemai-Hind has also expressed its sympathy with the objects of this Bill. Sir, there is something in the word Shariat, -may be it is Arabic, - which gives a sort of fright to some of my Honourable friends, but I think if they try to read the Muhammadan Law on the point, especially on the point of succession, they will realise that this Bill was long overdue and that it is a step in the right direction. People have no idea of what terrible conditions the Muslim women have had to endure in my own Province: I can say that whenever a Muslim died, at least before the Frontier Shariat

Law was enacted in the North-West Frontier Province, his daughter, his sister and his wife all used to be thrown into the street, and the reversioner in the tenth degree would come round and collar all his property. I think that the conscience of all those who believe in progress, social, political and economic will revolt against such practice and once people realise that this Bill is primarily intended to improve the status of women and to confer upon them benefits which are lawfully their due under the Muhammadan law, then they will gladly support this measure. 'Custom' is a very indefinite term. I know it as a lawyer that in my Province whenever a question of custom used to crop up it used to involve any amount of research work, lawyers used to indulge in research work to find out cases, look up small books on customary law and it was found that the custom varied from tribe to tribe, from village to village and it has been held, by the High Court in our Province before the Shariat Act came into force, that custom varied from one part of the village to the other. The position was so uncertain that people had to spend so much money on litigation that by the time litigation came to an end the property for which people were fighting would disappear. It was with a view to put an end to this uncertainty that people in the Frontier Province pressed for an Act which was subsequently passed into law.

I have only one thing to say. Personally I want the Muslims in India in matters affecting them to follow the personal law of the Muslims as far as they can. I want them to move in this direction because it is a thing which is going to help the Muslims and because the Muslims form a very important minority community in this country- they are 80 millions - all well-wishers of this country will agree with me that if it enhances the states of Muslims, if it brings the much needed relief to the Muslim women, it will be a good thing for the cause of the Indian nation. Therefore, in our Province an Act was passed which goes much further than this particular Bill which is now under discussion before this House. It is a very well-known fact that under the new Government of India Act, agricultural land and waqfs and religious trusts are provincial subjects and that this Honourable House cannot legislate about matters which are now on the provincial legislative list. The Act which we have in the Frontier Province, Act VI of 1935, goes much further than this Bill because it includes agricultural land and religious trusts. Therefore, I have tabled an amendment that this particular Bill - though I heartily agree with the principles of Appendix B 109 the Bill - when enacted into law, should not be extended to our Province. If it is so extended, it would mean that the people of the Frontier Province would be taking a step backward and not forwards. It is well-known fact and it is laid down in the Government of India Act, Section 107, that where a Federal Law comes into conflict with a Provincial Law and even if the Federal Law has been passed after the Provincial Law, then to that extent it over-rides the Provincial law and the Provincial Law becomes null and void. Therefore, my submission is that the intention with which I tabled my amendment was not with any idea of opposing the object of this Bill, but my reason for moving this amendment is that this Bill does not go as far as we wish

to go -at least in one Province, namely, the North-West Frontier Province. I submit this is a measure which has been long overdue. I have known cases where a widow who was enjoying life estate - and whose reversioners were waiting for her death - did not die but happened to have a very long life. There have been cases in the Northwest Frontier Province where people have taken the law into their own hands and in order to get the property they have murdered the widow. I can cite other cases before this Honourable House. There have been cases which I have come across in my legal and professional career where, when a man dies leaving a wife who by customary law has to enjoy the property till her death or remarriage, certain reversioners come forward and bring a suit to declare that the widow had married one of the reversioners with a view to proving that she was no longer a widow and with a view to terminate her life estate. There have been numerous cases where families have been ruined, murderers and stabbings have taken place because the dead hand of customary law stood in the way of the reversioners who were anxious to get what they could not get and in order to deprive the poor widow, false cases have been tromped up that she had remarried. There have been many other illegal tricks resorted to by people with a view to get hold of the property. I submit, Sir, that the dead hand of customary law must be removed. We are living in an age in which very important changes are taking place. After all this customary law is a thing of the past When many other things are going the way of all flesh, when even systems of Government have to change, when even mighty Empires have disappeared, when we see signs of softening even in the hearts of the Government of India, when we have got popular Congress Governments in seven Provinces - a thing which nobody would have believed six months ago or one year ago. I submit that it is high time that we got rid of this dead hand of custom. After all custom is a horrible thing as far as this particular matter is concerned, and by endorsing the principles of this Bill we would be doing justice to millions of Indian women who profess Muslim faith. I hope, Sir, the day is not far off when other communities will also bring similar measures and when in India women and men will be treated equally in the eyes of law in the matter of property, political rights, social rights and in all other respects. I have, therefore, great pleasure in supporting the principles of this Bill."

Based on the aforesaid debates and the details expressed hereinabove (-for details, refer to Part-4 – Legislation in India, in the field of Muslim 'personal law'), it was contended, that the main object of the legislation was not to express the details of the Muslim 'personal law' – 'Shariat'. The object was merely to do away with customs and usages as were in conflict with Muslim 'personal law' – 'Shariat'. It was therefore submitted, that it would not be

proper to hold, that by the Shariat Act, the legislature gave statutory status to Muslim 'personal law' – 'Shariat'. It would be necessary to understand the above enactment, as statutorily abrogating customary practices and usages, as were in conflict with the existing Muslim 'personal law' – 'Shariat'. It was submitted, that the above enactment did not decide what was, or was not, Muslim 'personal law' – 'Shariat'. It would therefore be a misnomer to consider that the Muslim Personal Law (Shariat) Application Act, 1937, in any way, legislated on the above subject. It was pointed out, that Muslim 'personal law' – 'Shariat' comprised of the declarations contained in the Quran, or through 'hadiths', 'ijmas' and 'qiyas' (-for details, refer to Part-2 – The practiced modes of 'talaq' amongst Muslims). It was pointed out, that the articles of faith, as have been expressed on a variety of subjects of Muslim 'personal law' – 'Shariat', have been in place ever since they were declared by the Prophet Mohammed. Insofar as the practice of 'talaq-e-biddat' is concerned, it was submitted, that it has been practised amongst Muslims for the last 1400 years. It was submitted, that the same is an accepted mode of divorce amongst Muslims. It was therefore urged, that it was not for this Court to decide, whether the aforesaid practice was just and equitable. The reason for this Court not to interfere with the same, it was submitted was, that the same was a matter of faith, of a majority of Muslims in this country, and this Court would be well advised to leave such a practice of faith, to be determined in the manner as was considered fit by those who were governed thereby. A belief, according to learned senior counsel, which is practiced for 1400 years, is a matter of faith, and is

protected under Article 25 of the Constitution. Matters of belief and faith, it was submitted, have been accepted to constitute the fundamental rights of the followers of the concerned religion. Only such practices of faith, permitted to be interfered with under Article 25(1), as are opposed to public order, morality and health. It was pointed out, that in addition to the above, a court could interfere only when articles of faith violated the provisions of Part III – Fundamental Rights, of the Constitution. Insofar as the reliance placed by the petitioners on Articles 14, 15 and 21 is concerned, it was submitted, that Articles 14, 15 and 21 are obligations cast on the State, and as such, were clearly inapplicable to matters of 'personal law', which cannot be attributed to State action.

97. While concluding his submissions, learned senior counsel also affirmed, that he would file an affidavit on behalf of the AIMPLB. The aforesaid affidavit was duly filed, which reads as under:

> "1. I am the Secretary of All India Muslim Personal Law Board which has been arraigned as Respondent No.3 and as Respondent No.8 respectively to the above-captioned Writ Petitions. I am conversant with the facts and circumstances of the present case and I am competent to swear this Affidavit.
> 2. I say and submit that the All India Muslim Personal Law Board will issue an advisory through its Website, Publications and Social Media Platforms and thereby advise the persons who perform 'Nikah' (marriage) and request them to do the following:-
> (a) At the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise the Bridegroom/Man that in case of differences leading to Talaq the Bridegroom/Man shall not pronounce three divorces in one sitting since it is an undesirable practice in Shariat;
> (b) That at the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise both the Bridegroom/Man and the Bride/Woman to incorporate a condition in the 'Nikahnama' to exclude resorting to pronouncement of three divorces by her husband in one sitting.
> 3. I say and submit that, in addition, the Board is placing on record, that the Working Committee of the Board had earlier already passed certain

resolutions in the meeting held on 15th and 16th April, 2017 in relation to Divorce (Talaq) in the Muslim community. Thereby it was resolved to convey a code of conduct/guidelines to be followed in the matters of divorce particularly emphasizing to avoid pronouncement of three divorces in one sitting. A copy of the resolution dated April 16, 2017 alongwith the relevant Translation of Resolution Nos. 2, 3, 4 & 5 relating to Talaq (Divorce) is enclosed herewith for the perusal of this Hon'ble Court and marked as Annexure A-1 (Colly) [Page Nos.4 to 12] to the present Affidavit."

Based on the above affidavit, it was contended, that social reforms with reference to 'personal law' must emerge from the concerned community itself. It was reiterated, that no court should have any say in the matter of reforms to 'personal law'. It was submitted, that it was not within the domain of judicial discretion to interfere with the matters of 'personal law' except on grounds depicted in Article 25(1) of the Constitution. It was contended, that the practice of 'talaq-e-biddat' was not liable to be set aside, on any of the above grounds.

98. While supplementing the contentions noticed in the preceding paragraph, it was submitted, that Article 25(2)(b) vested the power with the legislature, to interfere with 'personal law' on the ground of social welfare and reform. It was therefore contended, that the prayer made by the petitioner and those supporting the petitioner's case before this Court, should be addressed to the members of the community who are competent to amend the existing traditions, and alternatively to the legislature which is empowered to legislatively abrogate the same, as a measure of social welfare and reform. With the above observations, learned senior counsel prayed for the rejection of the prayers made by the petitioners.

99. Mr. Raju Ramachandran, Senior Advocate, entered appearance on behalf of Jamiat Ulema-i-Hind, i.e., respondent no.1 in Suo Motu Writ Petition (Civil) No.2 of 2015 and respondent no.9 in Writ Petition (Civil) No.118 of 2016. At the beginning of his submissions, learned senior counsel stated, that he desired to endorse each one of the submissions advanced before this Court by Mr. Kapil Sibal, Senior Advocate. We therefore hereby record the aforesaid contention of learned senior counsel.

100. In addition to the above, it was submitted, that the cause raised by the petitioner (and others) before this Court was clearly frivolous. It was submitted, that under the Muslim 'personal law' – 'Shariat', parties at the time of executing 'nikahnama' (marriage deed) are free to incorporate terms and conditions, as may be considered suitable by them. It was submitted, that it was open to the wife, at the time of executing 'nikahnama', to provide therein, that her husband would not have the right to divorce her through a declaration in the nature of 'talaq-e-biddat'. It was therefore submitted, that it was clearly misconceived for the petitioner to approach this Court to seek a declaration against the validity of 'talaq-e-biddat'. Alternatively, it was contended, that after the enactment of the Special Marriage Act, 1954, all citizens of India whether male or female, irrespective of the faith they professed, have the option to be governed by the provisions of the said Act, instead of their own 'personal law'. It was therefore contended, that spouses belonging to a particular religious denomination, had the choice to opt for a secular and non-religious law, namely, the Special Marriage Act, 1954, and such of the parties who accept the choice (even if they profess

the Muslim religion), would automatically escape from all religious practices, including 'talaq-e-biddat'. It was therefore contended, that such of the couples who married in terms of their 'personal law', must be deemed to have exercised their conscious option to be regulated by the 'personal law', under which they were married. Having exercised the aforesaid option, it was submitted, that it was not open to a Muslim couple to then plead, against the practice of 'talaq-e-biddat'. It was submitted, that when parties consent to marry, their consent does not extend to the choice of the person with reference to whom the consent is extended, but it also implicitly extends to the law by which the matrimonial alliances are to be regulated. If the consent is to marry in consonance with the 'personal law', then the rigours of 'personal law' would regulate the procedure for dissolution of marriage. And likewise, if the consent is to marry under the Special Marriage Act, 1954, the consent is to be governed by the provisions of the aforesaid legislation. In such a situation, it was submitted, that a person, who had consciously opted for the matrimonial alliance under 'personal law' cannot complain, that the 'personal law' was unfavourable or discriminatory. It was submitted, that in the above view of the matter, the very filing of the instant petition before this Court, and the support of the petitioner's cause by those who have been impleaded, or had appeared to represent the petitioner's cause, must be deemed to be wholly misconceived in law.

101. The second submission advanced at the hands of the learned senior counsel, was that the issues raised by the petitioner with reference to the

validity of 'talaq-e-biddat' – triple talaq were matters of legislative policy, and could not (though learned counsel truly meant – ought not) be interfered with through the judicial process. In this behalf, learned senior counsel invited the Court's attention to Maharshi Avadhesh v. Union of India[44], wherein the petitioner had approached this Court by filing a writ petition under Article 32 of the Constitution, with the following prayers:

> "(i) A writ of mandamus to the respondents to consider the question of enacting a common civil code for all citizens of India.
> (ii) To declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 and Articles 44, 38 39 and 39-A of the Constitution of India.
> (iii) To direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection."

It was pointed out, that this Court dismissed the above writ petition by observing, "these are all matters for legislature. The court cannot legislate on these matters."

102. Reliance was also placed on the Ahmedabad Women Action Group case[30]. It was submitted that this Court considered the following issues during the course of adjudication of the above matter.

> "(i) Whether Muslim Personal Law which allows Polygamy is void as offending Articles 14 and 15 of the Constitution.
> (ii) Whether Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, is void as it offends Articles 13, 14 and 15 of the Constitution.
> (iii) Whether the mere fact that a Muslim husband takes more than one wife is an act of cruelty."

44

103. It was pointed out, that having heard the above matter, the same was dismissed by recording the following observations in paragraph 4 of the judgment:

> "At the outset, we would like to state that these writ petitions do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involve issues of State policies with which the Court will not ordinarily have any concern. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court held that the remedy lies somewhere else and not by knocking at the doors of the courts."

104. Having raised the two preliminary objections with reference to the entertainment of the prayer made by the petitioner, learned counsel invited the Court's attention to abolition of the practice of 'talaq-e-biddat' in other countries. It was submitted, that (-for details, refer to Part-5 – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States), the above contention was adopted both by the petitioner, as well as, those who supported the petitioner's cause, as also by the Union of India, in order to contend, that the practice of 'talaq-e-biddat' has been done away with in other Islamic countries, as a matter of social reform, on account of its being abhorrent, and also unilateral and arbitrary. It was submitted, that the constitutional validity of 'personal law' in India, cannot be tested on the basis of enacted legislations of other countries. At this juncture, learned senior counsel desired us to notice, that the instant submission had been advanced without prejudice to the contention being canvassed by him, that the validity of 'personal law' cannot be tested at all, with reference to the fundamental rights vested in individuals under Part III

of the Constitution, for the reason, that 'personal law' cannot be treated as law within the meaning of Article 13 of the Constitution.

105. Mr. Raju Ramachandran, learned senior counsel, then endeavoured to establish the validity of 'talaq-e-biddat' – triple talaq. It was submitted, that out of the five schools of Sunni Muslims 'talaq-e-biddat' was considered a valid form of divorce of four of the said schools. It was submitted, that the above position was accepted by the Delhi High Court in the Masroor Ahmed case[4], wherein in paragraph 26, the High Court observed ".....It is accepted by all schools of law that 'talaq-e-biddat' is sinful, yet some schools regarded it as valid.....". It has also been acknowledged by the High Courts in different judgments rendered by them (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'). It was accordingly sought to be inferred, that once it was established as a fact, that certain schools of Shia Muslims believed 'talaq-e-biddat' to be a valid form of divorce, the consequence that would follow would be, that cohabitation amongst the spouses after the pronouncement of 'talaq-e-biddat' would be sinful, as per the injunction of the Quran, in 'sura' 2, Al Baqara Ayah 230. The same is reproduced hereunder:

> "And if he has divorced her (for the third time), then she is not lawful to him afterward until (after) she marries a husband other than him. And if the latter husband divorces her (or dies), there is no blame upon the woman and her former husband for returning to each other if they think that they can keep (within)the limits of Allah. These are the limits of Allah, which He makes clear to a people who know."

It was pointed out, that the belief that after a husband has divorced his wife by pronouncing talaq thrice, it had been interfered that the three pronouncements should be treated as a singular pronouncement. It was

pointd out, that High Courts have no such jurisdiction as has been exercised by them on the subject of 'talaq-e-biddat'. It was accordingly asserted, that the above action constituted the creation of inroads into 'personal law' of Muslims, which stood protected under Article 25 of the Constitution. In this behalf, it was also submitted, that while deciding the issue whether a belief or a practice constituted an integral part of religion, this Court held, that the above question needed to be answered on the basis of the views of the followers of the faith, and none else. In order to support his above submission, learned senior counsel, placed reliance on the Sardar Syedna Taher Saifuddin Saheb case[28], wherein this Court observed as under:

> "The content of Articlles 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt; Mahant Jagannath Ramanuj Das v. The State of Orissa; Sri Ventatamana Devaru v. The State of Mysore; Durgah Committee, Ajmer v. Syed Hussain Ali and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion".

It was pointed out, that the above view of this Court had been affirmed by this Court in N. Adithyan v. Travancore Devasom Board[45], wherein in paragraphs 9 and 16, it was observed as under:

> "9. This Court, in Seshammal v. State of T.N., (1972) 2 SCC 11 again reviewed the principles underlying the protection engrafted in Articles 25

45

and 26 in the context of a challenge made to abolition of hereditary right of Archaka, and reiterated the position as hereunder : (SCC p.21, paras 13-14)

"13. This Court in Sardar Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853 has summarized the position in law as follows (pp.531 and 532):

'The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, Mahant Jagannath Ramanuj Das v. State of Orissa, Venkataramana Devaru v. State of Mysore, Durgah Committee, Ajmer v. Syed Hussain Ali[15] and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.'

14. Bearing these principles in mind, we have to approach the controversy in the present case."

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the Sate or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down."

In continuation of the above submission, learned senior counsel also placed reliance on Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P.[46], wherein this Court held as under:

> "28.....All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. ....."

It was the pointed contention of learned senior counsel, that the judgments rendered by the High Courts on the subject of 'talaq-e-biddat' (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'), were unsustainable in law, because the High Courts had substituted their own views with reference to their understanding of 'talaq-e-biddat'. It was also pointed out, that supplanting of the views of one of the schools on the beliefs of the other four schools, of Sunni Muslims, with reference to 'talaq-e-biddat', was in clear breach of the understanding of Muslims.

106. Learned senior counsel also disputed the reliance on International Conventions by all those who had assisted this Court on behalf of the petitioner. In this behalf, it was pointed out, that reliance on International

---

46

Conventions, particularly on CEDAW was wholly misplaced, since India had expressed a clear reservation to the Conventions in order to support its constitutional policy of non-interference in the personal affairs of any community. In this behalf, while making a particular reference to CEDAW, it was submitted, that the above declarations/reservations were first made at the time of signing the aforesaid conventions and thereafter, even at the time of ratification. In this behalf, it was pointed out, that the first declaration was made by India in the following format:-

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

In view of the clear stance adopted at the time of signing the Convention, as also, at the time of its ratification, it was submitted, that there could be no doubt, that India had itself committed that it would not interfere with personal affairs of any community, without the initiative and consent of the concerned community. It was submitted, that the aforesaid commitment could not be ignored by the Union of India. While addressing this Court on the issue under reference, it was submitted, that the position adopted by the Union of India, was in clear derogation of the stance adopted on behalf of the India, as has been detailed above.

107. Learned senior counsel also seriously disputed the submissions advanced at the hands of the petitioners based on repudiation of the practice of 'talaq-e-biddat' in various secular countries with Muslims in the majority, as also, theocratic States, through express legislation on the issue

(-for details, refer to Part-5 – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). In this behalf, it was submitted, that 'personal law' of classes and sections of the society and/or of religious denominations are sought to be protected by the Constitution by raising them to the high position of fundamental rights. It was accordingly asserted, that what was available to such classes and sections of society, as also, to the religious denominations as a matter of fundamental right under the Constitution, could not be negated, because other countries had enacted legislations for such annulment. Further more, it was submitted, that legislation is based on the collective will of the residents of a particular country, and as such, the will of the residents of a foreign country, cannot be thrust upon the will of the residents in India. While adopting the position canvassed on behalf of learned senior counsel who had preceded him, it was pointed out, that it was open to the legislature in India, to likewise provide for such legislation, because entry 5 of the Concurrent List contained in the Seventh Schedule allows legislation even with reference to matters governed by 'personal law'. Additionally, it was submitted, that provision in this behalf was available in Article 25(2)(b), which provides that for espousing the cause of social welfare and reform it was open to the legislature even to legislate on matters governed under 'personal law'. It was therefore contended that all such submissions advanced on behalf of the petitioners need to be ignored.

108. Mr. V. Giri, Senior Advocate, entered appearance on behalf of Jamiat-ul-Ulama-i-Hind (represented by its General Secretary, 1 Bahadur

Shah Zafar Marg, New Delhi) – respondent no.7 in Suo Motu Writ Petition (Civil) No.2 of 2015 and respondent no.6 in Writ Petition (Civil) No. 118 of 2016. It would be relevant to mention, at the outset, that learned senior counsel endorsed the submissions advanced by Mr. Kapil Sibal and Mr. Raju Ramachandra, Senior Advocates, who had assisted this Court before him. Learned senior counsel focused his contentions, firstly to the challenge raised to the validity of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, insofar as, it relates to 'talaq-e-biddat' on the ground, that the same being unconstitutional, was unenforceable. Learned senior counsel, in order to raise his challenge, first and foremost, drew our attention to Sections 2 and 3 of the Muslim Personal Law (Shariat) Application Act, 1937 (-for details, refer to Part-4 – Legislation in India, in the field of Muslim 'personal law'). It was submitted, that Section 2 aforesaid, commenced with a *non obstante* clause. It was pointed out, that the aforesaid *non obstante* clause was referable only to amplify the exclusion of such customs and usages, as were contrary to Muslim 'personal law' – 'Shariat'. It was submitted, that reference was pointedly made only to such customs and usages as were not in consonance with the Muslim 'personal law' – 'Shariat'. It was asserted, that the mandate of Section 2 was aimed at making Muslim 'personal law' – 'Shariat' as "the rule of decision", even when customs and usages were to the contrary. It was sought to be explained, that the Shariat Act neither defined nor expounded, the parameters of the same, with reference to subjects to which Sections 2 and 3 were made applicable. It was therefore submitted, that the enactment

under reference did not introduce Muslim 'personal law' – 'Shariat', as the same was the law applicable to the Muslims even prior to the enactment of the said legislation. In this behalf, it was pointed out, that in different parts of the country customs and usages were being applied even with reference to the Muslims overriding their 'personal law'. In order to substantiate the above contention learned senior counsel made a pointed reference to the statement of objects and reasons of the above enactment, which would reveal that Muslims of British India had persistently urged that customary law and usages should not take the place of Muslim 'personal law' – 'Shariat'. It was also pointed out, that the statement of objects and reasons also highlight that his client, namely, Jamiat-ul-Ulema-i-Hind had supported the demand of the applicability of the Muslim 'personal law' – 'Shariat', for adjudication of disputes amonst Muslims, and had urged, that custom and usage to the contrary, should not have an overriding effect. It was pointed out, that this could be done only because Muslim 'personal law' – 'Shariat' was in existence and was inapplicable to the adjudication of disputes amongst Muslims, even prior to the above enactment in 1937. Understood in the aforesaid manner, it was submitted, that Muslim 'personal law' as a body of law, was only perpetuated, by the Shariat Act. It was submitted, that the Muslim 'personal law' had not been subsumed by the statute nor had the 1937 Act codified the Muslim 'personal law'. It was submitted, that the 1937 legislation was only statutorily declared that the Muslim 'personal law', as a set of rules, would govern the Muslims in India, and that, it would be the Muslim 'personal law' that would have an

overriding effect over any custom or usage to the contrary. It was therefore reiterated, that the legislature which enacted the Muslim Personal Law (Shariat) Application Act, 1937, neither modified nor amended even in a small measure, the Muslim 'personal law' applicable to the Muslims in India, nor did the legislature while enacting the above enactment, subsumed the Muslim 'personal law', and therefore, the character of the Muslim 'personal law' did not undergo a change on account of the enactment of the Muslim Personal Law (Shariat) Application Act, 1937. According to learned senior counsel, the Muslim 'personal law' did not metamorphized into a statute, and as such, the rights and duties of Muslims in India continued to be governed even after the enactment of the Shariat Act, as before. It was pointed out, that the Shariat Act did not substitute, nor did it provide for any different set of rights and obligations other than those which were recognized and prevalent as Muslim 'personal law' – 'Shariat'. As such, it was contended, that it was wholly unjustified to assume, that Muslim 'personal law' – 'Shariat' was given statutory effect, through the Shariat Act. It was therefore submitted that a challenge to the validity of Section 2 of the above enactment, so as to assail the validity of 'talaq-e-biddat' as being contrary to the fundamental rights contained in Part III of the Constitution, was an exercise in futility. Insofar as the instant assertion is concerned, learned senior counsel advanced two submissions – firstly, that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 did not by itself bring about any law providing for rights and obligations to be asserted and discharged by the Muslims as a

community, for the simple reason, that it only reaffirmed the perpetuieties of the Muslim 'personal law' – 'Shariat', and as such, the rights and obligations of persons which were subjected to Muslim 'personal law' – 'Shariat', continued as they existed prior to the enactment of the Shariat Act. And secondly, the Muslim 'personal law' – 'Shariat', was neither transformed nor metamorphized by the Shariat Act, in the nature of crystalised rules and regulations, and as such, even if Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was struck down, the same would automatically revive the Muslim 'personal law' – 'Shariat', in view of the mandate contained in Article 25 of the Constitution. Accordingly, it was pointed out, that the parameters of challenge, as were applicable to assail a statutory enactment, would not be applicable in the matter of assailing the Muslim 'personal law' – 'Shariat'. It was also the contention of learned senior counsel, that under Article 25(1) of the Constitution the right to freely profess, practice and propagate religion, was a universal right, guaranteed to every person, to act in affirmation of his own faith. It was submitted, that the above ambit was the core of the secular nature of the Indian Constitution. It was accordingly pointed out, that the confines of the rights protected under Article 25(1), could be assailed on limited grounds of public order, morality and health, and also if, the provisions of Part III – Fundamental Rights, of the Constitution were breached.

109. It was submitted, that a breach of the provisions contained in Part III – Fundamental Rights under the Constitution, could only be invoked

with reference to a State action, as only State action has to conform to Articles 14, 15 and 21. It was therefore submitted, that a facial subjugation of the right under Article 25(1) to the other provisons of the Constitution would be inapplicable in the case of 'personal law', that has no source to any statute, or State action. It was submitted, that the Shariat Act affirms the applicability of Muslim 'personal law' – 'Shariat' and perpetuates it by virtue of Section 2 thereof. And therefore, it would not give the Muslim 'personal law' – 'Shariat' a statutory flavour.

110. It was also submitted, that Sunnis were a religious denomination within the meaning of Article 25 of the Constitution, and therefore, were subject to public policy, morality and health. Sunni Muslims, therefore had a right *inter alia* to manage their own affairs in matters relating to religion. It was pointed out, that it could not be gainsaid, that marriage and divorce were matters of religion. Therefore, Sunnis as a religious denomination, were entitled to manage their own affairs in matters of marriage and divorce, which are in consonance with the Muslim 'personal law' – 'Shariat'. It was therefore submitted, that the provisions relating to marriage and divorce, as were contained in the Muslim 'personal law' – 'Shariat', were entitled to be protected as a denominational right, under Article 25 of the Constitution.

111. Mr. V. Shekhar, Mr. Somya Chakravarti, Senior Advocates, Mr.Ajit Wagh, Ajmal Khan, Senior Advocate, Mr. V.K. Biju, Mr. Banerjee, Mr. Ashwani Upadhyay, Mr.Vivek C. Solsha, Ms. Rukhsana, Ms. Farah Faiz, Advocates also assisted the Court. Their assistance to the Court, was on

issues canvassed by other learned counsel who had appeared before them. The submissions advanced by them, have already been recorded above. For reasons of brevity, it is not necessary for us to record the same submission once again, in the names of learned counsel referred to above. All that needs to be mentioned is, that we have taken due notice of the nuances pointed out, and their emphasis on different aspects of the controversy.

Part-9.

Consideration of the rival contentions, and our conclusions:

112. During the course of our consideration, we will endeavour to examine a series of complicated issues. We will need to determine, the legal sanctity of 'talaq-e-biddat' – triple talaq. This will enable us to ascertain, whether the practice of talaq has a legislative sanction, because it is the petitioner's case, that it is so through express legislation (-the Muslim Personal Law (Shariat) Application Act, 1937). But the stance adopted on behalf of those contesting the petitioner's claim is, that its stature is that of 'personal law', and on that account, the practice of 'talaq-e-biddat' has a constitutional protection.

113. Having concluded one way or the other, we will need to determine whether divorce by way of 'talaq-e-biddat' – triple talaq, falls foul of Part III – Fundamental Rights of the Constitution (this determination would be subject to, the acceptance of the petitioner's contention, that the practice has statutory sanction). However, if We conclude to the contrary, namely, that the 'talaq-e-biddat' – triple talaq, has the stature of 'personal law', We will have to determine the binding effect of the practice, and whether it can

be interfered with on the judicial side by this Court. The instant course would be necessary, in view of the mandate contained in Article 25 of the Constitution, which has been relied upon by those who are opposing the petitioner's cause.

114. Even if we agree with the proposition that 'talaq-e-biddat' – triple talaq constitutes the 'personal law' governing Muslims, on the issue of divorce, this Court will still need to examine, whether the practice of 'talaq-e-biddat' – triple talaq, violates the acceptable norms of "… public order, morality and health and to the other provisions …" of Part III of the Constitution (–for that, is the case set up by the petitioner). Even if the conclusions after the debate travelling the course narrated in the foregoing paragraph does not lead to any fruitful results for the petitioner's cause, it is their case, that the practice of 'talaq-e-biddat' being socially repulsive should be declared as being violative of constitutional morality – a concept invoked by this Court, according to the petitioner, to interfere with on the ground that it would serve a cause in larger public interest. The petitioners' cause, in the instant context is supported by the abrogation of the practice of 'talaq-e-biddat', the world over in countries with sizeable Muslim populations including theocratic Islamic States. The following examination, shall traverse the course recorded herein above.

I. <u>Does the judgment of the Privy Council in the Rashid Ahmad case, upholding 'talaq-e-biddat', require a relook</u>?

115. It would not be necessary for this debate – about the validity of 'talaq-e-biddat' under the Muslim 'personal law' – 'Shariat', to be prolonged or complicated, if the decision rendered by the Privy Council, in the Rashid

Ahmad case[1] is to be considered as the final word on its validity, as also, on the irrevocable nature of divorce, by way of 'talaq-e-biddat'. The debate would end forthwith. The aforesaid judgment was rendered by applying the Muslim 'personal law'. In the above judgment, 'talaq-e-biddat' was held as valid and binding. The pronouncement in the Rashid Ahmad case[1] is of extreme significance, because Anisa Khatun – the erstwhile wife and her former husband Ghyas-ud-din had continued to cohabit and live together with her husband, for a period of fifteen years, after the pronouncement of 'talaq-e-biddat'. During this post divorce cohabitation, five children were born to Anisa Khatun, through Ghiyas-ud-din. And yet, the Privy Council held, that the marital relationship between the parties had ceased forthwith, on the pronouncement of 'talaq-e-biddat' – triple talaq. The Privy Council also held, that the five children born to Anisa Khatun, could not be considered as the legitimate children of Ghyas-ud-din, and his erstwhile wife. The children born to Anisa Khatun after the parties stood divorced, were therefore held as disentitled to inherit the property of Ghyas-ud-din. The judgment in the Rashid Ahmad case[1] was rendered in 1932. The asserted statutory status of Muslim 'personal law' (as has been canvassed by the petitioners), emerged from the enactment of the Muslim Personal Law (Shariat) Application Act, 1937. The 'Shariat' Act expressly provided, that the Muslim 'personal law' – 'Shariat', would constitute "the rule of decision", in causes where the parties were Muslim. It is not in dispute, that besides other subjects, consequent upon the enactment of the Shariat Act, dissolution of marriage amongst Muslims, by way of 'talaq', would also

have to be in consonance with the Muslim 'personal law' – 'Shariat'. As noticed herein above, 'talaq-e-biddat' is one of the forms of dissolution of marriage by 'talaq', amongst Muslims. According to the petitioners case, the issue needed a fresh look, of the conferment of statutoty status to Muslim 'personal law' – 'Shariat'. It was submitted, that after having acquired statutory status, the questions and subjects (including 'talaq-e-biddat'), would have to be in conformity (-and not in conflict), with the provisions of Part III – Fundamental Rights, of the Constitution. Needless to mention, that all these are important legal questions, requiring examination.

116. In our considered view, the matter would most certainly also require a fresh look, because various High Courts, having examined the practice of divorce amongst Muslims, by way of 'talaq-e-biddat', have arrived at the conclusion, that the judgment in the Rashid Ahmad case[1] was rendered on an incorrect understanding, of the Muslim 'personal law' – 'Shariat'.

117. If the Muslim Personal Law (Shariat) Application Act, 1937, had incorporated the manner in which questions regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or matters such as marriage, dissolution of marriage, including talaq, ila, jihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (-as in Section 2 thereof), had to be dealt with, as per Muslim 'personal law' – 'Shariat' according to the petitioners, it would be quite a different matter. All the same, the Shariat Act did not describe how the

above questions and subjects had to be dealt with. And therefore, for settlement of disputes amongst Muslims, it would need to be first determined, what the Muslim 'personal law', with reference to the disputation, was. Whatever it was, would in terms of Section 2 of the 1937 Act, constitute "the rule of decision". After the Privy Council had rendered the judgment in the Rashid Ahmad case[1], and well after the asserted statutory status came to be conferred on Muslim 'personal law' – 'Shariat', the issue came up for consideration before the Kerala High Court in A. Yusuf Rawther v. Sowramma[47], wherein, the High Court examined the above decision of the Privy Council in the Rashid Ahmad case[1], and expressed, that the views of the British Courts on Muslim 'personal law', were based on an incorrect understanding of 'Shariat'. In the above judgment, a learned Single Judge (Justice V.R. Krishna Iyer, as he then was) of the Kerala High Court, recorded the following observations:

> "7. There has been considerable argument at the bar – and precedents have been piled up by each side – as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim law. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture – law is largely the formalized and enforceable expression of a community's cultural norms – cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions …. It is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against

47

them"." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." As the learned author, Ahmad A. Galwash notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came He declared divorce to he "the most disliked of lawful things in the sight of God. He was indeed never tired of expressing his abhorrence of divorce. Once he said: 'God created not anything on the face of the earth which He loveth more than the act of manumission. (of slaves) nor did He create anything on the face of the earth which he detesteth more than the act of divorce". Commentators on the Quoran have rightly observed – and this tallies with the law now administered in some Mulsim countries like Iraq – that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce."

118. Without pointedly examining the issue of the validity of 'talaq-e-biddat', under the Muslim 'personal law' – 'Shariat', this Court in Fuzlunbi v. K. Khader Vali[48], recorded the following observations:

"20. Before we bid farewell to Fazlunbi it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor J. ILR 30 Bom 539 that this view 'is good in law, though bad in theology'. Maybe, when the point directly arises, the question will have to be considered by this court, but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."

The above observations lead to the inference, that the proposition of law pronounced by the Privy Council in the Rashid Ahmad case[1], needed a relook.

48

119. It would be relevant to mention, that in the interregnum, the validity of 'talaq-e-biddat' was considered by a learned Single Judge (Justice Baharul Islam, as he then was) of the Gauhati High Court, in the Jiauddin Ahmed case[2], wherein, the High Court took a view different from the one recorded by the Privy Council (-in the Rashid Ahmad case[1]). In doing so, it relied on 'hadiths', 'ijma' and 'qiyas'. The issue was again examined, by a Division Bench of the Gauhati High Court, in the Mst. Rukia Khatun case[3]. Yet again, the High Court (speaking through, Chief Justice Baharul Islam, as he then was), did not concur with the view propounded by the Privy Council. The matter was also examined by a Single Judge (Justice Badar Durrez Ahmed, as he then was) of the Delhi High Court in the Masroor Ahmed case[4]. Herein again, by placing reliance on relevant 'hadiths', the Delhi High Court came to the conclusion, that the legal position expressed by the Privy Council on 'talaq-e-biddat', was not in consonance with the Muslim 'personal law'. The Kerala High Court, in the Nazeer case[5] (authored by, Justice A. Muhamed Mustaque) highlighted the woeful condition of Muslim wives, because of the practice of 'talaq-e-biddat', and recorded its views on the matter.

120. In view of the position expressed hereinabove, we are of the considered view, that the opinion expressed by the Privy Council with reference to 'talaq-e-biddat', in the Rashid Ahmad case[1], holding that 'talaq-e-biddat' results in finally and irrevocably severing the matrimonial tie between spouses, the very moment it is pronounced, needs to be examined afresh. More particularly, because the validity of the same as an

approved concept, of Muslim 'personal law' – 'Shariat', was not evaluated at that juncture (-as it indeed could not have been, as the legislation was not available, when the Privy Council had rendered its judgment), in the backdrop of the Shariat Act, and also, the provisions of the Constitution of India.

II. Has 'talaq-e-biddat', which is concededly sinful, sanction of law?

121. The petitioners, and others who support the petitoner's cause, have vehemently contended, that 'talaq-e-biddat', does not have its source of origin from the Quran. The submission does not need a serious examination, because even 'talaq-e-ahsan' and 'talaq-e-hasan' which the petitioners acknowledge as – 'the most proper', and – 'the proper' forms of divorce respectively, also do not find mention in the Quran. Despite the absence of any reference to 'talaq-e-ahsan' and 'talaq-e-hasan' in the Quran, none of the petitioners has raised any challenge thereto, on this score. A challenge to 'talaq-e-biddat' obviously cannot be raised on this ground. We are satisfied, that the different approved practices of talaq among Muslims, have their origin in 'hadiths' and other sources of Muslim jurisprudence. And therefore, merely because it is not expressly provided for or approved by the Quran, cannot be a valid justification for setting aside the practice.

122. The petitioners actually call for a simple and summary disposal of the controversy, by requiring us to hold, that whatever is irregular and sinful, cannot have the sanction of law. The above prayer is supported by contending, that 'talaq-e-biddat' is proclaimed as bad in theology. It was

submitted, that this practice is clearly patriarchal, and therefore, cannot be sustained in today's world of gender equality. In order to persuade this Court, to accept the petitioners' prayer – to declare the practice of 'talaq-e-biddat' as unacceptable in law, the Court's attention was invited to the fact, that the present controversy needed a similar intervention, as had been adopted for doing away with similar patriarchal, irregular and sinful practices amongst Hindus. In this behalf, reference was made to the practices of 'Sati', 'Devadasi' and 'Polygamy'.

123(i). We may only highlight, that 'Sati' was commonly described as – widow burning. The practice required a widow to immolate herself, on her husband's pyre (or alternatively, to commit suicide shortly after her husband's death). 'Sati' just like 'talaq-e-biddat', had been in vogue since time immemorial. It is believed, that the practice of 'Sati' relates back to the 1st century B.C.. On the Indian sub-continent, it is stated to have gained popularity from the 10th century A.D. The submission was, that just as 'Sati' had been declared as unacceptable, the practice of 'talaq-e-biddat' should likewise be declared as unacceptable in law.

(ii) 'Devadasi' translated literally means, a girl dedicated to the worship and service of a diety or temple. The surrender and service of the 'Devadasi', in terms of the practice, was for life. This practice had also been in vogue since time immorial, even though originally 'Devadasis' had a high status in society, because the Rulers/Kings of the time, were patrons of temples. During British rule in India, the Rulers backing and support to temples, waned off. It is believed, that after funds from the Rulers stopped,

to sustain themselves 'Devadasis' used dancing and singing as a means of livelihood. They also commenced to indulge in prostitution. The life of the 'Devadasi', thereupon came into disrepute, and resulted in a life of destitution. The practice had another malady, tradition forbade a 'Devadasi' from marrying.

(iii) So far as 'polygamy' is concerned, we are of the view that polygamy is well understood, and needs no elaboration.

124. We are of the view, that the practices referred to by the petitioners, to support their claim, need a further examination, to understand how the practices were discontinued. We shall now record details, of how these practices, were abolished:

(i) Insofar as the practice of 'Sati' is concerned, its practice reached alarming proportion between 1815-1818, it is estimated that the incidence of 'Sati' doubled during this period. A campaign to abolish 'Sati' was initiated by Christian missionaries (- like, William Carey), and by Hindu Brahmins (-like, Ram Mohan Roy). The provincial Government of Bengal banned 'Sati' in 1829, by way of legislation. This was then followed by similar laws by princely States in India. After the practice was barred by law, the Indian Sati Prevention Act, 1988 was enacted, which crimnalised any type of aiding, abetting or glorifying the practice of 'Sati'.

(ii) Insofar as the practice of 'Devadasi' is concerned, soon after the end of British rule, independent India passed the Madras Devadasi's (Prevention of Dedication) Act (-also called the Tamil Nadu Devadasis (Prevention of Dedication Act) on 09.10.1947. The enactment made prostitution illegal.

The other legislations enacted on the same issue, included the 1934 Bombay Devadasi Protection Act, the 1957 Bombay Protection (Extension) Act, and the Andhra Pradesh Devadasi (Prohibition of Dedication) Act of 1988. It is therefore apparent, that the instant practice was done away with, through legislation.

(iii) The last of the sinful practices brought to our notice was 'polygamy'. Polygamy was permitted amongst Hindus. In 1860, the Indian Penal Code made 'polygamy' a criminal offence. The Hindu Mariage Act was passed in 1955. Section 5 thereof provides, the conditions for a valid Hindu marriage. One of the conditions postulated therein was, that neither of the parties to the matrimonial alliance should have a living spouse, at the time of the marriage. It is therefore apparent, that the practice of polygamy was not only done away with amongst Hindus, but the same was also made punishable as a criminal offence. This also happened by legislation.

125. The factual and the legal position noticed in the foregoing paragraph clearly brings out, that the practices of 'Sati', 'Devadasi' and 'polygamy' were abhorrent, and could well be described as sinful. They were clearly undesirable and surely bad in theology. It is however important to notice, that neither of those practices came to be challenged before any court of law. Each of the practices to which our pointed attention was drawn, came to be discontinued and invalidated by way of legislative enactments. The instances cited on behalf of the petitioners cannot therefore be of much avail, with reference to the matter in hand, wherein, the prayer is for judicial intervention.

126. We would now venture to attempt an answer to the simple prayer made on behalf of the petitioners, for a summary disposal of the petitioner's cause, namely, for declaring the practice of 'talaq-e-biddat', as unacceptable in law. In support of the instant prayer, it was submitted, that it could not be imagined, that any religious practice, which was considered as a sin, by the believers of that very faith, could be considered as enforceable in law. It was asserted, that what was sinful could not be religious. It was also contended, that merely because a sinful practice had prevailed over a long duration of time, it could best be considered as a form of custom or usage, and not a matter of any binding faith. (This submission, is being dealt with in part IV, immediately hereinafter). It was submitted, that no court should find any difficulty, in declaring a custom or usage – which is sinful, as unacceptable in law. It was also the pointed assertion on behalf of the petitioners, that what was sacrilegious could not ever be a part of Muslim 'personal law' – 'Shariat'. The manner in which one learned counsel expressed the proposition, during the course of hearing, was very interesting. We may therefore record the submission exactly in the manner it was projected. Learned counsel for evoking and arousing the Bench's conscience submitted, "if something is sinful or abhorrent in the eyes of God, can any law by man validate it". It seems to us, that the suggestion was, that 'talaq-e-biddat' did not flow out of any religious foundation, and therefore, the practice need not be considered as religious at all. One of the non-professional individuals assisting this Court on behalf of the petitioners', went to the extent of stating, that the fear of the fact, that the

wife could be thrown out of the matrimonial house, at any time, was like a sword hanging over the matrimonial alliance, during the entire duration of the marriage. It was submitted, that the fear of 'talaq-e-biddat', was a matter of continuous mental torture, for the female spouse. We were told, that the extent of the practice being abhorrent, can be visualized from the aforesaid, position. It was submitted, that the practice was extremely self-effacing, and continued to be a cause of insecurity, for the entire duration of the matrimonial life. It was pointed out, that this practice violated the pious and noble prescripts of the Quran. It was highlighted, that even those who had appeared on behalf of the respondents, had acknowledged, that the practice of 'talaq-e-biddat' was described as irregular and sinful, even amongst Muslims. It was accordingly asserted, that it was accepted by one and all, that the practice was bad in theology. It was also acknowledged, that it had no place in modern day society. Learned counsel therefore suggested, that triple talaq should be simply declared as unacceptable in law, and should be finally done away with.

127. A simple issue, would obviously have a simple answer. Irespective of what has been stated by the learned counsel for the rival parties, there can be no dispute on two issues. Firstly, that the practice of 'talaq-e-biddat' has been in vogue since the period of Umar, which is roughly more than 1400 years ago. Secondly, that each one of learned counsel, irrespective of who they represented, (-the petitioners or the respondents), acknowledged in one voice, that 'talaq-e-biddat' though bad in theology, was considered as "good" in law. All learned counsel representing the petitioners were also

unequivocal, that 'talaq-e-biddat' was accepted as a "valid" practice in law. That being so, it is not possible for us to hold, the practice to be invalid in law, merely at the asking of the petitioners, just because it is considered bad in theology.

III. Is the practice of 'talaq-e-biddat', approved/disapproved by "hadiths"?

128. At the beginning of our consideration, we have arrived at the conclusion, that the judgment rendered by the Privy Council in the Rashid Ahmad case[1], needs a reconsideration, in view of the pronouncements of various High Courts including a Single Judge of the Gauhati High Court in the Jiauddin Ahmed case[2], a Division Bench of the same High Court – the Gauhati High Court in the Rukia Khatun case[3], by a Single Judge of the Delhi High Court in the Masroor Ahmed case[4], and finally, on account of the decision of a Single Judge of the Kerala High Court in the Nazeer case[5].

129. Even though inconsequential, and the same can never – never be treated as a relevant consideration, it needs to be highlighted, that each one of the Judges who authored the judgments rendered by the High Courts referred to above, professed the Muslim religion. They were Sunni Muslims, belonging to the Hanafi school. The understanding by them, of their religion, cannot therefore be considered as an outsider's view. In the four judgments referred to above, the High Courts relied on 'hadiths' to support and supplement the eventual conclusion drawn. There is certainly no room for any doubt, that if 'hadiths' relied upon by the High Courts in their respective judgments, validly affirmed the position expressed with reference to 'talaq-e-biddat', there would be no occasion for us to record a view to the

contrary. It is in the aforestated background, that we proceed to examine the 'hadiths' relied upon by learned counsel appearing for the rival parties, to support their individual claims.

130. A number of learned counsel who had appeared in support of the petitioners' claim, that the practice of 'talaq-e-biddat' was un-Islamic, and that this Court needed to pronounce it as such, invited our attention to a set of 'hadiths', to substantiate their position. The assertions made on behalf of the petitioners were opposed, by placing reliance on a different set of 'hadiths'. Based thereon, we will endeavour to record a firm conclusion, whether 'talaq-e-biddat', was or was not, recognized and supported by 'hadiths'.

131. First of all, we may refer to the submissions advanced by Mr. Amit Singh Chadha, Senior Advocate, who had painstakingly referred to the 'hadiths' in the four judgments of the High Courts (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'). Insofar as the Jiauddin Ahmed case[2] is concerned, details of the entire consideration have been narrated in paragraph 31 hereinabove. Likewise, the consideration with reference to the Rukia Khatun case[3] has been recorded in paragraph 32. The judgment in the Masroor Ahmed case[4] has been dealt with in paragraph 33. And finally, the Nazeer case[5] has been deciphered, by incorporating the challenge, the consideration and the conclusion in paragraph 34 hereinabove. For reasons of brevity, it is not necessary to record all the above 'hadiths' for the second time. Referefence may therefore be made to the paragraphs referred to above, as the first

basis expressed on behalf of the petitioners, to lay the foundation of their claim, that the practice, of 'talaq-e-biddat' cannot be accepted as a matter of 'personal law' amongst Muslims, including Sunni Muslims belonging to the Hanafi school. In fact, learned senior counsel, asserted, that the position expressed by the High Courts, had been approved by this Court in the Shamim Ara case[12].

132. Mr. Anand Grover, Senior Advocate, reiterated and reaffirmed the position expressed in the four judgments (two of the Gauhati High Court, one of the Delhi High Court, and the last one of the Kerala High Court) to emphasize his submissions, as a complete justification for accepting the claims of the petitioners. Interestingly, learned senior counsel made a frontal attack to the 'hadiths' relied upon by the AIMPLB. To repudiate the veracity of the 'hadiths' relied upon by the respondents, it was pointed out, that it was by now settled, that there were various degrees of reliability and/or authenticity of different 'hadiths'. Referring to the Principles of Mohomedan Law by Sir Dinshaw Fardunji Mulla (LexisNexis, Butterworths Wadhwa, Nagpur, 20th edition), it was asserted, that the 'hadiths' relied upon by the AIMPLB (to which a reference will be made separately), were far – far removed from the time of the Prophet Mohammad. It was explained, that 'hadiths' recorded later in point of time, were less credible and authentic, as with the passage of time, distortions were likely to set in, making them unreliable. It was asserted, that 'hadiths' relied upon in the four judgments rendered by the High Courts, were the truly reliable 'hadiths', as they did not suffer from the infirmity expressed above. In

addition to the above, learned senior counsel drew our attention, to Sunan Bayhaqi 7/547 referred to on behalf of the AIMPLB, so as to point out, that the same was far removed from the time of Prophet Mohammad. As against the above, it was submitted, that the 'hadiths' of Bhukahri (published by Darussalam, Saudi Arabia), also relied upon by the AIMPLB, were obvious examples of a clear distortion. Moreover, it was submitted, that the 'hadiths', relied upon by the AIMPLB were not found in the Al Bukhari Hadiths. It was therefore submitted, that reliance on the 'hadiths' other than those noticed in the individual judgments referred to hereinabove, would be unsafe (-for details, refer to paragraph 42).

133. Learned senior counsel also asserted, that as a historical fact Shia Muslims believe, that during the Prophet's time, and that of the First Caliph – Abu Baqhr, and the Second Caliph – Umar, pronouncements of talaq by three consecutive utterances were treated as one. (Reference in this behalf was made to "Sahih Muslim" compiled by Al-Hafiz Zakiuddin Abdul-Azim Al-Mundhiri, and published by Darussalam). Learned senior counsel also placed reliance on "The lawful and the prohibited in Islam" by Al-Halal Wal Haram Fil Islam (edition – August 2009). It was pointed out, that the instant transcript was of Egyptian origin, and further emphasized, that the same therefore needed to be accepted as genuine and applicable to the dispute, because Egypt was primarily dominated by Sunni Muslims belonging to the Hanafi school. In the above publication, it was submitted, that the practice of instant triple talaq was described as sinful. Reference was then made to "Woman in Islamic Shariah" by Maulana Wahiduddin

Khan (published by Goodword Books, reprinted in 2014), wherein, irrespective of the number of times the word 'talaq' was pronounced (if pronounced at the same time, and on the same occasion), was treated as a singular pronouncement of talaq, in terms of the 'hadith' of Imam Abu Dawud in Fath al-bari 9/27. It was submitted, that the aforesaid 'hadith' had rightfully been taken into consideration by the Delhi High Court in the Masroor Ahmed case[4]. In addition to the above, reference was made to "Marriage and family life in Islam" by Prof. (Dr.) A. Rahman (Adam Publishers and Distributors, New Delhi, 2013 edition), wherein by placing reliance on a Hanafi Muslim scholar, it was opined that triple talaq was not in consonance with the verses of the Quran. Reliance was also placed on "Imam Abu Hanifa – Life and Work" by Allamah Shiblinu'mani's of Azamgarh, who founded the Shibli College in the 19th century. Relying upon a prominent Hanafi Muslim scholar, it was affirmed, that Abu Hanifa himself had declared, that it was forbidden to give three divorces at the same time, and whoever did so was a sinner (-for details, refer to paragraph 42). Based on the aforestated text available in the form of 'hadiths', it was submitted, that the position adopted by the AIMPLB in its pleadings, was clearly unacceptable, and need to be rejected. And that, the coclusions drawn by the four High Courts referred to above, need to be declared as a valid determination on the subject of 'talaq-e-biddat', in exercise of this Court's power under Article 141 of the Constitution.

134. Mr. Kapil Sibal, appearing on behalf of the AIMPLB, contested the submissions advanced on behalf of the petitioners. In the first instance,

learned senior counsel placed reliance on verses from the Quran. Reference was made to Quran, Al-Hashr 59:71; Quran, Al-Anfal 8:20; Quran, Al-Nisa 4:64; Quran, Al-Anfal 8:13; Quran, Al-Ahzab 33:36; and Quran, Al-Nisa 4:115 (-for details, refer to paragraph 86 above). Pointedly on the subject of triple talaq, and in order to demonstrate, that the same is not in consonance with the Quranic verses, the Court's attention was drawn to Quran, Al-Baqarah 2:229; Quran, Al-Baqarah 2:229 and 230; Quran, Al-Baqarah 2:232; and Quran, Al-Talaq 65:1 (-for details, refer to paragraph 86 above). Besides the aforesaid, learned senior counsel invited this Court's attention to the statements attributed to the Prophet Mohammad, with reference to talaq. On this account, the Court's attention was drawn to Daraqutni, Kitab Al-Talaq wa Al-Khula wa Al-Aiyla, 5/23, Hadith number: 3992; Daraqutni, 5/81; Kitab al-Talaq wa Al-Khulawa aI-Aiyala, Hadith number: 4020; Sunan Bayhaqi, 7/547, Hadith number: 14955; AI-Sunan AI-Kubra Iil Bayhaqi, Hadith number: 14492; and Sahi al-Bukhari Kitab al-Talaq, Hadith number: 5259 (-for details, refer to paragraph 86 above). Representing the AIMPLB, learned senior counsel, also highlighted 'hadiths' on the subject of 'talaq' and drew our attention to Sunan Abu Dawud, Bad Karahiya al-Talaq, Hadith no: 2178; Musannaf ibn Abi Shaybah, Bab man kara an yatliq aI rajal imratahuu thalatha fi maqad wahadi wa ajaza dhalika alayhi, Hadith number: 18089; (Musannaf ibn Abi Shayba, Kitab al-Talaq, bab fi al rajal yatlaqu imratahuu miata aw alfa, Hadith number: 18098; Musannaf Abd al-Razzaq, Kitab al-talaq, Hadith number 11340; Musannaf ibn Abi Shayba, Kitab aI-Talaq, Hadith no: 18091; Musannaf Ibn

Abi Shayba, Hadith no: 18087; Al-Muhadhdhab, 4/305; and Bukhari, 3/402 (-for details, refer to paragraph 87 above).

135. Having dealt with the position expounded in the Quran and 'hadiths' as has been noticed above, learned senior counsel attempted to repudiate the veracity of the 'hadiths' relied upon, in all the four judgments rendered by the High Courts. In this behalf learned senior counsel provided the following complilation for this Court's consideration:

1. The Jiauddin Ahmed case[2]

Sl. No.	Reference	Comments
(i)	Maulana Mohammad Ali (referred to at paras 7, 11, 12 and 13 of the judgment)	He is a Qadiyani. Mirza Ghulam Ahmed (founder of the Qadiani School) declared himself to be the Prophet after Prophet Mohammed and it is for this reason that all Muslims do not consider the Qadiyani sect to be a part of the Islamic community.

2. The Rukia Khatun case[3]

Sl. No.	Reference	Comments
(i)		Authorities in this judgment are identical to the above mentioned judgment of Jiauddin Ahmed v. Anwara Begum.

3. The Masroor Ahmed case[4]

Sl. No.	Reference	Comments
(i)	Mulla (Referred at the footnote at page 153 of the judgment)	Approves the proposition that triple talaq is sinful, yet effective as an irrevocable divorce.

4. The Nazeer case[5].

Sl. No.	Reference	Comments
(i)	Basheer Ahmad Mohyidin (Referred at paras 1 and 6 of the judgment)	He wrote a commentary on the Quran entitled as Quran: The Living Truth, however the extract relied upon in the decision does not discuss triple talaq.

	paras 1 and 8 of the judgment)	Quran entitled as Tafsir Ibn Kathir. He takes the view, that three pronouncements at the same time were unlawful. It is submitted that he belonged to the Ahl-e-Hadith/Salafi school, which school does not recognize triple talaq.
(iii)	Dr. Tahir Mahmood (Referred in para 6 of the judgment)	He was a Professor of Law, Delhi University. He wrote a book entitled "Muslim Law in India and Abroad" and other books. Referred to other Islamic scholars to state, that it is a misconception that three talaqs have to be pronounced in three consecutive months, it is not a general rule as the three pronouncements have to be made when the wife is not in her menses, which would obviously require about three months. It is submitted, that the said extract is irrelevant and out of context as it does not specifically deal with validity of triple talaq.
(iv)	Sheikh Yusuf Al-Qaradawi (Referred in para 8 of the judgment)	He regarded triple talaq as against God's law. It is submitted that he was a follower of the Ahl-e-Hadith School.
(v)	Mahmoud Rida Murad (Referred in para 8 of the judgment)	He authored the book entitled as Islamic Digest of Aqeedah and Fiqh. He took the view that triple talaq does not conform to the teachings of the Prophet. He is a follower of the Ahl-e-Hadith school.
(vi)	Sayyid Abdul Ala Maududi (Referred in para 11 of the judgment)	He is a scholar of the Hanafi School. Though the passages extracted in the judgment indicate that he was of the view that three pronouncements can be treated as one depending on the intention. However, subsequently he has changed his own view and has opined that triple talaq is final and irrevocable.

(vii)	Dr. Abu Ameenah Bilal Philips (Referred in para 19 of the judgment)	He authored the book 'Evolution of Fiqh'. He states that Caliph Umar introduced triple talaq in order to discourage abuse of divorce. He is a follower of the Ahl-e Hadith school.
(viii)	Mohammed Hashim Kamali (Referred in para 23 of the judgment)	He was of the view that Caliph Umar introduced triple talaq in order to discourage abuse of divorce. He is a professor of law.

It was the submitted on behalf of the AIMPLB, that the views of persons who are not Sunnis, and those who did not belong to the Hanafi school, could not have been validly relied upon. It was submitted, that reliance on Maulana Muhammad Ali was improper because he was a Qadiyani, and that Muslims do not consider the Qadiyani sect to be a part of the Islamic community. Likewise, it was submitted, that reference to Basheer Ahmad Mohyidin was misplaced, as the commentary authored by him, did not deal with the concept of 'talaq-e-biddat'. Reference to Tafsir Ibn Kathir was stated to be improper, as he belonged to the Ahl-e-Hadith/Salafi school, which school does not accept triple talaq. It was submitted, that Dr. Tahir Mahmood was a Professor of Law at the Delhi University, and his views must be treated as personal to him, and could not be elevated to the position of 'hadiths'. It was pointed out, that Sheikh Yusuf al-Qaradawi, was a follower of Ahl-e-Hadith school, and therefore, his views could not be taken into consideration. So also, it was submitted, that Mahmoud Rida Murad was a follower of Ahl-e-Hadith/Salafi school. Reference to Sayyid Abdul Ala Maududi, it was pointed out, was improperly relied upon, because the view expressed by the above scholar was that "three

pronouncements of talaq could be treated as one, depending on the 'intention' of the husband". This position, according to learned senior counsel, does not support the position propounded on behalf of the petitioners, because if the 'intention' was to make three pronouncements, it would constitute a valid 'talaq'. With reference to Dr. Abu Ameenah Bilal Philips, it was submitted, that he was also a follower of the Ahl-e-Hadith/Salafi school. Last of all, with reference to Mohammed Hashim Kamali, it was pointed out, that he was merely a Professor of Law, and the views expressed by him should be considered as his personal views. It was accordingly asserted, that supplanting the views of other schools of Sunni Muslims, with reference to the practice of 'talaq-e-biddat' by the proponents of the Hanafi school, and even with the beliefs of Shia Muslims, was a clear breach of a rightful understanding of the school, and the practice in question.

136. Based on the submissions advanced on behalf of the AIMPLB, as have been noticed hereinabove, it was sought to be emphasized, that such complicated issues relating to norms applicable to a religious sect, could only be determined by the community itself. Learned counsel cautioned, this Court from entering into the thicket of the instant determination, as this Court did not have the expertise to deal with the issue.

137. Having given our thoughtful consideration, and having examined the rival 'hadiths' relied upon by learned counsel for the parties, we have no other option, but to accept the contention of learned senior counsel appearing on behalf of the AIMPLB, and to accept his counsel, not to enter

into the thicket of determining (on the basis of the 'hadiths' relied upon) whether or not 'talaq-e-biddat' – triple talaq, constituted a valid practice under the Muslim 'personal law' – 'Shariat'. In fact, even Mr. Salman Khurshid appearing on behalf of the petitioners (seeking the repudiation of the practice of the 'talaq-e-biddat') had pointed out, that it was not the role of a court to interprete nuances of Muslim 'personal law' – 'Shariat'. It was pointed out, that under the Muslim 'personal law', the religious head – the Imam would be called upon to decipher the teachings expressed in the Quran and the 'hadiths', in order to resolve a conflict between the parties. It was submitted, that the Imam alone, had the authority to resolve a religious conflict, amongst Muslims. It was submitted, that the Imam would do so, not on the basis of his own views, but by relying on the verses from the Quran, and the 'hadiths', and based on other jurisprudential tools available, and thereupon he would render the correct interpretation. Mr. Salman Khurshid, learned Senior Advocate also cautioned this Court, that it was not its role to determine the true intricacies of faith.

138. All the submissions noted above, at the behest of the learned counsel representing the AIMPLB would be inconsequential, if the judgment rendered by this Court in the Shamim Ara case[12], can be accepted as declaring the legal position in respect of 'talaq-e-biddat'. Having given a thoughtful consideration to the contents of the above judgment, it needs to be recorded, that this Court in the Shamim Ara case[12] did not debate the issue of validity of 'talaq-e-biddat'. No submissions have been noticed for or against, the proposition. Observations recorded on the subject, cannot

therefore be treated as *ratio decendi* in the matter. In fact, the question of validity of talaq-e-biddat' has never been debated before this Court. This is the first occasion that the matter is being considered after rival submissions have been advanced. Moreover, in the above judgment the Court was adjudicating a dispute regarding maintenance under Section 125 of the Code of Criminal Procedure. The husband, in order to avoid the liability of maintenance pleaded that he had divorced his wife. This Court in the above judgment decided the factual issue as under:

> "15. The plea taken by Respondent 2 husband in his written statement may be renoticed. Respondent 2 vaguely makes certain generalized accusations against the appellant wife and states that ever since the marriage he found his wife to be sharp, shrewd and mischievous. Accusing the wife of having brought disgrace to the family, Respondent 2 proceeds to state, vide para 12 (translated into English) — "The answering respondent, feeling fed up with all such activities unbecoming of the petitioner wife, has divorced her on 11-7-1987." The particulars of the alleged talaq are not pleaded nor the circumstances under which and the persons, if any, in whose presence talaq was pronounced have been stated. Such deficiency continued to prevail even during the trial and Respondent 2, except examining himself, adduced no evidence in proof of talaq said to have been given by him on 11-7-1987. There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq.
> 16. We are also of the opinion that the talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (see Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of talaq having taken place on 11-7-1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent 2 ought to have adduced evidence and proved the pronouncement of talaq on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated,

has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31-8-1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of Respondent 2, could not have been read in evidence as relevant and of any value.

17. For the foregoing reasons, the appeal is allowed. Neither the marriage between the parties stands dissolved on 5-12-1990 nor does the liability of Respondent 2 to pay maintenance comes to an end on that day. Respondent 2 shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law. The costs in this appeal shall be borne by Respondent 2."

The liability to pay maintenance was accepted, not because 'talaq-e-biddat' – triple talaq was not valid in law, but because the husband had not been able to establish the factum of divorce. It is therefore not possible to accept the submission made by learned counsel on the strength of the Shamim Ara case[12].

139. Having given our thoughtful consideration on the entirety of the issue, we are persuaded to accept the counsel of Mr. Kapil Sibal and Mr. Salman Khurshid, Senior Advocates. It would be appropriate for us, to refrain from entertaining a determination on the issue in hand, irrespective of the opinion expressed in the four judgments relied upon by learned counsel for the petitioners, and the Quranic verses and 'hadiths' relied upon by the rival parties. We truly do not find ourselves, upto the task. We have chosen this course, because we are satisfied, that the controversy can be finally adjudicated, even in the absence of an answer to the proposition posed in the instant part of the consideration.

IV. Is the practice of 'talaq-e-biddat', a matter of faith for Muslims? If yes, whether it is a constituent of their 'personal law'?

140. In the two preceding parts of our consideration, we have not been able to persuade ourselves to disapprove and derecognize the practice of 'talaq-e-biddat'. It may however still be possible for us, to accept the petitioners' prayer, if it can be concluded, that 'talaq-e-biddat' was not a constituent of 'personal law' of Sunni Muslims belonging to the Hanafi school. And may be, it was merely a usage or custom. We would, now attempt to determine an answer to the above noted poser.

141. As a historical fact, 'talaq-e-biddat' is known to have crept into Muslim tradition more than 1400 years ago, at the instance of Umayyad monarchs. It can certainly be traced to the period of Caliph Umar – a senior companion of Prophet Muhammad. Caliph Umar succeeded Abu Bakr (632-634) as the second Caliph on 23.8.634. If this position is correct, then the practice of 'talaq-e-biddat' can most certainly be stated to have originated some 1400 years ago. Factually, Mr. Kapil Sibal had repeatedly emphasized the above factual aspects, and the same were not repudiated by any of learned counsel (-and private individuals) representing the petitioner's cause.

142. The fact, that the practice of 'talaq-e-biddat' was widespread can also not be disputed. In Part-5 of the instant judgment – Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States, we have dealt with legislations at the hands of Arab States – Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libiya, Mrocco, Sudan, Syria, Tunesia, United Arab Emirates, Yemen; we have also dealt with legislations by South-east Asian States – Indonesia, Malaysia,

Philippines; we have additionally dealt with legislations by sub-continental States – Pakistan and Bangladesh. All these countries have legislated with reference to - 'talaq-e-biddat', in one form or the other. What can certainly be drawn from all these legislations is, that 'talaq-e-biddat' was a prevalent practice amongst Muslims, in these countries. Had it not been so, legislation would not have been required on the subject. It is therefore clear that the practice of 'talaq-e-biddat' was not limited to certain areas, but was widespread.

143. We have also extracted in the submissions advanced by learned counsel representing the rival parties, 'hadiths' relied upon by them, to substantiate their rival contentions. The debate and discussion amongst Islamic jurists in the relevant 'hadiths' reveal, that the practice of triple talaq was certainly, in vogue amongst Muslims, whether it was considered and treated as irregular or sinful, is quite another matter. All were agreed, that though considered as improper and sacrilegious, it was indeed accepted as lawful. This debate and discussion in the Muslim community – as has been presently demonstrated by the disputants during the course of hearing, and as has been highlighted through articles which appeared in the media (at least during the course of hearing), presumably by knowledgeable individuals, reveal views about its sustenance. The only debate in these articles was about the consistence or otherwise, of the practice of 'talaq-e-biddat' – with Islamic values. Not that, the practice was not prevalent. The ongoing discussion and dialogue, clearly reveal, if nothing else, that the practice is still widely prevalent and in vogue.

144. The fact, that about 90% of the Sunnis in India, belong to the Hanafi school, and that, they have been adopting 'talaq-e-biddat' as a valid form of divorce, is also not a matter of dispute. The very fact, that the issue is being forcefully canvassed, before the highest Court of the land, and at that – before a Constitution Bench, is proof enough. The fact that the judgment of the Privy Council in the Rashid Ahmad case[1] as far back as in 1932, upheld the severance of the matrimonial tie, based on the fact that 'talaq' had been uttered thrice by the husband, demonstrates not only its reality, but its enforcement, for the determination of the civil rights of the parties. It is therefore clear, that amongst Sunni Muslims belonging to the Hanafi school, the practice of 'talaq-e-biddat', has been very much prevalent, since time immemorial. It has been widespread amongst Muslims in countries with Muslim popularity. Even though it is considered as irreligious within the religious denomination in which the practice is prevalent, yet the denomination considers it valid in law. Those following this practice have concededly allowed their civil rights to be settled thereon. 'Talaq-e-biddat' is practiced in India by 90% of the Muslims (who belong to the Hanafi school). The Muslim population in India is over 13% (-about sixteen crores) out of which 4-5 crores are Shias, and the remaining are Sunnis (besides, about 10 lakhs Ahmadias) – mostly belonging to the Hanafi school. And therefore, it would not be incorrect to conclude, that an overwhelming majority of Muslims in India, have had recourse to the severance of their matrimonial ties, by way of 'talaq-e-biddat' – as a matter of their religious belief – as a matter of their faith.

145. We are satisfied, that the practice of 'talaq-e-biddat' has to be considered integral to the religious denomination in question – Sunnis belonging to the Hanafi school. There is not the slightest reason for us to record otherwise. We are of the view, that the practice of 'talaq-e-biddat', has had the sanction and approval of the religious denomination which practiced it, and as such, there can be no doubt that the practice, is a part of their 'personal law'.

V. Did the Muslim Personal Law (Shariat) Application Act, 1937 confer statutory status to the subjects regulated by the said legislation?

146. 'Personal law' has a constitutional protection. This protection is extended to 'personal law' through Article 25 of the Constitution. It needs to be kept in mind, that the stature of 'personal law' is that of a fundamental right. The elevation of 'personal law' to this stature came about when the Constitution came into force. This was because Article 25 was included in Part III of the Constitution. Stated differently, 'personal law' of every religious denomination, is protected from invasion and breach, except as provided by and under Article 25.

147. The contention now being dealt with, was raised with the object of demonstrating, that after the enactment of the Muslim Personal Law (Shariat) Application Act, 1937, the questions and subjects covered by the Shariat Act, ceased to be 'personal law', and got transformed into 'statutory law'. It is in this context, that it was submitted, by Ms. Indira Jaising, learned senior counsel and some others, that the tag of 'personal law' got removed from the Muslim 'personal law' – 'Shariat', after the enactment of the Shariat Act, at least for the questions/subjects with reference to which

the legislation was enacted. Insofar as the present controversy is concerned, suffice it to notice, that the enactment included "… dissolution of marriage, including talaq …" amongst the questions/subjects covered by the Shariat Act. And obviously, when the parties are Muslims, 'talaq' includes 'talaq-e-biddat'. The pointed contention must be understood to mean, that after the enactment of the Shariat Act, dissolution of marriage amongst Muslims including 'talaq' (and, 'talaq-e-biddat') had to be considered as regulated through a State legislation.

148. Having become a part of a State enactment, before the Constitution of India came into force, it was the submission of learned senior counsel, that all laws in force immediately before the commencement of the Constitution, would continue to be in force even afterwards. For the instant assertion, reliance was placed on Article 372 of the Constitution. We may only state at this juncture, if the first proposition urged by the learned senior counsel is correct (that dissolution of marriage amongst Muslims including 'talaq' was regulated statutorily after the 1937 Act), then the latter part of the submission advanced, has undoubtedly to be accepted as accurate.

149. We have already enumerated the relevant provisions of the Shariat Act (-for details, refer to Part-4 – Legislation in India, in the field of Muslim 'personal law'). A perusal of Section 2 thereof (extracted in paragraph 23 above) reveals, that on the questions/subjects of 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, "… the rule of decision …", where the parties are Muslims, shall be "… the Muslim Personal Law – Shariat. The submission of the learned counsel representing the petitioners, in support of the instant contention was, that since the "rule of the decision" *inter alia* with reference to 'talaq' (-'talaq-e-biddat'), was thereafter to be regulated in terms of the Shariat Act, what was 'personal law' (-prior to the above enactment), came to be transformed into 'statutory law'. This, according to learned counsel for the petitioners, has a significant bearing, inasmuch as, what was considered as 'personal law' prior to the Shariat Act, became an Act of the State. Having become an Act of the State, it was submitted, that it has to satisfy the requirements of Part III – Fundamental Rights, of the Constitution. This, it was pointed out, is indeed the express mandate of Article 13(1), which provides that laws in force immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III of the Constitution, shall to the extent of such inconsistency, be considered as void.

150. In order to support the issue being canvassed, it was submitted, that no "rule of decision" can be violative of Part III of the Constitution. And "rule of decision" on questions/subjects covered by the Shariat Act, would be deemed to be matters of State determination. Learned senior counsel was however candid, in fairly acknowledging, that 'personal laws' which pertained to disputes between the family and private individuals (where the

State had no role), cannot be subject to a challenge on the ground, that they are violative of the fundamental rights contained in Part III of the Constitution. The simple logic canvassed by learned counsel was, that all questions pertaining to different 'personal laws' amongst Muslims having been converted into "rule of decision" could no longer be treated as private matters between the parties, nor would they be treated as matters of 'personal law". In addition, the logic adopted to canvass the above position was, that if it did not alter the earlier position, what was the purpose of bringing in the legislation (the Shariat Act).

151. On the assumption, that 'personal law' stood transformed into 'statutory law', learned senior counsel for the petitioners assailed the constitutional validity of 'talaq-e-biddat', on the touchstone of Articles 14, 15 and 21 of the Constitution.

152. Mr. Kapil Sibal, learned senior counsel appearing for the AIMPLB, drew our attention to the debates in the Legislative Assembly, whereupon, the Muslim Personal Law (Shariat) Application Act, 1937 was enacted (for details, refer to paragraph 94). Having invited our attention to the above debates and more particularly to the statements of Abdul Qaiyum (representing North-West Frontier Province), it was contended, that the legislation under reference, was not enacted with the object of giving a statutory status to the Muslim 'personal law' – 'Shariat'. It was asserted, that the object was merely to negate the effect of usages and customs. It was pointed out, that even though Muslims were to be regulated under the Muslim 'personal law' – 'Shariat', yet customs and usages to the contrary

were being given an overriding effect. To the extent that customs and usages even of local tribes (-as also of local villages), were being given an overriding position over Muslim 'personal law', in the course of judicial determination, even where the parties were Muslims. It was therefore asserted, that it would be wrong to assume, that the aim and object of the legislators, while enacting the Shariat Act, was to give statutory status to Muslim 'personal law' – 'Shariat'. In other words, it was the contention of learned senior counsel, that the Shariat Act should only be understood as having negated customary practices and usages, which were in conflict with the existing Muslim 'personal law' – 'Shariat'.

153. Mr. V. Giri, learned senior counsel, supported the above contention by placing reliance on Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, on behalf of the AIMPLB. It was asserted, that Section 2 has a *non obstante* clause. It was pointed out, that aforestated *non obstante* clause was merely relatable to customs and usages. A perusal of Section 2, according to learned senior counsel, would leave no room for any doubt, that the customs and usages referred to in Section 2 of the Shariat Act, were only such customs and usages as were in conflict with the Muslim 'personal law' – 'Shariat'. It was accordingly submitted, that the object behind Section 2 of the Shariat Act was to declare the Muslim 'personal law' – 'Shariat', as the "rule of decision", in situations where customs and usages were to the contrary.

154. Learned senior counsel for the respondents desired us to accept their point of view, for yet another reason. It was submitted, that the

Muslim Personal Law (Shariat) Application Act, 1937, did not decide what was, and what was not, Muslim 'personal law' – 'Shariat'. It was therefore pointed out, that it would be a misnomer to consider, that the Shariat Act, legislated in the field of Muslim 'personal law' – 'Shariat' in any manner on Muslim 'personal law' – 'Shariat'. It was submitted, that Muslim 'personal law' – 'Shariat' remained what it was. It was pointed out, that articles of faith as have been expressed on the questions/subjects regulated by the Shariat Act, have not been dealt with in the Act, they remained the same as were understood by the followers of that faith. It was accordingly contended, that the Muslim 'personal law' – 'Shariat', was not introduced/enacted through the Shariat Act. It was also pointed out, that the Shariat Act did not expound or propound the parameters on different questions or subjects, as were applicable to the Sunnis and Shias, and their different schools. It was accordingly submitted, that it would be a misnomer to interpret the provisions of the Shariat Act, as having given statutory status to different questions/subjects, with respect to 'personal law' of Muslims. It was therefore contended, that the Muslim 'personal law' – 'Shariat' was never metamorphosed into a statute. It was therefore contended, that it would be wholly improper to assume that Muslim 'personal law' – 'Shariat' was given statutory effect, through the Muslim Personal Law (Shariat) Application Act, 1937.

155. Based on the above contentions, it was submitted, that the Muslim Personal Law (Shariat) Application Act, 1937 cannot be treated as having conferred statutory status on the Muslim 'personal law' – 'Shariat', and as

such, the same cannot be treated as a statutory enactment, so as to be tested for its validity in the manner contemplated under Article 13(1) of the Constitution.

156. We have given our thoughtful consideration to the submissions advanced at the hands of learned counsel for the rival parties. Having closely examined Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, we are of the view, that the limited purpose of the aforesaid provision was to negate the overriding effect of usages and customs over the Muslim 'personal law' – 'Shariat'. This determination of ours clearly emerges even from the debates in the Legislative Assembly before the enactment of Muslim Personal Law (Shariat) Application Act, 1937. In fact, the statements of H.M. Abdullah (representing West Central Punjab) and Abdul Qaiyum (representing North-West Frontier Province), leave no room for any doubt, that the objective sought to be achieved by the 'Shariat' was *inter alia* to negate the overriding effect on customs and usages over the Muslim 'personal law' – 'Shariat'. The debates reveal that customs and usages by tribals were being given overriding effect by courts while determining issues between Muslims. Even usages and customs of particular villages were given overriding effect over Muslim 'personal law' – 'Shariat'. We are also satisfied to accept the contention of the learned senior counsel, that a perusal of Section 2 and the *non obstante* clause used therein, has that effect. The Shariat Act, in our considered view, neither lays down nor declares the Muslim 'personal law' – 'Shariat'. Not even, on the questions/subjects covered by the legislation. There is no room for any

doubt, that there is substantial divergence of norms regulating Shias and Sunnis. There was further divergence of norms, in their respective schools. The Shariat Act did not crystalise the norms as were to be applicable to Shias and Sunnis, or their respective schools. What was sought to be done through the Shariat Act, in our considered view, was to preserve Muslim 'personal law' – 'Shariat', as it existed from time immemorial. We are of the view, that the Shariat Act recognizes the Muslim 'personal law' as the 'rule of decision' in the same manner as Article 25 recognises the supremacy and enforceability of 'personal law' of all religions. We are accordingly satisfied, that Muslim 'personal law' – 'Shariat' as body of law, was perpetuated by the Shariat Act, and what had become ambiguous (due to inundations through customs and usages), was clarified and crystalised. In contrast, if such a plea had been raised with reference to the Dissolution of Muslim Marriages Act, 1939, which legislatively postulated the grounds of divorce for Muslim women, the submission would have been acceptable. The 1939 Act would form a part of 'statutory law', and not 'personal law'. We are therefore constrained to accept the contention advanced by learned counsel for the respondents, that the proposition canvassed on behalf of the petitioners, namely, that the Muslim Personal Law (Shariat) Application Act, 1937 conferred statutory status, on the questions/subjects governed by the Shariat Act, cannot be accepted. That being the position, Muslim 'personal law' – 'Shariat' cannot be considered as a State enactment.

157. In view of the conclusions recorded in the foregoing paragraph, it is not possible for us to accept, the contention advanced on behalf of the

petitioners, that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937 ceased to be 'personal law' and got transformed into 'statutory law'. Having concluded as above, we must also hold (-which we do), that the practices of Muslim 'personal law' – 'Shariat' cannot be required to satisfy the provisions contained in Part III – Fundamental Rights, of the Constitution, applicable to State actions, in terms of Article 13 of the Constitution.

VI. Does 'talaq-e-biddat', violate the parameters expressed in Article 25 of the Constitution?

158. In our consideration recorded hereinabove, we have held, that the provisions of the Muslim Personal Law (Shariat) Application Act, 1937 did not alter the 'personal law' status of the Muslim 'personal law' – 'Shariat'. We shall now deal with the next step. Since 'talaq-e-biddat' remains a matter of 'personal law', applicable to a Sunni Muslim belonging to the Hanafi school, can it be declared as not enforceable in law, as it violates the parameters expressed in Article 25 (which is also one of the pointed contentions of those supporting the petitioners case)?

159. The above proposition is strenuously opposed by all the learned counsel who appeared on behalf of the respondents, more particularly, learned senior counsel representing the AIMPLB. During the course of the instant opposition, our attention was invited to the judgment rendered by the Bombay High Court in the Narasu Appa Mali case[23]. We may briefly advert thereto. In the said judgment authored by M.C. Chagla, CJ, in paragraph 13 and Gajendragadkar, J. (as he then was) in paragraph 23, recorded the following observations:

"13. That this distinction is recognised by the Legislature is clear if one looks to the language of S. 112, Government of India Act, 1915. That section deals with the law to be administered by the High Courts and it provides that the High Courts shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject. Therefore, a clear distinction is drawn between personal law and custom having the force of law. This is a provision in the Constitution Act, and having this model before them the Constituent Assembly in defining "law" in Art. 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This, in our opinion, is a very clear pointer to the intention of the Constitution-making body to exclude personal law from the purview of Art. 13. There are other pointers as well. Article 17 abolishes untouchability and forbids its practice in any form. Article 25(2)(b) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Now, if Hindu personal law became void by reason of Art. 13 and by reason of any of its provisions contravening any fundamental right, then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravened Arts. 14 and 15. This clearly shows that only in certain respects has the Constitution dealt with personal law. The very presence of Art. 44 in the Constitution recognizes the existence of separate personal laws, and Entry No. 5 in the Concurrent List gives power to the Legislatures to pass laws affecting personal law. The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is made with regard to it and leave it to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform Code. Our attention has been drawn to S. 292, Government of India Act, 1935, which provides that all the law in force in British India shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and S. 293 deals with adaptation of existing penal laws. There is a similar provision in our Constitution in Art. 372(1) and Art. 372(2). It is contended that the laws which are to continue in force under Art. 372(1) include personal laws, and as these laws are to continue in force subject to the other provisions of the Constitution, it is urged that by reason of Art. 13(1) any provision in any personal law which is inconsistent with fundamental rights would be void. But it is clear from the language of Arts. 372(1) and (2) that the expression "laws in force" used in this article does not include personal law because Art. 372(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment, and surely it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community. Although the point urged before us is not by any means free from difficulty, on the whole after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in Art. 13(1).

> 23. .....The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topics falling under personal law in item 5 in the Concurrent List—List III. This item deals with the topics of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law and yet the expression "personal law" is not used in Art. 13. because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Art. 13(1) at all."

160. It seems to us, that the position expressed by the Bombay High Court, as has been extracted above, deserves to be considered as the presently declared position of law, more particularly, because it was conceded on behalf of the learned Attorney General for India, that the judgment rendered by the Bombay High Court in the Narasu Appa Mali case[23], has been upheld by the Court in the Shri Krishna Singh case[29] and the Maharshi Avadhesh[32] cases, wherein, this Court had tested the 'personal laws' on the touchstone of fundamental rights in the cases of Mohd. Ahmed Khan v. Shah Bano Begum[49] (by a 5-Judge Constitution Bench), Daniel Latifi v. Union of India[50] (by a 5-Judge Constitution Bench), and in the John Vallamattom case[9], (by a 3-Judge Division Bench). An extract of the written submissions placed on the record of the case, on

49

50

behalf of the Union of India, has been reproduced verbatim in paragraph 71 above.

161. The fair concession made at the hands of the learned Attorney General, is reason enough for us to accept the proposition, and the legal position expressed by the Bombay High Court, relevant part whereof has been extracted above. Despite our instant determination, it is essential for us to notice a few judgments on the issue, which would put a closure to the matter.

(i) Reference may first of all be made to the Shri Krishna Singh case[29]. The factual position which arose in the above case, may be noticed as under:

'S', a Hindu ascetic, established the Garwaghat Math at Varanasi in 1925. The 'math' (monastery) comprised of Bangla Kuti and other buildings and lands endowed by his devotees. 'S' belonged to the Sant Math Sampradaya, which is a religious denomination of the Dasnami sect, founded by the 'Sankaracharya' (head of a monastery). During this lifetime, 'S' initiated 'A' as his 'chela' (disciple) and gave him full rights of initiation and 'bhesh' (spiritual authority). After the death of 'S', his 'bhesh' and sampradaya (succession of master or disciples) gave 'A' the 'chadar mahanti' (cloak of the chief priest) of the 'math' and made him the 'mahant' (chief priest), according to the wishes of 'S'. 'A' thereafter initiated the plaintiff, a 'sudra' (lowest caste of the four Hindu castes), as his 'chela' according to the custom and usage of the sect and after this death, in accordance with his wishes the 'mahants' and 'sanyasis' (persons leading a life of renunciation)

of the 'bhesh' and 'sampradaya' gave the 'chadar mahanti' to the plaintiff, and installed him as the 'mahant' of the 'math' in the place of 'A', by executing a document to that effect. 'A' during his life time purchased two houses in the city of Varanasi, from out of the income of the 'math'. When the plaintiff became the 'mahant', he brought a suit for ejectment of Respondents 2 to 5 from one of those houses, on the ground that Respondent 2 after taking the house on rent from 'A', had unlawfully sublet the premises to Respondents 3 to 5. The defendant respondents inter alia pleaded, that they were in occupation of the house as 'chelas' of 'A', in their own rights, by virtue of a licence granted to them by 'A', and therefore, on his death his natural son and disciple, the appellant became the owner thereof. One of the questions which needed to be determined in the above controversy, was formulated as under:

> (1) Whether the plaintiff being a 'sudra' could not be ordained to a religious order and become a 'sanyasi' or 'yati' and therefore, installed as 'mahant' according to the tenets of the Sant Mat Sampradaya?

In recording its conclusions with reference to Article 25, in the above disputed issue, this Court held as under:

> "17. It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law i.e. Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except, where such law is altered by any usage or custom or is modified or abrogated by statute."

(ii) Reference is also essential to Madhu Kishwar v. State of Bihar[51], wherein this Court observed a under:

> "It is worthwhile to account some legislation on the subject. The Hindu Succession Act governs and prescribes rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put on a par with a male heir. Next in the line of numbers is the Shariat law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by and large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of Section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the Official Gazette. Section 3(2) further provides that in the Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females. General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundanti cautela. Even under Section 3 of the Indian Succession Act, the State Government is empowered to exempt any race, sect or tripe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region."
>
> In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and Governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist court. apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist

[51]

court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For, in whatever measure be the concern of the court, it compulsively needs to apply, motion, described in judicial parlance as self-restraint. We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on p.36 (para 46) of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 45 and 21 of the Constitution and each case must be examined when full facts are placed before the court.

With regard to the statutory provisions of the Act, he has proposed to the reading down of Sections 7 and 8 in order to preserve their constitutionality. This approach is available from p.36 (paras 47, 48) onwards of his judgment. The words "male descendant wherever occurring , would include "female descendants". It is also proposed that even though the provisions of the Hindu Succession Act, 1925 in terms would not apply to the Schedule Tribes, their general principles composing of justice, equity and fair play would apply to them. On this basis it has been proposed to take the view that the Scheduled Tribe women would succeed to the estate of paternal parent, brother or husband as heirs by intestate succession and inherit the property in equal shares with the male heir with absolute rights as per the principles of the Hindu Succession Act as also the Indian Succession Act. However, much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the court's entering the thicket, it would follow a beeline for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the line with the systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are, indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, should normally be avoided. We are thus constrained to take this view. even though it may appear to be conservative for adopting a cautious approach, and the one proposed by our learned brother is, regretfully not acceptable to us."

(iii) In the Ahmedabad Women Action Group case[30], this Court recorded the questions arising for consideration in pargraphs 1 to 3, which are reproduced below:

"All these Writ Petitions are filed as Public Interest Litigation. In W.P. (C) No. 494 of 1996, the reliefs prayed for are as follows:

(a) to declare Muslim Personal Law which allows polygamy as void as offending Articles 14 and 15 of the Constitution;

(b) to declare Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, as void, offending Articles 13, 14 and 15 of the Constitution;
(c) to declare that the mere fact that a Muslim husband takes more than one wife is an act of cruelty within the meaning of Clause VIII (f) of Section 2 of Dissolution of Muslim Marriages Act, 1939;
(d) to declare that Muslim Women (Protection of Rights on Divorce) Act, 1986 is void as infringing Articles 14 and 15;
(e) to further declare that the provisions of Sunni and Shia laws of inheritance which discriminate against females in their share as compared to the share of males of the same status, void as discriminating against females only on the ground of sex.
2. In writ Petition (C) No. 496 of 1996, the reliefs prayed for are the following:-
(a) to declare Sections 2(2), 5(ii) and (iii), 6 and Explanation to Section 30 of Hindu Succession Act, 1956, as void offending Articles 14 and 15 read with Article 13 of the Constitution of India;
(b) to declare Section (2) of Hindu Marriage Act, 1955, as void offending Articles 14 and 15 of the Constitution of India;
(c) to declare Sections 3 (2), 6 and 9 of the Hindu Minority and Guardianship Act read with Section 6 of Guardians and Wards Act void;
(d) to declare the unfettered and absolute discretion allowed to a Hindu spouse to make testamentary disposition without providing for an ascertained share of his or her spouse and dependant, void.
3. In writ Petition (C) No. 721 of 1996, the reliefs prayed for are the following :
(a) to declare Sections 10 and 34 of Indian Divorce Act void and also to declare Sections 43 to 46 of the Indian Succession Act void."

The position expressed in respect of the above questions, after noticing the legal position propounded by this Court in the Madhu Kishwar case[39], was recorded in paragraph 4 as under:

"4. At the outset. we would like to state that these Writ Petitions do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involve issues of State policies with which the Court will not ordinarily have any concern. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court held that the remedy lies somewhere else and not by knocking at the doors of the courts."

(iv) Reference may also be made to the Sardar Syedna Taher Saifuddin Saheb case[28], wherein, this Court held as under:

"The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt; Mahant Jagannath Ramanuj Das v. The State of Orissa; Sri Ventatamana Devaru v. The State of Mysore; Durgah Committee, Ajmer v. Syed Hussain Ali and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion".

(v) It is also essential to note the N. Adithyan case[33], wherein this Court observed as under:

"9. This Court, in Seshammal v. State of T.N., (1972) 2 SCC 11 again reviewed the principles underlying the protection engrafted in Articles 25 and 26 in the context of a challenge made to abolition of hereditary right of Archaka, and reiterated the position as hereunder: (SCC p.21, paras 13-14)

"13. This Court in Sardar Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853 has summarized the position in law as follows (pp.531 and 532):

'The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, Mahant Jagannath Ramanuj Das v. State of Orissa, Venkataramana Devaru v. State of Mysore, Durgah Committee, Ajmer v. Syed Hussain Ali and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.'

14. Bearing these principles in mind, we have to approach the controversy in the present case."

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward

acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the Sate or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down."

(vi) Relevant to the issue is also the judgment in the Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi case[34], wherein it was held:

"28.....All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. ....."

(vii) The position seems to be clear, that the judicial interference with 'personal law' can be rendered only in such manner as has been provided for in Article 25 of the Constitution. It is not possible to breach the

parameters of matters of faith, as they have the protective shield of Article 25 (except as provided in the provision itself).

162. To be fair to the learned Attorney General, it is necessary to record, that he contested the determination recorded by the Bombay High Court in the Narasu Appa Mali case[23], and the judgments rendered by this Court affirming the same, by assuming the stance that the position needed to be revisited (-for details, refer to paragraph 71 above). There are two reasons for us not to entertain this plea. Firstly, even according to the learned Attorney General, the proposition has been accepted by this Court in at least two judgments rendered by Constitution Benches (-of 5-Judge each), and as such, we (-as a 5-Judge Bench) are clearly disqualified to revisit the proposition. And secondly, a challenge to 'personal law' is also competent under Article 25, if the provisions of Part III – Fundamental Rights, of the Constitution, are violated, which we shall in any case consider (hereinafter) while examining the submissions advanced on behalf of the petitioners. Likewise, we shall not dwell upon the submissions advanced in rebuttal by Mr. Kapil Sibal, Senior Advocate.

163. So far as the challenge to the practice of 'talaq-e-biddat', with reference to the constitutional mandate contained in Article 25 is concerned, we have also delved into the submissions canvassed, during the course of hearing. It would be pertinent to mention, that the constitutional protection to tenets of 'personal law' cannot be interfered with, as long as the same do not infringe "public order, morality and health", and/or "the

provisions of Part III of the Constitution". This is the clear position expressed in Article 25(1).

164. We will now venture to examine the instant challenge with reference to the practice of 'talaq-e-biddat'. It is not possible for us to accept, that the practice of 'talaq-e-biddat' can be set aside and held as unsustainable in law for the three defined purposes expressed in Article 25(1), namely, for reasons of it being contrary to public order, morality and health. Viewed from any angle, it is impossible to conclude, that the practice impinges on 'public order', or for that matter on 'health'. We are also satisfied, that it has no nexus to 'morality', as well. Therefore, in our considered view, the practice of 'talaq-e-biddat' cannot be struck down on the three non-permissible/prohibited areas which Article 25 forbids even in respect of 'personal law'. It is therefore not possible for us to uphold the contention raised on behalf of the petitioners on this account.

165. The only remaining ground on which the challenge to 'talaq-e-biddat' under Article 25 could be sustainable is, if 'talaq-e-biddat' can be seen as violative of the provisions of Part III of the Constitution. The challenge raised at the behest of the petitioners, as has been extensively noticed during the course of recording the submissions advanced on behalf of the petitioners, was limited to the practice being allegedly violative of Articles 14, 15 and 21. We shall now examine the veracity of the instant contention. The fundamental rights enshrined in Articles 14, 15 and 21 are as against State actions. A challenge under these provisions (Articles 14, 15 and 21) can be invoked only against the State. It is essential to keep in

mind, that Article 14 forbids the State from acting arbitrarily. Article 14 requires the State to ensure equality before the law and equal protection of the laws, within the territory of India. Likewise, Article 15 prohibits the State from taking discriminatory action on the grounds of religion, race, caste, sex or place of birth, or any of them. The mandate of Article 15 requires, the State to treat everyone equally. Even Article 21 is a protection from State action, inasmuch as, it prohibits the State from depriving anyone of the rights enuring to them, as a matter of life and liberty (-except, by procedure established by law). We have already rejected the contention advanced on behalf of the petitioners, that the provisions of the Muslim Personal Law (Shariat) Application Act, 1937, did not alter the 'personal law' status of 'Shariat'. We have not accepted, that after the enactment of the Shariat Act, the questions/subjects covered by the said legislation ceased to be 'personal law', and got transformed into 'statutory law'. Since we have held that Muslim 'personal law' – 'Shariat' is not based on any State Legislative action, we have therefore held, that Muslim 'personal law' – 'Shariat', cannot be tested on the touchstone of being a State action. Muslim 'personal law' – 'Shariat', in our view, is a matter of 'personal law' of Muslims, to be traced from four sources, namely, the Quran, the 'hadith', the 'ijma' and the 'qiyas'. None of these can be attributed to any State action. We have also already concluded, that 'talaq-e-biddat' is a practice amongst Sunni Muslims of the Hanafi school. A practice which is a component of the 'faith' of those belonging to that school. 'Personal law', being a matter of religious faith, and not being State action, there is no

question of its being violative of the provisions of the Constitution of India, more particularly, the provisions relied upon by the petitioners, to assail the practice of 'talaq-e-biddat', namely, Articles 14, 15 and 21 of the Constitution.

VII. Constitutional morality and 'talaq-e-biddat':

166. One of the issues canvassed on behalf of the petitioners, which was spearheaded by the learned Attorney General for India, was on the ground, that the constitutional validity of the practice of 'talaq-e-biddat' – triple talaq, was in breach of constitutional morality. The question raised before us was, whether under a secular Constitution, women could be discriminated against, only on account of their religious identity? It was asserted, that women belonging to any individual religious denomination, cannot suffer a significantly inferior status in society, as compared to women professing some other religion. It was pointed out, that Muslim women, were placed in a position far more vulnerable than their counterparts, who professed other faiths. It was submitted, that Hindu, Christian, Zoroastrian, Buddhist, Sikh, Jain women, were not subjected to ouster from their matrimonial relationship, without any reasonable cause, certainly not, at the whim of the husband; certainly not, without due consideration of the views expressed by the wife, who had the right to repel a husband's claim for divorce. It was asserted, that 'talaq-e-biddat', vests an unqualified right with the husband, to terminate the matrimonial alliance forthwith, without any reason or justification. It was submitted, that the process of 'talaq-e-biddat' is extra-judicial, and as such, there are

no remedial measures in place, for raising a challenge, to the devastating consequences on the concerned wife. It was pointed out, that the fundamental right to equality, guaranteed to every citizen under Article 14 of the Constitution, must be read to include, equality amongst women of different religious denominations. It was submitted, that gender equality, gender equity and gender justice, were values intrinsically intertwined in the guarantee assured to all (-citizens, and foreigners) under Article 14. It was asserted, that the conferment of social status based on patriarchal values, so as to place womenfolk at the mercy of men, cannot be sustained within the framework of the fundamental rights, provided for under Part III of the Constitution. It was contended, that besides equality, Articles 14 and 15 prohibit gender discrimination. It was pointed out, that discrimination on the ground of sex, was expressly prohibited under Article 15. It was contended, that the right of a woman to human dignity, social esteem and self-worth were vital facets, of the right to life under Article 21. It was submitted, that gender justice was a constitutional goal, contemplated by the framers of the Constitution. Referring to Article 51A(e) of the Constitution, it was pointed out, that one of the declared fundamental duties contained in Part IV of the Constitution, was to ensure that women were not subjected to derogatory practices, which impacted their dignity. It was pointed out, that gender equality and dignity of women, were non-negotiable. It was highlighted, that women constituted half of the nation's population, and inequality against women, should necessarily entail an inference of wholesale gender discrimination.

167. In order to support the submissions advanced on behalf of the petitioners, as have been noticed hereinabove, reliance was placed on Sarla Mudgal v. Union of India[52]. Our pointed attention was drawn to the following observations recorded therein:

> "44. Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before Qazi are as much matter of faith and conscience as the worship itself. When a Hindu becomes a convert by reciting Kalma or a Mulsim becomes Hindu by reciting certain Mantras it is a matter of belief and conscience. Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of faith. Reason and logic have little role to play. The sentiments and emotions have to be cooled and tempered by sincere effort. But today there is no Raja Ram Mohan Rai who single handedly brought about that atmosphere which paved the way for Sati abolition. Nor is a statesman of the stature of Pt. Nehru who could pilot through, successfully, the Hindu Succession Act and Hindu Marriage Act revolutionising the customary Hindu Law. The desirability of uniform Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."

Reliance was also placed on the Valsamma Paul case[20], wherefrom learned counsel emphasized on the observations recorded in the following paragraphs:

> "6. The rival contentions give rise to the question of harmonising the conflict between the personal law and the constitutional animation behind Articles 16(4) and 15(4) of the Constitution. The concepts of "equality before law" and "equal protection of the laws" guaranteed by Article 14 and its species Articles 15(4) and 16(4) aim at establishing social and economic justice in political democracy to all sections of society, to eliminate inequalities in status and to provide facilities and opportunities not only amongst individuals but also amongst groups of people belonging to Scheduled Castes (for short 'Dalits'), Scheduled Tribes (for short 'Tribes') and Other Backward Classes of citizens (for short 'OBCs') to secure adequate means of livelihood and to promote with special care the economic and educational interests of the weaker sections of the people, in particular, Dalits and Tribes so as to protect

52

them from social injustice and all forms of exploitation. By 42nd Constitution (Amendment) Act, secularism and socialism were brought in the Preamble of the Constitution to realise that in a democracy unless all sections of society are provided facilities and opportunities to participate in political democracy irrespective of caste, religion and sex, political democracy would not last long. Dr Ambedkar in his closing speech on the draft Constitution stated on 25-11-1949 that "what we must do is not to be attained with mere political democracy; we must make our political democracy a social democracy as well. Political democracy cannot last unless there lies on the base of it a social democracy".

Social democracy means "a way of life which recognises liberty, equality and fraternity as principles of life". They are not separate items in a trinity but they form union of trinity. To diversity one from the other is to defeat the very purpose of democracy. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. Articles 15(4) and 16(4), therefore, intend to remove social and economic inequality to make equal opportunities available in reality. Social and economic justice is a right enshrined for the protection of society. The right to social and economic justice envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles of the Constitution, in particular, Articles 14, 15, 16, 21, 38, 39 and 46 of the Constitution, is to make the quality of the life of the poor, disadvantaged and disabled citizens of society, meaningful. Equal protection in Article 14 requires affirmative action for those unequals by providing facilities and opportunities. While Article 15(1) prohibits discrimination on grounds of religion, race, caste, sex, place of birth, Article 15(4) enjoins upon the State, despite the above injunction and the one provided in Article 29(2), to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Dalits and Tribes. Equally, while Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, Article 16(4) enjoins upon the State to make provision for reservation for these sections which in the opinion of the State are not adequately represented in the services under the State. Article 335 of the Constitution mandates that claims of the members of the Dalits and Tribes shall be taken into consideration in making appointments to services and posts in connection with affairs of the Union or of a State consistent with the maintenance of efficiency of administration. Therefore, this Court interpreted that equal protection guaranteed by Articles 14, 15(1) and 16(1) is required to operate consistently with Articles 15(4), 16(4), 38, 39, 46 and 335 of the Constitution, vide per majority in Indra Sawhney v.Union of India [1992 Supp (3) SCC 217] known as Mandal case [1992 Supp (3) SCC 217]. In other words, equal protection requires affirmative action for those unequals handicapped due to historical facts of untouchability practised for millennium which

is abolished by Article 17; for tribes living away from our national mainstream due to social and educational backwardness of OBCs.

xxx xxx xxx

16. The Constitution seeks to establish a secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: S.R. Bommai v. Union of India (1994) 3 SCC 1) and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult. In State of Karnataka v. Appa Balu Ingale [1995 Supp (4) SCC 469] this Court has held in para 34 that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. A Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law. In that case, the need for protection of right to take water, under the Civil Rights Protection Act, and the necessity to uphold the constitutional mandate of abolishing untouchability and its practice in any form was emphasised.

xxx xxx xxx

21. The Constitution through its Preamble, Fundamental Rights and Directive Principles created a secular State based on the principle of equality and non-discrimination, striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr K.M. Munshi contended on the floor of the Constituent Assembly that “we want to divorce religion from personal

law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation" [Vide: Constituent Assembly Debates, Vol. VII, pp. 356-58].

xxx xxx xxx

26. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth — cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the UNO on 18-12-1979 and the Government of India had ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity."

Reference was also made to the decision of this Court in the John Vallamattom case[9], wherefrom learned counsel for the petitioner highlighted the following observations:

"42. Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion. Article 25 of the Constitution of India will, therefore, not have any application in the instant case.

xxx xxx xxx

44. Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Sarla Mudgal v. Union of India (1995) 3 SCC 635 it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

Last of all, our attention was drawn to the Masilamani Mudaliar case[16], wherefrom reliance was placed on the following:

"15. It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S.R. Bommai v. Union of India (1994) 3 SCC 1 this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. 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 Article 13 if they violate fundamental rights. Right to equality is a fundamental right. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it."

168. We have given our thoughtful consideration to the submissions noticed in the foregoing paragraphs. We are of the view, that in the determination of the matter canvassed, the true purport and substance of Articles 25 and 44 have to be understood. We shall now endeavour to deal with the above provisions.

169. During the course of hearing our attention has been drawn to the Constituent Assembly debates, with reference to Article 25 (-draft Article 19). The debates reveal that the members of the Constituent Assembly understood a clear distinction between 'personal law' and the 'civil code'. 'Personal law' was understood as based on the practices of members of communities. It was to be limited to the community itself, and would not affect members of other communities. The 'civil code' on the other hand, had an unlimited reach. The 'civil code' was understood to apply to every citizen of the land, to whatever community he may belong. So far as 'personal law' is concerned, it was recognized as arising out of, practices followed by members of particular communities, over the ages. The only member of the Assembly, who made a presentation during the debates (-Mohammed Ismail Sahib) stated, "This practice of following 'personal law' has been there amongst the people for ages. What we want under this amendment is that that practice should not be disturbed now and I want only the continuance of a practice that has been going on among the people for ages past ..... Under this amendment what I want this House to accept is that when we speak of the State doing anything with reference to the secular aspect of religion, the question of personal law shall not be brought

in and it shall not be affected. ….. The question of professions, practicing and propagating one's faith is a right which the human being had from the very beginning of time and that has been recognized as an inalienable right of every human being, not only in this land, but the world over and I think that nothing should be done to affect that right of man as a human being. That part of the article as it stands is properly worded and it should stand as it is." It is apparent, that the position expressed in the Sarla Mudgal case[40], clearly reiterates the above exposition during the Constituent Assembly debates. The response to the above statement (-of Mohammed Ismail Sahib), was delivered by Laksnmikanta Mitra, who observed, "This article 19 of the Draft Constitution confers on all persons the right to profess, practise and propagate any religion they like but this right has been circumscribed by certain conditions which the State would be free to impose in the interests of public morality, public order and public health and also in so far as the right conferred here does not conflict in any way with the other provisions elaborated under this part of the Constitution. Some of my Friends argued that this right ought not to be permitted in this Draft Constitution for the simple reason that we have declared time and again that this is going to be a secular State and as such practice of religion should not be permitted as a fundamental right. It has been further argued that by conferring the additional right to propagate a particular faith or religion the door is opened for all manner of troubles and conflicts which would eventually paralyse the normal life of the State. We would say at once that this conception of a secular State is wholly wrong. By secular State, as

we understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronise or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. ..... At the same time we must be very careful to see that this land of ours we do not deny to anybody the right not only to profess or practise but also to propagate any particular religion. .....Therefore I feel that the Constitution has rightly provided for this not only as a right but also as a fundamental right. In the exercise of this fundamental right every community inhabiting this State professing any religion will have equal right and equal facilities to do whatever it likes in accordance with its religion provided it does not clash with the conditions laid down here."

170. The debates in the Constituent Assembly with reference to Article 25, leave no room for any doubt, that the framers of the Constitution were firm in making 'personal law' a part of the fundamental rights. With the liberty to the State to provide for social reform. It is also necessary to notice at this stage, that the judgment in the Valsamma Paul case[20], cannot be the basis for consideration in the present controversy, because it did not deal with issues arising out of 'personal law' which enjoy a constitutional

protection. What also needs to be recorded is, that the judgment in the John Vallamattom case[9], expresses that the matters of the nature, need to be dealt with through legislation, and as such, the view expressed in the above judgment cannot be of any assistance to further the petitioners' cause.

171. The debates of the Constituent Assembly with reference to Article 44, are also relevant. We may refer to draft Article 25 (which came to be enacted as Article 44). The Article requires the State to endeavour to secure a uniform 'civil code'. A member who debated the provision during the deliberations of the Constituent Assembly, canvassed that groups and sections of religious denominations be given the right to adhere to their own personal law (-Mohamed Ismail Sahib), as it was felt, that interference in 'personal law' would amount to interfering with "…the way of life and religion of the people…". It was also argued (-by Naziruddin Ahmad), that what was extended as a protection through Article 25 (-draft Article 19), namely, "…all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion…", was sought to be taken away via Article 44. The position highlighted, was that all religious practices should remain, beyond the purview of law. One member of the Constituent Assembly (-Mahbood Ali Baig Sahib Bahadur), said that the uniform civil code, in the Article, should not include 'personal law'. He refuted the suggestions of M.Ananthasayanam Ayyangar by asserting, that practices of Muslims, in vogue for 1350 years could not be altered. Another member – Pocker Sahib Bahadur, supported the suggestion of

Mohamed Ismail Sahib. The question he posed was "…whether by the freedom we have obtained for this country, are we going to give up the freedom of conscience and that freedom of religion practices and that freedom of following ones own personal law…" But all these submissions were rejected. All this leads to the clear understanding, that the Constitution requires the State to provide for a uniform civil code, to remedy and assuage, the maladies expressed in the submissions advanced by the learned Attorney General.

172. There can be no doubt, that the 'personal law' has been elevated to the stature of a fundamental right in the Constitution. And as such, 'personal law' is enforceable as it is. All constitutional Courts, are the constitutional guardians of all the Fundamental Rights (– included in Part III of the Constitution). It is therefore the constitutional duty of all Courts to protect, preserve and enforce, all fundamental rights, and not the other way around. It is judicially unthinkable for a Court, to accept any prayer to declare as unconstitutional (-or unacceptable in law), for any reason or logic, what the Constitution declares as a fundamental right. Because, in accepting the prayer(s), this Court would be denying the rights expressly protected under Article 25.

173. It is not possible to adopt concepts emerging from the American Constitution, over the provisions of the Indian Constitution. It is therefore not possible to refer to substantive due process, as the basis of the decision of the present controversy, when there are express provisions provided for, on the matter in hand, under the Indian Constitution. It is also not

possible, to read into the Constitution, what the Constituent Assembly consciously and thoughtfully excluded (-or, to overlook provisions expressly incorporated). One cannot make a reference to decisions of the U.S. Supreme Court, though there would be no difficulty of their being taken into consideration for persuasive effect, in support of a cause, in consonance with the provisions of the Constitution of India and the laws. In fact, this Court is bound by the judgments of the Supreme Court of India, which in terms of Article 141 of the Constitution, are binding declarations of law.

174. The prayer made to this Court by those representing the petitioners' cause, on the ground that the practice of 'talaq-e-biddat' is violative of the concept of constitutional morality cannot be acceded to, and is accordingly declined.

VIII. Reforms to 'personal law' in India:

175. In our consideration, it is also necessary to briefly detail legislation in India with regard to matters strictly pertaining to 'personal law', and particularly to the issues of marriage and divorce, i.e., matters strictly within the confines of 'personal law'.

176(i). Reference in this context may first of all be made to the Divorce Act, 1869. The Statement of objects and reasons of the Bill, delineates the purpose that was sought to be achieved through the enactment. Relevant part thereof, is reproduced hereunder:-

> "Statement of objects and reasons
> The object of Indian Divorce Bill is to place the Matrimonial Law administered by the High Courts, in the exercise of their original

jurisdiction, on the same footing as the Matrimonial Law administered by the court for Divorce and Matrimonial Causes in England.

The 9th Section of the Act of Parliament for establishing High Courts of Judicature in India (24 and 25 Vic., C.104) provides that the High Courts shall exercise such Matrimonial Jurisdiction as Her Majesty by Letters Patent shall grant and direct. Under the authority thus conferred by Parliament, the 35th Section of the Letters Patent, constituting the High Courts of Judicature, provides as follows:—

"And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters matrimonial between our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has Ecclesiastical Jurisdiction. Provided always that nothing herein contained shall be held to interfere with the exercise of any Jurisdiction in matters matrimonial by any court not established by Royal Charter within the said Presidency lawfully possessed thereof."

In the Despatch of the Secretary of State transmitting the Letters Patent the 33rd and 34th paragraphs are to the following effect:—

"33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to matters matrimonial in general as they now are under the Supreme Court, and this they believe to be effected by Clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of the Act 20 and 21 Vic., C. 85, and in regard to which further provisions were made by 22 and 23 Vic., C.61, and 23 and 24 Vic., C.144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them, the Crown clearly could not so import, such, for instance, as those which prescribe the period of re-marriage, and those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation, and I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Court, the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The objects of the provision at the end of Clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within Divisions of the Presidency, not established by Royal Charter, any jurisdiction which they might have in matters matrimonial, as for instance in a suit for

alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere."

In addition to the Act of Parliament mentioned by the Secretary of State as regulating the jurisdiction of the England Divorce Court the Statute 25 and 26 Vic., Ch.81 has been passed in the year just expired (1862). The object of this statute is to render perpetual 23 and 24 Vic., Ch. 144 the duration of which had been originally limited to two years.

The draft of a Bill has been prepared to give effect to the Secretary of State's instructions, but some variations from the English Statutes in respect of Procedure have been adopted.

With a view to uniformity in practice in the several branches of jurisdiction, the Bill provides that the Procedure of the Code of Civil Procedure shall be followed, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial Causes in England, and it omits the provision in 20 and 21 Vic., Ch. 85 respecting the occasional trial of questions of fact by juries."

(ii) The Divorce Act, 1869 provided for the grounds for dissolution of marriage in Section 10 thereof. The same is extracted hereunder:-

"10.Grounds for dissolution of marriage.-(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent—

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.
(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."

(iii) In addition to the above, consequent upon a further amendment, Section 10A was added thereto, to provide for dissolution of marriage by consent. What is sought to be highlighted is, that it required legislation to provide for divorce amongst the followers of the Christian faith in India. The instant legislation provided for grounds on which Christian husbands and wives could obtain divorce.

177 (i). Parsis in India, are the followers of the Iranian prophet Zoroaster. The Parsis, are stated to have migrated from Iran to India, to avoid religious persecution by the Muslims. Parsis in India were governed in the matter of marriage and divorce by their 'personal law'. For the first time in 1865, the Parsi Marriage and Divorce Act was passed. The same was substituted by the Parsi Marriage and Divorce Act, 1936 after substantial amendments to the original enactment. The statement of objects and reasons of the Parsi Marriage and Divorce Act, 1936 clearly demonstrates the above position. The same is reproduced below:-

"Statement of objects and reasons
The Parsi Marriage and Divorce Act at present in force was passed in 1865. Since then circumstances have greatly altered and to some extent there has also been a change in the sentiments and views of the Parsi community. Hence a necessity for some change in the law has been felt for years. The Parsi Central Association took up the question in 1923 and appointed a Sub-Committee to suggest amendments. The Sub-Committee submitted a report which the Association got printed and circulated for opinion to most other Parsi Associations as well as prominent members of the community both in Bombay and outside. Many suggestions were made, and among them by the Trustees of the

Bombay Parsi Panchayat who had the advantage of seeing the suggestions of others. The Central Association adopted the suggestions of the Panchayat Trustees and reprinted the whole and again circulated it. Fresh suggestions were thereupon made in the press, on the platform, by associations and individuals. These were fully considered by the Trustees as well as the Association and the present draft is the result. On the whole it represents, the views of the great majority of the community, and has been approved by leading Parsis like Sir Dinshaw E. Wacha and the late Rt. Hon. Sir Dinshaw F. Mulla."

(ii) Chapter II of the aforesaid enactment, deals with the subject of marriages between Parsis. Section 3 provides for requisites of a valid Parsi marriage. Section 6 denotes a requirement of a certificate of marriage. Chapter IV provides for a variety of matrimonial suits, wherein Section 30 deals with suits for nullity. Section 31 deals with suits for dissolution of marriage. The grounds for divorce are set out in Section 32, which is reproduced herein below:-

"32.Grounds for divorce.- Any married person may sue for divorce on any one or more of the following grounds, namely:—
(a) that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it;
(b) that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit:
Provided that divorce shall not be granted on this ground, unless the plaintiff; (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage;
(bb) that the defendant has been incurable of the unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonable be expected to live with the defendant.
Explanation.- In this clause,-
(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
(b) the expression "psychopathic disorder" means a persistent disorder of disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment;

(c) that the defendant was at the time of marriage pregnant by some person other than the plaintiff:
Provided that divorce shall not be granted on this ground, unless: (1) the plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) marital intercourse has not taken place after the plaintiff came to know of the fact;
(d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence:
Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact;
(dd) that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the plaintiff to live with the defendant:
Provided that in every suit for divorce on this ground it shall be in the discretion of the Court whether it should grant a decree for divorce or for judicial separation only;
(e) that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution:
Provided that divorce shall not be granted on this ground if the suit has been filed more than two years (i) after the infliction of the grievous hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution;
(f) that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860):
Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period;
(g) that the defendant has deserted the plaintiff for at least two years;
(h) that an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for one year or more since such decree or order;
(j) that the defendant has ceased to be a Parsi by conversion to another religion;
Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact.

(iii) In addition to the above, Section 32B introduced by way of an amendment, provides for divorce by mutual consent, and Section 34

provides for suits for judicial separation, and Section 36 provides for suits for restitution of conjugal rights.

178(i). The Special Marriage Act, 1872 provided for inter-faith marriages. The same came to be replaced by the Special Marriage Act, 1954. The statement of objects and reasons thereof is reproduced hereunder:-

> "Statement of objects and reasons
> This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnization of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers. For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnizing and registering marriages between citizens of India in a foreign country.
> 2. Provision is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and thereby avail themselves of these provisions.
> 3. The bill is drafted generally on the lines of the existing Special Marriage Act of 1872 and the notes on clauses attached hereto explain some of the changes made in the Bill in greater detail."

(ii) The subject of solemnization of special marriages, is provided for in Section 4 of the above enactment. Section 4 lays down the conditions related to solemnization of special marriages, which requires a notice of the parties intending to get married, the procedure and conditions whereof are contained in Section 5. The provisions of the enactment require, entering a copy of the notice in the 'marriage notice book', and the publication thereof by affixation of the copy thereof to some conspicuous place in the office of marriage officer. Objections to the contemplated marriage can be preferred under Section 7. The manner in which the objections have to be dealt with is provided for in Sections 8, 9 and 10. Consequent upon the completion of

the formalities postulated in Chapter II of the enactment, parties are permitted to solemnize their marriage, for which the marriage officer shall issue a certificate of marriage, that would be considered as conclusive evidence of the fact that parties are married under the provisions of the Special Marriages Act, 1954.

(iii) Parties who have entered into a matrimonial alliance by way of ceremonies of marriage conducted under different faiths, and have been living together, are also permitted to register their marriage under the Special Marriage Act, 1954, under Section 15 thereof.

(iv) Chapter IV of the enactment deals with consequences of marriage under the Act. Chapter V provides the remedies of restitution of conjugal rights and judicial separation. Chapter VI defines void and voidable marriages, and provides for nullity of marriage and divorce. Section 27 included in Chapter VI incorporates the grounds for divorce, which are extracted hereunder:-

> "27.Divorce.-(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent—
> (a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
> (b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
> (c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860);
> (d) has since the solemnization of the marriage treated the petitioner with cruelty; or
> (e)has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
>
> Explanation.—In this clause,—

(a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
(b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment; or
(f) has been suffering from venereal disease in a communicable form; or
(g)has been suffering from leprosy, the disease not having been contacted from the petitioner; or
(h)has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive;
Explanation.—In this sub-section, the expression “desertion” means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly;
(1A)A wife may also present a petition for divorce to the district court on the ground,—
(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;
(ii)that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898) (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.
(2) Subject to the provisions of this Act and to the rules made thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970 (29 of 1970), may present a petition for divorce to the district court on the ground—
(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
(ii)that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.”

In addition to the above, Section 28 provides for divorce by mutual consent.

179. The Foreign Marriage Act, 1969 followed the Special Marriage Act, 1954. It was enacted on account of uncertainty of law related to foreign marriages. The statement of objects and reasons of the Foreign Marriage Act, 1969 expresses the holistic view, which led to the passing of the legislation. The same is reproduced below:-

> "Statement of objects and reasons
> This Bill seeks to implement the Twenty-third Report of the Law Commission on the law relating to foreign marriages. There is, at present considerable uncertainty as to the law on the subject, as the existing legislation touches only the fringes of the subject and the matter is governed by principles of private international law which are by no means well-settled, and which cannot readily be applied to a country such as ours in which different marriage laws apply to different communities. The Special Marriage Act, 1954 sought to remove the uncertainty to some extent by providing that marriages abroad between citizens of India who are domiciled in India might be solemnized under it. In the course of the debates in relation to that Act in Parliament, it was urged that a provision should be made for marriages abroad where one of the parties alone is an Indian citizen. In this context, an assurance was given that Government would, after careful consideration, introduce comprehensive legislation on the subject of foreign marriages. The present Bill is the outcome of that assurance.
> (2) The Bill is modelled on the Special Marriage Act, 1954, and the existing English and Australian Legislation on the subject of foreign marriages, subject to certain important modifications rendered necessary by the peculiar conditions obtaining in our country.
> The following are the salient features of the Bill:—
> (i) It provides for an enabling form of marriage more or less on the same lines as the Special Marriage Act, 1954 which can be availed of outside India where one of the parties to the marriage is an Indian citizen; the form of marriage thus provided being not in supersession of, but only in addition to or as an alternative to, any other form that might be permissible to the parties.
> (ii) It seeks to lay down certain rules in respect of capacity of parties and conditions of validity of marriage and also provides for registration of marriage on lines similar to those in the Special Marriage Act, 1954.
>
> (iii) The provisions of the Special Marriage Act, 1954, in regard to matrimonial reliefs are sought to be made applicable, with suitable modifications, not only to marriages solemnized or registered under the

proposed legislation, but also to other marriages solemnized abroad to which a citizen of India is a party."

(ii) Chapter II of the Foreign Marriage Act, 1969 provides for the solemnization of the foreign marriages. Section 4 contained therein expresses the conditions relating to solemnization of foreign marriages. The notice of an intended marriage is provided for in Section 5. The incorporation of the said marriage in the 'marriage notice book' is contained in Section 6. The publication of such notice is provided for in Section 7. Objections to the proposed marriage can be filed under Section 8. Consequent upon the fulfillment of the conditions and determination by the marriage officer, the place and form of solemnization of marriage are detailed in Section 13, whereupon, the marriage officer is required to enter a certificate of marriage, which is accepted as evidence of the fact that the marriage between the parties had been solemnized. Chapter III mandates the registration of foreign marriages, solemnized under other laws. Section 17 provides for necessary requirements therefor.

(v) It would be relevant to mention, that matrimonial reliefs as are provided for under the Special Marriage Act, 1954 (- which are contained in Chapters IV, V and VI thereof) have been adopted for marriages registered under the Foreign Marriage Act, 1969 (-see paragraph 179 above).

180. Muslims are followers of Islam. Muslims consider the Quran their holy book. For their personal relations, they follow the Muslim 'personal law' – 'Shariat'. The Muslim Personal Law (Shariat) Application Act, 1937, as already noticed above provided, "the rule of decision" in matters pertaining, inter alia, to marriage, dissolution of marriage including talaq,

ila, zihar, lian, khula and mubaraat would be the Muslim 'personal law' – 'Shariat', and not, any custom or usage to the contrary. It is therefore, that by a statutory intervention, customs and usages in conflict with Muslim 'personal law', were done away with, in connection with 'personal law' matters, in relation to Muslims. The Dissolution of Muslim Marriages Act, 1939 provided, grounds for dissolution of marriage to Muslim women, under Section 2 of the above enactment. Details with reference to 1937 and 1939 legislations, have already been narrated, in Part IV – Legislation in India, in the field of Muslim 'personal law'. Reference may, therefore, be made to Part IV above.

181 (i). The law of marriage and divorce amongst Hindus, has had a chequered history. A marriage, according to Hindu law, is a holy sacrament, and not a contract (as is the case of Muslims). Originally there were eight forms of Hindu marriages, four of which were considered regular – and the rest irregular. The choice of marriage, was limited only to one's own religion and caste. Polygamy was permitted amongst Hindus, but not polyandry. Widow marriage was also not permitted. Legislation in respect of Hindu marriages commenced in 1829 when Sati was abolished by law. In 1856, Hindu Widows' Remarriage Act, legalized the marriage of Hindu widows. In 1860, the Indian Penal Code made polygamy a criminal offence. In 1866, Native Converts Marriage Dissolution Act facilitated divorce for Hindus, who had adopted the Christian faith. In 1872, Special Marriage Act was enacted, but it excluded Hindus. In 1869, the Indian Divorce Act was passed, but this too remained inapplicable to Hindus. In 1909, the

Anand Marriage Act legalized marriages amongst Sikhs (called – Anand). In 1923, by an amendment to the Special Marriage Act, inter-religious civil marriages between Hindus, Buddhists, Sikhs and Jains were legalized. In 1937, the Arya Marriage Validation Act legalized the inter-caste marriages, and marriages with converts to Hinduism, among the followers of Arya Samaj. In 1949, Hindu Marriages Validity Act legalized inter-religious marriages.

(ii) The Hindu Marriage Act, was passed in 1955. Section 5 of the Hindu Marriage Act, 1955, provides for the conditions of a valid Hindu marriage. Section 7 incorporates the ceremonies required for a Hindu marriage. Section 8 provides for the requirement of registration of Hindu marriages. The remedies of restitution of conjugal rights and judicial separation, are provided for in Sections 9 and 10 respectively. Provisions related to nullity of marriages and divorce are contained in Sections 11 and 12. The grounds of divorce have been expressed in Section 13, which is reproduced below:-

> "13.Divorce.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
> (i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or
> (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
> (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
> (ii) has ceased to be a Hindu by conversion to another religion; or
> (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
> Explanation- In this clause,-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;
(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or
(iv) has been suffering from a virulent and incurable form of leprosy; or
(v) has been suffering from veneral disease in a communicable form; or
(vi) has renounced the world by entering any religious order; or
(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;
Explanation.- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.
(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-
(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.
(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-
(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:
Provided that in either case the other wife is alive at the time of the presentation of the petition; or
(ii)that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or
(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she

was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.- This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)."

By subsequent amendments, Section 13B was introduced, which provides for divorce by mutual consent.

182. A perusal of the details pertaining to legislation in India with regard to matters pertaining to 'personal law', and particularly to issues of marriage and divorce for different religious communities reveals, that all issues governed by 'personal law', were only altered by way of legislation. There is not a singular instance of judicial intervention, brought to our notice except a few judgments rendered by High Courts (-for details, refer to Part-6 – Judicial pronouncements, on the subject of 'talaq-e-biddat'). These judgments, however, attempted the interpretative course, as against an invasive one. The details depicted above relate to marriage between Christians, Parsis, inter-faith marriages, Muslims and Hindus, including Buddhists, Sikhs and Jains. The unbroken practice during the pre-independence period, and the post independence period – under the Constitution, demonstrates a clear and unambiguous course, namely, reform in the matter of marriage and divorce (which are integral components of 'personal law') was only introduced through legislation. Therefore in continuation of the conclusion already recorded, namely, that it is the constitutional duty of all courts to preserve and protect 'personal

law' as a fundamental right, any change thereof, has to be only by legislation under Articles 25(2) and 44, read with entry 5 of the Concurrent List contained in the Seventh Schedule to the Constitution.

IX. Impact of international conventions and declarations on 'talaq-e-biddat':

183. A number of learned counsel who assisted us in support of the petitioners' cause were emphatic, that the practice of 'talaq-e-biddat' was rendered impermissible, as soon as, India accepted to be a signatory to international conventions and declarations, with which the practice was in clear conflict. It was submitted, that continuation of the practice of 'talaq-e-biddat', sullied the image of the country internationally, as the nation was seen internationally as a defaulters to those conventions and declarations. It was pointed out, that by not consciously barring 'talaq-e-biddat', and by knowingly allowing the practice to be followed, India was seen as persisting and propagating, what the international community considers abhorrent. It was therefore submitted, that the practice of 'talaq-e-biddat' be declared as unacceptable in law, since it was in conflict with international conventions and declarations.

184. We may, in the first instance, briefly point out to the submissions advanced by Ms. Indira Jaising, learned senior counsel. She placed reliance on the Universal Declaration of Human Rights, adopted by the United Nations General Assembly as far back as in 1948. She drew our attention to the preamble thereof, to emphasise, that the declaration recognized the inherent dignity of human beings as equal and inalienable. She highlighted

the fact, that the declaration envisioned equal rights for men and women – both in dignity and rights. For this, she placed reliance on Article 1 of the Declaration. Referring to Article 2, she asserted, that there could be no discrimination on the basis of sex. Learned senior counsel evoked the conscience of this Court, to give effect to the declaration, to which India was a signatory. This Court's attention was also invited to the International Conventions on Economic, Social and Cultural Rights (ICESCR). The pointed aim whereof was to eliminate all forms of discrimination, including discrimination on the basis of sex. It was highlighted, that the International Conventions Bill for Rights for Women was ratified by 189 States. Referring to Article 1 thereof, it was submitted, that the objective of the convention was to eradicate discrimination against women. Having signed the aforesaid convention, it was submitted, that it was the obligation of all the signatory States, to take positive and effective steps for elimination of all facets of discrimination against women. It was highlighted, that 'talaq-e-biddat' was the worst form of discrimination, against women.

185. Learned Attorney General for India strongly supported the instant contention. It was his pointed assertion, that the Indian State was obligated to adhere the principles enshrined in international conventions. It was highlighted, that India was a founding member of the United Nations, and was bound by its charter. It was submitted, that gender equality as a human right, had been provided for in various conventions and declarations. We do not consider the necessity to repeat the submissions canvassed at the hands of the learned Attorney General, who painstakingly

adverted to the same, to support his prayer, that 'talaq-e-biddat' was a practice which violated a number of conventions to which India was a signatory. Details in this behalf, have been recorded by us in paragraph 74, while recording the submissions advanced by the learned Attorney General. The same be read herein, in continuation of the submissions briefly noticed above.

186. We have considered the submissions advanced on behalf of the petitioners, pointedly with reference to international conventions and declarations. We have not the least doubt, that the Indian State is committed to gender equality. This is the clear mandate of Article 14 of the Constitution. India is also committed to eradicate discrimination on the ground of sex. Articles 15 and 16 of the Constitution, prohibit any kind of discrimination on the basis of sex. There is therefore no reason or necessity while examining the issue of 'talaq-e-biddat', to fall back upon international conventions and declarations. The Indian Constitution itself provides for the same.

187. The reason for us, not to accede to the submissions advanced at the behest of those who support the petitioners' cause, with pointed reference to international conventions and declarations, is based on Article 25 of the Constitution, whereby 'personal law' of all religious denominations, is sought to be preserved. The protection of 'personal laws' of religious sections, is elevated to the stature of a fundamental right, inasmuch as Article 25 of the Constitution, which affords such protection to 'personal law' is a part of Part III (– Fundamental Rights), of the Constitution. It is

therefore apparent, that whilst the Constitution of India supports all conventions and declarations which call for gender equality, the Constitution preserves 'personal law' through which religious communities and denominations have governed themselves, as an exception.

188. Our affirmation, that international conventions and declarations are not binding to the extent they are in conflict with domestic laws, can be traced from a series of judgments rendered by this Court on the subject. Reference is being made to some of them herein below:

(i) Apparel Export Promotion Council v. A.K. Chopra[53],

The question that arose for consideration before this Court, in the instant case was, whether an action of a superior against a sub-ordinate female employee, which is against moral sanctions can withstand the test of decency and modesty, not amounting to sexual harassment? The question that arose was, whether the allegation that a superior tried to molest an inferior female employee at the work place, constituted an act unbecoming of the conduct and behaviour expected from the superior? And, whether an inferior female employee, has recourse to a remedial action? While examining the above proposition, this Court relying on international conventions and declarations arrived at the conclusion, that the same have to be given effect to unless they were contrary to domestic laws, by holding as under:

> "26. There is no gainsaying that each incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty — the two most precious fundamental rights guaranteed by the Constitution of India. As early as in 1993, at the ILO Seminar held at Manila, it was recognized that sexual

53

harassment of women at the workplace was a form of "gender discrimination against women". In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all *facets* of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate the working environment. These international instruments cast an obligation on the Indian State to gender-sensitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. (See with advantage — Prem Shankar Shukla v. Delhi Admn. Mackinnon Mackenzie and Co. Ltd. v. Audrey D' Costa; Sheela Barse v. Secy., Children's Aid Society SCC at p. 54; Vishaka v. State of Rajasthan People's Union for Civil Liberties v. Union of India and D.K. Basu v. State of W.B. SCC at p. 438.)

27. In cases involving violation of human rights, the 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. In the instant case, the High Court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case."

(ii) Krishna Janardhan Bhat v. Dattaraya G. Hegde[54]

54

In the instant case, this Court relied upon international conventions to determine the true import of 'burden of proof', under the Negotiable Instruments Act, 1881. This Court held as under:

> "44. The presumption of innocence is a human right. (See Narendra Singh v. State of M.P., Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Rajesh Ranjan Yadav v. CBI.) Article 6(2) of the European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact. In a recent article The Presumption of Innocence and Reverse Burdens: A Balancing Duty published in 2007 CLJ (March Part) 142 it has been stated:
>
> "In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice—where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."
>
> 45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates

raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."

(iii) State of Kerala v. Peoples Union for Civil Liberties[55]

The issue that arose for consideration in the instant case was with reference to the binding nature of the Indigenous and Tribal Populations Convention, 1957 and the declarations on the Rights of Indigenous People, 2007. Even though India had ratified convention and declaration, it was held, that the same were not binding. Reference may be made to the following observations recorded in the above judgment:

"105. We may notice that in Indigenous and Tribal Populations Convention, 1957 which has been ratified by 27 countries including India contained the following clauses:

"Article 11.—The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12.—1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13.—1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and

55

regulations, insofar as they satisfy the needs of these populations and do not hinder their economic and social development.

2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members."

Thus, removal of the population, by way of an exceptional measure, is not ruled out. It is only subject to the condition that lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. We may, however, notice that this Convention has not been ratified by many countries in the Convention held in 1989. Those who have ratified the 1989 Convention are not bound by it.

106. Furthermore, the United Nations adopted a Declaration on the Rights of Indigenous People in September 2007. Articles 3 to 5 thereof read as under:

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

4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."

107. It is now accepted that the Panchasheel doctrine which provided that the tribes could flourish and develop only if the State interfered minimally and functioned chiefly as a support system in view of passage of time is no longer valid. Even the notion of autonomy contained in the 1989 Convention has been rejected by India. However, India appears to have softened its stand against autonomy for tribal people and it has voted in favour of the United Nations Declaration on the Rights of Indigenous People which affirms various rights to autonomy that are inherent in the tribal peoples of the world. This declaration, however, is not binding."

(iv) Safai Karamchari Andolan v. Union of India[56]

In the instant case, the question that arose for consideration revolved around the validity of the inhuman practice of manually removing night soil, which involves removal of human excrements from dry toilets with bare

[56]

hands, brooms or metal scrappers, and thereupon, carrying the same in baskets to dumping sites for disposal. Dealing with the issue in the context of international conventions and declarations, this Court observed as under:

> "16. Apart from the provisions of the Constitution, there are various international conventions and covenants to which India is a party, which proscribe the inhuman practice of manual scavenging. These are the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The relevant provisions of UDHR, CERD and CEDAW are hereunder:
> Article 1 of UDHR
> "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."
> Article 2 of UDHR
> "2. Everyone is entitled to all the rights and freedom 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."
> Article 23(3) of UDHR
> "23. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."
> Article 5(a) of CEDAW
> "5. States parties shall take all appropriate measures—
> (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;"
> Article 2 of CERD
> "2. (1) States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end—
> * * *
> (c) each State party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;"

The above provisions of the International Covenants, which have been ratified by India, are binding to the extent that they are not inconsistent with the provisions of the domestic law."

189. In view of the above, we are satisfied, that international conventions and declarations are of utmost importance, and have to be taken into consideration while interpreting domestic laws. But, there is one important exception to the above rule, and that is, that international conventions as are not in conflict with domestic law, alone can be relied upon. We are of the firm opinion, that the disputation in hand falls in the above exception. Insofar as 'personal law' is concerned, the same has constitutional protection. Therefore if 'personal law' is in conflict with international conventions and declarations, 'personal law' will prevail. The contention advanced on behalf of the petitioners to hold the practice of 'talaq-e-biddat', on account it being in conflict with conventions and declarations to which India is a signatory can therefore not be acceded to.

X. Conclusions emerging out of the above consideration:

190. The following conclusions emerge from the considerations recorded at I to IX above:

(1) Despite the decision of the Rashid Ahmad case[1] on the subject of 'talaq-e-biddat', by the Privy Council, the issue needs a fresh examination, in view of the subsequent developments in the matter.

(2) All the parties were unanimous, that despite the practice of 'talaq-e-biddat' being considered sinful, it was accepted amongst Sunni

Muslims belonging to the Hanafi school, as valid in law, and has been in practice amongst them.

(3) It would not be appropriate for this Court, to record a finding, whether the practice of 'talaq-e-biddat' is, or is not, affirmed by 'hadiths', in view of the enormous contradictions in the 'hadiths', relied upon by the rival parties.

(4) 'Talaq-e-biddat' is integral to the religious denomination of Sunnis belonging to the Hanafi school. The same is a part of their faith, having been followed for more than 1400 years, and as such, has to be accepted as being constituent of their 'personal law'.

(5) The contention of the petitioners, that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be 'personal law', and got transformed into 'statutory law', cannot be accepted, and is accordingly rejected.

(6) 'Talaq-e-biddat', does not violate the parameters expressed in Article 25 of the Constitution. The practice is not contrary to public order, morality and health. The practice also does not violate Articles 14, 15 and 21 of the Constitution, which are limited to State actions alone.

(7) The practice of 'talaq-e-biddat' being a constituent of 'personal law' has a stature equal to other fundamental rights, conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention.

(8) Reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention. Such legislative intervention is permissible under Articles 25(2) and 44, read with entry 5 of the Concurrent List, contained in the Seventh Schedule of the Constitution. The said procedure alone need to be followed with reference to the practice of 'talaq-e-biddat', if the same is to be set aside.

(9) International conventions and declarations are of no avail in the present controversy, because the practice of 'talaq-e-biddat', is a component of 'personal law', and has the protection of Article 25 of the Constitution.

Part-10.

The declaration:

191. The whole nation seems to be up in arms. There is seemingly an overwhelming majority of Muslim-women, demanding that the practice of 'talaq-e-biddat' which is sinful in theology, be declared as impermissible in law. The Union of India, has also participated in the debate. It has adopted an aggressive posture, seeking the invalidation of the practice by canvassing, that it violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting, that it even violates constitutional morality. During the course of hearing, the issue was hotly canvassed in the media. Most of the views expressed in erudite articles on the subject, hugely affirmed that the practice was demeaning. Interestingly even during the course of hearing, learned counsel appearing for the rival parties, were in agreement, and described the practice of 'talaq-e-biddat' differently as, unpleasant, distasteful and unsavory. The position adopted

by others was harsher, they considered it as disgusting, loathsome and obnoxious. Some even described it as being debased, abhorrent and wretched.

192. We have arrived at the conclusion, that 'talaq-e-biddat', is a matter of 'personal law' of Sunni Muslims, belonging to the Hanafi school. It constitutes a matter of their faith. It has been practiced by them, for at least 1400 years. We have examined whether the practice satisfies the constraints provided for under Article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of 'personal law', has the protection of Article 25 of the Constitution.

193. Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion. The Constitution allows the followers of every religion, to follow their beliefs and religious traditions. The Constitution assures believers of all faiths, that their way of life, is guaranteed, and would not be subjected to any challenge, even though they may seem to others (-and even rationalists, practicing the same faith) unacceptable, in today's world and age. The Constitution extends this guarantee, because faith constitutes the religious consciousness, of the followers. It is this religious consciousness, which binds believers into separate entities. The Constitution endevours to protect and preserve, the beliefs of each of the separate entities, under Article 25.

194. Despite the views expressed by those who challenged the practice of 'talaq-e-biddat', being able to demonstrate that the practice transcends the barriers of constitutional morality (emerging from different provisions of the Constitution), we have found ourselves unable to persuade ourselves, from reaching out in support of the petitioners concerns. We cannot accept the petitioners' claim, because the challenge raised is in respect of an issue of 'personal law' which has constitutional protection.

195. In continuation of the position expressed above, we may acknowledge, that most of the prayers made to the Court (-at least on first blush) were persuasive enough, to solicit acceptance. Keeping in mind, that this opportunity had presented itself, so to say, to assuage the cause of Muslim women, it was felt, that the opportunity should not be lost. We are however satisfied that, that would not be the rightful course to tread. We were obliged to keep reminding ourselves, of the wisdoms of the framers of the Constitution, who placed matters of faith in Part III of the Constitution. Therefore, any endeavour to proceed on issues canvassed before us would, tantamount to overlooking the clear letter of law. We cannot nullify and declare as unacceptable in law, what the Constitution decrees us, not only to protect, but also to enforce. The authority to safeguard and compel compliance, is vested under a special jurisdiction in constitutional Courts (-under Article 32, with the Supreme Court; and under Article 226, with the High Courts). Accepting the petitioners prayers, would be in clear transgression of the constitutional mandate contained in Article 25.

196. Such a call of conscience, as the petitioners desire us to accept, may well have a cascading effect. We say so, because the contention of the learned Attorney General was, that 'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat' (-for details, refer to paragraph 77 above). According to the learned Attorney General, the said forms of talaq also suffered from the same infirmities as 'talaq-e-biddat'. The practices of 'polygamy' and 'halala' amongst Muslims are already under challenge before us. It is not difficult to comprehend, what kind of challenges would be raised by rationalists, assailing practices of different faiths on diverse grounds, based on all kinds of enlightened sensibilities. We have to be guarded, lest we find our conscience traversing into every nook and corner of religious practices, and 'personal law'. Can a court, based on a righteous endeavour, declare that a matter of faith, be replaced – or be completely done away with. In the instant case, both prayers have been made. Replacement has been sought by reading the three pronouncements in 'talaq-e-biddat', as one. Alternatively, replacement has been sought by reading into 'talaq-e-biddat', measures of arbitration and conciliation, described in the Quran and the 'hadiths'. The prayer is also for setting aside the practice, by holding it to be unconstitutional. The wisdom emerging from judgments rendered by this Court is unambiguous, namely, that while examining issues falling in the realm of religious practices or 'personal law', it is not for a court to make a choice of something which it considers as forward looking or non-fundamentalist. It

is not for a court to determine whether religious practices were prudent or progressive or regressive. Religion and 'personal law', must be perceived, as it is accepted, by the followers of the faith. And not, how another would like it to be (-including self-proclaimed rationalists, of the same faith). Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault therewith. Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem. It is therefore, that this Court had the occasion to observe, "….. However laudible, desirable and attractive the result may seem … an activist Court is not fully equipped to cope with the intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For, in whatever measure be the concern of this Court, it compulsively needs to apply, motion, described in judicial parlance as self-restraint ….."[30]

197. We have arrived at the conclusion, that the legal challenge raised at the behest of the petitioners must fail, on the judicial front. Be that as it may, the question still remains, whether this is a fit case for us to exercise our jurisdiction under Article 142, "…for doing complete justice …", in the matter. The reason for us to probe the possibility of exercising our jurisdiction under Article 142, arises only for one simple reason, that all concerned are unequivocal, that besides being arbitrary the practice of 'talaq-e-biddat' is gender discriminatory.

198. A perusal of the consideration recorded by us reveals, that the practice of 'talaq-e-biddat' has been done away with, by way of legislation in a large number of egalitarian States, with sizeable Muslim population and even by theocratic Islamic States. Even the AIMPLB, the main contestant of the petitioners' prayers, whilst accepting the position canvassed on behalf of the petitioners, assumed the position, that it was not within the realm of judicial discretion, to set aside a matter of faith and religion. We have accepted the position assumed by the AIMPLB. It was however acknowledged even by the AIMPLB, that legislative will, could salvage the situation. This assertion was based on a conjoint reading of Articles 25(2) and Article 44 of the Constitution, read with entry 5 of the Concurrent List contained in the Seventh Schedule of the Constitution. There can be no doubt, and it is our definitive conclusion, that the position can only be salvaged by way of legislation. We understand, that it is not appropriate to tender advice to the legislature, to enact law on an issue. However, the position as it presents in the present case, seems to be a little different. Herein, the views expressed by the rival parties are not in contradiction. The Union of India has appeared before us in support of the cause of the petitioners. The stance adopted by the Union of India is sufficient for us to assume, that the Union of India supports the petitioners' cause. Unfortunately, the Union seeks at our hands, what truly falls in its own. The main party that opposed the petitoners' challenge, namely, the AIMPLB filed an affidavit before this Court affirming the following position:

> "1. I am the Secretary of All India Muslim Personal Board will issue an advisory through its Website, Publications and Social Media Platforms

and thereby advise the persons who perform 'Nikah' (marriage) and request them to do the following:-

(a) At the time of performing 'Nikah' (marriage), the person performing the 'Nikah' will advise the Bridegroom/Man that in case of differences leading to Talaq the Bridegroom/Man shall not pronounce three divorces in one sitting since it is an undesirable practice in Shariat;

(b) That at the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise both the Bridegroom/Man and the Bride/Woman to incorporate a condition in the 'Nikahnama' to exclude resorting to pronouncement of three divorces by her husband in one sitting.

3. I say and submit that, in addition, the Board is placing on record, that the Working Committee of the Board had earlier already passed certain resolutions in the meeting held on 15th & 16th April, 2017 in relation to Divorce (Talaq) in the Muslim community. Thereby it was resolved to convey a code of conduct/guidelines to be followed in the matters of divorce particularly emphasizing to avoid pronouncement of three divorces in one sitting. A copy of the resolution dated April 16, 2017 along with the relevant Translation of Resolution Nos. 2, 3, 4 & 5 relating to Talaq (Divorce) is enclosed herewith for the perusal of this Hon'ble Court and marked as Annexure A-1 (Colly) [Page Nos. 4 to 12] to the present Affidavit."

A perusal of the above affidavit reveals, that the AIMPLB has undertaken to issue an advisory through its website, to advise those who enter into a matrimonial alliance, to agree in the 'nikah-nama', that their marriage would not be dissolvable by 'talaq-e-biddat'. The AIMPLB has sworn an affidavit to prescribe guidelines, to be followed in matters of divorce, emphasizing that 'talaq-e-biddat' be avoided. It would not be incorrect to assume, that even the AIMPLB is on board, to assuage the petitioner's cause.

199. In view of the position expressed above, we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. We

hope and expect, that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations (see at IX – Reforms to 'personal law' in India), even in India, but not for the Muslims. We would therefore implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance. We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation.

200. Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

201. Disposed of in the above terms.

.....CJI.
(Jagdish Singh Khehar)

.....J.
(S. Abdul Nazeer)

Note: The emphases supplied in all the quotations in the instant judgment, are ours.

New Delhi;
August 22, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

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

IN RE: MUSLIM WOMEN'S QUEST FOR EQUALITY ... PETITIONER (S)

VERSUS

JAMIAT ULMA-I-HIND AND OTHERS ...RESPONDENT (S)

WITH

Writ Petition (Civil) No. 118 OF 2016,

Writ Petition (Civil) No. 288 OF 2016,

Writ Petition (Civil) No. 327 OF 2016,

Writ Petition (Civil) No. 665 OF 2016 and

Writ Petition (Civil) No. 43 OF 2017.

J U D G M E N T

KURIAN, J.:

1. What is bad in theology was once good in law but after Shariat has been declared as the personal law, whether what is Quranically wrong can be legally right is the issue to be considered in this case. Therefore, the simple question that needs to be answered in this case

is only whether triple talaq has any legal sanctity. That is no more *res integra*. This Court in **Shamim Ara v. State of UP and Another**[57] has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore, in terms of Article 141[58], **Shamim Ara** is the law that is applicable in India.

2. Having said that, I shall also make an independent endeavor to explain the legal position in **Shamim Ara** and lay down the law explicitly.

3. The Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as "the 1937 Act") was enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community.[59] Section 2 is most relevant in the face of the present controversy.

2. Application of Personal law to Muslims. – Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land)

57

58

59

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 Muslim Personal Law (*Shariat*).

(Emphasis supplied)

4. After the 1937 Act, in respect of the enumerated subjects under Section 2 regarding "marriage, dissolution of marriage, including talaq", the law that is applicable to Muslims shall be only their personal law namely Shariat. Nothing more, nothing less. It is not a legislation regulating talaq. In contradistinction, The Dissolution of Muslim Marriages Act, 1939 provides for the grounds for dissolution of marriage. So is the case with the Hindu Marriage Act, 1955. The 1937 Act simply makes Shariat applicable as the rule of decision in the matters enumerated in section 2. Therefore, while talaq is governed by Shariat, the specific

grounds and procedure for talaq have not been codified in the 1937 Act.

5. In that view of the matter, I wholly agree with the learned Chief Justice that the 1937 Act is not a legislation regulating talaq. Consequently, I respectfully disagree with the stand taken by Nariman, J. that the 1937 Act is a legislation regulating triple talaq and hence, the same can be tested on the anvil of Article 14. However, on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness, I agree with the illuminating exposition of law by Nariman, J. I am also of the strong view that the Constitutional democracy of India cannot conceive of a legislation which is arbitrary.

6. Shariat, having been declared to be Muslim Personal Law by the 1937 Act, we have to necessarily see what Shariat is. This has been beautifully explained by the renowned author, **Asaf A.A. Fyzee** in his book **Outlines of**

Muhammadan Law, 5th Edition, 2008 at page 10.[60]

"…What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or *Shariat* and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have *Hadith* which are the Traditions of the Prophet- the records of his actions and his sayings- from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the *Hadith* to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or *Shariat* as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law."

7. There are four sources for Islamic law- (i) Quran (ii) Hadith (iii) Ijma (iv) Qiyas. The learned author has rightly said that the Holy Quran is the "first source of law". According to the learned author, pre-eminence is to be given to

60

the Quran. That means, sources other than the Holy Quran are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. Islam cannot be anti-Quran. According to Justice Bader Durrez Ahmad in **Masroor Ahmed v. State (NCT of Delhi) & Another**[61]:

"14. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of *ijtihad* employing the sophisticated jurisprudential techniques. The primary source is the *Quran*. Yet, in matters not directly covered by the divine book, rules were developed looking to the *hadis* and upon driving a consensus. The differences arose between the schools because of reliance on different *hadis*, differences in consensus and differences on *qiyas* and *aql* as the case may be."

(Emphasis supplied)

8. It is in that background that I make an attempt to see what the Quran states on talaq. There is reference to talaq in three Suras- in Sura II while dealing with social life of the community,

61

in Sura IV while dealing with decencies of family life and in Sura LXV while dealing explicitly with talaq.

9. Sura LXV of the Quran deals with talaq. It reads as follows:

"***Talaq*, or Divorce.**

In the name of God, Most Gracious,
Most Merciful.

1. O Prophet! When ye
Do divorce women,
Divorce them at their
Prescribed periods,
And count (accurately)
Their prescribed periods:
And fear God your Lord:
And turn them not out
Of their houses, nor shall
They (themselves) leave,
Except in case they are
Guilty of some open lewdness,
Those are limits
Set by God: and any
Who transgresses the limits
Of God, does verily
Wrong his (own) soul:
Thou knowest not if
Perchance God will
Bring about thereafter
Some new situation.

2. Thus when they fulfill
Their term appointed,
Either take them back
On equitable terms
Or part with them
On equitable terms;
And take for witness

Two persons from among you,
Endued with justice,
And establish the evidence
(As) before God. Such
Is the admonition given
To him who believes
In God and the Last Day.
And for those who fear
God, He (ever) prepares
A way out,

3. And He provides for him
From (sources) he never
Could imagine. And if
Any one puts his trust
In God, sufficient is (God)
For him. For God will
Surely accomplish His purpose :
Verily, for all things
Has God appointed
A due proportion.

4. Such of your women
As have passed the age
Of monthly courses, for them
The prescribed period, if ye
Have any doubts, is
Three months, and for those
Who have no courses
(It is the same):
For those who carry
(Life within their wombs),
Their period is until
They deliver their burdens :
And for those who
Fear God, He will
Make their path easy.

5. That is the Command
Of God, which He
Has sent down to you :
And if any one fears God,
He will remove his ills
From him, and will enlarge
His reward.

6. Let the women live
(In ‘*iddat*) in the same
Style as ye live,
According to your means :
Annoy them not, so as
To restrict them.
And if they carry (life
In their wombs), then
Spend (your substance) on them
Until they deliver
Their burden : and if
They suckle your (offspring),
Give them their recompense :
And take mutual counsel
Together, according to
What is just and reasonable.
And if ye find yourselves
In difficulties, let another
Woman suckle (the child)
On the (father’s) behalf.

7. Let the man of means
Spend according to
His means : and the man
Whose resources are restricted,
Let him spend according
To what God has given him.
God puts no burden
On any person beyond
What He has given him.
After a difficulty, God
Will soon grant relief.”

Verse 35 in Sura IV of the Quran speaks on arbitration for reconciliation-

“35. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,

God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things.”

Sura II contains the following verses pertaining to divorce:

“226.For those who take
An oath for abstention
From their wives,
A waiting for four months
Is ordained;
If then they return,
God is Oft–forgiving,
Most Merciful.

227.But if their intention
Is firm for divorce,
God heareth
And knoweth all things.

228. Divorced women
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according
To what is equitable;
But men have a degree
(of advantage) over them.
And God is Exalted in Power,
Wise.”

“229. A divorce is only

Permissible twice: after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,
(Men), to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by God.
If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others).

230. So if a husband
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided
They feel that they
Can keep the limits
Ordained by God.
Such other limits
Ordained by God,
Which He makes plain
To those who understand.

231. When ye divorce

Women, and they fulfill
The term of their (‘*Iddat*),
Either take them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If anyone does that,
He wrongs his own soul.
Do not treat God’s Signs
As a jest,
But solemnly rehearse
God’s favours on you,
And the fact that He
Sent down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well acquainted
With all things.”[62]

10. These instructive verses do not require any interpretative exercise. They are clear and unambiguous as far as talaq is concerned. The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains

[62]

finality.[63] In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat.

11. The above view has been endorsed by various High Courts, finally culminating in **Shamim Ara** by this Court which has since been taken as the law for banning triple talaq. Interestingly, prior to **Shamim Ara**, Krishna Iyer, J. in **Fuzlunbi v. K Khader Vali and Another**[64], while in a three judge bench in this Court, made a very poignant observation on the erroneous approach of Batchelor, J. in **Sarabai v. Rabiabai**[65] on the famous comment "good in law, though bad in theology". To quote:

> "20. Before we bid farewell to *Fuzlunbi* it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with *talaq* in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view

63

64

65

of Batchelor, J. that this view "is good in law, though bad in theology". Maybe, when the point directly arises, the question will have to be considered by this Court but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."

12. More than two decades later, **Shamim Ara** has referred to, as already noted above, the legal perspective across the country on the issue of triple talaq starting with the decision of the Calcutta High Court in **Furzund Hossein v. Janu Bibee**[66] in 1878 and finally, after discussing two decisions of the Gauhati High Court namely **Jiauddin Ahmed v. Anwara Begum**[67] and **Rukia Khatun v. Abdul Khalique Laskar**[68]**,** this Court held as follows-

"13. There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in *Jiauddin Ahmed v. Anwara Begum* (1981) 1 Gau LR 358 and later speaking for the Division Bench in *Rukia Khatun v.Abdul Khalique Laskar* (1981) 1 Gau LR 375. In *Jiauddin Ahmed case* a plea of previous

66

67

68

divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid *talaq* of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's; if the attempts fail, '*talaq'* may be effected. (para 13). In *Rukia Khatun case*, the Division Bench stated that the correct law of *talaq* as ordained by the Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an

attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the above said observations made by the learned Judges of High Courts.…."

(Emphasis supplied)

13. There is also a fruitful reference to two judgments of the Kerala High Court - one of Justice Krishna Iyer in **A. Yousuf Rawther v. Sowramma**[69] and the other of Justice V. Khalid in **Mohd. Haneefa v. Pathummal Beevi**[70]. No doubt, **Sowaramma** was not a case on triple talaq, however, the issue has been discussed in the judgment in paragraph 7 which has also been quoted in **Shamim Ara.**

"..The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. …It is a popular fallacy that a Muslim male enjoys, under the Quoranic law, unbridled authority to liquidate the marriage. 'The whole Quoran expressly forbids a man to

69

70

seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them".' (Quoran IV:34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." ....Commentators on the Quoran have rightly observed - and this tallies with the law now administered in some Muslim countries like Iraq -that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce..."

14. Khalid, J. has been more vocal in **Mohd. Haneefa**:

"5..Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the

leaders of public opinion of the community will also be disturbed."

15. After a detailed discussion on the aforementioned cases, it has been specifically held by this Court in **Shamim Ara**, at paragraph 15 that "...there are 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 this conclusion by the Bench in **Shamim Ara** is made after "respectful agreement" with **Jiauddin Ahmed** that "talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, '*talaq*' may be effected." 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 triple talaq in **Shamim Ara**.

16. **Shamim Ara** has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to the tenets of the Holy Quran. Consequently, triple talaq lacks the approval of Shariat.

17. The High Court of Andhra Pradesh, in **Zamrud Begum v. K. Md. Haneef and another**[71], is one of the first High Courts to affirm the view adopted in **Shamim Ara**. The High Court, after referring to **Shamim Ara** and all the other decisions mentioned therein, held in paragraphs 13 and 17 as follows:

> "13. It is observed by the Supreme Court in the above said decision that talaq may be oral or in writing and it must be for a reasonable cause. It must be preceded by an attempt of reconciliation of husband and wife by two arbitrators one chosen from the family of the wife and other by husband. If their attempts fail then talaq may be effected by pronouncement. The said procedure has not been followed. The Supreme Court has culled out the same from *Mulla* and the principles of Mahammedan Law.
>
> XXXX
>
> 17. I am of the considered view that the alleged talaq is not a valid talaq as it is not in accordance with the principles laid down by

71

the Supreme Court. If there is no valid talaq the relationship of the wife with her husband still continues and she cannot be treated as a divorced wife.…."

(Emphasis supplied)

18. In **A. S. Parveen Akthar v. The Union of India**[72], the High Court of Madras was posed with the question on the validity and constitutionality of Section 2 of the 1937 Act in so far as it recognises triple talaq as a valid form of divorce. The Court referred to the provisions of the Quran, opinions of various eminent scholars of Islamic Law and previous judicial pronouncements including **Shamim Ara** and came to the following conclusion:

"45.Thus, the law with regard to talaq, as declared by the apex Court, is that talaq must be for a reasonable cause and must be preceded by attempt at reconciliation between the husband and the wife by two arbiters one chosen by wife's family and the other from husband's family and it is only if their attempts fail, talaq may be effected.

XXXX

48.Having regard to the law now declared by the apex Court in the case of *Shamim Ara*, 2002 AIR SCW 4162, talaq, in whatever form,

72

must be for a reasonable cause, and must be preceded by attempts for reconciliation by arbiters chosen from the families of each of the spouses, the petitioner's apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of talaq is valid, is based on a misunderstanding of the law."

(Emphasis supplied)

As far as the constitutionality of Section 2 is concerned, the Court refrained from going into the question in view of the decisions of this Court in **Shri Krishna Singh v. Mathura Ahir and Others** [73] and **Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India**[74]**.**

19. The High Court of Jammu and Kashmir, in **Manzoor Ahmad Khan v.Saja & Ors.**[75], has also placed reliance on **Shamim Ara**. The Court, at paragraph 11, noted that in **Shamim Ara,** the Apex Court relied upon the passages from judgments of various High Courts "which are eye openers for those who think that a Muslim man can divorce his wife merely at whim or on caprice." The Court finally held that

73

74

75

the marriage between the parties did not stand dissolved.

20. In **Ummer Farooque v. Naseema**[76], Justices R Bhaskaran and K.P. Balachandran of the High Court of Kerala, after due consideration of the prior decisions of the various Courts, in paragraphs 5 and 6 held that:

> "**5**...The general impression as reflected in the decision of a Division Bench of this Court in *Pathayi v. Moideen* (1968 KLT 763) was that the only condition necessary for a valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at the that time and he can effect divorce whenever he desires and no witnesses are necessary for dissolution of the marriage and the moment when talaq is pronounced, dissolution of marriage is effected; it can be conveyed by the husband to the wife and it need not be even addressed to her and it takes effect the moment it comes to her knowledge etc. But this can no longer be accepted in view of the authoritative pronouncement of the Supreme Court in *Shamim Ara v. State of U.P*. [2002 (3) KLT 537 (SC)].
>
> **6.** The only thing to be further considered in this case is whether the divorce alleged to have been effected by the husband by pronouncement of talaq on 23-7-1999 is proved or not. The mere pronouncement of

76

talaq three times even in the presence of the wife is not sufficient to effect a divorce under Mohammadan Law. As held by the Supreme Court in *Shamim Ara's* case [2002 (3) KLT 537 (SC)], there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife…"

(Emphasis supplied)

21. In **Masroor Ahmed**, Justice Badar Durrez Ahmed, held as follows:

"32. In these circumstances (the circumstances being – (1) no evidence of pronouncement of *talaq*; (2) no reasons and justification of *talaq*; amd (3) no plea or proof that *talaq* was preceded by efforts towards reconciliation), the Supreme Court held that the marriage was not dissolved and that the liability of the husband to pay maintenance continued. Thus, after **Shamim Ara** (supra), the position of the law relating to *talaq*, where it is contested by either spouse, is that, if it has to take effect, first of all the pronouncement of *talaq* must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that *talaq* was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place…."

(Emphasis supplied)

22. As recently as in 2016, Mustaque, J. of the High Court of Kerala in **Nazeer @ Oyoor Nazeer v. Shemeema**[77], has *inter alia* referred to **Shamim Ara** and has disapproved triple talaq.

23. Therefore, I find it extremely difficult to agree with the learned Chief Justice that the practice of triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law.

24. To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Indian Constitution. That is subject only to the following- (1) public order, (2) health, (3) morality and (4) other provisions of Part III dealing with Fundamental Rights. Under Article 25 (2) of the Constitution of India, the State is also granted power to make law in two contingencies notwithstanding the freedom granted under Article 25(1). Article 25 (2) states that "nothing in this Article shall affect the

77

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.” Except to the above extent, the freedom of religion under the Constitution of India is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree. Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of

Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice and thus, my disagreement with the learned Chief Justice for the constitutional protection given to triple talaq. I also have serious doubts as to whether, even under Article 142, the exercise of a Fundamental Right can be injuncted.

25. When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. I believe that a reconciliation between the same is possible, but the process of harmonizing different interests is within the powers of the legislature. Of course, this power has to be exercised within the constitutional parameters without curbing the religious freedom guaranteed under the Constitution of India. However, it is not for the Courts to direct for any legislation.

26. Fortunately, this Court has done its part in **Shamim Ara**. I expressly endorse and

re-iterate the law declared in **Shamim Ara**. 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.

.....J.
(KURIAN JOSEPH)

New Delhi;
August 22, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

SUO MOTU WRIT (CIVIL) No. 2 of 2015

IN RE: MUSLIM WOMEN'S QUEST
FOR EQUALITY …PETITIONER

VERSUS

JAMIAT ULMA-I-HIND & ORS. ...RESPONDENTS

WITH

WRIT PETITION (CIVIL) No. 118 of 2016

SHAYARA BANO …PETITONER

VERSUS

UNION OF INDIA AND ORS. MINISTRY
OF WOMEN AND CHILD DEVELOPMENT
SECRETARY AND ORS. ...RESPONDENTS

WITH

WRIT PETITION (CIVIL) No. 288 of 2016

AAFREEN REHMAN …PETITIONER

VERSUS

UNION OF INDIA AND ORS. …RESPONDENTS

WITH

WRIT PETITION (CIVIL) No. 327 of 2016

GULSHAN PARVEEN …PETITIONER

VERSUS

UNION OF INDIA REPRESENTED BY

THE SECRETARY AND ORS. …
RESPONDENTS

WITH

WRIT PETITION (CIVIL) No. 665 of 2016

ISHRAT JAHAN …PETITIONER

VERSUS

UNION OF INDIA MINISTRY OF
WOMEN AND CHILD DEVELOPMENT
REPRESENTED BY THE SECRETARY
AND ORS. …RESPONDENTS

WITH

WRIT PETITION (CIVIL) No. 43 of 2017

ATIYA SABRI …PETITIONER

VERSUS

UNION OF INDIA REPRESENTED
BY THE SECRETARY AND ORS. …RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

Having perused a copy of the learned Chief Justice's judgment, I am in respectful disagreement with the same.

1. This matter has found its way to a Constitution Bench of this Court because of certain newspaper

articles which a Division Bench of this Court in **Prakash** v. **Phulavati**, (2016) 2 SCC 36, adverted to, and then stated:

> "28. An important issue of gender discrimination which though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights of Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution, Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her. Although the issue was raised before this Court in *Ahmedabad Women Action Group (AWAG)* v. *Union of India* [*Ahmedabad Women Action Group (AWAG)* v. *Union of India*, (1997) 3 SCC 573], this Court did not go into the merits of the discrimination with the observation that the issue involved State policy to be dealt with by the legislature. [This Court referred to the observations of Sahai, J. in *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635 : 1995 SCC (Cri) 569 that a climate was required to be built for a uniform civil code. Reference was also made to observations in *Madhu Kishwar* v. *State of Bihar*, (1996) 5 SCC 125 to the effect that the Court could at best advise and focus attention to the problem instead of playing an activist role.] It was observed that challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 was pending before the Constitution Bench and there was no reason to multiply proceedings on such an issue.

> 31. It was, thus, submitted that this aspect of the matter may be gone into by separately registering the matter as public interest litigation (PIL). We are of the view that the suggestion needs consideration in view of the earlier decisions of this Court. The issue has also been highlighted in recent articles appearing in the press on this subject. [*The Tribune* dated 24-9-2015 "Muslim Women's Quest for Equality" by Vandana Shukla and *Sunday Express Magazine* dated 4-10-2015 "In Her Court" by Dipti Nagpaul D'Souza.]
>
> 32. For this purpose, a PIL be separately registered and put up before the appropriate Bench as per orders of Hon'ble the Chief Justice of India."
>
> (at pages 53 and 55)

Several writ petitions have thereafter been filed and are before us seeking in different forms the same relief – namely, that a Triple Talaq at one go by a Muslim husband which severs the marital bond is bad in constitutional law.

2. Wide ranging arguments have been made by various counsel appearing for the parties. These have been referred to in great detail in the judgment of the learned Chief Justice. In essence, the petitioners, supported by the Union of India, state that Triple Talaq is an anachronism in today's day and age and, constitutionally speaking, is anathema.

Gender discrimination is put at the forefront of the argument, and it is stated that even though Triple Talaq may be sanctioned by the Shariat law as applicable to Sunni Muslims in India, it is violative of Muslim women's fundamental rights to be found, more particularly, in Articles 14, 15(1) and 21 of the Constitution of India. Opposing this, counsel for the Muslim Personal Board and others who supported them, then relied heavily upon a Bombay High Court judgment, being **State of Bombay** v. **Narasu Appa Mali**, AIR 1952 Bom 84, for the proposition that personal laws are beyond the pale of the fundamental rights Chapter of the Constitution and hence cannot be struck down by this Court. According to them, in this view of the matter, this Court should fold its hands and send Muslim women and other women's organisations back to the legislature, as according to them, if Triple Talaq is to be removed as a measure of social welfare and reform under Article 25(2), the legislature alone should do so. To this, the counter argument of the other side is that Muslim personal laws are not being attacked as such. What is the subject matter

of attack in these matters is a statute, namely, the Muslim Personal Law (*Shariat*) Application Act, 1937 (hereinafter referred to as the "1937 Act"). According to them, Triple Talaq is specifically sanctioned by statutory law *vide* Section 2 of the 1937 Act and what is sought for is a declaration that Section 2 of the 1937 Act is constitutionally invalid to the aforesaid extent. To this, the Muslim Personal Board states that Section 2 is not in order to apply the Muslim law of Triple Talaq, but is primarily intended to do away with custom or usage to the contrary, as the non-obstante clause in Section 2 indicates. Therefore, according to them, the Muslim personal law of Triple Talaq operates of its own force and cannot be included in Article 13(1) as "laws in force" as has been held in **Narasu Appa** (supra).

3. The question, therefore, posed before this Court is finally in a very narrow compass. Triple Talaq alone is the subject matter of challenge – other forms of Talaq are not. The neat question that arises before this Court is, therefore, whether the 1937 Act can be said to recognize and enforce Triple Talaq as a rule

of law to be followed by the Courts in India and if not whether **Narasu Appa** (supra) which states that personal laws are outside Article 13(1) of the Constitution is correct in law.

4. Inasmuch as the Muslims in India are divided into two main sects, namely Sunnis and Shias, and this case pertains only to Sunnis as Shias do not recognize Triple Talaq, it is important to begin at the very beginning.

5. In a most illuminating introduction to Mulla's Principles of Mahomedan Law (16th Ed.) (1968), Justice Hidayatullah, after speaking about Prophet Mahomed, has this to say:

> "The Prophet had established himself as the supreme overlord and the supreme preceptor. Arabia was steeped in ignorance and barbarism, superstition and vice. Female infanticide, drinking, lechery and other vices were rampant.
>
> However, the Prophet did not nominate a successor. His death was announced by Abu Bakr and immediate action was taken to hold an election. As it happened, the Chiefs of the tribe of Banu Khazraj were holding a meeting to elect a Chief and the Companions went to the place. This meeting elected Abu Bakr as the successor. The next day Abu Bakr ascended the pulpit and everyone took an oath of allegiance (*Bai'at).*_

This election led to the great schism between the Sunnis and Shias. The Koreish tribe was divided into Ommayads and Hashimites. The Hashimites were named after Hashim the great grand-father of the Prophet. There was bitter enmity between the Ommayads and the Hashimites. The Hashimites favoured the succession of Ali and claimed that he ought to have been chosen because of appointment by the Prophet and propinquity to him. The election in fact took place when the household of the Prophet (including Ali) was engaged in the obsequies. This offended the Hashimites. It may, however, be said that Ali, regardless of his own claims, immediately swore allegiance to Abu Bakr. Ali was not set up when the second and third elections of Omar and Osman took place, but he never went against these decisions and accepted the new Caliph each time and gave him unstinted support.

Abu Bakr was sixty years old and was Caliph only for two years (d. 634 A.D.). Even when he was Caliph, the power behind him was Omar Ibnul Khattab. It is said that Abu Bakr named Omar as his successor. Even if this be not true, it is obvious that the election was a mere formality. Omar was assassinated after ten years as Caliph (644 A.D.). Osman was elected as the third Caliph. Tradition is that Omar had formed an inner panel of electors (six in number), but this is discountenanced by some leading historians. Later this tradition was used by the Abbasids to form an inner conclave for their elections. This special election used to be accepted by the people at a general, but somewhat formal, election. Osman was Caliph for 12 years and was assassinated (656 A.D.). Ali was at last elected as the fourth Caliph. The election of the first four Caliphs, who are

known as *Khulfai-i-Rashidin* (rightly-guided Caliphs) was real, although it may be said that each time the choice was such as to leave no room for opposition. Ali was Caliph for five years. He was killed in battle in 661 A.D. Ali's son Hasan resigned in favour of Muavia the founder of the Ommayad dynasty. Hasan was, however, murdered. The partisans of Ali persuaded Hussain, the second son of Ali, to revolt against Mauvia's son Yezid, but at Kerbala, Husain died fighting after suffering great privations. The rift between the Sunnis and the Shias (*Shiat-i-Ali* party of Ali) became very great thereafter."

6. It is in this historical setting that it is necessary to advert to the various sub-sects of the Sunnis. Four major sub-sects are broadly recognized schools of Sunni law. They are the Hanafi school, Maliki school, Shafi'i school and Hanbali school. The overwhelming majority of Sunnis in India follow the Hanafi school of law. Mulla in Principles of Mahomedan Law (20th Ed.), pg. xix to xxi, has this to say about the Hanafi school:

"This is the most famous of the four schools of Hanafi law. This school was founded by Abu Hanifa (699-767 A.D.). The school is also known as "Kufa School". Although taught by the great Imam Jafar-as-Sadik, the founder of the Shia School, Abu Hanifa was, also a pupil of Abu Abdullah ibn-ul-Mubarak and Hamid bin-Sulaiman and this may account for his founding a separate school. This school was favoured by the Abbasid Caliphs and its doctrines spread far and wide. Abu Hanifa earned

> the appellation "The Great Imam". The school was fortunate in possessing, besides Abu Hanifa, his two more celebrated pupils, Abu Yusuf (who became the Chief *Kazi* at Baghdad) and Imam Muhammad Ash-Shaybani, a prolific writer, who has left behind a number of books on jurisprudence. The founder of the school himself left very little written work. The home of this school was Iraq but it shares this territory with other schools although there is a fair representation. The Ottoman Turks and the Seljuk Turks were Hanafis. The doctrines of this school spread to Syria, Afghanistan, Turkish Central Asia and India. Other names connected with the Kufa School are Ibn Abi Layla and Safyan Thawri. Books on the doctrines are *al-Hidaay* of Marghinani (translated by Hamilton), *Radd-al-Mukhtar* and *Durr-ul-Mukhtar* of Ibn Abidin and *al-Mukhtasar* of Kuduri. The *Fatawa-i-Alamgiri* collected in Aurangzeb's time contain the doctrines of this school with other material."

7. Needless to add, the Hanafi school has supported the practice of Triple Talaq amongst the Sunni Muslims in India for many centuries.

8. Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. There is something astonishingly modern about this – no public declaration is a condition precedent to the validity of a Muslim marriage nor is any religious ceremony deemed absolutely essential, though they are usually carried

out. Apparently, before the time of Prophet Mahomed, the pagan Arab was absolutely free to repudiate his wife on a mere whim, but after the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man can justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet Mahomed had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this is not far to seek. Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage.

9. This then leads us to the forms of divorce recognized in Islamic Law. **Mulla** (supra), at pages 393-395, puts it thus:

> "S.**311. Different modes of talak**. **–** A talak may be effected in any of the following ways:-
>
> (1) *Talak ahsan.* – This consists of a *single* pronouncement of divorce made during a *tuhr* (period between menstruations)

followed by abstinence from sexual intercourse for the period of *iddat* .

When the marriage has not been consummated, a talak in the *ahsan* form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a *tuhr* is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing.

Talak Ahsan is based on the following verses of Holy Quran: “and the divorced woman should keep themselves in waiting for three courses.” (II:228).

> “And those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their courses.” (LXV: 4).

(2) *Talak hasan*- This consists of three pronouncements made during *successive tuhrs*, no intercourse taking place during any of the three *tuhrs.*

The first pronouncement should be made during a *tuhr*, the second during the *next tuhr*, and the third during the *succeeding tuhr.*

Talak Hasan is based on the following Quranic injunctions:

> “Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness.” (II: 229).
>
> “So if he (the husband) divorces her (third time) she shall not be lawful to him afterward until she marries another person.” (II: 230).

(3) *Talak-ul-bidaat or talak-i-badai.*- This consists of –

(i) Three pronouncements made during a single *tuhr* either in one sentence, e.g., "I divorce thee *thrice,*" - or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee", or

(ii) a *single* pronouncement made during a *tuhr* clearly indicating an intention *irrevocably* to dissolve the marriage, e.g., "I divorce thee irrevocably."

Talak-us-sunnat and talak-ul-biddat

The Hanafis recognized two kinds of *talak,* namely, (1) *talak-us-sunnat,* that is, *talak* according to the rules laid down in the *sunnat* (traditions) of the Prophet; and (2) *talak-ul-biddat,* that is, new or irregular *talak*. *Talak-ul-biddat* was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. *Talak-ul-sunnat* is of two kinds, namely, (1) *ahsan,* that is, most proper, and (2) *hasan,* that is, proper. The *talak-ul-biddat* or heretical divorce is good in law, though bad in theology and it is the most common and prevalent mode of divorce in this country, including Oudh. In the case of *talak ahsan* and *talak hasan,* the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (S.312), and the husband has the option to revoke it before then. But the *talak-ul-biddat* becomes irrevocable immediately it is pronounced (S.312). The essential feature of a *talak-ul-biddat* is its irrevocability. One of tests of irrevocability is the repetition *three times* of the formula

of divorce *within one tuhr.* But the triple repetition is not a necessary condition of *talak-ul-biddat,* and the intention to render a *talak* irrevocable may be expressed even by a *single* declaration. Thus if a man says "I have divorced you by a *talak-ul-bain* (irrevocable divorce)", the *talak* is *talak-ul-biddat* or *talak-i-badai* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain*" (irrevocable) manifests of itself the intention to effect an irrevocable divorce."

[Emphasis Supplied]

10. Another noted author, A.A.A. Fyzee, in his book "Outlines of Muhammadan Law" (5th Ed.), at pages 120-122, puts it thus:

> "The pronouncement of *talaq* may be either revocable or irrevocable. As the Prophet of Islam did not favour the institution of *talaq*, the revocable forms of *talaq* are considered as the 'approved' and the irrevocable forms are treated as the 'disapproved' forms. A revocable pronouncement of divorce gives a *locus poenitentiae* to the man; but an irrevocable pronouncement leads to an undesirable result without a chance to reconsider the question. If this principle is kept in mind the terminology is easily understood. The forms of *talaq* may be classified as follows:
>
> (a) *talaq al-sunna* (i.e., in conformity with the dictates of the Prophet) –
>
> (i) *ahsan* (the most approved), (ii) *hasan* (approved).
>
> (b) *talaq al-bid'a* (i.e., of innovation; therefore not approved) – (i) three declarations (the so-called triple divorce) at one time, (ii) one irrevocable declaration (generally in writing).

The *talaq al-sunna*, most approved form consists of one single pronouncement in a period of *tuhr* (purity, i.e., when the woman is free from her menstrual courses), followed by abstinence from sexual intercourse during that period of sexual purity (*tuhr*) as well as during the whole of the *iddat*. If any such intercourse takes place during the periods mentioned, the divorce is void and of no effect in Ithna Ashari and Fatimi laws. It is this mode or procedure which seems to have been approved by the Prophet at the beginning of his ministry and is consequently regarded as the regular or proper and orthodox form of divorce.

Where the parties have been away from each other for a long time, or where the wife is old and beyond the age of menstruation, the condition of *tuhr* is unnecessary.

A pronouncement made in the *ashan* form is revocable during *iddat*. This period is three months from the date of the declaration or, if the woman is pregnant, until delivery. The husband may revoke the divorce at any time during the *iddat*. Such revocation may be by express words or by conduct. Resumption of conjugal intercourse is a clear case of revocation. For instance, *H* pronounces a single revocable *talaq* against his wife and then says 'I have retained thee' or cohabits with her, the divorce is revoked under Hanafi as well as Ithna Ashari law. After the expiration of the *iddat* the divorce becomes irrevocable.

A Muslim wife after divorce is entitled to maintenance during the *iddat*, and so also her child in certain circumstances.

The *hasan* form of *talaq*, also an approved form but less approved than the first (*ahsan*), consists of three successive pronouncements during three consecutive periods of purity (*tuhr*). Each of these

pronouncements should have been made at a time when no intercourse has taken place during that particular period of purity.

The *hasan* form of *talaq* requires some explanation and a concrete illustration should suffice. The husband (H) pronounces *talaq* on his wife (W) for the first time during a period when W is free from her menstrual courses. The husband and wife had not come together during this period of purity. This is the first talaq. H resumes cohabitation or revokes this first *talaq* in this period of purity. Thereafter in the following period of purity, at a time when no intercourse has taken place, H pronounces the second *talaq*. This talaq is again revoked by express words or by conduct and the third period of purity is entered into. In this period, while no intercourse having taken place, H for the third time pronounces the formula of divorce. This third pronouncement operates in law as a final and irrevocable dissolution of the marital tie. The marriage is dissolved; sexual intercourse becomes unlawful; *iddat* becomes incumbent; remarriage between the parties becomes impossible unless W lawfully marries another husband, and that other husband lawfully divorces her after the marriage has been actually consummated.

Thus it is clear that in these two forms there is a chance for the parties to be reconciled by the intervention of friends or otherwise. They are, therefore, the 'approved' forms and are recognized both by Sunni and Shia laws. The Ithna Ashari and the Fatimi schools, however, do not recognize the remaining two forms and thus preserve the ancient conventions of the times of the Law-giver.

The first, or *ahsan*, form is 'most approved' because the husband behaves in a gentlemanly manner and does not treat the wife as a chattel. The second is a form in

which the Prophet tried to put an end to a barbarous pre-Islamic practice. This practice was to divorce a wife and take her back several times in order to ill-treat her. The Prophet, by the rule of the irrevocability of the third pronouncement, indicated clearly that such a practice could not be continued indefinitely. Thus if a husband really wished to take the wife back he should do so; if not, the third pronouncement after two reconciliations would operate as a final bar. These rules of law follow the spirit of the Quranic injunction: 'when they have reached their term take them back in kindness or part from them in kindness'.

A disapproved form of divorce is *talaq* by triple declarations in which three pronouncements are made in a single *tuhr*, either in one sentence e.g. 'I divorce thee triply or thrice' or in three sentences 'I divorce thee, I divorce thee, I divorce thee.' Such a *talaq* is lawful, although sinful, in Hanafi law; but in Ithna Ashari and the Fatimi laws it is not permissible. This is called *talaq al-ba'in*, irrevocable divorce.

Another form of the disapproved divorce is a single, irrevocable pronouncement made either during the period of *tuhr* or even otherwise. This form is also called *talaq al-ba'in* and may be given in writing. Such a 'bill of divorcement' comes into operation immediately and severs the marital tie. This form is not recognized by the Ithna Ashari or the Fatimi schools."

[Emphasis Supplied]

11. It is at this stage that the 1937 Act needs consideration. The Statement of Objects and Reasons of this Act are as follows:

"For several years past it has been the cherished desire of the Muslims of British

> India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (*Shariat*) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naurally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (*Shariat*) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law."
>
> [Emphasis Supplied]

12. It is a short Act consisting of 6 Sections. We are directly concerned in these cases with Section 2. Section 2 of the 1937 Act states:

> "**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 properly 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*)."

13. A word as to the meaning of the expression "Shariat". A.A.A. Fyzee (supra), at pages 9-11, describes "Shariat" as follows:

> "Coming to law proper, it is necessary to remember that there are two different conceptions of law. Law may be considered to be of divine origin, as is the case with the Hindu law and the Islamic law, or it may be conceived as man-made. The latter conception is the guiding principle of all modern legislation; it is, as Ostrorog has pointed out, the Greek, Roman, Celtic or Germanic notion of law. We may be compelled to act in accordance with certain principles because God desires us to do so, or in the alternative because the King or the Assembly of wise men or the leader of the community or social custom demand it of us, for the good of the people in general. In the case of Hindu law, it is based first on the Vedas or *Sruti* (that which is heard); secondly on the *Smriti* (that which is remembered by the sages or *rishis*).

Although the effect of custom is undoubtedly great yet *dharma*, as defined by Hindu lawyers, implies a course of conduct which is approved by God.

Now, what is the Islamic notion of law? In the words of Justice Mahmood, 'It is to be remembered that Hindu and Muhammadan law are so intimately connected with religion that they cannot readily be dissevered from it'. There is in Islam a doctrine of 'certitude' (*ilm al-yaqin*) in the matter of Good and Evil. We in our weakness cannot understand what Good and Evil are unless we are guided in the matter by an inspired Prophet. Good and Evil – *husn* (beauty) and *qubh* (ugliness) – are to be taken in the ethical acceptation of the terms. What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or *Shariat* and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have *Hadith* which are Traditions of the Prophet – the records of his actions and his sayings – from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or *Shariat* as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law.

Modern jurists emphasize the importance of law for understanding the character and ethos of a people. Law, says a modern jurist, 'streams from the soul of a people like national poetry, it is as holy as the national religion, it grows and spreads like language; religious, ethical, and poetical elements all contribute to its vital force'; it is 'the distilled essence of the civilization of a people'; it reflects the people's soul more clearly than any other organism. This is true of Islam more than of any other faith. The *Shari'at* is the central core of Islam; no understanding of its civilization, its social history or its political system, is possible without a knowledge and appreciation of its legal system.

Shariat (lit., the road to the watering place, the path to be followed) as a technical term means the Canon law of Islam, the totality of Allah's commandments. Each one of such commandments is called *hukm* (pl. *ahkam*). The law of Allah and its inner meaning is not easy to grasp; and *Shariat* embraces all human actions. For this reason it is not 'law' in the modern sense; it contains an infallible guide to ethics. It is fundamentally a Doctrine of Duties, a code of obligations. Legal considerations and individual rights have a secondary place in it; above all the tendency towards a religious evaluation of all the affairs of life is supreme.

According to the *Shariat* religious injunctions are of five kinds, *al-ahkam al-khamsah*. Those strictly enjoined are *farz*, and those strictly forbidden are *haram*. Between them we have two middle categories, namely, things which you are advised to do (*mandub*), and things which you are advised to refrain from (*makruh*) and finally there are things about which religion is indifferent (*ja'iz*). The daily prayers, five in number, are *farz*; wine is *haram*; the addition prayers like those on

> the *Eid* are *mandub*; certain kinds of fish are *makruh*; and there are thousands of *ja'iz* things such as travelling by air. Thus the *Shariat* is totalitarian; all human activity is embraced in its sovereign domain. This fivefold division must be carefully noted; for unless this is done it is impossible to understand the distinction between that which is only morally enjoined and that which is legally enforced. Obviously, moral obligation is quite a different thing from legal necessity and if in law these distinctions are not kept in mind error and confusion are the inevitable result."

14. It can be seen that the 1937 Act is a pre-constitutional legislative measure which would fall directly within Article 13(1) of the Constitution of India, which reads as under:

> "**Article 13 - Laws inconsistent with or in derogation of the fundamental rights -** (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.
> (2) xxx xxx xxx
> (3) In this article, unless the context otherwise requires,-
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
> (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not

be then in operation either at all or in particular areas."

15. However, learned counsel for the Muslim Personal Board as well as other counsel supporting their stand have argued that, read in light of the Objects and Reasons, the 1937 Act was not meant to enforce Muslim personal law, which was enforceable by itself through the Courts in India. The 1937 Act was only meant, as the non-obstante clause in Section 2 indicates, to do away with custom or usage which is contrary to Muslim personal law.

16. We are afraid that such a constricted reading of the statute would be impermissible in law. True, the Objects and Reasons of a statute throw light on the background in which the statute was enacted, but it is difficult to read the non-obstante clause of Section 2 as governing the enacting part of the Section, or otherwise it will become a case of the tail wagging the dog. A similar attempt was made many years ago and rejected in **Aswini Kumar Ghosh** v. **Arabinda Bose**, 1953 SCR 1. This Court was concerned with Section 2 of the Supreme Court Advocates (Practice in High Courts) Act, 1951. Section 2 of the said Act read as follows:

> "Notwithstanding anything contained in the Indian Bar Councils Act, 1926, or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court may, be permitted to practice in that High Court every Advocate of the Supreme Court shall be entitled as of right to practice in any High Court whether or not he is an Advocate of that High Court:
> Provided that nothing in this section shall be deemed to entitle any person, merely by reason of his being an Advocate of the Supreme Court, to practice in any High Court of which he was at any time a judge, if he had given an undertaking not to practice therein after ceasing to hold office as such judge."

17. The argument made before this Court was that the non-obstante clause furnishes the key to the proper interpretation of the scope of the Section and the enacting clause must, therefore, be construed as conferring only a right co-extensive with the disability removed by the opening clause. This argument was rejected by this Court as follows:

> "23. Turning now to the *non obstante* clause in section 2 of the new Act, which appears to have furnished the whole basis for the reasoning of the Court below — and the argument before us closely followed that reasoning — we find the learned Judges begin by inquiring what are the provisions which that clause seeks to supersede and then place upon the enacting clause such construction as would make the right conferred by it co-extensive with the disability imposed by the

> superseded provisions. “The meaning of the section will become clearer”, they observe, “if we examine a little more closely what the section in fact supersedes or repeals.....The disability which the section removes and the right which it confers are co-extensive.” This is not, in our judgment, a correct approach to the construction of section 2. It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the *non obstante* clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment.”
>
> (at pages 21-22)

This view was followed in **A.V. Fernandez** v. **State of Kerala,** 1957 SCR 837 at 850.

18. It is, therefore, clear that all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq when it comes to the Muslim personal law applicable to Sunnis in India. Therefore, it is very difficult to accept the argument on behalf of the Muslim Personal Board that Section 2 does not recognize or enforce Triple Talaq. It clearly and obviously does both, because the Section makes Triple Talaq “the rule of decision in cases where the parties are Muslims”.

19. As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression “laws in force” in Article 13(3)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency.

20. At this stage, it is necessary to refer to the recognition of Triple Talaq as a legal form of divorce in India, as applicable to Sunni Muslims. In an early Bombay case, **Sarabai** v. **Rabiabai**, (1906) ILR 30 Bom 537, Bachelor, J. referred to Triple Talaq and said that “it is good in law though bad in theology”. In a Privy Council decision in 1932, 5 years before the 1937 Act, namely **Rashid Ahmad** v. **Anisa Khatun**, (1931-32) 59 IA 21: AIR 1932 PC 25, the Privy Council was squarely called upon to adjudicate upon a Triple Talaq. Lord Thankerton speaking for the Privy Council put it thus:

> “There is nothing in the case to suggest that the parties are not Sunni Mahomedans governed by the ordinary Hanafi law, and, in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R.K Wilson, in his

> Digest of Anglo-Muhammadan Law, 5th ed., at p. 136, as follows: "The divorce called *talak* may be either irrevocable (*bain*) or revocable (*raja*). A *talak bain*, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A *talak bain* may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either:—(*a*) Once, followed by abstinence from sexual intercourse, for the period called the *iddat*; or (*b*) Three times during successive intervals of purity, i.e, between successive menstruations, no intercourse taking place during any of the three intervals; or (*c*) Three times at shorter intervals, or even in immediate succession; or (*d*) Once, by words showing a clear intention that the divorce shall immediately became irrevocable. The first-named of the above methods is called *ahsan* (best), the second *hasan* (good), the third and fourth are said to be *bidaat* (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid."
>
> (at page 26)

The Privy Council went on to state:

> "Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective: Baillie's Digest, 2nd ed., p. 208; Ameer Ali's Mohammedan

Law, 3rd ed., vol. ii., p. 518; Hamilton's Hedaya, vol. i., p. 211."

(at page 27)

21. It is thus clear that it is this view of the law which the 1937 Act both recognizes and enforces so as to come within the purview of Article 13(1) of the Constitution.

22. In this view of the matter, it is unnecessary for us to decide whether the judgment in **Narasu Appa** (supra) is good law. However, in a suitable case, it may be necessary to have a re-look at this judgment in that the definition of "law" and "laws in force" are both inclusive definitions, and that at least one part of the judgment of P.B. Gajendragadkar, J., (para 26), in which the learned Judge opines that the expression "law" cannot be read into the expression "laws in force" in Article 13(3) is itself no longer good law – See **Sant Ram & Ors.** v. **Labh Singh & Ors.,** (1964) 7 SCR 756.

23. It has been argued somewhat faintly that Triple Talaq would be an essential part of the Islamic faith and would, therefore, be protected by Article 25 of the Constitution of India. Article 25 reads as follows:

"**Article 25 - 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 (2), the 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."

24. "Religion" has been given the widest possible meaning by this Court in **Commissioner, Hindu Religious Endowments, Madras** v. **Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**, 1954 SCR 1005 at 1023-1024. In this country, therefore, atheism would also form part of "religion". But one important caveat has been entered by this Court, namely, that only what is an essential religious practice is protected under Article 25. A few decisions

have laid down what constitutes an essential religious practice. Thus, in **Javed** v. **State of Haryana**, 2003 (8) SCC 369, this Court stated as under:

> "60. Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(*q*) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does."
>
> (at page 394)

And in **Commissioner of Police** v. **Acharya Jagdishwarananda Avadhuta,** 2004 (12) SCC 770, it was stated as under:

"9. The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. (See generally the Constitution Bench decisions in *Commr., H.R.E.* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [AIR 1954 SC 282 : 1954 SCR 1005], *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and *Seshammal* v. *State of T.N.* [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.) What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its

> fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (*sic* essential) part or practices."
>
> (at pages 782-783)

25. Applying the aforesaid tests, it is clear that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it. According to **Javed** (supra), therefore, this would not form part of any essential religious practice. Applying the test stated in **Acharya Jagdishwarananda** (supra)**,** it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice. Indeed, Islam divides all human action into five kinds, as has been stated by Hidayatullah, J. in his introduction to **Mulla** (supra). There it is stated:

> "**E. Degrees of obedience**: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) **First degree:** *Fard*. Whatever is commanded in the Koran, *Hadis* or *ijmaa* must be obeyed.

Wajib. Perhaps a little less compulsory than *Fard* but only slightly less so.

(ii) **Second degree:** *Masnun, Mandub and Mustahab:* These are recommended actions.

(iii) **Third degree:** *Jaiz or Mubah:* These are permissible actions as to which religion is indifferent.

(iv) **Fourth degree:** *Makruh:* That which is reprobated as unworthy.

(v) **Fifth degree:** *Haram:* That which is forbidden."

Obviously, Triple Talaq does not fall within the first degree, since even assuming that it forms part of the Koran, Hadis or Ijmaa, it is not something "commanded". Equally Talaq itself is not a recommended action and, therefore, Triple Talaq will not fall within the second degree. Triple Talaq at best falls within the third degree, but probably falls more squarely within the fourth degree. It will be remembered that under the third degree, Triple Talaq is a permissible action as to which religion is indifferent. Within the fourth degree, it is reprobated as unworthy. We have already seen that though permissible in Hanafi jurisprudence, yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of Article

25(1). This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution.

26. And this brings us to the question as to when petitions have been filed under Article 32 of the Constitution of India, is it permissible for us to state that we will not decide an alleged breach of a fundamental right, but will send the matter back to the legislature to remedy such a wrong.

27. In **Prem Chand Garg** v. **Excise Commissioner, U.P.,** 1963 (Supp.) 1 SCR 885, this Court held:

> "2. Article 32(1) provides that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed, and sub-art. (4) lays down that this right shall not be suspended except as otherwise provided for by this Constitution. There is no doubt that the right to move this Court conferred on the citizens of this country by Article 32 is itself a guaranteed right and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizens fundamental rights. The fundamental rights guaranteed by Part III which have been made

justiciable, form the most outstanding and distinguishing feature of the Indian Constitution. It is true that the said rights are not absolute and they have to be adjusted in relation to the interests of the general public. But the scheme of Article 19 illustrates, the difficult task of determining the propriety or the validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of socio-economic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution makers thought it advisable to treat the citizen's right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore, be appropriately described as the corner-stone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of Patanjali Sastri J., regard itself "as the protector and guarantor of fundamental rights," and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights." (Vide *Romesh Thappar* v. *State of Madras* [[1950] SCR 594 at 697]). In discharging the duties assigned to it, this Court has to play the role "of a sentinel on the *qui vive*" (Vide *State of Madras* v. *V.C. Row* [[1952] SCR 594 at 597]) and it must always regard it as its solemn duty to protect the said fundamental rights' zealously and vigilantly (Vide *Daryao* v. *State of U.P.* [[1962] 1 SCR 574 at p. 582])"

28. We are heartened to note that in a recent U.S. Supreme Court decision the same thing has been

said with respect to knocking at the doors of the U.S. Supreme Court in order to vindicate a basic right. In **Obergefell** v. **Hodges,** 135 S. Ct. 2584 at 2605, decided on June 26, 2015, the U.S. Supreme Court put it thus:

> "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

29. However, counsel for the Muslim Personal Board relied heavily on this Court's decision in **Ahmedabad Women Action Group** v. **Union of India**, (1997) 3 SCC 573. This judgment refers to several earlier decisions to hold that the declarations sought for did not deserve disposal on merits, which involve issues of State policy that courts ordinarily do not have

concern with. This Court, therefore, declined to entertain writ petitions that asked for very sweeping reliefs which, interestingly enough, included a declaration of voidness as to "unilateral talaq". This Court referred in detail to the judgment of the Bombay High Court in **Narasu Appa** (supra) in declining to review Muslim personal law. However, when it came to the challenge of a statutory enactment, Muslim Women (Protection of Rights on Divorce) Act, 1986, this Court did not wish to multiply proceedings in that behalf, as a challenge was pending before a Constitution Bench regarding the same.

30. Hard as we tried, it is difficult to discover any ratio in this judgment, as one part of the judgment contradicts another part. If one particular statutory enactment is already under challenge, there is no reason why other similar enactments which were also challenged should not have been disposed of by this Court. Quite apart from the above, it is a little difficult to appreciate such declination in the light of **Prem Chand Garg** (supra). This judgment, therefore, to the extent that it is contrary to at least two Constitution

Bench decisions cannot possibly be said to be good law.

31. It is at this point that it is necessary to see whether a fundamental right has been violated by the 1937 Act insofar as it seeks to enforce Triple Talaq as a rule of law in the Courts in India.

32. Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts- (1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the U.K., and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in **State of U.P.** v. **Deoman Upadhyaya**, (1961) 1 SCR 14 at 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a rule by which subjects could be classified. If

the classification was "intelligible" having regard to the object sought to be achieved, it would pass muster under Article 14's anti-discrimination aspect. Again, Subba Rao, J., dissenting, in **Lachhman Das** v. **State of Punjab**, (1963) 2 SCR 353 at 395, warned that overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content. He referred to the doctrine of classification as a "subsidiary rule" evolved by courts to give practical content to the said Article.

33. In the pre-1974 era, the judgments of this Court did refer to the "rule of law" or "positive" aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. In **S.G. Jaisinghani** v. **Union of India**, (1967) 2 SCR 703, this Court held:

> "In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law,

> discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey — "Law of the Constitution" — 10th Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. in *United States* v. *Wunderlick* [342 US 98], "when it has freed man from the unlimited discretion of some ruler…. Where discretion, is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the *case of John Wilkes* [(1770) 4 Burr. 2528 at 2539], "means sound discretion guided by law. It must be governed by rule, not by humour : it must not be arbitrary, vague, and fanciful"."
>
> (pages 718 – 719)

This was in the context of service rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India.

34. Similarly, again in the context of an Article 14 challenge to service rules, this Court held in **State of**

Mysore v. **S.R. Jayaram**, (1968) 1 SCR 349 as follows:

> "The principle of recruitment by open competition aims at ensuring equality of opportunity in the matter of employment and obtaining the services of the most meritorious candidates. Rules 1 to 8, 9(1) and the first part of Rule 9(2) seek to achieve this aim. The last part of Rule 9(2) subverts and destroys the basic objectives of the preceding rules. It vests in the Government an arbitrary power of patronage. Though Rule 9(1) requires the appointment of successful candidates to Class I posts in the order of merit and thereafter to Class II posts in the order of merit, Rule 9(1) is subject to Rule 9(2), and under the cover of Rule 9(2) the Government can even arrogate to itself the power of assigning a Class I post to a less meritorious and a Class II post to a more meritorious candidate. We hold that the latter part of Rule 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Articles 14 and 16(1) of the Constitution and must be struck down."
>
> (pages 353 – 354)

35. In the celebrated **Indira Gandhi** v. **Raj Narain** judgment, reported in 1975 Supp SCC 1, Article 329-A sub-clauses (4) and (5) were struck down by a Constitution Bench of this Court. Applying the newly evolved basic structure doctrine laid down in **Kesavananda Bharati** v. **State of Kerala**, (1973) 4

SCC 225, Ray, C.J. struck down the said amendment thus:

> "59. Clause (4) suffers from these infirmities. First, the forum might be changed but another forum has to be created. If the constituent power became itself the forum to decide the disputes the constituent power by repealing the law in relation to election petitions and matters connected therewith did not have any petition to seize upon to deal with the same. Secondly, any decision is to be made in accordance with law. Parliament has power to create law and apply the same. In the present case, the constituent power did not have any law to apply to the case, because the previous law did not apply and no other law was applied by clause (4). The validation of the election in the present case is, therefore, not by applying any law and it, therefore, offends rule of law."
>
> (at page 44)

36. This passage is of great significance in that the amendment was said to be bad because the constituent power did not have any law to apply to the case, and this being so, the rule of law contained in the Constitution would be violated. This rule of law has an obvious reference to Article 14 of the Constitution, in that it would be wholly arbitrary to decide the case without applying any law, and would thus violate the rule of law contained in the said Article. Chandrachud, J., was a little more explicit in that he expressly

referred to Article 14 and stated that Article 329-A is an outright negation of the right of equality conferred by Article 14. This was the case because the law would be discriminatory in that certain high personages would be put above the law in the absence of a differentia reasonably related to the object of the law. He went on to add:

> "681. It follows that clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of 'law' itself. And the Constitutional law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English law at Oxford, which were published in 1885 under the title, "*Introduction to the Study of the Law of the Constitution*". But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts. The second meaning grew out of Dicey's unsound dislike of the French Droit Administratif which he regarded "as a

misfortune inflicted upon the benighted folk across the Channel" [See S.A. de Smith: Judicial Review of Administrative Action, (1968) p. 5]. Indeed, so great was his influence on the thought of the day that as recently as in 1935 Lord Hewart, the Lord Chief Justice of England, dismissed the term "administrative law" as "continental jargon". The third meaning is hardly apposite in the context of our written Constitution for, in India, the Constitution is the source of all rights and obligations. We may not therefore rely wholly on Dicey's exposition of the rule of law but ever since the second world war, the rule has come to acquire a positive content in all democratic countries. [See Wade and Phillips: Constitutional Law (Sixth Edn., pp. 70-73)] The International Commission of Jurists, which has a consultative status under the United Nations, held its Congress in Delhi in 1959 where lawyers, judges and law teachers representing fifty-three countries affirmed that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. One of the committees of that Congress emphasised that no law should subject any individual to discriminatory treatment. These principles must vary from country to country depending upon the provisions of its Constitution and indeed upon whether there exists a written Constitution. As it has been said in a lighter vein, to show the supremacy of the Parliament, the charm of the English Constitution is that "it does not exist". Our Constitution exists and must continue to exist. It guarantees equality before law and the equal protection of laws to everyone. The denial of such equality, as modified by the judicially evolved theory of classification, is the very negation of rule of law."

(at page 258)

37. This paragraph is an early application of the doctrine of arbitrariness which follows from the rule of law contained in Article 14. It is of some significance that Dicey's formulation of the rule of law was referred to, which contains both absence of arbitrary power and equality before the law, as being of the essence of the rule of law.

38. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage Bhagwati, J., in **E.P. Royappa** v. **State of T.N.**, (1974) 4 SCC 3 stated (at page 38):

> "85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public

employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as

distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

[Emphasis Supplied]

39. This was further fleshed out in **Maneka Gandhi** v. **Union of India**, (1978) 1 SCC 248, where, after stating that various fundamental rights must be read together and must overlap and fertilize each other, Bhagwati, J., further amplified this doctrine as follows (at pages 283-284):

"*The nature and requirement of the procedure under Article 21*

7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must

> reiterate here what was pointed out by the majority in *E.P. Royappa* v. *State of Tamil Nadu* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348] namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."
>
> [Emphasis Supplied]

40. This was further clarified in **A.L. Kalra** v. **Project and Equipment Corpn.**, (1984) 3 SCC 316, following **Royappa** (supra) and holding that arbitrariness is a doctrine distinct from discrimination. It was held:

> "19… It thus appears well-settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need

> not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in *Ajay Hasia case* [(1981) 1 SCC 722: 1981 SCC (L&S) 258: AIR 1981 SC 487: (1981) 2 SCR 79: (1981) 1 LLJ 103] and put the matter beyond controversy when it said "wherever therefore, there is arbitrariness in State action whether it be of the Legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action". This view was further elaborated and affirmed in *D.S. Nakara* v. *Union of India* [(1983) 1 SCC 305: 1983 SCC (L&S) 145: AIR 1983 SC 130: (1983) UPSC 263]. In *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248: AIR 1978 SC 597: (1978) 2 SCR 621] it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14."
>
> (at page 328)

The same view was reiterated in **Babita Prasad** v. **State of Bihar**, (1993) Suppl. 3 SCC 268 at 285, at paragraph 31.

41. That the arbitrariness doctrine contained in Article 14 would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in the case of **Ajay Hasia** v.

Khalid Mujib Sehravardi, (1981) 1 SCC 722 (at pages 740-741):

> "16... The true scope and ambit of Article 14 has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in *E.P. Royappa* v. *State of Tamil Nadu* [(1974) 4 SCC 3, 38: 1974 SCC (L&S) 165, 200: (1974) 2 SCR 348] that this Court laid bare a new dimension of Article 14 and pointed out that that article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: [SCC p. 38: SCC (L&S) p. 200, para 85]
>
> > "The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a

> way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in *Royappa* case [(1975) 1 SCC 485: 1975 SCC (L&S) 99: (1975) 3 SCR 616] and it was reaffirmed and elaborated by this Court in *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7)

> "Now the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by this Court in *International Airport Authority* case [(1979) 3 SCC 489] at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely

> a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."
>
> [Emphasis Supplied]

42. In this view of the law, a three Judge Bench of this Court in **K.R. Lakshmanan (Dr.)** v. **State of T.N.**, (1996) 2 SCC 226**,** struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed under Article 14. One was that the Act in question was discriminatory and, therefore, violative of Article 14. The other was that in any case the Act was arbitrary and for that reason would also violate a separate facet of Article 14. This is clear from paragraph 45 of the said judgment. The judgment went on to accept both these arguments. In

so far as the discrimination aspect is concerned, this Court struck down the 1986 Act on the ground that it was discriminatory in paragraphs 46 and 47. Paragraphs 48 to 50 are important, in that this Court struck down the 1986 Act for being arbitrary, separately, as follows (at pages 256-257):

> "48. We see considerable force in the contention of Mr. Parasaran that the acquisition and transfer of the undertaking of the Club is arbitrary. The two Acts were amended by the 1949 Act and the definition of 'gaming' was amended. The object of the amendment was to include horse-racing in the definition of 'gaming'. The provisions of the 1949 Act were, however, not enforced till the 1974 Act was enacted and enforced with effect from 31-3-1975. The 1974 Act was enacted with a view to provide for the abolition of wagering or betting on horse-races in the State of Tamil Nadu. It is thus obvious that the consistent policy of the State Government, as projected through various legislations from 1949 onwards, has been to declare horse-racing as gambling and as such prohibited under the two Acts. The operation of the 1974 Act was stayed by this Court and as a consequence the horse-races are continuing under the orders of this Court. The policy of the State Government as projected in all the enactments on the subject prior to 1986 shows that the State Government considered horse-racing as gambling and as such prohibited under the law. The 1986 Act on the other hand declares horse-racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. We do not agree with the

contention of Mr. Parasaran that the 1986 Act is a colourable piece of legislation, but at the same time we are of the view that no public purpose is being served by acquisition and transfer of the undertaking of the Club by the Government. We fail to understand how the State Government can acquire and take over the functioning of the race-club when it has already enacted the 1974 Act with the avowed object of declaring horse-racing as gambling? Having enacted a law to abolish betting on horse-racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse-racing again in the name of public good and public purpose. It is ex facie irrational to invoke "public good and public purpose" for declaring horse-racing as gambling and as such prohibited under law, and at the same time speak of "public purpose and public good" for acquiring the race-club and conducting the horse-racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1986 Act.

49. We, therefore, hold that the provisions of 1986 Act are discriminatory and arbitrary and as such violate and infract the right to equality enshrined under Article 14 of the Constitution.

50. Since we have struck down the 1986 Act on the ground that it violates Article 14 of the Constitution, it is not necessary for us to go into the question of its validity on the ground of Article 19 of the Constitution."

[Emphasis Supplied]

43. Close upon the heels of this judgment, a discordant note was struck in **State of A.P.** v.

McDowell & Co., (1996) 3 SCC 709. Another three Judge Bench, in repelling an argument based on the arbitrariness facet of Article 14, held:

> "43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is 'arbitrary' and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in *State of T.N.* v. *Ananthi Ammal* [(1995) 1 SCC 519]. Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third

ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to

> three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see *Council of Civil Service Unions* v. *Minister for Civil Service* [1985 AC 374: (1984) 3 All ER 935: (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in *R.* v. *Secy. of State for Home Deptt., ex p Brind* [1991 AC 696: (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted."
>
> (at pages 737-739)

44. This judgment failed to notice at least two binding precedents, first, the judgment of a Constitution Bench in **Ajay Hasia** (supra) and second, the judgment of a coordinate three judge bench in **Lakshmanan** (supra). Apart from this, the reasoning contained as to why arbitrariness cannot be used to strike down legislation as opposed to both executive action and subordinate legislation was as follows:

(1) According to the Bench in **McDowell** (supra), substantive due process is not something accepted by either the American courts or our courts and, therefore, this being a reiteration of substantive due process being read into Article 14 cannot be applied. A Constitution Bench in **Mohd. Arif** v. **Supreme Court of India**, (2014) 9 SCC 737, has held, following the celebrated **Maneka Gandhi** (supra), as follows:

> "27. The stage was now set for the judgment in *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, (1978) 2 SCR 621: (1978) 1 SCC 248]. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See at SCR pp. 646-48: SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687: SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCR p. 723: SCC pp. 338-39, para 85)
>
> > "85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for

> preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."

28. Close on the heels of *Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, (1978) 2 SCR 621: (1978) 1 SCC 248] came *Mithu* v. *State of Punjab* [(1983) 2 SCC 277: 1983 SCC (Cri) 405], in which case the Court noted as follows: (SCC pp. 283-84, para 6)

> "6. … In *Sunil Batra* v. *Delhi Admn*. [(1978) 4 SCC 494: 1979 SCC (Cri) 155], while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in *Bank Nationalisation case* [*Rustom Cavasjee Cooper (Banks*

> *Nationalisation)* v. *Union of India*, (1970) 1 SCC 248] *and Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, (1978) 2 SCR 621: (1978) 1 SCC 248] ….
>
> In *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684: 1980 SCC (Cri) 580] which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, (1978) 2 SCR 621 : (1978) 1 SCC 248], it will read to say that: (SCC p. 730, para 136)
>
> '136. "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."
>
> The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."
>
> (at pages 755-756)

Clearly, therefore, the three Judge Bench has not noticed **Maneka Gandhi** (supra) cited in **Mohd. Arif** (supra) to show that the wheel has turned full circle and substantive due process is part of Article 21 as it is to be read with Articles 14 and 19.

Mathew, J., while delivering the first Tej Bahadur Sapru Memorial Lecture entitled "*Democracy and Judicial Review*", has pointed out:

> "Still another point and I am done. The constitutional makers have formally refused to incorporate the "due process clause" in our Constitution on the basis, it seems, of the advice tendered by Justice Frankfurter to Shri B.N. Rau thinking that it will make the Court a third Chamber and widen the area of Judicial review. But unwittingly, I should think, they have imported the most vital and active element of the concept by their theory of review of 'reasonable restrictions' which might be imposed by law on many of the fundamental rights. Taken in its modern expanded sense, the American "due process clause" stands as a high level guarantee of 'reasonableness' in relation between man and state, an injunction against arbitrariness or oppressiveness. I have had occasion to consider this question in *Kesavananda Bharati's case*. I said:
>
> > "When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources…If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause."

In fact, **Mithu** v. **State of Punjab**, (1983) 2 SCC 277, followed a Constitution Bench judgment in **Sunil Batra** v. **Delhi Administration & Ors.**, (1978) 4 SCC 494. In that case, Section 30(2) of the Prisons Act was challenged as being unconstitutional, because every prisoner under sentence of death shall be confined in a cell apart from all other prisoners, that is to say he will be placed under solitary confinement. The Constitution Bench read down Section 30(2) to refer only to a person who is sentenced to death finally, which would include petitions for mercy to the Governor and/or to the President which have not yet been disposed of. In so holding, Desai, J. speaking for four learned Judges, held (at pages 574-575):

> "228. The challenge under Article 21 must fail on our interpretation of sub-section (2) of Section 30. Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Sub-section (2) of Section 30 establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in *Maneka Gandhi's case* (supra) that the

> law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14. Once Section 30(2) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law."
>
> [Emphasis Supplied]

In a long and illuminating concurring judgment, Krishna Iyer, J., added (at page 518):

> "52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248 and *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."
>
> [Emphasis Supplied]

Coming to **Mithu** (supra), a Constitution Bench of this Court struck down Section 303 of the Indian Penal Code, by which a mandatory sentence of death was imposed on life convicts who commit murder in jail. The argument made by the learned counsel on behalf of the petitioner was set out thus:

> "5. But before we proceed to point out the infirmities from which Section 303 suffers, we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that section. The sum and substance of the argument is that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down."
>
> (at page 283)

After quoting from **Sunil Batra** (supra), the question before the Court was set out thus:

> "6……The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21."
>
> (at page 285)

After setting out the question thus, the Court further stated:

> "9…...Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that

> sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?"
>
> (at page 287)

The question was then answered in the following manner:

> "18. It is because the death sentence has been made mandatory by Section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under Section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the court is relieved from its obligation under Section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust."
>
> 19… To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that Section 235(2) of the Criminal Procedure Code were applicable to the case and the court was under an obligation to hear the accused on the question of sentence, it would have to put some such question to the accused:
>
> > "You were sentenced to life imprisonment for the offence of

> forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death?"

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law."

(at pages 293, 294 and 296)

In a concurring judgment, Chinnappa Reddy, J., struck down the Section in the following terms:

> "25. Judged in the light shed by *Maneka Gandhi* [(1978) 1 SCC 248] and *Bachan Singh* [(1980) 2 SCC 684], it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

(at page 298)

It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".

However, the three Judge Bench in **Mcdowell** (supra) dealt with the binding Constitution Bench decision in **Mithu** (supra) as follows (at page 739):

> "45. Reference was then made by Shri G. Ramaswamy to the decision in *Mithu* v. *State of Punjab* [(1983) 2 SCC 277: 1983 SCC (Cri) 405] wherein Section 303 of the Indian Penal Code was struck down. But that decision turned mainly on Article 21 though Article 14 is also referred to along with Article 21. Not only did the offending provision exclude any scope for application of judicial discretion, it also deprived the accused of the procedural safeguards contained in Sections 235(2) and 354(3) of the Criminal Procedure Code. The ratio of the said decision is thus of no assistance to the petitioners herein."

A binding judgment of five learned Judges of this Court cannot be said to be of "no assistance" by stating that the decision turned mainly on Article 21, though Article 14 was also referred to. It is clear that the ratio of the said Constitution Bench was based both on Article 14 and Article 21 as is clear from the judgment of the four learned Judges in paragraphs 19 and 23 set out supra.[78] A three Judge Bench in the teeth of this ratio cannot, therefore, be

78

said to be good law. Also, the binding Constitution Bench decision in **Sunil Batra** (supra), which held arbitrariness as a ground for striking down a legislative provision, is not at all referred to in the three Judge Bench decision in **Mcdowell** (supra).

(2) The second reason given is that a challenge under Article 14 has to be viewed separately from a challenge under Article 19, which is a reiteration of the point of view of **A.K. Gopalan** v. **State of Madras**, 1950 SCR 88, that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven Judge Bench of this Court in **Rustom Cavasjee Cooper** v. **Union of India,** (1970) 1 SCC 248, and followed in **Maneka Gandhi** (supra). Arbitrariness in legislation is very much a facet of unreasonableness in Article 19(2) to (6), as has been laid down in several Judgments of this Court, some of which are referred to in **Om Kumar** (infra) and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well.

(3) The third reason given is that the Courts cannot sit in Judgment over Parliamentary wisdom. Our law reports are replete with instance after instance where Parliamentary wisdom has been successfully set at

naught by this Court because such laws did not pass muster on account of their being “unreasonable”, which is referred to in **Om Kumar** (infra).

We must never forget the admonition given by Khanna, J. in **State of Punjab** v. **Khan Chand**, (1974) 1 SCC 549. He said:

> “12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one’s own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others

> against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found' to suffer from no such infirmity."

This again cannot detain us.

(4) One more reason given is that the proportionality doctrine, doubtful of application even in administrative law, should not, therefore, apply to this facet of Article 14 in constitutional law. Proportionality as a constitutional doctrine has been highlighted in **Om Kumar** v. **Union of India,** (2001) 2 SCC 386 at 400-401 as follows:

> "30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional *legislation* on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India — such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India,

freedom to reside and settle in any part of India — this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. "Reasonable restrictions" under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered. In *Chintamanrao* v. *State of M.P.* [AIR 1951 SC 118: 1950 SCR 759] Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the fundamental rights "should not be arbitrary or of an excessive nature, *beyond what is required* in the interests of the public". "Reasonable" implied intelligent care and deliberation, that is, the *choice* of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a *proper balance* between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in *State of Madras* v. *V.G. Row* [AIR 1952 SC 196: 1952 SCR 597: 1952 Cri LJ 966], observed that the Court must keep in mind the "nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the *disproportion* of the imposition, the prevailing conditions at the time". This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in *State of A.P.* v. *McDowell & Co.* [(1996) 3 SCC 709] recently. This level

of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Criminal Procedure Code, 1974 and the Indian Penal Code came up for consideration in *Bachan Singh* v. State *of Punjab* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J. (see *Bachan Singh* v. *State of Punjab* [(1982) 3 SCC 24 : 1982 SCC (Cri) 535]) dealt elaborately with "proportionality" and held that the punishment provided by the statute was *disproportionate*.

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India* v. *Nergesh Meerza* [(1981) 4 SCC 335: 1981 SCC (L&S) 599] (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in State of A.P. v. McDowell and Co. [(1996) 3 SCC 709] ."

45. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in **McDowell** (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

46. We only need to point out that even after **McDowell** (supra), this Court has in fact negated statutory law on the ground of it being arbitrary and

therefore violative of Article 14 of the Constitution of India. In **Malpe Vishwanath Acharya** v. **State of Maharashtra**, (1998) 2 SCC 1, this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paragraphs 8 to 15 and 31).

47. Similarly in **Mardia Chemicals Ltd. & Ors.** v. **Union of India & Ors. etc. etc.,** (2004) 4 SCC 311 at 354, this Court struck down Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as follows:

> "64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (*i*) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (*ii*) there is no determination of the amount due as yet, (*iii*) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (*iv*) no special reason for double security in respect of an amount yet to be determined and settled, (*v*) 75% of the amount claimed by no means would be a meagre amount, and (*vi*) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of

> 75% of the undetermined demand. Such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

48. In two other fairly recent judgments namely **State of Tamil Nadu** v. **K. Shyam Sunder**, (2011) 8 SCC 737 at paragraphs 50 to 53, and **A.P. Dairy Development Corpn. Federation** v. **B. Narasimha Reddy**, (2011) 9 SCC 286 at paragraph 29, this Court reiterated the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution.

49. In a Constitution Bench decision in **Ashoka Kumar Thakur** v. **Union of India**, (2008) 6 SCC 1 at 524, an extravagant argument that the impugned legislation was intended to please a section of the community as part of the vote catching mechanism was held to not be a legally acceptable plea and rejected by holding that:

> "219**.** A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions

> of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in *State of Rajasthan* v. *Union of India* [(1977) 3 SCC 592] said: (SCC p. 660, para 149)
>
> > "*149*. … if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities."

50. A subsequent Constitution Bench in **K.T. Plantation (P) Ltd.** v. **State of Karnataka**, (2011) 9 SCC 1, dealt with the constitutional validity of the Roerich and Devikarani Roerich Estate (Acquisition and Transfer) Act, 1996, the legal validity of Section 110 of the Karnataka Land Reforms Act, 1961, Notification No. RD 217 LRA 93 dated 8-3-1994 issued by the State Government thereunder and the scope and content of Article 300-A of the Constitution. While

examining the validity of a legislation which deprives a person of property under Article 300-A, this Court when faced with **Mcdowell** (supra) pointed out that (at page 58):

> "203**.** Even in *McDowell case* [(1996) 3 SCC 709], it was pointed out that some or other constitutional infirmity may be sufficient to invalidate the statute. A three-Judge Bench of this Court in *McDowell & Co. case* [(1996) 3 SCC 709] held as follows: (SCC pp. 737-38, para 43)
>
> > "*43*. … The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (*1*) lack of legislative competence and (*2*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.… No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and

> bad for them. The court cannot sit in judgment over their wisdom."

> 204**.** A two-Judge Bench of this Court in *Union of India* v. *G. Ganayutham* [(1997) 7 SCC 463: 1997 SCC (L&S) 1806], after referring to *McDowell case* [(1996) 3 SCC 709] stated as under: (*G. Ganayutham case* [(1997) 7 SCC 463: 1997 SCC (L&S) 1806] , SCC p. 476, para 22)

> > "22. … That a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the *statute* and that the court can go into the question whether there is a proper *balancing* of the fundamental right and the restriction imposed, is well settled."

> 205**.** Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy."

> [Emphasis Supplied]

51. In a recent Constitution Bench decision in **Natural Resources Allocation, In re, Special Reference No.1 of 2012**, (2012) 10 SCC 1, this Court went into the arbitrariness doctrine in some detail. It referred to

Royappa (supra), **Maneka Gandhi** (supra) and **Ajay Hasia** (supra) (and quoted from paragraph 16 which says that "… the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached…"). It then went on to state that "arbitrariness" and "unreasonableness" have been used interchangeably as follows:

> "103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport* v. *Govt. of A.P.* [(2002) 2 SCC 188], this Court has observed thus: (SCC pp. 203-04, para 25)
>
> > "*25*. … In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."
>
> (at page 81)

After stating all this, it then went on to comment, referring to **McDowell** (supra) that no arbitrary use

should be made of the arbitrariness doctrine. It then concluded (at page 83):

> "107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *McDowell case* [(1996) 3 SCC 709] has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."
>
> [Emphasis Supplied]

On a reading of this judgment, it is clear that this Court did not read **McDowell** (supra) as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and **Ajay Hasia** (supra) in particular, which stated that legislation can

be struck down on the ground that it is “arbitrary” under Article 14, went on to conclude that “arbitrariness” when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is “manifestly arbitrary”; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

52. Another Constitution Bench decision reported as **Dr. Subramanian Swamy** v. **Director, Central Bureau of Investigation**, (2014) 8 SCC 682, dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This Section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in **Dr. Subramanian Swamy** v. **Director, Central**

Bureau of Investigation, (2005) 2 SCC 317, and after referring to several judgments including **Ajay Hasia** (supra), **Mardia Chemicals** (supra), **Malpe Vishwanath Acharya** (supra) and **McDowell** (supra), the reference *inter alia* was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

After referring to the submissions of counsel, and several judgments on the discrimination aspect of Article 14, this Court held:

> "48. In *E.P. Royappa* [*E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3: 1974 SCC (L&S) 165], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)
>
> > "*85*. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is

> therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good

> or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."
>
> (at pages 721-722)

Since the Court ultimately struck down Section 6-A on the ground that it was discriminatory, it became unnecessary to pronounce on one of the questions referred to it, namely, as to whether arbitrariness could be a ground for invalidating legislation under Article 14. Indeed the Court said as much in paragraph 98 of the judgment as under (at page 740):

> "Having considered the impugned provision contained in Section 6-A and for the reasons indicated above, we do not think that it is necessary to consider the other objections challenging the impugned provision in the context of Article 14."

53. However, in **State of Bihar** v. **Bihar Distillery Ltd.**, (1997) 2 SCC 453 at paragraph 22, in **State of M.P.** v. **Rakesh Kohli**, (2012) 6 SCC 312 at paragraphs 17 to 19, in **Rajbala** v. **State of Haryana & Ors.**, (2016) 2 SCC 445 at paragraphs 53 to 65 and **Binoy Viswam** v. **Union of India**, (2017) 7 SCC 59 at paragraphs 80 to 82, **McDowell** (supra) was read as being an absolute bar to the use of "arbitrariness" as a

tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, **Mcdowell** (supra) itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following **McDowell** (supra) are, therefore, no longer good law.

54. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In **Cellular Operators Association of India** v. **Telecom Regulatory Authority of India**, (2016) 7 SCC 703, this Court referred to earlier precedents, and held:

> "**Violation of fundamental rights**
> 42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. (See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [(1985) 1 SCC 641: 1985 SCC (Tax) 121], SCC at p. 689, para 75.)
>
> 43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of*

Karnataka [(1996) 10 SCC 304], this Court held: (SCC p. 314, para 13)

> "13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power*. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [(1985) 1 SCC 641 : 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being*

reasonable, but in the sense that it is manifestly arbitrary'. Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution*."

44. Also, in *Sharma Transport* v. *State of A.P.* [(2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25)

> "25. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

(at pages 736-737)

55. It will be noticed that a Constitution Bench of this Court in **Indian Express Newspapers** v. **Union of India**, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.

56. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of

Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in **Fyzee's book** (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in **Shamim Ara** v. **State of U.P.**, (2002) 7 SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held as under:

> "13…The correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, *talaq* may be effected (para 13). In *Rukia Khatun case* [(1981) 1 Gau LR 375] the Division Bench stated that the correct law of *talaq*, as ordained by the Holy Quran, is: (*i*) that "talaq" must be for a reasonable cause; and (*ii*) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "*talaq*" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.
> 14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts."

(at page 526)

57. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in **Rashid Ahmad** (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after **Shamim Ara** (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated

above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.

……J.
(Rohinton Fali Nariman)

……J.
(Uday Umesh Lalit)

New Delhi;
August 22, 2017.

IN THE SUPREME COURT OF INDIA

Original Civil Jurisdiction

Writ Petition (C) No. 118 of 2016

Shayara Bano ... Petitioner

versus

Union of India and others ... Respondents

with

Suo Motu Writ (C) No. 2 of 2015

In Re: Muslim Women's Quest For Equality

versus

Jamiat Ulma-I-Hind

Writ Petition(C) No. 288 of 2016

Aafreen Rehman ... Petitioner

versus

Union of India and others ... Respondents

Writ Petition(C) No. 327 of 2016

Gulshan Parveen ... Petitioner

versus

Union of India and others ... Respondents

Writ Petition(C) No. 665 of 2016

Ishrat Jahan ... Petitioner

versus

Union of India and others ... Respondents

Writ Petition(C) No. 43 of 2017

Atiya Sabri ... Petitioner

versus

Union of India and others ... Respondents

ORDER OF THE COURT

In view of the different opinions recorded, by a majority of 3:2 the practice of 'talaq-e-biddat' – triple talaq is set aside.

.....CJI.
(Jagdish Singh Khehar)

.....J.
(Kurian Joseph)

.....J.
(Rohinton Fali Nariman)

.....J.
(Uday Umesh Lalit)

.....J.
(S. Abdul Nazeer)

New Delhi;
August 22, 2017.