IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

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

IN THE MATTER OF:

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

VERSUS

Jamiat Ulama-i-Hind & others …Respondents

AND
IN THE MATTER OF :-

WRIT PETITION (CIVIL) NO. 118 OF 2016

Shayara Bano … Petitioner

VERSUS

Union of India & others …Respondents

NOTE ON ARGUMENTS OF Mr. KAPIL SIBAL SENIOR ADVOCATE

FILED BY:-
EJAZ MAQBOOL, ADVOCATE FOR THE RESPONDENT NO 8 (AIMPLB) IN WRIT PETITION (CIVIL) NO. 118 OF 2016

(I)

Concept of Personal Law

1. Personal law represents matters of faith continued for centuries having a direct relationship to the faith of the community representing a religious denomination. Such matters of faith span the life of a person with reference to the family and the community to which he or she is a part of.

2. Apropos the above, personal law relates to the ceremonies performed at the time of birth of an individual in the family and within the community. Thereafter, the dress code, the manner in which marriages are performed and the ceremonies relating thereto, the parting of ways of a marital couple, divorce, if any, issues of custody and guardianship of children, if any, are also matters, which in the absence of legislation are guided by faith. Upon divorce, how the property is to be distributed and at the time of death, the ceremonies to be performed are also guided by matters of faith embedded in practices. Questions of inheritance and succession are dealt with thereafter in the same manner.

3. Black's Law Dictionary (10th Edition, 2014) defines "*Personal law*" as follows **(@pg. 1 of the Compilation of Respondent No. 8-AIMPLB)**: -

"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)."

Further the definition of personal laws by R.H. Graveson in Conflict of Laws 188 (7th ed. 1974) was also provided. R.H. Graveson defines personal law as follows:-

"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 …"

The evolution of matters of faith relating to religious practices is to be judged in the context of recognition of those practices by the community over centuries. An individual's thought and action inconsistent with such practices cannot be the basis of determining matters of faith.

4. None of the above is applicable if legislation covers any of the matters referred to above. Such legislations can be tested on the anvil of Part III of the Constitution.

(II)

Personal Laws cannot be tested on the anvil of Part III of the Constitution of India

1. Societies of different faiths are essentially patriarchal. This is true of all faiths, Hindus, Christian, Islam, Parsi, Zoroaster, Buddhist etc. There are very few exceptions to this. Reform through codification of such faith binds all individuals within the community. This process is evolutionary.

2. Absent such law, faith is the arbiter of individuals belonging to the community and practicing a particular faith.

3. The Constitution of India recognizes 'personal law' of all religious denominations being communities and protects their faith by making them immune from challenge under Part III of the Constitution. This is evident from the following judgments: -

   (i) In *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 84) **(@ Tab 11/Vol. 2 of the Compilation of Cases submitted by the Union)**:-

   a. Justice Chagla at **paragraph 16** observed as follows:

   "16. That this distinction is recognised by the Legislature is clear if one looks to the language of S. 112, Government of India Act, 1915. That section deals with the law to be administered by the High Courts and it provides that the High Courts shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject. Therefore, a clear distinction is drawn between personal law and custom having the force of law. ***This is a provision in the Constitution Act, and having this model before them the Constituent Assembly in defining "law" in Art. 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This, in our opinion, is a very clear pointer to the***

intention of the Constitution-making body to exclude personal law from the purview of Art. 13. *There are other pointers as well. Article 17 abolishes untouchability and forbids its practice in any form. Article 25(2)(b) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Now, if Hindu personal law became void by reason of Art. 13 and by reason of any of its provisions contravening any fundamental right, then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravened Arts. 14 and 15. This clearly shows that only in certain respects has the Constitution dealt with personal law.* ***The very presence of Art. 44 in the Constitution recognizes the existence of separate personal laws, and Entry No. 5 in the Concurrent List gives power to the Legislatures to pass laws affecting personal law. The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is made with regard to it and leave it to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform Code****. Our attention has been drawn to S. 292, Government of India Act, 1935, which provides that all the law in force in British India shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and S. 293 deals with adaptation of existing penal laws. There is a similar provision in our Constitution in Art. 372(1) and Art. 372(2). It is contended that the laws which are to continue in force under Art. 372(1) include personal laws, and as these laws are to continue in force subject to the other provisions of the Constitution, it is urged that by reason of Art. 13(1) any provision in any personal law which is inconsistent with fundamental rights would be void.* ***But it is clear from the language of Arts. 372(1) and (2) that the expression "laws in force" used in this article does not include personal law because Art. 373(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment, and surely it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community.***

Although the point urged before us is not by any means free from difficulty, on the whole after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in Art. 13(1)."

b. Justice Gajendragadkar at **paragraph 29** observed as follows:

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

(ii) Thereafter in *Krishna Singh v. Mathura Athir* (1981) 3 SCC 689 **(@ Tab 68/Vol. 5 of the Compilation of Cases submitted by the Union)**, this Hon'ble Court at **Para 17** held as follows:-

"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."

(iii) Both the above-mentioned judgments were confirmed by this Hon'ble Court in *Ahmedabad Women Action Group v. Union of India* **(@ Tab 101/Vol. 9 of the Compilation of Cases submitted by the Union)**, (1997) 3 SCC 573 (Para 8,9 and 18).

4. This is clear from the definition of 'law' and the expression 'laws in force' thus far interpreted by this Court under Article 13 of the Constitution. If read along with Article 372 and Entry 5 of List III, it is clear that 'personal laws' are not subject to challenge under Part III of the Constitution. This is evident from the following judgments: -

(i) *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 84) **(@ Tab 11/Vol. 2 of the Compilation of Cases submitted by the Union)** at paragraph 16 (quoted above).

(ii) In *Youth Welfare Federation v. Union of India, (MANU/AP/0626/1996)* **(@ pgs. 2-35 of the of the Compilation of Respondent No. 8-AIMPLB)**, the Hon'ble High Court of Andhra Pradesh held as follows:-

"13. A combined reading of Articles 13, 366(10) and 372 of the Constitution of India reveals the true intention of the use of the words in Articles 13 and 372. It would thus be correct to say that the expression "laws in force" or "law in force" in Articles 13 and 372 have the same meaning as "existing law" in Article 366(10) except that the words stand extended in Article 13 to also include customs or usages having the force of law because Article 13(3)(b) is to be read with Article 13(3)(a). Thus understood, the existing laws which are continued under Article

372 would continue to operate subject to the provisions of Article 13(1) i.e., if they are not void because of being inconsistent with the provisions of Part III of the Constitution. The definitions of "laws in force" or "law in force" being inclusive in nature, would naturally mean that the expressions are intended to be extended ones i.e., while law or laws in force would have to be understood in their natural sense as whatever law continuing to be in force, the definitions make it clear that all laws which were made by legislature or competent authorities prior to the commencement of the Constitution, has not been repealed even if such law or any part of it was not in operation, would be regarded as laws in force and continue to be operative unless it is void because of Article 13(1). But this would, applying the clue available in Article 366(10), be the mandate only in respect of enacted or framed laws but not those which are not enacted by any legislative body or other competent authority but are nonetheless laws which are applied by the Courts as administering the relations between the parties, say as relating to marriage, inheritance, etc. Those include the foundational sources of the personal laws of the different communities applied to them by the Courts administering the law in the land and hence view was correctly taken in the State of Bombay v. Narasu Appa (supra) that while such laws are also laws in force in general way, yet they are not laws in force in the sense it is used in Articles 13(1) or 372.

14. … Thus the personal law of different communities continue in operation unaffected by any change of Rulers. Such law would continue to operate unabated until because of social necessity of reformation or for any other reason the competent authority changes the law. Once the law is so changed and made into an enactment, ordinance, bye-law, order or otherwise it would, in the context of the Indian Constitution, be subject to the provisions of Part III and has to satisfy the test and the Courts may declare it void.

15. In view of the discussions, the proposition of invalidity of personal laws which are inconsistent to Part III would only be partially correct i.e., that the statutory personal laws and customs or usages having the force "of laws only are subject to the paramountcy of the fundamental rights but it has to be held, by necessary interpretation, that non-statutory personal laws

at the commencement of the Constitution transcend the fundamental rights. This interpretation of Articles 13(1) and 372 would be logical and wholesome as interpretation of the Constitution differs from interpretation of ordinary statutes and the maxims of statutory interpretation do not always apply to the interpretation of Constitution.

……. It is hence to be found as to what was the real intention of the Constitution when it said that all laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent they are inconsistent with Part III. It is indeed very difficult to conceive that the framers of the Constitution did ever visualise that on one day, when the Constitution is introduced, all laws of all communities would be ironed out of all their differences by application of the fundamental rights and the differences of religious perception, custom, practice, may, of the very way of livings of this vastly heterodox multitudes of communities would be deprived of their individuality in the matters of religion and religious practices. The enormity of the resultant situation would have prevented any such contemplation to have been ever made and indeed no such precipitative action could ever have been intended as is clear from Article 44 which put the introduction of a uniform civil code not in Part III but in Part IV, as a goal to be achieved in good time when situation conducive to it prevails. If by mere force of Article 13 the object of the uniformity would have been stood achieved, there would have been no necessity for placing Article 44 on the body of the Constitution. Another reason for which the non-statutory personal laws must be held to be outside the purview of Article 13(1) is that customs or usages having force of law were specifically included as being law for the purpose of that Article as otherwise there would have been room to contend that they were not laws within its meaning. Custom and usages having the force of law are non-statutory having not been framed by anybody and hence when their inclusion was thought necessary, those were specifically specified as being laws for the purpose of the Article. If it would have been the intention of the Constituent body to include non-statutory personal laws as well, that would have been made clear by specific inclusion. Those cannot be brought within the ambit of the Article merely because they were laws applied by

the Courts of India as similarly customs or usages having the force of law were also being applied by the Courts of India in the administration of justice but yet were specifically included and there was no reason why non-statutory personal laws could not have been likewise included.

18. For all such reasons, I would agree with the view expressed in the referring order that uncodified personal laws not altered by usage or custom are outside the purview of Part III of the Constitution. But if such personal laws have been modified or abrogated by statute, or varied by custom or usages having the force of law, their constitutional validity is liable to be tested, as the case may be, on the anvil of Article 13(1) and 13(2) of the Constitution of India.

5. The expression 'custom and usage' in Article 13 of the Constitution does not include the faith of a religious denomination embedded in personal laws. Reference is made to the Section 112 of the Government of India Act, 1915 wherein a clear distinction was drawn between personal laws and customs having the force of law. The Constituent Assembly advisedly, therefore, in Article 13 used the expression 'custom and usage' and omitted the expression 'personal law'. This is also clear from Entry 5 of the List III in the 7th Schedule, which is the only place in the Constitution which uses the expression 'personal law.' The Constituent Assembly was aware of the distinction between 'personal law' and the 'custom and usage' and chose advisedly to exclude 'personal law' and include 'custom and usage' in Article 13 of the Constitution. This position has been affirmed by the Hon'ble High Court of Andhra Pradesh in *Youth Welfare Federation v. Union of India, (MANU/AP/0626/1996)* **(@ pgs. 2-35 of the Compilation)** at paragraph 15, wherein the Hon'ble High Court observed as follows:-

".....Another reason for which the non-statutory personal laws must be held to be outside the purview of Article 13(1) is that customs or usages having force of law were specifically included as being law for the purpose of that Article as otherwise there would have been room to contend that they were not laws within its meaning. Custom and usages having the force of law are non-statutory having not been framed by anybody and hence when their inclusion was thought necessary, those were specifically specified as being laws for

the purpose of the Article. If it would have been the intention of the Constituent body to include non-statutory personal laws as well, that would have been made clear by specific inclusion. Those cannot be brought within the ambit of the Article merely because they were laws applied by the Courts of India as similarly customs or usages having the force of law were also being applied by the Courts of India in the administration of justice but yet were specifically included and there was no reason why non-statutory personal laws could not have been likewise included."

6. Apropos the above, if 'personal law' stands excluded from the definition of 'law in force' in Article 13 then all matters of faith having a direct relationship to a religious denomination being matters of personal law cannot be tested on the anvil of Articles 14, 15, and 21 of the Constitution of India.

7. In any event, even when the legislature has enacted laws, such as in case of the Hindu Marriage Act,1955 customs contrary to the Act have been specifically protected by Section 29 (2) of the Act. In fact by virtue of Section 2 of the Act, the Act has been made inapplicable to Scheduled Tribes. The following cases reflect as to how, customs contrary to the Act have been saved by the Courts :-

(i) In *Dukku Labudu Bariki v. Sobha Hymavathi Devi* [MANU/AP/0367/2003] **(@ pgs. 36-67 of the of the Compilation of Respondent No. 8-AIMPLB) (at paragraph 44 and 45)**, the Hon'ble High Court of Andhra Pradesh, approved a custom of divorce prevailing amongst the tribal communities and the Kummari caste people wherein divorce would validly take place, if a woman leaves her husband and elopes with another man and the second husband returns the marriage expenses and bride-price incurred to the former husband.

(ii) In *Loya Padmaja alias Venkateswaramma v. Loya Veera Venkata Govindarajulu*, MANU/AP/0798/1999 **(@ pgs. 68-73 of the Compilation of Respondent No. 8-AIMPLB) (at paragraph 19)**, the Hon'ble High Court of Andhra Pradesh, approved a form of customary divorce obtained from caste elders.

8. Further, reference to Article 26 (b) of the Constitution gives the freedom to every religious denomination to manage its own affairs in matters of religion. This also indicates that Constitutional mandate is for Courts to protect matters of faith and allow the religious denomination to manage its own affairs in matters of faith. In fact this principle has been elaborated by this Hon'ble Court in *Riju Prasad Sarma v. State of Assam* (2015) 9 SCC 461(at para 66) **(@ Tab 172 /Vol. 17 of the Compilation of Cases submitted by the Union)**:

> *"On considering the rival submissions and the relevant case laws, we are inclined to agree with the submissions on behalf of the respondents that Article 13(1) applies only to such pre-constitution laws including customs which are inconsistent with the provisions of Part III of the Constitution and not to such religious customs and personal laws which are protected by the fundamental rights such as Articles 25 and 26. In other words, religious believes, customs and practices based upon religious faith and scriptures cannot be treated to be void. Religious freedoms protected by Articles 25 and 26 can be curtailed only by law, made by a competent legislature to the permissible extent. The Court can surely examine and strike down a State action or law on the grounds of Articles 14 and 15."*

9. All submissions made on grounds of discrimination that the right to 'Talaq' is unilateral at the instance of the man in a marital relationship begs the question. 'Personal law' cannot be tested on grounds of discrimination. Such a test can only be applied when such 'personal laws' are deemed to be 'laws' under Article 13 of the Constitution.

10. This proposition is also clear from Article 371 A of the Constitution in respect of the State of Nagaland wherein it is set out that no Act of Parliament in respect of religious and social practices of Nagas and other matters referred to therein shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by resolution so declares. This principle is also enunciated in Article 371 G which applies to the State of Mizoram wherein too it is set out that no Act of Parliament in respect of religious or social practices of the Mizos along with other matters stated therein shall apply unless the

Legislative Assembly of State of Mizoram by a resolution so decides. The Constitutional scheme, therefore, suggests that whenever elected Members of Parliament or a Legislative Assembly were to make a law codifying such religious and social practices then alone would such law be enforceable through courts of law and their constitutionality under Part III of the Constitution can be tested.

(III)

Concept of Talaq in Sharia

1. It is submitted that religious denominations in India with reference to Islam are broadly divided into two categories - Sunnis and Shias. Within Sunnis, you have separate religious denominations being Hanafi, Malaki, Shafei and Hanbali and the 5th school that has emerged which is not a part of any of the four above is referred to as Ahl-e-Hadith. In India, amongst the Sunnis, that religious denomination referred to as 'Hanafi' represent 90% or more of Sunnis in India. There is a very small percentage of other religious denominations within India. In fact, most of the Shafeis are concentrated in Kerala and the Konkan region. A chart indicating the details regarding various schools of thought in Islam is provided **at pages 74-75 of the Compilation of Respondent No. 8-AIMPLB.**

2. There are three forms of Talaq - Ahsan, Hasan and Talaq-e-Biddat. None of these forms are referred to in the Quran or Hadith. The challenge in these petitions is that Triple Talaq, which is Talaq-e-Biddat is not recognized by the Quran. None of these nomenclatures are referred to in the Quran.

3. The procedure to be followed in all the different forms of Talaq practiced by Muslims is not reflected in the Quran or Hadith. Hadith declares that Talaq in itself is not a good practice, but recognizes the factum of Talaq. This is accepted by all believers of Islam. The Quran represents the revelations of Allah to Prophet Mohammad. The Quran also states that what the Prophet has said from time to time is also a part of Islam and is to be obeyed and followed. Courts can take judicial notice of the fact that what the Prophet said from time to time was not recorded by the Prophet himself but is a part of oral tradition. What the Prophet said from time to time was immediately after his passing away compiled by his companions. This has been, through oral tradition, recognized and passed on to generation after generation. This is in the form of Hadith.

4. Apropos the above, Islam represents (i) what is in the Quran, (ii) what was stated and practiced by the Prophet from time to time, and (iii) what was memorized and recorded in the Hadith which through centuries of generations believe represents what the Prophet had said and practiced. This represents Islamic law being practiced over

centuries and has become part of the religious faith of various denominations. This law is called Shariat. In the context of this, the following verses in the Quran relevant for the matters in issue in these petitions maybe set out:-

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 59:7)[Please see page 2 of compilation of original texts, transliteration and translation]**

ii. O you who believe, obey Allah and His Messenger, and do not turn away from Him when you listen (to him). **(Quran, Al-Anfal 8:20))[Please see page 3 of compilation of original texts, transliteration and translation**

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))[Please see page 4 of compilation of original texts , transliteration and translation**

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**) **)[Please see page 5 of compilation of original texts , transliteration and translation]**

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 matter; and whoever disobeys Allah and His messenger, he indeed gets off the track, falling into an open error. **(Quran, Al-Ahzab 33:36))[Please see page 6 of compilation of original texts , transliteration and translation]**

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); [Please see page 7 of compilation of original texts , transliteration and translation]**

References in Quran with respect to Triple Talaq are as follows:-

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 on them in what she gives up to secure her release. These are the limits set by Allah. Therefore, do not exceed them. Whosoever exceeds the limits set by Allah, then, those are the transgressors. **(Quran, Al-Baqarah 2:229) [Please see page 8 of compilation of original text, transliteration and translation.]**

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) [Please see page 9 of compilation of original text, transliteration n and translation.]**

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) [Please see page 10 of compilation of original text, transliteration n and translation.]**

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) [Please see page 11 of compilation of original text, transliteration n and translation.]**

Statements attributed to the Prophet in relation to Talaq relevant for the purposes of this case are the following: -

i. Salmah bin 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 (Pbuh) separated her from him irrevocably. and it didn't reach to us that the Prophet (Pbuh) rebuked him for that (Daraqutni, Kitab Al- Talaq wa Al- Khula wa AI- Aiyla, 5/ 23, Hadith number: 3922). **[Please see page 41 of compilation of original texts , transliteration and translation]**

ii. Anas recounts on Muadh's authority: "I heard the Prophet (Pbuh) saying: 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- Aiyla, Hadith number: 4020). **[Please see page 44 of compilation of original texts , transliteration and translation]**

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 action on your part would have been a sin" (Sunan Bayhaqi,

7/ 547, Hadith number: 14955).**[Please see page 50 of compilation of original texts , transliteration and translation]**

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 then he, I would have taken her back. (AI- Sunan AI- Kubra Iil Bayhaqi, Hadith number:14492)). **[Please see page 53 of compilation of original texts , transliteration and translation]**

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) **[Please see page 74 of compilation of original texts, transliteration and translation]**

The references to the Hadith in relation to Talaq for the purposes of this case are the following:-

(i) "Of all the things permitted by Allah, divorce is the most undesirable act. (Sunan Abu Dawud, Bab Karahiya al- Talaq, Hadith no: 2178). **[Please see page 32 of compilation of original texts , transliteration and translation]**

(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; **[Please see page 35 of compilation of original texts , transliteration and translation]**

(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)**.[Please see page 38 of compilation of original texts , transliteration and translation]**

(iv) A man met another playful man in Medinah. He said, "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). **[Kindly see page 59 of compilation of original texts, transliteration and translation]**

(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.). **[Please see page 62 of compilation of original texts, transliteration and translation]**

(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). **[Please see page 65 of compilation of original texts, transliteration and translation]**

(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). **[Please see page 83 of compilation of original texts, transliteration and translation]**

(viii) Chapter heading runs thus: "The stance 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). **[Please see page 92 of compilation of original texts, transliteration and translation]**

5. The above is an integral part of the Hanafi school, which faith represents of 90% of the Sunnis in India.

6. In the light of the above, the submissions made that the Quran alone has said everything about Talaq and the manner in which it is to be administered and the procedures to be followed in different forms of Talaq is a misconception.

7. In any event, the Court in exercise of its powers under the Constitution should not, in matters of faith, seek to interpret the manner in which the community should understand its own faith. This is especially so in the context of different interpretations sought to be given by different scholars on matters of faith. It is noticed that the interpretations relied upon by the Petitioners in this case are mostly of scholars who do not belong to the Sunni faith. In fact, one of the scholars relied upon is the disciple of Mirza Ghulam Ahmed (founder of the Qadiani School) who declared himself to be the Prophet after Prophet Mohammed. Qadiani's disciple was Mohammed Ali. The interpretations relied upon in the judgments of *Masroor Ahmed Vs. State (Nct of Delhi) and Anr.* [ILR(2007) II Delhi @ para 29], *Mst. Rukia Khatoon v. Abdul Khalique* [(1981) 1 GLR 375 @ para 8], *Jiauddin Ahmed V. Mrs. Anwara Begum* [(1981)1 GLR 358 @ para 7] and at page 9 of the W.P.(Civil) 118 of 2016 are those of Mohammed Ali. He is not recognized by all Muslims. It would be a travesty of justice if his utterances are relied upon and followed contrary to the faith of all Muslims in India.

8. The Quran and Hadith represent the Islamic beliefs. Islam also relied upon interpretations by scholars of both Quran and Hadith, together they from the Sharia. The core values of Islam were perfected during the time of the Prophet. However Islamic law was enunciated taking into account these core values.

(IV)

Triple Talaq

1. Talaq can be in 3 forms Ahsan, Hasan and Talaq-e-Biddat as stated earlier. None of these nomenclatures are referred to either in the Quran or in the Hadith. These forms are categorized and interpreted by Islamic scholars. What is common in all forms is the finality of Talaq. Ahsan if not revoked is final, Hasan if not revoked is final, Triple Talaq when administered is final. In all forms of Talaq, when administered three times become irrevocable.

2. The petitioners, however, are not challenging the finality of Talaq but challenging the procedure of Triple Talaq, which has the immediate consequence of finality. The question now is whether Triple Talaq is a part of the faith of Hanafi school. Imam Abu Hanifa, who himself did not record his own understanding of what the Prophet said in writing, however, had two disciples who immediately upon his death in writing recorded what he had said about Triple Talaq. One of his disciples was Abu Yusuf , the chief justice in the Abbassid Empire and the other disciple, Imam Muhammed was the deputy Qazi of the same Caliphate.

3. Imam Abu Hanifa's disciple, Imam Abu Yusuf in his book entitled as "*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". **(Page 190)**

4. Imam Abu Hanifa's disciple, Imam Abu Muhammed in his book entitled as "*Al-Muatta*" [First Volume] stated the following on the Triple Talaq:-

    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 according to what her husband intended, if his intention is one then 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. **(Page 48)**

5. Even qua other schools, the following has been stated:-

(i) Most of the Ulema take the innovative divorce as effective **(**Baday al- sanay, fasl Hukum Talaq- al Bidaa, Kitab al- Talaq , 3/153). **[Please see page 77 of compilation of original texts, transliteration and translation]**

(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).**[Please see page 80 of compilation of original texts, transliteration and translation]**

(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) **[Please see page 86 of compilation of original texts, transliteration and translation]**

(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) **[Please see page 89 of compilation of original texts, transliteration and translation]**

(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) Muaffaqud 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 his wife : Divorce yourself , intending three , and she has divorced herself thrice, it will 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 someone else. Consummation of marriage is immaterial. The validity of Triple Talaq is also endorsed by all Ahl Al Sunnah jurists. Allama Ibn Qudama 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) **[Please see page 86 of compilation of original text, transliteration and translation.]**

6. Many women belonging to the Hanafi school who accept Triple Talaq as a valid form of divorce cannot be as a matter of law be denied the consequences thereof. Such belief of women should not be interfered with and cannot be set at naught through a judicial pronouncement, the consequence of that would be what as a matter of faith is valid in law with legal consequences within the faith will create societal complications to such women.

7. From the above, it is, therefore, clear that Triple Talaq for the Hanafis, a religious denomination is a matter of faith.

(V)

Triple Talaq in foreign countries

1. In other jurisdictions too prior to codification, including countries like Pakistan, Egypt, Tunisia etc. Triple Talaq was considered part of the Islamic faith.

(VI)

The Muslim Personal Law (Shariat) Application Act, 1937

(Act of 1937)

1. The essential purpose of the said Act of 1937 was to ensure that all those customs and practices which were contrary to Islam but being followed by those who embraced Islam should be discontinued and declared to be contrary to Islam. This is made not only clear from the objects and reasons of the Act of 1937 but also the language of Section 2. The following judgments of various High courts reflect that position:-

   (i) In *Ashrafalli Cassim Ali Jairazbhoy v. Mahomedalli Rajaballi* [ILR 1947 Bom 1] **(@pgs. 76-98 of the Compilation of Respondent No. 8-AIMPLB),** the question arose regarding the testamentary succession of Khoja Muslims, whether their customs would govern the testamentary succession or the same would be governed by Muslim Personal Law. The Hon'ble Bombay High Court, noted that since testamentary succession is not a matter enumerated in Section 2 of the Shariat Application Act, the customary law would prevail. The Hon'ble High Court **at page 7** observed as follows: -

   "The next question is whether the Shariat Act (XXVI of 1937) has in any way affected the legal position so far as it relates to Khojas. Section 2 of that Act abrogates all custom and usage which is contrary to Mahomedan law in those matters which are enumerated in that section and applies to Muslims their strict Muslim Personal Law. The only subjects that I need refer to ate intestate succession, gifts, trusts and trust properties, and wakfs. It is to be noted that testate succession is not referred to in that section. Therefore it is clear that any established custom with regard to testate succession which departs from Mahomedan law can still be enforced by Courts of law, and as I have already held that Khojas were governed by Hindu law both in matters of testate and intestate succession, although in the case of the latter they would now be governed by Mahomedan law, as far as the former is concerned their customary law would still prevail…."

   (ii) The aforementioned position of law was noted and affirmed by the Madras High Court in *Puthiya Purayil Abdurahiman*

Karnavan and Manager of the tavazhi taward and another v. Thayath Kancheentavida Avoomma & Ors. [69 L.W. 66 @ pg. 70] (@ **pgs. 99-105 of the Compilation of Respondent No. 8-AIMPLB**).

(iii) In *Moulvi Mohammed and Ors. v. S. Mohaboob Begum* (AIR 1984 Mad 7) **(@pgs. 106-110 of the Compilation of Respondent No. 8-AIMPLB)**, the question arose regarding the intestate succession in case of an adopted heir since Muslim Personal Law does not recognise the concept of adoption. The Court held that adoption was not mentioned in Section 2 of the Shariat Application Act,1937 and therefore customary law could be made applicable, however the parties failed to lead satisfactory evidence of existence of a custom. The Hon'ble Madras High Court at **paragraph 3** of the judgment observed that: -

"A reading of Ss. 2 and 3(1) of the Shariat Act clearly brings out the following propositions: (i) Notwithstanding any custom or usage to the contrary, in all questions regarding matters enumerated in S. 2 of the Shariat Act, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat). Hence, in respect of these enumerated matters, custon or usage to the contrary shall stand abrogated, (ii) S. 3(1) of the Shariat Act states that a person who satisfies the prescribed authority about the three ingredients set out in Cls. (a), (b) and (c) thereof, may make a declaration as enjoined by the said provision and thereafter, the provisions of S. 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. This conveys the meaning that only when the declaration is made, custom or usage relating to the three matters, namely, adoption, wills and legacies will stand excluded. The Shariat Act has ruled out custom or usage with reference to the enumerated subjects in S. 2 thereof and enables the Muslims to rule out custom or usage with regard to three more subjects referred to in S. 3(1). Adoption as such is not one of the enumerated subjects in S. 2. Adoption is not necessarily inheritance or succession, although it may lead to inheritance or succession"

(iv) In *Sulaika Bivi v. Rameeza Bivi*, [2000 (4) CTC 454] **(@ pgs. 111-125 of the Compilation of Respondent No. 8-AIMPLB)**, the father died bequeathing more than 1/3rd of his estate by a will. Under Muslim law a testator can only bequeath 1/3rd of his estate by way of a will and not beyond. Under Hanafi law, if the heirs of the testator gave consent for the bequest exceeding 1/3rd of the estate, the bequest is valid otherwise the bequest would abate. In this case, the widow gave her consent to the bequest and also gave consent on behalf of her minor children. It was held that since mother was not a natural guardian under Muslim Personal Law, the consent given by her was invalid. The Hon'ble Madras High Court observed as follows **(@ paragraphs 28-32)**: -

"28. In this context, it will be useful to refer to the book titled "Muslim Law of Marriages and Succession in India" by Justice S.A. Khader. Former Judge of High Court of Madras. Therein the learned author has co-related the purport of the enactment of Act 26 of 1937, in the context of various custom and usage prevalent in certain sections of the Muslims living in different parts of this country. In Chapter 4 of the said book, the learned author has traced out the historical development as to how several common civil codes came to be enacted governing both Hindus and Muslims in India and the wisdom of British Administrators in having left largely untouched for reasons purely political the personal or family laws relating to succession intestate and testamentary, marriage, dissolution of marriage and the like. In that context, in so far as the Muslims were concerned, while referring to various customary practices followed by some sects of the Muslim, the learned Author has identified those sects and noted them as (i) Mappillas of North Malabar, (ii) Cutchi Memons, (iii) Khojas, (iv) Sunni Boharas of Gujarat, (v) Molesalam Giarasias of Breach and (vi) Halai Memon of Probandar (Gujarat).

29. The learned Author, apparently, after making a study of those sections of Muslims, found that though they were ardent Muslims, they were also governed by certain other practices, customs contrary to Muslim Personal Law, by virtue of custom and usage that was prevalent amongst them. While dealing on that subject, with regard to Mappillas of North Malabar, it

appears that they were governed in the matters of inheritance by the Marumakkathayam system of matriarchal succession unknown to Muslim Law. The learned author has referred to the Mapilla Succession Act, 1918 (Act 1 of 1980) passed by the Legislature of the then Madras Presidency which prescribed that notwithstanding any custom to the contrary, the separate property of such a Mappilla shall devolve upon his heirs in the order and according to the rules of Muslim Law. The learned Judge also by referring to Malabar Wills Act, 1898 found that those Mappillas were entitled to dispose of their separate property in entirety by will, while under the Shariat, a Muslim can dispose of by will only one-third of his estate. The Mappilla Wills Act 1928 extended to the Mappilla Muslims, the Shariat Law with effect from 1.1.1929. The learned author was also pleased to note that neither the Mappilla Succession Act, 1918 nor Mappilla Wills Act, 1928 affects the Tarward property, unless the Mappilla concerned was exclusively entitled to it. It was also quoted therein that the Muslim Personal Law (Shariat) Application Act, 1937 (Act 26 of 1937) also does not touch or affect the rights and incidents of the Mappilla Marumakkathayam tarward, where property devolved by survivorship, a concept quite foreign to the Shariat. ……

30. In this context, it is also worthwhile to refer to the statement of objects and reasons, accompanying the Bill which become Act 26 of 1937. It reads as under:

> *"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 boon repeatedly agitated in the press as well as on the platform. The Jamaiat-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 of 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 Organizations 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"

31. In so far as the State of Tamil Nadu was concerned, by Tamil Nadu Act, Section 2 of the Parent Act was substituted and the substituted Section 2 reads as under:

"Notwithstanding any custom or usage to the contrary in all questions 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 mubarrat, maintenance dower, guardianship, gifts, trusts and trust properties, and wakfs, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)"

32. A conjoint reading of the provisions contained in the Act, including the Tamil Nadu amendment along with circumstances that existed then, when the Act was brought into force, make it clear that the whole purpose of the enactment was to rule out any possibility of customary law taking the place of Muslim Personal Law. In fact, a reading of the statement of objects and reasons disclose that customary law was treated as a misnomer inasmuch as it did not have any sound basis to stand upon and was very much liable to frequent changes without any certainty and definiteness. The purport of the enactment is

that the application of Muslim Personal Law was the rule and anybody's attempt to go by any custom or usage was considered as an exception. Only under certain stated circumstances where the enforcement of any customary usage or practice was attempted to be tinkered with in certain sects such as in the case of Mappillas, Kozas, etc., the need for a declaration under section 3 of the Act for enforcement of the Muslim Personal Law in respect of any particular individual would arise. Therefore going by the history of the said Legislation, it will have to be held that the application of the Muslim Personal Law being the rule, that would govern the parties and there would be no need or necessity to hold that unless a declaration is made under section 3, there is no scope for application of the Muslim Personal Law….."

2. The Act of 1937 is neither an attempt to codify the 'personal law' of Muslims in India nor does it represent a statutory enactment of 'personal laws' of Muslims in India.

3. As far as the right of the woman to obtain Khula is concerned, that is again a matter that is determined through mediation through the Qazi. In many instances, the woman is able to obtain Khula, because the husband accepts the mediation of the Qazi. The wife can seek Khula from the husband directly before even going to the Qazi. If the husband agrees, no further act is required. Apart from that, the wife can also seek divorce under the Dissolution of Muslim Marriages Act, 1939 (Act of 1939) through appropriate Civil Courts in India.

4. At the time before entering into a marital relationship, Muslim women have 4 options before them: -

(i) to persuade the suitor to have their marriage registered under the the Special Marriage Act, 1954.

(ii) to negotiate in the Nikah Nama and include provisions therein consistent with Islamic law to contractually stipulate that: -

   a) Husband does not resort to Triple Talaq
   b) Right to herself pronounce Talaq (in all forms)
   c) Ask for very high mehr amount in case of Talaq and impose such other conditions as are available to her in order to protect her dignity.