IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) No. 118 OF 2016

IN THE MATTER OF:

Shayara Bano … Petitioner

versus

Union of India & Ors. ... Respondents

Submissions in Rejoinder of Mr. Amit Singh Chadha, Senior Advocate, appearing for the Petitioner.

I. The Petitioner, citizen of India – a Muslim woman, is a victim of the practice of Triple Talaq.

She hears the Muslim male-dominated AIMPLB to say that this practice:

- "Admittedly is not part of Koran"
- "is not recognized by many schools of Islam"
- "is irregular"
- "is patriarchal"
- "is even sinful"
- "is bad in theology but is good in law"

So, please don't grant any relief; we will remedy it by issuing stepwise instructions providing for –

- "Attempt at reconciliation"
- "Temporary withdrawal of company of spouse"
- "One arbitrator each side to attempt reconciliation"
- "failure of all of the above, a single talaq by husband"
- "Compulsory waiting for 3 months"
- "Change of mind during waiting period and if so, divorce automatically cancelled"
- "If not, divorce complete"
- "Fresh nikah permitted without halala"

though it is a 1400 year old practice.

She hears the State say:

- "it is bad in law"
- "Discriminatory in 3 ways"
- "it is bad in theology"
- "it is violative of the constitutional guarantees"

- We have recognized it by a statute i.e. the 1937 Act.
- Hold it to be illegal.
- But we will not legislate under List III Entry 5.

In such a situation it is only this Constitutional Court which must perform its function as a protector/enforcer/guardian of the citizens right under Articles 14, 15 and 21 of the Constitution of India, which are being violated with impunity by the State when it gives statutory recognition by Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter "1937 Act") to the impugned practice of triple talaq.

II. Article 25

1. The fundamental right to practice, profess and propagate religion is enshrined in Article 25 of the Constitution.

2. The admitting facts that Triple Talaq is:

   - That the religion of Islam does not discriminate between men and women.

- That Islam tries to maintain married state as far as possible.

- Neither a part of Quran.

- Not recognized by many of schools of Islam (except Hanafi).

- outlawed in various Muslim Countries including predominantly Sunni Hanafi Countries – Pakistan[1] & Afghanistan[2] that AIMPLB is itself contemplating to change it, establishes that is not an essential tenet of the religion of Islam and as such not amenable to the protection of Article 25.

- Is Irregular.

- Is even sinful.

- Is bad in theology.

3. Anything that is admittedly bad in theology (a religious belief) and sinful in the religion

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[1] See: Haider, Nadya (2000) "Islamic Legal Reform: The case of Pakistan and Family Law" Yale Journal of Law & Feminism: Vol.12: Iss.2, Article 5. Available at: http://digitalcommons.law.yale.edu/yjlf/vol12/iss2/5

[2] Article 130 of the Constitution of the Islamic Republic of Afghanistan lays down: "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner."

can never be masquerading as faith. The cloak of faith is a contradiction as sinful, as there can be no belief/faith in what is sinful.

4. As such what is bad is theology and sinful in that religion can obviously not come under the protection of Article 25. What Article 25 seeks to protect are religious beliefs which the religion itself seeks to uphold and respect.

5. Be that as it may, this practice fails the essentiality test as laid down in *Commissioner of Police vs. Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 770, the protection under Article 25 and 26 is "not confined to matters of doctrine or belief but extends to acts done in pursuance of religions, 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."

6. This practice also fails the test of "constitutional morality" to which the freedoms of Article 25 are also subject to. The judgment of this Court in *Manoj Narula vs. Union of India*, cited at (2014) 9 SCC 1, explains "constitutional morality" in paragraph as:

> *"74. 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: -*
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> *"Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic."*
>
> *75. 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…….. "

7. Post the Constitution, if this practice is not protected by Article 25 and it obviously fails the test of Articles 14, 15(1) and 21 of the Constitution, it is also bad in law.

III. The State shall not deny the right in Article 14, and

The state shall not discriminate in Article 15(1).

The above is a prohibition on the State. This mandate will extend to the action of the State recognizing or permitting by statute a practice which is violative of this protection.

IV. The object of the 1937 Act not only to do away with some Hindu usages and customs. That was one of the objectives. It was also for the complete application of Shariat in respect of the matters stated therein to all Muslims in India.

In this regard it is important to take notice of the Legislative Assembly debates dated 09.09.1937 and of the Moslem Personal Law (Shariat) Application Bill leading to the enactment of the Muslim Personal Law (Shariat) Application Act, 1937. The debates also discussed the meaning and purport of Shariat and the relevant extracts are reproduced as follows:

> "Moslem Personal Law (Shariat) Application Bill
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> Legislative Assembly Debates on 9.09.1937
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> (Pg.1441- 1442)
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> Qazi Muhammad Ahmad Kazmi: ……. According to him, Muslim personal law means the personal law of the Hanafis, the personal law of the Shias, the personal law of the Sunnis, but the word "Shariat", according to my Honourable friend, means only the personal law of one particular sect of the Muslim community.

Sir Muhammad Yamin Khan: Only one law of all the Muslims and not of different sects.

Qazi Muhammad Ahmad Kazmi: Whatever he says has to be accepted. Now, Sir, just as has been explained by Sir Muhammad Yamin Khan, if by "Shariat" he means one law, he must remember that all Mussalmans, who say that they are following the Shariat, are the believers in one Koran and are believers in one Prophet and one God, and, therefore, Shariat for Muslims means one Shariat, and he takes very serious objection to that. If Muslims say they have one Shariat, that is very objectionable to my Honourable friend.

Sir Muhammad Yamin Khan: No No.

…….

Sir Muhammad Yamin Khan: What is mean is that Shariat can only be one and the personal laws of the Muslims can be different according to the sect to which they belong. Shias may have their own personal law, the Hanfis may have their own personal law, and, so far as Shariat is concerned, you cannot divide it into two different things- one Shariat for the Sunni, another Shariat for the Hanafis, and so on. You cannot do that.

Legislative Assembly Debates on 16.09.1937

…….

(Pg.1822-1823)

Syed Ghulam Bhik Nairang: Anyhow, I want finally to remove all apprehension from his mind by citing to him a few words from the Holy Koran itself. The word "Shariat" is derived from the root *"Shara'a".* To be quit precise, lest I should commit a mistake in quoting the sacred text, I will read from a written note. The Holy Koran says:

> …….
>
> "God has laid down for you as a religious law what he laid down for Noah and the law which we have revealed to thee and to Abraham ad to Moses and to Jesus, so that you may uphold the law and not create dissensions therein"

So that the work "Shara'a" occurs about the Muslim Personal Law in the Holy Koran itself, and the word "Shariat" is derived from "Shara'a". Therefore, my Honourable friend, Sor Muhamad Yamin Khan, need have no apprehension on that point and we are quite safe when we call Muslim Personal Law by the name, Shariat.

Sir Muhammad Yamin Khan: On a point of personal explanation Sir. What I meant was not that there is not a religious law. What I mean is that Shariat can be only one, it cannot

be two, it cannot be three, it cannot be four. When you use the word “Shariat” that must imply that there is only one law, but when you come to say Personal Muslim Law, there are so many personal Muslim laws which are for every sect. Therefore, the word “Shariat” does not cover the words “Muhammadan Personal Law”.

…….

Maulana Zafar Ali Khan: I must start at the outset by declaring that we Muslims, who in number more than eight crores in India, have got a law of our own, before which we bow down in utter humility and with full submission. That law is the law of Islam. With regards to this law, the book we believe is the final message of Lord Almighty to mankind, says: “Innaddina Indallah-i-Islam” (the Faith with the Lord is the faith of Islam). Islam means submission to the Will of the Almighty and the Almighty has ordained that so far as the Muslim nation is concerned in will be governed according to certain principles which are fixed and will remain fixed till the end of this world. This law is perfect and that section of the law with which we are concerned at the present moment, is the personal law of the Mussalmans. The personal law refers to such questions as divorce, separation, succession and the like. This is a sort of domestic law for is and unless we come under this law there is a great danger of the Moslems losing their solidarity and national unity. I remember many many years ago when a charter for the

administration of Bengal and Bihar was taken by the East India Company from Shah Alam, who stipulated that in the administered area the law of Islam shall hold. That law was administered in those days for some time. The Koran was translated, the fiqah was translated and there were Kazis and Muftis but, when Mussalmans lost all their power and solidarity, disintegrating influences set in and the law of Islam fell into desuetude. Then came the law of Islam in this country. People began to be governed by custom and usages. Islam does not believe in these customs and does away with these usages. What has been laid down in the Koran cannot be neutralized by the effects of custom and usages. In this country, we all of us did not come from Arabia or from Turkestan. Millions and millions of us were converted to the faith if Islam by the inherent beauty of this religion."

V. The judgment of the Madras High Court in *Moulvi Mohammed & Ors. vs. S. Mohaboob Begum*, AIR 1984 Madras 7, held in paragraph 3 that a reading of Section 2 of the 1937 Act brings out that notwithstanding any custom or usage to the contrary, in all questions regarding matters specifically enumerated in Section 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, custom or usage to the contrary stand abrogated. Section 3 of the 1937 Act lays down that only when the declaration is made, custom or usage relating to the three matters namely, adoption, wills and legacies will stand excluded.

VI. With reference to Article 13, the following reasoning of the judgment of the Bombay High Court in *The State of Bombay vs. Narasu Appa Mali* cited at AIR 1952 Bom. 84:

> *"26. ……. But the argument is that the personal laws must be deemed to be included in the expression "laws in force" on the ground that whatever is included in the word 'laws" in Article 13(3)(a) must automatically be held to be included in the expression "laws in force" in Article 13(3)(b). I feel considerable difficulty in accepting this argument. If custom or usage having the force of law was really included in the expression "laws in force," I am unable to see why it was necessary to provide for the abolition of untouchability*

expressly and specifically by Article 17. This article abolishes untouchability and forbids its practice in any from. It also lays down that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. Untouchability as it was practised amongst the Hindus owed its origin to custom and usage, and there can be no doubt whatever that in theory and in practice it discriminated against a large section of Hindus only on the ground of birth. If untouchability thus clearly offended against the provisions of Article 15(1) and if it was included in the expression 'laws in force", it would have been void under Article 13(1). In that view it would have been wholly unnecessary to provide for its abolition by Article 17. That is why I find it difficult to accept the argument that custom or usage having the force of law should be deemed to be included in the expression "laws in force……."

- is overruled in *Sant Ram* & *Ors.* vs. *Labh Singh & Anr.* cited at (1964) 7 SCR 756 wherein it has been held that

"4. …….The definition of the phrase "laws in force" is an inclusive definition and is intended to include laws passed or made by a Legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in operation in particular areas or at all. in other words, laws, which were not in operation, though on the statute book, were included in the phrase

"laws in force". But the second definition does not in any way restrict the ambit of the word "law" in the first clause as extended by the definition of that word. It merely seeks to amplify it by including something which, but for the second definition, would not be included by the first definition. There are two compelling reasons why custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force". Firstly, to hold otherwise, would restrict the operation of the first clause in such ways that none of the things mentioned in the, first definition would be affected by the fundamental rights. Secondly, it is to be seen that the second clause speaks of "laws" made by the State and custom or usage is not made by the State. If the first definition governs only cl. (2) then the words "custom or usage", would apply neither to cl. (1) nor to cl. (2) and this could hardly have been intended. It is obvious that both the definitions control the meaning of the first clause of the Article……."

VII. Historically, certain practices which were considered part of Hindu Religious practices, such as Sati[3], Devadasis[4] and Polygamy[5], were declared illegal/ unlawful and punishable.

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[3] The Bengal Sati Regulation, 1829

[4] Madras Devadasis (Prevention of Dedication) Act, 1947

Karnataka Devadasis (Prohibition of Dedication) Act, 1982

[5] Hindu Marriage Act, 1955

- A change/social reform whose time has come cannot be obstructed by Article 25.

- There is a plethora of writing, articles, debates & discussions are evidence of the fact that society is demanding this change.

- The observation of various judges, of various courts about triple talaq is reflects that the time for social change has come:

1. Yousuf Rawther vs. Sowramma, AIR 1971 Ker. 261
2. Sri Jiauddin Ahmed vs. Mrs. Anwara Begum, (1981) GLR 358
3. Must. Rukia Khatun vs. Abdul Khalique Laskar, (1981) 1 GLR 375
4. Masroor Ahmed vs. State (NCT of Delhi) & Anr. 2008 (103) DRJ 137

There is no judicial opinion pointing in the reverse direction.

VIII Mr. Salman Khurshid/ Mr. Kapil Sibal Gender Neutral Talaq:

Give the right to the Muslim Women in the Nikahnama as a delegate of the husband to give triple talaq.

Submission:

The above would still be discriminatory as by virtue of Section 2 of the Dissolution of Muslim Marriages Act, 1939. She will have to enforce it by a decree in a suit unlike the husband for whom it will be instantaneous.

Besides the ground reality is that in a Patriarchal society the woman has a much weaker bargaining position, the moot question then is, would it strengthen the institution of marriage or weaken it and thereby exposing the women to greater insecurity?

She may get that right but she does not want to get out of the marriage. The husband just throws her out after triple talaq.

The social evil sought be remedied is not the wife throwing out the husband but vice versa.

Conclusion

In the Fourth Edition, Volume II, Constitutional Law of India by H.M. Seervai in clause 12.60 at page 1281 it is stated as under:

> *"**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."*