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The Issue of Triple Talaq & its Remedy

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The *Constitution of India* guarantees absolute right of equality to every Indian under Article 14. However, this inherent right to equality, irrespective of any gender bias, has long been a bone of contention which poses a litmus test for the Indian judiciary each time it is faced with tough questions of violation of Women's *Right to Equality*. This is because, like other countries in the world, patriarchal society of India also has been miser to grant *Right to Equality* to women. Despite its religious diversity, a democratic and secular state like India, which has been regarded as a vibrant democracy and secular state across the world, is often faced with many hurdles in trying to uphold its secular stance and provide equal rights to all.

Recently, after the Shah Bano's long standing precedent, the *Supreme Court of India* was tasked with upholding the *Rights of Equality* for divorce and related issues of Muslim Women under the constitutional mould of India. The ambiguous term such as *Shariat Law*, and, whether the unilateral right to divorce exercised by Muslim Men is sacrosanct to Islam or it is a part of *Muslim Personal Laws*, and whether the same can be subjected to the *Test of Constitutionality* and be covered under *Fundamental Rights* which include Article 14, which create a constant fear in the minds of married Muslim Women of getting divorce at any time leading to the complications of Muslim Women's right to divorce, maintenance, and related issues, were challenged under existing laws.

The arguments put forth by various stake holders such as *All India Muslim Women Personal Law Board* (AIMWPLB), who wanted the practice of giving divorce by orally pronouncing *Talaq* three times to be abolished were heard by the *Supreme Court*, on the other side *All India Muslim Personal Law Board* (AIMPLB), disapproving the Court's practice to interfere with Muslim Personal Laws vehemently protested saying that it is a part of their religious practice, and that they are covered under Article 25 and Article 26 of the *Constitution* to practice their religion. Such a stance of *AIMPLB* met with widespread criticism from many quarters including various Islamic organizations mainly working for the Muslim Women's Rights. The Apex Court, however, heard all including the Union of India for six days in May, 2017 and perused the precedents, has now reserved its judgment.

The AIMWPLB argued that the impugned practices pertaining to matters of marriage and divorce including right to maintenance, alimony and custody of the children etc. are secular activities resulting in civil consequences for women affecting their status as married women and hence in the event of their being discriminatory are capable of being challenged on the touch stone of Articles 14, 15 and 21 of the Constitution of India, which cannot be said to be a part of religious practice as claimed to be protected by AIMPLB under Article 25, Article 26 or Article 29 of the Constitution of India. The AIMWPLB sought protection of their rights by declaring such practices as illegal, and anti-Constitutional, also urging to the Apex Court to issue an advisory to the Government of India to enact *Muslim Marriage Act* to protect the marital rights of the Muslims on the lines of *Hindu Marriage Act of 1955*.

Moreover, it sounds paradoxical where on one hand AIMPLB claims protection of Personal Laws to be a part of their religious practice by using Article 25 and Article 26 of the Constitution which are an integral part of Part-III of the Constitution, and on the other hand they refuse the same to be subjected to the *Test of Constitutionality* of the same Constitution which granted them such a right.

It also creates another paradoxical situation when, on one hand the Muslim Community per se, claim that their marriage is a civil CONTRACT and that it is valid if the parties to the Contract are competent to "contract" (their marriage) within the meaning as defined under section 11 of The Contract Act, 1872 [see Section 3(b) of The Muslim Personal Law (Shariat) Application Act, 1937] and say that their marriage is NOT A RELIGIOUS CEREMONY unlike Hindus who believe that their marriage is sacrosanct, and on the other hand, the same AIMPLB tries to protest the said civil CONTRACT of Muslim Marriage to be subjected to the Test of Constitutionality under the same Constitution to which The Contract Act of 1872 is subjected to and will ever remain so for the times to come, because the Constitution of India is the supreme law of the land.

The AIMPLB or any other fundamentalist or radical groups who protest the interference of the Courts of Law in the event when the rights of Muslims are infringed / challenged, or the enactment of Muslim Marriage Act which is the only way to protect the Personal Rights of Muslims in

India, are breathing Hot and Cold simultaneously and are clearly thriving under hypocrisy who on one side seek protection of religious practice under Article 25 and Article 26 or Article 29 of the Constitution, and on the other under the garb of the same protection infringe the Right to Equality guaranteed to Muslim Women which, is enjoyed by Muslim Men themselves for them being Indian citizen reflecting a strong patriarchy stance embarrassed by the so called custodians of Islam.

Personal Laws and any other *Laws in Force* in India are subject to Article 13 of the Constitution of India, and hence *Muslim Personal Law* is also capable of challenge on the ground of violation of Fundamental Rights, because basic defining feature of the expression "law" is that it is binding on those to whom it applies, which is recognized by the State as a "law" and enforceable by the State. Personal Law has the character of being binding on those to whom it applies and is enforced by the State, hence it is law within the meaning of Article 13 of Constitution of India.

Though, Personal Laws have no precise definition, however, it has been defined by different authors, the Privy Council, High Court, Supreme Court, and pre-constitution legislations as follows:

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

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

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

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

In *Mary Sonia Zachariah v. Union of India* 1995 (1) KLT 644 FB, it was held by the Apex Court that, *'So long as the infringed provisions are part of an Act, it must pass the test of constitutionality even if the provision is based upon religious principles.'* Therefore, if the *Muslim Personal Law* is incorporated by reference of any Act where no part of that law is found to be outside the scope of making it statutory and is capable of challenge if it does not comply with Part III of the Indian Constitution.

The Practice of Talaq-E-Biddat, Nikah-Halala etc. are claimed to be a part of Muslim Personal Law and protected by Section 2 of *Muslim Personal Law (Shariat) Application act of 1937* violates the Fundamental Rights of Muslim Women under Articles 14, 15 And 21 of the constitution of India and therefore are void because such practice is violative of right to equality of Muslim women guaranteed under Articles 14 and 15 to the extent that a Muslim man exercises power to declare a unilateral divorce and the Muslim woman has no control over such unilateral arbitrary extra judicial divorce and her marital status.

Marriage being a matter of status, its termination which has civil consequences must be declared by a competent court of law alone and not by one of the parties to the marriage namely the husband unilaterally and the impact of such practice of Talaq-e-Biddat on Muslim women is that she loses her right to residence, and to claim maintenance and custody of her children which is often denied in a court of law to her for that being a part of *Muslim Personal Law* where unilateral divorce is practiced. This also violates their right to life and dignity guaranteed under Article 21 of the Constitution of India.

In Hina vs. State of UP WC No. 51421 of 2016 the Supreme Court held that *"The instant divorce (Triple Talaq) though has been deprecated and not followed by all sects of muslim community in the country, however, is a cruel and the most demeaning form of divorce practised by the muslim community at large. Women cannot remain at the mercy of the patriarchal setup held under the clutches of sundry clerics having their own interpretation of the holy Quoran."*

Further, given that the marriage entails change in the life and a commitment that two people make to each other out of natural love and affection to share and care for each other, the rights conferred by virtue of the marriage are the legitimacy of children, custody of children, right to reside in matrimonial home form a civil right in a person concerned. Hence, it stands to reason that if the marriage is to be terminated, it must be done with good reason and with due regard to the rights of both the parties to the marriage and by a judicial forum. Therefore, unilateral form of divorce as practiced by Muslim Men, do not have offer an equal opportunity in participating in the decision that vitally concerns them and results in alteration of their status in the society. Especially, when most of the Muslim women are illiterate / less educated, and home-makers who lose social and financial stability as they no longer receive any support from their husbands or his family, in certain cases they even lose the support of their own family besides losing their Mehr which often is a nominal sum.

This practice in a social and democratic country such as India can only be said that this law is ex-facie discriminatory as it is a right to act in an arbitrary manner conferred on a husband to the detriment of his wife and must be declared unconstitutional as being discriminatory based on sex. While judging the constitutionality of a law, we expect that the

Supreme Court will not only look at the text of the law but will also take into consideration its disparate consequences on women, because while testing the constitutional validity of a legislation, it is not the object of the law alone that it must be seen as valid or void but the impact that it has on the rights of the parties also needs to be considered.

It is also equally true that there has been no exemption from the Test of Constitutionality to any statute including Muslim Personal Law (Shariat) Application act of The Muslim Personal Law (Shariat) Application Act, 1937 by the Republic of India as indeed there cannot be one and hence all laws have to comply with the guarantee of equality and non-discrimination. In any event the mere fact that India has made a reservation to Article 16, cannot prevent the Apex Court from adjudicating its constitutional validity which only absolves India from being accountable in an international forum, without affecting the jurisdiction of this Court.

Therefore it is perceived that marriage and divorce are matters of secular nature and can be regulated by the State which is similar to what was held by the Supreme Court in Sarla Mudgal v. Union of India (1995) 3 SCC 635 (Para.33) where it held that, *"…Marriage, succession and like matters of a secular character…"*. And again in John Vallamattom v. Union of India (2003) 6 SCC 611 (Para. 44) it was held that *"it*

is not a matter of doubt that marriage, succession and the like matters of secular character ..."

The Supreme Court has also time and again acknowledged the difference between secular and religious activities in context of interpretation of Articles 25 and 26 and has held that the State can regulate secular matters and secular matters of religion are not protected under the said Articles.

Talaq-e-biddat and nikah-halala (impugned practices) that are claimed to be a part of Muslim Personal Law and protected by Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 (impugned section) violate the fundamental rights of Muslim women under Articles 14, 15 and 21 of the Constitution of India and therefore the said practices are not entitled to recognition and the impugned section, to the extent it protects them is void.

A historic and giant step towards the protection of Muslim Women's rights and recognition of the State in empowering the female sex in the country is expected under the light of absolute right to equality guaranteed under Article 14 which is upheld by the Apex Court in various other cases clearly establishing that all personal laws are subject to the Test of Constitutionality. The Court also recorded that 22 Muslim countries like Pakistan, Bangladesh, Saudi Arabia and other African countries like Tunisia and Algeria etc. have moved towards reforms and codified their laws offering equal status to women and protection of their rights under the laws of the State. The Constitution Bench hearing the matter, however, declined to determine the constitutional validity of the related issues such as Nikah Halala, and Polygamy etc.

The Constitution Bench in this regard shall either set a precedent declaring the practice of *Triple Talaq* as unconstitutional, or not interfere with the personal laws considering it a part of religion by not subjecting it to the test of Constitutionality, thereby demarcating its stand between a judicial court and an ecclesiastical one.
