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A.F.R.
Reserved
Court No.2

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

ORIGINAL APPLICATION NO 287 of 2012

Wednesday, this the 25th day of May 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Lance Naik/Tailor Mohammad Faroor @ Farooq Khan (Army No. 3199473W) of 8 JAT, now posted to HQ 22 Infantry Division Camp, C/o 56 APO (located somewhere in Uttar Pradesh) son of Shri Usman Gani, resident of Ward No. 1, Village Mohanpur, Tehsil and District Bareilly (U.P.)

...Applicant

Ld. Counsel for the applicant: **Shri P.N. Chaturvedi Advocate**

Versus

1. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi, 110011
2. General Officer Commanding-in-Chief, Southern Command, Pune, 411001.
3. Commanding Officer of 8 Battalion of the JAT Regiment, C/o 56 APO.
4. Officer-in-Charge, Records, JAT Regiment, Bareilly, 243001.
5. PAO (OR), the JAT Regiment, Bareilly, 243001.
6. Ms. Arsey Jahan, daughter of Shri Abdul Kadir Khan, resident of Quarter N. B-176, IFFCO Township, Awala, District Bareilly, U. P. 243403.
7. Camp Commandant, HQ 22 Infantry Division Camp, C/o 56 APO.
8. Additional Chief Judicial Magistrate 5th, Bareilly.

.....Respondents

Ld. Counsel for the : **Shri M.K. Sherwani,**
Respondents **Shri SN Pandey, Central**
Govt Counsel assisted by
Maj Preeti Tyagi, OIC Legal Cell.

(Per Justice Devi Prasad Singh, J)

1. We have heard Shri P. N. Chaturvedi, Ld. Counsel for the applicant and Shri S.N. Pandey, Ld. Counsel for the respondents assisted by Lt Col Subodh Verma, OIC, Legal Cell and Shri M.K. Sherwani for respondent No 6.
2. This petition under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred by applicant being aggrieved with payment of maintenance to respondent No. 6 Ms. Arsey Jahan who happens to be wife of the applicant, allegedly divorced under the Muslim Personal Law.
3. The plight of women in this world by different masters of religion broadly expressed in a poem by *Saqib Hussain* is reproduced as under:

*“We chase everything night and day
But from the soul we turn away*

*Everything we hold high in rank
The soul we throw down and stamp*

*To serve selfish desires we are quick
The soul we hold back, put in a pit
Strangle, curse, constantly hit
Laugh at, sneer at, snarl and spit*

*Such oppression!
By ourselves, on ourselves!*

*Such a shame, disaster, so sad
Because the soul is all we have*

*It was given to us in a sacred trust
Everything else will turn to dust*

*The soul is the only thing we take
Grow, purify it, or your own sake.”*

4. Hindustan, i.e. Bharat, i.e. India in case considered from the ancient manuscripts, we may find that there has been no gender discrimination between man and woman, boy and girl. Both were equal in status with hand-in-hand, sharing life from beginning to end. Before marriage girls were duly respected and educated with emphasis on knowledge and character by the parents and after marriage husbands took due care with purity of mind-set, coordination, affection and compassion. All decisions with regard to family matters or otherwise were taken with due consultation with each other.

One example may be sufficient to indicate the place of women in ancient world of India. *Rig Veda* is substantially creation of women, which is oldest manuscript according to UNICEF (1500-2000 BC.). It was Lopmudra, wife of Sage August with the assistance of 64 literary women, who wrote major portion of *Rig Veda*. *Rig Veda* contains discussion between husband and wife, i.e. Sage August and Lopmudra, with regard to several aspects of worldly and spiritual affairs.

Later on, by passage of time and on account of persecution, kidnapping, forcible marriage, keeping concubine and forcible conversions to other religions, divided kingdoms, the frightened Indian women started

wearing *Sari* with closed face (*Ghoonghat*), gone away from education and knowledge because of orthodox preachers and male dominated society.

However, things became encouraging for the women with rays of hope and sunshine after the advent of Indian Constitution. Greater India was divided on communal lines on Jinnah's call consented by Nehru resulting into creation of India and Pakistan. However, having faith in the Indian Constitution, substantial number of minorities including Muslims decided to live in India to enjoy their life with freedom and constitutionalism propagated by Indian leaders. Ultimate instrument of Justice, Liberty, Equality, and Fraternity is the Constitution of India. It creates bond to unite India in diversity as an instrument to establish rule of law.

5. A question cropped up whether fifty percent of the population or to a lesser percentage (women) who are suffering from some social evil and slavery, losing their liberty and quality of status under the garb of Personal Law, shall not be entitled to Constitutional protection, statutory mandates, Rules and Regulations framed by appropriate authorities or legislature?

6. In the present case, a divorce took place by ex parte action of the applicant-husband through a notice dated

17.08.2011 with the claim that in view of divorce notice, the respondents, i.e. Government of India/Army authorities had no right to grant maintenance to respondent No. 6 as the marriage has been dissolved. Maximum maintenance may be given for three months along with *Mehar*. It shall be appropriate to deal with different aspects of the social enigma or plight under different heads.

7. (I) **FACTS:**

- (i) Applicant Lance Naik/Tailor Mohd Farooq alias Farooq Khan, a member of the Indian Army working as tailor, was married to respondent No 6 under Muslim Usage, practice and Personal Law on 24.10.2009. It appears that the matrimonial life was on rocks for one or the other reason. The applicant shifted burden of breakage of matrimonial life on respondent No 6.
- (ii) It is stated that on account of bitterness in matrimonial life, an agreement was signed between them (**Annexure A-4 to the O. A.**) for a peaceful matrimonial life. It is alleged that respondent No 6 left the house unilaterally with ornaments worth rupees four lacs. Applicant filed a case in the family court Bareilly on 26.03.2010. Later on respondent No 6 also filed a criminal case under Section 498-A

of the Indian Penal Code on 30.05.2011. In consequence thereto, applicant and his parents were arrested. In Writ Petition No 12659 of 2011, the Allahabad High Court on 11.07.2011 directed to make all efforts for amicable settlement through mediation (**Annexure No A-6 to the O. A.**) which seems to failed since respondent No 6 declined to enter into compromise. While claiming right to deny with regard to the payment of maintenance, the applicant's Ld. Counsel submitted and pleaded that respondent No 6 is entitled to maintenance allowance only for three months, i.e. for the period of *Iddat*. It is stated that *Talaq*, an Arabic word, means 'to release' or 'repudiation of marriage' by husband. Under the Muslim Law husband has unrestricted right to divorce his wife without giving a reason. It is submitted that Muslim Law does not require existence of any fault or of a matrimonial offence as an excuse for *Talaq*. Submission is wherever it is impossible for spouse to live together, they must separate peacefully.

- (iii) Relying upon Muslim Personal Law, it is proudly argued and submitted that under Muslim Personal Law, husband has the absolute authority to terminate marriage by pronouncing *Talak*. It is

also submitted that Muslim society is dominated by males. Conjugal happiness primarily depends upon efforts of the husband. Whenever the husband finds that the marriage cannot be continued happily, he has right to dissolve the marriage, but it is not misused. It is admitted that *Talaq* is permitted only when the wife by her conduct or her words does injury to the husband or happens to be impious.

- (iv) Addressing on the right to *talaq* the applicant submits that every Muslim husbands of sound mind is competent to give *talaq* to his wife without assigning any reason. On attaining age of puberty, wife may be given *talaq* and it does not depends on any condition or cause. It is submitted that except under Hanafi Law, the consent of the husband in pronouncing *talaq* must be a free consent. Under Hanafi Law, a *talaq* pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc. Is valid and dissolves the marriage. It is also submitted that *talaq* may be in writing without adhering to any particular form. Presence of wife is not necessary and it may be signed in the presence of *Quazi* or

wife's father or any other person. *Talaq* whether oral or in writing may be made without witnesses and is valid under Sunni Law. The applicant is a Sunni Muslim.

- (v) It is stated that Dissolution of Muslim Marriages Act, 1939 does not affect the right which a married Muslim woman may have under Muslim Law to her dower or any part thereof on the dissolution of marriage. Mutual rights of inheritance cease after the divorce becomes irrevocable. Cohabitation becomes unlawful after the divorce has become irrevocable and the children born of such an intercourse are illegitimate and cannot be legitimated by acknowledgment. Remarriage between divorced couple is unlawful where husband has divorced wife by three declarations subject to following course:

- (a) Wife should observe *Iddat*;
- (b) After observing *Iddat*, she should be lawfully married to another person;
- (c) This intervening marriage must be actually consummated;
- (d) The second husband must pronounce divorce or die; and
- (e) The wife should observe *Iddat* after this divorce or death.

(vi) Ld. Counsel relied upon the case of ***Rashid Ahmad vs. Anisa Khatun***, AIR 1932 PC 25. Ld. Counsel also stated that maintenance of divorced woman may be looked into under the Muslim Personal Law, Section 125 of the Code of Criminal Procedure, 1973, and The Muslim Women (Protection of Rights on Divorce) Act, 1986. It is submitted that where husband serves notice of divorce on wife, the wife shall be entitled for maintenance from the date she receives the notice even if the notice mentions some earlier date of pronouncement of *talaq*. Ld. Counsel relied on the case of ***Mohammed Ali vs. Faredunnissa Begum***, AIR 1970 AP 298. It is submitted that in the case of ***Mohd Ahmad Khan vs. Shah Babo Begum*** delivered by Hon'ble Supreme Court, respondent's entitlement to maintenance, relying on *Ayats 241 and 242 of Quran* has been Legislatively overruled by the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short, Act of 1986). Extra judicial divorce is recognized under Muslim Law such as *talaq, Ila, Zihar, Khula* or *Mubarat* and also under the

Dissolution of Muslim Marriages Act, 1939. It checks capricious use of *talaq* by husbands and provides for subsistence after dissolution of marriage.

- (vii) It is further stated that under Army Act Section 91 (i), maintenance can be granted only to legally wedded wife and to legitimate or illegitimate children. Since divorce has already taken place, no maintenance can be granted to the wife.

8. On the other hand, Army and respondent No. 6 defended that Army has right to grant maintenance to the wife. Respondent No. 6 stated that she submitted application for grant of maintenance which was considered and granted in accordance to Army Order 2 of 2001. While filing counter affidavit, respondent No. 6 averred that her father invested an amount of almost rupees ten lacs apart from jewellery costing rupees four lacs and other materials costing rupees three lacs spending almost rupees twenty lacs at the time of marriage of respondent No. 6 with applicant. List of items has been annexed as Annexure CA-1 to the counter affidavit. It is submitted that the applicant used to beat her mercilessly and when the torture became unbearable, respondent No. 6 called her father from whom applicant demanded rupees two lacs which was

paid to him after taking loan by parents of respondent No. 6.

9. In December 2009, the applicant left respondent No. 6 at her parents' house stating that he will come and take her back, but he didn't turn up. On interference of Pradhan and villagers respondent No. 6 came to the house of the applicant on 15.03.2010 where she was thrashed by applicant. On account of assault and injuries, parents of respondent No. 6 came to the house of applicant on 16.03.2010 and noticing the pecuniary condition of their daughter, they took her to the nearest police station with assistance of one Smt. Sushma Arora, Member, U.P. State Women Commission.

10. On interference of the police, again an agreement was signed on 16.03.2010, copy of which has been filed along with the counter affidavit as **Annexure CA-2**. Injuries inflicted upon respondent No. 6 by applicant are borne out from Medical Report dated 17.03.2010, a copy of which has been filed along with the counter affidavit of respondent No. 6 as **Annexure CA-3**. It is further submitted that though applicant agreed to take respondent No. 6, but he did not turn up and filed a case before the Family Court, Bareilly in utter violation of agreement dated 16.03.2010. However, in the meantime during October 2010 on interference of

Chairman of Aonla, the applicant took back respondent No. 6 to his house but again started to persecute her and in November 2010 applicant forcibly took respondent No. 6 from his house and left her outside to her parental house. It is submitted by respondent No. 6 that the applicant lodged Complaint Case No. 1414 of 2011, under Section 323, 504, 452 and 506 of the Indian Penal Code against parents and brothers of respondent No. 6. Counselling done by Astha Cell/Brave Heart Cell, Army Women Welfare Association **(Annexure CA-4 to the counter affidavit)** seems to also failed.

11. Thereafter the applicant filed case for decree of divorce bearing No. 737 of 2011 in the Court of Civil Judge (Senior Division) Bareilly, which according to respondent No. 6 was dismissed by order dated 21.04.2012. Copy of the order has been filed as **Annexure CA-6** to the counter affidavit. It is alleged by respondent No. 6 that she filed Case No. 4350 of 2011 bearing Crime No. 1380 of 2011 against applicant under Section 498-A, 323 and 504 of the Indian Penal Code which is pending in the Court of Additional Chief Judicial Magistrate, Bareilly. Mediation in the High Court also failed (supra). After failure of mediation, the High Court rejected the application filed by the applicant under Section 482 Code of Criminal

Procedure vide order dated 29.10.2012, a copy of which has been filed as **Annexure CA-9** to the counter affidavit.

12. Subject to aforesaid back-drop, the present controversy has come to this Tribunal.

13. Oral unilateral divorce or triple *Talaq* has been discussed worldwide. Under Personal Law process for different types of *Talaqs* are borne out from different texts and arguments of parties, which may be summarized as under:

II. NIKAH:

14. According to available texts and as argued by Ld. Counsel for the parties, Nikah, or marriage, among Muslims is based on contract based on offer and acceptance. Different texts available reveal that:

(a). Nikah is a great bounty from Allah Ta'ala. The affairs of this world and the hereafter are put in order through marriage. There is a lot of wisdom and many benefits in marriage. A person saves himself from sinning and his heart is put at ease. He does not have any evil intentions and his thoughts do not begin to wander and stray. The greatest virtue is that there are only benefits and only rewards in this. This is because a husband and wife's sitting together and engaging in a loving conversation, joking with each other, etc. is better than nafl salat.

(b) A marriage can be executed by just two words, e.g. a person says the following words in the presence of witnesses: "I give my daughter to you in marriage." The person who is addressed replies: "I accept her in marriage." In so doing, the marriage is valid and both of them are lawful husband and wife. However, if the person has several daughters, the nikah will not be executed by his uttering the words mentioned above. He will have to mention the daughter by name, e.g. he says : "I give my daughter, Qudsiyyah, to you in marriage", and the person replies : "I accept her in marriage."

(c). A person says: "Give so-and-so daughter of yours to me in marriage." The father replies: "I give her to you in marriage." In so saying, the nikah will be valid irrespective of whether he says that he accepts or not. (In other words, it is not necessary for the word "accept" to be mentioned).

(d). If the daughter is present and the father says: "I give this daughter of mine in marriage to you", and the person replies: "I accept her", the nikah will be valid. It will not be necessary to mention her name.

(e) In order for a nikah to be valid, it is also essential for at least two males or one male and two females to be present, to hear the nikah being performed, and to hear the two words (i.e. the offer and the acceptance) being uttered. Only then will the nikah be valid. If two persons sit together in privacy and one says to the other : "I give my daughter to you in marriage" and the other person replies : "I accept your daughter",

the nikah will not be valid. Similarly, if the nikah was performed in the presence of one person only, even then the nikah will not be valid.

(f). If there are no males present, but only females, the nikah will not be valid even if there are ten females present. Together with two females, one male has to be present.

(g). It is preferable to perform the nikah in a large gathering such as after the jumu'ah salat in a jumu'ah masjid or in any other large gathering. This is so that the nikah will be well announced and the people will become aware of the nikah. A nikah should not be performed in secret and privacy. However, if due to some reason many persons are unable to attend, then at least two males or one male and two females who hear the nikah being performed in their very presence should be present.

(h). If both the man and woman are mature, they can perform their own nikah. All that they have to do is say the following in the presence of two witnesses: One of them must say: "I am making my nikah with you" and the other must say : "I accept." In so doing, the nikah will be valid.

15. In view of above, unlike Hindus, Nikah is a contractual obligation based on consent of both sides. Unless the other one is agreed, there cannot be Nikah, then whether without agreement of both sides, there can be talaq? We propose to consider the question of validity of talaq in

terms of arguments advanced by Ld. Counsel for the parties, pleadings on record as well as available texts referred to hereinafter.

III. FOUR STEPS BEFORE THE TALAQ:

16. It is argued that as a first step, when there is a marital discord, the Quran advises the husband to talk out the difference (*fa'izu hunna*) with his wife. If misunderstanding persists, the parties are asked to sexually distance themselves (*wahjuru hunna*) from each other in the hope that temporary physical separation may encourage them to unite.

And if this procedure too fails, the husband is instructed, as a third step, to once again discuss (*wazribu hunna*) with his wife the seriousness of the situation and try to bring about reconciliation. In pursuance of *wazribu hunna*, the husband shall explain to his wife that if they do not resolve their differences soon enough, their dispute will have to be taken beyond the confines of their house which may not be in the interest of both the parties. This is because, if the dispute still remains unresolved, as a fourth step, the Quran requires the matter to be placed before two arbiters, one from the family of each spouse, for resolution.

IV. THREE TALAQS:

17. It is only after the failure of the aforementioned four attempts at reconciliation that the Quran allows the first *talaq* to be pronounced followed by a waiting period called the *iddah*. Not more than two divorces can be pronounced within this period, the duration of which are three monthly courses. For women who have attained menopause or suffer from amenorrhea the period of *iddah* is three months, and in the case of pregnant women it is till the termination of pregnancy.

And if the parties are unable to unite during *iddah* as envisaged by verse 2:228, the final irrevocable *talaq* can be pronounced, but only after the expiry of the *iddah*. Once the final *talaq* has been invoked the marital bond is severed and the parties cease to be of any relation to each other. However, even after *iddah* has lapsed, the Quran offers the contending parties a chance to reunite, provided the final *talaq* has not been pronounced. It says, “When you divorce women and they complete their term (*iddah*), do not prevent them from marrying their husbands if they mutually agree on equitable terms”. In other words, after the expiry of *iddah*, as per verses 2:231 & 232, the parties are given the options of remarriage and permanent separation-the

separation being the third and the final irrevocable *talaq* to be pronounced in the presence of two witnesses.

18. Thus, it can be summarised from the above discussion that after four serious attempts at reconciliation a Muslim husband is permitted to divorce his wife once or twice within the period of *Iddah* to resume conjugal relations without having to undergo the procedure of remarriage. After the expiry of *Iddah* he can either re-contract the marriage on fresh and mutually agreeable terms or irrevocably divorce her by pronouncing the third and the final *talaq*. It is understood here that the woman cannot be left hanging without either being united with her husband or irrevocably divorced. The parties have to decide one way or the other within a reasonable period of time. This is clearly implied in the verse 2:231 which says “but do not take them back to hurt them or to take undue advantage. If anyone does this he wrongs himself”.

19. However, to emphasise the sanctity of the marriage tie and the enormity of breaking it for frivolous reasons, the Quran warns that once the parties choose to separate after the expiry of the *iddah*, they cannot entertain hopes of marrying again unless the wife takes another husband and he divorces her. It is understood here that a divorce may result only if the new husband has serious differences with

his wife, and in the rare event of such differences cropping up, he is required to follow the Quranic procedure of divorce as discussed above.

V. DIVORCE AS PRACTICED IN INDIA

20. Despite the clarity of the Quran on the issue the concept of divorce has been completely misunderstood. As per the prevailing understanding of “shariah” in India, *talaq* is broadly categorised into *talaq al sunnah* and *talaq al bid’ah*. The first form refers to divorce pronounced in accordance with the Quranic procedure as explained by the Prophet, and the second one alludes to a sinful innovation (*bid’ah*) supposedly justified by the Caliph Umar. In this type of divorce the husband is authorised to repudiate his marriage by saying the word *talaq* thrice in quick succession in the presence of his wife who then ceases to be his spouse with immediate effect. The Caliph is said to have legalised this innovation to discourage Muslims of his time from resorting to it.

21. This account may not be authentic for two reasons. First, a *hadith* in the collection of Abu Dawud States that Caliph Umar himself punished people who uttered three divorces in one go. Second, why would the Caliph legalise the very misogynist practice he was trying to abolish? It would have made sense to issue a decree to the contrary,

delegitimizing the annulment of marriage on the pronouncement of three divorces in one sitting. What is even more astonishing is, Hanafi jurists consider *Talaq al bid'ah* a grave sin and yet legalise it as the AIMPLB has just done. No theological (or logical) explanation is offered to rationalise this indefensible position.

22. The legality of instant triple talaq has also led to abominable circumvention of the Quranic injunction discussed above to overcome its impracticality. To help the victims of this law a pliable person is set up who marries the divorced wife, consummates the marriage overnight and divorces her the next day so that the original husband can remarry her. This outrageousness which an innocent woman is subjected to for the ruthlessness of an un-Islamic and inhuman law is known as *halala*. Although many ulema have outlawed this disgraceful practice, it still prevails clandestinely in some Muslim societies.

23. The invalidity of triple talaq is also established from a Prophetic hadees. When informed about a man who gave three divorces at a time the Prophet was so enraged that he said, “Are you playing with the Book of Allah who is Great and Glorious while I am still amongst you?” (Mishkat-ul-Masabih). The reference to the “Book of Allah” in this

report is clear admonition of Muslims not to deviate from the gender-just, egalitarian philosophy of the Quran.

VI. CHANGING MUSLIM WORLD:

24. It shall be appropriate to consider the changing Muslim world from the material made available. Several Muslim countries have reformed their laws in an attempt to bring them in conformity with the Quran and authentic teachings of the Prophet. The Moroccan Family Code (Dooudawana) of 2004, for instance, puts the husband and wife on an equal footing and states that neither of them, especially the husband, can pronounce divorce unilaterally except under judicial supervision. This, the Code explains, is to control and restrict the abusive arbitrary practices of the husband in exercising repudiation. The Code also contains mechanisms for reconciliation and mediation both through the family and the judge. Additionally, it invalidates irregular pronouncements of divorce by the husband and stipulates that divorce cannot be registered until all vested rights owed to the wife and children have been paid in full by the husband.

25. Nearer home, Pakistan enacted a similar legislation as far back as 1961 entitled *The Muslim Family Laws Ordinance*. According to this law any man who wishes to

divorce his wife shall, after the pronouncement of *talaq* in any form whatsoever, give the Chairman of the state appointed Union Council notice in writing of his having done so, with a copy to the wife. Within thirty days of the receipt of notice the Chairman shall constitute an Arbitration Council consisting of himself and a representative of each of the parties for the purpose of bringing about reconciliation between the parties. Contravention of this procedure is punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to 5000 or both.

26. Even Algeria, Indonesia, Iran and Tunisia have de-recognized a husband's right to unilateral divorce by legislating that all divorces must go through a court.

27. Unlike in India, where Muslim women have no right to divorce, in Turkey and Iran, both husband and wife enjoy equal rights for seeking divorce. In Pakistan, Indonesia and Bangladesh government officials have to prove that they had gone for a divorce only after having made serious efforts to patch up their differences with their spouse. In all these Islamic countries, divorce is final only after a court verdict.

28. Again Turkey, Indonesia, Iraq, Iran and Bangladesh have legally banned one sided divorces, which gave men

arbitrary powers to break marriages, while countries like Egypt, Sudan, Jordan, Tunisia, Morocco, Pakistan and Bangladesh had banned the practice of triple talaq long ago.

29. Saudi Arabia allows the traditional practice of “triple talaq” divorce, where a man can divorce his wife simply by saying ‘I divorce you’ (talaq) three times. He can rescind the divorce if this was done in the heat of the moment, but only if the wife agrees (and only on three occasions). The husband must maintain a divorced wife and any children from the marriage if the wife is unable to support herself, although she may have trouble receiving timely payments. Children generally remain with the mother until about five or six, after which boys return to their father to begin their formal education. The husband can claim custody of any sons when they reach the age of ten. Girls more often remain with their mother. A female divorcee usually returns to her family, and few remarry.

VII. HOLY QURAN:

30. Some of the verses (Ayats) show how the Holy Quran intends to serve humanity without discrimination, to quote:-

(i) *“Some faces on that day will be bright, looking eagerly towards their Lord (75:23-4)”*

- (ii) *“Thou, O man, art verily labouring towards thy Lord, a hard labouring; then thou art going to meet Him (84:7)”*
- (iii) *“They know only the outer aspect of the life of this world, and of the Hereafter they are utterly unmindful.*
- (iv) *Do they not reflect in their minds? Allah has not created the heavens and the earth and all that is between the two but in accordance with the requirement of wisdom and for a fixed term. But many men believe not in the meeting of their Lord (30:8-9)”*
- (v) *“Verily, the righteous will be in the midst of Gardens and streams, in the seat of truth with an omnipotent King (54:55-6)”*
- (vi) *“Say, ‘I am only a man like yourselves; only I have received the revelation that your God is only One God. So let him who hopes to meet his Lord do good deeds, and let him associate no one in the worship of his Lord’(18:111).*
- (vii) *“Whoso does right, it is for his own soul; and whose does evil, it will only go against it. And thy Lord is not at all unjust to His servants (41:47)”*
- (viii) *“It shall have the regard it earns, and it shall get the punishment it incurs (2:287)”*

- (ix) *“God Almighty has said O My men! If all those of you who have lived before you and all those who will come after you, common men as well as leaders among you, were to become as pious and pure as the one most pious and pure among you, even then, no increase would be made to my God-hood. Similarly, O My men, if all those of you who have gone before and all those who will come after you, common men as well as your leaders were to become as vicious as the most vicious among you, no decrease would be made to my God-hood. And O My men! If all those of you have gone before and all those who are coming later were to assemble together in one place and ask of Me anything they could possible ask, then even had I given everyone everything he asked for, even then it would make no difference to My Treasures of Mercy and Forgiveness; may be as little as the amount of water that sticks on the point of a needle dropped in a sea. O My men, it is your own works and their consequences which I keep in safe keeping, on which I keep my eye, and which I make over to you without any addition or subtraction. Therefore, if there is one who finds in his record anything to his credit, let him praise Allah, and if there is one who finds anything to his discredit, let him blame no one but himself (Muslim).*
- (x) *Is any doubt or uncertainty now left on the subject of the ultimate end of our actions? All*

actions, all works, duties, are intended to promote man's own progress. Fasting is prescribed but only that you may become pious, sacrifice is commanded but with the warning that

*It is not the blood
Or the flesh of the animal
That reaches God –
What reaches Him
Is your piety (22:28)*

(xi) *The end of Taqwa is closeness to God, to God Himself. Those who achieve Taqwa (piety) are called Muttaqeen (the pious). And the pious are described thus:*

(xii) *Know it for certain that Allah is with the pious*

Allah is a friend of the pious

Only the pious succeed in the end

Surely, Allah loves those who are righteous

Remember, for the pious awaits an excellent resort.”

31. Issue of triple talaq is subject to Prophet said in different verses. Triple talaq including ex parte decision by the husband if looked into; it seems to be against the basic tenets of Holy Quran. Holy Quran shows that righteousness is the duty of every one. Then question cropped up how a Muslim may be entitled to neglect or leave his wife by stroke of pen against her wishes in the midnight or during mid-day without any prior communication, discussion or consent?

VIII. UNITED NATIONS RESOLUTIONS:

32. After *Second World War*, the most remarkable institutional development in human rights has been the evolution of an international multilateral treaty regime, with appropriate monitoring bodies. At the time of the only previous World Conference on Human Rights that held in Tehran in 1968 not a single human rights treaty body existed. By the time of the world conference in Vienna, several treaty bodies had come into existence under seven treaties namely the International Covenant on Civil and Political rights, 1977 the International Covenant on Economic, Social and Cultural rights 1966 the Convention on the Elimination of all Forms of Radical discrimination, 1966 the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 the Convention on the Elimination of Discrimination against Torture and the Convention of all the Rights of the child 1986. At the time of Vienna Conference 168 States were parties to these treaties, all plugged into their monitoring procedures.

33. These are Universal treaties, in the sense that they are open to all States. At the centre stands the International Covenant on Civil and Political Rights, with its detailed provisions and rather substantive monitoring procedures. The Covenant on Economic, Social and

Cultural Rights has also developed monitoring procedures-in part modelled on the committee under the Civil and Political Covenant, and, in part fashioned for their own separate needs. The other treaties specify in further details specific rights already contained in the International Covenant on Civil and Political Rights, and provide further monitoring mechanisms.

34. The most important of these monitoring mechanisms has been the examination, in their presence, of reports submitted by the States parties. The fact that all States are required to participate in this monitoring procedure and that the calling in, on States for examination does not, of itself, indicate an adverse finding rather it has encouraged even states with adverse human rights situations to participate. Some of these treaties provide for Optional Protocols, under which States can agree to individuals within their jurisdiction bringing legal claims of human rights violations. This procedure is particularly well developed under the International Covenant on Civil and Political Rights, where the Human Rights Committee has now established a very substantial jurisprudence. As of 15 May, 1994, there are 126 States parties to the covenant, and 74 of them accept the Optional Protocol. The number is growing rapidly.

IX. CONSTITUTIONALISM:

35. The State, its exchequer or even its courts ordinarily should not pronounce judgment in contravention to the rights conferred by the UN Resolutions.

36. Article 51 of the Constitution of India is reproduced as under :-

“51. Promotion of international peace and security.-- *The State shall endeavour to—*

- (a) promote international peace and security;*
- (b) maintain just and honourable relations between nations;*
- (c) foster respect for international law and treaty obligations in the dealings organised peoples with one another; and*
- (d) encourage settlement of international disputes by arbitration”.*

37. In view of aforesaid mandate of Article 51 of the Constitution of India the need is to foster respect of International law and treaty obligations in the dealings of organised peoples with one another. Whether it is Personal Law or a custom or usage it may not override the theme of Article 51 of the Constitution unless constitutionally provided otherwise. It is true that International treaties donot automatically become part of the law and they have to be incorporated in the national law, but the higher judiciary may interpret statutes and the Constitution so as to maintain

harmony with rules of international law. The power to implement international treaties falls within the domain of Union under Article 23 of the Constitution of India.

38. Before coming to Constitution of India to deal with the subject, it shall be appropriate to deal with constitutionalism which is foundation of every Constitution.

39. The International Congress of Jurists that met in New Delhi in 1959 endorsed thick conception of the rule of law and resolved as under:

“In many societies, particularly those which have not yet fully established traditions of democratic legislative behaviour, it is essential that certain limitations on legislative power ... should be incorporated in a written constitution and that the safeguards therein contained should be protected by an independent judicial tribunal; in other societies, established standards of legislative behaviour may serve to ensure that the same limitations are observed ... notwithstanding that their sanctions may be of a political nature.

40. In two Australian cases i.e. **Commonwealth Aluminium Corporation Pty. Ltd v. Attorney General (WA) [1976] Qd R 231**, and **West Lakes Ltd vs. South Australia (1980) 25 SASR 389**, importance of Constitution was considered. Observation of Ferguson J. seems to be relevant for the purpose of present controversy, to quote:-

“... The constitution of every free civilized community is based on the assumption that the body to which it commits the power of making its laws may be trusted to bring to the exercise of that power a reasonable degree of sanity. If at any time that trust should prove to be misplaced, then the State would be in very evil case, and would be hard put to it to find a way of escaping disaster.”

41. In reality, it is said the Courts have stubbornly protected fundamental values of common law from legislative interference while acknowledging political constraints on their ability to do so. Doctrine of *ultra vires* is facet of such assumption. John Finnis in his article ‘*Nationality, Alienate and Constitutional Principle*’ published in Law Quarterly Review 123 (2007) 417 at 417 eloquently expressed his views as under:-

“Constitutional principles and rights prevail over ordinary norms of statutory interpretation; the presumption that statutes do not overturn these rights and principles qualifies the ordinary subordination of our common law to parliamentary authority”

42. Jeffrey Goldsworthy in his celebrity book ‘*Parliamentary Sovereignty*’, referring to observations of Lord Hoffmann in ***R. vs. Secretary of State for the Home***

Department, ex parte Simms, (2000) 2 AC 115 at 131, observed:-

“Parliament can, if it chooses, legislate contrary to fundamental principles of human rights.....But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document”.

43. A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens. The constitutional Courts as sentinel on the *qui vive*, therefore, function objectively and

dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers conferred upon other wings and at the same time maintain a delicate balance on even keel.”

44. The principle of constitutionalism advocates a check and balance model of the separation of powers. It envisages a diffusion of powers, necessitating different independent centers of decision-making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights.

45. In a free democracy the dignity of man is the supreme value. It is inviolable and must be respected and protected by the State. For the sake of his dignity, he must be guaranteed the largest possible scope for development of his personality. In the political social sphere, it is not enough for authority to look after the welfare of “subjects”, no matter how well. Rather, the individual should participate responsibly and to the largest extent possible in decisions concerning the entire community. The State must make it possible for him to do so; it can accomplish this and mainly by guaranteeing freedom of intellectual controversy and discussion of ideas.

46. The free democratic order also deduces from the idea of man's dignity and freedom and task of insuring that justice and humanity exist in relationship among citizens themselves. This duty includes preventing exploitation of one individual by another. But free democracy refuses to equate exploitation of one individual by another. Also free democracy refuses to equate exploitation with the economic fact of hired labour in the service of private enterprise. Rather, liberal democracy considers it its task to prevent real exploitation, namely, exploitation of labour under degrading conditions and for insufficient wages. It is for this reason that the principle of the social state has been elevated to a constitutional principle.

47. Liberal democracy is imbued with the notion that it should be possible to develop freedom and equality of citizens, despite obvious conflicts between these two values.

48. The wider principle of social justice consists simply in the claims of all men to all advantages and to an equal share in all advantages which are commonly regarded as desirable and which are in fact conducive to human well being. The basic demand for equal treatment in all respects is not confined to food or material things but extends to opportunities for entertainment, recreation,

education, travel etc. (A.M. Honore : *Social Justice in Summer's Essays in Legal Philosophy*, p. 78).

49. Keeping in view the aforesaid broader principles of constitutionalism, whether it is collective right of citizens or individual right, both are protected by philosophy and ethos of the Constitution. In the garb of Personal Law, citizens cannot be deprived constitutional protection.

50. It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.

51. Religious liberty is not an isolated reality. It exists, or is denied, in the midst of a complex of institutions, attitudes and practices. It is inseparable from measures of liberty in

general and from certain specific liberties, such as those of free expression and association. Religious liberty is supported by related liberties; the efforts to secure religious liberty is, both in history and in contemporary society, a force working largely towards the associated liberties as Sturzo observes:

“One liberty never stands alone; it must form part of a system or it is not liberty.”

Harrington realized, in the seventeenth century:

“Without liberty of conscience, civil liberty cannot be perfect; and without civil liberty, liberty of conscience cannot be perfect.”

So remarks a distinguished writer upon the contemporary scene.

*“It is impossible to grant freedom of worship without granting freedom of the press, freedom of assembly. Religious liberty cannot exist without civil liberty and vice versa” (Bates: **Religious Liberty, p. 343**).*

52. The equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at the inequalities arising on account of vast social and economic differentiation and is thus consequently as essential ingredient of social and economic justice. The security clause in the Constitution has been equated to

mean that the people of the country ought to be secured of socio-economic justice by way of a fusion of Fundamental Rights and Directive Principles of State Policy. (vide ***Minerva Mills v. Union of India***, AIR 1980 SC 1789: (1981) 1 SCR 206: (1980) 3 SCC 625, as referred in ***Secretary, Haryana State Electricity Board v. Suresh***, AIR 1999 SC 1160 (1161): (1999) 3 SCC 601: (1999) 2 JT 435: (1999) 2 Scale 315: (1999) 3 Supreme 277: (1999) 3 SLT 353 : (1999) 1 SCJ 695 : (1999) 4 SRJ 339 : (1999) 1 LLJ 1086: 1999 Lab IC 1323: (1999) 81 FLR 1016: (1999) 94 FJR 554: (1999) 2 LLN 612: (1999) 2 SLR 1).

53. Constitution is the mother of all law in force within the territory of a country. The Indian Constitution is occupied and performed well on different facets of life and administration since last seventy years. Hon'ble the Apex Court and different High Courts created dent over the arrogant administration and politicians securing dignified life for Indian people. Constitution is not only a black letter law but it is something very special because of the very genesis of law. Indian law, customs, traditions and usages which infringe constitutional ethos will be struck down by the courts. Nothing is over or above or beyond the control of Constitution within the territory of India.

X. CONSTITUTIONAL SAFEGUARDS:

54. Fundamental rights contained in *Chapter III* of the Constitution are the pulse beat of the Indian Constitution. It checks the commission and omission of the State which offend human right in any manner or in any form. Legislation which gives wide power to the executive to select items for special treatment, without indicating the policy, may be set aside being violative of equality (Article 14 of the Constitution of India). On the one hand, provisions which lay down policy may be upheld. But, on the other hand, provisions which fail to give such guidance of quality or equal treatment, dignity and equality of life as well as other different facets of life may be invalidated by higher judiciary (Vide ***State of West Bengal vs. Anwar Ali***, AIR 1952 SC 75, ***Meenakshi Mills vs. Vishwanath***, AIR 1955 SC 13, ***Avinder vs. State of Punjab*** AIR 1979 SC 321 and ***Ajeet Singh vs. State of Punjab***, AIR 1967 SC 885).

55. Article 14 of the Constitution deals with equality before law. On the other hand, Article 15 prohibits discrimination on the ground of religion, race, caste, sex or place of birth. For convenience sake Article 15 is reproduced as under :-

“15. Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth-(1) *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30”.

56. For the present controversy clause (2) of Article 15 of the Constitution is relevant which provide that no citizen shall, on grounds of sex be subjected to disability, liability, restriction or condition with regard to access to different places. The crucial word in this Article is ‘discrimination’ which means ‘making an adverse distinction with regard to’ or ‘distinguishing unfavourably from others’ (***Kathi Raning Rawat vs. State of Saurashtra***, AIR 1952 SC 123). Analogy which may be drawn from clause (2) is that there shall be no discrimination on the ground of sex and will be given stress to personal life by liberal construction. Any action which is arbitrary shall be hit by Article 14 read with Article 16 of the Constitution. (vide ***DTC vs. Mazdoor***

Congress, AIR 1991 SC 101, paragraphs 258-280). Article 21 of the Constitution protects life and personal liberty of a person which includes different facets of life. By passage of time Hon'ble the Apex Court has given wide amplitude to Article 21 of the Constitution of India.

57. In the case of ***Kapila Hingorani vs. State of Bihar***, (2003) 6 SCC 1. Hon'ble Apex Court while considering the observation of Frank I. Michelman in his celebrity treatise held as under :-

“35. In “The Constitution, Social Rights and Liberal Political Justification”, Frank I. Michelman, published in International Journal of Constitutional Law, Vol I, p 13, it is stated:

"Whatever else it may also be, a country's written constitutional bill of rights is a high-ranking regulatory law, a 'statute' fraught with direct legal consequences. Granted, the constitution may not be 'simply' that. No doubt it may figure as something beyond positive law: 'a "mirror reflecting the national soul",' perhaps; an expression of national ideals, aspirations, and values expected, as such, to 'preside and permeate the processes of judicial interpretation and judicial discretion' throughout the length and breadth of the national legal order. But had bills of rights

not also and always registered as direct, regulatory legislation - as laws to be enforced like other laws - jurists and scholars the world over would not have conducted their debates over the constitutionalization of social rights in the terms that we have grown used to.

Constitutions, to be sure, are regulatory laws of a special kind, setting terms and conditions for the making and execution of all other laws. Typically, although not necessarily, some of the terms and conditions are cast in the form of a bill of rights; a list of certain interests of persons, upon whom are conferred what are considered to be legal rights, not just background moral claims, to have these interests at least negatively respected, and maybe positively secured and redeemed, by the "State's Legislature and other actions yet to come."

58. In paras 57, 59 and 60 their Lordships of the Hon'ble Apex Court have capsuled right of different facets of life and personal liberty flowing from Article 21 and referring to earlier judgments observed as under :-

"57. Expansion of the right to life and personal liberty under Article 21 of the Constitution has been made by implicating :

(i) Right to travel - Maneka Gandhi v. Union of India, AIR (1978) SC 597 and

Satwant Singh v. A.P.O., New Delhi, AIR (1967) SC 1836.

(ii) Right to privacy - Kharak Singh v. State of U.P., AIR (1963) SC 1295; Sharda v. Dharampal, JT (2003) 3 SC 399

(iii) Right to speedy trial – “Common Cause A Registered Society v. Union of India, AIR (1997) SC 153.

(iv) Right to prisoners to interview - Prabha Dutt v. Union of India, AIR (1982) SC 6.

(v) Right to a fair trial – Commr. Of Police, Delhi v. Registrar, Delhi High Court, AIR (1997) SC 95.

(vi) Right against torture and custodial violence - D.K. Basu v. State of W.B., AIR (1997) SC 10

(vii) Right to free legal aid - State of Maharashtra v. Manubhai Pragaji Vashi, AIR (1996) SC 1.

(viii) Right to primary education - Unnikrishnan v. State of A.P., [1993] 1 SCC 645 and T.M.A. Pai Foundation v. State of Karnataka, [2002] 8 SCC 481.

(ix) Right to health and medical care - CERC v. Union of India, AIR (1995) SC 922 and State of Punjab v. Mohinder Singh Chawla, AIR (1997) SC 125

(x) Right to pollution-free environment - M.C. Mehta v. Union of India, AIR (1987) SC 965.

(xi) Right to Safe drinking water – AP Pollution Control Board v. Prof. M. V. Nayudu, AIR (1999) SC 822

(xii) *Sexual harassment of working women- Visakha v. State of Rajasthan, AIR (1997) SC 3011 and Aparent Export Promotion Council v. A.K. Chopra, [1999] 2 SCC 34.*

(xiii) *Right to a quality life - Hinch Lal Tiwari v. Kamala Devi and Ors, [2001] 6 SCC 496.*

(xiv) *Right to Family Pension - S.K. Mastan Bee v. General Manager South Central Rly, [2003] 1 SCC 184*

59. Explaining the rights of a citizen under Article 21 of the Constitution of India, this Court in ***S.M.D. Kiran Pasha v. Government of AP and Ors.***, [1990] 1 SCC 328 observed that Article 226 of the Constitution of India would be maintainable also when a right is threatened as contra distinguished from the right when infringed. This Court held (SCC p. 342, para 21).

“21. In the language of Kelsen the right of an individual is either a mere reflex right - the reflex of a legal obligation existing towards this individual; or a private right in the technical sense the legal power bestowed upon an individual to bring about by legal action the enforcement of the fulfilment of an obligation existing towards him, that is, the legal power. From the above analysis it is clear that in the instant case the appellant's fundamental right to liberty is the reflex of a legal obligation of the

rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of the legal action would, therefore, amount to denial of his right of enforcement of his right to liberty...."

60. It is also well-settled that interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of constitutional law are expanding. The necessity to take recourse to such interpretative changes has recently found favour with the Division Bench of this Court in The State of Maharashtra v. Dr. Praful B. Desai, (SCC pp. 610-11, paras 13-15).

"13. One needs to set out the approach which a court must adopt in deciding such questions. It must be remembered that the first duty of the court is to do justice. As has been held by this Court in the case of Nageswar Shri Krishna Chobe vs State of Maharashtra courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available

evidence. Of course the rights of the accused have to be kept in mind and safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights.

14. *It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled 'Statutory Interpretation', 2nd Edition page 617:*

"It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other

matters.....That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out It also comprises processing by executive officials."

15. *At this stage the words of Justice Bhagwati in the case of National Textile Workers' Union v. P.R. Ramakrishnan, at CC p. 225, para 9 (SCR) at p. 956 need to be set out. They are:*

'We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still: it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the living tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the

law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind.”

59. Apart from above, Hon'ble Apex Court in the case of **Chameli Singh vs. State of U.P.** (AIR 1996 SC 105), while dealing with Article 21 of the Constitution of India held that decent and civilized life is fundamental right and it also includes food, water and decent environment. In a case reported in **Francis Coralie vs. Union Territory** (AIR 1981 SC 746 at p. 753), their Lordships while interpreting Article 21 of the Constitution held as under:-

“The question which often arises is whether Article 21 relating to right to life is limited only to protection of limb or faculty or does it go further and embrace some-thing more. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course the

magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights”.

60. The Hon’ble Apex Court also considered the jurisprudence of personhood in different cases. According to Hon’ble Apex Court the jurisprudence of personhood or philosophy of the rights to life envisaged under Article 21 of the Constitution enlarge its sweep to encompass human personality in its full blossom with invigorative health which is a wealth to the workman to earn his livelihood to sustain the dignity of person and to live a life with dignity and equality. The expression ‘life’ assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living hygienic conditions in the work place and leisure.

61. In the book 'Constitution of India' by Jagdish Swaroop third Edition Vol 1 as revised by Dr. L.M. Singhvi and Justice G.P. Mathur (Former Judge of Supreme Court of India) while relying upon catena of judgments observed as under :-

“The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of States’ security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions”.

62. In view of the above there appears to be no room of doubt that individual rights constitutionally protected may not be compromised for any reason whatsoever except for national security or alike grounds.

63. Much emphasis has been given to Articles 25 and 26 of the Constitution of India. For convenience sake Articles 25 and 26 of the Constitution are reproduced as under:-

“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, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly”.

* * * * *

“26. Freedom to manage religious affairs
Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law”.

64. The spirit of Articles 25 and 26 of the Constitution is to secure and protect religious rights of the citizens. Religion is based on faith. Though it may interfere with science and constitutional spirit, but it seems to have continued since ages to provide source to maintain

optimism in life. Some religions believe in God, but some do not believe in God. Muslims, Hindus and Christians believe in God. On the other hand Buddhism and Jainism broadly do not believe in God. Buddhists rely upon *Dharma, Eternal Law*. But it is not easy to define religion which has also not been defined in the Constitution. It is a term which is hardly susceptible of any rigid definition. At least through 19th century in the United States religion was referred to theistic notions respecting divinity morality and worship and was recognized as legitimate and protected only so far as it was generally accepted as civilized by western standards.(*Tribe: American Constitutional law p. 825*).

65. Hon'ble Supreme Court in the case of ***The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshimindra Tirtha Swamiar of Sri Shirur Mutt*** (AIR 1954 SC 282) has laid down the following principles :-

(1) *Religion means 'a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being'.*

(2) *A religion is not merely an opinion, doctrine or belief it has its outward expression in acts as well.*

(3) *Religion need not be theistic.*

(4) 'Religion denomination' means a religious sect or body having a common faith and organization and designated by a distinctive name.

(5) Allah which takes away the rights of administration from the hand of a religious denomination altogether invests in another authority would amount to violation of the right guaranteed under clause (d) of Article 26".

66. Hon'ble Apex Court in the case of **S.P. Mittal vs. Union of India**, reported in AIR 1983 SC 1 ruled that keeping in view the provision of the Constitution and the light shed by judicial precedence, religious is a matter of faith. It is a matter of belief and doctrine. It concerns the conscience i.e. the spirit of man it must be capable of overt expression in word and deed, such as worship or ritual. Some are easily identifiable; some require conscious looking. Primarily it is a question of consciousness of the community as to how does the fraternity or solidarity regards it capable with host of situation required to be considered. It may be noted that so many great persons or *Prophets; Budha, Mahaveer and Christ* never thought it founding a new religion but these great religions bear their names.

67. In **Venkataramana Devaru vs. State of Mysore** (AIR 1958 SC 255 p. 264) the Hon'ble Apex Court while

considering the matter of religion under Article 26 (b) certain practices regarded by religious community has been held to be part of religion and protection granted by Articles 25 (1) and 26 (b) was extended to such practice. However Hon'ble Apex Court in the case **S.P. Mittal** (supra) and one case reported in **M. Ismail Faruqui (Dr.) vs. Union of India** (AIR 1995 SC 605 p. 640) held that protection guaranteed under Article 25 (1) of the Constitution is available to all persons subject to public order, morality and health and provisions contained in Part III of the Constitution. It is held that freedom of conscience is to be separated from right to profess, practice and propagate religion, they go together and together, hand in hand.

68. It is also held that religious practice does not mean or extend right to worship at any place since it may infringe religious freedom guaranteed under Articles 25 and 26. Hon'ble the Apex Court in the case of **Commissioner of Police vs. Acharya Jagadishwarananda Avadhuta**, AIR 2004 SC 2984 p. 2981 held that freedom to act and practice guaranteed by Articles 25 and 26 may be subject to regulations in our Constitution subject to public order, morality and health including other provisions contained in Part III of the Constitution (Fundamental Rights). In the case of **Commissioner of Police vs. Acharya**

Jagadishwarananda Avadhuta (supra) Hon'ble Apex Court was seized with a controversy raised by *Ananda Margies* of their right to Tandava Nritya (dance) in public places their Lordship held that essential part of a religion means the core belief 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 super structure of religion is built, without which, a religion will be no religion. There may not be addition or subtraction to such part. In the case reported in ***State of West Bengal vs. Ashutosh Lahiri***, AIR 1995 SC 464 as referred in the case of ***State of Gujrat vs. Mirzapur Moti Kureshi Kasab Jamat*** (2005) 8 SCC 538 the Hon'ble Apex Court noted that sacrifice of any animal by Muslims for the religious purpose of Bakarid did not include slaughtering of cow as the only way of carrying out that sacrifice. Slaughtering of cow on *Bakarid* was neither essential to nor necessarily required as part of the religious ceremony. More so when it is common knowledge that bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makr-Sankranti and Gopashtmi etc.

69. In ***Ratilal Panachand Gandhi vs. State of Bombay***, AIR 1954 SC 388 Hon'ble the Apex rejected with regard to

certain provisions held to be baseless where religious objection was negatived.

70. In ***Lily Thomas vs. Union of India***, AIR 2000 SC 1650 it has been held by Hon'ble Apex Court that religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the persons feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every Personal Law is sacred institution. Under Hindu law, marriage is a sacrament.

71. Keeping in view the aforesaid broader principles flowing from the Constitution, it may be reasonably inferred that the religious practices, customs and usages may be part of religion, but in any case they cannot offend constitutional rights guaranteed in Article 14 read with Article 21 of Part III of the Constitution. As said (supra) right to live does not mean animal living but human living which includes equality in law and dignity of life, privacy, respectable treatment, morality and other different facets of life which conserves and protects man's right to live as human being.

72. Accordingly a married or unmarried Muslim woman has right to claim the guarantees provided by Articles 14 and 15 read with Article 21 of the Constitution (supra).

73. Hon'ble Apex Court in a recent judgment in Writ Petition (Civil) No. 386 of 2005, ***Vishwa Lochan Madan vs. Union of India & ors***, decided on 07.07.2015, while considering right of Muslim *Quazi* to issue *Fatwa* held that no religion including *Islam* punishes the innocent. Religion cannot be allowed to be merciless to the victim. Faith cannot be used as dehumanising force and proceeded to observe as under:-

“We observe that no Dar-ul-Qazas or for that matter, anybody or institution by any name, shall give verdict or issue Fatwa touching upon the rights, status and obligation, of an individual unless such an individual has asked for it. In the case of incapacity of such an individual, any person interested in the welfare of such person may be permitted to represent the cause of concerned individual. In any event, the decision or the Fatwa issued by whatever body being not emanating from any judicial system recognized by law, it is not binding on anyone including the person, who had asked for it. Further, such an adjudication or Fatwa does not have a force of law and, therefore, cannot be enforced by any process using coercive method. Any person trying to enforce that by any method shall be illegal and has to be dealt with in accordance with law”.

74. In view of above, there appears no room of doubt that because of fundamental rights guaranteed by the Constitution (Articles 14, 15, 165 and 21) read with United Nations Resolutions (supra), talaq or triple talaq cannot be executed for deserting a lady or her children negating constitutional guarantee provided to every citizen of India.

XI. MORALITY:

75. Moral values inhibit different qualities and facets of life which include justness, fairness and dignified treatment.

76. In ***Motilal Padampat Sugar Mills vs. State of U.P. & ors***, 1979 (2) SCC 409 Hon'ble Supreme Court emphasized for social acceptance of law with moral values and observed that it should be constant endeavour of the Court and the legislatures to close the gap between law and morality and bring about as near as approximation between the two as possible.

77. "Morality" is derived from the Latin word *moralitas* means manner, character; proper behavior is a system of conduct and ethics that is virtuous. In descriptive sense morality refers to personal or cultural values, codes of conduct or social mores which distinguished between right and wrong in a given society. It refers directly to what is wrong and right. The law and morality are complimentary to each other and serve to regulate our behavior. Law accomplishes this primarily through the threat of sanctions in case, it is disobeyed. On the other hand, immoral act may lead to legal sanction or may not. Article 14 of the Constitution provides justness and fairness in action. The justness and fairness is the part and parcel of morality.

78. Noble laureate Amartya Sen in his celebrated treatise, "The Idea of Justice" observed that there are three principles governing the administration of justice. Firstly, a

theory of justice that can serve as the basis of practical reasoning must include the ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies-an exercise that is such a dominant feature of many theories of justice in political philosophy today. Secondly, while many comparative questions of justice can be successfully resulted and agreed upon in reasoned arguments, there could well be other comparisons in which conflicting considerations are not fully resolved. Reasonable arguments in competing directions can emanate from people with diverse experience and traditions but they can also come within the society or for that matter even for the very same person. Thirdly, the presence of remediable injustice may well be connected with behavioral transgressions rather than with institutional shortcomings. Justice is ultimately connected with the way people's live go and not merely with the nature of the institution surrounding them. In contrast, many of the principal theories of justice concentrate overwhelmingly on him to establish just institutions.

79. Amartya Sen speaks for political and moral philosophy on one side and also discussed the ongoing engagements in law, economics, politics. The requirement

of theory of justice include bringing reason into play in the diagnosis of justice and injustice. Democracy has to be judged not just by institutions that formally exists but by the extent to which different voices from diverse sections of the people can actually be heard.

80. Amartya Sen says, to quote : *“Indeed the business every dynamic persons tend to have some kind of reasons, possibly from creed ones, in support of their dogmas like racist, sexist, classist and caste based prejudices belonging there and other course reasoning but there is hope in this sense bad reasoning can be confronted by better reasoning. The scope of reasoned engagement does exist though people may refuse at initial stage”*.

81. **Mahatma Gandhi** from time to time propagated for moral values in personal as well as public life. He emphasized for morality in public life observing that *“ultimately it is the individual who is the unit”*.

Mahatma Gandhi also interpreted the civilization as the “mode of conduct” which regulate the society from generation to generation. Virtually, it is the individual who influence the system individually or jointly as the member of governing body, legislature, bureaucracy or judiciary. In his concluding lecture Dr. Rajendra Prasad observed that a

good constitution may be bad in case, bad peoples are at the helm of affairs and bad constitution may be good in case, good peoples are managing the affairs of the country. Accordingly, personal or codified law affecting the citizens' public and private rights may be good or bad or may be just and unjust, may be legal or illegal depending upon the person who are enforcing it and managing the affairs. In case persons at helm of affairs fail, courts interfere.

82. it shall be appropriate to refer what Immauel Kant has said, to quote:

“We must not accept a good Constitution because those who make it are moral men. Rather it is because of a good Constitution that we may expect a society composed of moral men”.

The purpose of law is not only to regulate the society or run the government but the purpose of law is also to ensure that the persons possessing moral value occupy high offices in all the three wings of the government to provide selfless service to the country.

83. The pure and positive theory of law canvassed by certain western philosophers makes a man 'animal'. There must be inner morality in the enforcement of law. Law should be implemented, interpreted and enforced in such way which enhances and give strength to the morality in

“men’s” private and public life. Morality is a flavour of law which check hypocrisy in public and private life and compel a person or authority to speak honestly, act fairly and honour the humanity.

84. The swift change in the policy or statutory provisions to meet out the immediate requirement without future vision may be disadvantageous for the country of the society at large. Successive change in policy or law erodes people faith in the administration or the Government.

85. **Lon L. Fuller** in his treatise ***The Morality of Law*** observed as under:

“Of the principles that make up the internal morality of the law, that which demands that laws should not be changed too frequently seems least suited to formalization in a constitutional restriction.”

Further the author observed, to quote as under:

“Yet there is a close affinity between the harms done by retrospective legislation and those resulting from too frequent changes in the law. Both follow from what may be called legislative inconstancy.”

The author has noted the anguish of American people weary of the fluctuating policy which has directed the public councils.

86. While accepting the State's right to change law retrospectively referring the Judgment of **Ochoa vs. Hernandez y Morales.**, 230 U.S. 139, the author (supra) observed as under:

“The affinity between the problems raised by too frequent or sudden changes in the law and those raised by retrospective legislation receives recognition in the decisions of the Supreme Court. The evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect. But sometimes an action taken in reliance on the previous law can be undone, provided some warning is given of the impending change and the change itself does not become effective so swiftly that an insufficient time is left for adjustment to the new state of the law. Thus the Court has said:

“it is well settled that [statutes of limitations] may be modified by shortening the time prescribed, but only if this is done while the time is still running, and so that a reasonable time still remains for the commencement of any action before the bar takes effect.”

87. Learned author further says, to quote:

“the internal morality of the law is not something added to, or imposed on, the power of law, but is an essential condition of that power itself.”

Learned author further proceeded to observe, to quote:

“I should apologize for insisting on so obvious a proposition as that some minimum adherence to legal morality is essential for the practical efficacy of law, were it not that the point is so often passed over precisely in contexts where it needs most to be made explicit.”

88. However, keeping in view the moral devaluation in society and system coupled with the political and vested interest as noted by courts from time to time, violation of Article 21 of the Constitution should be nipped in bud.

89. Apart, since a decision is more or less affected by the individual thoughts, actions and interest of the person running a system or community, the decisions must be in accordance to constitutional ethos and spirit.

90. Lack of morality, while construing other provisions, shall in due course of time, convert man into animal and result with the end of civilization. Nature of crime and sexual exploitation of women is changing very fast because of missing of moral values in education as well as judicial pronouncements. Though through Articles 25 and 26 of the Constitution, the Framers of the Constitution, were conscious of the value based life of Indian civilization. Loss of morality in personal life is because it is not inculcated

from childhood and is the main reason why girls of age of 2, 3, 4, 5, 6 or more are subjected rape, abduction and child sex abuse and so many alike problems.

91. Accordingly we are of the view that triple talaq, oral or by ex parte action, is immoral un-Islamic and ante thesis to Constitutional philosophy. In any case a government servant has got no right to divorce through triple talaq and the statutory conditions are binding on such government servant and shall have overriding affect on Personal Law. In private case also, the government has right to impose restrictions and any action under Personal Law comprising dignity, quality and decency of life shall offend the constitutional ethos, hence the courts may strike down any such action in a suit or collateral proceedings or may direct to ignore such action being violative of Articles 14, 21 25 and 26 of the Constitution.

XII. CUSTOM, USAGE AND PRACTICE:

92. The Holy Quran permits for triple talaq though it seems to be not meant for ex parte use. Even if it has been practiced for thousands or more years it shall offend constitutional ethos and may not be treated as law under Article 13 as pressed by the applicant.

93. While delivering judgment on behalf of Full Bench at the Lucknow Bench of Allahabad High Court in the Writ

Petition No 9470 of 2014 **Smt Chawali vs. State of U.P. & Ors**, one of us (Justice Devi Prasad Singh) had the occasion to consider usage and practice.

94. It is held, "*The Court may take note of the fact that life style, social norms, tradition, customs and usage in the Indian Sub Continent are almost different than Western countries. In Western countries, the individual right is based on the development taken place under the historical background during last few hundred years of their civilization. On the other hand, in Indian Sub Continent, particularly in India, the right of family to nourish, educate, bring up and make children (boys and girls) good citizen as a member of family unit is based on thousand years of civilizational experience and the customs and traditions developed thereon*".

95. Article 13 of the Constitution of India declares customs and usage as "laws in force". For convenience, Article 13 is reproduced as under:

*"13. (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) 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 usages having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by 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.]

96. On the other hand, Articles 14 and 21 extend equal protection of law, individual right of life and liberty, read with Art. 19 which we shall deal with in the later part of present judgment. According to P Pramanatha Aiyar's *The Major Law Lexicon*, 4th Edition 2010, Volume 2 page 1698, custom has been defined as under:

"Custom. A custom to be valid must not be contrary to justice, equity or good sense. It must not

have been declared to be void by any competent authority nor would contravene any express provision of the law. It must also be ancient, certain and invariable. A custom may either be general or special. It may be proved or disproved in any of the following ways:

(1) By the opinion of persons likely to know of its existence or having special means of knowledge thereof.

(2) By statements of persons who are dead or whose attendance cannot be procured without unreasonable delay or expenses, provided they were made before, any controversy as to such custom arose, and were made by persons who would have been or likely to have been aware of the existence of such custom if it existed.

(3) By any transaction by which the custom in question was claimed, modified, recognised, asserted, or denied or which was inconsistent with its existence.

(4) By particular instances by which the custom was claimed, recognised, or exercised, or knowledge of its exercise was disputed, asserted or departed from. A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. A custom to

be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin; and, fourthly, it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect."

97. Incidentally, in England, custom has been defined not as a source of law but it becomes law itself and English people are proud of their customs. Custom has been defined as under:

"Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a free people without their consent : so wherever they consent and use a certain rule or method as a law, such rule etc., gives it the power of a law, and if it is universal, then it is common law if particular to this or that place, then it is custom. (3 Salk. 112; Tomlin). Custom is one of the most triangles of the laws of England; those laws being divided into Common Law, Statute Law, and Custom: (Page 1698, The Major Law Lexocon, 4th Edition 2010).

98. Supreme Court of India in a case reported in AIR 1952 SC 23 **Thakur Gokalchand vs Parvin Kumari** held that a custom in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but

the English rule that "a custom in order that it may be legal and binding, must have been used so long that the memory of man runs not to the contrary" should not be strictly applied to Indian conditions.

Again the Supreme court in (2006) 13 SCC 627 *Bhimashya versus Janabi* held that though 'custom' has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication.

99. In (2008) 13 SCC 119 *Salekh Chand versus Satya Gupta*, their Lordships of Supreme Court held that 'custom' is a rule which in a particular family or a particular class or community or in a particular district has from long use, obtained the force of law. Custom cannot be extended by analogy. One custom cannot be deduced from another. It cannot be a matter of theory but must always be a matter of fact. It cannot be enlarged by parity of reasoning. According to Herbert W. Horwill, the *Usages of the American Constitution* 22 (1925), "A 'usage' is merely a customary or habitual practice; a 'convention' is a practice that is established by general tacit consent. 'Usage' denotes something that people are accustomed to do; 'convention' indicates that they are accustomed to do it because of a general agreement that is the proper thing to do (Page 7027

from P. Ramanatha Aiyar's The Major Law Lexicon, 4th Edition 2010).

100. In **Commr., H.R.C.E. (Admn.) v. Vedantha Sthapna Sabha**, (2004) 6 SCC 497, 512, para 24, Supreme Court held that "The concept of long continuance and passage of time is inbuilt in the expression 'usage'".

In view of above, customs, usage have force of law subject to limitation of Fundamental Right (Part III of the Constitution) accruing to the citizens. Art. 21 confers Fundamental Rights to citizens having different facets of life like right to live quality of life, dignity of life, right of human living, right of privacy etc vide (2003)6 SCC 1 **Kapila Hingorani versus State of Bihar**. Right flowing from Article 19 confers different rights which relate to association, movement, trade, profession etc.

101. In AIR 1951 SC 128 **Keshavan Madhava Menon versus State of Bombay**, their Lordships of Hon'ble Supreme Court by majority (Bench of seven Hon'ble Judges) ruled that Art. 13(1) is prospective in its operation. Hon'ble Justice Das in his leading judgment further ruled that Art. 13(1) has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the

exercise of fundamental rights on and after the date of the commencement of the Constitution.

However, Justice Mehr Chand Mahajan while reiterating the aforesaid proposition further added that rule of justice, equity and good conscience apply even if a provision becomes void, to quote:

"It is also unnecessary to examine the country the further argument of the learned Attorney-General that in any case since 1868 in this country the rule of construction of statutes is the one laid down by Section 6 of the General Clauses Act, 1868, and that though in express terms that statute may not be applicable to the construction of Article 13(1) of the Constitution, yet that rule is a rule of justice, equity and good conscience and has become a rule of common law in this country and should be applied even to cases where statutes become void by reason of their being repugnant to the Constitution."

102. In (1962) Supp. 3 S.C.R. 724 **Bhau Ram vs. B. Baijnath Singh**, Hon'ble Supreme Court considered Art. 13(3) with regard to importance of customs and usage.

24. In AIR 1965 SC 314 **Sant Ram and others vs Labh Singh and others**, a Constitution Bench of Hon'ble Supreme Court considered the words "custom and usage" as provided in Art. 13 in the following words, to quote :

"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 clause (2) then the words "custom or usage", would apply neither to clause (1) nor to clause (2) and this could hardly have been intended. It is obvious that both the definitions control them meaning of the first clause of the Article. The argument cannot, therefore, be accepted. It follows that respondent No. 1 cannot now sustain the decree in view of the prescriptions of the Constitution and the determination of this Court in Bhau Ram's case".

103. In (1996) 5 SCC 125 Madhu Kishwar and others versus State of Bihar and others, a three Judge Bench of Hon'ble Supreme Court has reiterated the aforesaid proposition of law but with different words. While reiterating the Fundamental Right of citizens with regard to justice to individual as one of the highest interest of democratic State, their Lordships held that the judiciary cannot protect the interests of common man unless it redefines the protections of the Constitution and the common law and it should adapt itself to the needs of the changing society and be flexible and adaptable. It has been held that the intent of Articles 38,

39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. Their Lordships held as under.

"Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is a foundation on which the potential of the society stands. In Sheikriyammada Nalla Koya v. administrator, Union Territory of Laccadives, Minicoy and Amindivi Islands K.K. Mathew, J., as he then was, held that customs which are immoral are opposed to public policy, can neither be recognised nor be enforced. Its angulation and perspectives were stated by the learned Judge thus :

It is admitted that the custom must not be unreasonable or opposed to public policy. But

the question is unreasonable to whom? Is a custom which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A judge may not set himself in opposition to a custom which is fully accepted by the community.

But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, whose guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organisations of existing society. Thus, the judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that opinion is abhorrent to right thinking people. In other words, the judge would

consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality."

104. Customs, usage and traditions developed in pursuance to thousand years of experience of mankind in a particular society have got its own importance. It should be normally not interfered unless it is against the Constitutional mandate or statutory provisions. A great American author Benjamin N. Cardozo while considering logic, history and custom of a given society in his famous treatise, "The Nature of the Judicial Process", observed as under :

"The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live. Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by me mercy." That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order." (page 66).

Roscoe Pound, a great Jurist of his time in his book, "an Introduction to the Philosophy of Law" has

reiterated the aforesaid proposition and further held that there are two requirements to determine the philosophical thinking about law. According to Roscoe Pound (supra), to quote :

"On the one hand, the paramount social interest in the general security, which as an interest in peace and order dictated the very beginnings of law, has led men to seek some fixed basis of a certain ordering of human action which should restrain magisterial as well as individual willfulness and assure a firm and stable social order. On the other hand, the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security and of making continual new compromise because of continual changes in society have called ever for readjustment at least of the details of the social order. They have called continually for overhauling of legal precepts and for refitting them to unexpected situations. And this has led men to seek principles of legal development by which to escape from authoritative rules which they feared or did not know how to reject but could no longer apply to advantage. These principles of change and growth, however, might easily prove inimical to the general security, and it was important to reconcile or unify them with the idea of a fixed basis of the legal order."

Learned author cited an exhortation addressed by Demosthenes to an Athenian jury as to why men obey the law, to quote:

"Men ought to obey the law, he said, for four reasons : because laws were prescribed by God, because they were a tradition taught by wise men who knew the good old customs, because they were deductions from an eternal and immutable moral code, and because they were agreements of men with each other binding them because of a moral duty to keep their promises."

105. In view of above, even if some criterion have been imposed by religion, it shall not affect right of women to enjoy the benefits conferred by the Constitution with regard to their safety, security, dignity and quality of live. Practices or usages shall not confer any right to husbands to divorce Muslim ladies by ex parte decision, oral or other means including letters, against constitutional ethos offending rights guaranteed by Articles 14 and 21 of the Constitution. As held by Hon'ble Apex Court, no Personal Law, or a person or society, collectively or individually may be permitted to de-humanise the system.

XIII. REQUIREMENTS/CONDITIONS FOR WOMEN IN HOLY QURAN AND MUSLIM LAW:

106. A number of restrictions have been imposed on the women to maintain themselves and secure their chastity without mixing with men. Though on onehand, under Muslim Law equality with men has been preached, but on the other hand, discrimination seems to also exist. These

conflicting provisions are used to make out a case far and against women which suites to the society, group or section of people. It shall be appropriate bring on record certain sayings of Holy Quran and Traditions of Muslim women and their social life:

Obtaining Permission

"O you who believe, do not enter houses other than your own houses, until you have obtained permission and greeted their dwellers; this is better for you, that you may remember."(Holy Qur'an, 24:27).

Resemblance

Imam Ali (a.s.) quotes the Messenger of Allah (s.a.w.) as saying:

"Allah curses those men who make themselves resemble women or those women who make themselves resemble men."

Perfuming Outside Home

Imam Husayn (a.s.) quotes the Prophet of Islam as saying:

"Any woman who perfumes herself and leaves her home is cursed by the angels and deprived of the blessings of the Almighty Allah until she returns home."

Evil Looks

Imam Husayn (a.s.) quotes the Messenger of Allah as saying:

"An evil look is one of the poisonous arrows of Iblis (Satan) and how an evil look causes long-suffering regrets."

Avoiding the Forbidden Things

Imam al-Baqir (a.s.) narrates:

"Every eye shall cry on the Day of Resurrection with the exception of three: an eye which passed the nights guarding Muslims (their wealth, land, etc.) for the sake of Allah; an eye which wept for fear of Allah; and an eye which was cast down against the deeds made forbidden by Allah."

Looking at Women

Imam al-Sadiq (a.s.) was asked whether it is lawful for a man to look at the face of a woman whom he wants to marry and also to look at her from behind. He said:

"Yes, there is no objection for a man to look at a woman whom he wants to marry including her face and to look at her from behind."

Saluting Women

Imam Husayn (a.s.) says:

"The Messenger of Allah (s.a.w.) used to salute

women and they used to reply his salutation. While the Commander of the Faithful, Imam Ali (a.s.), also used to salute women, but he disliked to salute the young among the women and said, 'I feared that her voice would admire me and thus affect me so I would commit sin more than get reward.'

Sitting on Roadsides

Abi Saeed al-Khidri narrates that the Messenger of Allah (s.a.w.) said:

"Beware of sitting on roadsides.' Then some of his companions asked him,. 'Oh Messenger of Allah! We cannot stop these meetings on roadsides where we talk about different matters.' The Messenger of Allah (s.a.w.) said, 'If you refuse but to stop having such meetings, then you should give the road its rights.'

"They asked him, 'What are the rights of the road?'

He said, 'To cast down your eyes; to forbear harms to others; to reply to salutation,. to enjoin what is right and to forbid what is wrong.'"

Being Covetous of the Honour of Believers

The Commander of the Faithful (a.s.) said:

"Surely Allah gets angry for the honour of the believing men and the believing women. So a believing man should get angry (for his honour).

Because he who does not get angry (for his honour) is the one whose heart is upside-down."

Guarding Oneself

The Messenger of Allah (s.a.w.) said:

"Guard yourselves from six things and I am your surety for Paradise: when you speak, speak the truth; perform when you promise; discharge your trust,. and guard your private parts (except from your wives); cast down your eyes; with hold your hand from committing aggression or forbidden things."

Respecting a Woman

The Messenger of Allah (s.a.w.), addressing the Muslims on the occasion of the Farewell Pilgrimage, warned them against the values which he feared would be neglected after him, and referred to woman as one of the important issues about whom he said:

"Observe your duty to Allah in respect to the women, and treat them well."

The Blessed Marriage

Anas narrates that the Messenger of Allah (s.a.w.) said:

"Whoever marries a woman for her glory, Allah will not increase his, but will bring him humiliation; whoever marries her for her wealth, Allah will not increase his, but place him in poverty; whoever marries her for ancestral claims, Allah will not

increase his, but in meanness; whoever marries a woman for nothing but to cast down his eyes, guard his private parts, and join a relationship, Allah will bless him through her and vice versa."

The Holy Qur'an says:

"And one of His signs is that He created for you mates from among yourselves that you may dwell in tranquility with them, and He put between you love and compassion; most surely there are signs for a people who reflect."(Holy Qur'an, 30:21).

In another verse, the obedient married women are described:

"...therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard." (Holy Qur'an, 4:34).

Encouragement to Keep Hijab

Islam, with its benevolent view towards women, encourages them to keep *hijab* in this verse of the Holy Qur'an:

"O Prophet! Tell your wives and your daughters and the women of the believers that they should cast their outer garments over them (when abroad); this is more proper, that they should be known (recognized as such) and not molested. And Allah is ever Forgiving, Merciful." (Holy Qur'an, 33:59).

Equality

The Holy Qur'an speaks of the equality of the two sexes in various verses. In one place it says: *"...and women have rights similar to those against them in a just manner,..." (Holy Qur'an, 2:228).*

Elsewhere, the Holy Qur'an says:

"O mankind, surely We have created you from a male and a female, and made you nations and tribes, that you may know each other. Surely the noblest of you with Allah is the most righteous. Surely Allah Knowing, Aware."(Holy Qur'an, 49:13).

About work and doing good deeds, again the Holy Qur'an reveals the beauty of Islam and its equal treatment of workers. This is something the West still has not been able to accomplish! The Holy Qur'an says:

"And whoever does righteous deeds, whether male or female, and he/she is a believer - they will enter the Garden, and not the least injustice will be done to them." (Holy Qur'an, 4:124).

"Whoever does good, whether male or female, and is a believer, We shall certainly make him live a good life, and We shall certainly give them their reward for the best of what they did." (Holy Qur'an, 16:97).

Another verse, Allah, Most High still promises:

"...I will not suffer the work of any worker among you to be lost whether male or female, the one of you being from the other..."(Holy Qur'an, 3:195) .

Praise be to Allah, Lord of the Worlds.

107. In Islam there is absolutely no difference between men and women as far as their relationship to Allah is concerned, as both are promised the same reward for good conduct and the same punishment for evil conduct. The Quran says”

“And for women are rights over men similar to those of men over women.” [Noble Quran 2:228].

The Quran, in addressing the believers, often uses the expression, 'believing men and women' to emphasize the equality of men and women in regard to their respective duties, rights, virtues and merits. It says:

"For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast, for men and women who guard their chastity, and for men and women who engage much in Allah's praise, for them has Allah prepared forgiveness and great reward." [Noble Quran 33:35]

This clearly contradicts the assertion of the Christian Fathers that women do not possess souls and that they will exist as sexless beings in the next life. The Quran says that women have souls in exactly the same way as men and will enter Paradise if they do good:

"Enter into Paradise, you and your wives, with delight." [Noble Quran 43:70]

"Who so does that which is right, and believes, whether male or female, him or her will We quicken to happy life." [Noble Quran 16:97]

The Quran admonishes those men who oppress or ill-treat women:

"O you who believe! You are forbidden to inherit women against their will. Nor should you treat them with harshness, that you may take away part of the dowry you have given them - except when they have become guilty of open lewdness. On the contrary live with them on a footing of kindness and equity. If you take a dislike to them, it may be that you dislike something and Allah will bring about through it a great deal of good." [Noble Quran 4:19]

108. Considering the fact that before the advent of Islam the pagan Arabs used to bury their female children alive, make women dance naked in the vicinity of the Ka'bah during their annual fairs, and treat women as mere chattels

and objects of sexual pleasure possessing no rights or position whatsoever, these teachings of the Noble Quran were revolutionary. Unlike some religions, which regarded women as being possessed of inherent sin and wickedness and men as being possessed of inherent virtue and nobility, Islam regards men and women as being of the same essence created from a single soul. The Quran declares:

"O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, his mate, and from this pair scattered (like seeds) countless men and women. Reverence Allah, through Whom you demand your mutual (rights), and reverence the wombs (that bore you); for Allah ever watches over you." [Noble Quran 4:1]

109. The Prophet of Islam (peace and blessings be upon him) said, "Women are the twin halves of men." The Quran emphasizes the essential unity of men and women in a most beautiful simile:

"They (your wives) are your garment and you are a garment for them." [Noble Quran 2:187]

Just as a garment hides our nakedness, so do husband and wife, by entering into the relationship of marriage, secure each other's chastity. The garment gives comfort to the body; so does the husband find comfort in

his wife's company and she in his. "The garment is the grace, the beauty, the embellishment of the body, so too are wives to their husbands as their husbands are to them." Islam does not consider woman "an instrument of the Devil", but rather the Quran calls her Muhsana - a fortress against Satan because a good woman, by marrying a man, helps him keep to the path of rectitude in his life. It is for this reason that marriage was considered by the Prophet Muhammad (peace and blessings be upon him) as a most virtuous act. He said: "When a man marries, he has completed one half of his religion." He enjoined matrimony on Muslims by saying: "Marriage is part of my way and whoever keeps away from my way is not from me (i.e. is not my follower)." The Quran has given the raison d'être of marriage in the following words:

"And among His signs is this, that He has created for you mates from among yourselves, that you may dwell in tranquility with them; and He has put love and mercy between you. Verily in that are signs for those who reflect." [Noble Quran 30:21]

110. The Shariah regards women as the spiritual and intellectual equals of men. The main distinction it makes between them is in the physical realm based on the equitable principle of fair division of labor. It allots the more

strenuous work to the man and makes him responsible for the maintenance of the family. It allots the work of managing the home and the upbringing and training of children to the woman, work which has the greatest importance in the task of building a healthy and prosperous society.

111. In view of above, prima facie, it appears that Sharia regards women as spiritually and mentally equals of men.

The main distinction it makes between them seems in the physical realm based on equitable division of labour. It allots strenuous work to men and makes them responsible for maintenance of family. It allots the work of managing home to men and the task of building a healthy and prosperous society.

112. Though husbands are 'a degree above their wives', but a harmonious construction shows that women are not less in the matter of dignity and respect than men. Needless to say that there are some indications, which according to modern world, may be treated as discriminatory. A man may practice polygamy with four wives, but not the women. However, Prophet will not allow polygamy for his son-in-law Ali for the reason that it would hurt Fatima and her mother; supposed to be part of the body of Great Prophet. Apart from the above Islam speaks

and praises for chastity by women. In any case it is not permissible for women to develop illicit relationship and lose chastity before marriage. It is always expected that women shall lower their gaze and guard their modesty for greater purity. It is also said in Islam that whenever anything is brought to home by father or else, it shall be distributed beginning with girls first because girls love their parents more than boys. With regard to marriage and restriction of four wives Holy Quran restricts the number of wives to four and also orders complete equality and justice between them.

“And if you fear that you will not deal fairly towards the orphans, marry of the women who seem good to you, two or three or four, and if you fear that you cannot do justice between them, then (marry) only one”. (IV:3)

113. As a mother, the status of women has been raised by Islam to such an extent that nothing higher is conceivable. The Holy Quran says,

“Your Lord has commanded that you shall worship none but Him and goodness to your parents. If either or both of them reach old age in your life, say not to them a word of contempt, nor repel them, but address them in terms of honour, And make yourself submissively gentle to them with compassion and say: O my Lord bestow on them compassion even as

they cherished me in my childhood". (Chapter 17 Vers 23 & 24)

114. With regard to use of Hizab, it is said, to quote:

"And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and their ornaments except what (must ordinarily) appear thereof, that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or those whom their right hands possess, or the male servants not having need (of women), or small children who have not attained knowledge of what is hidden of women; and let them not strike their feet in order to draw attention to their hidden embellishment...". (Chaper 24 Ver 30).

115. In view of above, there appears no room of doubt that though women are supposed to maintain particular status in their life following certain conditions, but they are equal in status, dignity and quality of life.

XIV. DIVORCE, STATUTORY PROVISIONS AND DISCUSSION:

116. Ex parte divorce, oral or by letter, telegram or any other form, seems to not permissible in Personal Law of Muslims if we read with equitable and harmonious

construction. The great Holy book which deal with maintaining human conduct should not be read in piecemeal, but should be read from A to Z and thereafter to interpret the words on the basis of inference drawn. Treating equality granted to women by Holy Quran, reasonably an inference may be drawn that ex parte triple talaq seems to be not permissible.

117. A lady who has married for the first time with a man loses her chastity, which has been given prime importance in Islam but also further lose her bodily and physical attraction depending on tenure of marriage and age. In case there are children, then children also lose fatherly or motherly treatment and affection as well as shelter provided to them in the form of parents by the God Almighty. Accordingly there appears no reason to presume that triple talaq may be granted ex parte in the absence of wife or without consent of wife. In case there is disagreement between the spouse, then they may approach the court in the form of divorce suit to settle the controversy. A man who has enjoyed the chastity and modesty and inclusiveness of the life of the lady may not throw his wife with the stroke of pen or by oral declaration or alike

measures. Such action shall be against constitutional ethos (supra) and not permissible.

118. As pointed out (supra), Nikah is based on offer and acceptance. On the other hand, applicant claims talaq merely by ex parte declaration even by postal notice or notice by lawyer or alike methods through ex parte actions. We fail to understand whether intention of Quranic ethos is to permit husband to divorce wife by ex parte actions (supra)? The magnitude of rights of men and women, with emphasis on equality, in any case does not permit the Muslims to enter into talaq by notice or by telephonic communication or in angriness or with intention to remarry another lady. In case contention of the applicant is accepted, then it shall go against the basic concepts and tenets of a great religion like Islam. In our view, talaq, oral or by communication through telephonic communication or by notice or any ex parte proceedings, is un-Islamic and against the Holy Quran. Rightly, in many Islamic countries such talaq has been banned by legislation. However, in the present case, under thrust of Articles 14 and 21 of the Constitution of India read with Holy Quran, in its totality, makes such talaq void ab initio.

119. Once marriage is based on 'offer and acceptance' then unless the declaration of talaq by husband is accepted by the wife, that too in the presence of each other, shall not be deemed to be execution of divorce or talaq. In case the wife disagrees with the declaration of talaq by husband, the only way out is to approach Civil Court for dissolution of marriage or talaq and a declaration accordingly. So far as maintenance is concerned, in view of Hon'ble Apex Court judgments, the provisions contained in the Army Act, 1954 and Rules framed there under or Army Orders issued there under shall override the Personal Law to the extent of payment of maintenance allowance. The wife shall be entitled to for payment of maintenance from the husband till marriage is dissolved by mutual consent or by decree of divorce from the competent court. However, in case the woman has no source of livelihood and not remarried, then she and her children, as the case may be, both may claim maintenance form the husband/father till remarriage of divorced lady taken place, subject to decency and dignity of life.

120. Section 96 of the Army Act empowers Army authorities to deduct from the pension of salary of armed forces personnel for maintenance. Army Order dated

17.10.2003 deals with the maintenance allowance to wife and children under the Army Act. For convenience sake it may be reproduced as under :-

“No 79333/AG/DV-1(P) *Additional Directorate General
Discipline and Vigilance
Adjutant General’s Branch
Army Headquarters
New Delhi-110011*

No. 79333/AG/DV-1 (P) 17 Oct 2003

GRANT OF MAINTENANCE ALLOWANCE TO WIFE AND CHILDREN UNDER ARMY ACT

1. *Reference Army Headquarters letters of even No dated 06 Jan 03 and 04 Feb 03 and your replies thereto.*

2. *Based on the comments of commands the matter requesting inclusion/exclusion of certain allowances admissible to service personnel have been examined in consultation with other two services and JAG Deptt. at this HQ.*

3. *Allowance like Submarine Allowance, Flying Allowance, Special Force Allowance, Para Jump Instructor Allowance, HAFA/FAA/MFAAA/SCCIA, etc. are risk related and affected by placement and nature of duties of the personnel concerned, are not to be included for the purpose of calculation of maintenance allowance.*

4. *Henceforth the pay and allowances for the purpose of calculation of maintenance allowance will include the following:*

- (a) Basic Pay (including stagnation, increment, rank pay, classification allowances).*
- (b) Rank Pay.*
- (c) Dearness Allowance.*

(d) *Tech. Allowance.*

5. *For the purpose of conversion of pre-1996 maintenance allowance cases from fixed amount to percentage basis, a request from the beneficiary is not necessary. However a fresh Show Cause Notice be given to the officer/PBOR concerned and cases be considered based on the reply given.*

6. *The above instructions will be effective from 01.01.2004 onwards.*

*Sd/- x x x x x
(Anil Malhotra)
Brig
DDG (B) D&V
For Adjutant General"*

121. The aforesaid provision in consonance of Section 96 of the Army Act has got mandatory force. The entitlement of lady shall continue unless there is lawful separation in the form of divorce with due compliance of principles of natural justice and the four primitive steps (supra). Even after separation, unless marriage takes place, the lady may claim maintenance apart from Mehar and in case she is unable to maintain herself, till she marries again. However, in case there is dispute with regard to divorce, then for the Army authorities it shall be necessary that the incumbent produces decree of divorce from the competent court. It is open for the Army authorities not to consider triple talaq done ex parte, or in case same is disputed by the lady. Keeping in view the different facets of Article 21 of the

Constitution, the lady cannot be thrown into dustbin or on the street like consumer good by the husband. He has to take care of her in case she has got no source of livelihood or shelter. This right conferred upon her by Article 21 of the Constitution cannot be taken away either by Personal Law or by statutory provision which is a constitutionally protected right, and shall override every action taken under Articles 25 and 26 of the Constitution of India. In none of the judgments referred, or attention has been drawn to any such judgment, where Hon'ble Apex Court or High Courts have looked into the right of a lady with this angle. Constitution is mother of all laws and in view of Article 13 of the Constitution; any law enacted or practice under Personal Law continuing in contravention to Part III of the Constitution shall not survive and may be simply ignored.

122. Under the Muslim Law, marriage is a contract and contract cannot be rescinded unilaterally unless provided in the agreement. Attention has not been invited to any provision in the *Nikahnama* which may entitle the husband to rescind contract, orally or by ex parte decisions.

123. There is one more reason why Muslim women require such protection. Under the strict interpretation, after Iddat period of three months, payment of Mehar is irrevocable

and in case the husband wants to remarry her, the lady has to marry with some other person, obtain divorce, spend Iddat period, and then remarry former husband. Though purpose of it seems to make divorce tough for Muslim men, but it seems to adversely affect the life of Muslim ladies. In the modern world, even if a Muslim lady remarries, she shall be protected by constitutional provisions and penal law of the country and in case she is mal-treated or humiliated in whatsoever manner under Personal Law.

124. Iddah, the period after menstruation is a natural process and there is no fault of the ladies hence it cannot be treated as a ground to discard them or hold them with impunity. No doubt certain precautions are taken but that is to ensure that the lady does not suffer from infection. But in any case it cannot be treated as impurity of body, mind or soul. Ultimately the body goes to dust and soul remains pure and moves on. Accordingly in any case the statutory or constitutional provision or mandate may not be overridden by Personal Law for grant of maintenance. Order dated 17.10.2003 deals with grant of maintenance to the wife, whether Hindu or Muslim and cannot be treated differently on the ground of Personal Law.

125. It is duty of the Courts to protect fundamental rights conferred to a lady or a man, individually or collectively. It

is duty of the Government and then the Courts to ensure that in the garb of Personal Law, a person is not persecuted, mal-treated, humiliated or subjected to some cruelty. This inference with regard to protection of Constitutional right may be also drawn from the case of ***Bijoe Emmanuel vs. State of Kerala*** (1986) 3 SCC 615, p. 626. For convenience sake relevant portion from said case is reproduced as under :-

“19. We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (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. Thus while on the one hand, Article 25 (1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by

Article 25 (1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practise or to provide for social welfare and reform. It is the duty and function of the court to do”.

126. Attention has been drawn to The Muslim Women Protection Act, 2006 stating that after divorce a Muslim woman and children, if any, are entitled to maintenance. This question has been considered by the Hon’ble Apex Court in the case of **Noor Saba Khatun vs. Mohd. Quasim**, 1997 SC 3280. After considering the aforesaid act their Lordships held as under:

“4. Does Section 3(1)(b) of the 1986 Act in any way affect the rights of the minor children of divorced Muslim parents to the grant of maintenance under Section 125, Cr.P.C., is thus the moot question”

“5. The preamble to the Act 1986 Act reads:

“An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and to provide for

matters connected therewith or incidental thereto”

“6. The Act, thus, aims to protect the rights of Muslim Women who have been divorced. The 1986 Act was enacted as a sequel to the judgment in Mohd Ahmed Khan vs. Shah Bano Begum, AIR 1985 SC 945. The question of maintenance of children was not involved in the controversy arising out of the judgment in the case of Shah Bano Begum (supra). The Act was not enacted to regulate the obligations of a Muslim father to maintain his minor children unable to maintain themselves which continued to be governed with Section 125, Cr. P.C. This position clearly emerges from a perusal of the relevant provisions of the 1986 Act.”

“10. Thus, both under the Personal Law and the statutory law (see 125 Cr.P.C.) the obligation of a Muslim father having sufficient means to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife”.

XV. PENAL OFFENCES:

127. It shall be appropriate to look into the Penal Offences which may be attracted like conditions of compelling to re-marry another person, then after Iddat, marry again the

earlier husband to whom she has divorced. The provisions contained in Sections 354, 354-A, 354-B, 376-A, 376-B, 376-C and 376-E are relevant, which are reproduced as under:

“Section 354. Assault or criminal force to woman with intent to outrage her modesty.-- *Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine”.*

* * * * *

“Section 354 A. Sexual harassment and punishment for sexual harassment.-- *A man committing any of the following acts—*

- (i) physical contact and advances involving unwelcome and explicit sexual overtures;*
or
- (ii) a demand or request for sexual favours;*
or
- (iii) showing pornography against the will of a woman; or*
- (iv) making sexually coloured remarks,*

shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offences specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with

rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offences specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”

* * * * *

“Section 354B.-- Assault or use of criminal force to woman with intent to disrobe. ---Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.”

* * * * *

“Section 376-A. Punishment for causing death or resulting in persistent vegetative state of victim.—Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of Section 376 and in the course of such commission inflicts an injury which causes the death of a woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall

mean imprisonment for the remainder of that person's natural life, or with death".

* * * * *

“Section 376-B. Sexual intercourse by husband upon his wife during separation.--
Whoever has sexual intercourse with his wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of Section 375”.

* * * * *

“Section 376-C. Sexual intercourse by a person in authority- Whoever, being—

1. *in a position of authority or in a fiduciary relationship; or*
2. *a public servant; or*
3. *superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or*
4. *on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the*

premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.-- *In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.*

Explanation 2. -- *For the purposes of this section, Explanation 1 to section 375 shall also be applicable.*

Explanation 3. -- *“Superintendent”, in relation to a jail, remand home or other place of custody or a women’s or children’s institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.*

Explanation 4. -- *The expressions “hospital” and “women’s or children’s institution” shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.”*

* * * * *

“Section 376--E. Punishment for repeat offenders. *Whoever has been previously convicted of an offence punishable under section 376 or section 376-A or section 376-D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life*

which shall mean imprisonment for the remainder of that person's natural life, or with death.

128. The aforesaid provisions may be attracted in circumstances in case the arguments advanced by Ld. Counsel for the applicant and pleadings on record is strictly complied with regard to talaq and remarriage. However, we are not recording any conclusive finding. Apart from above, The Protection of Women from Domestic Violence Act, 2005 deals with certain circumstances where a woman is caused harm or injury or endangers the safety of life or limb. Section 3 of the Act, 2005 provides that by any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it:

1. harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
2. harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
3. has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
4. otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

129. The Army Act, 1954 is a Special Act regulating appointment and service condition of Army personnel. This Special Act substitutes General Law, i.e. Criminal Procedure Code. Accordingly, decision taken by Army authorities to grant maintenance is in conformity with Section 96 of the Act read with Army Orders, Circulars and Regulations and seems to be perfectly covered and within jurisdiction and has got the same force of law as Section 125, Cr.P.C.

130. Accordingly, we feel that respondent No. 6 is entitled for payment of maintenance from the applicant and Personal Law does not come in the way to implement and enforce provisions contained in the Army Act, 1954 and order issued thereon as well as fundamental right guaranteed under Part III of the Constitution.

131. Plight of women was also taken note by the Constitutional Bench of Hon'ble Apex Court in the case of ***Mohd Ahmed Khan vs. Shah Bano Begum & ors***, AIR 1985 SC 945, to quote:

“Before we conclude, we would like to draw attention to the Report of the Commission Marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer

of the Commission to Question No. 5 (page 1215 of the Report) is that:

“a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children”

The Report concludes thus:

“In the words of Allama Iqbal, “the question which is likely to confront Muslim countries in the near future, is whether the Law of Islam is capable of evolution – a question which will require great intellectual effort, and is sure to be answered in affirmative”.

132. Observations of Hon’ble Apex Court with regard to women, particularly a Muslim lady, seems to also flow from the couplets of Zehra Nigah from “Celebrating the Best of Urdu Poetry” selected and translated by Khushwant Singh, page 188..189. It shall be appropriate to reproduce it in Hindi as well as its English translation:

“१॥āā½ā ½āñÀā Öō ØāiÊā °āā°íāāÖ
 „½āÆ ½āñÀāè Öō |āñÀÖ °āÀÖā
 ,āāōÀ †āŠÖā¶āāè ½āñÀāè „½āÆ †āŠāè |āÀÖ Öāñ
 ½āiā|āíāÀ ½āiā|āíāÀ ½āÆ|āÖāÀ ½āiÆ|āÖāÀ
 ½āñÀāè °āñ¶āā½ā °āñ ÞāñÖā ½āāā
 °āñ-āíāā ½āÀ Øā¾āāè
 °āā¹ā ¶āñ „Öā†āŠāñ °āi†āóŠ ½āò °¹āŠ¶āā āā¾āā

„Ôã†ãŠãñ ĵÀ ©ãã äã†ãŠ ½ãìĴãŠÀ Ĵã†ãŠãèÀ
„Ôã†ãŠã ĤãñÔÀã Ĵã ãñŒÈò

ìãõÔãñ äã•ãĴã ©ããè •ã°ã ¼ããè ìããñ ½ã¹ãìŠĴã
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„½ãÆ °ã§ããèÔã °ãÀÔã

ìããñ ½ãì•ããããÔã ìãÔã¹ã †ãŠã ĵãããÈã°ã

ÀãÔñ Ô†ãŠ †ãŠã ½ãìÔãããã¹ãŠÀ Ôìãã

ããõÀ •ãã½ã-†-ìãÔã¹ã ¼ããè „ÔãĴãñ”

*“Gul Badshah is my name
I am thirteen years of age
My story like my age, you’ll see
Is in bits and pieces and as hort as it can be;
My mother had no face nor name that it could say
Nor money to buy medicines,
Óne day she simply faded away.
My father buried her in burqa in case
The Angles of Death ogle at her face—
Anyway, even when alive she was like one dead
One could say,

My father’s name was Zartaj Gul
He was thirty-two
He had just one ambition to fulfil
He was a holy warrior and wanted to die a martyr
So he took the path of righteousness”*

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„Ôã±ãŠãè °ããÖãò ½ãò ÔîÀ-ããñ-±ãŠÔãîÀ ”

“He got the love for martyrdom from the hands of my uncle

My uncle, for what it is worth, was a holy warrior up north

And prayed five times a day

Since martyrdom is a complex question

It is wiser to put it away for another day

However, my father is now in paradise:

In his hand he holds a goblet of sparkling wine

In his arms a beauty and a pretty boy.”

133. When ladies are going to Moon and Mars, travelling the space, it is unfortunate that a big section of women are humiliated in the garb of Muslim Law against the constitutional ethos.

XVI. FINDINGS:

134. In view of above, we conclude our findings as under:

- (i) Constitution is the mother of all law and has overriding effect over Personal Law as well as other provisions, practices or usage which offend the constitutional right of persons, collectively or individually.
- (ii) Nikah (supra) is based on offer and acceptance between man and woman. Unless both agree, there cannot be Nikah. On the same analogy, declaration of talaq or divorce by the husband

must be done in the presence of the woman, i.e. the wife, and only in case both agree, talaq would be executed. In the event of disagreement, the option left is to file a Regular Suit for divorce wherein the Court may look into the grounds of both the parties and may accept or refuse the grant of talaq keeping in view the factual matrix on record.

- (iii) The sweep of Articles 14 and 21 of the Constitution covering rationality and fairness along with dignity and quality of life shall override the right conferred by Articles 25 and 26 of the Constitution. No lady can be compelled to marry again in case she wants to marry her husband again after talaq as a condition to marry another person before remarriage with earlier husband is humiliating and against the dignity of a lady protected by Article 21 of the Constitution and constitute offence (supra)
- (iv) Under the Muslim Law, marriage is a contract and contract cannot be rescinded unilaterally Personal Law or Constitution of India does not entitle the husband to rescind contract, orally, by notice or by ex parte decisions, hence seems to be

unsustainable, otherwise also it shall be bad in law.

- (v) In appropriate case, a person may be charged under the Penal Code (supra) for abusing his position as husband whether it is for the purpose of divorce or remarriage.
- (vi) Under the garb of Personal Law, individual or collective rights of the citizens protected by Part III (Articles 14 and 21) of the Constitution of India may not be infringed
- (vii) It is duty of the Government as well as the Court to protect fundamental rights of the citizens which includes compliance of principles of natural justice affecting civil rights, quality, dignity and other facets of life necessary for human living.
- (viii) Fundamental rights (Articles 14, 15, 16, 21 and 22) have got overriding effect over Articles 25 and 26 and Personal Law; either it is Hindu or Muslim or any religion. No person can be persecuted, tortured, humiliated or dishonoured in the garb of Personal Law. Nothing can be done which may affect dignity and quality of life of man or woman under the garb of Personal Law.

- (ix) In none of the cases on behalf of the applicant or by the parties this point has been considered that Personal Law, usage or custom in case detrimental to fundamental rights or statutory mandate guaranteed by Part III of the Constitution may not be lawful. It is un-Islamic, inhuman and unconstitutional.
- (x) Declaration of oral triple talaq by ex parte proceedings, action or otherwise may not be given force by Government machinery or the courts while dealing with the subject matter being contrary to constitutional ethos, particularly Part III of the Constitution.
- (xi) Order passed by the Army authorities for grant of maintenance to respondent No 6 in pursuance to power conferred by Section 96 of the Army Act, 1954 read with Army Orders is perfectly within jurisdiction and calls for no interference.
- (xii) Women of every religion of the country are protected by Constitution of India and no person has right to go against constitutional spirit in the shadow of Personal Law. The method and manner of worship of God Almighty or the Prophet is the pith and substance of every religion. It may

not be interfered by the courts subject to conditions flowing from Articles 25 and 26 of the Constitution. But so far as custom, tradition or usage is concerned, it may be interfered in case it is violative of fundamental rights guaranteed by Part III (Articles 14 and 21) of the Constitution.

135. While parting with the case we would like to add that every lady becomes daughter, girl, wife, mother and grandmother at different stages of life. We all are born from a woman whom we call mother. How a mother can be given different treatment in her early age or during matrimonial life, is not understandable. It only amounts to gender discrimination, which is against the very theme of Indian Constitution, which is the uniting bond of country, securing individual and collective rights of the citizens.

136. Both husband and wife are complimentary to each other. No one is inferior or superior to the other. Ofcourse depending on the knowledge, intellect and experience, one of the two may have more say while dealing with family status. One fateful day they depart each other and in case the lady, the house wife, has no earning source, then the husband has got no right to throw her on the street without any food, clothes and shelter. Unless she gets married or

has got other source of livelihood, the husband has to bear the responsibility because it is he who offended the chastity for sexual pleasure or carry on his progeny. In due course of time the body becomes fragile and suffers from so many maladies and problems. Before laying our hands we would like to quote the couplet of an anonymous poet, as under :-

“Gazing at her, my heart melts and mind wanders:
 What kind of world awaits her, it ponders.
 As a female growing up in the 21st century,
 Will her life be full of misery or tranquillity?
 Reality, however, refuses to allow any reflection,
 And crudely points towards the actual situation.

Countless number are shunned into silence,
 Through rape, torture and domestic violence.
 She’s a victim of an acid attack or honour killing.
 She’s caught up in the barbarity of female trafficking.
 Illiteracy, dis-empowerment and insecurity
 Is for millions a heart-rending reality.

If only women were so fortunate-we’re told,
 To be living in the democratic fold.
 For isn’t that where they have ‘freedom’ and ‘rights’
 To live purposeful lives and reach new heights?
 A place where public participation’s accessible to all?
 Where there are set of rights protecting all?

Alas, behind this smokescreen created by the media,
 And those obsessed by the democratic idea,
 Lies a life-style full of confusion,
 Where women’s rights are a mere illusion.

It is in this free, developed world that we find,

A list that is dismal and one of a kind:
 Of the top ten countries with the highest rape crime,
 The first eight are 'working' democracies of our time.
 The rise in domestic violence is here a certainty.
 Take as an example, the land of opportunity,
 Where one in four will suffer in her lifetime.
 For being a woman, as if this was a crime.

There lies, too, an inconceivable hypocrisy,
 In the guise of gender equality.
 Women, who work and toil as much as men,
 Come pay day, earn less than men.
 Moreover, a woman's work is yet to finish,
 For she has a home to look after and children to cherish.
 In such a society, maternity leave is frowned upon.
 Being mothers and carers is looked down upon.

Living a narrative with a slightly different text,
 Are women of today, whether in the East or the West.
 Their cry for emancipation is for all to hear.

Their desperate plea is all so clear.
 Wanting change simply through democracy,
 And wanting improvement through gender equality,
 Is nothing but a product of an unconscious mind,
 For it will be the case of the blind leading the blind"

Vivekanand said, "where can we go to find God if we cannot see him in our own hearts and in every living being" that too in our own associates (*emphasis supplied*). Let women of all ages, in distress, "**Arise, Awake and Stop not until the goal is reached**"

Let justice be done to every woman of all ages and every religion, though Heaven may fall down.

ORDER

137. Subject to above, the O. A. does not seem to have merit and does not call for any interference. Respondent No 6 is entitled for payment of maintenance. We decide the O. A. as under :-

- (a) Relief claimed by applicant lacks merit, hence we decline to grant any relief to the applicant and is rejected.
- (b) Respondent No 6 is entitled for maintenance in terms of order passed by the Army alongwith arrears of maintenance, in case already not paid.
- (c) The arrears of maintenance shall be paid to respondents No 6 within three months from the date of production of certified copy of the present order and shall continue to be paid the same till the Army Order survives. Army to enforce the order in appropriate manner.

O. A. is **decided** accordingly.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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(Justice D.P. Singh)
Member (J)