

**CONSTITUTIONAL SENTIMENTS AND JUDICIARY – A STUDY ON  
FREEDOM OF RELIGION IN INDIA WITH SPECIAL REFERENCE TO  
TRIPLE TALAQ (TALAQ-E-BIDDAT) RULING.**

**Amit Raj Agrawal \***

**Abstract**

In India there are many practices associated with religion, which are superstitious in nature, though the apex court by inventing doctrine of essential religious practices placed those practices outside the scope of part III of the Constitution of India, but nonetheless the scholars have always questioned the basis and propriety of the Court and accused the Court of having interfered with the matter of religion. Recently, the five judges’ Constitution Bench with majority dictum in *Sharya Bano* case held the practice of instant triple talaq (*Talaq-e- Biddat*) is invalid. The majority stand happens to be in direct conflict with the minority opinion authored by Khehar , C.J., where he observed triple talaq (*Talaq-e-Biddat*) to be the part of one’s religious faith and thus beyond the scope of judicial scrutiny. Though the majority have succeeded in securing constitutional values to a greater extent, but still a question relating to inclusion of personal law within the scope of judicial review has not been answered authoritatively. Undoubtedly, the constitutional mandate enshrined under article 25(2)(b) and the legitimate judicial authority empowered government and the judiciary to bring significant reforms in the matters concerning atrocious application of personal law, but significant work is yet to be done. Through, this paper author attempts to presents the constitutional position on freedom of religion in India with critical analysis of ruling of the apex court in triple talaq (*Talaq-e-Biddat*) matter.

- I. Introduction .....**
- II. Constitutional Mandate over freedom of Religion.....**
- III. Personal Law and the Judicial Acumen.....**
- IV. Supreme Court of India on practice of *Talaq-e-Biddat*.....**
- V. Summary of discussion.....**

---

\* LL.M. (Distinction) Gold Medalist, UGC-JRF, Assistant Professor, Delhi Metropolitan Education. Noida.

## I. Introduction

CONSTITUTION OF INDIA provides for freedom of religion to all persons<sup>1</sup>, the effect of it has been rightly observed by Donald Eugene Smith as he writes:<sup>2</sup>

Freedom of religion means that the individual is free to consider and to discuss with others the relative claims of differing religions, and to come to his decision without any interference from the state. He is free to reject them all. If he decides to embrace one religion, he has freedom to follow its teachings, participate in its worship and other activities, propagate its doctrines, and hold office in its organisations. If the individual later decides to renounce his religion or to embrace another, he is at liberty to do so.

Smith in unequivocal terms emphasises upon the magnitude of religious freedom guaranteed by the Constitution of India. However, it is important to note that unlike other articles of the Part III of the Constitution, articles 25 and 26 of the Constitution of India starts with limitation first and then articulates the rights. Perhaps the reasons may be - A citizen of India is a citizen of India first and a Hindu, Muslim, Christian, Sikh, Parsi, Jain or Buddha thereafter. Further, P.K Tripathi<sup>3</sup> writes that the scheme of precedence adopted by the articles only indicate unmistakably the salutary principle of our constitutional philosophy in this regard, namely, the principle of giving primacy to the individual, placing him before and above religion, and recognizing freedom of religion only as incidental to his well being and liberty.

---

<sup>1</sup> The Constitution of India, art. 25 reads as - (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, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—  
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;  
(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

<sup>2</sup> Donald Eugene Smith, *India as a Secular State* 4 (Oxford University Press, Bombay, 1<sup>st</sup> edn., 1963).

<sup>3</sup> Dr.V. M Bachal, *Freedom of Religion and Indian judiciary* (Sangam Press Ltd, Allahabad, 1<sup>st</sup> edn., 1975).

Under the constitutional scheme, in between citizen and religion, for state citizen matter and religion comes thereafter. State is primarily concerned with the well being of its citizens; therefore, subjecting the freedom of religion to some well identified limitation is the manifestation of the constitutional commitment of the state. Judiciary, as an important limb of the state and having entrusted with the duty of protecting the rights of the citizens<sup>4</sup>, from time to time has involved in rigours interpretations of the constitutional provisions of freedom of religion enshrined under part III of the Constitution.<sup>5</sup> On this one of the renowned scholars of constitutional law of this country has identified the constitutional duty of higher judiciary.<sup>6</sup> However, judicial approach over religious freedom attracts severe criticism from the scholars.<sup>7</sup>

The Constitution looked to the future with a commitment to social reform and change.<sup>8</sup> Therefore, the judicial role becomes vocal and important. Nonetheless, the fundamental question always remains unanswered as to permissible limit of judicial hands in bringing social reform and change. Touching upon this aspect, Kerala high court has made a pertinent observation:<sup>9</sup>

Courts interpret law and evolve justice on such interpretation of law. It is in the domain of the legislature to make law. Justice has become elusive for

---

<sup>4</sup>In discharging the duties assigned to it, this court has to play the role of a ‘sentinel on the qui vive, *State of Madras v. V.G Row*, AIR 1952 SC 196.

<sup>5</sup>Ofrif Liviatan, “Judicial Activism and Religion– Based tension in India and Isarael” 26 *AJICL* 589(2009). - Faced with the dual challenge of harmonizing constitutional protections to religious freedom with the quest of effectuating gradual social change, the Indian Supreme Court has walked a thin line, acknowledging that it is often searching for the “common sense view . . . [to] be actuated by considerations of practical necessity.”, the Court did not shy away from innovative judicial constructions that often produced controversial and conflicting legal results, generating ample applause along with harsh criticism.

<sup>6</sup> H.M Seervai, *Constitutional Law of India* (N.M Tripathi Pvt. Ltd, Bombay, 4<sup>th</sup>edn., 1993). blatant violation of religious freedom by the arbitrary action of religious heads has to be dealt with firmly by our highest Court. This duty has resolutely discharged by our high courts and the Privy Council before our Constitution. No greater service can be done to our country than by the Supreme Court and the High Courts discharging that duty resolutely, disregarding popular clamour and disregarding personal predilections.

<sup>7</sup>B.N Kirpal, Ashok H Desai, *et.al.* (eds.), *Supreme But Not Infallible Essays in Honour of the Supreme Court of India* 263 (Oxford University Press, New Delhi, 2000). The Supreme Court needs to review its jurisprudence on religious freedom. The Court must take religion as it finds them, even if the claims made are unusual. Obvious cases of fraud can be easily detected. It does not lie with the judiciary to tell people what constitutes the faith, or whether they are Hindus or which particular tenet or practice is an ‘essential practices’ exclusively entitled to constitutional protection. The ‘essential practices’ test was originally designed to enhance those aspects of faith which called for rigorous scrutiny and not to deprive non-essential practices of constitutional protection altogether. If any particular practice is found to be invidious, it can always be restrained by way of the extensive range of permissible restrictions rather than be controversially rejected by judges playing high priests of each and every faith. See also J.Duncan M. Derret, *Religion Law and the State in India* 447(Oxford University Press , New Delhi, 1<sup>st</sup> edn.,1999).

<sup>8</sup>*Ibid.*

<sup>9</sup>2017 (1) KLT 300.

Muslim women in India not because of the religion they profess, but on account of lack of legal formalism resulting in immunity from law.

Observations of the court raise a very important discussion upon the subject, does legislative vacuum on the subject permits the court to shirk its responsibility by remaining mute spectator of the malady suffered by Muslim women in the name of religion? And further when the matter happens to be one which involves the alleged violation of fundamental right, how far it is justified to seek legislative action when judicial remedy in itself is the fundamental right.<sup>10</sup>

Convincingly, majority in *Shayara Bano v. Union of India*<sup>11</sup> by 3:2 expressly held that triple – talaq. i.e. *talaq-e- biddat* is invalid relying upon the decision of this court in *Shamim Ara v. State of UP*<sup>12</sup> and earlier decisions of Guwahati high court.<sup>13</sup> However, it is important to note the none of the decisions mentioned above have expressly rendered triple-talaq, i.e. *talaq-e- biddat* invalid, rather the decisions provided for certain guidelines pertaining the exercise of right of divorce by Muslim men in accordance with Islamic injunction. On the other hand, the minority opinion authored by Chief Justice is also important to note as he observed that, *talaq-e-biddat*, though bad in theology, is good in law, is a matter of personal law of Sunni Muslim belonging to Hanafi School and therefore the same is given the protection of article 25 of the Constitution of India. He further advocated for appropriate legislative measures. Certainly, majority and minority opinions of the court present a peculiar notion of Islamic jurisprudence on the issue of personal law of the Muslim community.

Aforesaid Constitution Bench decision of the apex court on the subject is of immense relevance on account of the fact that other issues touching upon the personal laws of the Muslim

---

<sup>10</sup>*Supra* note 4. Also see, *Obergefell v. Hodges*, 135 S. Ct. 2584 at 2605 - “The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. “*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”

<sup>11</sup> 2017 (9) SCALE 178 : Writ Petition (C) No 118 of 2016 ( Decided on August 22, 2017).

<sup>12</sup> (2002) 7 SCC 518.

<sup>13</sup>*Rukia Khatton v. Abdul Khaliq Laskar*, (1981) 1 Gau LR 375, Also see, *Jiauddin Ahmend v. Anwara Begum*, (1981) 1 Gau LR 358.

community is pending before the apex court.<sup>14</sup> Therefore, the present study is undertaken to examine the scope of freedom of religion enshrined under the constitution of India and the critical examination of the ratio of the higher court on the subject.

## II. Constitutional Mandate over Freedom of Religion

During the Constituent Assembly Debates, Dr. B.R Ambedkar, the Chairperson of drafting Committee on the proposal of saving of the personal law within the ambit of religious freedom remarked:<sup>15</sup>

The religious conception in this country is so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill..... There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion...*I personally do not understand why religion should be given this vast expensive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon the field. (Emphasis added)*

An observation of Dr. Ambedkar clearly shows that he was not in favour of extending the scope of religion as to include personal law within its ambit.

It has been observed that, during initial days of the Indian Constitution, the Bombay High Court was not in favour of broadening the scope of religion and accordingly, the scope of

---

<sup>14</sup>After Triple Talaq, Petition in SC For Declaring Polygamy, Nikah-Halala Unconstitutional, *available at:* <http://www.livelaw.in/triple-talaq-petition-sc-declaring-polygamy-nikah-halala-unconstitutional/> (last visited on May 28, 2018). Also see, Delhi Woman Moves SC For Criminalising Polygamy, Nikah-Halala, *available at:* <http://www.livelaw.in/delhi-woman-moves-sc-criminalising-polygamy-nikah-halala-read-petition/> (last visited on May 28, 2018).

<sup>15</sup> *Constituent Assembly Debates*, Vol VII, at 781.

religion was given narrow interpretation.<sup>16</sup> However, the apex court didn't accept this narrow interpretation of religion suggested by Bombay high court and broadened the scope of religion in *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thritha Swamiar of Sri Shirur Mutt*<sup>17</sup> as under:<sup>17A</sup>

Religion is a matter of faith with individual or communities and it is not necessary theistic. There are well known religions in India like Buddhism or Jainism which does not believe in God or in any intelligent first cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but a doctrine of belief. *A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion, and these forms and observances might extend even to matters of food and dress. (emphasis added)*

In the above mentioned case, the Court has further bifurcated the religion into essential and non essential practices and accorded the protection of article 25(1) only to essential religious practices. On this, Smith in his work rightly pointed out while commenting on the apex court's ruling- "what constitutes the essential part of religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offering of food should be given to idol at particular hours of the day , that periodical ceremonies should be performed in a certain way at a certain periods of the year or that there should be daily recital of sacred texts or oblation to the sacred fire, all these would be regarded as parts of religion and mere fact that they involve expenditure of money, or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character.", the court in a way has broadened the scope of religion to include more in its ambit.

---

<sup>16</sup> *Ratilal v. State of Bombay*, AIR 1953 Bombay 242. The Bombay high court confined the scope of religion only to ethical and moral percepts and didn't even include the ritual and ceremonies as referred to by Dr. Ambedkar. Therefore, whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men that alone can constitute religion as understood in the Constitution. See Also, *supra* note 2 at 105, 106.

<sup>17</sup> AIR 1954 SC 282.

<sup>17A</sup> *Ibid* at 290.

The effect of the *ratio decidendi* was that the court in a number of cases has analysed the scope of religion as to construe whether the same be given the fundamental protection under the Constitution or not? In *Mohd. Hanif Quareshi v. State of Bihar*,<sup>18</sup> the apex court held that sacrifice of cow could not be considered to be an obligatory overt act for a Muslims to exhibit his religious beliefs and accordingly construed the subject of cow slaughter not an essential religious practice as to qualify for fundamental constitutional protection. Interestingly, the court in order to arrive the decision has given its own interpretation of Quran, Hamilton's translation of Hedaya and the testimony of a Hindu Pandit in the absence of an 'affidavit' by a [Muslim] Maulana explaining the implications of these verses. This is certainly a matter of concern as it has been rightly pointed out by *senior advocates*, Rajeev Dhawan and Fali S Nariman that "this is an undesirably unsafe way of examining and pronouncing on faith. Judges become theologians and are forced to make roving inquiries about all or any religious texts, beliefs or practices. Once the door is opened, there is no limit to which the Court cannot go."<sup>19</sup>

Interestingly, on the issue of faith, the Calcutta high court bravely told the Supreme Court that the latter was wrong and had not examined all the facts.<sup>20</sup> Further controversy crops in with the decision of apex court on religious distinctness of some sects.<sup>21</sup>

On perusal of the above decisions, the observation of court raises an important question about the propriety of court in deciding the meaning of the term religion for the purpose of construing the scope of it within the ambit of part III of the Constitution. However, it is to be noted that as observed in earlier paragraphs, Dr. Ambedkar while commenting upon the state of religious affairs in the country raised the concern about its scope and ambit and therefore, it becomes important to understand the role of constitutional courts of the country. Further, under the constitutional scheme, mandate of article 25 is not absolute as it is subject to public order, health,

---

<sup>18</sup> AIR 1958 SC 731.

<sup>19</sup> *Supra* note 7 at 260.

<sup>20</sup> In the matter of *Jagdishwarananda v. Police Commissioner, Calcutta* (1984)1 SCR 447, apex court observed that the *tandava* dance was not a part of faith of Anand Margis. However, in *Commissioner v. Jagdishwarananda*, AIR 1991 Cal 263. Calcutta high court observed contrary.

<sup>21</sup> *Supra* note 7 at 261. - the disciples of sage Ramakrishna who had created separate *maths* (religious endowments) and "missions" throughout the world were denied their legitimate status of being recognized as a separate sect within Hinduism *Brahamchari Sidheshwar v. State of West Bengal*, (1995)4 SCC 646. The Swaminarayans were told that on a true interpretation of Hinduism. they were Hindus, even if they were protested they were not. *Swami Yagnapurushdasji v. Muldas* (1966) 3 SCR 242.

morality and other provisions of part III of the Constitution. Furthermore, state reserves power to restrict and regulate the secular, financial, economic and political activities associated with religious practice. The constitutional limitation on freedom of religion necessarily requires pragmatic and balanced judicial approach. Therefore, it is humbly submitted that, while the court has a constitutional duty, but the same should be discharged with utmost caution and care and consistent with aims and objects of the Constitution. On this, the recent decision of the Bombay High Court on Haji Ali Dargah Trust case and its subsequent approval by the apex court needs loud applauds.<sup>22</sup>

### III. Personal law and the judicial acumen

In India, those who advocate for reforms in personal laws as well as those who are against the reform, aligned their arguments in the provisions of the Constitution itself. As it has been rightly observed<sup>23</sup> that the State claims the right to reform these laws in order to bring them into conformity with the Constitution by giving women equality. Further, the opposition to reform is based on the Constitutional right to freedom of religion, guaranteed as a fundamental Right by Articles 25-28, which is claimed to encompass the right to be governed by religious personal laws.

Accordingly the Constitution itself present a difficult scenario and resultantly the question which still requires convincing answer as to the permissible limit of state interference in the matter of personal law in a secular setup. The argument becomes critical with further

---

<sup>22</sup> The issue pertains to denial of entry of women in the sanctum sanctorum of Haji Ali Dargah at Bombay. A public interest Litigation was filed alleging gender discrimination and arbitrary denial of access to women. The division bench of Bombay high court in *Dr. Noorjehan Safia Niaz v. State of Maharashtra*, (2016) 5 AIR Bom R 660, held that neither the objects nor the Scheme vest any power in the trustees to determine matters of religion, on the basis of which entry of women is being restricted. The court further held that the Haji Ali Dargah Trust is a public charitable trust. It is open to people all over the world, irrespective of their caste, creed or sex, etc. Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play. Therefore, Trust has no right to discriminate entry of women into a public place of worship under the guise of 'managing the affairs of religion' under article 26 and as such, the state will have to ensure protection of rights of all its citizens guaranteed under Part III of the Constitution, including articles 14 and 15, to protect against discrimination based on gender. Against the above order of the High Court, special leave petition was filled before the Supreme Court, but the court upheld the order and directed the trust to remove all the obstructions to facilitate women pilgrims to enter the sanctum sanctorum of the Haji Ali Dargah at par with men. *Haji Ali Dargah Trust v. Dr. Noorjehan Safia Niaz*, (2016) 16 SCC 788.

<sup>23</sup> Archana Prasshar, *Women and Family Law Reform in India* 19 (Sage Publication India Pvt. Ltd., New Delhi, 1992).

observations<sup>24</sup> that the state has not adopted a consistent policy with regard to the reform of religious personal laws.

Further, in the Constituent Assembly, the scope of religious freedom *vis-a-vis* personal law was extensively dealt with. Some of the member<sup>25</sup> of the Constituent Assembly suggested that the personal law should be given immunity from state regulation on account of sanctity of religion attached to it. However, the majority of the members of the Assembly rejected the argument and has held that personal laws shall not be given protection from state regulation on account of religion.<sup>26</sup> Thus the members of the Constituent Assembly were clear in their approach as far as personal laws are concerned, they didn't intend to immunise the personal law from state regulation on account of religious sanctity attached to it.

Soon after the enforcement of the Constitution, the issue concerning the application of personal law *vis-a-vis* the constitutional mandate concerning religious freedom was called in question before the division bench of Bombay high court.<sup>27</sup> Though the court held that personal law doesn't come within the meaning of the term "laws in force" within article 13(3)(b) of the Constitution and thereby explicitly accorded protection to personal law from operation of part III<sup>28</sup> of the Constitution. But nonetheless while adopting the narrow interpretation of term religion<sup>29</sup>, court emphatically observed the regulatory role of state on account of social reform and accordingly refused to accept the argument of respondent as to include the practice of

---

<sup>24</sup> *Id* at 18. Hindu Personal law has been extensively reformed in order to give equal legal rights to Hindu women. The personal laws of other (minority) communities have been left virtually untouched, ostensibly because the leaders of these communities claim that their religious laws are inviolate and also because there is said to be no demand for change from within their communities.

<sup>25</sup> *Constituent Assembly Debates*, Vol VII, at 540-541, Mr. Mohammad Ismail Sahib has of the view that a secular state should not interfere with personal law of the people, which was part of their faith, their culture, and their way of life. Further, Mr. Naziruddin Ahmad advocated for personal law as a matter of faith, he also argued that even British who enacted uniform civil and criminal codes, never tried to scrap the personal law .

<sup>26</sup> *Supra* note 15. Also see observation of K.M Munshi at 548. "that Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible , a strong and consolidated nation".

<sup>27</sup> *The State of Bombay v. Narasu Appa mali*, AIR 1952 Bom 84. Bombay Prevention of Hindu Bigamous Marriages Act 1946 , has been called in question on account of violation of fundamental right enshrined under art 14, 15 and 25. The court has upheld its constitutional validity. See detailed reasons at page no- 85-94.

<sup>28</sup> Fundamental Rights.

<sup>29</sup> *Ibid*. A sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief.

polygamy as an integral part of Hindu religion. Madras high court<sup>30</sup> on similar line upheld the constitutionality of Madras Hindu (Bigamy Prevention and Divorce) Act 1949.. Even Allahabad high court<sup>31</sup> advocated for the regulatory role of state for social welfare and reform.

On the issue of divorce among the Christians, the observations of Kerala<sup>32</sup> and Bombay high courts<sup>33</sup> necessarily strengthen the constitutional values in a multi-religious society.<sup>34</sup> Declaring the provisions contained under section 10 of the Divorce Act, 1869 violative of constitutional imperative enshrined under articles 14, 15, 21, the high courts in themselves assumed the reformist attitude to bridge the gap between the personal laws and in particular Kerala high court observed:<sup>35</sup> “Inevitable, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is palpable.

---

<sup>30</sup> *Srinivas Aiyar v. Saraswathi Ammal*, AIR 1952 Mad 193. “The freedom to practice religion is not an absolute right but as article 25 itself states it is subject to public order, morality and health and subject to other provisions of this part. Art 25(2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus. The religious practice may be controlled by legislation if the state thinks that in the interest of social welfare and reform it is necessary to do so”

<sup>31</sup> *Ram Prasad Seth v. State of U.P.*, AIR 1957 All 411. Rule 27, U.P Government Servant conduct rules, which provides that a Government servant cannot marry a second wife during the presence of the first wife without the permission of the State Government does not infringe the fundamental right guaranteed under Art 25. Marriage is a social institution and it may be for the welfare of the State to control such an institution and to bring about measures of reforms, which the legislature’s wisdom thinks proper to do in the interest of the State.

<sup>32</sup> *Ammini E.J v. Union of India*, AIR 1995 Ker 252(FB).

<sup>33</sup> *Pragati Varghese v. Cyril George Verghese*, AIR 1997 Bom 349.

<sup>34</sup> Provisions contained under section 10 of the Divorce Act, 1869 (Act 4 of 1869), to the extent it violates arts 14, 15 and 21 are unconstitutional. Under Section 10 while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery simpliciter, the wife has to prove that the husband is guilty of adultery which is (1) incestuous, (2) coupled with cruelty which without adultery would have entitled her to divorce a mensa et toro, (3) coupled with desertion without reasonable excuse for 2 years or upwards, etc. Therefore, as far as the ground of adultery is concerned husband is in much favorable position when compared to the wife since she has to prove adultery with one or other aggravating circumstances indicated in the section itself. Evidently the above discrimination is one purely based upon sex and nothing else. Such a discrimination based purely on sex will be against the mandatory provisions in Article 15 of the Constitution of India and denial of equality before law guaranteed under Article 14 of the Constitution. Further, spouses belonging to all other religions governed by Hindu Marriage Act, 1955, Parsi marriage and Divorce Act, 1936, Muslim wives under the Dissolution of Muslim Marriage Act, 1939, Special Marriage Act, 1934 and Foreign Marriage Act, 1969 are entitled to get dissolution of their marriage on the ground of cruelty and desertion for the period fixed by the respective Acts. Thus, in regard to the grounds allowed by law for dissolution of marriage, there is a discriminatory treatment meted out to christian spouses. The discrimination resulting from the absence of suitable provisions recognizing cruelty and desertion for a reasonable period as grounds for dissolution of marriage in the Act can in the circumstances be treated only as one based solely on religion and as such violative of Article 15 of the Constitution. Article 21 guarantees protection of life and personal liberty. Right to life, includes the right to life with human dignity. A Christian wife, who is treated cruelly by her husband and is subjected to indignities, is compelled to live with him without dignity. Personal liberty guaranteed to every person under Article 21 of the Constitution is denied to Christian women.

<sup>35</sup> *Supra* note 32 at 275.

Later on in conformity with the observation of High Courts, Parliament of India has amended section 10<sup>36</sup> as to ensure gender equality and to bring parity among religious identities.

On perusal of decisions of various high courts across the country, it is evident that the courts are inclined towards reform in personal law and in certain cases courts themselves assumed the role of legislature in bringing reform as to protect the constitutional values and to ensure the existence of constitutional culture in the country. Further, V.N Khare<sup>37</sup> the then, CJ, strongly recommended for Uniform Civil Code in the Country.

Interestingly, in another case where a public interest litigation challenging the constitutionality of various personal laws was filed before the apex court, the apex court refused to go into its merits on account of same being the subject matter of state policies, reflect cautious approach the court has undertaken with regard to personal laws.<sup>38</sup>

Further, it is important to note here that the observations of Division Bench of Bombay high court in *Narasu Appa Mali*<sup>39</sup>, appears to be the standard for the courts as regard nature of personal law *vis-a-vis* fundamental rights are concerned. As the court observed that the laws in force' in article 13(3)(b) referred to statutory laws, therefore, it means personal laws which are codified and acquired the statutory shape, are well within judicial reach. As it has also been observed that:<sup>40</sup> - the position generally seems to be that Indian courts will not consider whether uncodified personal laws are consistent with the Constitution on the ground that they do not amount to laws in force. They will, however, consider this question when dealing with custom or codified personal laws.

Aforesaid discussions present real dichotomy between the scope of religious freedom under the Constitution of India and personal law, though the constitutional courts have refrained from testing the constitutionality of uncodified personal law, nonetheless, the courts have consistently been advocating for reforms in personal laws.<sup>41</sup>

---

<sup>36</sup> The Indian Divorce (Amendment) Act 2001(Act 51 of 2001).

<sup>37</sup> *John Vallamattom v. Union of India*, AIR 2003 SC 2903 at 2913.

<sup>38</sup> *Ahmadabad Women Action group v. Union of India*, AIR 1997 SC 3617.

<sup>39</sup> *Supra* note 27.

<sup>40</sup> Farrah Ahmed, *Religious freedom under the personal Law System* 35 (Oxford University Press, New Delhi, 1<sup>st</sup> edn., 2016).

<sup>41</sup> *Pannalal Bansilal v. State of A.P* (1996) 2 SCC 498.

Even the renowned Muslim scholar has advocated for reforms in Muslim personal law as per the observation of Mohammad Ghouse<sup>42</sup> whether Muslims who intends to keep plural wives or divorce their wives unilaterally for no reason or any reason, or who refuses to maintain their divorced wives, in any manner involve in the act of professing, practicing or professing their religion. On this Mohammad Ghouse<sup>43</sup> argued that marriage, divorce, inheritance and other aspects of personal status despite the sources of Muslim law regulating them, social or secular activities surrounding them, the state can validly enact measures of social welfare and reform in respect of matters governed by Muslim Law. He further observed that in India Muslim Law obtains binding force not from the divine law but from the Constitution of the country. Though, the observation seems to be extreme but the role of the state is important.

#### **IV. Supreme Court of India on practice of *Talaq-e-biddat* - Observations**

Supreme Court of India in *Shayara Bano v. Union of India*<sup>44</sup> case has critically analysed the practice of triple talaq, i.e. *talaq-e biddat* on the touch stone of constitutional norms, the Muslim Personal Law (Shariat) Application Act, 1937, judicial incisiveness both pre and post independence, and scholarly writings. Though minority observed the practice of triple talaq, i.e. *talaq-e biddat* as an essential part of one's faith and same is constitutionally protected, the majority ruled that the practice of triple talaq, i.e. *talaq-e-biddat* is invalid. The matter is adjudicated by constitutional bench of five judges and decided by 3:2. Jagdish Singh Khehar, CJ S Abdul Nazeer, J were in minority, where as Kurian Joseph, Rohintan F Nariman and U.U Lalit, JJ. formed the majority.

Interestingly, the minority opinion, authored by Khehar C.J treating the practice of triple talaq as a part of one's faith and accorded fundamental protection of art 25 of the Constitution of India irrespective of the fact that the practice is considered as irreligious within the religious denomination in which the practice is prevalent necessarily question the judicial acumen relating to doctrine of essential religious practice evolved to test the qualification for art 25 of the

---

<sup>42</sup> *Infra* note 37.

<sup>43</sup> Mohammad Ghouse, *Personal law and the Constitution of India*, available at: <http://14.139.60.114:8080/jspui/bitstream/123456789/736/15/Personal%20Laws%20and%20the%20Constitution%20in%20India%20.pdf> (last visited on June 8, 2018).

<sup>44</sup> *Supra* note 11.

Constitution of India. Minority's, *raison d'être* relating to the practice of *talaq-e-biddat* of its having widespread prevalence in India as the practice is observed by 90% of the Muslims (who belong to the Hanafi School) and consequently treating the same having approval of particular religious denomination and thereby considering it as one's religious faith certainly does not find space under the constitutional jurisprudence relating to fundamental rights of freedom of religion.

What is the test of personal law? Is there exist any distinction between the expression "personal law" and "custom and usages." As per the observation of Chagla, CJ. in *Narasu Appa Mali*<sup>45</sup> case, "Custom and Usage is deviation from personal law and not personal law itself. The law recognises certain institutions which are not in accordance with religious texts or even opposed to them because they have been sanctified by custom or usage, but the difference between personal law and custom and usage is clear and unambiguous". Further, the apex court itself ruled in *Mohammad Ahmed Khan v. Shah Bano Begum*<sup>46</sup> "there can be no greater authority on...[ a particular question of Muslim personal law] than the holy Quran". Furthermore, observations of Farrah Ahmed<sup>47</sup> on Muslim Personal Law (Shariat) Application Act, 1937, - This enactment claims to apply Muslim personal Law (Sharait) to Muslims on certain questions. This is a claim that a certain set of rules will apply to Muslims and also that these are rules of Islamic *religious doctrine* certainly find space with the very object and purpose of the Act of 1937.<sup>48</sup> And also bring out distinction between personal law and custom and usages. Keeping in view, the aforesaid observations, minority opinion is indeed surprising as to how can an

---

<sup>45</sup> *Supra* note 27 at 88.

<sup>46</sup> AIR 1985 SC 945.

<sup>47</sup> Farrah Ahmed, *Religious Freedom Under the personal Law System* 26 (Oxford University Press, New Delhi, 1<sup>st</sup> ed., 2016).

<sup>48</sup> **STATEMENT OF OBJECTS AND REASONS-** For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. *The status of Muslim women under the so-called Customary Law is simply disgraceful.* All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. *They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled.* In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (*Shariat*) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

oppressive practice which lacks religious sanctity, and is against the very dignity of women be given the protection of faith . It is also important here to note that though minority relied extensively on mandate of section 2 of the Act of 1937 but failed to observe the importance of statement of object and reasons of the aforesaid legislation.

Though majority have ruled in favour of invalidity, but they have adopted different paths. Kurian Joseph's observations that the Muslim Personal Law (Shariat) Application Act, 1937, does not confer statutory status to Muslim Personal Law (Shariat) , and therefore in respect of certain matters<sup>49</sup>, the rule of decision shall be Muslim Personal Law (Shariat) , but since , the practice of *talaq-e-biddat* is against the basic tenets of holy Quran and consequently it violates Shariat emphatically recognises the religious sanctity behind the source of Muslim personal law. In Indian context, observation stands good for two purposes. *Firstly*, it denounces the practices from constitutional protection, which have evolved out of arbitrary customary practices, lacking religious sanctity and *secondly*, it recognises the regulatory role of the state as to bring reforms within the constitutional framework.

Further, the illuminating exposition of law laid down by Justice Rohinton F Nariman as to confer statutory status to Muslim Personal Law (Shariat) and to bring it within the catch of article 13(1)(b) of the Constitution, as per the existing constitutional jurisprudence indubitably provides the Muslim women with the constitutional safeguards enshrined under article 14, 15 and 21 of the Constitution. However, the researcher respectfully expresses his disagreement on construction of the Act of 1937 with Rohinton F Nariman on account of the following facts. *First*, it is a sound principle of construction of a statute as observed in *Sussex Peerage case*<sup>50</sup> and subsequently followed in other cases<sup>51</sup> as well, "that if the words of the statute are in themselves precise and unambiguous , then no more can be necessary than to expound those words in their natural and ordinary sense. Here the Act of 1937 expressly provides under section 2 of the Act of

---

<sup>49</sup> Muslim Personal Law (Shariat) Application Act 1937- s. 2 -Application of Personal law to Muslims. – Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula and mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be Muslim Personal Law (*Shariat*).

<sup>50</sup> (1844) 11 Cl & Fin 85, p 143. Also see. MN Rao and Amita Dhanda , *NS Bindra's Interpretation of Statutes* 435 (Lexis Nexis Butterworths, New Delhi, 10<sup>th</sup> edn., 2007).

<sup>51</sup> *Shankar Dass v. Mahu Ram*, AIR 1963 HP 32-33.

1937<sup>52</sup> that “.....the rule of decision shall be Muslim personal law”, admits indubitable conclusion about the authority of Muslim personal law in itself in respect of matters enumerated in terms of section 2 of the Act of 1937. Further, if legislature would have intended to enforce the Muslim Personal law through the Act of 1937, it would have laid down, every detail relating to Muslim Personal law, like the one which have been done in case of Dissolution of Muslim Marriage Act, 1939. Furthermore, object and purpose of the Act of 1937<sup>53</sup> also leave no room for any doubt as to the authority of Muslim Personal Law in itself.

Notwithstanding the aforesaid observations, the majority ruling in particular authored by Justice Nariman seems correct as it aims towards creating constitutional culture based on the principles of equality, liberty and dignity of women. But it is equally important to argue at the outset, is it necessary to confer statutory status on the subject in order to test its constitutionality as per mandate of article 13 the Constitution? Though this is no more a *res integra* as per *Narasu Appa Mali* ruling, but the opinion of C.J Kania<sup>54</sup>, necessarily provides an insight as far as judicial role in Sovereign Socialist Secular Democratic Republic of India is concerned.

## V. Summary of the Discussion

In India under a secular set up, it is always a challenge for the state to accommodate a vast diversities of religion affecting entire life of individuals and particularly when religious freedom is accorded a fundamental protection. People professing different faiths, always inclined to take recourse to their personal law in most of their matters on account of their deep rooted religious identity; this certainly aggravates the challenge before the state. Therefore, the state is required to take stringent steps consistent with constitutional norms in bringing social welfare and reform. For state, citizen matters not their religious affiliations or associations. If state fails to do so, in a way it is a denial of state duty to provide for well being of citizen.

Convincingly, it can very well be argued that, Courts in India, though put fetters on themselves in analysing the constitutionality of uncodified personal law on the touchstone of fundamental

---

<sup>52</sup> *Infra* note 49.

<sup>53</sup> *Infra* note 48.

<sup>54</sup> *A.K Gopalan v. State of Madars*, AIR 1950 SC 27. As per Kania C.J- The inclusion of cl (1) and (2) of Art 13 in the Constitution of India appears to be a matter of abundance caution. .... the existence of Art 13 (1) and 13(2) in the Constitution of India, therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to abridged by the Constitution itself.

rights, but in no way precluded from observing the role of state in bringing social reform and change in matters concerning atrocious application of personal law resulting in denial of constitutional protection of equality, liberty and dignity. Further, being the protector and guarantor of the rights of the people, judiciary, can very well by progressive interpretation of the Constitution in itself become the crusader of change. Recent ruling of the apex court on the issue of triple talaq certainly needs appreciation for creating a constitutional culture in the country having multi religious identities under the banner of secular state. Though majority of judges have succeeded in limiting the atrocious application of personal law, but the matter has not yet concluded. Judicial approach in relation to uncodified personal law still requires comprehensive analysis of article 13 of the Constitution, though courts have consistently been relied upon *Narasu Appa mali* ruling to justify their position, but the progressive society and constitutional values are still looking for convincing answer.

Interestingly, judicial approach about Constitution *vis-a- vis* uncodified personal law so far appears to be textual rather than progressive and value based. If Constitution permits state to take measures for social welfare and reform, why the same Constitution delimits the judiciary from testing the constitutionality of uncodified personal law, this matter certainly requires deliberations and analysis. If it continues then in coming years, Constitution may have judicial reasons but certainly it will not have prudent rationality and it will severely affect the existence of Sovereign Socialist Secular Democratic Republic of India.