IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO ..... OF 2022
(UNDER ARTICLE 32 OF THE CONSTITUTION)

IN THE MATTER OF:

Benazeer Heena

... Petitioner

VERSUS

1. Union of India
   Through the Secretary,
   Ministry of Home Affairs, North Block, New Delhi-110001
2. Union of India
   Through the Secretary,
   Ministry of Law & Justice, Shashtri Bhawan, New Delhi-110001
3. Union of India
   Through the Secretary
   Ministry of Minority Affairs,
   Paryavaran Bhawan, CGO Complex, New Delhi-110003
4. Union of India
   Through the Secretary,
   Ministry of Women & Child Development,
   Shastri Bhawan, New Delhi-110001
5. Union of India
   Through the Secretary,
   Ministry of Social Justice & Empowerment
   Shastri Bhawan, New Delhi-110001
6. National Commission for Women
   Through the Chairperson
   Plot No-21, FC33, Institutional Area,
   Jasola, New Delhi, Delhi 110025
7. National Human Rights Commission
   Through the Chairperson
   Manav Adhikar Bhawan, Block-C,
   GPO Complex, INA, New Delhi - 110023
8. National Commission for Protection of Child Rights
   Through the Chairperson
   Chaderlok Building, Janpath Road, New Delhi-110001....Respondents

PIL TO DECLARE PRACTICES OF TALAQ-E-HASAN AND ALL OTHER FORM OF UNILATERAL EXTRA-JUDICIAL TALAQ VOID AND UNCONSTITUTIONAL FOR BEING ARBITRARY IRRATIONAL & CONTRARY TO ARTICLES 14, 15, 21, 25 AND TO FRAME GUIDLINE FOR GENDER NEUTRAL RELIGION NEUTRAL UNIFORM GROUNDS OF DIVORCE & UNIFORM PROCEDURE OF DIVORCE

To,
THE HON'BLE CHIEF JUSTICE OF INDIA
AND LORDSHIP'S COMPANION JUSTICES
OF THE HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER
THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petitioner is filing this writ petition as PIL under Article 32 seeking appropriate writ/order/direction/declaration to declare that "*Talaq-E-Hasan and all other forms of Unilateral Extra-Judicial Talaq*" is void and unconstitutional for being arbitrary irrational and violative of Articles 14, 15, 21, 25. Petitioner also seeks direction to Centre to frame guidelines for "*Gender Neutral Religion Neutral Uniform Grounds of Divorce & Uniform Procedure of Divorce for all citizens*".

2. Petitioner's name is Benazeer Heena; residence at _____; Ph._____, _____, PAN No: _____, AADHAAR No-_____. Annual Income is ___. Petitioner is a Journalist, Post Graduate in Mass Communication & Victim of *Unilateral Extra-Judicial Talaq-E-Hasan*. Petitioner is filing

this PIL for development of socially-economically downtrodden and marginalized citizens.

3. Petitioner has not approached any other court for the reliefs claimed in the present Writ Petition. No representation has been filed with any authority since the constitutional validity is under challenge and the reliefs claimed can only be granted by this Hon'ble Court.

4. Petitioner was married to Mr. Yusuf Naqi Resident of _____ as per Muslim rites on 25.12.2020 and has a male child from wedlock. Petitioner's parents were compelled to give dowry and later she was tortured for not getting big dowry. Petitioner's husband and his family members tortured her physically-mentally not only after the marriage but also during the pregnancy which made her seriously ill. When Petitioner's father refused to give dowry then her husband gave her *Unilateral Extra-Judicial Talaq-E-Hasan* through a Lawyer, which is totally against Articles 14, 15, 21, 25 and UN Conventions.

5. Whenever, anything required at home, petitioner's husband directly called her parents and ask either to send money or required thing. Her Husband always taunts her and torture her for not bringing money from her parents. Her Husband uses to beat her on small

issues like less salt in food, or more sugar in tea etc. Due to unreasonable demands & torturous behavior of husband, petitioner was forced to leave the Home. One day petitioner's husband beats her, throws her luggage outside and asks her to leave that's why she left the home on 7.12.2021 and living with parents. Petitioner's husband torture her, suspects her character, calls her characterless and prostitute without any reason, and planning to remarry without taking legal divorce from her. Petitioner submitted a complaint to DCW on 23.2.2022 and lodged FIR on 5.4.2022 but police says that *Unilateral Extra Judicial Talaq-E-Hasan* is permitted under Sharia.

6. The Court had not only observed that gender discrimination against Muslim women needs to be examined, but had also been pleased to direct that a PIL be registered for which notices were directed to be issued to the Ld. Attorney General and the National Legal Services Authority, New Delhi. Referring to *John Vallamattom v. Union of India, (2003) 6 SCC 611*, it was observed in *Prakash and Others v. Phulavati and Others, Civil Appeal No. 7217 of 2013 decided on 16.10.2015*, that laws dealing with marriage and succession are not a part of religion, the law has to change with time, and international covenants and treaties could be referred to examine validity and

reasonableness of a provision. Accordingly, Court directed that issue of gender discrimination against Muslim women under Muslim personal laws, specifically lack of safeguards against arbitrary divorce and second marriage by a Muslim husband during currency of first marriage notwithstanding the guarantees of the Indian Constitution, may be registered as a PIL and heard separately.

7. A perusal of the decisions of this Court in *Prakash v. Phulavati* (supra), *Javed v. State of Haryana, (2003) 8 SCC 369*, and *Sarla Mudgal v. Union of India (1995) 3 SCC 635* illustrates that polygamy is injurious to public morals and it can be superseded by the State just as it can prohibit human sacrifice or the practice of *sati*. In fact, in *Khursheed Ahmad Khan v. State of Uttar Pradesh, (2015) 8 SCC 439*, this Hon'ble Court has also taken the view that practices permitted or not prohibited by a religion do not become a religious practice or a positive tenet of the religion, since a practice does not acquire the sanction of religion merely because it is permitted. It is accordingly submitted that a ban on Unilateral Extra-Judicial Talaq has long been the need of the hour in the interest of public order and health. It is further submitted that this Hon'ble Court has already expressed the view that Triple Talaq is not an integral part

of religion and Article 25 merely protects religious faith, but not practices which may run counter to public order, morality or health.

8. The practice of *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq* is neither harmonious with the modern principles of human rights and gender equality, nor an integral part of Islamic faith. Many Islamic nations have restricted such practice, while it continues to vex the Indian society in general and Muslim women like the Petitioner in particular. It is submitted that the practice also wreaks havoc to lives of many women and their children, especially those belonging to the weaker economic sections of the society.

9. Muslim women can't give *Talaq-E-Hasan & other forms of unilateral extra-judicial talaq* but Muslim men can. Such discrimination and inequality hoarsely expressed in form of polygamy is abominable when seen in light of the progressive times of the 21st century.

10. *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq is* an evil plague similar to *sati*. Unfortunately, even in 21st century, it continues to vex Muslim women notwithstanding that such practice poses extremely serious health social economic moral and emotional risks. It is submitted that religious officers and priests like *imams, maulvis*, etc. who propagate, support and authorise the *Talaq-E-*

Hasan and other forms of unilateral extra-judicial talaq are grossly misusing their position, influence and power to subject Muslim women to such gross practice which treats them as chattel, thereby violating their fundamental rights enshrined in Articles 14, 15, 21, 25.

11. It has been noted in *Sarla Mudgal* (supra) that bigamous marriage has been made punishable amongst Christians by Christian Marriage Act, 1872, amongst Parsis by Parsi Marriage and Divorce Act, 1936, and amongst Hindus, Buddhists, Sikhs and Jains by Hindu Marriage Act, 1955. However, the Dissolution of Muslim Marriages Act, 1939 does not secure for Indian Muslim women the protection from bigamy which has been statutorily secured for Indian women belonging to all other religion. It is submitted that the citizens of India who followed religions other than Islam also traditionally practiced polygamy, but the same was prohibited not only because laws dealing with marriage are not a part of religion, but also because the law has to change with time and ensure a life of dignity unmarred by discrimination on the basis of gender. It is further submitted that the failure to secure the same equal rights and life of dignity for Muslim women violates their most basic human and fundamental right to life of dignity unmarred by gender

discrimination, which in turn have a critical impact on their social and economic rights to say the least.

12. In *State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84*, wherein the constitutional validity of Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged on the ground of violation of Articles 14, 15, 25, a Division Bench consisting of Justice Chagla and Justice Gajendragadkar, held that a sharp distinction must be drawn between religious faith and belief and religious practices, since the State only protects religious faith and belief while religious practices that run counter to public order, morality or health or a policy of social welfare must give way to the good of the people of the State. It is submitted that this view has been referred to with approval by this Hon'ble Court in *Khursheed Ahmad Khan* (supra).

13. The observations in *Danial Latifi (2001) 7 SCC 740*, are of utmost relevance. The Court stated that when interpreting provisions where matrimonial relationship was involved it has to consider the social conditions prevalent in our society, where a great disparity exists in matter of economic resourcefulness between a man and a woman whether they belong to the majority or the minority group, since our society is male dominated both economically and socially and

women are invariably assigned a dependent role irrespective of the class of society to which they belong. The Court further observed that solutions to societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity, decency of life, and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith, beliefs, sectarian, racial and communal constraints.

14. It is submitted that Muslim Personal Law (Shariat) Application Act, 1937, by providing for the application of Muslim personal law in matters relating to marriage where the parties are Muslims, conveys a wrong impression that the law sanctions the practices of *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq*, which is grossly injurious to the fundamental rights of the married Muslim women and offends Articles 14, 15, 21, 25 and UN Convention. It is, accordingly, submitted that the Muslim Personal Law (Shariat) Application Act, 1937, which is subject to the Constitution, is invalid in so far as it seeks to recognise and validate the practices of *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq*.

15. The Muslim Personal Law Application Act, 1937, Section 2 reads: *"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 properly 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 the Muslim Personal Law."

16. It is submitted that this provision, in so far as it seeks to recognise and validate *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq* is void and unconstitutional as such practices are not only repugnant to the basic dignity of a woman as an individual but also violative of fundamental rights guaranteed under Articles 14, 15, 21, 25 of the Constitution and UN Conventions.

17. The Constitution neither grants any absolute protection to the personal law of any community that is arbitrary or unjust, nor exempts personal laws from the jurisdiction of the Legislature or the Judiciary. To the contrary, Entry 5 of List III in the Seventh Schedule confers power on the Legislature to amend and repeal existing laws

or pass new laws in all such matters (including marriage and divorce) which were on August 15, 1947, governed by personal laws.

18. The freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 is not absolute and, in terms of Article 25(1), is "*subject to public order, morality and health and to the other provisions of this Part*". Harmonious reading of Part-III clarifies that freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 is subject to the fundamental rights guaranteed by Articles 14, 15, 21. In fact, Article 25 clearly recognises this interpretation by making the right guaranteed by it subject not only to other provisions of Part-III but also to public order, morality and health. Constitutional morality has been expounded in *Manoj Narula v Union of India 2014 (9) SCC 1* wherein it was observed that the Constitution is a living instrument and the principle of constitutional morality essentially means to bow down to the norms of the Constitution and to not act in a manner which is arbitrary or violative of the rule of law. In this context, it was also observed by the Court that the traditions and conventions have to grow to sustain the value of such morality and democratic values can survive and become successful when the people at large

are strictly guided by constitutional parameters, since commitment to the Constitution is a facet of constitutional morality.

19. The Legislature has failed to ensure the dignity and equality of women in general and Muslim women in particular especially when it concerns matters of marriage, divorce and succession. Despite the observations of this Court for the past few decades, Uniform Civil Code remains an elusive Constitutional goal that the Courts have fairly refrained from enforcing through directions and the Legislature has dispassionately ignored except by way of paying some lip service. However, it is submitted that laws dealing with marriage and succession are not part of religion and the law has to change with time, which finds support from the views expressed by this Hon'ble Court in *John Vallamattom* (supra) and *Prakash v. Phulavati* (supra). It is further submitted that this Hon'ble Court has already held that the issue of gender discrimination against Muslim women under Muslim personal laws, specifically the lack of safeguards against second marriage by a Muslim husband during currency of first marriage notwithstanding the guarantees of the Constitution of India, needs to be examined. Eventually, the practice of instantaneous triple-talaq was declared illegal by this Hon'ble

Court in *Shayara Bano Case* [(2017) 9 SCC 1] but *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq* still exists.

20. It is submitted that in view of the changes in laws in various Islamic countries that either restrict extra-judicial talaq, as well as the development of international laws, this Court is the sole hope not only for Muslim women but also for the Muslim community which has been suffering on account of personal laws that are in violation of the fundamental rights guaranteed by the Constitution.

21. Article 3 of the Universal Declaration of Human Rights provides that everyone has right to life, liberty and security of person while Article 7 provides that everyone is equal before law and is entitled without any discrimination to equal protection of the law. Since the adoption of the Universal Declaration of Human Rights, the universality and indivisibility of human rights have been emphasised and it has been specifically recognised that women's human rights are part of universal human rights. In 2000, on the grounds that it violates the dignity of women, United Nations Human Rights Committee considered polygamy a destruction of the internationally binding International Covenant on Civil and Political Rights (India acceded on 10.04.1979) and recommended that it be made illegal in States. It

is accordingly submitted that it is well recognised in international law that polygamy critically undermines dignity of women.

22. Non-discrimination and equality between men-women are central principles of human rights law. Both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights prohibit discrimination on the basis of gender and guarantee women and men equality in the enjoyment of the right covered by the Covenants. Article 26 of International Covenant on Civil and Political Rights provides for equality before the law and equal protection of law, while Article 2(2) of International Covenant on Economic, Social and Cultural Rights requires States to guarantee that rights enunciated in the Covenant can be exercised without any discrimination of any kind including on lines of gender or religion. Discrimination and inequality can occur in different ways including through laws or policies that restrict, prefer or distinguish between various groups of individuals. Therefore, to achieve actual equality, the underlying causes of women's inequality must be addressed since it is not enough to guarantee identical treatment with men.

23. The United Nations Economic and Social Council's Committee on Economic, Social and Cultural Rights explained in its General

Comment No. 16 of 2005 that parties to the International Covenant on Economic, Social and Cultural Rights are obliged to eliminate not only direct discrimination, but also indirect discrimination, by refraining from engaging in discriminatory practices, ensuring that third parties do not discriminate in a forbidden manner directly or indirectly, and taking positive action to guarantee women's equality. It is submitted that failure to eliminate *de jure* (formal) and *de facto* (substantive) discrimination constitutes a violation of the rights of women envisaged in such international treaties and covenants. It is further submitted that not only must the practices of *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq* be declared illegal and unconstitutional, but the actions of religious groups, bodies and leaders that permit and propagate such practices must also be declared illegal and unconstitutional.

24. In its General Comment No. 28, the Committee on Civil and Political Rights clearly issued a declaration against the practice of polygamy by saying that it completely violates the right to equality guaranteed by Article 3 of the Convention. The Committee noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with principle. Polygamy violates dignity of women. It

is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist

25. Article 5 of Convention on Elimination of All Form of Discrimination Against Women (CEDAW) explicitly places an obligation on all State Parties to *"modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women."* In its General Recommendation No. 21, the Committee on the Elimination of Discrimination against Women elaborated on equality in marriage and family relations, and observed that polygamous marriages contravene a woman's right to equality with men, and can have serious emotional and financial ramifications for her. The Committee noted "with concern" despite their Constitutions guaranteeing the right to equality, some States parties continued to permit polygamous marriages in accordance with personal/ustomary law. This, as per the Committee, violated the constitutional rights of women, as also Article 5(a) of CEDAW. Accordingly, *All forms of Unilateral Extra-Judicial Talaq* is void for being arbitrary irrational and contrary and therefore Centre must

frame guidelines for *Gender Neutral Religion Neutral Uniform Grounds of Divorce & Uniform Procedure of Divorce for all citizens.*

26.The Language used in Articles 32 and Article 226 is very wide and the powers of the Supreme Court as well as of the High Court's extends to issuing orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provision of the Constitution, there is no need to look back to procedural technicalities of the writs in English Law. The Court can make and order in the nature of these prerogative writs in appropriate cases in appropriate manner so long as the fundamental principles that regulate the exercise of jurisdiction in matter of granting such writ are observed **[T.C. BASAPPA v. T. NAGAPPA, AIR 1954 SC 440]**

27.An application under Article 32 cannot be thrown out simply because the proper direction or writ has not been prayed for. Thus, where an order in the nature of mandamus is sought in a particular form, nothing bars the Court from granting it in a different form. Article 32 gives a very wide discretion in the matter of framing the

writ to suit the exigencies of particular cases. **[CHARANJIT LAL CHOWDHURY, AIR 1951 SC 41]** Even if petitioner has asked for wider relief which cannot be granted by Court, it can grant such relief to which the petitioner is entitled to **[RAMBHADRIAH, AIR 1981 SC 1653]**. The Supreme Court has power to grant consequential relief to do full and complete justice even in favour of those persons who may not be before the Court or have not moved the Supreme Court. **[PRABODH VERMA AIR 1985 SC 167]**

28. For the protection of fundamental right and rule of law, the Court under this article can confer jurisdiction on a body or authority to act beyond the purview of statutory jurisdiction or function, irrespective of the question of limitation prescribed by the statute. Exercising such power, Supreme Court entrusted the NHRC to deal with certain matters with a direction that the Commission would function pursuant to its direction and all the authorities are bound by the same. NHRC was declared not circumscribed by any condition and given free hand and thus act *sui generis* conferring jurisdiction of special nature **[PARAMJIT KAUR, AIR 1999 SC 340]**

29. Simply because a remedy exists in the form of Article 226 for filing a writ in High Court, it does not prevent or bar an aggrieved person

from directly approaching Supreme Court under Article 32. It is true that Court has imposed a self-restraint in its own wisdom on exercise of jurisdiction where aggrieved person has an effective alternative remedy in the form of Article 226. However, this rule which requires the exhaustion of alternative remedy is a rule of convenience and a matter of discretion rather than rule of law. It does not oust the jurisdiction of the Court to exercise its jurisdiction under Article 32. **[MOHAMMED ISHAQ (2009) 12 SCC 748]**

30. **The Supreme Court is entitled to evolve the New Principles of Liability** to make the guaranteed remedy to enforce fundamental rights real and effective, to do complete justice to aggrieved person. It was held that the court was not helpless and the wide powers given to the Court by Article 32 of the Constitution, which is fundamental right imposes a constitutional obligation on the Supreme Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enables reward of monetary compensation in appropriate cases, where that is the only redress available. The remedy in public law has to be more readily available when invoked by have-nots who are not possessed of the where

withal for enforcement of their right in private law, even though its exercise is to be tempted by judicial restraint to avoid circumvention of private law remedies, which more appropriate. Under Article 32, the Court can pass appropriate orders to do complete justice between parties even if it is found that petition filed is not maintainable in law. **[Saihba Ali, (2003) 7 SCC 250]**

31. **The Facts Constituting Cause of Action** accrued on 19.4.2022 and subsequent days when petitioner's husband gave her *Talaq-E-Hasan, which is a unilateral extra-judicial form of Talaq*, not only through Speed Post but also through an Advocate. Copy of the Notice of Pronouncement of Talaq-E-Hasan is Annexure P-1. (pages 39-51)

32. The injury is extremely large because *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* is illegal and unconstitutional for being arbitrary, irrational and violative of Articles 14, 15, 21, 25.

33. Petitioner has not filed any other petition either in this Court or in any other Court seeking same or similar relief as prayed.

34. Petitioner has no personal interests in filing this PIL.

35. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus with issue involved in this PIL.

36. Petitioner has not submitted representation and there is no other remedy available except approaching this Court under Article 32.

37. There is no personal gain private motive oblique reasons in filing it.

GROUNDS

A. The importance of ensuring protection of Muslim women from *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* has profound consequences on the quality of justice rendered in the country as well as ensuring a life of dignity guaranteed by Part-III.

B. Right to dignity and equality is undisputedly the most sacrosanct fundamental right and it prevails above all other rights. Therefore the solutions to societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity, decency of life, and dictates of necessity in the pursuit of social justice should be decided on considerations other than religion or religious faith or beliefs, or sectarian, racial or communal constraints.

C. The Muslim Personal Law (Shariat) Application Act, 1937, by providing for the application of Muslim personal law in matters relating to marriage where the parties are Muslims, conveys a wrong impression that the law sanctions *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq*, which is grossly

injurious to the fundamental rights of married Muslim women and offends Articles 14, 15, 21 and 25 of the Constitution of India and the international conventions on civil and human rights.

D. The Dissolution of Muslim Marriages Act, 1939 fails to secure for Indian Muslim women the protection from *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq*, which protection has been statutorily secured for women belonging to other religions, and is to that extent violative of Articles 14, 15, 21 and 25 and international conventions on civil rights and human rights.

E. The Constitution neither grants any absolute protection to the personal law of any community that is unjust, nor exempts personal laws from the jurisdiction of the Legislature or the Judiciary.

F. Entry-5 of List-III in the Schedule-7 confers power on the Legislature to amend and repeal existing laws or pass new laws in all such matters (including marriage and divorce) which were on August 15, 1947, governed by personal laws, and the Legislature has practically abdicated its duties and permitted the basic fundamental rights of Muslim women to be widely violated which also affects the entire country as a matter of public order, morality and health.

G. Freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 is "*subject to public order, morality and health and to the other provisions of Part-III*". It is submitted that the Constitution does not preclude the State from introducing social reforms and enacting laws on subjects traditionally associated with religion, especially when such laws aim to secure public order, morality, health and the rights guaranteed by Part-III of the Constitution. It is further submitted that the concept of "constitutional morality" has been expounded by a 5-judge bench of this Hon'ble Court in ***Manoj Narula v. Union of India*** *(supra)* wherein it was observed that the Constitution of India is a living instrument and the principle of constitutional morality essentially means to bow down to the norms of the Constitution and to not act in a manner which is arbitrary or violative of the rule of law since commitment to the Constitution is a facet of constitutional morality.

H. The Constitution only protects religious faith and belief while the religious practice of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* run counter to public order, morality, and health and must therefore yield to the basic human and fundamental right

of Muslim women to live with dignity, under equal protection of laws, without any discrimination on the basis of gender or religion.

I. The Legislature has failed to ensure the basic dignity and equality of women in general and Muslim women in particular when it concerns matters of marriage, divorce and succession.

J. A bench of 3 judges of this Hon'ble Court in ***Ahmedabad Women Action Group v. Union of India (1997) 3 SCC 573***, when faced with partially similar prayers as raised in this petition, decided to not interfere with the practices in Muslim Personal Law on the ground that such matters were policy decisions and did not warrant any interference by Courts of law. It is submitted with the utmost respect that this approach amounts to an abdication of responsibility vested on writ courts under the Constitution.

K. Questions involving violations of fundamental rights are not merely questions of policy to be sent back to the Parliament. They are concrete questions, the duty to answer which has been placed upon the Supreme Court by Article 32 of the Constitution. Hence, it is most humbly submitted that questions involving discrimination against marginalized groups (such as women) cannot be left unanswered by constitutional courts of this country. The Parliament

may have the power to legislate on such issues, as also a constitutional responsibility to do so, but if it abdicates the said responsibility by folding its hands, the Court must not merely follow suit. Therefore, it is submitted that the decision in AWAG (supra) merits reconsideration by a larger bench of this Hon'ble Court.

L. A complete ban on *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* has long been the need of the hour as it renders Muslim wives extremely insecure, vulnerable and infringes their fundamental rights guaranteed under Articles 14, 15, 21, 25.

M. Muslim Personal Law, insofar as it allows Muslim men to *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* does not extend the same permission to women, is void for being violative of Articles 14, 15 and 21 of the Constitution. Muslim Personal Law falls within the expression "laws in force" as contained in Article 13(1). Therefore, by virtue of Article 13(1), any part of Muslim Personal Law that contravenes Part-III of the Constitution would, to that extent, be void. The definition of the term "law" contained in Article 13(3)(a) of the Constitution will apply to the phrase "laws in force" as used in Article 13(1). This principle was laid down by a bench of 5 judges of this Hon'ble Court in *Sant Ram v. Labh Singh* (1964) 7 SCR

756. It was also held that custom and usage, which found place in the definition of "law" under Article 13(3)(a), would be included in the phrase "laws in force" for the purposes of Article 13(1). Therefore, any custom or usage in force within the territory of India since before the commencement of the Constitution is void.

N. The definition of the word "law" in Article 13(3)(a) is inclusive one. Personal law is very similar in nature to custom or usage, because like customs and usages, even personal law is an age-old practice observed by a given community. If that is so, there is no reason to exclude personal law from the ambit of wide & inclusive definition of the term "law" in Article 13(3)(a). There could be no rationale as to why Framers intended to subject customs and usages to the rigours of Part-III, but not personal law. In fact, personal law is different from custom and usage in that it is actively recognized/sanctioned by the State through legislation (e.g. Muslim Personal Law (Shariat) Application Act, 1937 gives express legal sanction to the Shariat). This intense proximity with State action is all the more reason to include personal law within the ambit of "law" for the purposes of Article 13. In any event, democratic republic of India cannot conceive of a system that possesses absolute immunity from constitutional

scrutiny and review, despite governing people in the most intimate matters of their lives. Fundamental rights are not empty guarantees; their infringement – whether perpetrated by the State through its actions, or condoned by the State through its omissions –must be guarded against at all costs.

O. Two coordinate Benches of this Hon'ble Court in the past have made certain observations on this point in the nature of obiter dicta. In C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil (1996) 8 SCC 525, a bench of 3 judges observed that: ***15.*** *It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S.R. Bommai v. Union of India [(1994) 3 SCC 1] this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and*

opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights. Right to equality is a fundamental right. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it. ***26.*** *It is true that Section 30 of the Act and the relevant provisions of the Act relating to the execution of the Wills need to be given full effect and the right to disposition of a Hindu male derives full measure there under. But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the constitutional goal. Harmonious interpretation, therefore, is required to be adopted in giving effect to the relevant provisions consistent with the*

constitutional animation to remove gender-based discrimination in matters of marriage, succession etc.…"

P. However, contrary observations were made by a bench of 2 judges in Krishna Singh v. Mathura Ahir (1981) 3 SCC 689: *17. It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, learned Judges failed to appreciate that Part-III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except, where such law is altered by any usage or custom or is modified or abrogated by statute."*

Q. These observations were followed and affirmed by a bench of 3 judges in AWAG (supra). Thus, the two conflicting observations having been endorsed by two benches of equal strength, the same

calls for resolution of this issue by a larger bench. This is without prejudice to the submissions made above, i.e., that personal law is in fact subject to Part-III of the Constitution because of the interpretation given to Articles 13(1) and 13(3) by the Constitution Bench in Sant Ram (supra).

R. Muslim Personal Law, like all other personal law, is subject to the rigours of Part-III. Consequently, any part of Muslim Personal Law contravening Part-III would, to that extent, be void and ineffective. The Law, insofar as it allows Muslim men to have multiple wives and does not extend the same permission to women, contravenes Articles 14-15. All Indians are required to be afforded equality before the law as well as equal protection of laws. A law that discriminates against any person on the ground of sex is violative of the guarantee of equality. Muslim Personal Law permits practice of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq*. It also permits Muslim men to marry upto 4 women. However, no similar provision exists for multiple marriages for women. This places the man at the centre of marriage as an institution. It seeks to degrade women to a position inferior to that of men. It treats women as men's chattel, and reduces their status to an object of desire to be possessed by

men. Consequently, it offends the core ideal of equality of status. Therefore, by virtue of the command of Article 13(1), Muslim Personal Law, insofar as it allows Muslim men to give *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* and does not extend the same permission to women, is void and inoperative.

S. *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* contravene Article 21 of the Constitution. Firstly, the discrimination between men-women grossly offends the right to dignity of women, which has been recognized as an integral part of the right to life and personal liberty. Such a distinction has the effect of reducing the woman's status to much inferior to that of the man. By considering the woman but an object of the man's desire, such a system causes gross affront to the dignity of women. The right to life implies a right to a meaningful life and not to a mere animal existence, it must follow that there exists within the folds of Article 21 a right to live in mental peace. Systemic violence against women that results in mental or psychological anguish cannot but be understood as taking away the said right. Therefore, the system of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* interferes with the right conferred by Article 21 of the Constitution. The said right may only

be taken away by a just, fair and reasonable law, which is lacking in the instant case. Therefore, the part of Muslim Personal Law sanctioning the practice of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* stands in contravention of Articles 14, 15 and 21 of the Constitution, and is void for that reason.

T. In any event, S.2 of the Muslim Personal Law (Shariat) Application Act, 1937 (the "**Shariat Act**"), insofar as it recognizes and sanctions the practice of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq*, is contrary to Articles 14, 15 and 21 of the Constitution, and therefore void and inoperative. S.2 of the Shariat Act recognizes and sanctions the Muslim Personal Law (Shariat) as the applicable rule in matters of marriage where the parties are Muslims. By extension, S.2 of the Act positively affirms and gives legal backing to discriminatory and unconstitutional practice of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq*.

U. In Shayara Bano v. Union of India (2017) 9 SCC 1, Nariman, J., writing for himself and for Lalit, J., held another portion of S.2 of the Shariat Act ultra vires the constitution, on the ground that the practice of Triple Talaq was manifestly arbitrary. It is submitted that on that count alone, S.2 of the Act is contrary to Articles 14, 15(1) and

21 insofar as it recognizes and sanctions practice of *Talaq-E-Hasan and other forms of unilateral extra-judicial talaq*.

V. The idea of "constitutional morality" was elaborated by a bench of 5 judges in Manoj Narula v. Union of India (2014) 9 SCC 1. Dipak Misra, J. (as he then was), speaking on behalf of the majority of this Hon'ble Court, held that traditions and conventions must grow to sustain the value of constitutional morality. It is most respectfully submitted that the word "morality" occurring in Article 25 of the Constitution must be interpreted to mean "constitutional morality". It is further submitted that "constitutional morality" encompasses equality as a core value, as held by a bench of 5 judges of this Hon'ble Court in Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697. Therefore, it is beyond doubt that the right to freely profess, practice and propagate one's religion is subject to the idea of equality, to which the practice of *Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq* is abhorrent.

W. This is basic doctrine that the Constitution has primacy over the Common Laws and Common Laws have primacy over the personal Laws. Hence, the Court may declare "*Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq"* arbitrary irrational and

contrary to Articles 14, 15, 21, 25. Moreover, Equality should be the basis of all personal law since the Constitution envisages equality, justice and dignity for women. Therefore, the Court may direct the Centre to frame guidelines for gender neutral religion neutral uniform grounds of divorce and uniform procedure of divorce.

PRAYERS

It is respectfully prayed that this Hon'ble Court may be pleased to issue an appropriate writ, order or direction to the respondents to:

a) direct and declare the practice of "*Talaq-E-Hasan and all other forms of unilateral extra-judicial talaq"* is void and unconstitutional for being arbitrary, irrational and violative of Articles 14, 15, 21, 25;

b) direct and declare Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 is void and unconstitutional for being violative of Articles 14, 15, 21, 25, in so far as it validates the practice of "*Talaq-E-Hasan and other forms of unilateral extra-judicial talaq"*;

c) direct and declare the Dissolution of Muslim Marriages Act, 1939, is void and unconstitutional for being violative of Articles 14, 15, 21, 25 in so far as it fails to secure for Muslim women the protection from "*Talaq-E-Hasan and other forms of unilateral extra-judicial talaq"*;

d) direct Centre to frame guideline for *Gender Neutral Religion Neutral Uniform Grounds of Divorce & Uniform Procedure of Divorce for all;*

e) pass other order as Court deems fit/proper and allow the cost.

New Delhi — Advocate for petitioner

02.05.2022 — (Ashwani Kumar Dubey)