IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION WRIT

PETITION (CIVIL) NO 235 OF 2018

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Moullim Mohsin Bin Hussain Bin Abdad Al Kathiri ...Petitioner

VERSES

Union of India & others ...Respondents

PAPER BOOK

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(ADVOCATE FOR PETITIONER: R.D.UPADHYAY)

SYNOPSIS

Nikah Mutah and Nikah Misyar, literally means "pleasure marriage" is a verbal and temporary marriage contract that is practiced in Muslim Community, in which, duration of marriage and the mahr is specified and agreed upon in advance. It is a private contract made in a verbal format. Preconditions for Nikah Mutah are: The bride must not be married, she must be Muslim, she should be chaste and not addicted to fornication. She may not be a virgin, if her father is absent and cannot give consent. At the end of contract, marriage ends and women undergo iddah, a period of abstinence from marriage (intercourse). The iddah is intended to give paternal certainty to any child/girl if she becomes pregnant during the temporary marriage. It is pertinent to state that a written declaration of intent to marry and acceptance of the terms are required in other forms of marriages in Islam.

Generally, Nikah Mutah and Nikah Misyar have no proscribed minimum or maximum duration. However, the Oxford Dictionary of Islam, indicates the minimum duration of the marriage is debatable and durations of at least three days, three months or one year have been suggested. Sunni Muslims and within Shia Islam, Zaidi Shias, Ismaili Shias and Dawoodi Bohras do not practice Nikah Mutah. However, Sunni Muslims practice Nikah Misyar, which is similar to Nikah Mutah.

Many Islamic scholars have already said that Nikah Halala, Nikah Mutah and Nikah Misyar are forbidden and void in Islam and its nothing but a religiously sanctioned rape. Undoubtly, these practices are not only violative of Articles 14, 15 and 21 of the Constitution but also injurious to public order, morality and health.

In 2000, the United Nations Human Rights Committee reported that polygamy violates the International Covenant on Civil and Political Rights (ICCPR), citing concerns that the lack of "equality of treatment with regard to the right to marry" meant that polygamy, restricted to polygyny in practice, violates the dignity of women and should be outlawed. Specifically, the Reports to the UN Committees have noted violations of the ICCPR due to these inequalities and reports to the General Assembly of the UN have recommended it be outlawed. It is pertinent to state that India is signatory of ICCPR and Polygamy is an offence under Section 494 of the Indian Penal Code (IPC).

Many Countries have taken strong stand against polygamy. The Department of Justice of Canada has argued that polygamy is a violation of International Human Rights Law, as a form of gender discrimination. In Canada the federal Criminal Code applies throughout the country. It extends the definition of polygamy to having any kind of conjugal union with more than one person at the same time. Also, anyone who assists, celebrates or is a part to a rite, ceremony, or contract that sanctions a polygamist relationship is guilty of polygamy.

A life of dignity and equality is undisputedly the most sacrosanct fundamental right guaranteed by the Constitution of India and it prevails above all other rights available under the law.

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 the religion or religious faith or spiritual beliefs or sectarian, racial or communal constraints.

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 Nikah Halala, Nikah Mutah and Nikah Misyar and Polygamy, which is not only grossly injurious to public order, morality and health, but also violative of the fundamental rights of Muslim women guaranteed under Articles 14, 15 and 21 of the Constitution.

The Constitution neither grants any absolute protection to any personal law of any community that is unjust, nor exempts personal laws from the jurisdiction of the Legislature or Judiciary. 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, [(2014) 9 SCC 1]*** 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.

The Constitution only protects positive tenets of the religion. Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy definitely run counter to public order, morality and health and must therefore yield to the basic right of women to live with dignity, under equal protection of laws, without any discrimination on the basis of gender or religion.

Muslim Personal Law, like all other personal law, is subject to the rigours of the fundamental rights guaranteed under the Constitution. Consequently, any part of the Muslim Personal Law contravening the fundamental rights would, to that extent, is void and ineffective.

Muslim Personal Law, insofar as it allows Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy does not extend the same permission to women, contravenes the principle of equality guaranteed under Articles 14 and 15 of the Constitution. All persons within the territory of India are required to be afforded equality before the law as well as the equal protection of laws. Undoubtly, a law that discriminates against any person on the sole ground of sex is arbitrary and violative of the guarantee of equality.

The Muslim Personal Law permits Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and marry with upto four women. However, no similar provision exists for women. This system 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, Muslim Personal Law, insofar as it allows Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and have multiple wives and does not extend the same permission to women, is void and incapable of operation within the territory of India.

Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy contravenes Article 21 of the Constitution. The discrimination between men and women as regards the permission to have multiple spouses grossly offends the right to dignity of women, which has been recognized as an integral part of the right to life and personal liberty under the Article 21. Such a distinction has the effect of reducing the woman's status to much inferior to that of the man.

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. Thus, practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy interferes with the right conferred by Article 21 of the Constitution. By considering the woman, an object of man's desire and practice Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy causes gross affront to the dignity of women.

Equality should be the basis of personal law since the Constitution envisages equality, justice and dignity for all citizens. Several Islamic nations have banned the practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy, while Indian Muslim women are still suffering on account of such practices. Thus, the basic rights of women are being violated continuously, despite reforms introduced by Islamic nations to secure a life of dignity unmarred by the gender discrimination.

The Constitution of India has primacy over the common law and common law has primacy over personal law and Indian Penal Code is applicable upon all Citizens. Hence, this Hon'ble Court may declare that practice of Nikah Halala, Nikah Mutah and Nikah Misyar is rape under Section 375, IPC and Polygamy is an offence under Section 494 IPC.

A complete ban on Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy has been the need of the hour as it renders Muslim women extremely insecure, vulnerable and infringes their fundamental rights. The importance of ensuring protection of women from the Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy have profound consequences on the quality of justice rendered in the country as well as ensuring a life of dignity for the citizens as guaranteed by Part III the Constitution.

Article 16(1) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) mandates State Parties to eliminate discrimination against women in all matters relating to marriage and ensure equality of men and women, the following:

i. The same right to enter into marriage;

ii. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

iii. The same rights/responsibilities during marriage & at its dissolution;

iv. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

v. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

vi. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

vii. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

viii. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

From above international obligations, it is clear that India cannot conceive institutions like Nikah Halala, Nikah Mutah, Nikah Misyar that rests on regressive notions of inherent inequality between men-women.

LIST OF DATES

29.03.2000: In its General Comment No. 28 (2000), UN Committee on Civil and Political Rights very 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 this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.*"

13.05.2005: Article 3 of ICESCR recognizes that "*equal right of men and women to the enjoyment of all economic, social and cultural rights*". In its General Comment No. 16 (2005), the Committee on Economic, Social and Cultural Rights expanded on the aforementioned Article 3, and stated in very clear terms that State Parties to the ICESCR have a positive obligation to eliminate: "*prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women*". This includes the positive obligation to prevent third parties (non-State actors) from interfering directly or indirectly with the enjoyment of the right to equality.

14.07.2017: CEDAW in its General Recommendation, 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 very serious emotional and financial ramifications for her and her dependents. 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 or customary law. This, as per the Committee, violated the constitutional rights of women.

20.09.2017: The Indian Express published the News - Contract marriage racket: Police arrest eight Arab sheikhs in Hyderabad who wanted to 'marry' minor girls

22.08.2017: The five judges bench of this Hon'ble Court declared *Section 2 of the Muslim Personal Law Application Act, 1937,* arbitrary and violative of Articles 14, 15 and 21 of the Constitution, insofar as it seeks to recognize and validate practices of *Talaq-E-Biddat,* but left the issues viz. Polygamy, Halala etc undecided.

19.03.2018: Nikah Halala, Nikah Mutah, Nikah Misyar & Polygamy is not only violative of Article 14,15,21 of Constitution but also injurious to public order, morality & health. Hence, this petition in larger public interest.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINALJURISDICTION

WRIT PETITION (CIVIL) NO 235 OF 2018 (UNDER ARTICLE32OFTHECONSTITUTIONOFINDIA) **IN THE MATTER OF:**

Moullim Mohsin Bin Hussain Bin Abdad Al Kathiri,

[redacted]

...Petitioner

Verses

1. Union of India Through theSecretary, Ministry of Law and Justice, Shashtri Bhawan, New Delhi-110001
2. Union of India Through theSecretary, Ministry of Women and Child Development, ShashtriBhawan,NewDelhi-110001
3. Law Commission of India ThroughtheChairman, 4th Floor, B-Wing, Loknayak Bhawan, Khan Market,New Delhi-110003

.....Respondents

WRIT PETITION & UNDER ARTICLE 32 TO DECLARE SECTION 2 OF THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937, VIOLATIVE OF ARTICLES 14, 15 AND 21 OF THE CONSTITUTION INSOFAR AS IT SEEKS TO RECOGNIZE AND VALIDATE PRACTICE OF NIKAH HALALA, NIKAH MUTAH, NIKAH MISYAR AND POLYGAMY;

To,

THE HON'BLE CHIEF JUSTICE

&LORDSHIP'SCOMPANIONJUSTICES OF HON'BLE

SUPREME COURT OF INDIA

HUMBLE PETITION OF ABOVE-NAMED PETITIONER THEMOST RESPECTFULLYSHOWETHASUNDER:

1. Petitioner is filing this writ petition as a PIL under the Article 32 to declare Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, unconstitutional and violative of Articles 14, 15 and 21 of the Constitution, insofar as it seeks to recognize and validate the practice of Nikah Halala, Nikah Mutah and Nikah Misyar and Polygamy.

2. Petitioner has not filed any other petition either in this Hon'ble Court or in any other High Court seeking same/similar directions as prayed here.

[redacted]Petitioner's full name is Moullim Mohsin Bin Hussain Bin Abdad Al Kathiri, [redacted]

4. The facts constituting cause of action accrued on 22.08.2017 and every subsequent date, when this Hon'ble Court declared Triple-Talaq void but left the other issues viz. Polygamy and Halala undecided. Executive has neither enacted a Law to prohibit Triple Talaq, Nikah Halala, Nikah Mutah and Nikah Misyar nor declared them an offence under the IPC.

5. The injury caused to the women as practice of Triple Talaq, Polygamy, Nikah Halala, Nikah Mutah and Nikah Misyar are not only violative of Articles 14, 15 and 21 of the Constitution but also injurious to public order, morality and health. But, police lodge FIR in very few cases under Sections 498A, 494 and 375 of the IPC respectively for these offences.

6. Petitioner has no personal interests, individual gain, private motive or oblique reasons in filing this writ petition. The petition is not guided for gain of any other individual person, institution or body.

7. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with the issue involved in this writ petition. It is totally bona-fide and in the larger public interest.

8. There is no need to move concerned authority for relief sought in this petition and no other remedy available except filing the instant PIL.

9. Nikah Mutah and Nikah Misyar, literally means "pleasure marriage" is a verbal and temporary marriage contract that is practiced in Muslim Community, in which, duration of marriage and the mahr is specified and agreed upon in advance. It is a private contract made in a verbal format. Preconditions for Nikah Mutah are: The bride must not be married, she must be Muslim, she should be chaste and not addicted to fornication. She may not be a virgin, if her father is absent and cannot give consent. At the end of contract, marriage ends and women undergo iddah, a period of abstinence from marriage (intercourse). The iddah is intended to give paternal certainty to any child/girl if she becomes pregnant during the temporary marriage. It is pertinent to state that a written declaration of intent to marry and acceptance of the terms are required in other forms of marriages in Islam.

10. Generally Nikah Mutah and Nikah Misyar have no proscribed minimum or maximum duration. However, the Oxford Dictionary of Islam, indicates the minimum duration of the marriage is debatable and durations of at least three days, three months or one year have been suggested. Sunni Muslims and within Shia Islam, Zaidi Shias, Ismaili Shias and Dawoodi Bohras do not practice Nikah Mutah. However, Sunni Muslims practice Nikah Misyar, which is similar to Nikah Mutah.

11. Many Islamic scholars have already said that Nikah Halala, Nikah Mutah and Nikah Misyar are forbidden and void in Islam and its nothing but a religiously sanctioned rape. Undoubtly, these practices are not only violative of Articles 14, 15 and 21 of the Constitution but also injurious to public order, morality and health. But, the Government has not taken appropriate steps to ban these social evils.

12. In 2000, the United Nations Human Rights Committee reported that polygamy violates the International Covenant on Civil and Political Rights (ICCPR), citing concerns that the lack of "equality of treatment with regard to the right to marry" meant that polygamy, restricted to polygyny in practice, violates the dignity of women and should be outlawed. Specifically, the Reports to the UN Committees have noted violations of the ICCPR due to these inequalities and reports to the General Assembly of the UN have recommended it be outlawed. It is pertinent to state that India is signatory of ICCPR and Polygamy is an offence under Section 494 of the Indian Penal Code (IPC).

13. Many Countries have taken strong stand against polygamy. The Department of Justice of Canada has argued that polygamy is a violation of International Human Rights Law, as a form of gender discrimination. In Canada, the federal Criminal Code applies throughout the country. It extends the definition of polygamy to having any kind of conjugal union with more than one person at the same time. Also, anyone who assists, celebrates or is a part to a rite, ceremony, or contract that sanctions a polygamist relationship is guilty of polygamy.

14. A life of dignity and equality is undisputedly the most sacrosanct fundamental right guaranteed by the Constitution of India and it prevails above all other rights available under the law.

15. 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 the religion or religious faith or spiritual beliefs or sectarian, racial or communal constraints.

16. 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 Nikah Halala, Nikah Mutah and Nikah Misyar and Polygamy, which is not only grossly injurious to public order, morality and health, but also violative of the fundamental rights of Muslim women guaranteed under Articles 14, 15 and 21 of the Constitution.

17. The Constitution neither grants any absolute protection to any personal law of any community that is unjust, nor exempts personal laws from the jurisdiction of the Legislature or Judiciary. 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, [(2014) 9 SCC 1]*** 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.

18. The Constitution only protects positive tenets of the religion.

Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy definitely run counter to public order, morality and health and must therefore yield to the basic right of women to live with dignity, under equal protection of laws, without any discrimination on the basis of gender or religion.

19. Muslim Personal Law, like all other personal law, is subject to the rigours of the fundamental rights guaranteed under the Constitution. Consequently, any part of the Muslim Personal Law contravening the fundamental rights would, to that extent, is void and ineffective.

20. Muslim Personal Law, insofar as it allows Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy does not extend the same permission to women, contravenes the principle of equality guaranteed under Articles 14 and 15 of the Constitution. All persons within the territory of India are required to be afforded equality before the law as well as the equal protection of laws. Undoubtly, a law that discriminates against any person on the sole ground of sex is arbitrary and violative of the guarantee of equality.

21. The Muslim Personal Law permits Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and marry with upto four women. However, no similar provision exists for women. This system 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, Muslim Personal Law, insofar as it allows Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and have multiple wives and does not extend the same permission to women, is void and incapable of operation within the territory of India.

22. Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy contravenes Article 21 of the Constitution. The discrimination between men and women as regards the permission to have multiple spouses grossly offends the right to dignity of women, which has been recognized as an integral part of the right to life and personal liberty under the Article 21. Such a distinction has the effect of reducing the woman's status to much inferior to that of the man.

23. 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. Thus, practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy interferes with the right conferred by Article 21 of the Constitution. By considering the woman, an object of man's desire and practice Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy causes gross affront to the dignity of women.

24. Equality should be the basis of personal law since the Constitution envisages equality, justice and dignity for all citizens. Several Islamic nations have banned the practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy, while Indian Muslim women are still suffering on account of such practices. Thus, the basic rights of women are being violated continuously, despite reforms introduced by Islamic nations to secure a life of dignity unmarred by the gender discrimination..

25. The Constitution of India has primacy over the common law and common law has primacy over personal law and Indian Penal Code is applicable upon all Citizens. Hence, this Hon'ble Court may declare that practice of Nikah Halala, Nikah Mutah and Nikah Misyar is rape under Section 375, IPC and Polygamy is an offence under Section 494 IPC.

26. A complete ban on Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy has been the need of the hour as it renders Muslim women extremely insecure, vulnerable and infringes their fundamental rights. The importance of ensuring protection of women from the Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy have profound consequences on the quality of justice rendered in the country as well as ensuring a life of dignity for the citizens as guaranteed by Part III the Constitution.

27. Article 16(1) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) mandates State Parties to eliminate discrimination against women in all matters relating to marriage and ensure equality of men and women, the following:

i. The same right to enter into marriage;

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viii. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

28. From above international obligations, it is clear that India cannot conceive institutions like Nikah Halala, Nikah Mutah, Nikah Misyar that rests on regressive notions of inherent inequality between men-women.

29. Mutah, literally meaning joy, is a condition where rules of Islam are relaxed. It is used for a short term contract marriage that is Nikah Mutah. Since beginning, Mutah is a sensitive area of disagreement between those who follow Sunni Islam (for whom Nikah Mutah is void and forbidden) and those who follow Shia Islam (for whom Nikah Mutah is allowed). Few Shias and Sunnis do agree that, initially, or near the beginning of Islam, Nikah Mutah and Nikah Misyar was a legal contract. Beyond that time, the legality of these practices are debated.

30. A historical example of Nikah Mutah is described by Ibn Hajar Asqalani in his commentary on the work of Sahih al-Bukhari. Muawiyah, first caliph of Umayyad dynasty, entered into a Nikah Mutah contract with a woman. She was a slave who was owned by a man called Banu Hazrmee. She received yearly stipend from Muawiyah. Ordinarily, sexual access rights to a female slave belongs to her slave owner as part of his property rights, which cannot be shared or assigned until slave is married, in which case the slave owner loses all rights to sexual access.

31. Islamic scholar, Abdar-Razzaq and Sanani, described how Sayeed bin Jabeer Jubayr frequently visited a woman in Mecca. When asked why, he said he had a contract of Nikah Mutah with her and seeing her was "more halal than drinking water". By contrast, in the Sahih al- Bukhari, Mutah marriage is classed as forbidden because Ali bin Abu Talib said that he heard Muhammad say that it is forbidden. As narrated by 'Ali bin Abu Talib: "On the day of khaibar, Allah's Apostle forbade the eating of donkey-meat" as mentioned in Sahih al-Bukhari. Zaidi Shia texts state that Ali said Mutah marriage was void forbidden and for this reason the Zaidi Shia do not practice Nikah Mutah.

32. In sixteenth century, during the reign of Akbar, the third emperor of the Mughal Empire, who was believed to be a Hanafi Sunni, debates on religious matters were held weekly on Fridays. When discussing Nikah Mutah, Shiite theologians argued that the historic Sunni scholar Malik ibn Anas supported the practice. However, the evidence from Malik's Muwatta (manual of religious jurisprudence) was not forthcoming. The Shiite theologians persisted that Nikah mutah was legalized for the twelve Shia during Akbar's reign.

33. While according to the actual book Muwatta by Malik ibn Anas, the oldest book on Islamic Jurisprudence, Mutah was banned because Ali ben Abu Taleb said that Mutah was banned by Muhammad himself on the day of Khaibar. For this reason, the Zaidi Shias do not practice Mutah marriage. According to Islamic scholar Malik ibn Anas - *"Both Abdullah and Al-Hasan, the two sons of Muhammad ben Ali Abu Taleb, from their father Muhammad ben Ali ben Abu Taleb from Ali ben Abu Taleb, that the Messenger of Allah had forbidden temporary marriages, and the eating of the flesh of the domestic donkey on the day of Khaibar."* [Muwatta - Volume I, Chapter 18, Hadith 1151]

34. The Hanafi school of Sunni jurisprudence argues that although the Nikah Mutah is valid, but marriage is regarded as a temporary condition and therefore, the temporary element of the contract makes it void. The only Sunni Arab jurisdiction that mentions Nikah Mutah in Jordan; if the Nikah Mutah meets all other requirements, it is treated as if it were a permanent marriage. The 13th century scholar, Fakhr al-Din al-Razi said, amongst the Ummah there are many great scholars who deem Mutah to have been abrogated, whilst others say that Mutah still remains.

35. The 20th century Sunni scholar, Waheed uz-Zaman, Deobandi said On the topic of Mutah, differences have arisen amongst the Sahaba, and the Ahlul Hadith, and they deemed Mutah to be permissible, since Mutah under the Sharia was practiced and this is proven, and as evidence of permissibility they cite verse 24 of Surah Nisa as proof. The argument is that practice of Mutah is definite and there is ijma (consensus) and therefore one cannot refute proof by using logic.

36. The Gharabal Quran, the dictionary of Quranic terms states, the people of Faith are in agreement that Mutah is halal, then a great man said Mutah was abrogated, other than them remaining scholars, including the Shia believe Mutah remain halal in the same way it was in the past. The Tafsir Haqqani, a critical explanation of the Quran states, Some Sunni scholars deem Mutah permissible, in the same way the Sahaba Ibn Abbas & Imran bin Haseen deemed it permissible. But, Ibn

Abbas was rebuked by Ali himself on Mutah marriage itself. In sahih Muslim, it is mentioned that Ali heard that Ibn Abbas gave relaxation in connection with contracting of temporary marriage. Ali replied-don't be hasty (in religious verdict), Ibn'Abbas, on the day of Khaibar prohibited for ever the doing of it - and eating of the flesh of domestic asses.

37. Sunni Muslims use this hadeeth from Sahih Muslim as further evidence that even great companions like Ibn Abbas got it wrong and Ali had to correct him. And this correction by Ali they say ends the whole subject matter on the complete banning of Mutah marriage. De facto, temporary marriages were conducted by Sunnis by not specifying how long the marriage would last in the written documents themselves while orally agreeing to set a fixed period.

38. Even though Nikah Mutah is prohibited by Sunni schools of law, several types of innovative marriage exist, including Misyar (ambulant) and ʿurfi (customary)marriage. Many scholars regard Misyar as being comparable to Nikah Mutah: for the sole purpose of *"sexual gratification in a licit manner"*. Sunnis dismiss these claims as nothing more than Shia polemics. Nikah Misyar, they argue, unlike Nikah Mutah is not temporary but a permanent marriage with no time limits. The difference between a normal marriage and Misyar marriage is that in Misyar the man and woman forego certain rights temporarily until both partners choose to reinstate them. But, Misyar is still frowned upon in Sunni Islam and never recommended. In Baathist Iraq, Uday Hussein's daily newspaper Babil, which at one point referred to the Shiites as rafidah, a sectarian epithet for Shia regularly used by ultraconservative Salafi Muslims, attacked Whhabi clerics as hypocrites for endorsing Nikah Misyar while denouncing Nikah Mutah.

39. The Twelver Shias as the main branch of Shia Islam give arguments based on the Quran, hadith, history, and moral grounds to support their position on Mutah. Word of Quran takes precedence over that of any other scripture, including An-Nisa, known as verse of Mutah. A Twelver Shia hadith attributed to Ali ibn Yaqteen notes that Musa al- Kadhim, the seventh of The Twelve Imams, when asked about Nikah Mutah, said-*"Why do you ask, when Ali, with the blessing of Allah, have a wife at your side?* Ali replied: *"No, I just want to know."* Imam Kadhim replied: *"The permissibility is present within the Book of Allah".* Hadiths also record the use of Nikah Mutah during the time of Abu Bakr, a caliph and sahabi. Later, Umar, also a caliph and sahabi, prohibited Mutah.

40. Other relevant Hadiths include those of Imran ibn Husain, and Abdullah Ibn Abbas. The opinion of Ibn Abbas is cited in Fatih al- Qadir: "Ibn Abbas said the verse of Mutah"; in Tafseer Mualim al Tanzeel Ibn Abbas said: *"The verse of Mutah was an order and it's Halal."*; in Tafseer Kabeer, *"The verse of Mutah appears in the Quran, no verse has come down to abrogate it.";* in Bukhari: "On that, a freed slave of his said to him, "That is only when it is very badly needed and (qualified permanent) women are scarce, or similar cases."

41. Historically, the Twelver Shias see that Nikah Mutah has varied in its spiritual legality, changing from Halal to Haram and back again over time, and thus cannot be considered in the same light as, for example, taking alcohol, which was never advocated by Mohammad. Other Twelver Shia hadiths are not in favor of Mutah marriage because Imam Baqir and Imam Jafar told their companions and their followers to be careful in practicing of Nikah Mutah in fear of prosecution.

42. Abdullah Bin Umair asked Abi Jafar: *Is it acceptable to you that your women, daughters, sisters, daughters of your aunts do Mutah?* Abu Jafar rebuked him when he mentioned his women and daughters of his aunts. Because due to the question being of the ignorant kind, and that the question was only asked to rise frustration about Nikah Mutah.

43. In another Twelver Shia hadith narrated from Imam Jafar Ul Sadaq Narrated by Amaar: Abu Abdullah, Imam Jafar Sadaq said to Suliman Bin Khaled: *"I from myself have made Mutah Haram on to the both of you, as long as you are in Medina. And this because you come to me all to frequent, and I fear the followers of the other party will capture you and prosecute you because of your friendship to me".*

44. In Zaidi books like Mujmoo Imam Ali, Hadiths narrated by Ali bin Abi Talib state: *"Allah's Messenger forbade temporary marriage in the year of Khaybar."* Ali Talib said to a man who was engaging in Mutah: *"You are a straying person, Messenger of Allah has forbidden temporary marriage".* Zaidites dismissed all claim made by Athana Asheri, Twelver Shia about Mutah legality & class text that try to justify it as fabrications. Zaidites and Ismailites argue that it is narrated from Imam Jaffar ul Sadiq to Imam Ismail Ul Mubarak that these texts are fornication and that it is adultery, *Zina Bil Raza*. Zaidites argue that the traditions banning Nikah Mutah are classified as Muthawathar, highly authentic.

45. Muhammad ibn Idris ash-Shafii, a 9th century Sunni Shafii Islamic scholar writes: "*Nikah Mutah in our eyes is false"*, whilst Imam Malik deemed it permissible, as proof he says: *"it was Halal and permissible, it was removed and was not abrogated".* Ahmad Ibn Hanbal, a 9th century Sunni scholar writes: In the same way that Ibn Abbas deemed Mutah to be Halal, Imam Ibn Hanbal also stated Mutah was halal. Ibn Abbas and other party amongst the Sahaba narrated traditions that Mutah is halal, and Ibn Hanbal also said that it was practicable. Ibn Abbas another Sahaba said that Mutah can be utilized when needed, Ibn Hanbal also narrated the same. Sayyid Abul Ala Maududi, a 20th century Sunni scholar writes: Whether Mutah is Haram or Halal is a dispute that creates dissension between Shias and Sunnis, and has resulted in heated discussion, it is not difficult to ascertain the truth. A man comes across such situations when Nikah becomes impossible and he is forced to make a distinction between Zina and Mutah. In such scenarios practicing Mutah is a better option to Zina.

46. Sunnis term Mutah a *"Lustful act under a religious cover".* Many scholars have said that Mutah in present age amounts to prostitution. Following 2014 release of 82-page document detailing Iran's rampant prostitution, Mutah has been suggested by Iranian parliamentarians as a solution to the problem – where couples would be allowed to register their union through institution of Mutah marriage. The establishment of chastity houses has also been proposed in the past where prostitutes will be provided in state sanctioned houses, but the clients would have to perform the Nikah Mutah first. The proposal has not been as of yet ratified by Iranian authorities. According to Shahla Haeri, the Iranian middle class itself considers Mutah to be prostitution which has been given a religious cover by fundamentalists.

47. Western writers have argued that Mutah is prostitution. Julie Parshall writes that Mutah is legalized prostitution, which has been sanctioned by the Twelver Shia authorities. She quotes the Oxford encyclopedia of modern Islamic world to differentiate between Nikah and Mutah, and states that while Nikah is for procreation, Mutah is just for sexual gratification. According to Zeyno Baran, Mutah provides men a religiously sanctioned prostitution. Elena Andreeva observes that Russian travelers to Iran consider Mutah to be "legalized profligacy" which is indistinguishable from prostitution. Supporters of Mutah argue that Mutah is different from prostitution for a couple of reasons, including necessity of iddah in case the couple has sexual intercourse. It means that if a woman marries a man in this way and has sex, she has to wait for a number of months before marrying again and therefore, a woman cannot marry more than three or four times in a year.

48. Nikah Misyar has been suggested by many Islamic authors to be a comparable marriage with Nikah Mutah (temporary marriage) and that they find it for the sole purpose of *"sexual gratification in a licit manner".* According to Karen Ruffle, assistant professor of religion at the University of Toronto, even though Nikah Mutah is prohibited by Sunni schools of law, several types of impermanent marriage exist, including Misyar (ambulant) marriage and ʿurfi (customary) marriage, which gained popularity in parts of the Sunni world. According to Florian Pohl, assistant professor of religion at Oxford College, Misyar marriage is controversial issue in the Muslim world, as many see it as practice that encourages marriages for purely sexual purposes, or that it is used as a cover for a form of prostitution.

49. Islamic scholars like Ibn Uthaimeen or Al-Albani claim, for their part, that Misyar marriage maybe legal but not moral. They agree that the wife can reclaim the rights, which she gave up at the time of contract at any time. But, they are opposed to this type of marriage on the grounds that it contradicts the spirit of the Islamic law of marriage and that it has perverse effects on the woman, the family, and the community in general. Some ulama (scholars) have issued fatwas (legal opinions) in which they contend that Misyar is zina (fornication). For Al- Albani, Misyar marriage may even be considered as illicit, because it runs counter to the objectives and the spirit of marriage in Islam, as described in this verse from the Quran :

"And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts)..."

50. Al-Albani also underlines the social problems, which can result from the Misyar marriage, particularly in the event that children are born from this union. The children raised by their mother in a home from which the father is always absent without reason may suffer difficulties. Ibn Baazwas asked about Misyar marriage with the intention of divorce. He replied that it is permissible, and he along with Permanent Council (of Muftis), decreed that it is permissible. *"Someone asked him: In one of your tapes, you have a fatwa that it is permissible for someone in a Western country to get married with the intention of getting divorced after a specific period. What is the difference between this and between Mutah?*

Response: *Yes, this fatwa has come from Permanent Council (of Muftis), and I am its leader, and we have ruled that it is permissible to marry with the intention of getting divorced if this intention is between the servant and his Lord. If someone marries in a Western country, and his intention is that when he finishes his studies or finds a job or something like this that he will get divorced, then there is absolutely no problem with this in the opinion of all 'ulama. This intention is something between the servant and Allah, and is not a condition. The difference between this and Mutah is that Mutah has the condition of a definite time period, such as a month or two months or a year or two years and so forth. If the time period ends, then the Nikah is abrogated. This is the invalid form Mutah. However, if somebody marries according to the Sunnah of Allah and the Prophet, but he nonetheless holds the intention in his heart that when he leaves the country he will divorce, then there is no harm it. This intention might change, and so it is not something definite.*

This intention is not a condition, and it is something between the servant and his Lord. There is no harm in it, and it is one of the ways that a person may remain chaste and avoid fornication and debauchery. This is the statement of all people of knowledge."

51. Earlier ulama (scholars) also noted consensus upon Nikah Misyar (temporary) marriagewiththeintentionofdivorce.Al-Nawawiwrote:

"Qazi said: *'There is an unanimous agreement that whoever performs permanent marriage but his intent is to stay with her for a specific period, verily his marriage is valid, and it is not Mutah marriage, because Mutah marriage is based on a conditional period."*

52. Ibn Baaz was also asked about Misyar marriage as thus:

"This kind of marriage is where the man marries a second, third or fourth wife, and the wife is in a situation that compels her to stay with her parents or one of them in her own house and the husband goes to her at various times depending on the circumstances of both. What is the Islamic ruling on this type of marriage?"

He replied: *"There is nothing wrong with that if the marriage contract fulfills all the conditions set out by sharee'ah, which is the presence of the wali and the consent of both partners, and the presence of two witnesses of good character to the drawing up of the contract, and both partners being free of any impediments, because of the general meaning of the words of the Prophet (peace and blessings of Allaah be upon him): 'The conditions that are most deserving of being fulfilled are those by means of which intimacy becomes permissible for you' and 'The Muslims are bound by their conditions.' If the partners agree that the woman will stay with her family or that her share of the husband's time*

will be during the day and not during the night, or on certain days or certain nights, there is nothing wrong with that, so long as the marriage is announced and not hidden."

53. Shaykh-Al-Albani was asked about Nikah Misyar and he forbade it for two reasons: *The purpose of marriage is repose as Allah says: "And among His Signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect". But this is not achieved in this kind of marriage. It may be decreed that the husband has children with this woman, but because he is far away from her and rarely comes to her, that will be negatively reflected in his children's upbringing and attitude.*

54. According to the Quran (2:229, 2:230): *"Divorce is twice. Then, either keep her in an acceptable manner of release her with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah . But if you fear that they will not keep [within] the limits of Allah , then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah , so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers." "And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah . These are the limits of Allah, which He makes clear to a people who know."*

55. The above Quran stated verse is often interpreted as following: *If a husband divorces his wife by pronouncing talaq, he can revoke the divorce within the iddah, that is, the period of separation that precedes divorce. If the divorce is completed, the couple can remarry. The couple may divorce and remarry twice. However, if they divorce a third time, they can neither unite within the iddah period nor marry again until the ex- wife marries another man, to ensure that the divorce is taken seriously. Consequently, the above interpretation is used as a strategy to remarry, or Halala, and often justified by some as true belief. This belief has been the basis of financial and sexual exploitation of Muslim women, and has received much critical news coverage.*

56. On 29.03.2000, in its General Comment No. 28 (2000), the UN Committee on Civil and Political Rights very 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 this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.*" Copy of UN General Comment No. 28 dated 29.03.2000 is annexed as Annexure P-1. (Pages 44-52)

57. On 13.05.2005, Article 3 of ICESCR recognizes the "*equal right of men and women to the enjoyment of all economic, social and cultural rights*". In its General Comment No. 16 (2005), the UN Committee on Economic, Social and Cultural Rights expanded on the aforementioned Article 3, and stated in very clear terms that State Parties to the ICESCR

have a positive obligation to eliminate "*prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women*". This includes the positive obligation to prevent third parties (non-State actors) from interfering directly or indirectly with the enjoyment of the right to equality. True copy of the UN General Comment No. 16 dated 13.052005 is annexed herewith as Annexure P-2. (Pages53-62)

58. The Committee on Elimination of Discrimination Against Women (CEDAW) in its General Recommendation 35 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 very serious emotional and financial ramifications for her and her dependents. The Committee noted "*with concern*" despite their Constitution guaranteeing the right to equality some States parties continued to permit polygamous marriages in accordance with personal or customary law. This, as per Committee, violated the constitutional rights of women. True copy of the CEDAW General Recommendation No.35 dated 14.07.2017 is annexed as Annexure P-3. (Page63-78)

59. On 22.08.2017, the five judges bench of this Hon'ble Court declared *Section 2 of the Muslim Personal Law Application Act, 1937,* arbitrary and violative of Articles 14, 15 and 21 of the Constitution, insofar as it seeks to recognize and validate practices of *Talaq-E-Biddat,* but left other issues such as polygamy and Nikah-halala undecided.

60. The practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy is not only violative of Articles 14, 15 and 21 of the Constitution but also injurious to public order, morality and health.

61. If Preamble is key to understand the Constitution of India, the Directive Principles are its basic ideals. The Constitution makers poured their mind by setting forth humanitarian socialist secular principles, which epitomized hopes and aspirations of people and declared the Directives as the fundamental in the governanceofthecountry.

62. Directive Principles are affirmative instruction from the ultimate sovereign to the State authorities, to secure to all citizens; Justice – social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all fraternity, assuring dignity of the individual and unity and integrity of the nation. Therefore, it is duty of the State to direct their activities in such a manner so as to secure the high ideals set forth in the Preamble and Parts III and IV of the Constitution. The Directives are an amalgam of diverse subject embracing the life of the nation and include principles, which are statements of socio economic rights, social policy, administrative policy and international policy.

63. The object of the Article 44 is to introduce a uniform civil code for all Indian citizens to promote fraternity, unity and national integration. It proceeds on the assumption that there is no necessary connection between religion and personal laws in a civilized society. While the Constitution guarantees freedom of conscience and of religion, it seeks to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage, just as it has been done even in Muslim Countries like Turkey and Egypt. The object of Article 44 is not to encroach upon religious liberties. The Article 25 already reserves such right of the State.

64. Dr. B.R. Ambedkar, during the Constituent Assembly said as thus: *"In fact, bulk of these different items of civil laws have already been codified during the British Rule and the major items still remaining for a Uniform Civil Code are marriage, divorce, inheritance and succession"*.

65. The several enactments, which have been made by the Parliament since Independence in the name of the Hindu Code relating to marriage, succession, adoption and guardianship, relate only to Hindus (including Budhists, Jains and Sikhs) and excludes the Muslims, who are the major slice of the minority communities and who are more vociferously objecting to frame a uniform civil code for all citizens of India.

66. In Shah Bano case, this Hon'ble Court has observed: *"It is a matter of regret that Article 44 has remained dead letter. It provides that 'the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India' but there is no evidence of any official activity for framing a common civil code. A belief seems to have gained that it is for Muslim community to take a lead in the matter of reforms of their personal law. Common civil code will help the cause of national integration by removing desperate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is for the State, which is charged with the duty of securing a uniform civil code and it has legislative competence to do so. A counsel in this case whispered that legislative competence is one thing, the political courage to use that competence is quite another. We understand difficulties involved in bringing persons of different faiths and persuasion on a common platform but beginning has to be made, if the Constitution has any meaning. Role of the reformer has*

to be assumed by the Courts because; it is beyond endurance of sensitive minds to allow injustice when it is so palpable. Piecemeal attempts to bridge the gap cannot take the place of Common Code. Justice to all is for more satisfactory way of dispensing justice than justice from case to case".

67. The objection against uniform civil code that it would be a tyranny to the minority community was strongly rejected by Sh. Munshi as thus: *"An argument has been advanced that the enactment of a common civil code would be tyrannical to minorities. Nowhere in advanced Muslim countries, personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a common civil code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. When the Sharia Act was passed, the Khojas and Cutchi Memons were highly dissatisfied. They then followed certain Hindu customs for generations since they became converts they had done so. They didn't want to confirm to Sharia and yet by legislation of the Central Legislature where certain Muslim members who felt that Sharia law should be enforced upon the whole community carried their points. Khojas and Cutchie Memons unwillingly had to submit to it. When you want to consolidate a community, you have to consider the benefit, which may accrue, to the whole community and not to the customs. It is not therefore; correct to say that such an Act is tyranny of the majority. If you look at the Countries in Europe, which have a common civil code, everyone who has gone there from any part of the world and even minorities has to submit the common civil code. The point is whether we are going to consolidate and unify our personal law. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties*

as regards inheritance of succession. What have these things got to do with religion. I really fail to understand. There is no reason why there should not be a common civil code throughout the territory of India. 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 consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity but there are many factors and important faction, which still offer serious dangers to national consolidation. It is very necessary that whole of our life insofar as it is restricted to secular sphere must be unified in such a way that we may be able to say- 'We are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are strong and consolidated nation.' From that point of view, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that, this is not an attempt to exercise tyranny over a minority community; it is much more tyrannous to majority community".

68. Sh. Alladi Krishnaswami Iyer said that a Civil Code ran into every department of civil relation to the law of succession, to the law of marriage and similar matters; there could no objection to the general statement that *'State shall endeavour to secure a Uniform Civil Code'*.

69. The Drafting Committee Chairman Dr. BR Ambedkar also spoke at some length on the matter. He said: *"We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal court.....We have the law of transfer of property which deals with property relation and which is operative*

throughout the country……. I can cite innumerable enactments, which would prove that the country has practically a Civil Code, uniform in its contents and applicable to the whole of the country."

70. In John Vallamattom versus Union of India, [AIR 2003 SC 2902: (2003) 6 SCC 611], the then Hon'ble Chief Justice of India Justice V. N. Khare, with whom the other two Judges, Justice Sinha and Justice Lakshman agreed, observed: *"A common civil code will help the cause of national integration by removing all contradictions based on ideologies".* The Court also observed that *"the power of the Parliament to reform and rationalize the personal laws is unquestioned and the command of Article 44 of the Constitution is yet to be realized".*

71. In Sarla Mudgal case [AIR 1995 SC 1531: (1995) 3 SCC 635], while insisting the need for a Common Civil Code, this Hon'ble Court has held that the fundamental rights relation to religion of members of any community would not be affected thereby. It was held that personal law having been permitted to operate under authority of legislation the same can be superseded by a uniform civil code. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized Society. Article 25 guarantees religious freedom and Article 44 seeks to divest religion from social relation and personal law. Marriage, succession and like matter of secular character cannot be brought under the Articles 25, 26 and 27. Hon'ble Judges requested the Prime Minister of India to have a fresh look at Article 44 and endeavour to secure for the citizens a uniform civil code throughout the territory of India and wanted the Court to be informed about the steps taken. However, in Lily Thomas case, the Court clarified the

remarks made in Sarla Mudgal case was only as an opinion of the Judges and declared that no direction have been issued for any legislation. At the same time, the Court did not express any dissenting view of the need for a common civil code. It only held that to have a legislation or not is a policy decision and Court cannot give any direction to the Executive.

72. That diversity in the personal matters along with religious differentiation leads to sentimental tension between different communities as has been learnt by bitter experience from the history leading to partition and subsequent events till today. It can never be forgotten that the policy of British imperialism was 'divide and rule' and for that purpose, they would at times can anything, which might make the cleavage between Hindus and Muslims, wider and wider. The British rulers, thus, lost no opportunity in inserting even newer wages like the communal award which planted separate representation in the legislature according to religion; and eventuality led to lamentable partition, which truncated the motherland and involved so much of bloodshed and inhuman outrages.

73. The ideological concept, which led to partition was the assertion of the Muslims that they constitute a 'Nation' separate from the Hindus. Even though Hindu leader did not admit two-nation theory. Partition is an accomplished fact and cannot be wiped off. The framers of the Constitution had in their mind the fresh experience of atrocities, which were committed at the time of partition of India. When the Muslims were given the options to go away to new dominion, it was quite natural for the leaders of divided India to aspire for the unity of the one nation, namely, Indian, so that history might not repeat itself.

74. By 42nd amendment; expression *'Unity of Nation'* was replaced by the *'Unity and Integrity of the Nation'* and Article 51A was introduced, which inter-alia provides that: *It shall be the duty of every citizen of India*

(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem; (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; (c) to uphold and protect the sovereignty, unity and integrity of India; (d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; (f) to value and preserve the rich heritage of our composite culture; (g) to protect and improve the natural environment including forests, lakes rivers and wild life, and to have compassion for living creatures; (h) to develop the scientific temper, humanism and the spirit of inquiry and reform; (i) to safeguard public property and to abjure violence; (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

75. The Constitution makers wanted to establish a 'Secular State' and with that purpose they codified Article 25 which guaranteed freedom of religion, freedom of conscience and freedom to profess, practice and propagate religion, to all persons. But at the same time they sought to distinguish between essence of a religion and other secular activities, which might be associated with religious practice but yet did not form a part of the core of the religion, and with this end in view they inserted

Clause 2(a) as thus: *"Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities, which may be associated with religious practices."*

76. Anybody, who raises an objection to implementation of Article 44 becomes guilty of violation of the Preamble, Article 44 as well as Article 51A and any Government, which yields to such demands, even after 68 years of the adoption of the Constitution, would be not only liable to the charge of throwing the Constitution to the winds, but also of being a party to the violation of Articles 44 and Article 51A, and also of guarantee of equality and non-discrimination on the ground of religion, race, caste, sex & place of birth under Articles 14-15 of the Constitution.

77. Clause (e) of the Article 51A enjoins every citizen to renounce practices derogatory to the dignity of woman. Clause (h) enjoins every citizen to develop scientific temper, humanism and the spirit of inquiry and reform. It needs little arguments to point out that a man marrying up to four wives or divorcing his wife by the utterance of word 'Talaq' thrice; or refusal to maintain a divorced wife after a limited period of time (three months); are all practices derogatory to the dignity a woman. Therefore, any member of the Muslim community, who resorts to such practices, who himself or urges that such practices should be immuned from legislation or that Article 44 itself must be wiped off or restricted to persons other than Muslims, is violating the Article 51A. Whether that provision of the Article 51A are unenforceable in the Court of law or not, is a different question; but in other countries, such a person would have lost his citizenship if not something more.

78. It is the most radical argument that Article 44 should not be implemented because it is opposed to Sharia. It is pertinent to quote the former CJI Justice Chagla's article 'Plea for Uniform Civil Code' - *"Article 44 is a mandatory provision binding the Government and it is incumbent upon it is to give effect to this provision... The Constitution was enacted for the whole country, it is binding for the whole country, and every section and community must accept its provisions and its Directives".*

79. As far as the plea of Muslim identity is concerned, it is nothing but a relic of the two-nation theory, which was asserted by Muslim leaders to carve out a separate State on the basis of religion. On the other hand, Nationalist Indian leaders all along urged that there was only one Nation, *viz.* India; and after the Muslims went away on the partition, there was nothing to stand in the way of proclaiming in the Preamble that the goal of India was One Nation united by the bond of fraternity. There should not be any fear of losing identity when the Constitution guarantees religion, language, culture, in Articles 26, 29, 30 of the Constitution. After the partition, the Muslims who preferred to remain in divided India knew very well what they could get from the Secular Indian Government. Hence, *to cry for more, is nothing but a resurrection of slogan 'Islam in Danger' which led to the partition of India.*

80. It is next contended that even though a common civil code is desirable, it could not be implemented until Muslim themselves come forward to adopt it. It is only a diluted form of plea for abolition of Article 44 of the Constitution altogether, because the Article 44 may virtually be effaced if the Muslims never come forward with their consent. None of Directives lay down that they can be implemented only

if there is 100% consents of the citizens throughout the territory of India. The Constitution was adopted after the due deliberation as to its provisions being beneficial to the people of India, by the Constituent Assembly having enough Muslim representatives.

81. Illiterate/ignorant parents don't desire that their children should go to school instead of helping them in agriculture, or earning money in factories. Should the implementation of Article 45 wait until these people give their consent? The controversy arising from the Shah Bano case clearly exposed that it is only a section of the Muslim community, who would not accept it. Is there any precedent in any country, where the caprices of such a fraction of the population having allowed to stand in the way of unity, integrity and progress of the entire nation and the implementation of the fundamental law of the country, adopted by a solemn Constituent Assembly? Article 44 is addressed to State thus it is duty of State to implement it in consonance with Articles 14, 15 and 21.

82. This Hon'ble Court has obserevd: *"A belief seems to have gained ground that it is for the Muslims community to take a lead in the matter of reforms of their personnel law.....But it is the State which is charged the duty of securing a uniform civil code for the citizens of the country. This duty has been imposed on the State with the object of achieving national integration by removing disparate loyalties to laws which have conflicting ideologies."* The question arises – why then has the Union Government failed to discharge the Constitutional mandate for more than 6 decades? The Answer has been pithily answered by the Court – "*lack of political courage*" – which many other responsible persons have amplified as the fear of losing Muslim votes at the next election.

83. The State has not only failed to implement Article 44 of the Constitution but also violated the norm of the much-vaunted secularism. It is also curious that the Government has not yet protested against the decision of the Indian Muslim Personal Law Board to setup parallel Courts in many localities to decide the cases under the Shariat, even though the setting up of such a parallel Courts will not only sound a death knell to Article 44 of the Constitution, but also to the other provisions in the Constitution providing for one system of judiciary throughout the territory of India for all its people. It is definitely a retrograde step cutting at the roots of the Constitution of India.

84. It is also urged that the Shariat is immutable being founded on the Quran which is ordained by the God. Apart from the historical fact that this issue has been concluded by the partition of India and adoption of the Constitution it has been belid by the multifarious changes by way of reform in all the Muslim State e.g. Egypt, Jordan, Morocco, Pakistan, Syria, Tunisia, Turkey – where no question of Hindu dominance arose.

85. It is pertinent to State the Report of the Commission on Marriage and Family Laws, which was appointed by the Government of Pakistan in 1955, and which should have demolished, once for all, the plea that the Shariat is immutable. In words of Allama Iqbal, *"The question which is likely to confront Muslim Countries in the near future, is whether the Law of Islam is capable of evolution – a question which will require great intellectual effort, and is sure to be answered in the affirmative."*

86. Goa has a common civil code since 1965, which is applicable on all its citizens. Now a pertinent question arises - if Uniform Civil Code can be implemented in Goa, then why not throughout the territory of India.

87. One more logic is given that even if a common civil code is formulated, it should be optional for the Muslims to adopt its provisions. Petitioner states that it is only a diluted version of the forgoing pleas, viz. that the Shariat is immutable; that no Code can be imposed on Muslims without their consent. It is unmeaning to draw-up a uniform civil code as enjoined by Article 44 if it is not binding on every citizen.

88. Polygamy is totally prohibited in Tunisia and Turkey. In countries like Indonesia, Iraq, Somalia, Syria, Pakistan and Bangladesh, it is permissible only if authorized by the prescribed authority. Unilateral Talaq has been abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq etc. In Pakistan and Bangladesh, any form of extra judicial Talaq shall not be valid unless confirmed by an arbitration council but in India, it is continuing. The Dissolution of Muslim Marriage Act, 1939, provided Muslim women to obtain dissolution in certain cases, which they do not have under the Shariat. Under the Act, marriage with another woman would be treated as an act of 'cruelty' to bar a husband's suit for restitution of conjugal rights. The Act has been adopted in Pakistan and Bangladesh with amendments. The statement of objects and reasons of the Act, which has been conceded by Muslims in India, Pakistan and Bangladesh is illuminating: *"There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the Court dissolving her marriage in case a husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her un-provided for and under other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India."*

89. If the Government is serious to bring about a common civil code, it should come forward with authoritative pronouncement instead of being beguiled by statements issued by few fundamentalists led by All India Muslim Personal Law Board, which is an NGO, registered in 1973.

90. Shariat is controlled by legislation in Pakistan and Bangladesh. In India, a uniform law of maintenance was adopted by Section 488 CrPC. When Section 125 CrPC extended to divorced women, Muslims contended that it should not be applied to them as it was contrary to Shariat but the Court turned down this contention. The Court also rejected argument that according to Muslim Personal Law, husband's liability to provide for maintenance of his divorced wife is limited to iddat. It was held that Section 125 CrPC overrides the personal law.

91. This Hon'ble Court interpreted that under Section 3 of the Act, 1986, a Muslim husband is liable to make provision for the future of a divorced wife even after iddat period.. *[Sabra Shamim versus Maqsood Ansari, (2004) 9 SCC 606]* Justice Khalid of Kerala High Court reminded the plight of Muslim women and wanted the law to be amended to alleviate their sufferings and above decisions were approved by this Hon'ble Court in Shamim Ara v State of UP *[(2002) 7 SCC 518]*.

92. In the Constituent Assembly, Mr. Nasiruddin's speech says thus: "*certain aspects of the Civil Procedure Code have interfered with our Personal Law and very rightly so and also that marriage and inheritance are similar practices associated with religion". [Vol-VII, P542]*

93. Many minor girls are victim of contract marriage viz. Nikah Halala, Nikah Mutah and Nikah Misyar. Latest incident published by the Indian Express on 20.09.2017 is annexed as Annexure P-4. (Pages 79-80)

GROUNDS

A. Nikah Mutah and Nikah Misyar, literally means "pleasure marriage" is a verbal and temporary marriage contract that is practiced in Muslim Community, in which, duration of marriage and the mahr is specified and agreed upon in advance. It is a private contract made in a verbal format. Preconditions for Nikah Mutah are: The bride must not be married, she must be Muslim, she should be chaste and not addicted to fornication. She may not be a virgin, if her father is absent and cannot give consent. At the end of contract, marriage ends and women undergo iddah, a period of abstinence from marriage (intercourse). The iddah is intended to give paternal certainty to any child/girl if she becomes pregnant during the temporary marriage. It is pertinent to state that a written declaration of intent to marry and acceptance of the terms are required in other forms of marriages in Islam.

B. Generally, Nikah Mutah and Nikah Misyar have no proscribed minimum or maximum duration. However, the Oxford Dictionary of Islam, indicates the minimum duration of the marriage is debatable and durations of at least three days, three months or one year have been suggested. Sunni Muslims and within Shia Islam, Zaidi Shias, Ismaili Shias and Dawoodi Bohras do not practice Nikah Mutah. However, Sunni MuslimspracticeNikahMisyar,whichissimilartoNikahMutah.

C. Many Islamic scholars have already said that Nikah Halala, Nikah Mutah and Nikah Misyar are forbidden and void in Islam and its nothing but a religiously sanctioned rape. Undoubtly, these practices are not only violative of Articles 14, 15 and 21 of the Constitution but also injurious to public order, morality and health.

D. In 2000, the United Nations Human Rights Committee reported that polygamy violates the International Covenant on Civil and Political Rights (ICCPR), citing concerns that the lack of "equality of treatment with regard to the right to marry" meant that polygamy, restricted to polygyny in practice, violates the dignity of women and should be outlawed. Specifically, the Reports to the UN Committees have noted violations of the ICCPR due to these inequalities and reports to the General Assembly of the UN have recommended it be outlawed. It is pertinent to state that India is signatory of ICCPR and Polygamy is an offence under Section 494 of the Indian Penal Code (IPC).

E. Many Countries have taken strong stand against polygamy. The Department of Justice of Canada has argued that polygamy is a violation of International Human Rights Law, as a form of gender discrimination. In Canada the federal Criminal Code applies throughout the country. It extends the definition of polygamy to having any kind of conjugal union with more than one person at the same time. Also, anyone who assists, celebrates or is a part to a rite, ceremony, or contract that sanctions a polygamist relationship is guilty of polygamy.

F. A life of dignity and equality is undisputedly the most sacrosanct fundamental right guaranteed by the Constitution of India and it prevails above all other rights available under the law.

G. 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 the religion or religious faith or spiritual beliefs or sectarian, racial or communal constraints.

H. 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 Nikah Halala, Nikah Mutah and Nikah Misyar and Polygamy, which is not only grossly injurious to public order, morality and health, but also violative of the fundamental rights of Muslim women guaranteed under Articles 14, 15 and 21 of the Constitution.

I. The Constitution neither grants any absolute protection to any personal law of any community that is unjust, nor exempts personal laws from the jurisdiction of the Legislature or Judiciary. 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, [(2014) 9 SCC 1]*** 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.

J. The Constitution only protects positive tenets of the religion. Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy definitely run counter to public order, morality and health and must therefore yield to the basic right of women to live with dignity, under equal protection of laws, without any discrimination on the basis of gender or religion.

K. Muslim Personal Law, like all other personal law, is subject to the rigours of the fundamental rights guaranteed under the Constitution. Consequently, any part of the Muslim Personal Law contravening the fundamental rights would, to that extent, is void and ineffective.

L. Muslim Personal Law, insofar as it allows Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy does not extend the same permission to women, contravenes the principle of equality guaranteed under Articles 14 and 15 of the Constitution. All persons within the territory of India are required to be afforded equality before the law as well as the equal protection of laws. Undoubtly, a law that discriminates against any person on the sole ground of sex is arbitrary and violative of the guarantee of equality.

M. The Muslim Personal Law permits Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and marry with upto four women. However, no similar provision exists for women. This system 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, Muslim Personal Law, insofar as it allows Muslim men to practice Nikah Halala, Nikah Mutah, Nikah Misyar and have multiple wives and does not extend the same permission to women, is void and incapable of operation within the territory of India.

N. Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy contravenes Article 21 of the Constitution. The discrimination between men and women as regards the permission to have multiple spouses grossly offends the right to dignity of women, which has been recognized as an integral part of the right to life and personal liberty under the Article 21. Such a distinction has the effect of reducing the woman's status to much inferior to that of the man.

O. 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. Thus, practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy interferes with the right conferred by Article 21 of the Constitution. By considering the woman, an object of man's desire and practice Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy causes gross affront to the dignity of women.

P. Equality should be the basis of personal law since the Constitution envisages equality, justice and dignity for all citizens. Several Islamic nations have banned the practice of Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy, while Indian Muslim women are still suffering on account of such practices. Thus, the basic rights of women are being violated continuously, despite reforms introduced by Islamic nations to secure a life of dignity unmarred by the gender discrimination.

Q. The Constitution of India has primacy over the common law and common law has primacy over personal law and Indian Penal Code is applicable upon all Citizens. Hence, this Hon'ble Court may declare that practice of Nikah Halala, Nikah Mutah and Nikah Misyar is rape under Section 375, IPC and Polygamy is an offence under Section 494 IPC.

R. A complete ban on Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy has been the need of the hour as it renders Muslim women extremely insecure, vulnerable and infringes their fundamental rights. The importance of ensuring protection of women from the Nikah Halala, Nikah Mutah, Nikah Misyar and Polygamy have profound consequences on the quality of justice rendered in the country as well as ensuring a life of dignity for the citizens as guaranteed by Part III the Constitution.

S. Article 16(1) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) mandates State Parties to eliminate discrimination against women in all matters relating to marriage and ensure equality of men and women, the following:

i. The same right to enter into marriage;

ii. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

iii. The same rights/responsibilities during marriage & at its dissolution;

iv. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

v. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

vi. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

vii. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

viii. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free ofchargeorforavaluableconsideration.

T. From above international obligations, it is clear that India can't conceive institutions such as Nikah Halala, Nikah Mutah, Nikah Misyar etc. that rests on regressive notions of inherent inequality between men-women.

PRAYERS

Keeping in view the above stated facts and circumstance and appalling effects of contract marriage (Nikah Halala, Nikah Mutah, Nikah Misyar) and Polygamy on Muslim women and girls, it is the most respectfully prayed that this Hon'ble Court may be pleased to issue a writ, order or direction in the nature of mandamus directing the respondents to:

a) declare that Section 2 of the Muslim Personal Law (Shariat) Application Act,1937, insofar as it recognizes and sanctions practice of Nikah Halala, is contrary to Articles 14, 15 and 21 of the Constitution, hence void;

b) declare that Section 2 of the Muslim Personal Law (Shariat) Application Act,1937, insofar as it recognizes and sanctions practice of Nikah Mutah, is contrary to Articles 14, 15 and 21 of the Constitution, hence void;

c) declare that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, insofar as it recognizes and sanctions practice of Nikah Misyar is contrary to Articles 14, 15 and 21 of the Constitution, hence void;

d) declare that Section 2 of the Muslim Personal Law (Shariat) Application Act,1937, insofar as it recognizes and sanctions the practice of polygamy is contrary to Articles 14, 15 and 21 of the Constitution, hence void;

e) declare (in the alternative to Prayers d) that the words "*in any case in which such marriage is void by reason of its taking place during the life of such husband or wife*" occurring in Section 494 of the IPC are contrary to Articles 14, 15 and 21 of the Constitution, hence void and inoperative;

f) pass any such other order, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and allow the cost.

DRAWN ON:15.3.2018 **(R.D.UPADHYAY)**

FILED ON:19.3.2018 **ADVOCATE FOR PETITIONER**