SYNOPSIS

By way of the present petition under Article 32, Petitioner challenges the constitutionality of the Muslim Women (Protection of Rights on Marriage) Act, 2019. Section 1 (3) of the impugned Act says that it shall be deemed to have come into force on the 19th day of September 2018. It is submitted that this Act is violative of Articles 14, 15 and 21of the Constitution and accordingly, liable to be struck down. **Justification for invocation of Article 32**

It is respectfully submitted that the exercise of jurisdiction under Article 32 is warranted in this case for the following reasons:

1. The Act applies across the country and has thus has national ramifications.
2. The Act has introduced penal legislation, specific to a class of persons based on religious identity. It is causative of grave public mischief, which, if unchecked, may lead to polarization and disharmony in society.
3. Adjudication of the legality of the Act by a plurality of High Courts under Article 226 would mean multiplicity of litigation over the same cause of action.
4. Adjudication of the legality of this Act deserves the consideration of this Hon'ble Court especially considering this Hon'ble Court's recent pronouncement on the issue of triple talaq in *ShahyaraBano v. Union of India,* (2017) 9 SCC 1.

Incidentally, the said decision was also rendered in exercise of jurisdiction under Article 32.

5. Article 32 is itself a fundamental right and the jurisdiction of the Hon'ble Court is mandatory. This Hon'ble Court observed in *Romesh Thappar v. State of Madras*, AIR 1950 SC 124:

> *"Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights…."*

6. As far as Petitioners' standing is concerned, Petitioner No.1 is the Samastha Kerala Jamiathul, a religious organisation of the Sunni Muslim scholars and clerics in Kerala. It was founded in 1925. Petitioner No.1 is the largest Muslim organization in Kerala in terms of number of followers, number of mahals (territories divided into different areas) controlled, number of masjids and the number of madrasas (religious schools), colleges and other institutes run by it.
7. Petitioners submit that the invocation of Article 32 by an association of Muslims (such as Petitioner No.1) is warranted in this case considering the legislation in question affects the entirety of the Muslim community. The legislation is class specific to Muslims. Petitioner No.2 is a practicing Muslim, who is a citizen of India.

Violation of Article 14

Sections 3 & 4

1. In *ShahyaraBano*(supra), the leading opinion of Nariman, J. struck down the practice of Triple Talaq for being manifestly arbitrary (see paras 101 to 104). Describing "manifestly arbitrariness", the leading opinion observed: "*manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation is manifestly arbitrary"* (para 101).
2. Applying this very test to the impugned Act, it is submitted that the Act is unconstitutional under Article 14 as it is manifestly arbitrary.
3. Section 3 is a redundant declaration. There is no purpose, no effect, no point to this provision. The Central Government cannot improve on a declaration of law made by this Hon'ble Court under Article 141 in *ShahyaraBano*(supra). A redundant legislation must be regarded a dead letter.
4. The real thrust for the Act is thus not the reiterative (and futile) declaration contained in Section 3 thereof but the punishment prescribed by Section 4. The intent behind the Act is not abolition of Triple Talaq but punishment of Muslim husbands. Section 4 imposes a maximum sentence of 3 years imprisonment when a Muslim husband pronounces Triple

Talaq. The offence is cognizable and non-bailable as per Section 7.

5. Creation of an offence may be the prerogative of the legislature. The Government is duty bound to act reasonably and sensibly, not merely in administrative matters but sovereign matters. To Petitioner's knowledge there is no informed assessment or study that forms basis for the Central Government to have created this offence. That some isolated instances of the practice have occurred despite the *in-rem* judgment of this Hon'ble Court does not imply that a penal provision is required to be immediately enacted to prevent the practice.

6. Having regard to the *ratio decidendi* in *Shahyara Bano* (supra), legislation cannot be manifestly arbitrary, borne out of caprice, excessive, disproportionate to the harm sought to be remedied and without adequate determining principle.

7. If the motive was to protect a Muslim wife in an unhappy marriage, no reasonable person can believe that the means to ensure it is by putting an errant husband in jail for 3 years and create a non-bailable offence for merely saying "TalaqTalaqTalaq".

8. By virtue of *Shahyara Bano*(supra) the said utterance is without legal sanction or effect. The marriage survives, regardless of such utterance. It is difficult to imagine why the mere utterance of meaningless words should attract a three-year sentence for the husband.

9. As per the Judgment of this Hon'ble Court no divorce will be legally concluded by saying 'triple talaq' and thus this is to be considered as a procedural violation in effecting divorce. There are statutorily prescribed procedure for divorce in other religions too and non-compliance of this procedure for divorce is not a punishable offence for members of other religions. There is no reasonableness or constitutional logic for making the procedural infirmity in effecting divorce a punishable offence for members of Muslim community alone and such legislation cannot withstand the test of Article 14.
10. For these reasons, Sections 3, 4 and 7 are capricious, irrational, without adequate determining principle, excessive and disproportionate and hence, manifestly arbitrary. They deserve to be struck down under Article 14.
11. As the aforesaid provisions are not severable from the other provisions of the Act, the entire Act has to be struck down.

<u>Sections 5& 6</u>

1. Sections 5 and 6 of the Act creates a classification among married women who have suffered "Triple Talaq" and those who have not. Both provisions are causative of confusion in asmuch as it lends some semblance of legitimacy to "Triple Talaq" even though the practice has no legal recognition.
2. A marriage continues regardless of the utterance of Triple Talaq as per *Shahyara Bano* (supra). If the pronouncement of Triple Talaq has no legal effect as per Judgment of this

Hon'ble Court, women subjected to such pronouncement are not a distinct or separate class of persons. There is no reasonable classification made in Sections 5 and 6 which makes special dispensation for women subjected to "Triple Talaq". The classification is thus violative of Article 14 and has to be struck down.

3. The general provisions of law, including Section 125, Cr.P.C., Protection of Women from Domestic Violence Act, 2005, and this Hon'ble Court's pronouncement in *Danial Latifi v. Union of India*, (2001) 7 SCC 740 and other judgments already provide for contexts and situations where maintenance is warranted by judicial order.

Article 15

1. Article 15 forbids class legislation predicated solely on the basis of a person's religion. Considering that Triple Talaq is not recognized in law, the utterance thereof, whether by a Muslim or person of any other community is equally irrelevant. However, Section 3 of the Act declares that it is only the utterance of Triple Talaq by the "Muslim husband" that is "void and illegal".
2. This begs the question whether, in the Central Government's belief, utterance of Talaq by non-Muslim husbands has any legal value.
3. It is submitted that Triple Talaq has no legal value by virtue of *ShahyaraBano*(supra). The Central Government could not

have altered the effect of the said judgment by confining the illegality to instances where the pronouncement is by Muslim husbands. It was impermissible for the Central Government to have altered the declaration rendered by this Hon'ble Court in *ShahyaraBano*(supra).

4. The use of the term "Muslim husband" in in Section 3 is not innocuous. Section 4 penalises any utterance so abolished by Section 3. The offence is again confined only to Muslim husbands. It is absurd that for an utterance which has no legal effect, whether spoken by Muslim, Hindu or Christian, it is only the Muslim husband who is penalized with a three-year sentence.
5. The scope of Sections 3 and 4 of the Act, being confined to Muslim husbands, has no constitutional justification under Article 15. If the act has no recognition in law, only Muslims cannot be penalized for committing the act.

Article 21

1. Substantive due process is now recognized to be a part of a person's fundamental right under Article 21 (*Mohd. Arif v. Supreme Court of India*, (2014) 9 SCC 737).
2. The law that is not just, fair or reasonable is no law under the Constitution. The leading opinion of DY Chandrachud, J., in *K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1 holds *inter alia:*

> *"….Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The interrelationship*

> *between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well…"*
>
> (see para 294).

3. The impugned Act is manifestly arbitrary and discriminatory, having regard to the submissions already made hereinbefore. It is also manifestly unfair and unreasonable. It creates an offence and causes a deprivation of liberty without justification.
4. There is no benevolence or welfare apparent in this Act. Abolition of Triple Talaq was not a surviving cause for legislative action. Protection of wives cannot be achieved by incarceration of husbands.
5. A truly welfare-oriented legislation would promote amicable resolution of matrimonial disputes, regardless of community. A welfare-oriented legislation would not purport to criminalise marital discord and moreover, particularize the criminalization only to one community. With respect, it is submitted that any such a legislation ought to shock the judicial conscience. The impugned Act is such an endeavour and ought to be struck down for violating Article 21.

LIST OF DATES AND EVENTS

Date	Event
22.08.2017	The Constitution Bench of this Hon'ble Court delivers its verdict in *ShahyaraBano v. Union of India,* (2017) 9 SCC 1. The leading opinion of Nariman, J. strikes down the practice of Triple Talaq as unconstitutional for being manifestly arbitrary. The concurring opinion of Kurian, J., endorses the result contained in the opinion of Nariman, J., with different reasons. The opinion of Khehar, CJI, is a dissenting opinion which holds that the practice cannot be struck down but the Government can be directed to appropriate legislation.
28.12.2017	The Lok Sabha passed the Muslim Women (Protection of Rights on Marriage) Bill which was introduced by the Government *inter alia* on the basis that: *"…setting aside talaq-e-biddat by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce."*

02.01.2018	The Muslim Women (Protection of Rights on Marriage) Bill was introduced in the Rajya Sabha.
August 2018	The Government is stated to have introduced amendments to the pending Bill at Rajya Sabha. The Bill along with its proposed amendments are pending consideration before the Rajya Sabha.
19.09.2018	The Central Government promulgatedthe Muslim Women (Protection of Rights on Marriage) Ordinance, 2018.
24.09.2018	Petitioner herein filed W.P (C) No. 1248 of 2018 before this Hon'ble Court challenging the Ordinance.
2-11-2018	When the above numbered writ petition was taken up for hearing this Hon'ble Court was not inclined to admit the petition for the reason that the parliament session is to be held within a couple of week and the ordinance is to lapse on account of the same. Under the said circumstance petitioner sought to withdraw the

	petition and the petition was accordingly dismissed as withdrawn.
21-01-2019	The Ordinance cease to operate.
12-01-2019	Government of India re-promulgated the Ordinance for same purpose. The re-promulgated ordinance has also lapsed and the Bill introduced to replace the Ordinance could not be passed in the Upper House.
21-02-2019	Respondent again promulgated the Ordinance for third time.
07-03-2019	Petitioner challenged the Second Ordinance before this Hon'ble Court in W.P (C) No. 302 of 2019.
25-03-2019	This Hon'ble Court was not inclined to entertain the Writ Petition holding that challenge in the petition is to an ordinance.
30-07-2019	Parliament passed the Muslim Women (Protection of Rights on Marriage) Bill, 2019.
1-08-2019	Hon'ble President of India gave assent to the Bill turning it into an Act to replace the Ordinance. Section 1 (3) of the Act says that it shall be deemed to have come into force on 19-09-2018.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

WRIT PETITION (CIVIL) NO. OF 2019

IN THE MATTER OF:

1. SAMASTHA KERALA JAMIATHUL ULEMA
   FRANCIS ROAD,KOZHIKODE – 3
   KERALA
   REPRESENTED BY ITS GENERAL SECRETARY

2. ALIKUTTY MUSLIYAR
   GENERAL SECRETARY
   SAMASTHA KERALA JAMIATHUL ULEMA
   THIRURKAD, MALAPPURAM DISTRICT
   KERALA

VERSUS

1. UNION OF INDIA
   REPRESENTED BY
   SECRETARY,
   MINISTRY OF LAW AND JUSTICE
   GOVERNMENT OF INDIA
   4TH FLOOR, A-WING,
   SHASTRI BHAWAN,
   NEW DELHI-110001

WRIT PETITION UNDER ARTICLES 32 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF A WRIT, ORDER OR DIRECTION IN THE NATURE OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT TO SET ASIDE THE IMPUGNED ORDINANCE HEREIN AS UNCONSTITUTIONAL.

TO

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUDGES OF THE

SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE

PETITIONER ABOVENAMED

MOST RESPECTFULLY SHOWETH:

1. Petitioner No.1 is the Samastha Kerala JamiathulUlema, a religious organization of the Sunni Muslim scholars and clerics in Kerala. It was founded in 1926 and it stands registered under the Society Registration Act bearing Registration No. S.1/1934-35. Petitioner No.1 is the largest Muslim organization in Kerala in terms of number of followers, number of mahals (territories divided into different areas) controlled,number of masjids and the number of madrasas (religious schools), colleges and other institutes run by it.
2. Petitioners submit that the invocation of Article 32 by an association of Muslims (such as Petitioner No.1) is warranted in this case considering the legislation in question affects the entirety of the Muslim community. The legislation is class specific to Muslims. Petitioner No.2 is a practicing Muslim, who is a citizen of India.
3. By way of the present petition under Article 32, Petitioner challenges the constitutionality of the Muslim Women (Protection of Rights on Marriage) Act, 2019. It is submitted that this Act is violative of Articles 14, 15 and 21 of the Constitution and accordingly, liable to be struck down.

4. Petitioners have not approached any High Court or other Forums challenging the impugned Act herein or seeking the same relief as sought for. Petitioners' challenge against the impugned Act is it violates their Fundamental Rights enshrined under Articles 14, 15 and 21 of the Constitution of India and hence they prefer this petition seeking constitutional remedy of Article 32 before this Hon'ble Court.

5. Brief Facts of the case that necessitates filing of present petition is summed up as under :

5.1 On 22-08-2017 the Constitution Bench of this Hon'ble Court delivers its verdict in *ShahyaraBano v. Union of India,* (2017) 9 SCC 1. The leading opinion of Nariman, J. strikes down the practice of Triple Talaq as unconstitutional for being manifestly arbitrary. The concurring opinion of Kurian, J., endorses the result contained in the opinion of Nariman, J., with different reasons. The opinion of Khehar, CJI, is a dissenting opinion which holds that the practice cannot be struck down but the Government can be directed to appropriate legislation. A true copy of the judgment dated 22-08-2017 passed by this Hon'ble Court in W.P. (C) No. 118 of 2016 is produced herewith and marked as **ANNEXURE-P1** (Page Nos. to).

5.2 On 28-12-2017 the Lok Sabha passed the Muslim Women (Protection of Rights on Marriage) Bill which

was introduced by the Government *inter alia* on the basis that: *"…setting aside talaq-e-biddat by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce."*

5.3 The Muslim Women (Protection of Rights on Marriage) Bill was introduced in the Rajya Sabha on 02-01-2018.

5.4 In August 2018 the Government is stated to have introduced amendments to the pending Bill at Rajya Sabha. The Bill along with its proposed amendments are pending consideration before the Rajya Sabha.

5.5 On 19-09-2018 the Central Government promulgated the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018.

5.6 On 24.09.2018 Petitioner herein filed W.P (C) No. 1248 of 2018 before this Hon'ble Court challenging the Ordinance.

5.7 On 2-11-2018, when the above numbered writ petition was taken up for hearing this Hon'ble Court was not inclined to admit the petition for the reason that the parliament session is to be held within a couple of week and the ordinance is to lapse on account of the same. Under the said circumstance petitioner sought to

withdraw the petition and the petition was accordingly dismissed as withdrawn. A true copy of the Order dated 2-11-2018 of this Hon'ble Court in WP (C) No. 12480 of 2018 is produced herewith and marked as **ANNEXURE-P3**.

5.8 The Ordinance ceased to operate on 21-01-2019.

5.9 Government of India re-promulgated the Ordinance for same purpose on 12-01-2019.

5.10 The re-promulgated ordinance has also lapsed and the Bill introduced to replace the Ordinance could not be passed in the Upper House.

5.11 Respondent again promulgated the Ordinance for third timeand the same was notified on 21-02-2019. A true copy of theMuslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 notified on 21-02-2019 is produced herewith and marked as **ANNEXURE-P4**.

5.12 Petitioner again challenged the Second Ordinance before this Hon'ble Court in W.P (C) No. 302 of 2019. This Hon'ble Court was not inclined to entertain the Writ Petition holding that challenge in the petition is to an ordinance, A true copy of order dated 25-03-2019 passed by this Hon'ble Court in Writ Petition (C) No. 302 of 2019 is produced herewith and marked as **ANNEXURE-P5.**

5.13 On 30-07-2019 Parliament passed the Muslim Women (Protection of Rights on Marriage) Bill, 2019.

5.14 On 1-08-2019 Hon'ble President of India gave assent to the Bill turning it into an Act to replace the Ordinance. Section 1 (3) of the Act says that it shall be deemed to have come into force on 19-09-2018. A true copy of the Muslim Women (Protection of Rights on Marriage) Act, 2019 is produced herewith and marked as **ANNXURE-P5.**

5.15 Under the above circumstances petitioners are left with no other efficacious alternative remedy than to invoke the constitutional remedy under Article 32 of the Constitution of India in this petition before this Hon'ble Court on the following among other:

GROUNDS

A. That the impugned Act applies across the country and has thus has national ramifications.The Ordinance has introduced penal legislation, specific to a class of persons based on religious identity. It is causative of grave public mischief, which, if unchecked, may lead to polarization and disharmony in society. Further, adjudication of the legality of the Ordinance by a plurality of High Courts under Article 226 would mean multiplicity of litigation over the same cause of action. Hence this is fit case for interference of this Hon'ble Court under Article 32 of the Constitution of India.

B. That adjudication of the legality of this Ordinance deserves the consideration of this Hon'ble Court especially considering this Hon'ble Court's recent pronouncement on the issue of triple talaq in *ShahyaraBano v. Union of India,* (2017) 9 SCC 1. Incidentally, the said decision was also rendered in exercise of jurisdiction under Article 32.

C. That Article 32 is itself a fundamental right and the jurisdiction of the Hon'ble Court is mandatory. This Hon'ble Court observed in *RomeshThappar v. State of Madras*, AIR 1950 SC 124:

> *"Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights…."*

D. That Article 123 enables the promulgation of ordinances only in instances requiring "immediate action". The absence of emergent reasons negates any invocation of the provision. Reference may be made to *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 and other judgments.Triple Talaq is a practice that dates back to about 1400 years. It was legally recognized and enforced till the majority judgment in *ShahyaraBano*(supra). Despite the Central Government having had ample opportunity to abolish the practice before the judgment in *ShahyaraBano*(supra), if not for 1400 years, at least the 67

years of the existence of the Constitution preceding *ShahyaraBano*(supra), the Government chose to await the adjudication in *ShahyaraBano*(supra).Once there was declaration made by this Hon'ble Court under Article 141 in *ShahyaraBano*(supra), there was no surviving action, let alone "immediate action" warranted to reiteratively abolish the practice and penalize Triple Talaq by way of an Ordinance under Article 123. Hence the promulgation of impugned Ordinance is against the spirit of Article 123 and a fraud on the Constitution.

E. That it is strange if not absurd that within months of the judgment in *ShahyaraBano*(supra), in hot haste, there is an ordinance banning Triple Talaq under the emergent provision of Article 123. A practice that was around for only about 1400 years and now, in any case derecognized by virtue of *ShahyaraBano*(supra), did not require the Government's emergent intervention under Article 123.

F. That the purported basis behind the Ordinance is set out in the preambular paragraphs, which read as follows:

> *"WHEREAS the Muslim Women (Protection of Rights on Marriage) Bill, 2017 has been passed by the House of the People and is pending in the Council of States;*
>
> *AND WHEREAS inspite of the fact that the Supreme Court has held in the matter of ShayaraBano v. Union of India [Writ Petition (Civil) No. 118 of 2016] and other connected matters that the practice of triple talaq (talaq-e-biddat) as unconstitutional, the said practice is still continuing unabated;*
>
> *AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which*

render it necessary for him to take immediate action to give effect to the provisions of the said Bill with certain modifications;"

"Unabated" must mean that despite the judgment, the practice continues with full vigour and force. To declare that something is "unabated" despite judgment one must:

(a) know how pervasively the practice was committed, *prior* to the judgment;

(b) ascertain how far has the judgment impacted or prevented occurrences, since its pronouncement.

As far as (a) above is concerned, it is doubtful that anybody, including the Government, had any idea or understanding of the national statistical occurrence of Triple Talaq prior to the judgment in *ShahyaraBano*(supra). As far as (b) above is concerned, it is impossible to ascertain how far has the practice ***not*** been committed, after the judgment in *ShahyaraBano*(supra). After all, a non-occurrence of an event is not a recorded fact.Therefore, the use of the term "unabated" is misleading, inapt and improper. The declaration in the Ordinance that the practice continues "unabated" is entirely whimsical. It is merely on the *ipse dixit*of the Central Government that such practice continues to prevail, "unabated".

G. That the fact that the matter is pending before the Council of States is reason to await the outcome of the matter, not basis to accelerate its coming into force by emergency Ordinance.

With respect, the reasoning evident in the Preamble lays bare the Government's regard to the Parliamentary process. This Ordinance is submitted to be a case of misuse of Article 123. Since the invocation of Article 123 was colourable, the Ordinance as a whole ought to be struck down.

H. That the respondent Government has been promulgating and re-promulgating the very same Ordinance for third time within a span of one year. Parliament sessions were held two times during this period and the Government failed to enact the law to replace the Ordinance with the support of Parliament. Failing to win the confidence of parliament to make the law, government has resorted to the ordinance making power repeatedly. Hence this perverse and arbitrary exercise of respondent Government is liable to be held as fraud on the Constitution.

I. That in *ShahyaraBano*(supra), the leading opinion of Nariman, J. struck down the practice of Triple Talaq for being manifestly arbitrary (see paras 101 to 104). Describing "manifestly arbitrariness", the leading opinion observed: "*manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation is manifestly arbitrary"* (para 101). Applying this very test to the impugned Ordinance, it is submitted that the

Ordinance is unconstitutional under Article 14 as it is manifestly arbitrary.

J. That Section 3 of the impugned Ordinance is a redundant declaration. There is no purpose, no effect, no point to this provision. The Central Government cannot improve on a declaration of law made by this Hon'ble Court under Article 141 in *ShahyaraBano*(supra). A redundant legislation must be regarded a dead letter.

K. That the real thrust for the Ordinance is thus not the reiterative (and futile) declaration contained in Section 3 thereof but the punishment prescribed by Section 4. The intent behind the Ordinance is not abolition of Triple Talaq but punishment of Muslim husbands. Section 4 imposes a maximum sentence of 3 years imprisonment when a Muslim husband pronounces Triple Talaq. The offence is cognizable and non-bailable as per Section 7. Creation of an offence may be the prerogative of the legislature. The Government is duty bound to act reasonably and sensibly, not merely in administrative matters but sovereign matters. To Petitioner's knowledge there is no informed assessment or study that forms basis for the Central Government to have created this offence. That some isolated instances of the practice have occurred despite the *in-rem* judgment of this Hon'ble Court does not imply that a penal provision is required to be immediately enacted to prevent the practice.

L. That having regard to the *ratio decidendi*in *ShahyaraBano*(supra), legislation cannot be manifestly arbitrary, borne out of caprice, excessive, disproportionate to the harm sought to be remedied and without adequate determining principle.

M. That as per the Judgment of this Hon'ble Court no divorce will be legally concluded by saying 'triple talaq' and thus this is to be considered as a procedural violation in effecting divorce. There are statutorily prescribed procedure for divorce in other religions too and non-compliance of this procedure for divorce is not a punishable offence for members of other religions. There is no reasonableness or constitutional logic for making the procedural infirmity in effecting divorce a punishable offence for members of Muslim community alone and such legislation cannot withstand the test of Article 14.

N. That if the motive was to protect a Muslim wife in an unhappy marriage, no reasonable person can believe that the means to ensure it is by putting an errant husband in jail for 3 years and create a non-bailable offence for merely saying "TalaqTalaqTalaq". By virtue of *ShahyaraBano*(supra) the said utterance is without legal sanction or effect. The marriage survives, regardless of such utterance. It is difficult to imagine why the mere utterance of meaningless words should attract a three-year sentence for the husband.For these reasons, Sections 3, 4 and 7 are capricious, irrational, without adequate determining principle, excessive and

disproportionate and hence, manifestly arbitrary. They deserve to be struck down under Article 14. Further, as the aforesaid provisions are not severable from the other provisions of the Ordinance, the entire Ordinance has to be struck down.

O. That Sections 5 and 6 of the Ordinance creates a classification among married women who have suffered “Triple Talaq” and those who have not. Both provisions are causative of confusion inasmuch as it lends some semblance of legitimacy to “Triple Talaq” even though the practice has no legal recognition.

P. That a marriage continues regardless of the utterance of Triple Talaq as per *ShahyaraBano*(supra). If the pronouncement of Triple Talaq has no legal effect as per Judgment of this Hon’ble Court, women subjected to such pronouncement are not a distinct or separate class of persons. There is no reasonable classification made in Sections 5 and 6 which makes special dispensation for women subjected to “Triple Talaq”. The classification is thus violative of Article 14 and has to be struck down.

Q. That the general provisions of law, including Section 125, Cr.P.C., Protection of Women from Domestic Violence Act, 2005, and this Hon’ble Court’s pronouncement in *Danial Latifi v. Union of India*, (2001) 7 SCC 740 and other judgments already provide for contexts and situations where maintenance is warranted by judicial order.

R. That Article 15 forbids class legislation predicated solely on the basis of a person's religion. Considering that Triple Talaq is not recognized in law, the utterance thereof, whether by a Muslim or person of any other community is equally irrelevant. However, Section 3 of the Ordinance declares that it is only the utterance of Triple Talaq by the "Muslim husband" that is "void and illegal". This begs the question whether, in the Central Government's belief, utterance of Talaq by non-Muslim husbands has any legal value. It is submitted that Triple Talaq has no legal value by virtue of *ShahyaraBano*(supra). The Central Government could not have altered the effect of the said judgment by confining the illegality to instances where the pronouncement is by Muslim husbands. It was impermissible for the Central Government to have altered the declaration rendered by this Hon'ble Court in *ShahyaraBano*(supra).

S. That the use of the term "Muslim husband" in in Section 3 is not innocuous. Section 4 penalizes any utterance so abolished by Section 3. The offence is again confined only to Muslim husbands. It is absurd that for an utterance which has no legal effect, whether spoken by Muslim, Hindu or Christian, it is only the Muslim husband who is penalized with a three-year sentence. The scope of Sections 3 and 4 of the Ordinance, being confined to Muslim husbands, has no constitutional justification under Article 15. If the act has no

recognition in law, only Muslims cannot be penalized for committing the act.

T. That substantive due process is now recognized to be a part of a person's fundamental right under Article 21 (*Mohd. Arif v. Supreme Court of India*, (2014) 9 SCC 737).The law that is not just, fair or reasonable is no law under the Constitution. The leading opinion of DY Chandrachud, J., in *K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1 holds *inter alia:*

> *"….Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The interrelationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well…"*
>
> (see para 294).

The impugned Ordinance is manifestly arbitrary and discriminatory, having regard to the submissions already made hereinbefore. It is also manifestly unfair and unreasonable. It creates an offence and causes a deprivation of liberty without justification.

U. That there is no benevolence or welfare apparent in this Ordinance. Abolition of Triple Talaq was not a surviving cause for legislative action. Protection of wives cannot be achieved by incarceration of husbands.

V. That a truly welfare-oriented legislation would promote amicable resolution of matrimonial disputes, regardless of community. A welfare-oriented legislation would not purport to criminalize marital discord and moreover, particularize the criminalization only to one community. With respect, it is submitted that any such legislation ought to shock the judicial conscience. The impugned Ordinance is such an endeavor and ought to be struck down for violating Article 21.

W. That under Section 4 of the impugned Ordinance read with Section 7(a) a Muslim man can be jailed for a period up to three years at the instance of wife or a blood / marital relative of the wife. But the Ordinance has not defined blood and marital relationship and not to be taken to mean only primary relatives. This provision has the potential to destroy a marital relationship in case any of the relative of wife makes a false complaint against the husband. This provision is highly detrimental not only to the wife but also a marital relationship.

X. The impugned Ordinance makes the offence of uttering 'Triple Talaq' nonbailable and further states that the Magistrate can grant bail only after hearing the wife. This provision has far reaching consequences in granting of bail. There is no provision that victim shall be heard before granting bail to the accused. Further, the husband shall only be given bail on the conditions imposed by the wife.

Generally bail is granted on the satisfaction of a judge that the accused shall not influence witnesses, shall not disappear and shall not temper with evidence. Attaching conditions to the bail like payment of money etc. at FIR stage takes away the presumption of innocence and is contrary to the settled principles of law.

6. The Petitioner craves leave to add, amend or alter the grounds during the course of pendency of the instant Writ Petition.
7. That the Petitioner has not filed any other or similar Petition before this Hon'ble Court or any other Court for similar relief as prayed for in the present Writ Petition.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

(a) Declare that the Muslim Women (Protection of Rights on Marriage) Act, 2019 notified on 31-07-2019 is violative of Articles 14, 15, 21 and 123 of the Constitution of India and hence unconstitutional and unenforceable;

(b) Pass such other and further orders as this Hon'ble Court may think fit in the interest of justice and equity.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY

DRAWN AND FILED BY

(ZULFIKER ALI PS)

Advocate for the Petitioner

DRAWN ON:
FILED ON: 25-09-2018

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA
WRIT PETITION (CIVIL) NO. OF 2018

IN THE MATTER OF:

SAMASTHA KERALA JAMIATHUL ULEMA
AND ANR .....PETITIONERS

VERSUS

UNION OF INDIA..... RESPONDENT

AN APPLICATION SEEKING STAY

TO
THE HONOURABLE THE CHIEF JUSTICE
OF INDIA AND OTHER COMPANION JUSTICES
OF THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF THE
APPLICANT ABOVE NAMED

MOST RESPECTFULLY SHOWETH

1. The instant Writ Petition, being preferred under Article 32 of the Constitution of India, raises an extremely fundamental question of right of a citizen to have a timely adjudication to his complaint and inter alia, seeks to challenge an ex-facie arbitrary action of the respondent.
2. That the facts of the case is not reproduced herein for the sake of brevity and this Hon'ble Court may have kind enough to read the relevant part of accompanying WP as part of this application.

3. By way of the present petition under Article 32, Petitioner challenges the constitutionality of the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 notified on 21.02.2019. It is submitted that this ordinance is violative of Articles 14, 15 and 21 of the Constitution and accordingly, requires to be struck down. The Ordinance is also unconstitutional for failing to satisfy the mandatory requirements of Article 123 of the Constitution.
4. That by way of impugned Ordinance herein the respondent seeks to penalize a Muslim man who utters the word talaq three times to his wife, which according to the Judgment of this Hon'ble Court has no legal effect whatsoever and a complete non-est in law.
5. That once there was declaration made by this Hon'ble Court under Article 141 in *ShahyaraBano*(supra), there was no surviving action, let alone "immediate action" warranted to reiteratively abolish the practice and penalize Triple Talaq by way of an Ordinance under Article 123.
6. It is strange if not absurd that within months of the judgment in *ShahyaraBano*(supra), in hot haste, there is an ordinance banning Triple Talaq under the emergent provision of Article 123. A practice that was around for only about 1400 years and now, in any case derecognized by virtue of *ShahyaraBano*(supra), did not require the Government's emergent intervention under Article 123.

7. That the impugned Ordinance is patently unconstitutional and has immediate propensity to deprive Muslim men and women of their Fundamental Rights enshrined under Articles 14, 15 and 21 of the Constitution. Hence the operation of impugned Ordinance may be kept in abeyance till its legality is finally decided by this Hon'ble Court.
8. The application made herein is bona fide and deserves to be allowed in the interest of justice.

PRAYER

It is, therefore, humbly prayed that the Hon'ble Court, pending hearing and final disposal of this Writ Petition, may be pleased to:

(i) Stay the operation ofthe Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 notified on 21.02.2019;

(ii) Pass such other and further order as this Hon'ble Court may deem fit in the interest of justice and equity.

AND FOR THIS ACT OF KINDNESS THE PETITIONER HEREIN SHALL FOREVER PRAY

Filed By:

(ZULFIKER ALI .P.S)
Advocate for the Petitioner

Drawn on:
Filed On: