IN THE SUPREME COURT OF INDIA
W.P. (C) NO. 118 OF 2016

IN THE MATTER OF:

SHAYARA BANO …Petitioner

VERSUS

UNION OF INDIA … Respondents

WRITTEN SUBMISSIONS ON BEHALF OF THE UNION OF INDIA

1. The present petition by which the Petitioner seeks to challenge the practices of triple talaq *(talaq-e-bidat), nikah halala* and polygamy, raises matters of abiding significance in relation to the status and dignity of Muslim women in India. This Hon'ble Court is called upon to determine whether the aforesaid practices are compatible with contemporary constitutional morality and the principles of gender equality and gender equity guaranteed under the Constitution of India. In the context of the above debate, the pivotal issue that needs to be answered is whether under a secular Constitution, women, merely by virtue of their religious identity and/or the religion which they profess, can be relegated to a status significantly more vulnerable than their counterparts who profess any other faith, namely Hindus, Christians, Zoroastrians, Buddhists, Sikhs, Jains, etc. In other words, the fundamental question for determination by this Hon'ble Court is whether, in a secular democracy, religion can be a reason to deny equal status and dignity, available to women under the Constitution.

2. On 16.2.2017, the following questions which broadly cover the issues to be determined by this Hon'ble Court in the present matter were framed on behalf of the Union of India and handed over to this Hon'ble Court:

(i) Whether the impugned practices of *talaq-e- bidat, nikah halala* and polygamy are protected under Article 25(1) of the Constitution?

(ii) Whether Article 25(1) is subject to Part III of the Constitution and in particular Articles 14 and 21 of the Constitution?

(iii) Whether personal law is "law" under Article 13 of the Constitution?

(iv) Whether the impugned practices of *talaq-e- bidat, nikah halala* and polygamy are compatible with India's obligations under international treaties and covenants to which it is a signatory?

3. The above questions involve broad, interlinked issues and the same are addressed in these written submissions.

I. GENDER EQUALITY, GENDER EQUITY & A LIFE OF DIGNITY OF STATUS AS AN OVERARCHING CONSTITUTIONAL GOAL

(i) The fundamental right to equality guaranteed to every citizen of India under Article 14 of the Constitution of India takes within its fold, equality of status. Gender equality, gender equity and gender justice are values intrinsically entwined in the guarantee of equality under Article 14. The conferment of a social status based on patriarchal values or one that is at the mercy of men-folk is incompatible with the letter and spirit of Articles 14 and 15 of the Constitution. The right of a woman to human dignity, social esteem and self- worth are vital facets of her right to life under Article 21 of the Constitution. It is submitted that gender justice is a constitutional goal of overwhelming importance and magnitude without accomplishing which half of the country's citizenry will not be able to enjoy to the fullest the rights, the status and opportunities available under the Constitution to every citizen of India. Article 51-A (e) under Part IV of the Constitution provides that it shall be the duty of every citizen of India,

> "(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;"

(ii) It is submitted that gender equality and the dignity of women are non-negotiable, overarching constitutional values and can brook no compromise. These rights are necessary in letter and in spirit not only to realise the aspirations of every individual woman who is an equal citizen of this country but also for the larger well- being of society and the progress of the nation, one half of which is made up by women. Women must be equal participants in the development and advancement of the world's largest democracy and any practice which denudes the status of a citizen of India merely by virtue of the religion she happens to profess, is an impediment to that larger goal.

(iii) The importance of gender justice enshrined in Articles 14 and 21 of the Constitution has been eloquently articulated by this Hon'ble Court in a series of judgements, a reference to some of which is made hereinbelow:

(a) In *Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami Thirukoil*, (1996) 8 SCC 525, a *three*-judge bench of this Hon'ble Court held:

> **"15.** It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In *S.R. Bommai* v. *Union of* India,[7] this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights. Right to equality is a fundamental right. […]
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> **16.** The General Assembly of the United Nations adopted a declaration on 4-12-1986 on "The Development of the Right to Development" in which India played a crusading role for its adoption and ratified the same. Its preamble recognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfilment of

human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic, social and political rights.

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17. Article 1(1) assures right to development an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6(1) obligates the State to observance of all human rights and fundamental freedoms for all without any discrimination as to *race, sex, language* or *religion* (emphasis supplied). Sub-article (2) enjoins that … equal attention and urgent consideration should be given to implement, promotion and protection of civil, political, economic, social and political rights. Sub-article (3) thereof enjoins that:

"State should take steps to eliminate obstacle to development, resulting from failure to observe civil and political rights as well as economic, social and economic rights. Article 8 casts duty on the State to undertake, … necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources … and distribution of income."

Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

18. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. (emphasis supplied)"

(b) In *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, this Hon'ble Court emphasised the value of gender equality and the need to discard patriarchal mindsets. This Hon'ble Court drew from international jurisprudence to strike down a law which debarred women from employment

on the pretext that the object of the law was to afford them protection. The Court held that "it is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy [of the women]". The court also quoted from a judgment of the US Supreme Court where discrimination was rationalised "by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage . . . ." (Paragraph 44, page 17)

(c) In *Vishaka v. State of Rajasthan,* (1997) 6 SCC 241, this Hon'ble Court, in the context of protection of women against sexual harassment in the workplace, underlined the right of women to dignity, universally recognised as a basic human right.

(d) In *Charu Khurana v. Union of India*, (2015) 1 SCC 192, this Hon'ble Court emphasised that the "sustenance of gender justice is the cultivated achievement of intrinsic human rights and that there cannot be any discrimination solely on the ground of gender."

(e) In *Githa Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228, interpreting the Hindu Minority and Guardianship Act, 1956, this Hon'ble Court emphasised the necessity to take measures to bring domestic law in line with international conventions so as to eradicate discrimination of all forms against women.

(f) In *Air India v. Nergesh Meerza*, (1981) 4 SCC 335, this Hon'ble Court condemned male chauvinism and unfavourable biases against women.

(iv) Articles 14, 15 and 21 form an inseparable part of the basic structure of the Constitution of India. These values – the right to equality, non-discrimination and the right to live life with dignity form the bedrock of the Constitution. Gender equality and dignity for women which impacts half of our citizenry is equally an inalienable and inseparable part of the basic structure of the Constitution. This is because women belong to every class and section of society, every religion, every

caste and denomination of society. Since women transcend all social barriers, arguably, the most fundamental facet of equality under the Constitution is gender equality and gender equity.

Facets of discrimination that arise on account of the impugned practices

(v) The practices which are under challenge, namely, triple talaq, nikah halala and polygamy are practices which impact the social status and dignity of Muslim women and render them unequal and vulnerable *qua* men belonging to their own community; women belonging to other communities and also Muslim women outside India. There are unreasonable classifications which arise from practices such as those under challenge in the present petition, which deny to Muslim women the full enjoyment of fundamental rights guaranteed under the Constitution. These facets of discrimination are as follows:

(a) Status of Muslim women qua women belonging to other faiths

On the one hand, the question is whether a woman, being a Muslim woman, who is an equal citizen of this country can be in a significantly more vulnerable position when compared to her counterparts who may belong to any other religion or denomination, merely by virtue of her religion. In other words, merely because of her religious identity (and religion is something which she is fully entitled to profess and practice), she is being conferred with a social status that ends up as being subservient to, and at the whim and fancy of men folk. Therefore, on the one hand, these practices create social inequity inasmuch as the status of a Muslim woman is significantly different from the social and legal status of a woman who practices any other religion. In other words, there arises an unreasonable differentiation/classification between Muslim women and non-Muslim women who are both citizens of the same country. Such discrimination based on religion cannot be countenanced in a secular country.

(b) Status of Muslim women qua Muslim men in India

The second form of obvious discrimination is that the impugned practices render Muslim women significantly inferior and subservient to men inasmuch as a Muslim woman has to accept divorce at the whim and caprice of the husband; she may be compelled to live in a polygamous marriage and if she wants to return to a husband who has divorced her, she may be forced to bear the humiliation of marrying another man, consummating her marriage with the latter before she returns to her previous husband after the death of or divorce of the second husband. Any such practices which have the effect of treating women as chattel, deny them basic human dignity and inflict physical or emotional humiliation on them, ought to have no place in a society that strives towards equality.

(c) Status of Muslim women in India qua Muslim women in other countries

The practices in other countries have been set out in a chart in the counter-affidavit filed on behalf of the Union of India. A large number of Muslim countries or countries with overwhelmingly large Muslim population, such as, Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt and Iran have undertaken significant reforms and the practices of 'instant triple talaq' or 'automatic polygamy at will' is not permitted in most of these countries. These societies have accepted reform as being consistent with the practice of Islam. The paradox is that Muslim women in India are more vulnerable in their social status because of the prevalence of such practices, even though they live in a secular country. Therefore, the position of Indian women is weaker than women who live in theocratic societies or countries where Islam is the State religion. The impugned practices are therefore repugnant to the guarantee of secularism, an essential feature of the Indian Constitution. Perpetuation of regressive or gender unjust practices in the name of religion are anathema to a secular Constitution which guarantees non-discrimination on grounds of religion.

II. ESTABLISHMENT OF A 'SOCIAL DEMOCRACY' AS A CONSTITUTIONAL GOAL

(i) In the context of gender equality and gender equity, the larger goal of the State is to strive towards the establishment of a social democracy. In his closing speech on the draft Constitution on 25th November 1949, Dr. Ambedkar stated: "What we must do is not to be attained with mere political democracy; we must make out political democracy and a social democracy as well. Political democracy cannot last unless there lies on the base of it a social democracy." A social democracy has been described as "[A] way of life which recognises liberty, equality and fraternity as principles of life". In order to achieve a social democracy, social and economic justice envisaged in the preamble and articulated in the fundamental rights and directive principles, in particular Articles 14, 15, 16, 21, 38, 39 and 46 must be relied upon. In this context, the judgment of the Supreme Court in *Valsamma Paul v. Cochin University*, 1996 (3) SCC 545 is noteworthy:

> **"16.** The Constitution seeks to establish a secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: *S.R. Bommai* v. *Union of India* [(1994) 3 SCC 1]) and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult. […] Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law. […]"

(ii) Paragraph 20 of *Valsamma* is also noteworthy because it notes that various Hindu practices which were not in tune with the times had been done away with in the interest of promoting equality and fraternity. Paragraph 21 emphasizes the need to

divorce religion from personal law. Paragraph 22 mentions the need to foster a national identity which does not deny pluralism of Indian culture but rather preserves it. Noteworthy extracts from *Valsamma Paul v. Cochin University*, 1996 (3) SCC 545 are reproduced below:

> **"21.** The Constitution through its Preamble, Fundamental Rights and Directive Principles created a secular State based on the principle of equality and non-discrimination, striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr K.M. Munshi contended on the floor of the Constituent Assembly that:
> "we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation" [Vide: Constituent Assembly Debates, Vol. VII, pp. 356-58].
> **22.** In the onward march of establishing an egalitarian secular social order based on equality and dignity of person, Article 15(1) prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it. Indian culture is a product or blend of several strains or elements derived from various sources, in spite of inconsequential variety of forms and types. There is unity of spirit informing Indian culture throughout the ages. It is this underlying unity which is one of the most remarkable everlasting and enduring feature of Indian culture that fosters unity in diversity among different populace. This generates and fosters cordial spirit and toleration that make possible the unity and continuity of Indian traditions. Therefore, it would be the endeavour of everyone to develop several identities which constantly interact and overlap, and prove a meeting point for all members of different religious communities, castes, sections, sub-sections and regions to promote rational approach to life and society and would establish a national composite and cosmopolitan culture and way of life."

(iii) Patriarchal values and traditional notions about the role of women in society are an impediment to the goal of achieving social democracy. Gender inequity impacts not only women but has a ripple effect on the rest of the community, preventing it from shaking out of backwardness and partaking to the full, liberties guaranteed by a

modern Constitution. Citizens from all communities have the right to the enjoyment of constitutional guarantees and if some sections of society are held back from doing so, they are likely to hold back the community at large, resulting in lopsided development and pockets of social backwardness, which is not in the larger interest of the integrity and development of the nation. Therefore, secularism, equality and fraternity being the overarching guiding principles, all communities must move forward guaranteeing to women equal rights, at the same time preserving diversity and plurality. This is a goal which can be achieved within the framework of the Constitution.

III. THE FREEDOM OF RELIGION UNDER ARTICLE 25 OF THE CONSTITUTION

(i) Article 25 of the Constitution reads:

> "25. *Freedom of conscience and free profession, practice and propagation of religion*.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
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> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
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> (*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
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> (*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus….."(emphasis supplied)

(ii) Freedom of religion is subject to fundamental rights:

The words of Article 25(1) of the Constitution which confer the right to practice, preach and propagate religion are "**subject to the provisions of this Part**", which means that it is subject to Articles 14 and 15 which guarantee equality and non-discrimination. In other words, under our secular Constitution, the right to the freedom of religion is subject to and in that sense, subservient to other fundamental rights such as the right to equality, the right to non-discrimination and the right to a life with dignity. In *Sri Venkataramana Devaru v. State of Mysore*, 1958 SCR 895 :

AIR 1958 SC 255 (paragraph 26), the Court considered the meaning of the phrase "**subject to the provisions of this Part**" in Article 25 (1) to state that the other provisions of the Part would "prevail over" it, or would "control the right conferred" by Article 25 (1).

(iii) Freedom of religion is not confined to the male gender:

It is also necessary to note that Article 25(1) provides that all persons are equally entitled to freedom of conscience and the right to profess, practice and propagate religion. This means that the right is equally available to women and is not confined to men. Therefore, any patriarchal or one sided interpretation of religion or the practice of religion ought not to be countenanced.

(iv)Freedom of religion is subject to, *inter alia*, morality and health:

The freedom of religion under Article 25 is subject to public order, morality and health. Even assuming, purely for the purposes of argument, that such practices are an integral or essential part of religion, it is submitted that the fundamental right guaranteed under Article 25 is qualified, *inter alia*, on grounds of "morality". Morality in the present context would denote contemporary constitutional morality which endeavours to strive for gender equality and dignity of women and the abandonment of practices which may be considered patriarchal, anachronistic or retrograde. In *Javed v. State of Haryana*, (2003) 8 SCC 369, a bench of three Hon'ble judges held:

> **"43.** A bare reading of this article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.
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> **44.** The Muslim law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of the Haryana Act being violative of Article 25 does not arise."

Further, in *Commissioner of Police v Acharya Jagadishwaranda Avadhuta*, (2004) 12 SCC 770, a bench of three judges took the view that polygamy is injurious to public welfare and morality:

> **"77.** Though the freedom of conscience and religious belief are absolute, the right to act in exercise of a man's freedom of conscience and freedom of religion cannot override public interest and morals of the society and in that view it is competent for the State to suppress such religious activities which are prejudicial to public interest. That apart, any activity in furtherance of religious belief must be subordinate to the criminal laws of the country. It must be remembered that crime will not become less odious because it is sanctioned by what a particular sect may designate as religious. Thus polygamy or bigamy may be prohibited or made a ground of disqualification for the exercise of political rights, notwithstanding the fact that it is in accordance with the creed of a religious body.
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> **78.** The liberty of the individual to do as he pleases, even in innocent matters, must yield to the common good. In other words, the police power of the State is founded on the theory that when there is conflict between the rights of an individual and the interest of society, the interest of society must 803 prevail. In an organised society there cannot be any individual right which is injurious to the community as a whole. At the same time, the police power is not absolute and must not be arbitrary or oppressive. In other words, the police power must be exercised for preservation of the community from injury. What our Constitution attempts to do is to strike a balance between individual liberty and social control. There are two limbs to religious freedom contained in Article 25. While one limb guarantees the right the other limb incorporates restrictions on the exercise of the right so that they (*sic* it) may not conflict with public welfare or morality."

Likewise, in *Sarla Mudgal*, (1995) 3 SCC 635, this Hon'ble Court observed that polygamy is injurious to public morals:

> **"34.** It has been judicially acclaimed in the United States of America that the practice of polygamy is injurious to "public morals", even though some religions may make it obligatory or desirable for its followers. It can be superseded by the State just as it can prohibit human sacrifice or the practice of 'Suttee' in the interest of public order. Bigamous marriage has been made punishable amongst Christians by Act (XV of 1872), Parsis by Act (III of 1936) and Hindus, Buddhists, Sikhs and Jains by Act (XXV of 1955)."

(iii) <u>Distinction between religion and religious practices:</u>

It is necessary to draw a line between religion per se and religious practices. The latter are not protected under Article 25. "Religion" has been explained in *A.S. Narayana Deekshitulu v. State of A.P.,* (1996) 9 SCC 548, (1996) 9 SCC 548 (at page 592, paragraphs 86 and 87):

> "**86.**A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.
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> **87.** In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc.; even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be predominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class of persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise 594definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right

> to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or regulating any activity — economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence — factual or legislative or historic — presented in that context is required to be considered and a decision reached."

In *Javed v*. State *of Haryana*, (2003) 8 SCC 369, the Court drew a distinction between religion and religious practice:

> **"49.** In *State of Bombay* v. *Narasu Appa Mali*, the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) was challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held: (AIR p. 86, para 5)
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> "[A] sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."
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> **50.** Their Lordships quoted from American decisions that the laws are made for the governance of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is a recognized institution according to Hindu religious practice, Their Lordships stated in no uncertain terms: (AIR p. 86, para 7)
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> "[T]he right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(*b*) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

(iv) Polygamy as a social practice / custom:

Practices such as polygamy cannot be described as being sanctioned by religion inasmuch as historically, polygamy prevailed across communities for several centuries including the ancient Greeks and Romans, Hindus, Jews and Zoroastrians. It had less to do with religion and more to do with social norms at the time. In the Holy Qoran as well, it appears that the prevalent or perhaps even rampant practice of polygamy in pre- Islamic society was sought to be regulated and restricted so as to treat women better than they were treated in pre- Islamic times. It is submitted that the practice of polygamy is a social practice rather than a religious one and therefore would not be protected under Article 25. This is true also of *nikah halala* and triple talaq. As elaborated below, for the same reason, polygamy would amount to a custom or usage, which is "law" within the meaning of Article 13 and therefore subject to fundamental rights.

(v) Incorrectness of observations in *Narasu Appa Mali* observation on personal law:

It is submitted that personal laws must be examined in the light of the overarching goal of gender justice and dignity of women. The underlying idea behind the preservation of personal laws was the preservation of plurality and diversity among the people of India. However, the preservation of such diverse identities cannot be a pretext for denying to women the status and gender equality they are entitled to under the Constitution as citizens of India. It is submitted that personal law is "law" within the meaning of Article 13 and any such law which is inconsistent with fundamental rights is void. It is respectfully submitted that the interpretation of a division bench of the Bombay High Court in *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84 to the effect that Article 13 of the Constitution does not cover personal laws warrants reconsideration for, *inter alia*, the following reasons:

(a) The plain language of Article 13 clearly posits that personal law as well as customs and usage are covered within the scope of "law". Article 13 reads:

"13. Laws inconsistent with or in derogation of the fundamental rights

> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void
> (3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas
> (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368"

The meaning of "law" as defined in sub-articles (2) and (3) of Article 13 is not exhaustive and hence covers personal law. It is submitted that under clause (2) of article 246 of the Constitution, Parliament and State Legislatures have power to make laws also on subject matters enumerated in entry 5 of Concurrent List of the Seventh Schedule to the Constitution pertaining to 'Marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law'. Since the subject matters of Entry 5 are relatable to personal laws, therefore, "personal law" is law within the meaning of sub-clause (a) of clause (3) of Article 13 of the Constitution.

The observation of the Bombay High Court in *Narasu Appa Mali* is contrary **to the plain language of article 13**. This particularly is the view of the plain language of Article 13(3) (a) which defines "law" as including "*any…custom or usage having in the territory of India the force of law*".

(b) The observations in *Narasu Appa Mali* are obiter and do not constitute the ratio of the judgment.

(c) The said judgment, being a judgment of a High Court is not binding on this Hon'ble Court.

(d) Without prejudice to the above, the said practices under challenge have been incorporated into the Muslim Personal Law (Shariat) Application Act, 1937 which is a "law in force" within the meaning of Article 13(3)(b). The Petitioner has challenged Section 2 of the aforesaid Act in so far as it recognises and validates the practices of triple talaq or talaq-e-bidat, nikah halala and polygamy. Therefore, even assuming for the purposes of argument that these practices do not constitute customs, the same are nonetheless covered by Article 13.

(e) Pertinently, despite this ruling that was later followed in *Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689 and *Maharshi Avdhesh* v. *Union of India*, (1994) Supp (1) SCC 713, the Supreme Court has actively tested personal laws on the touchstone of fundamental rights in cases such as *Daniel Latifi v. Union of India, (2001) 7 SCC 740 (5J), Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 (5J), John Vallamattom v. Union of India, (2003) 6 SCC 611 (3J) etc*. Further, in *Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami Thirukoil*, (1996) 8 SCC 525, a <u>three</u> judge bench adopted a contrary position to *Narasu Appa Mali* and stated that *"[…] But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the constitutional goal*." (paragraph 26) It further stated that, "*Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights*." (paragraph 15). It is significant to note that this case concerned the inheritance rights of Hindu women.

In the circumstances aforesaid, it is respectfully submitted that the observations in *Narasu Appa Mali* that personal law is not covered under Article 13 are incorrect and not binding upon this Hon'ble Court.

(vi) Essential practice test:

The Constitution accords guarantee of faith and belief to every citizen, but every practice cannot be held to be an integral part of such faith and belief. The religious practices must satisfy the overarching constitutional goal of gender equality, gender justice and dignity.

It is submitted that practices of triple talaq, *nikah halala* and polygamy cannot be regarded as part of any "essential religious practice" and would not therefore automatically be entitled to protection under Article 25. The test of what amounts to an essential religious practice, was laid down in a catena of judgments including *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, AIR 1954 SC 282 (paragraph 20), *Ratilal* v. *State of Bombay*, AIR 1954 SC 388 (paragraph 13), *Qureshi* v. *State of Bihar*, AIR 1958 SC 731 (paragraph 13), *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534 (paragraph 22), *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 853 (paragraph 60). It is significant to note that in the counter-affidavit dated August 2016 filed on behalf of the Muslim Personal Law Board i.e. Respondent no. 3 to this petition, the practices of triple talaq, nikah halala and polygamy have been referred to as "undesirable". It is respectfully submitted that no "undesirable" practice can be elevated to the status of an "essential practice", much less one that forms the substratum of religion.

It may be relevant to add that the judgment of the Bombay High Court in *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84, passed about 64 years ago seems to acknowledge that although multiple marriages were acceptable across communities in the past, there was no legal bar in abolishing such practice, given

the march of time and the need for social reform. The judgment further seems to acknowledge that at the time it was rendered, 1951, i.e. more than sixty years ago, "*one community might be prepared to accept and work social reform; another may not yet be prepared for it…*" It did not hold or even indicate that there was any bar, legal or constitutional, to the introduction of social reform across communities, including the Muslim community. In fact, the judgment says that "*the State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise*." In other words, there is a clear indication that reform was to follow in the Muslim community as well. However, the same has not happened for over six and a half decades and women who comprise a very sizable proportion of the said Indian population (approximately 8% of the population of India, i.e. 96.68 million approximately, as per 2011 census) remain extremely vulnerable, both socially as well as financially. Even though it may be true to say that only some women are directly and actually affected by these practices being divorced by *talaq e bidat* or being in a polygamous marriage, the fact remains that every woman who is subject to the said law lives under the threat, fear or prospect of these practices being invoked against her, which in turn impacts her status, her choices, her conduct and her right to a life with dignity. In any event, even if the fundamental rights of a small section of society which has suffered on account of the impugned practices are violated, the courts are not deterred from exercising their powers of judicial review. Undoubtedly, certain practices at the time they evolved, including the practice of polygamy, must be viewed in the context of the times. Although they may have been regarded as progressive and path-breaking centuries ago, ushering in reform and security, with the passage of several centuries and the evolution of women and notions of gender justice, these practices require a serious reconsideration.

IV. INTERNATIONAL COVENANTS

(i) India is obligated to adhere to the principles enshrined in international covenants to which it is a party. India being a founding member of the United Nations, is bound by its Charter, which is the first ever international agreement to proclaim gender equality as a human right in its preamble, reaffirming "faith in fundamental human rights, in the dignity of the human person, in the equal rights of men and women and of Nations large and small." Significantly, the United Nations Commission on the Status of Women first met in February, 1947, with 15 member states - all represented by women; including India, represented by Shareefah Hamid Ali. During its very first session, the Commission declared its guiding principles, including, "to raise the status of women, irrespective of nationality, race, language or religion, to equality with men in all fields of human enterprise, and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law." (United Nations Commission on the Status of Women, First Session, E/281/Rev. 1, February 25, 1947). The Universal Declaration of Human Rights, 1948, the International Covenant of Economic, Social and Cultural Rights, 1966 and the International Covenant of Social and Political Rights, 1966 lay stress on equality between men and women. The other relevant international instruments on women are: Convention on the Political Rights of Women (1952), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), Universal Declaration on Democracy (1997), and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

(ii) The Government of India ratified the Vienna Declaration or the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 19-6-1993. The preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social,

economic and cultural life of their country; hampers the growth of the personality from society and family and makes more difficult for the full development of potentialities of women in the service of their countries and of humanity. Article 1 of the CEDAW defines discrimination against women, while Article 2(*b*) enjoins the State parties to pursue elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women". Clause (c) of Article 2 enjoins to ensure legal protection of the rights of women and Article 3 of the CEDAW enjoins State parties to take all appropriate measures to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.

(iii) The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this convention and other declarations and is committed to actualise them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned.

V. INTERNATIONAL PRACTICES

(i) It is extremely significant to note that a large number of Muslim countries or countries with an overwhelmingly large Muslim population such as, Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt, Iran and Sri Lanka have undertaken significant reforms and have regulated divorce law and polygamy. The international position is summarized in a chart in the counter affidavit filed by the Union of India.

(ii) Pakistan requires a man to obtain the permission of an Arbitration Council as also of his first wife before contracting a second marriage. A divorcing husband is required to send notice to the Council, and a copy of the said notice to his wife, after which the Council will attempt to broker reconciliation. While practices in

Bangladesh are similar to those in Pakistan, in Tunisia and Turkey, polygamy has been criminalized. Tunisia and Turkey also do not recognize extra- judicial divorce such as the practice of talaq-e-bidet. In Afghanistan, while nikah- halala is an acceptable practice, divorce where three pronouncements are made in one sitting is considered to be invalid. In Morocco and Indonesia, polygamy is permitted with the permission of the court and the consent of the first wife. In fact, Morocco permits women to include a clause in their marriage contract prohibiting a second marriage. Divorce proceedings take place in a secular court, procedures of mediation and reconciliation are encouraged, and men and women are considered equal in matters of family and divorce. In Indonesia, divorce is a judicial process, where those marrying under Islamic Law can approach the Religious Court for a divorce, while the others can approach the district courts for the same. In Iran and Sri Lanka, divorce can be granted by a Qazi and Court respectively, only after reconciliation efforts have failed.

(iii) It is noteworthy that even theocratic states have undergone reform in this area of the law and therefore in a secular republic like India there is no reason to deny women the rights available under the Constitution. The fact that Muslim countries have undergone extensive reform would also bely the case that the practices in question are an essential religious practice.

In the circumstances aforesaid, in answer to the issues outlined above it is submitted:

(i)The practices of *talaq-e-bidat, nikah halala* and polygamy are not protected under Article 25(1) of the Constitution.

(ii) Article 25(1) is subject to Part III of the Constitution and in particular to Articles 14 and 21 of the Constitution.

(iii) Personal law is "law" within the meaning of Article 13 of the Constitution.

(iv) The practices of *talaq-e-bidat*, *nikah halala* and polygamy are not compatible with India's obligations under international treaties and covenants to which it is a signatory.

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