CONSTITUTION, STATUTORY LAWS AND PERSONAL LAW: THE DIVIDED CONSTITUTIONAL BENCH IN *SHAYARA BANO* V. *UNION OF INDIA*

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I. Introduction

Muslim personal law doesn't require Muslim couples to recite vows in their marriage but that doesn't make it any less sacred than it is considered in Hindu Law. The true nature of marriage is highly debatable. Some says it to be a pure civil contract because it requires proposal from one and acceptance from other, the consent must be free and the marriage can be breached. Other opines that it is an *ibadat,* a religious sacrament in nature.Whatever may be the nature of the marriage but one fact, which can never be denied is that Muslim law has also been stung by the vicious divorce.Prophet has discouraged divorce yet it has been allowed by the holy Quran and Hadith in certain situations.

Divorce may be effected at the instance of the husband. It may be effected at the request of wife or the marriage may be dissolved by mutual consent, called *Mubarat*. Divorce at the instance of husband can further be divided into five categories: *talaq-e-ahsan*, *talaq-e-hasan*, *talaq-e-biddat*, *ila*, and *zihar*. In Muslim personal law, divorce asked by wife is known as *khula*. Apart from that women can file for divorce under Dissolution of Muslim Marriages Act, 1939.

While *talaq-e-ahsan*is considered to be most approved mode of *talaq* approved by both Quran and Hadith, *talaq-e-hasan*, is considered only reasonable and proper mode of *talaq*. *Talaq-e-biddat* on the other hand is regarded as sinful irregular mode of *talaq*. Three pronouncement made in one sentence during a *tuhr* is enough to break the sacred knot of marriage in this form of *talaq* and the divorce becomes effective and irrevocable forthwith the pronouncement of *talaq*. In *talaq-e-ahsan* the husband makes single pronouncement of *talaq* during *tuhr*. It is followed by a period of abstinence called *iddat* which generally is for three menstrual cycles or three lunar month[1]

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1 *Tuhr* is a period when a woman is free from her menstrual course; it's a state of purity. In an unconsummated marriage, *talaq* may even be pronounced when the wife is in her menstrual course. If the spouses are away from each other for a long period or where the wife is beyond the age of mensuration, the condition of *tuhr* (purity) is not applicable. *See*, Prof. I.A. Khan (ed.), Aqil Ahmad Mohammedan Law (Central Law Agency, 2007) p. 170.

This mode of *talaq* is revocable hence if the spouses resume cohabitation or the husband expresses that 'he has retained her' during the period of *iddat*, the pronouncement is treated revoked. Though absence of resumption of cohabitation within *iddat* period makes the pronouncement irrevocable and final. In *talaq-e-Hasan*, the husband makes three successive pronouncements of *talaq*. The pronouncement is made during the *tuhr*, the second during the next *tuhr* and the third during the succeeding *tuhr*; if the wife is non- menstruating, the pronouncement should be made during the successive intervals of 30 days[2]. Third pronouncement makes the divorce irrevocable. While cooling off period during *iddat* in these two forms of *talaq* assure chance of reconciliation, the unavailability of the same in *talaq-e-biddat* subject it to the criticism by feminists, scholars, jurists and other sections of the society.

The legality and constitutionality of triple *talaq* was challenged by five Muslim women before the Supreme Court[3] and it was urged todeclare this practice illegal and impermissible as it violates women right to equality, life and dignity.The issue is finally dispose of by the Supreme Court, on 22nd August 2017. Majority judgment of Justices R.F Nariman, U.U Lalit and J. Kurian Joseph running down 123 pages declared triple *talaq* invalid. While Justice R.F Nariman, Justice U.U. Lalit held the practice to be arbitrary, unreasonable, unfair violating Muslim women right to equality encroaching upon their right to life and dignity, Justice Kurian Joseph adjudged the practice not integral part of right to religion. Chief Justice J.S. Khehar and Justice S.A. Nazeer in 272 pages expressed their dissenting view on the issue and recognized triple *talaq* as part and parcel of Muslim personal law and thus enjoy the status of fundamental right under Article 25 of the Constitution. Exercising its power under Article 142, Chief Justice then directed the Union of India to bring appropriate legislation particularly with reference to *talaq-e-biddat*. The judge then granted injunction against Muslim husbands from pronouncing triple *talaq*. This injunction would remain operative for a span of six months. If the legislature initiates the process before the expiry of six months, the injunction would continue till the legislature comes up with the legislature. Failing which the injunction shall cease to operate. This paper endeavors to critically appraise the verdict delivered by the divided Constitutional bench and also highlights the gaps and lacuna in the judgment and pandora box it has opened for the Judiciary.

2 *Ibid.*

3 *Shayara Bano* v. *Union of India,* AIR 2017 SC 4609.

II. Shayara Bano v. Union of India

A. Against the validity and legality of triple talaq

To challenge the validity of triple *talaq* the petitioners rested their case on constitutional morality claiming that commitment to the Constitution is the fulcrum of constitutional morality, which further demands tradition and conventions to grow under the light of such ethos[4]. The second bullet was shot on Article 25 of the Constitution, which declares Freedom of religion subject to other fundamental rights provided under part III of the Constitution.[5] It was claimed that plethora of judgments substantiate the fact that under the right to religion only core belief, essential to spiritual well-being could be protected. *Talaq-e-biddat* unanimously considered to be sinful and therefore could never been regarded as essential part of Muslim religion and therefore prayed to be declared invalid by the Court.

It was further contended by Ms Indira Jaising arguing on behalf of the Muslim Women who have been divorced by their husbands by pronouncement of triple *talaq* that with the commencement of Muslim Personal Law (Shariat) Application Act, 1937 (hereafter Act, 1937) personal law has reached the status of statutory law and thus must be tested on the touchstone of other fundamental rights provided under part III of the Constitution. The court's attention was further drawn towards the various International covenants, commissions and declarations.[6] All of these conventions and commissions are rigorously working to ensure equal status to women in the society and to eliminate all forms of discrimination, biases and impediments to development demands enforcement from the ratifying and participatory states. India being one of them is obliged to maintain the sanctity of the same.

It was urged by the Attorney General Mukul Rohatgi that almost all the Muslim Countries including Islamic theocratic States have undergone significant reforms and in such a scenario, India being a secular country there is no reason

[4] *Manoj Narula* v. *Union of India,* (2014) 9 SCC 1.

[5] *Sri Venkataraman Devaru* v. *State of Mysore*, 1958 SCR 895. It was held in this case that other provision of part III would prevail over Art 25 of the Constitution.

[6] Like Universal Declaration on Human Rights (UDHR), 1948; Convention on the Political Rights of Women, 1952; Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women, 1955; International Convention on Civil and Political Rights, International Convention on Economic (ICCPR), 1966, Social and Cultural Rights (ICESCR), 1966; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974; Vienna Declaration and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1979;Universal Declaration on Democracy 1997; and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.*See*, *supra* n. 3, paras 47 and 74.

to delay and deny women their equitable rights already been acknowledged and secured by the rest of the world. He also highlighted the requirement of differencing religion per se and religious practices, and argued that Constitution protects the former not the latter.[7]

Further it was submitted by Ms Indira Jaising that cardinal principle of interpretation demands all the conflicting provisions of the Constitution must be construed harmoniously and right to religion must give way to women right to equality.

It was then contended by Mr. Salman Khurshid that to settle the conflict *Quran* must be referred first and only in absence of clear guidance, hadith[8] could be referred. When the answer is available neither in *Quran* nor in *sunna*, general consensus called *ijma* could be taken into consideration though it must be kept in mind that the *sunna* and *ijma* must not be read in a manner which runs counter to the message given by Quran. As triple *talaq* leaves no door open for reconciliation and goes against the spirit of Quran hence should be held invalid.

B. Proponents of validity and legality of triple talaq

To rebut the contentions raised by the opponents of triple *talaq* it was argued before the court that personal law and custom and usage are not identical terms. The definition of 'custom and usage' does not include in itself personal law followed by religious denomination and hence they are not subservient to Article 13 of the Constitution. Also the fact that the Act, 1937 ensures applicability of Muslim personal law over customary law but that itself doesn't gives the Act, 1937 flavour of statutory law.

It was contended that in India majority of the Muslims are Sunni's and 90% of them belongs to Hanafi school and petitioners relied on interpretation suggested by scholars who didn't even belong to the Sunni faith hence there elucidation is irrelevant to decide the present dispute.To unveil the ambit and scope of freedom of religion, Kapil Sibal learned Senior Advocate drew court's attention to Constituent Assembly debates in which Mahboob Ali Beg, Pocker Sahib, Mohamed Ismail Sahib, Sahib Bahadur, Naziruddin Ahmad proposed amendments to draft Article 35, Uniform Civil Code,[9] so that personal laws could be guarded against any dent targeted in the name of fundamental rights. He also claimed that the personal laws of some of the communities are very

[7] *A.S. Narayana Deekshitulu* v. *State of A. P.,* (1996) 9 SCC 548, paras 86 and 87 were placed before the court.

[8] *Supra* n.3, p. 87. Tradition of the Prophet Muhammad is recorded in the *hadiths*.

[9] *Supra*, n. 3, pp. 140-145.

near and dear to them and a march into their personal law will bring disharmony, discontent and dissatisfaction in the people and society of India. It was further submitted by Mr. V. Giri, that question of violation of Fundamental rights could be invoked against State action, personal law, not being statutory law does not find its origin from state and therefore could not be challenged on the ground of transgressing provisions contained in part III of the Constitution.

C. Decision of the Court

The very first issue taken up by Chief Justice J.S Khehar was whether *Rashid Ahmad* v. *Anisa Khatun*[10] in which Privy Council upheld the validity of *talaq-e-biddat* holding it to be final and irrevocable the very moment it is pronounced, require a relook? After weighing rival contentions against each other, Hon'ble Chief Justice of the Supreme Courtrelied on the judgment of Yusuf *Rawther* v. *Sowramma,*[11] *Jiauddin Ahmed* v. *Anwara Begum,*[12] *Mst. Rukia Khatun* v. *Abdul Khalique Laskar,*[13]*Masroor Ahmed* v. *State (NCT of Delhi)*,[14] *Nazeer* v. *Shemeema*.[15] In Yusuf case the validity of triple *talaq* was again questioned before the Court. It was held by Justice V.R Krishna Iyer that the views expressed by Privy Council on Muslim personal law are based on incorrect understanding of 'Shariat'. In *Jiauddin Ahmed,* Gauhati High Court negated the validity of triple *talaq* and decided contrary to what was held in *Rashid Ahmad* case. The court in this case said:

> A perusal of the Quranic verses quoted above and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J (ILR 30 BOM. 537) that "the whimsical and capricious divorce by the husband is good in law, though bad in theology". These observations have been based on the concept that women were chattel belonging to men, which the holy Quran does not brook. Costello, J. in 59 Calcutta 833 has not, with respect, laid down the correct law of *talaq*. In my view the correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family the other from the husband's. If the attempts fail, *talaq* may be effected.

[10] AIR 1932 PC 25.

[11] AIR 1971 Ker 261.

[12] (1981) 1 Gau LR 358.

[13] (1981) 1 Gau LR 375.

[14] (2007) ILR 2 Delhi 1329.

[15] 2017 (1) KLT 300.

Delhi High court was also moved to decide the fate of triple *talaq* in the *Masroor Ahmed* case. Justice Badar Durrez Ahmed relying on relevant '*hadith'* deduced that Privy Council decision was not in consonance with Muslim personal law. In the words of the court:[16]

> it is accepted by all schools of law that *talaq-e-biddat* is sinful. Yet some schools regard is as valid. Courts in India have also held it to be valid. The expression-bad in theology but valid in law-is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by Prophet Muhammad. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by *shia* schools. There are views even amongst the *sunni* schools that the triple *talaq* pronounced in one go would not be regarded as three *talaqs* but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple *talaq* has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.
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> In this background, I would hold that a triple *talaq (talaq-e-biddat),* even for *sunnimuslims* be regarded as one revocable *talaq*. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the *iddat* period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the *iddat* period expires and the *talaq* can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh *nikah* on fresh terms of *mahr etc*.

Then the High court of Kerala in *Nazeer* case emboldened the miserable condition of Muslim wives[17] in consequence of continuing the practice of pronouncing triple *talaq,* which severe the matrimonial ties in one sentence.

After careful perusal of the afore mentioned judgments it was held by the court that Rashid Ahmad case yearn for a fresh look. It was further held by the hon'ble Judge that although *talaq-e-biddat* does not find its origin in Quran but so is the case withother forms of divorces like *talaq-e-ahsan* and *talaq-e-hasan*. The petitioners have not challenged the validity and legality of these

[16] *Ibid.*, para 26 and 27.

[17] *Supra* n. 15.

two and they in fact have been acknowledged by the petitioner to be most proper and reasonable mode of *talaq*. Therefore challenge to triple *talaq* cannot be allowed on this score.

Chief Justice then explained that *sati*, *devadasi* and polygamy were sinful practices but they were discontinued and invalidated by the legislatures. In the present scenario also it is the parliament, which has the authority to bring reform Judiciary being bound by the rule of separation of power, is incapable to do so. Expressing his disagreement with the Chief Justice on the aforesaid issue J. Kurian Joseph said that this Court in *Shamim Ara* v. *State of UP*[18] already held that triple *talaq* lacks legal sanctity. Since then *Shamim Ara* is understood as the law of the land by various High Courts.

It was further held by the hon'ble Chief justice that there is unanimity about two issues. First that *talaq-e-biddat* has been followed for more than 1400 years. Secondly triple *talaq* in consensus acknowledged bad in theology but good in law. Hence the court can't held the practice to be invalid. Also it considers *talaq-e-biddat*as an integral part of Sunni's personal law. Expressing his disagreement with Chief Justice J.S Khehar, and Justice Kurian Joseph explained that the whole purpose of the Act, 1937 was to discontinue anti Shariat practices. To decipher the meaning of Shariat, the Judge referred to Asaf A.A Fyzee, which runs thus:[19]

> What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or *Shariat* and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions' and who can answer them? Certainly not man, say the Muslim legists. We have the Quran which is the very word of god. Supplementary to it we have hadith which are the Traditions of the Prophet-the records of his actions and his sayings-from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Quran or in the Hadiths to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles.

The hon'ble judge thus concluded that *hadiths, ijma* or *qiyas* could not go against what is precisely stated in *Quran. talaq-e-biddat* as doesn't confer opportunity of reconciliation between the spouses is against the tenets of *Quran*, cannot be afforded Constitutional protection. Further to elucidate the meaning

[18] (2002) 7 SCC 518.

[19] Tahir Mahmood (ed.), OUTLINES OF MUHAMMADAN LAW (Oxford University Press, 2008).

of essential practice Justice R.F Nariman quoted two pivotal judgments[20] of this court. In *Javed* it was held that

> what is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted

In *Commisioner of Police* v. *Acharya Jagdishwaranda Avadhuta*[21] apex court while explaining the essential part of a religion, states:[22]

> what is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one;s religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (sic essential) part or practices.

Triple *talaq* fails the aforementioned test, as the Islamic religion would survive even in the absence of this practice. Triple *talaq* is neither commanded nor recommended at the most it is considered permissible though reprobated as unworthy.[23] Hence *talaq-e-biddat* could not be adjudged essential practice having protection under Article 25 (1) of the Constitution. The contention of the Muslim Personal Board that the reform could be brought by legislature is not

[20] *Javed* v. *State of Haryana*, 2003 (8) SCC 369.

[21] 2004 (12) SCC 770.

[22] *Ibid*.

[23] Also *see* M. Hidayatullah & A. Hidayatullah (eds.), INTRODUCTION TO MULLA'S PRINCIPLES OF MAHOMEDAN LAW (N.M. Tripathi Ltd., 1990). Degree of obedience- Islam divides all human action into five kinds. (i) First degree:*Fard*, (ii)Second degree: *Masnun, Mandub* and *Mustahab*, (iii) Third degree:*Jaiz*or *Mubah*, (iv) Fourth degree: *Makruh*, (v) Fifth degree: *Haram*.

sustainable, as Article 25(2) (b) will come into picture only if the practice is essential integral part of religion under Article 25(1) of the Constitution.

The next question entertained by Chief Justice Khehar was that whether *talaq-e-biddat* violates the parameters expressed in Article 25 of the Constitution as it infringes the other provisions of part III of the constitution? Has Muslim personal law gained statutory law status with the enactment and enforcement of Act, 1937? In answer to this question the Chief Justice pronounced that after a careful perusal of the various provision of the constitution, we conclude that the expression 'law in force' under Article 13 does not include personal law. Also that fundamental right provided under part III of the Constitution can be invoked against the state. Since personal law 'Shariat' is not based on any State legislative action hence cannot be tested on the touch stone of being a State action[24]. Having closely examined Section 2 of the concerned Act, it could hardly be doubted that the Act was enacted with the sole purpose to ensure over riding effect of Muslim personal law 'Shariat' over usages and customs. The Act, 1937 does not lays down or declare Muslim personal law. Justice Kurian Joseph endorsed the same view.

Contrary to the aforementioned was the opinion of Justices R.F Nariman and U.U. Lalit. These two judges declared the Act, 1937 as a pre constitutional legislative measure and therefore subject to Article 13(1) of the Constitution of India. Section 2 of the 1937 Act mandates that "notwithstanding any custom or usage, in the matter provided under section 2, the rule of decision shall be Muslim personal law.[25] It was further held that 1937 Act recognizes and enforces all forms of *talaq* recognized and enforced by Muslim personal law and that mean it would include triple *talaq* too. As this court has already concluded 1937 Act is a law made by legislature, it squarely would find place in expression "law in force" in Article 13 (3) (b). Triple *talaq* being inconsistent with fundamental right would hit Article 13 (1) of the Constitution and hence unconstitutional.

On the question of Constitutional morality and *talaq-e-biddat*, and the impact of international conventions and declarations on *talaq-e-biddat*, Chief Justice Khehar said that Constitutional Assembly debates leads us to a clear

[24] *Supra* n.3.

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

direction, that Constitution requires state to provide for a uniform civil code.[26] In reference to international conventions and declaration court maintained that while Constitution respects and supports all conventions and declaration it preserves 'personal law' as an exception.

III. Some Observations

The apex case caution that court cannot transgress the field of legislature is laudable and true yet at the same time it is relevant to highlight here that court being court of justice, equity and good conscience can never foster practices which puts the women in dark alley of injustice. Where such act of husband should have got slap on his face that act is strangely finding support and legitimacy in the words of Chief Justice Khehar. The doctrine of separation envisage legislature should legislate, executive to execute and judiciary to dispense justice in accordance with existing laws. In reality such watertight division is impracticable and impossible. Court could have worried about the possibility of adequate enforcement but in the present situation where central government speaking through Attorney General, Mukul Rohatgi has already supported the cause, such fear loses its grips.

Also it is noteworthy that on one hand Chief Justice Khehar expressed his inability to usurp the function of legislature and refused to declare triple *talaq* invalid and illegal. Strangely he didn't hesitate issuing direction to the Union of India to come with the appropriate legislation blatantly disregarding principle of judicial restraint. On this Justice Kurian Joseph said that court couldn't grant injunction under Article 142, which restrict the enforcement of fundamental right.

With respect to Holy *Quran* in reference to *talaq-e-biddat*, it is unfortunate to say that the Chief Justice failed to gauge the fact that *Quran* though have not provided the modes of divorce but in a precise manner has crystalized the procedure, which the husband must adhere to. Divorce as ordained by Quran must not be pronounced in arbitrary fashion rather the *talaq* must be for a reasonable cause preceded by attempts of reconciliation by two arbitrators one from the husband's side and other from the wife's family.[27] Further, with respect to the Chief Justice Khehar declaring triple *talaq* integral and essential part of Muslim personal law enjoying stature of fundamental right, then why in fact the judge held that *Rashid Ahmad* require relook at triple *talaq*. If the court doesn't want to transgress its limit, specifically in the light of the above finding what is the need of examining ita fresh? A practice does not become

[26] *Supra* n. 3.

[27] *Sura* LXV of the Quran.

integral part of a religion even if it is in vogue since time-immemorial. The test to find out essential practices of the religion has already been clarified through *Javed* and *Acharya Jagdishwaranda Avadhuta* cases.

Reflecting on the findings of the Chief Justice about the Act, 1937 doesn't codify Muslim personal law. It becomes pertinent to mention that 1937 Act may not lay down or declare Muslim personal law but Muslim personal law is given overriding effect over customs and usage and it is enforceable because of the mandate of Section 2 of the 1937 Act. It is one thing to say that inadvertently the legislature made the whole Muslim personal law applicable on Muslims without even ascertaining its righteousness and it is totally different thing to deny the fact of the personal law reaching the status of statutory law. The legislature could be criticized for introducing the law without foreseeing its consequences but this fact cannot be denied that the Muslim personal law is binding and enforceable in court of law because of the existence of Section 2 of the Act, 1937. Therefore the validity of the Act can always be challenged in the light of Article 13 of the Constitution. The personal law must be in consonance with fundamental right otherwise the fate of the same is not hard to predict.

Also with respect to the declaration by the Chief Justice of the Supreme Court that fundamental right provided under part III of the Constitution could be invoked against state only and Shariat not having reached to the status of statutory law cannot be tested on the touchstone of state action. Well if that is the case then why writ of Habeas Corpus could be enforced even against private individual. In *Indian Council for Enviro-Legal Action* v. *Union of India,*[28] the apex Court held:[29]

> If by the action of private corporate bodies a person's fundamental right is violated the court would not accept the argument that it is not 'State' within the meaning of Article 12 and therefore, action cannot be taken against it.

IV. Conclusion

Undoubtedly the verdict on triple *talaq* has brought back smile of Muslim Women and has earned praise from every corner of the society. But even in the mood of festivity we cannot afford to overlook the fact that by declaring a practice as integral to religion having stature of fundamental right is immune to be struck down by Article 13 of the Constitution and could be reformed by the parliament in India, the court has itself chopped its hand and made itself handicap. This observation of the Chief Justice Khehar might put the judiciary in awkward,

[28] (1996) 3 SCC 212.

[29] *Ibid.* Also there are plethoras of cases, which rebut this finding.

inconvenient position where the Court would be made a mere spectator witnessing injustice winning over equity. The Court being court of justice should always adopt harmonious interpretation of law. Choosing one fundamental right over all the other fundamental rights has dis balanced the conflicting rights and goes against the rules of interpretation. Judiciary of any country is eyes of that society; the protector and guardian of rule of law and the hope of the population with the sword of courage must dispense justice in the society.