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Critical Analysis of Triple Talaq under Muslim Law

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Religion has become a part of the human race and for a human being. Human life and religion are so closely mixed that it is hard to dissociate each other. Religion has reached not only the spiritual sphere but deciding the very core of individuality. With the passage of time, humans have developed various customs and notions by which they governed their lives. These customs and notions do not only extend up to the individual but also affect the family life and social life of an individual. Religion is playing important role in deciding the pattern an individual will behave in the outer world e.g. to whom he marries, how the marriage will be dissolved, how, by what rules the marriage will be organised, etc. Thus religion plays a huge and crucial role in individual life. Likewise, it is always a debatable question that how much a state should interfere and regularized the practices and beliefs of a religious community. There are several practices in religions, which have been practised by the followers of that religion too, which are not suitable according to the modern developed and the scientific world. History is evident that the rulers always interfere in the religious matters and personal affairs of a particular religion especially matters governing their mutual domestic relations. They allowed the people to be governed by their respective religious personal conduct. Even in the British empire, they allowed the Hindus and Muslims to be governed by their mutual personal laws which are religious in character. The logic is that the religious community did not want to interfere in the matters of the religion in customs that have been practised for several years and became part of the religion itself, though the practice is discriminatory they never want it to change. At the time of independence, India adopted to be a secular state which is also enriched in our Indian constitution, and not to interfere with religious matters of the people.

Keywords: *triple talaq, constitution of India, muslim women.*

INTRODUCTION

Marriage is an important part of human life; its essence is the same in all religions but nature changes. The two persons marrying each other are governed by the rules which are followed by that particular community and they are supposed to live in consonance with these rules in the future even after marriage. The nature of marriage differs according to religion or according to the customs of the community. The breakdown of marriage is another aspect that is related to the personal affairs of the individual. Divorce means the dissolution of marriage when two persons have decided not to live together and the court and community either don't allow them to live together. Under HINDU LAW, there is no concept of divorce prior to the codification of Hindu law. Marriage is considered sacramental between two people for life. But in Muslim law, generally, marriage is a contract between two consenting persons which can be terminated as well. The term used in the Muslim law for divorce is '**Talaq'**. Under Muslim law, there have been various type of Talaq which has been recognised by the Muslim community, though many times it was stated that the practice of talaq is discriminatory and derogatory to women. It was also alleged that the practice of Talaq is inconsistent with the Indian constitution. Therefore, it becomes a need to analyse the practice of talaq so that a person should not suffer and must be provided with all rights given under the constitution. Marriage, in Muslim law, is understood as a civil contract. It is not considered a sacramental act as considered in Hindu law. But Fyzee[1] opined distinctively and stated that the institution of marriage in Islam is something more in spirit rather than a contract. It has the content of both *Ibadat* and *mamala* (worldly affairs). It is not purely a contract in nature. Another eminent writer on Muslim law Tahir Mahmood is also of the similar opinion that the marriage in Islam is a solemn pact rather than merely a contract. The Quran does not permit talaq as a rule for termination of the marriage. various steps are prescribed to be taken before conclusive divorce it also including arbitration and conciliation between the married persons so that the institution of marriage should be there it would be wrong to say that Islam does not believe in the holiness of the institution of marriage, it wants to protect the ecclesiastical institution of marriage and the termination or breakdown of marriage should be done due to extreme

[1] Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (4th edition, Oxford University Press 2009)

unavoidable reasons. The provisions of polygamy and talaq are to be studied from the time of the pre-Islamic period in Arabs where women were treated as a slave and many heinous practices were in continuity, so the Islam was developed to systematised the human living and develop humanity in humans. There is no formal institution of marriage in those days. The men have all the right to abandon women without assigning any cause and reason. They can divorce and revoke the divorce according to their convenience and their own choice. The prophet of Islam disapproved of these practices and systematised the divorce methods. Islam has always had a pragmatic approach toward human affairs and recognizes divorce. The Holy Quran itself allows the individual to untie the knot of the marriage. However, the Quran legalise the practice of talaq to break or terminate the marriage but it is also suggested that the talaq should not be exercised generally but can only be used as a last option when there is no alternative to preserve the institution of marriage. It is considered in Islam that when the marriage is not working well it is better to break the marriage instead of spoiling the life of both. It is suggested by many authors that talaq is the most unlike concept to prophets though it is legal a sin. Talaq is the worst thing that is permitted in Islam according to the prophet[2]. It is considered evil but a necessary one and should not be exercised unless there are extraordinary compelling circumstances.

In Islam, there are **three methods**, in which a marriage **(*nikah*)** can be terminated,

1. **Talaq:** Talaq is a method in which a male partner of the marriage can terminate the marriage unilaterally.
2. **Khula:** Khula is the second category of dissolution of marriage in Islam. Under *Khula* the dissolution is initiated by the women and can only be done if the husband consents to it. Sometimes the husband already authorised the wife to dissolve the marriage unilaterally in such condition the women can dissolve the marriage solemnly,
3. **Mubarat:** Mubarat is a method of dissolution in which both the partners dissolve the marriage with all their mutual consent. Mubarat literally meant 'release from each other. In Mubarat, both the parties wish to divorce and the proposal may initiate in

[2] Faiz Hassan Badrudin Tyabji, *Muslim Law: The Personal Law of Muslims in India and Pakistan* (4th edition, N.M. Tripathi 1968)

from either side either my husband or my wife. When the proposal is accepted the marriage is conclusively dissolved.

The concept of dissolution of marriage in Islamic or Muslim law has been the result of prevailing conditions and behaviour of society in the pre-Islamic period. There is no formal institution of marriage in those days. The men have all the right to abandon women without any cause and reason. They can divorce and revoke the divorce according to their convenience. The prophet of Islam disapproves of these practices and systematised divorce methods.

DIFFERENT KINDS OF *TALAQ*

Talaq which is generally Arabic synonymous with divorce. Talaq literally means opening a knot or freedom from obligations. In its legal sense, the term talaq means talaq means removal of nuptial tie either through express or implied methods by the husband effecting instantaneously or consequentially[3]. The term talaq refers to the thing or right given to the husband to terminate the institution of marriage through an unequivocal statement. It is in other words the unilateral process of dissolution of marriage in which another party is not involved. The term talaq means unilateral termination of the marriage. Talaq is considered an authority that a Muslim always has over the wife. Talaq under Muhammadan law is provided in the Holy Quran which is a supreme book in Islam. The prophet of Islam disapproved of all the prevailing practices of divorce at that time and only supported talaq-ul-Sunnat. Talaq under Islam can be given in different ways:

Talaq-e-Ahsaan:

It is considered the most proper and most reasonable form of divorce. This kind of talaq is given by the husband through pronouncing 'talaq' which is subsequently followed by an abstinence period which is known as the *iddat* period. The *iddat* denotes the period of 90 days. If the woman is menstruating, the period of *iddat* is three subsequent menstruations and if the woman is not menstruating then the period will be calculated as three lunar months. However, the husband can only pronounce the talaq only within a period *tuhr* which means the term of

[3] B.M. Dayal, *The Durr-ul-Mukhtar* (English Translated, Kitab Bhawan, New Delhi 1992) 117

purity when the wife was not menstruating[4]. If the husband does not by words revoke the talaq before the iddat period or does not have any wedlock with the wife the talaq will be conclusively established. Before the completion of a period of iddat, the husband is given the opportunity to revoke the talaq. If talaq is not revoked before the prescribed iddat period, the talaq becomes irrevocable thereafter the marriage bond will be terminated and the couple is prohibited to resume marital relationship except in the condition of fresh marriage however it must be noted here that the after the third pronouncement of word talaq they cannot even remarry. The wife has to remarry another man and she has to take a divorce from that man then her marriage will be dissolved only then the first couple could remarry. It is the most laudable form of divorce.

Talaq-e-Hasan:

Another permitted form of talaq in Islamic law is *talaq-e-Hasan*. This is commonly followed by Islamic followers. It is laudable form of talaq. This *hasan* form of talaq is quite similar to the *Ahsaan* form but in the *Hasan* form, there are three pronouncements of talaq instead of one pronouncement. A husband can pronounce *talaq-e-Hasan* by pronouncing divorce in successive three *tuhrs.* It means he has to pronounce talaq in purity after three consecutive menstruation or lunar months. The first and second pronouncement of talaq is revocable by the husband. It can be revoked either expressly or by the cohabitation with the wife. The third pronouncement of talaq is irrevocable and conclusively terminates the marriage. The wife has to observe the mandatory iddat period after the third pronouncement. The distinction between the *Ahsaan* and *Hasan* form of talaq is that the women have to observe the iddat period after the only pronouncement of talaq on the other hand in the *Hasan* form women have to observe the iddat period only after the final and third pronouncement of *talaq*. *Talaq-e-hasan*does did not permit a husband to divorce and revoke the divorce multiple times. If the divorce is revoked twice and it has been given a third time it will become conclusive notwithstanding the gap between

[4] Charles Hamilton, *The Hedaya, or Guide: A Commentary on the Mussulman Law* (4 vol., Cambridge University Press 2013)

the time period of divorce[5]. Both forms of talaq are permitted in Islam as *talaq-ul-Sunnat*. The prophet of Islam supported only these two categories of divorce not any other. It is important to mention that the renowned Muslim jurist Mahmood stated that the various modes of talaq are erroneously allowed and developed. He also stated that different forms of talaq have been interpreted by Muslim orthodoxies. He stated that the Quranic law does not approve of different forms of talaq and does not mention it instead of recognising different kinds of divorce it prescribes, only, the procedure of divorce. He focused on the *Quran* (II: 229) which provides a procedure for divorce. The divorce can only be pronounced twice, after that either the party should live harmoniously or separate with kindness. It means only two divorces are irrevocable; the third divorce results in inconclusive termination of marital institution. *The Quran* does not mention the consecutive period of *this*. Thus according to him, the third talaq can be pronounced at any time during the subsistence of marriage regardless of consecutive *tuhrs*.

Talaq-ul-Biddat:

This form of talaq is generally understood as triple talaq. This is an irrevocable form of talaq. It can be exercised by the husband pronouncing three consecutive talaqs simultaneously which results in the instant breakdown of the marriage. Since the abovementioned two forms of talaq are approved by *Quran* and *hadith,* there are no disputes with regards to their legality but the third form *talaq-ul-biddat* is not approved by the prophet and neither approved by *Quran*. Recently, this form of talaq has undergone high criticism and judicial scrutiny.

CONCEPT OF TRIPLE TALAQ IN MUHAMMEDAN LAW

Triple talaq which is known as *Talaq-ul-Biddat*, *Talaq-al-Bidah* & *Talaq-ul-Bain*. This is an irregular form of dissolution of marriage in the Muslim Personal Law. It is considered an innovative form of divorce that has been developed after the prophet. This form of dissolution derives its authority neither from the Quran nor from the Hadiths. Since it is not authorised by *Quran*, this practice is not universally followed by Muslims. Islamic Law is a jurist made law,

[5] Dr. Naima Huq, "Talaq: A Modern Debate" (1995) 6 (1) Dhaka University Law Journal, 33 <http://journal.library.du.ac.bd/index.php?journal=DULJ&page=article&op=viewFile&path[]=1393&path[]=1333> accessed 08 November 2018

the Quran and hadith are interpreted by several jurists according to their own conscience and reasonability. Thus, different sects have multiple schools of thought depending upon the jurists they followed. This is the reason the practice of *triple talaq* is not common among all categories of Muslims. This practice is mostly observed in the *Hanafi school* of *Sunnis.* This form of talaq was not prevalent during the time of the prophet. It has been developed after the prophet. *Hidayaah* an authoritative source of the Sunni school of thought defines triple talaq as where the husband repudiates his wife by uttering three divorces in a single moment or he repeats the sentence thrice within the period of *tuhr*[6]. Triple talaq is instantaneous divorce which operates by pronouncing three talaqs at once (talaq, talaq, talaq) or by saying I give you *Bain talaq* it gave thee three talaqs. The core feature of this talaq is its irrevocability and it terminates the marriage at the very moment when the husband pronounces talaq to the wife[7]. Thus, this form of talaq leaves no space for the husband to reconsider his decision to the dissolution of marriage and revoke it.

After the divorce, the woman is supposed to undergo the required period of iddat and after that, they both cannot live as husband and wife together and cannot remarry each other. If they want to make a fresh *nikah, the* wife has to marry another person and when their marriage is consummated & dissolved then only she can marry her first husband.

POSITION OF PERSONAL LAWS UNDER THE INDIAN CONSTITUTION

Since our context is related to 'talaq' which is a part of Muslim personal law; we need to analyze the constitutional position of personal law in India. India has a number of varieties culturally, geographically, religiously, and linguistically. It has multiple religions and multiple sects in a single religion. In ancient times, people are governed by religion. Religious law was considered above all laws because of the notion that it is made by God himself. Thus some customs have been developed between persons practising the same religion in their mutual relation or mutual dealings such as the procedures relating to marriage and divorces. But, the positive law concept has revolutionized the legal theory. According to it, laws are made by the

[6] Charles Hamilton (n 5)
[7] Justice Altaf Hussain, *Status of Women in Islam* (Law Publications 1987)

authority i.e. sovereign or legislature to which the task of legislation has been conferred. This positive law concept is always in confrontation with religious law. People of any religion are very sensitive with regard to their religious practices and whenever the state tries to interfere or alter their religious practices state has to face protest and agitation people. In the medieval period of Indian history when Muslims came, India and their community started to grow in India, the question before the kings were always which law should be applicable to Muslims, in their personal dealings or to Hindus in theirs. In this period the applied law in the personal relation of the individual is according to their religion or sometimes depends upon the king as well. Even the Britishers had not interfered in the personal law of the individual. They continued the practice that Hindus will be governed according to Hindu personal law and Muslims will be governed according to Muslim personal law. But in the case of conflict of an inter-religious person, the statutory law will be applicable.

So, the practice of not interfering in the domain of public law was continued even in the Constitution. The constitution guarantees every individual to profess and practise his religion. India got independence in 1947 after the division of its territory between two nations on a religious base. A large community of Muslim religions was still living in India; they had high expectations from the constituent assembly. Though the constituent assembly did not specifically enumerate 'secularism' as a noble objective in the original constitution their intention was always to work on a secular path. Later on, secularism[8] was added in the preamble as a noble objective but even prior to that though the term secular was invisible yet. Its essence was always there in fundamental rights. But, the dispute between positive law and personal law was not resolved even through the constitution. Every religion has some practices which are discriminatory or not according to the egalitarian society which must be reformed and changed. It is evident from history that we have banned the '*Sati Pratha*' and several other practices that are superstitious and unreasonable. The conflict between personal law and the power of the state to reform those personal laws and abandon certain practices is not new and never-ending. Still, we need to find some workable solution to resolve this so that both the law could work harmoniously.

[8] Constitution of India, 1976, 42nd Amendment

SCHEME OF PROTECTION OF PERSONAL LAW UNDER THE CONSTITUTION WITH RESPECT TO FREEDOM OF RELIGION

The constitution of India guarantees freedom of religion as a fundamental right. Article 25 guarantees every individual to profess, practice, and propagate his religion. It is necessary for his spiritual development. However, the right guaranteed in article 25 is not absolute but subject to certain restrictions. These restrictions could be imposed by the legislature in the public interest. Personal laws which are or became a part of religious exercise are protected under the Art. 25because there is a little difference between religious law and personal law. Religious law is a law that governs the relationship between a person and an ideal. On the other hand personal law governs the relation of mutual dealing of a member of a particular religion. Hence a personal law is not necessarily a part of religious law. There is a difference between freedom to believe and freedom to act. The US Supreme Court in the case of ***Conwell. Connecticut (1940)*** observed the difference in above mentioned two terms and stated that freedom of belief denotes the faith or trust in the devotees or ideals of a religion which is absolute on the other hand freedom to act affected the society and hits the personal dealing of an individual which can never be absolute but subject to certain limitation and restriction imposed by state or legislature. The same interpretation has been adopted in Indian legal jurisprudence regarding the fundamental right to religion. It protects freedom of conscience and professes any religion but restrictions can be imposed upon matters of practice and propagation. Indian constitution protects the practices of any religion which are an exclusively essential feature of that religion without which the core of that religion will be distorted. However, no uniform rule can be laid down to identify whether a particular practice is an essential practice under that religion or not. This is a subjective analysis.

Thus, under the Indian Constitutional law, only those practice of personal law is protected which are essential feature of the religion not otherwise. If any practice is not an essential practice it will be subject to the limitation and restrictions imposed under article 25. Dr. B.R. Ambedkar in the constituent assembly stated that the concept of religion in this country is so vast that it covers almost all aspects from birth to death. It is expected that no sensible state, in

the name of social reform or any other kind of limitation would affect the very essence of any religion. The life of an individual and religion are so closely interwoven that it is hard to differentiate between religious and personal law however it is clear that they are different because they operate in different spheres. Now it is a well-established situation that the personal law is neither synonym nor co-extensive with religion. All that is included in religious scriptures may not form the essence of a religion. Allahabad High court in an ancient case of ***Govinda v Inayat Ullah (1885[9])*** stated that every law is influenced by the social or economic provisions of the time which certainly do not form the permanent foundation of law. If all that is contained in the scriptures were equally essential it would hardly be possible today to find out a good follower of any religion. Thus, we can say that Article 25[10] which guarantees freedom of religion does only up to the extent when they form an essential religious practice. The Constitution of India nowhere specifically protects the personal law of the Individuals. Even from a close study of British India, we would find in later developments that Muslim personal law is not applicable to Muslims because it is personal law but because there is legislation to that effect. The constituent assembly was not agreed to guarantee the inviolability of personal laws. On the other hand, Constitution casts a positive direction to frame a uniform civil code under article 44[11] so that all people whatever religion they profess can be subject to common personal law. If we read Article 25 and Article 44 harmoniously, we would find that intention of the constituent assembly was never to be immunizing personal law from state control. Instead of personal law, they want a common and uniform code of personal law. Entry 5 of the concurrent list also empowers the legislature to enact laws regarding all matters in respect of which parties in judicial proceedings before the commencement of the Constitution are subject to their personal law. Though, the personal law is allowed to be continued till a competent legislature was not in a position to legislate. This continuance is authorized by a presidential order under article 372(1)[12]. Thus, we may formally say that the assembly has never had such intention to immunize the personal laws of a different religion. They always wanted to reform the personal law and uniformity in them.

[9] *Govind v Inayat Ullah* (1885) ILR 7 All 775
[10] Constitution of India, 1950, art. 25
[11] Constitution of India, 1950, art. 44
[12] Constitution of India, 1950, art. 372(1)

JUDICIAL REVIEW OF ANY CUSTOMARY PRACTICE UNDER PERSONAL LAW-

Supreme Court is considered the guardian of the constitution and the final interpreter of the law. It has numerous powers with respect to the protection of justice in the nation. To exercise such wide responsibility Supreme Court is empowered with numerous powers. Judicial Review is one such power given to the Supreme Court to protect the inviolability of fundamental rights. It is one of the powers of the Supreme Court by which it protects the invasion of legislature and executive upon fundamental rights but from the very inception of the constitution, the issue always was there that whether the personal law of an individual or a religion can be judicially reviewed or not. Every personal law whether a Hindu, Muslim, Jews, or Christian has some discriminatory usages or customs which they practised from an ancient age. Since most of personal are dominantly patriarchal, they are discriminatory towards the woman. In such conditions, it became highly essential whether the court can review the personal law practice custom usage or not. This is highly essential to establish an egalitarian society and to achieve social justice which is set out as an objective in the preamble. Here, we will discuss how this chaotic position subsisted till 70 years of independence. The first-ever decision which started this chaos was ***Narasu Appa Mali*** v ***State of Bombay***[13] though this was a two-judge bench yet its interpretation dominated the relation between personal law and fundamental rights. In this judgment, it was concluded that personal law cannot be judicially reviewed or checked upon the fundamental rights. The judgment was unfortunate as well as the reasoning which was adopted. It was stated in this judgment that personal laws are not included in the definition of law and law-in-forces mentioned in article 13[14] of the Constitution. The Bench relied upon the government of India Act, 1915 in which the definition of law specifically included personal law. The Bench also stated that since the constituent assembly has the act of 1915 before then even they had not included the term 'Personal law' in the definition of law. It was further stated by the bench that 'custom & usage having the force of law' does not include the personal law in their ambit. They further stated that personal law had no force over the law as they were religiously governed. They held that the definition of

[13] *Narasu Appa Mali v State of Bombay* AIR 1952, Bom 84
[14] Constitution of India, 1950, art. 13

law in article13 is inclusive and contains all enacted and statutory forms of law. Relying on the above-mentioned interpretation, they held that personal laws are not a law under the meaning of law in article 13 and thus cannot be checked upon as a fundamental right. This case dominated the thought of entire judicial minds until the recent verdict of the Hon'ble Supreme Court in the *Sabarimala case*. The reasoning employed in *Narasu*[15] Case lacks in consideration certain important factors:

- As we have already discussed in the previous chapter that the intention of the constituent assembly was never to exclude personal law from judicial scrutiny.
- Custom and usage include personal law because personal law is not protected because it is a mutual relation between people governed by the same religion but because they are practices which practised for a long time. Thus, they form a part of custom and nothing else
- Having the force of law is another issue. To comprehend this, we need to understand from where the personal law derives its authority or validity.
- All personal laws are enforced by the courts thus they have sanctioned of law behind them.
- All personal law in India is not in working because they are practised by the people of religion but there are statutes providing authority to them.
- President Order under article 372 (1) with respect to enforcement of personal laws as law in force as they were prior to the independence clearly indicates that they are enforceable in a court of law because they derived their authority from the law as mentioned under article 13

There are several other decisions with regard to this issue that relied on *Narasu's* reasoning such as ***Krishna Singh*** v ***Mathura Ahir***[16]and ***Maharshi Avdhesh*** v ***Union of India***[17]**.**

But the case of ***Masilmani Mudaloar*** v ***The idol of Sri Swaminatha Swami Thirukoil 1996***[18] *t*urns the situation in which the Supreme Court tested the validity of personal law upon the

[15] Narasu Appa Mali (n 14)
[16] *Krishna Singh v Mathura Ahir* (1980), AIR 707
[17] *Maharshi Avdhesh v Union of India* (1994) SCC, Supl. (1) 713

touchstone of the constitution. The court stated that personal law is not derived from the constitution. They must be in consonance with the fundamental right otherwise such personal law will be void. Unfortunately, this reasoning of the Supreme Court does not last too long. In another case ***Ahmedabad Women Action Group*** v ***Union of India 1997***[19], Supreme Court again shifted to the reasoning of *Narasu's* case. But recently in the case of ***Indian young lawyer Asso.*** v ***State of Kerala***[20], the constitutional bench decided the matters and it was concluded that custom must yield to fundamental rights and ended the reasoning of the *Narasu's* Case

CONCLUSION

Divorce is a bitter truth in the Institution of marriage in every religion because sometimes the pair does not find it appropriate to live with each other. The Institution of marriage has been developed to civilise human lives. The practice of divorce is not a very new introduction to society. This is an age-old practice that remained in society in various forms. Undoubtedly religion has played a pivotal role in regulating these social phenomena. Religion is influenced by the social, economic, cultural, and prevailing circumstances and nature of society. The history is evident that the male has dominated the most of the concepts of religion. The concept of talaq in Islam is no exception to it. Most of the interpretations of Islamic Law and customs are enunciated by only the male gender mostly, it would not be wrong to say that men were and are not willing to give up their dominating position to protect and preserve the dignity of their female counterparts. The core Philosophy of every religion does not prescribe unbridled authority of men and suppression of women, these are men which used their social position and interpreted it in such a way. The Islamic principles were developed to sweep the nomadic culture and the worst social customs followed in the lands of Arabs. Thus, Islam prescribes sound and rational living. But the concept of triple talaq followed by the Hanafi school of thought is no more a sound and rational rule which should continue to have protection because it is not allowed by the true intent of Islamic law. We have analysed that the reform has been brought throughout the world in the practice of divorce and other

[18] *Masilmani Mudaloar v Idol of Sri Swaminatha Swami Thirukoil* (1996), AIR 1697
[19] *Ahmedabad Women Action Group v Union of India* (1997) 3 SCC 573
[20] *Indian Young Lawyer Asso. v State of Kerala* (2006) Writ Petition (Civil) No. 373/2006

practices of family law. The practice of triple talaq gives unbridled and autocratic authority to the Muslim law to dissolve the marriage without concerning the interest and rights of another party to the marriage. The procedure followed in the triple talaq does not accord with the very basic principles of natural law or just and fair procedure. This practice is manifestly arbitrary and against the basic feature of the constitution. The world has, together, conferred several equalising rights to the women so that their status could be uplifted and their rights must be protected. In the neo-technological world, the distinction between men and women cannot be justified and these corrupt and abhorrent practices should be discontinued.