IN THE MATTER OF TRIPLE *TALAQ*

BRIEF OF WRITTEN SUBMISSIONS

1. Though matters of religion have periodically come before our courts, and been decided in the context of Article 25 of the Constitution, inevitably the claims relating to Articles 14-19 and Directive Principles of State Policy continue to be made. Rising concerns over issues of empowerment of all citizens and gender justice have increased the demand on courts to respond to new challenges. The present slew of cases is part of that trend, but comes at a delicate moment in the life of our nation. The Supreme Court cannot refuse to engage on the ground that issues involved have political overtones or motives, but it might advisedly contain its scrutiny to narrow constitutional permissibility and for the present refuse an invitation to examine broader issues such as whether Personal laws are part of law under Article 13 and therefore subject to judicial review; or whether a Uniform Civil Code might be enforceable. In other words if the immediate concern about Triple *Talaq* and the related issue of *Halala* can be addressed by endorsing a more acceptable alternate interpretation, it would be sufficient for the purpose of ensuring justice to all.

BACKGROUND:

2. Under Islamic law if the answer to any question, solution to a conflict, or resolution to an issue, is provided for in the Holy *Quran* - that is the final word and rule of *Sharia*. When there is no clear guidance in the *Quran*, theologians

must look to the traditions of the Prophet as recorded in the *Hadis*. If no guidance is found even there then we must refer to general consensus of opinion or *Ijma* (which the *ulema* would arrive at after closely studying the first two). If the resolution is found by *Ijma* then that too would become a rule of Islamic law.

3. To this extent Islamic law, like any other, is a living and evolving body of law. However, it must remain rooted in the original sources of the faith. Thus, to understand different concepts under Islam it is important to appreciate the context in which these concepts developed.

ISLAMIC CIVILIZATION: REFORMATION THROUGH RELIGION

4. Reforms under Islam marked a departure from *Ayyam-i-jahiliya*, i.e., the period of ignorance. In pre-Islamic Arabia, women were considered as the property of men with no right to inheritance or to own any property. The various reforms introduced by Islam included the end of female infanticide prevalent in pre-Islamic Arabia, requirement of woman's consent for marriage and *mehar* amount as consideration, recognition of woman's right to inherit/own property, right to maintenance, right to seek unilateral divorce if the husband was abusive, and to re-marry after divorce or demise of the husband. Some of these rights did not exist even in the West till the early 20th century. Thus in many ways Islamic societies were ahead of many others in recognizing a fundamental equality of the genders.

5. Among the pre-Islamic Arab tribes the right to divorce possessed by the husband was unlimited and was frequently exercised without any regard to any marital

obligations. It could be exercised arbitrarily and without any regard for any formal obligations or responsibilities on behalf of the husband. Such social evils were well known to the Prophet Mohammad and in proclaiming the words of Allah in the *Quran*, as well as through his teachings in his life time, he sought to right many of these wrongs and frame rules and laws under which the bond of matrimony would be held sacred and the position of the wife greatly elevated. Prophet Mohammed restrained the power of divorce possessed by the husbands; he gave to the women the right of obtaining separation on reasonable grounds; and towards the end of his life he went so far as practically to forbid its exercise by the men without the intervention of arbiters or a judge. He pronounced "*talak to be the most detestable before the Almighty God of all permitted things*" for it prevented conjugal happiness and interfered with the proper bringing-up of children[1].

THE CONCEPT OF MARRIAGE UNDER MUSLIM LAW/ *SHARIA*

6. Under Muslim Law, marriage was considered as a pious civil contract. "*No sacrament but marriage has maintained its sanctity since the earliest time. It is an act of ibadat or piety for it preserves mankind free from pollution [...] It is instituted by divine command among members of the human species*"[2] The binding contract of marriage depends on offer and acceptance in the presence of two witnesses. The contract of marriage or *nikahnama* compulsorily includes *mehar* or

[1] Reported by Abu Daud*; comp. Radd-ul-Muhtar, Vol. II, p. 682* as quoted in *Syed Muhammadan Law, Vol. 2* at p. 436
[2] Durr-ul-Mukhtar and the Radd-ul-Muhtar as quoted in Syed Ameer Ali*, Muhammadan Law, Vol. 2,* Kitab Bhawan, New Delhi, 1986, p. 241.

consideration for marriage to be paid to the bride immediately, though the bride may agree to defer payment during the subsistence of the marriage, not later than the granting of divorce. This was a precursor to pre-nuptial agreements familiar to the contemporary developed societies.

7. Based on validity, a marriage may be of three kinds under *Sunni* Law, namely:

   i. **Valid (*sahih*):** A marriage which conforms with the legal requirements in all respects is a valid marriage.

   ii. **Void (*batil*):** A marriage contracted between parties on whom absolute prohibition applies is void. Absolute prohibitions arise from legitimate and illegitimate relationship of blood (consanguinity), from alliance or affinity, and from fosterage.

   iii. **Irregular or invalid (*fasid*):** A marriage contracted between parties on whom relative, prohibitory or directory prohibitions apply is voidable. Relative prohibitions arise from causes that render the marriage only invalid, for the cause that creates the bar may be removed at any time thus rendering the union lawful *ab initio* without the necessity of a fresh contract. Thus, a man may not marry two sisters or a woman and her niece by the same contract or one after another while the previous marriage is subsisting. But if such a marriage is contracted in fact, it is invalid (*fasid*) but not void (*batil*), for the prior marriage may get dissolved any time by death or divorce of one of them and thus validate the second union.[3] Prohibitive incapacity, for example, springs from the fact that the woman is already the wife of another man. A man cannot marry the widow or divorcee of another man during her *iddat*.[4]

THE CONCEPT OF DIVORCE UNDER MUSLIM LAW

[3] Syed Ameer Ali*, Muhammadan Law, Vol. 2,* Kitab Bhawan, New Delhi, 1986, p. 250.
[4] *id.*, p. 252-53

8. The present petitions are primarily directed against the practice of Triple *Talaq* being unilateral, instantaneous, irreversible divorce in one sitting or one act of communication. While this is examined hereafter it is important to note that divorce in Islam is not restricted to the husband's exclusive and untrammeled right but provides several other modes that give a greater, even equal role to the woman. Here, as noted above, the importance of the *Nikahnama* is key as all conscionable terms may be included therein. A standard form has been approved by the Personal Law Board and needs to be widely circulated and insisted upon.

FORMS OF DIVORCE UNDER MUSLIM LAW

9. Under the Muslim Law a marriage is dissolved either by the death of a spouse or by divorce.

10. When the dissolution of the marriage tie proceeds from the husband, it is called *talaq*. Technically, the power of the husband is unilateral and absolute; but, virtually and in practice, it is restrained within definite bounds by the numerous formulae that are attached to its exercise.[5]

11. A *talaq* whether oral or in writing may be made without witnesses. *Talaq* without witnesses is valid under *Sunni* Law. Under the *Shia* Law, a *talaq* is not effective, unless it is pronounced strictly in accordance with the *Sunnat*, in Arabic terms, in the presence of at least two adult male witnesses, with the distinct intention to dissolve the marriage tie, out of the husband's own free will, without any restraint

[5] Supra note 3

or pressure brought to bear upon him, sane and having sound understanding while pronouncing it and after attainment of puberty.

12. A *talaq* may be effected by the husband in any of the following modes: (i) *Talaq-ul-sunnat* (ii) *Ila* (iii) *Zihar* and (iv) *Talaq-ul-biddat*.

    i. ***Talaq-ul-sunnat*:** The talaq-ul-sunnat is the divorce that is effected in accordance with the rules laid down in the traditions (the *sunnat*) handed down from the Prophet or his principle disciples. It is, in fact, the mode or procedure that seems to have been approved of by him at the beginning of his ministry, and is, consequently, regarded as the regular or proper form of divorce. It can be further sub-divided into:

        a. ***Ahsan*:** '*Ahsan*' in Arabic means 'best' or 'very proper'. In the *talaq-ul-sunnat* pronounced in the *ahsan* form, the husband is required to submit to the following conditions: (1) he must pronounce the formula of divorce once, in a single sentence; (2) he must do so when the woman is in a state of purity (*tuhr*) and (3) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three *tuhrs*. The last clause is intended to demonstrate that the resolve, on the husband's part, to separate from the wife, is not a passing whim, but is the result of a settled determination. On the lapse of the term of three *tuhrs*, the separation takes effect as an irrevocable divorce.

            A pronouncement made in the *ahsan* form is revocable during *iddat*. Suchrevocation may be either in express words or may be implied. Cohabitation with the wife is an implied revocation of *talaq*. After the expiration of the *iddat*, the divorce becomes irrevocable.

        b. ***Hasan*:** '*Hasan*' in Arabic means 'good' or 'proper'. In the *hasan* form, the husband, is required to pronounce the formula three times

during three successive *tuhrs*. When the last formula is pronounced, the *talaq* or divorce becomes irrevocable.[6]

ii. ***Ila*:** Divorce by *Ila* is a species of constructive divorce that is effected by abstinence from sexual intercourse for a period of four months pursuant to a vow.[7]

iii. ***Zihar*:** *Zihar* is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply for a judicial divorce.[8]

iv. ***Khula*:** A divorce by *khula* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife.[9]

v. ***Mubarat*:** A *mubarat* divorce is dissolution of marriage by agreement when the aversion is mutual and both the sides desire a separation. The offer may proceed from the wife or the husband but once it is accepted, the dissolution is complete and it operates as *talaq-ul-bain* or irrevocable divorce, as in the case of *khula*. Both in *khula* and *mubarat*, the wife is bound to observe the *iddat*.[10]

vi. ***Talaq-ul-bidat*:** *Talaq-ul-bidat*, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Muhammedan era. *Talaq-ul-biddat* consists of three pronouncements made during a single *tuhr* either in one sentence, "I divorce you thrice" or in separate sentences, "I divorce you, I divorce you, I divorce you" or, a single pronouncement made during a tuhr

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[6] *Fatwa-i-Alamgiri, Vol. I, p. 492* as quoted in *Muhammadan Law, Vol. 2*, p. 436
[7] Mulla, *Principles of Mahomedan Law,* Lexis Nexis, Gurgaon, 2015, p. 402
[8] *ibid*
[9] *ibid*
[10] *ibid*

clearly indicating an intention to irrevocably dissolve the marriage, "I divorce you irrevocably."[11]

PROCEDURE OF TALAQ AS PER SOURCES OF ISLAMIC LAW

13. "*Marriage in its essence is an act of chastity established by the law* [per se] *not admitting of dissolution; in order therefore, to remove the tie, it is necessary to adhere strictly to the formula (sigheh) prescribed for the purpose.*"[12]

14. The basic source of Islamic Law is divine revelation: one is the direct word of Allah - The Holy *Quran* and the other is the indirect word of God - The *Sunnah*. These two forms of revelations are said to be the root of Islamic Law.

15. *Ijma* and *Ijtihad* are the secondary and dependent sources. They derive their value from the primary sources. *Ijma* has been defined as the consensus of the *Mujtahids* or jurists of a certain period on a particular matter. Wilson defines it as concurrence, i.e. propositions shown to have been accepted as indisputable under the first four rightly directed Caliphs or in the time of the companions and of the generation immediately succeeding them.[13]

16. *Ijtihad* is the process of making an independent interpretation of the legal sources, the Holy *Quran* and the *Sunnah* by the *Mujtahids* or jurists. As Shah Wali-Allah states, the object of *ijtihad* is to exert to know what would have been the judgment

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[11] *ibid*

[12] Sharayya, p. 311 as quoted in *Muhammadan Law, Vol. 2,* p. 437

[13] I.A. Khan ed., Aqil Ahmad, *Textbook of Mohammedan Law*, Central Law Agency, Allahabad, 2007, p. 23.

of the Prophet if the problem had occurred before him.[14] According to traditions, its starting point is the absence of any clearly applicable text and it may operate only so far as the judgment does not contravene the Holy *Quran* and the *Sunnah*.[15] *Ijtihad* is of three kinds: *Ijtihad bayani* (interpretation by way of explanation of matters expressly dealt with in the Holy *Quran* or *Hadith* but need further explanation), *Ijtihad qiyasi* (interpretation by way of analogical reasoning of matters not expressly dealt with in the two primary sources but are similar to those expressly mentioned in them) and *Ijtihad istislahi* (matters not expressly stated in the Holy *Quran* or *Hadith* which cannot be solved by analogical reasoning and for which *maslahah* (utilities) is considered to be the basis for arriving at a decision).

THE HOLY QURAN

17. The Holy *Quran* has nowhere ordained that the three divorces pronounced in a single breath will have the effect of three separate divorces. To this effect relevant verses of the Quran can be relied upon:

    i. "For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful." (2:226)
    ii. "But if their intention is firm for divorce, Allah heareth and knoweth all things." (2:227)
    iii. "Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands

[14] Shah Wali-Allah, *Fuyud al-Haramain*, p. 48 as quoted by Dr. Riaz-ul-Hasan Gilani in *The Reconstruction of Legal Thought in Islam*, Markazi Maktaba Islami Publishers, New Delhi, 2006, p. 115.
[15] *Id.*, p. 116.

have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree [of advantage] over them. And Allah is Exalted in Power, Wise." (2:228)

iv. "A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, [Men], to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye [judges] do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah; so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong [Themselves as well as others]." (2:229)

v. "When ye divorce women, and they fulfil the term of their ['Iddat], either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, [or] to take undue advantage; if any one does that; He wrongs his own soul. Do not treat Allah's Signs as a jest, but solemnly rehearse Allah's favours on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear Allah, and know that Allah is well acquainted with all things." (2:231)

vi. "If ye fear a breach between them twain, appoint [two] arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things." (4:35)

vii. "O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period of 'Iddat have ye to count in respect of them: so give them a present. And set them free in a handsome manner." (33:49)

viii. "O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count [accurately], their prescribed periods: And fear Allah

your Lord: and turn them not out of their houses, nor shall they [themselves] leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his [own] soul: thou knowest not if perchance Allah will bring about thereafter some new situation." (65:1)

ix. "Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence [as] before Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He [ever] prepares a way out." (65:2)

x. "Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses [it is the same]: for those who carry [life within their wombs], their period is until they deliver their burdens: and for those who fear Allah, He will make their path easy." (65:4)

18. Therefore, according to the Holy *Quran* divorce is permissible only twice during the lifetime of the husband. The possibility of being with the wife is still open after two pronouncements of divorce. It is only after the third divorce is pronounced that the divorce becomes irrevocable. The essence of the provision is to give some time to the husband to make a conscious decision as to whether he wants to irrevocably break the marriage tie and also to stop the earlier practice of divorcing the wife as many times as one may wish for during their lifetime.

THE SUNNAH

19. The principles stated in the Holy *Quran* were applied to facts in practice by the Prophet. Consequently, what was said or done or agreed to by Prophet became

another immutable primary source of Muslim Law. The narrations of what was said or done or agreed to by Prophet are called *Hadith* or Traditions. The only room for the exercise of human reason is within their understanding. Of the several Hadith it is widely accepted that some like Sahih Bukhari are considered more reliable than others.

20. The fact that mere repetition of divorce thrice in one sitting does not amount to a *Mughallaza* or final divorce finds support in the following traditions from Sahih Muslim:

    i. [3652] 1 - (1471) It was narrated from Ibn 'Umar that he divorced his wife while she was menstruating, at the time of the Messenger of Allah 'Umar bin Al-Khattâb asked the Messenger of Allah about that and the Messenger of Allah said to him: "Tell him to take her back, then wait until she has become pure, then menstruated again, then become pure again. Then if he wishes he may keep her, or if he wishes he may divorce her before he has intercourse with her. That is the 'Iddah (prescribed periods) for which Allah has enjoined the divorce of women."

    ii. [3673] 15 - (1472) It was narrated that Ibn 'Abbâs said: "During the time of the Messenger of Allah it, Abü Bakr and the first two years of 'Umar's Khjlâfah, a threefold divorce (giving divorce thrice in one sitting) was counted as one. Then 'Umar bin Al-Khattâb said: 'People have become hasty in a matter in which they should take their time. I am thinking of holding them to it.' So he made it binding upon them."

    iii. [3674] 16 - (...) Ibn Tawüs narrated from his father that Abü As-Sahbâ' said to Ibn 'Abbâs: "Do you know that the threefold divorce was regarded as one at the time of the Messenger of Allah iW and Abü Bakr, and for three years of 'Umar's leadership?" He said: "Yes."

iv. [3675] 17 - (...) It was narrated from Tawüs that AN As-Sahbâ' said to Ibn 'Abbâs: "Tell us of something interesting that you know. Wasn't the threefold divorce counted as one at the time of the Messenger of Allah and Abü Bakr?" He said: "That was so, then at the time of 'Umar the people began to issue divorces frequently, so he made it binding upon them.

v. "Mahmud-b, Labeed reported that the Messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said, 'Are you playing with the Book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; shall I not kill him."[16]

vi. According to an Hadith quoted by M. Mohammed Ali in Manual of Hadeth p. 2861 from Masnad of Imam Ahmad bin Hanbul 1:34, the procedure during the time of Prophet and the caliphate of Abu Bakr, and the first two years of Hazrat Umar was that divorce uttered thrice was considered as one divorce. The Umar said, "people had made haste in a matter in which that was moderation for them, so we may make it take effect with regard to them. So he made it take effect to them." The Holy Quran is however very clear on the point that such a divorce must be deemed to be a single divorce.[17]

vii. There is another tradition reported by Rokanah-b. Abu Yazid that he gave his wife Sahalmash an irrevocable divorce, and he conveyed it to the Messenger of Allah and said: by Allah, I have not intended but one divorce. Then messenger of Allah asked Have you not intended but one (divorce)? Rokana said: By Allah, I did not intend but one divorce. The Messenger of Allah then returned her back to him. Afterwards he

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[16] Al Maulana Fazlul Karim, Mishkat-ul-Masabih: An English Translation and Commentary, Islamic Book Service, New Delhi p. 693 as quoted in Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 175

[17] *Syed Ameer Ali, Muhammadan Law, Vol. 2, Kitab Bhawan, New Delhi, 1986 referred in Mst. Ghulam Sakina v. Umar Bakhsh PLD 1964 SC 456, Amiruddin v. Khatun Bibi ILR 39 All. 371 followed in Sh. Fazlur Rahman v. Mst. Aisha AIR 1929 Pat. 81*

divorced her for second time at the time of Hadrat Omar and third time at the time of Hadrat Osman.[18]

viii. The Quranic philosophy of divorce is further buttressed by the Hadith of the Prophet wherein he warned, 'of all things which have been permitted, divorce is the most hated by Allah'.[19] The Prophet told his people: "Al-Talaqu indallah-i abghad al-mubahat", meaning "Divorce is most detestable in the sight of God; abstain from it."[20]

21. As ordained by the Holy *Quran*, the acts and sayings of Prophet are to be obeyed. Therefore, when we have hadith stating in clear terms that Prophet considered three divorces in one sitting as one, the deeds of the Companions may not be seen. It is reported that when once news was brought to him that one of his disciples had divorced his wife, pronouncing the three talaqs at one and the same time, the Prophet stood up in anger on his carpet and declared that the man was making a plaything of the words of God, and made him take back his wife." [21]

22. Even if we look to the deeds of the Prophet's companions, it is quite clear from the hadith that the same was followed during Caliph Abu Bakr's times and the first two years of Caliph Umar and it was only to meet any exigency that Caliph Umar had started treating pronouncement of three divorces in one sitting as final and irrevocable:

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[18] *Al Maulana Fazlul Karim, Mishkat-ul-Masabih: An English Translation and Commentary, Islamic Book Service, New Delhi p. 690 as quoted in I.A. Khan ed., Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 176*

[19] Nehaluddin Ahmad, 'A Critical Appraisal of' Triple Divorce' in Islamic Law', International Journal of Law, Policy and the Family 23, (2009), 53–61

[20] Samreen Hussain, Triple *Talaq*: A Socio-Legal Analysis

[21] *Radd-ul-Muhtar, Vol. II, p. 684, Manual of Hadeth, p. 287 where the original Hadith taken from Annisai Chap. 27 verse 6 is reported, as quoted by Syed Ameer Ali in Muhammadan Law, Vol. 2, Kitab Bhawan, New Delhi, 1986*

i. Caliph Umar, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose.

ii. When the Arabs conquered Syria, Egypt, Persia, etc. they found women there much more better in appearance as compared to Arabian women and hence they wanted to marry them. But the Egyptian and Syrian women insisted that in order to marry them, they should divorce their existing wives instantaneously by pronouncing three divorces in one sitting.

iii. The condition was readily acceptable to the Arabs because they knew that in Islam divorce is permissible only twice in two separate period of tuhr and its repetition in one sitting is unislamic, void and shall not be effective. In this way, they could not only marry these women but also retain their existing wives. This fact was reported to the second Caliph Hazrat Umar.

iv. The Caliph Umar then in order to prevent misuse of the religion by the unscrupulous husbands decreed that even repetition of the word talaq, talaq, talaq at one sitting would dissolve the marriage irrevocably. It was, however, a mere administrative measure of Caliph Umar to meet an emergency situation and not to make it a law permanently.[22]

TAFSIR

23. Qur'an Tafsir Ibn Kathir (Vol.1) states as follows:

"Divorce is Thrice

This honorable Ayah abrogated the previous practice in the beginning of Islam, when the man had the right to take back his divorced wife even if he had divorced her a hundred times, as long as she was still in her iddah (waiting period). This

[22] *I.A. Khan ed., Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 174-75*

situation was harmful for the wife, and this is why Allah made the divorce thrice, where the husband is allowed to take back his wife after the first and the second divorce (as long as she is still in her Iddah). The divorce becomes irrevocable after the third divorce."

"Pronouncing Three Divorces at the same Time is Unlawful

The last Ayah we mentioned was used as evidence to prove that it is not allowed to pronounce three divorces at one time. What further proves this ruling is that Mahmud bin Labid has stated - as An-Nasa'i recorded - that Allah's Messenger was told about a man who pronounced three divorces on his wife at one time, so the Prophet stood up while angry and said: "The Book of Allah is being made the subject of jest while I am still amongst you"

A man then stood up and said, "Should I kill that man, O Messenger of Allah"

TREATMENT OF TRIPLE TALAQ JURISTS UNDER DIFFERENT SCHOOLS

24. Other than Shias there are four schools of Islamic jurisprudence – Hanafi (followed by a majority of Indian muslims), Hanbali, Maliki, and Shafi. There are conspicuous differences in interpretation amongst the schools and no clear conflict of law principles.

25. Imam Abu Hanifa holds that three pronouncements shall amount to three separate divorces and they shall result in a *Mughallazah* or final divorce. The explanation that the husband had used the three pronouncements simply for the sake of emphasis cannot change the nature of divorce and a *Mughallazah* divorce would

be effected. The is also the view held by majority of the *Hanafi* jurists who hold that in such a case *Mughallazah* divorce would be effected and would be good in law though bad in religion.

26. Ibn Taymiah holds that if a husband does not repeat the divorce three times, but says "I divorce you three times or thrice" or uses some silimar expression then the pronouncement shall amount to only one pronouncement of divorce and so shall be a non-*Mughallazah* divorce. Ibn Ishaq, Tawus, Akramah and Ibn Abbas hold that three pronouncements of divorce at one and same time constitute only one divorce.[23]

27. The *Hanafi* jurists who consider three pronouncements to amount to three or final divorce have explained that in those days people did not actually mean three divorces but meant only one divorce and other two pronouncements were meant merely to emphasise the first pronouncement. But in contemporary era three pronouncements are made with the intention to effect three separate and distinct divorces, hence it cannot be counted as one divorce. But this interpretation of the *Hanafi* jurists is generally not acceptable as it goes against the very spirit of procedure of law as laid down in the Holy *Quran* as well as the *Hadith* which enjoin that in case of breach between husband and wife it should be referred to the arbitration and failing an amicable settlement, a divorce is allowed subject to a period of waiting or *iddat* during which a reconciliation is possible and husband

[23] *Fatawa: Ibn Taymiah, Vol. III, p. 141 as referred in I.A. Khan ed., Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 177 citing K.N. Ahmad, p. 86*

can take back his wife. The main idea in the procedure for divorce, as laid down by Islam, is to give the parties an opportunity for reconciliation. If three pronouncements are treated as a *Mughallazah* divorce, then no opportunity is given to the spouses or the husband to retrieve a hasty divorce. This rule was introduced long after the time of Prophet and it renders ineffective the measures provided in the Holy *Quran* against the hasty action thereby depriving people of a chance to change their minds, retrieve their mistakes and retain their wives.[24]

28. The *Shias* and the *Malikis* do not recognise the validity of the *talaq-ul-bidat*, while the *Hanafi* and the *Shafi* agree in holding that a divorce is effective, if pronounced in the *biddat* form, "though in its commission the man incurs a sin".[25] According to *Shia* law, there is general consensus that triple divorce at one time will be counted as only one divorce though it is pronounced in several numbers and *Imamia* sect of *Shia* has faith that such divorce is no divorce.[26]

29. All these schools allow revocation; that is, a husband who has suddenly and under inexplicable circumstances pronounced the formula against his wife, may revoke any time before the three tuhrs have expired. When the power of recantation is lost, the separation or *talaq* becomes *bain*; while it continues, the talaq is simply *rajaat* or revocable.[27]

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[24] *I.A. Khan ed., Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 177*
[25] *Syed Ameer Ali in Muhammadan Law, Vol. 2, Kitab Bhawan, New Delhi, 1986*
[26] *Fatawa: Ibn Taymiah, Vol. III, p. 141 as referred in I.A. Khan ed., Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 178 citing K.N. Ahmad, p. 91*
[27] *Syed Ameer Ali in Muhammadan Law, Vol. 2, Kitab Bhawan, New Delhi, 1986, p. 436*

TALAQ-UL-BAIN

30. When a definite and complete separation (*talaq-ul-bain)* has taken place, the parties so separated cannot remarry without the formality of the woman marrying another man and being divorced from him (*halala*). This rule was framed with the object of restraining the frequency of divorce in Arabia.

IDDAT OR PROBATION

31. Every woman married to a man by a lawful contract is bound, for the prevention of confusion of parentage, to observe probation in the case of the dissolution of the marriage tie. But if the marriage is invalid and the parties have separated before actual consummation, there is no *iddat*. But if consummation has taken place, the *iddat* will be reckoned from the time of separation (*tafriq*).[28]

INDIAN COURTS AND MUSLIM PERSONAL LAW

32. The Indian judiciary has dealt with the concept of Triple *Talaq* as early as 1905 in the matter of *Sara Bai v. Rabia Bai*[29] wherein the Bombay High Court recognised this form of talaq as irrevocable.

33. In *Saiyid Rashid Ahmad v. (Mst) Anisa Khatun*[30] the Privy Council held that recognized that three talaqs pronounced at one time would be valid and effective. The Court stated that the parties therein were "*Sunni Muhammedans*" and were thus "*governed by the ordinary Hanafi law, and in the opinion of their Lordships,*

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[28] *Syed Ameer Ali in Muhammadan Law, Vol. 2, Kitab Bhawan, New Delhi, 1986, p. 459*
[29] ILR (1905) 30 Bom 537
[30] AIR 1932 PC 25

the law of divorce applicable in such a case [was] *correctly stated by Sir R.K. Wilson, in his Digest of Anglo-Muhammadan Law (6th edition) at p. 139, as follows:- The divorce called talak may be either irrevocable (bain) or revocable (rajjat). A talak bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced, A talak bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either. (a) Once, followed by abstinence from sexual intercourse, for the period called the iddat; or (b) Three times during successive intervals of purity, i.e., between successive menstruations, no intercourse taking place during any of the three intervals; or, (c) Three times at shorter intervals, or even in immediate succession; or (d) Once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first-named of the above methods is called ahsan (best), the second hasan (good), the third and fourth are said to be bidaat (sinful), but are nevertheless regarded by Sunni lawyers as legally valid.*"

34. Such rulings were often driven by the understanding of the judiciary in British India that Muslims believed their laws to have divine source and thus the former were wary to interfere with them to any great extent. However, in time judicial pronouncements began to more carefully consider the application of Islamic law and the writings of those that questioned the unbridled and arbitrary nature of an irrevocable divorce pronounced thrice in one sitting.

35. V.R. Krishna Iyer, J. stated in *A. Yousuf Rawther vs Sowramma*[31], "[i]*t is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them".*" (Quaran IV:34) *The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law."*

36. In *Rukia Khatun v. Abdul Khalique Laskar*[32] Bahrul Islam, J., the Chief Justice of the Gauhati High Court sitting on a Division Bench referred to Sura IV verse 35 of the Quran and held that "*there is a condition precedent which must be complied with before the talaq is effected. The condition precedent if when the relationship between the husband and the wife is strained and the husband intends to give 'talaq' to his wife he must chose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may calm down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give 'talaq'. The 'talaq' must be for good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret*."

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[31] AIR 1971 Ker 261
[32] (1981) 1 Gau. L.R. 375

37. In the same case the Court cited the observations of Maulana Mohammad Ali that "*it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce.*"

38. Thus, in the Guahati court's opinion the correct law of '*talaq*' as ordained by Holy *Quran* is:

    i. that 'talaq' must be for a reasonable cause; and
    ii. that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his.
    iii. If their attempts fail, 'talaq' may be effected.

39. The concept of Triple *Talaq* was challenged again in 2008 when Badar Durrez Ahmed, J. came to the conclusion that "*triple talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq*". In this matter of *Masroor Ahmed v State (NCT of Delhi)*[33] Justice Ahmed as his lordship then was, made a close examination of the sanctity of Triple *Talaq* in paragraphs 23-38 of the judgment and came to the aforesaid conclusion based on the reasoning that this "*form of talaq*" did not fulfill in the requirements for an effective divorce under the teachings of the Quran.

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[33] 2008 (103) DRJ 137

40. In *Mohammad Naseem Bhat v. Bilquees Akhter*[34] and another the Court dismissed review in the matter of the same name and reiterated that "[t]*he power to pronounce talaq* […] *is not unbridled but subject to the limitations provided under Shariat Law itself. Two of the limitations that talaq, if necessary, is to be pronounced not in a whimsical or arbitrary manner but for a genuine reason and that a serious and sincere effort for reconciliation between the estranged spouses, must precede pronouncement of talaq, are substantive in character, to be proved to successfully resist an action brought by wife to enforce a right based on her claimed marital status, while other two conditions viz. talaq, even where there is a genuine reason and the reconciliation efforts fail, is to be pronounced in presence of two witnesses endued with justice and during the prescribed period (purity) touch the procedure and the last may be proved by mere statement of the person, insisting on divorce and resisting the claim.*"

41. As recently as December 2016 the High Court of Kerala held in *Nazeer v Shemeema*[35] that "[i]*t is to be noted that Qur'an nowhere approves triple talaq in one utterance and on the other hand promotes conciliation as best method to resolve the marital discord. The method and procedure of divorce as* [mentioned] *above has been referred to by all leading Islamic scholars. They also have frowned upon triple talaq in single utterance to effect divorce saying that it revolts against Allah's law. One of the eminent Islamic scholars Sheikh Yusuf al*

[34] 2016 (1) JKJ 312
[35] 2017 (1) KLJ 1

Qaradawi in his book The Lawful and the Prohibited in Islam' refers to method of divorce and holds that Triple talaq in single utterance is against God's law."

REFORMS AND DEVELOPMENTS IN ISLAMIC STATES

42. In many Muslim countries across the world, domestic law no longer recognizes triple *talaq* as a valid form of divorce. A survey of the following provisions in various legislations of such states shows that more and more the Islamic world has come to realize that Triple *Talaq* does not have any foundation in the teachings of Islam; and certainly not any place in the modern world under Islamic law.

43. In most of these countries, three pronouncements are taken as one single pronouncement of *talaq* (much like the ratio of *Masroor Ahmed*).

44. The following survey of the major Muslim countries of the world shows that the laws in these nations supports the propositions of the intervener[36]:

i. EGYPT

- Article 356 and 557 of the Law No. 25 (1929), as amended by Law No. 100 of 1985 Concerning Certain Provisions on Personal Status in Egypt, expressly provides that triple-talaq will be considered as one.

ii. IRAQ

- Article 37(2) of Law No. 188 of 1959, The Law of Personal Status of Iraq states that "[t]hree verbal or gestural repudiations pronounced at once will count as only one divorce."

iii. SUDAN

[36] See, Munir M., *Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change,* International Review of Law 2013:2 at pg 3 ; Also see, Hussain S., *Triple Talaq: A Socio-Legal Analysis* [2010] ILI aw Review 129 at pg. 146.

- Section 360 of Sudanese Manshur-i-Qadi al-Qudat provides that triple-talaq shall be considered as one.
- Article 3, Shariah Circular No. 41/1935 of Sudan states that pronouncement of all divorces by the husband is revocable except the third one, along with a divorce before consummation of marriage, and a divorce for consideration.

iiii. PAKISTAN

- Section 7 of Muslim Family Law Ordinance 1961 provides that the traditional form of divorce is not in force in its original form. According to said provision:

"(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

[…]

(3) Save as provided in sub-section (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation."

v. SYRIA

- Under Article 92 of Law No. 34 of the Law of Personal Status of Syria of 1953 if a divorce is coupled with a number, expressly or implied, not more than one divorce shall take place and every divorce shall be revocable except a third divorce, a divorce before consummation, and a divorce with consideration. Further, such a divorce would be considered irrevocable

vi. MOROCCO, AFGHANISTAN, LIBYA, KUWAIT and YEMEN

- Adopted similar laws in 1958, 1977, 1984 and 1992, respectively

  i. Article 51 Book Two of the Mudawwana of 1957 and 1958 of Morocco

  ii. Sections 145 and 146 of the Civil Law of 4 January 1977 of Afghanistan

  iii. Section 33(d) of Law No. 10 of 1984, Concerning the Specific Provisions on Marriage and Divorce and their Consequences in Libya

  iiii. Section 109 of Law No. 51 of 1984 regarding 'al-Ahwal al-Shakhsiyah' (Personal Law) in Kuwait

  v. Article 64 of the Republican Decree Law No. 20 0f 1992, Concerning Personal Status of Yemen

vii. UAE, QATAR, BAHRAIN

- Despite the impression of these countries being overtly orthodox, they have adopted similar measures under their Personal Law statutes:

  i. Section 103(1) of Qanun al-Ahwal al-Shakhsiya (Personal Law) of UAE No. 28 of 2005

  ii. Section 108 of Qanun al-Usrah (Family Law) of Qatar, No. 22 of 2006

  iii. Section 88(C) of Law No. 19 of 2009 regarding Qanun Ahkam al-Usrah

viii. SRI LANKA

- The Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006, provides that a husband intending to divorce his wife "*shall give notice of his intention to the Qauzi*" who shall attempt reconciliation between the spouses "*with the help the relatives of the parties and of the elders and other influential Muslims of the area.*" However, if after thirty days of giving notice to the Qadi, attempts at reconciling the spouses remain fruitless, "*the husband, if he desires to proceed with the divorce, shall pronounce the talak in the presence of the Qadi and two witnesses*."

PROPOSITIONS SET FORTH BY THE INTERVENER

45. The intervener humbly puts before this Hon'ble Court the following propositions based on the 'Questions for Determination' set before this Hon'ble Court by the Petitioners and the Respondents in the instant matter.

Q: WHETHER MUSLIM PERSONAL LAW CAN BE TESTED ON THE BASIS OF PART III OF THE CONSTITUTION OF INDIA?

46. This Hon'ble Court has time and again held that personal laws cannot be tested on the touchstone of Part III of the Constitution. However, as stated in the preliminary submissions above, the Hon'ble Court may at present not examine the broader issue of whether personal laws are part of law under Article 13 of the Constitution.

Q: WHETHER A COURT CAN INTERPRET HOLY SCRIPTURES?

47. It is humbly submitted that it is not the role of the Courts to interpret Muslim Personal Law but rather hold which interpretation is correct.

48. Under Muslim Personal Law the religious heads or imams are called upon to decipher the teachings of the Quran and the Hadis in particular conflicts.

49. The imams resolve these conflicts not by deciding what is the correct course of action *suo moto* but by reading the sources, i.e. the Holy *Quran* and the *Hadis*, and deciphering what is the correct interpretation of the same.

50. The role of the Court, not being a body necessarily well versed in the intricacies of the faith or vested with the trust and authority of its followers, is not to interpret the teachings of the Holy *Quran* and the *Hadis*. The role of the Court is to look at the interpretations offered by scholars and imams and decide which is the correct one to apply to a given case. Herein, the Court's role is no different from the application of any general or secular law. Inherent self imposed restrictions against what is described as judicial legislation would apply more vigorously to the matter of personal law.

51. Just as the Court may have access to experts when hearing civil or criminal cases, and particularly under the Waqf Act 1995 as amended in 2013, they would have access to experts in Islamic law when dealing with questions of Muslim Personal Law. They need not address questions by novel reasoning of their own.

52. Further, as the Court stated in *Koolsom Beebee v Aga Mahomed Jaffer*[37] "*it would be wrong for the Court on a point of this kind* [i.e. in relation to personal law] *to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority*"

Q: IN VIEW OF THE RATIO OF THE DECISION BY THIS HON' BLE COURT IN SHAMIM ARA V STATE OF U.P. AND ANOTHER REPORTED IN (2002) 7 SCC 518, DECLARING A UNILATERAL TALAQ WITHOUT FOLLOWING THE DUE PROCESS AS LAID DOWN THEREIN IS ARBITRARY AND NOT VALID IN LAW,

[37] Koolsom Beebee and Ors. v. Aga Mahomed Jaffer Bindanim, (1897) ILR 25P.C.9

CAN ANY PETITION/PROCEEDINGS BE MAINTAINABLE REOPENING THE ISSUE WHICH HAS BECOME RES INTEGRA IN SHAMIM ARA'S CASE?

53. It is humbly submitted that this question fundamentally misunderstands the ratio of the *Shamim Ara* case

54. In the aforementioned the case this Hon'ble Court the salient holding of the Court was that "*talaq to be effective has to be pronounced*" and that "[t]*he term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate*".

55. Citing the case of *Rukia Khatun v Abdul Khalique Laskar* (supra) this Hon'ble Court held that "*the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected.*"

56. It is humbly submitted that *Shamim Ara*, while in agreement with the observations of the High Courts, did not comment on the validity of Triple *Talaq* per se. Thus the matter is still open to be decided by the Court.

Q: WHETHER THE CHANGES BROUGHT ABOUT IN THE PERSONAL LAWS BY FOREIGN COUNTRIES CAN BE A GUIDE FOR INTERPRETING MUSLIM PERSONAL LAW IN THIS COUNTRY?

57. It is humbly submitted that as Islamic Law the world round is guided by the same primary sources, i.e. the Holy *Quran* and the *Sunnah*, their interpretation and application by other countries can be a valid guide for interpreting Muslim Personal Law in this country:

58. While Muslim Personal Law is in some ways a peculiar creature of the Indian subcontinent, the religious heads in India in applying the law carry on an identical exercise as that carried out by officials and religious heads in other countries, i.e. they look at the primary sources of Islam to find the solution to any issue; failing a resolution in the primary sources a solution is found by consensus.

59. Where consensus differs amongst different scholars, different schools are formed which interpret or apply the law differently. While the majority of the religious leaders in India may subscribe to one such school (i.e. *Hanafi*), this does not invalidate the guidance/opinion of the other schools of thought, which may be as valid.

60. Where there are changes in the application/interpretation of Personal Law this is driven by a change in the consensus/thinking of different schools of jurists, i.e. a change in the *Ijma*.

61. These changes do not reflect a new interpretation of the Holy *Quran*, which is by its nature absolute and timeless, but rather a change in the opinion of what is the true meaning of the words of the Holy *Quran* through deliberation. In other words,

through the independent reasoning or the thorough exertion of a jurist's mental faculty towards gleaning the true meaning of the words of the Holy Quran (*Ijtihad*).

62. In these circumstances it is clear that the changes in Personal Law in foreign countries may also be a consideration/guide in the interpretation of Muslim Personal Law in India.

63. To buttress the point the intervener briefly draws the attention of the Court to the relationship between National Law and International Law. In many cases changes in national legislation are driven by international commitments or changes in international law. The legislature being supreme, no change in international law alone can bind a national legislature to change the law. However, many times changes in international law, particularly the signing of international treaties, can be a persuasive, if not determinative, guide towards changes in the national law.

64. Finally, the courts in India, including this esteemed institution, often refer to the judgments of foreign courts when looking at an issue of national law. While this is not a mandatory exercise, courts have often chosen to include the wisdom of their counterparts in other jurisdictions when considering a question of law before them. Foreign judgments may help guide our judiciary on similar or identical questions of law. Similarly, the Court may also look to the treatment in Muslim countries of the questions before the Court herein and seek, though they are not

bound by, guidance in the choice in other countries between the interpretations offered by various schools of Islamic jurisprudence.

Q: WHETHER QAZIS HAVE THE LEGAL AUTHORITY TO ISSUE CERTIFICATE OF DIVORCE CERTIFYING THE VALIDITY OF TRIPLE TALAQ?

65. Qazis are not empowered under the law in India to issue certificates of marriage or divorce. Their presence during either of the events does not validate the events and their absence does not invalidate them. (*All Assam Muslim Marriage & Ors. vs State Of Assam And Ors.* I (2002) DMC 11). Clearly therefore the need is to ensure adjudication by *Qazis* or Family Courts applying *Shariah* for the purpose as provided for, for instance, in the Kazis (Maharashtra Amendment) Act 1978, which provides therein:

> "*5. (1) It shall be the duty of every person, who officiates as Kazi or Naib Kazi […] at a celebration of any marriage, to maintain a proper record of the marriage or marriages attended by him in that capacity, and, if so required by or on behalf of either of the parties to the marriage, to give inspection and duly certified true copies of the documents in his possession relating to the marriage, like the Nikah Nama […]* "

66. Directions were recently issued in the same vein by the Madras High Court as well in *Mrs. Bader Sayeed Advocate v. Union of India* (2017 SCC OnLine Mad 74). Relying on Sec. 4 of the Kazis Act, 1880, the court issued directions that for

the purposes of legal proceedings, the certificate is only an opinion. The AIMPLB, which is respondent no. 9 in the above matter, has also taken this stand

Q: WHETHER MUSLIM WOMEN HAVE A STRONGER RIGHT TO DIVORCE IN THE FORM OF KHULA? WHETHER THE RIGHT TO SEEK KHULA IS BALANCED BY THE RIGHT TO PRONOUNCE TRIPLE TALAQ AND WHETHER THE RIGHT TO SEEK KHULA WILL BE AFFECTED/COMPROMISED IF THE RIGHT TO PRONOUNCE TRIPLE TALAQ IS STRUCK DOWN?

67. Khula allows women to release themselves from the marital bond on offering the meher to the husband as consideration for release. The execution of a khula is subject to the husband's acceptance of the same. Khula leaves the husband with the choice of rejecting the offer of khula.

68. Although initiated by the wife, khula cannot be seen as a counter part of triple talaq for women. Hence, it is submitted that it will not be affected if Triple talaq is struck down.

FURTHER PROPOSITIONS BY THE INTERVENER

69. The Intervener hereby submits the following further propositions before the Court:

70. It is submitted that 'Triple Talaq' might be considered as one, revocable Talaq:

i. It is clear that the practice in most Muslim countries is to treat Triple Talaq not as three pronouncements in one sitting counting as a valid irrevocable divorce, but rather as one pronouncement.

ii. The view that triple talaq cannot be an effective divorce if made as three irrevocable pronouncements in one sitting is supported by many judicial rulings over many decades, and as recently as 2008.

iii. The intervener humbly submits that this is the correct view and the view that is consonant with the letter and spirit of the Holy Quran, as is clear from many judicial pronouncements and commentary from respected religious leaders/imams.

71. From another perpective, the case of single *talaq,* although revocable from the point of view of the husband, is final for the wife subject to the waiting or *idda*t period. If the husband revokes the *talaq* the wife has no option but to return to him. Surely this is no less onerous for the wife than being divorced instantaneously. After the second divorce the revocation is complete only by the wife's consent.

72. It is submitted that the real problem is neither triple *talaq* nor *talaq* per se but rather the fact that the institutional arrangement has been by-passed. Since even unilateral *talaq* by the husband has to be for reasonable cause and proceeded by attempts by mediators from either side who report to a *qazi*, there is a built-in element of adjudication. Furthermore the *qazi* ensures that *mehar* is paid and provision made for *iddat* period as well as for children, before the *talaq* becomes effective. With intervention of adjudication all doubts about lack of witnesses and use of modern day communications like sms or whatsapp will be addressed.

73. Furthermore, no reliable data is forthcoming to show that *talaq*/triple *talaq* amongst muslims exceeds divorce amongst other communities. Thus it is not the

principle but the lack of adjudication that causes the problem. Unless *talaq* (which is only one part of a comprehensive scheme of marriage and divorce) itself is found unacceptable, the anxiety expressed about triple *talaq* seems misplaced given that there is more than adequate judicial and legislative material to establish that irrespective of the number to times *talaq* is expressed at one sitting it will count only as one. It is humbly submitted that once that is taken as the accepted position there is no further issue about *Halala* since *talaq Ahsan* allows a fresh *nikah* in case the same couple wants to get back together.

74. It is humbly submitted that the Court will be circumspect in going into matters that are essentially the purview of legislative or executive policy:

i. It is undoubtedly within the power and duty of the Court to check the uncontrolled exercise of Legislative or Executive power. However in performing that role the Court should not be eager to subsume the powers it seeks to check.

ii. The Court should refrain from legislating afresh in the guise of commenting upon the Constitutional validity of personal law. The Court should thus refrain from commenting on issues such as the institution of a Uniform Civil Code, which would fall within the ambit of the Legislature.

iii. While Indian Courts have long recognized that court cannot be curtailed from exploring legal issues under the US doctrine of "political questions", yet that does not mean that courts will not show self imposed restraint if the desired outcome is possible

iv. Where and when the legislature in its wisdom seeks to introduce reforms in the civil or codified personal law it shall be open to the Court to judge the validity of the same. However, it should not seek to frame legislative or executive policies in the guise of judicial pronouncements.