**IN THE SUPREME COURT OF INDIA**
**CIVIL ORIGINAL JURISDICTION**
**I.A. No of 2017 IN**
**WRIT PETITION (CIVIL) NO. 118 OF 2016**
**WITH**
**SUO-MOTU WRIT PETITION (C) NO. 2 OF 2015**

**IN THE MATTER OF:**
SHAYARA BANO

…PETITIONER

VERSUS

UNION OF INDIA & ORS.

…RESPONDENTS

**AND IN THE MATTER OF:**
MR. SALMAN KHURSHID
SENIOR ADVOCATE, SUPREME COURT OF INDIA
4, GULMOHAR AVENUE
JAMIA NAGAR
NEW DELHI 110025

…INTERVENER/APPLICANT

**REVISED SUBMISSIONS (IN LIGHT OF ARGUMENTS PUT FORWARD BEFORE THE HON'BLE COURT)**

**IN THE MATTER OF TRIPLE *TALAQ***

REVISED SUBMISSIONS (IN LIGHT OF ARGUMENTS PUT FORWARD BEFORE THE HON'BLE COURT)

1. Though matters of religion have periodically come before our courts, and been decided in the context of Articles 25 and 26 of the Constitution of India, inevitably the claims relating to Articles 14-19, and the 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 'laws in force' 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 based on a pluralistic reading of the sources of Islam, i.e. by taking a wholistic view of the Holy *Quran* and *Hadith* as interpreted by various schools of thought (not just the *Hanafi* school), 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 the rule of *Sharia*. When there is no clear guidance in the Holy *Quran*, theologians must look to the traditions of the Prophet or *Sunna* 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* arrive at after closely studying the first two and sitting in discussion and debate). If the resolution is found by *Ijma* then that too would become a rule of Islamic law. However, a rule arrived at by *Ijma* may never derogate from the Holy *Quran*, just as no instance or recollection in the *Hadis* may derogate from the Holy Scripture either.

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. Social 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 *mehr* 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 upon divorce or demise of the husband. Many 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 Holy *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]

[1] Reported by Abu Daud*; comp. Radd-ul-Muhtar, Vol. II, p. 682* as quoted in *Syed Muhammadan Law, Vol. 2* at p. 436

## 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 an offer by the man and acceptance by the woman, in the presence of two witnesses representing the two sides. The contract of marriage or '*Nikahnama'* compulsorily includes *mehr* (dower) or consideration for marriage to be paid to the bride immediately, though the bride may agree to defer payment during the subsistence of the marriage, but not later than the granting of divorce. This was a precursor to pre-nuptial agreements familiar to the contemporary developed societies.

7. The *Nikah* ceremony is conducted by a traditional *qazi*, who is a muslim priest but not necessarily trained in *fikh* or Islamic jurisprudence (unlike a *Qazi* who heads the community of priests in an area). The ceremony usually involves the qazi appointing two witnesses and a *vakil* (advocate) to seek the consent of the bride to marry the bridegroom for a stated *mehr*. The *vakil* identifies the bride, and the three report the consent to the *qazi*, who then confirms the marriage. A certificate is given to both sides with the signatures of the *qazi*, the husband, the wife, the *vakil*, and the two witnesses. It is significant to note that the offer of marriage with a particular *mehr come*s from the man to the

[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.

woman and never the other way round. In this way, and many others, Muslim marriage does not strictly assign identical rights and duties to both sides. However, it is important to look at the scheme in toto and remember that equality and uniformity cannot always be equated.

THE CONCEPT OF DIVORCE UNDER MUSLIM LAW

8. The present petitions are primarily directed against the practice of Triple *Talaq* – being a 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 was first proposed in India by Dr Zeenat Shaukat Ali in her book on Islam and another draft 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.[3]

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

11. A *talaq* whether oral or in writing is believed to be possible without witnesses 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 or pressure brought to bear upon him, being sane and having sound understanding while pronouncing it and after the 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 affected 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*. Such revocation 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.[4]

Besides *talaq* or divorce initiated by the husband, there are other methods of dissolution of marriage in Islam, ensuring gender equality and equity between spouses and indeed in keeping with modern trends in divorce law. It is important that this Court recognize the entire system to negate the popular odium of the regressive element in Islam.

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. This might be described as implied form of *talaq.*[5]

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[4] *Fatwa-i-Alamgiri, Vol. I, p. 492* as quoted in *Muhammadan Law, Vol. 2*, p. 436
[5] Mulla*, Principles of Mahomedan Law,* Lexis Nexis, Gurgaon, 2015*,* p. 402

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.[6]

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, which are approved by the Qazi.[7]

v. ***Mubarat*****:** A *mubarat* divorce is dissolution of marriage by agreement when the aversion is mutual and both the sides desire a separation. In common law this amounts to divorce by mutual consent. 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*. However, in *khula* and *mubarat*, the wife is nevertheless bound to observe the *iddat*.[8]

vi. ***Talaq-e-Tafweez*** is the delegation by the man of his right to pronounce *talaq* to a third party (acting as agent of the husband) or his bride/wife, while also retaining it to himself. This can be written into the *Nikahnama* as indeed any other term such as no triple divorce, or an agreement can be made to the effect even after the marriage ceremony (as a sort of post-nuptual agreement).

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[6] *ibid*
[7] *ibid*
[8] *ibid*

vii. ***Fasq*** allows the wife to get the marriage annulled with the help of a Muslim Judge (*Qazi*) even if the husband is against it. The woman opting for it has to publicise her plan to seek divorce, and most women give '*Fasq*' ads in newspapers. Theoretically, this form of divorce (or rather annulment) is available to either party for annulment of marriage on grounds that overlap with *khula* for the woman *(or as under the Dissolution of Muslim Marriages Act, 1939).*

The *Hanafi* law, however, does not recognize *Fasq* as a mode of dissolution of marriage. That is precisely the reason why the Dissolution of Muslim Marriages Act, 1939 (hereinafter, 1939 Act) was enacted in order to '*consolidate and clarify the provisions of Muslim law*' and recognize *Fasq* (judicial divorce), which was already a part of the Muslim Personal Law (*Shariat*). The following Statement of Objects and Reasons of the 1939 Act is noteworthy in this regard:

> "*There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafi'i or Hambali Law.*"

This is a clear example of harmonizing of different schools of Islamic jurisprudence, which was also undertaken under the Shariat Application Act 1937, giving precedence to *Shariat* over local customs and usages. In order to apply the *Shariat* not only had the courts to wean out custom and usage but also to find common ground between the four schools. That indeed is the exercise this Court has to undertake in the instant case.

viii. ***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* clearly indicating an intention to irrevocably dissolve the marriage, "I divorce you irrevocably."[9]

13. In the Glossary of Islamic terms in English Translation of Sahih Muslim translated by Nasiruddin al-Khattab (Darussalam, 2007), *Bid'ah* is defined as follows:

> *Bid'ah*: Any heresy or innovated practice introduced in the religion of Allah which have no basis in the Qur'ân or Sunnah and to regard these new things as acts of Ibâdah. The Prophet said that every Bid'ah is a deviation from the true path and every deviation leads to Hell-fire.

14. The same text also offers the following definitions:

[9] *ibid*

*SharI'ah*: These are the rules and regulations of Islam, the Divine law. SharI'ah is the totality of of Allah's Commandments relating to man's activities. It signifies the entire Islamic way of life, especially the Law of Islam. The SharI'ah is based upon the Qur'ân and the Sunnah of the Prophet Muhammad, and is interpreted by scholars in deliberating and deciding upon questions and issues of a legal nature.

*Zindiq*: One who goes so far into innovated and deviant beliefs and philosophizing, etc., without sticking to the truth found in the Qur'ân and the Sunnah to such an extreme extent that they actually leave Islam altogether.

15. It must be understood that the concept of *Talaq-ul-biddat or* irregular *Talaq* itself is based on the limit of three Talaqs placed on the man, i.e. the he can divorce the same woman only three times in life, the first two being revocable within the *iddat* and the third being final and irrevocable. Furthermore even if the first two are not revoked during the *iddat* period and thus become final, they can be followed by fresh *nikah*. Even this option is not open to the man or woman after the third talaq. In the remote chance of the couple wishing to marry again it is possible only if the woman has been married to another man, conjugated the marriage and then divorced. This restriction was placed to ensure that *talaq* was not made a whimsical mockery. This second kind of 'triple *talaq*' is integral to ensuring the sanctity of marriage under Islam and should not be conflated with *Talaq-ul-biddat* or 'instantaneous triple *talaq*'.

16. The scheme of marriage and divorce in Islam needs to be seen as a whole while judging its reasonableness and the balance of equity. While it is true that the man is given the primary authority in relation to the giving of divorce, this can be delegated by agreement or by insertion of terms in the *nikahnama*. Further, this perceived inequity is balanced by the woman's rights and entitlements for maintenance, the provision for duties of paternity in case she is found to be pregnant following pronouncement of *talaq*, payment of *mehr* as consideration for marriage, etc. The scheme itself does not regard both sides as absolutely equal, yet it balances the rights and duties of both. Thus, while the man retains the primary ability to give divorce, he also has to make the offer of marriage and provide consideration.

PROCEDURE OF TALAQ AS PER SOURCES OF ISLAMIC LAW

17. "*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.*"[10]

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.

18. *Ijma* and *Ijtihad* are the secondary and dependent sources. They derive their value from the primary sources. *Ijma* has been defined

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

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.[11]

19. *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 of the Prophet if the problem had occurred before him.[12] 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*.[13] *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).

20. King Fahd of Saudi Arabia, in an address to a congress of theologians in Mecca in 1983, noted that the gates of *ijtihad* have

[11] I.A. Khan ed., Aqil Ahmad, *Textbook of Mohammedan Law*, Central Law Agency, Allahabad, 2007, p. 23.
[12] 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.
[13] *Ibid*, at p. 116.

not closed. Recently in 2013, King Abdulla bin Abdulaziz Al Saud too repeated the same in a statement to leaders, key Islamic personality and heads of Haj mission. Thus the process of exploring the meaning of the Holy Quran through introspection and inward discovery is still open to jurists and scholars and no interpretation of the same is set in stone.

THE HOLY QURAN

21. 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 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)

22. 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

23. 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. Of the several *Hadith* it is widely accepted that some like *Sahih Bukhari* are considered more reliable than others. The only room for the exercise of human reason is within their understanding.

24. 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.”[14]

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

[14] 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

Holy Quran is however very clear on the point that such a divorce must be deemed to be a single divorce.[15]

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 divorced her for second time at the time of Hadrat Omar and third time at the time of Hadrat Osman.[16]

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'.[17] 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."[18]

ix. [2005] 43 - (867) It was narrated that Jâbir bin 'Abdullâh said: "When the Messenger of Allah delivered a Khutbah, his eyes would turn red, his voice would become loud, and his anger would increase, until it was as if he was warning of an attacking army, saying: 'The enemy will attack in the morning or in the evening.' He said: 'The Hour and I have been sent like these two,' and he held his index finger and middle finger up

[15] *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*

[16] *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*

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

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

together. And he would say: 'The best of speech is the Book of Allah, the best of guidance is the guidance of Muhammad, and the worst of matters are those which are newly-invented, and every innovation is a going astray.' Then he would say: 'I am closer to every believer than his own self. Whoever leaves behind wealth, it is for his family; whoever leaves behind a debt or dependents, then the responsibility of paying it off and of caring for them rests upon me."[19]

x. [2006] 44 - (...) Jâbir bin 'Abdullâh said: "In the Khutbah of the Prophet on Friday, he would praise Allah, then he would say other things, raising his voice..." a similar Hadith (as no. 2005).

xi. [4796] 59 - (1852) It was narrated that Ziyâd bin 'Ilâqah said: "I heard 'Arfajah say: 'I heard the Messenger of Allah say: "There will be Fitnah and innovations. Whoever wants to divide this Ummah when it is united, strike him with the sword, no matter who he is."[20]

xii. [4797] ( ... ) A similar report (as no. 2796) was narrated from 'Arfajah from the Prophet, except that in their Hadith it says: "...kill him".

25. 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

[19] Sahih Muslim in the Book of Jumu'ah (Friday) Prayer
[20] Sahih Muslim in the Book of Leadership

declared that the man was making a plaything of the words of God, and made him take back his wife.[21]

26. 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:

    i. Caliph Umar, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavored 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 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.

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[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*

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

27. 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 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"*

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

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

TREATMENT OF TRIPLE TALAQ JURISTS UNDER DIFFERENT SCHOOLS

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

29. The general impression is that the *Hanafi* school of law holds triple *talaq* to be valid and that three pronouncements shall amount to three separate divorces and shall result in a *Mughallazah* or final divorce.

30. A reading of two of the works – *Al-fiqh al-absat* and *Al-fiqh al-akbar* – attributed to Abu Hanifa (the founder of the *Hanafi* school of jurisprudence) makes no mention of triple *talaq* or *talaq-e-bidaat*. However the following portions imply that in fact there was no clear guidance that they help it to be valid in all circumstances:

    i. "*Abu Mutee` said, "I said, "So inform me about the most virtuous Fiqh."*
    *Abu Haneefah said, "That a man learns Imaan in Allaah Ta`aalaa, the legislations, the Sunan, the Hudood (prescribed punishments), the disagreements of the Ummah and its consensus.""*"

    This shows that Abu Hanifa himself felt that it was important not just to look at what was said in consensus (i.e. by the

majority), but also by those in disagreement (i.e. minority opinions).

ii. "*He (Imaam Abu Haneefah) said, „Hammaad narrated to us from Ibraaheem, from ibn Mas`ood that he used to say, „Indeed, the worst of matters are the newly invented ones. Every newly invented matter is a Bid`ah (Innovation), every Bid`ah is deviation and every deviation is in the fire."*

Here we should remember that triple *talaq* or *talaq-e-bidaat* is, by name and nature, an innovation – it is a practice of pre-islamic arabs that was made to survive despite its admonition by the Prophet himself. Thus Abu Hanifa would have seen such a practice as a sin and a deviation from the *fiqh*.

31. Abu Hanifa explained the principles which he followed in his ijtihad and to which he bound himself in derivation of rules. He said, "*I follow Allah's Book when I find a rule in it. When I do not find a rule in it, I follow the Sunnah of Allah's Messenger (PBUH) and sound traditions from him which has been transmitted by the reliable persons. When I do not find a rule in Allah's Book nor in the Sunnah of Allah's Messenger, I follow the opinion of way of the Companions I wish, and leave the opinion of anyone wish. Then I do not go beyond their opinions to follow the opinion of others. When the matter comes to Ibrahim, al-Sha'bi, al-Hassan ibn Sirin, Sa'id ibn al-Musayyab, and he mentioned the names of some men who exercised ijtihad, I have the right to exercised ijtihad, as they did*."[23]

[23] 'Abu Hanifa: Life History and Works' (Muslima, December 2011) <http://muslimarealm.blogspot.in/2011/12/imam-abu-hanifa-life-history-and-works.html> accessed 16 May 2017

If Abu Haanifa himself felt it was his task to introspect upon the words of the Prophet and his Companions, then why must scholars today take his word as Gospel, instead of conducting the same exercise themselves. Even then he did not necessarily follow the words of all the Companions, but rather took those that he belived accorded with his understandings of the Holy *Quran*.

32. 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 similar 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.[24]

33. 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. 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

[24] *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*

which a reconciliation is possible and husband 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.[25]

34. Hajjaj bin Artat (A narrator of one the Hadiths of Ayesha and a *Hanafi* jurist) and Muhamad ibn Muqatil (a 3rd Generation *Hanafi* Jurist) both considered triple *talaq* invalid. The former stated that not even counted as one divorce[26], while the latter was of the view that it would be considered as one revocable divorce or *talaq-i-raj'i*[27].

35. The *Shias* and the *Malikis* do not recognise the validity of the *talaq-ul-bidat*, while the *Hanafi* and the *Shaifi* agree in holding that a divorce is effective, if pronounced in the *biddat* form, "*though in its commission the man incurs a sin*".[28] 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.

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[25] *I.A. Khan ed., Aqil Ahmad, Textbook of Mohammedan Law, Central Law Agency, Allahabad, 2007, p. 177*
[26] Asgharali Engineer, The Quran, Women and Modern Society, (2 nd ed.) New Dawn Press, 2005 at. Pg. 149
[27] Asgharali Engineer, Rights of Women in Islam, (3 rd Ed), Sterling Publishers, 2008, at Pg. 148
[28] *Syed Ameer Ali in Muhammadan Law, Vol. 2, Kitab Bhawan, New Delhi, 1986*

36. 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.

TALAQ-UL-BAIN

37. 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

38. Every woman married to a man by a lawful contract is bound, for the prevention of confusion of parentage, to observe probation for three menstrual periods 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*).

INDIAN COURTS AND MUSLIM PERSONAL LAW

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

40. In *Saiyid Rashid Ahmad v. (Mst) Anisa Khatun* 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, 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.*"

41. 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.

42. V.R. Krishna Iyer, J. stated in *A. Yousuf Rawther vs Sowramma*, "[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."*

43. In *Rukia Khatun v. Abdul Khalique Laskar* 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*."

44. 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.*"

45. 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.

46. 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)* 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.

47. In *Mohammad Naseem Bhat v. Bilquees Akhter* 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.*"

48. As recently as December 2016 the High Court of Kerala held in *Nazeer v Shemeema* 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 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

49. 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.

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

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

1. **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.

2. **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."

3. **SUDAN**

- 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.

4. **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."

5. **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

6. **MOROCCO, AFGHANISTAN, LIBYA, KUWAIT and YEMEN**

- Adopted similar laws in 1958, 1977, 1984 and 1992, respectively
- Article 51 Book Two of the Mudawwana of 1957 and 1958 of Morocco
- Sections 145 and 146 of the Civil Law of 4 January 1977 of Afghanistan
- Section 33(d) of Law No. 10 of 1984, Concerning the Specific Provisions on Marriage and Divorce and their Consequences in Libya
- Section 109 of Law No. 51 of 1984 regarding 'al-Ahwal al-Shakhsiyah' (Personal Law) in Kuwait
- Article 64 of the Republican Decree Law No. 20 0f 1992, Concerning Personal Status of Yemen

7. **UAE, QATAR, BAHRAIN**

- Despite the impression of these countries being overtly orthodox, they have adopted similar measures under their Personal Law statutes:
- Section 103(1) of Qanun al-Ahwal al-Shakhsiya (Personal Law) of UAE No. 28 of 2005
- Section 108 of Qanun al-Usrah (Family Law) of Qatar, No. 22 of 2006

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

8. **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

52. 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.

*THE COURT NEED TO GO INTO THE QUESTION OF CONSTITUTIONALITY OF PERSONAL LAW*

53. 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 at present need not examine the broader issue of whether personal laws are part of law under Article 13 of

the Constitution if it accepts the proposition that instantaneous triple *talaq* is in fact no part of the shariat/muslim personal law.

*THE COURT SHOULD NOT SEEK TO INTERPRET HOLY SCRIPTURES*

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. Further, as the Court stated in *Koolsom Beebee v Aga Mahomed Jaffer* "*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*"

*SHAMIM ARA DOES NOT PUT THE QUESTION OF UNILATERAL TRIPLE TALAQ TO REST*

60. It is humbly submitted that in the case of *Shamim Ara* (supra) 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*".

61. 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.*"

62. 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.

*CHANGES IN PERSONAL LAW IN FOREIGN COUNTRIES MAY BE A GUIDE TO THE COURT WHILE CONSIDERING THE PRESENT ISSUE*

63. 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:

64. 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.

65. 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.

66. 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*.

67. 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*).

68. 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.

69. 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.

70. 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.

*CURRENTLY, QAZIS ARE NOT EMPOWERED TO ACT AS AN ADJUDICATORY AUTHORITY IN ISSUES RELATING TO MARRIAGE OR DIVORCE UNDER MUSLIM PERSONAL LAW*

71. 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. See Bombay Qazis Act

72. 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.

73. During oral arguments the issue of some adjudicatory supervision was raised by the Intervener, as well as other senior counsel. The Intervener humbly submits that *Qazis*, duly authorized so to act, may be such adjudicatory authority as envisioned in the entire scheme of marriage and divorce laid out in the Holy Quran and the hadith and thus help safeguard the rights of both the wife and husband as intended in the Holy scriptures.

*MUSLIM WOMAN'S RIGHT OF KHULA IS INDEPENDENT OF TRIPLE TALAQ*

74. Khula allows women to release themselves from the marital bond on offering to give up *mehr* to the husband, or any other condition as may be agreed upon by them, as consideration for release. The execution of a *khula* is subject to the husband's acceptance of the terms, but it is not currently clear if he can refuse entirely.

75. 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

76. The Intervener hereby submits the following further propositions before the Court.

*TRIPLE TALAQ SHOULD BE CONSIDERED AS ONE REVOCABLE TALAQ*

77. 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.

78. There is another important way of looking at the issue. In the case of single Talaq although it is revocable from the point of view of the husband, for the wife it is final subject to the waiting or *iddat* period. It must be noted that 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. However there is some material to the effect that revocation of the second divorce is possible only with the wife's consent.

79. The real problem is neither triple talaq nor talaq but the fact that the institutional arrangement of adjudication has been by-passed. Since even the unilateral *talaq* by the husband has to be for reasonable cause and preceded by attempts by mediators/arbiters from either side who reported to a qazi, there is an element of adjudication. Furthermore the qazi ensures that *mehr* has been paid and provision made for *iddat* period (i.e for maintenance and residence for the divorced wife) as well as for any 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. In any case no reliable data is forthcoming to show that talaq/triple talaq amongst muslims exceeds divorce amongst other communities. A recent survey done by Abu Saleh Sherief shows that in fact the perception of the rest of the world of talaq in Muslim communities does not necessarily match the ground reality.

80. The intervener humbly submits that 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 of times talaq is pronounced at one sitting it will count only as one. 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.

*THE COURT SHOULD BE CIRCUMSPECT IN ENTERING MATTERS ESSENTIALLY WITHIN LEGISLATIVE OR EXECUTIVE PURVIEW*

81. 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.

*TRIPLE TALAQ IS NO PART OF SHARIAT*

82. In response to the Court's question whether Triple Talaq should be considered mere custom or usage (in the context of Section 2 of the Muslim Personal Law (Shariat) Application Act 1937) the Intervener humbly submits that this question is in fact moot.

83. As the Intervener has sought to show through many preceding sections (see 'THE HOLY QURAN' pages 14-16 and 'THE SUNNAH' pages 17-20) Triple Talaq finds no mention in the primary sources of Islam. In fact, in light of the entire scheme of Marriage and Divorce as laid down in the same, the concept of an

instantaneous talaq is antithetical to the very teachings of Islam and the Prophet.

84. Thus Triple Talaq cannot be considered a part of the Shariat. In fact as seen from the account of its enforcement under the second Caliph Hazrat Umar (see page 21-22) if anything it was made valid only to meet the exigencies of a particular situation and from there precipitated only through usage, never through any proclamation that it was an essential and integral part of the Islamic faith.

85. Triple Talaq can only be considered as a creature of custom. One that most, if not all, sections of the worldwide Muslim community and most Muslim countries, have recognised as *haram* or sin and thus not a valid form.

86. Furthermore, in the objects and reasons of the Act it states that the "*introduction of Muslim Personal Law will automatically raise them [Muslim women] to the position to which they are naturally entitled*". The Intervener submits that Prophet had an identical object when he brought the word of Allah to the pre-Islamic community, i.e. to better the position of women, who were so badly mistreated by the pre-Islamic Arabs. Thus, the Court would only be fulfilling the purpose of the Act by recognizing that 'Muslim Personal Law' or Shariat is in fact constituted of the wise and endearing words of the Holy Quran, and the teachings of the Prophet, i.e. the Hadith

87. Finally, in applying the interpretations or teachings of a particular school the Court must recognize that no school is an infallible or

immutable authority. Islamic jurists seek to interpret the primary sources of Islam either through ijma (consensus) or ijtihaad (introspection). In this they are informed by their own social, political and cultural realities. Thus, different jurists may come to different conclusions at different times. The task of the Court should be to look at the various interpretation offered by Islamic jurists/authorities and seek to apply the one in the situation which best offers an equitable and just solution. Here this exercise has been well described by Badar Ahmad, J. in Masroor Ahmad (supra) as follows:

> "*25. When a difference of opinion is discernible within a particular school, normally the dominant opinion is taken as representative of the school. But, this does not mean that a qazi [or indeed a court], when required to render a decision in a specific case, cannot, in the interest of justice and equity, adopt the view of the minority within the school. It is also interesting to note that traditionally the qazi gave the ruling based upon the school which he followed. So, if he was a follower of the hanafi school he decided cases on the basis of hanafi fiqh. Consequently, if a dispute were to be brought to a qazi who followed shafei fiqh he would decide according to shafei precepts. In India, the secular courts while applying muslim law to muslims in accordance with section 2 of the 1937 Act have adopted the principle of applying the fiqh to which the parties belong. Meaning thereby, that hanafi principles would be applied to adherents of the hanafi school and ithna ashari law to ithna asharis and so on. This, however, has not been strictly followed, perhaps in ignorance. Clearly, a qazi or a*

*judge is permitted to apply a minority view within a school of fiqh to adherants of that school. He is also permitted to apply a view taken by a school of law of which the parties are not members of. This can be done in the interest of justice and equity and to avoid hardship to any one or both the parties provided, of course, that what the judge proposes to do is not contrary to a basic tenet of Islam or the Quran or a ruling or saying or act of prophet Muhammad*."

88. The door to such a pluralistic interpretation of muslim personal law is in fact opened by the statement of the Hanafi jurists themselves, as recorded in the Objects and Reasons of the Act, which states that the teachings of another school may be applied where the teachings of the Hanafi school may cause hardship. (*quoted supra at page 9*).

89. The Muslim Personal Law Board have argued that the Court must accept their view of faith and refrain from interfering with it on any ground, including Constitutional scrutiny. It is a matter in which only the community can take a view or Parliament can take initiative to deal with it. It seems strange that a matter of faith is not immutable but variable at the hands of community or Parliament and yet the Court must steer clear of it. If Triple *talaq* is intrinsic to faith and therefore beyond the interference of Courts it seems inexplicable that the Board speaks of working to educate people to refrain from resorting to triple *talaq*. The Board also argued that triple *talaq* can be mutually agreed to be shunned in the *nikahnama* although to exclude other forms of *talaq* would be unIslamic and therefore not permissible. How can one "essential part" of Islam be excludable if other parts are not?

FURTHER MATERIALS IN RESPONSE TO QUESTIONS POSED BY THE COURT DURING HEARINGS

90. In an effort to answer some of the questions posed by the Court to both sides during oral arguments, the Intervener offers the following documents before the Court along with the revised/updated written submissions.

*PERIODS OF THE VARIOUS CALIPHS AND FOUNDERS OF SCHOOLS OF ISLAMIC JURISPRUDENCE*

91. In response to the query of the Court regarding the periods during which the various Caliphs and eminent Islamic jurists presided the Intervener offers the following table(s) of information:

CALIPHS[29]

| CALIPH | YEARS (A.D) | MOST NOTABLE ASPECT OF REIGN |
|---|---|---|
| Abū Bakr | 632-634 | Expansion of the Muslim Empire during the *Riddah* Wars, unifying all of Arabia |
| 'Umar (Omar) | 634-644 | Further expansion into Egypt, Syria and Iraq<br>Dissemination of the teachings of the Qur'an<br>Established legal system with prescribed punishments and jail system.<br>Sometimes called "Umar the Great". |

[29] Taken from R Bhala, *Understanding Islamic Law (Shari'a)*, (*LexisNexis*, 2011), 120

| | | |
|---|---|---|
| ‘Uthmān | 644-656 | Conquests across Africa, Armenia and Afghanistan.<br>Official version (canonical text) of the Qur’ān. |
| ‘Alī | 656-661 | First Civil War (First *Fitna*) within the Muslim Empire. |

FOUNDERS OF SUNNI SCHOOLS OF LAW[30]

| JURIST | SCHOOL | YEAR(S) |
|---|---|---|
| Abū Ḥanīfa | Hanafi | 702 - 772 AD |
| Abu Yusuf | | 735/739 - 798 |
| Muhammad al-Shaybani | | 749/50 – 805 AD |
| Malik Ibn Anas | Maliki | 711 – 795 AD |
| Al-Shafi‘i | Shafi’i | 767 – 820 AD |
| Ahmad ibn Hanbal | Hanbali | 780 – 855 AD |

[30] Source: Wikipedia

## SUMMARY

Triple *talaq* in one sitting is an aberration and irregular on which there is considerable disagreement amongst different schools and even scholars of the same school.

On the facts of the instant case the court is not required to consider whether *talaq*/ triple *talaq* is core part of religion or indeed to consider the very concept of religion and therefore what part is core of the faith and what part mere social practice associated with religion. But in deciding what is the true meaning of the sources of Islamic law the Court is justified in looking at different schools and reputed scholars to arrive at a conclusion. This is not legislation on judicial reform.

Ultimately a reading of the Holy Quran does not approve it and all Muslim countries irrespective of the prevalent school have by statute made it clear that triple *talaq* is to be treated as one.

If triple *talaq* is excluded from the correct understanding of *Shariat* there is no occasion to test it upon constitutional scrutiny. Therefore in applying the shariat under section 2 of the *Shariat* Application Act 1937 only the correct view of *Shariat* will be applied.

On the argument of the learned AG on constitutional morality the response must be that constitutional morality is not independent of religion and its importance in the constitutional scheme of things. It must be noted religion is part of Part III and not therefore subservient to it. Constitutional morality cannot be divorced from

religion as indeed the Indian version of Secularism cannot be. Any attempt to do that can lead to unimaginable confusion. At best it can be said that in appropriate facts and circumstances it might be necessary to balance Arts 25 and 26 with Arts 14,15,19 and 21. However this is not the case for such an exercise.

Apart from the aberration or innovation (irregular) that distorted the concept if three limits on *talaq* in a life time of a marriage the problem seems to have arisen from the falling into disuse of the role of the *Qazi* or adjudication in dissolution of muslim marriages.