

Legal analysis of divorce in Islam and rights of Muslim women:  
*Shariah Law* and the Holy Qur'an, with the special emphasis on *triple talaq* or *talaq-e-biddat*

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### ABSTRACT

2017 the year when the Apex Court of India criminalised *Triple talaq*, a method of marriage annulment in which husband by spelling *talaq* thrice in any form including mobile texting, email, telephonic conversation, etc<sup>2</sup> could annul the marriage irrevocably. This brought the entire Islamic divorce mechanism into picture hence it became indispensable for the researcher to research on the topic with the Holy Qur'an as its basis. The paper also includes the landmark cases like *Jiauddin Ahmed vs. Anwar Begum*<sup>3</sup>, *Must. Rukia Khatun vs. Abdul Khalique Laskar*<sup>4</sup>, and *Shayara Bano vs. Union of India*<sup>5</sup> where majorly two issues were raised:

- Can *Talaq-e-Bidat* (specifically instant *talaq*) be considered as an essential practice in Islam?
- Whether practice of instant *talaq* violates the fundamental right of Muslim women?

All these provisions and case laws will help us to understand the need of the bill and unveil many envisaged practices practiced in the name of Islam in order to escape the rigid reconciling divorce laws. The paper also tries to lay down a comparative study between different Islamic countries and India in order to criticize un-constitutional divorce which even those countries banned but were still prevalent in India. By the end of this paper the reader would inculcate enough knowledge to understand the Divorce laws in Islam and also Rights indulged by the Qur'an to Muslim women.

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<sup>2</sup> *Triple Talaq: India criminalises Muslim 'instant divorce'*, BBC (Jul. 30, 2019), <https://www.bbc.com/news/world-asia-india-49160818>.

<sup>3</sup> *Jiauddin Ahmed v. Anwara Begum*, (1981) 1 GLR 358.

<sup>4</sup> *Must. Rukia Khatun v. Abdul Khalique Laskar*, (1981) 1 GLR 375.

<sup>5</sup> *Shayara Bano and Ors. v. Union of India (UOI) and Ors.*, (2017) 9 SCC 1.

## INTRODUCTION

Dominance over women is no new concept for human civilisation contrary to the fact that women are the source of life. But Islam has changed this concept by specifically influencing the matrimonial regulations<sup>6</sup> and one of its classic evidence was recognised by *Tahir Mahmood*<sup>7</sup> which at present is known as the Break Down theory (all sorts of contentious events like riots, rebellion, etc happens in the society when mechanism of social control lose its restraining power)<sup>8</sup>. It is clearly understood that the Prophet was against divorce when he interpreted that “*all the things which have been permissible to men, Divorce is the most hated by Alla*”<sup>9</sup>. Hence the researcher believes that it is necessary for true followers of Islam to interpret the text of *Alla* in its true sense.

Divorce more prevalently known as *Talaq* in Islam (adherents of Hanafi Sunni Islamic School of Jurisprudence<sup>10</sup>) signifies annulment of marriage which can be emanated from either side. Qur’an’s Chapter 2: 231 states that “*Talaq is permissible twice*” which means that pronouncement of *talaq* for third time dissolves marriage and husband and wife can remarry only when wife has married again and again got divorced (Quran 2:230)<sup>11</sup>. The Qur’an provides a greater extent of rights and privilege to the male over women and favours reconciliation between couple evident when mentions that “*And their husband have greater right to take them back in the period, if they wish for reconciliation*”<sup>12</sup>.

Now when it comes to India just like every other country has its own legal mechanism of marriage as well as separation, so does India<sup>13</sup> but when it comes to marriage people tend to follow their religious tradition as marriage across all major religions in the world is considered as a holy sacrament. The major challenge while revoking *triple talaq* was whether the Parliament has the authority to criminalize a religious practice<sup>14</sup>. In *Ratilal Panachand Gandhi vs. State of Bombay*<sup>15</sup> the Supreme Court held that Right to freedom of Conscience and Right to freely profess, practice, and propagate once religion is a fundamental right<sup>16</sup> but are subject

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<sup>6</sup> BEGAM, SULTAN JAHAN, AL-HIJAB OR WHY PARDAH IS NECESSARY FOR ISLAMIC INJUNCTION ON FEMALE SECULSION 120 (1968).

<sup>7</sup> TAHIR MAHMOOD, THE MUSLIM LAW OF INDIA 95 (1980).

<sup>8</sup> Bert Useem, *Breakdown Theory of Collective Action*, 24 Annual Review of Sociology 215-238 (1998), <https://www.annualreviews.org/doi/abs/10.1146/annurev.soc.24.1.215?journalCode=soc#:~:text=Breakdown%20theory%20is%20the%20classic,trol%20lose%20their%20restraining%20power.>

<sup>9</sup> PEER MAHMUD EBRAHIM, LIGHT, KNOWLEDGE, TRUTH: FAMILY LIFE IN ISLAM 99-100 (1973).

<sup>10</sup> Syed Mohammed, *Hanafi Jurisprudence sanctions triple talaq*, THE TIMES OF INDIA (Aug. 23, 2017, 06:40 AM), <https://timesofindia.indiatimes.com/city/hyderabad/hanafi-jurisprudence-sanctions-triple-talaq/articleshow/60182584.cms>.

<sup>11</sup> ISLAM AWAKENED (Oct. 16, 2020, 10:21 AM), <https://www.islamawakened.com/quran/2/228/>; Maulana Muhammad Ali, *English Translation and Commentary of the Holy Quran* (2010).

<sup>12</sup> Id.

<sup>13</sup> S Keerthana & Sathishprem SR Raghavarathan, *Comparative analysis of divorce laws: A look into the divorce laws of Islamic world*, 4 International Journal of Law 81, 81-88 (2018), <http://www.lawjournals.org/download/364/4-4-24-643.pdf>.

<sup>14</sup> Supra 1.

<sup>15</sup> Panachand Gandhi v. State of Bombay, 1954 AIR 388.

<sup>16</sup> INDIA CONST. Art. 25.

to reasonable restrictions. Those restrictions are as follows: *Firstly*, Freedom to profess and practice one's religion doesn't give the follower the right to infringe any subject of public morality, order or health. *Secondly*, State has full authority to make decisions regarding any secular subject on socio, economic and political issues which might also be a subject to religious practice.

When it comes to Islam there are three forms of divorce- *Ahsan, Hasan and Talaq-e-Bidat* amongst which *Talaq-e-Bidat* is the only one which is irrevocable<sup>17</sup> which be further discussed in the later paper. Soon after *talaq* is pronounced the wife is in most cases expected to leave the matrimonial house and arrange for her own livelihood which is mostly staying with her parents until the husband agrees to remarry her<sup>18</sup>. The ill mentality of our society considers her as a burden and disgrace for the family. All these events have an adverse effect on her psychology. This gets add on when the husband denies his financial commitment towards the family which make the wife responsible to feed her children. It is a fallacy that *Shariah Law* gives power of dominance to husband, but in reality wife has certain rights of entitlement which they are abruptly denied as husbands loses their sense of justice and good conscience towards there wife and also lack of knowledge and awareness among the Muslim women which will be discussed in further paper.

## DIFFERENT ASPECTS OF DIVORCE UNDER ISLAMIC LAW

In Islam marriage is considered as a contract and divorce can be termed as breach of that contract<sup>19</sup>. In order to completely understand the concept we need to systematically dig into its various concepts. The Holy Qur'an being the source of *Shariah Law*, becomes necessary on researchers part to explore in order to understand the gist of divorce norms which the society follows claiming it to be mentioned in the Qur'an. Even-though the Holy Qur'an stands marriage as an infinite firm bond but still lays down rules in order to annul the marriage<sup>20</sup>. When things gets adverse between spouse then the Qur'an claims them to stay together after the pronouncement of divorce or *talaq*<sup>21</sup> and if during this period husband and wife undergoes sexual intercourse then the divorce automatically stands null and void<sup>22</sup> but if there is none ever then no waiting period is required<sup>23</sup>. This waiting period (known as *iddat*) lasts till the third menstruation cycle of the women. For women who don't menstruate anymore for them it's

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<sup>17</sup> Pinaki Chakraborty, *Triple Talaq bill: Key Things to Know*, THE TIMES OF INDIA (Jul. 30, 2019, 16:23 PM), <https://timesofindia.indiatimes.com/india/triple-talaq-bill-key-things-to-know/articleshow/70449972.cms>.

<sup>18</sup> Centre for Islamic Legal Studies & Ahmadu Bello University Zaria, PROMOTING WOMEN'S RIGHTS THROUGH SHARIA IN NORTHERN NIGERIA 18-23, (British Council 2005), [http://www.ungei.org/dfid\\_promoting\\_womens\\_rights.pdf](http://www.ungei.org/dfid_promoting_womens_rights.pdf).

<sup>19</sup> Supra 8.

<sup>20</sup> HARALD MOTZKI, MARRIAGE AND DIVORCE: ENCYCLOPEDIA OF THE QUR'AN 279 (Jane Dammen McAuliffe (ed.) Brill 2006).

<sup>21</sup> *Towards Understanding the Qur'an*, ISLAMIC STUDIES 65:1, <https://www.islamicstudies.info/tafheem.php?sura=65&verse=1&to=12>.

<sup>22</sup> Supra 20, Qur'an 65:1.

<sup>23</sup> Supra 20, Qur'an 33:49.

three months and for women who are pregnant for them the waiting period lasts till the time they deliver the baby<sup>24</sup>. If even after the waiting period the couple wants to undergo divorce then to complete the procedure they need two witnesses<sup>25</sup>. Unless it is the third divorce between the same husband and wife, then husband and wife can remarry after divorce if they wish. But after third divorce the wife shall get married with someone else and get divorced again<sup>26</sup> to be eligible to marry her first spouse which is also known as *Nikah Halala*<sup>27</sup>.

## INFERENCE

The researcher interprets that all these provisions clearly exhibit that the Holy Qur'an gives equal rights to both men and women towards divorce. Islamic Law Scholars even claim that the concept of *Triple talaq* is a misinterpretation of the holy Qur'an of the men in order to dominate women in the society<sup>28</sup>. In many instances men tend to annul their marriage on the phone by simply texting *talaq* three times. They tend to allow husbands to dominate them, endure with their aggressive behaviour and completely sacrifice their own life to them.

## VARIANT WAYS OF DIVORCE UNDER MUSLIM LAW

The Qur'an lays down various modes of divorce. Some of them are discussed below:

### A. UNANIMOUS ACT OF THE HUSBAND

In Islamic law husbands can unilaterally annul the marriage by methods which can be distinguished in broader terms as revocable and irrevocable. This revocable form is termed as approved method of divorce and it gives *locus poenitentias*<sup>29</sup> to male whereas the irrevocable one is considered as unapproved<sup>30</sup>.

Following are the forms of divorce<sup>31</sup>:

- *Talaq-e-Sunnat or Talaq-e-Raje*- This is a revocable form of divorce which can be further sub-divided into:

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<sup>24</sup> Supra 20, Qur'an 2:228 & 65:4.

<sup>25</sup> Supra 20, Qur'an 65:2.

<sup>26</sup> Supra 20, Qur'an 2:230.

<sup>27</sup> Vatsala Singh, *What does Quran say about Nikah Halala? Will banning it help?*, THE QUINT, (Jul. 24, 2018, 18:26 PM), <https://www.thequint.com/voices/women/so-what-does-the-quran-say-about-nikah-halala-triple-talaq-polygamy>.

<sup>28</sup> ABDUL ALA MAUDUDI, THE MEANING OF THE QURAN 159-60 (1972).

<sup>29</sup> Locus Poenitentiae means a privilege back out from a contract before it is completed. <https://www.merriam-webster.com/legal/locus%20poenitentiae>.

<sup>30</sup> FIRAASAT ALI & FURGAN ALI, DIVORCE IN MOHAMMEDAN: THE LAW OF TRIPLE DIVORCE 21(1983).

<sup>31</sup> All India, *Triple Talaq and Other Forms of Muslim Divorce Explained*, NDTV (Dec. 28, 2017, 19:55 PM), <https://www.ndtv.com/india-news/triple-talaq-and-other-forms-of-muslim-divorce-explained-1793123>.

- a. *Talaq-e-Ahsan* – In this form of marriage the husband expresses his intention to annul the marriage by making a statement which says “*I have divorced thee*” during *tuhr*(period when the wife isn’t menstruating) and then they have to wait till the *iddat* period is over which for a women is three monthly periods. During this period the wife isn’t allowed to remarry. During the *iddat* period if they consummate or the husband declares “*I have retained thee*” then the divorce gets revoked and they again get status of spouse.

In case of pregnant women the *iddat* period lasts till she gives birth to the baby and for women after menopause it is three months.

- b. *Talaq-e-Hassan*- In same line as *Talaq-e-Ahsan*, *Talaq-e-Hassan* the process of divorce initiates with pronouncement by the husband but unlike *Talaq-e-Ahsan* three pronouncements are to be made within a period of three months. If before third pronouncement husband and wife undergo cohabitation then the divorce stands as revoked. But if a third pronouncement is made then the wife shall undergo an *iddat* period.
- *Talaq-ul-Biddat*- The triple acclamation of the word *talaq* irrevocably annuls the marriage. Another method can be by making a declaration which is generally made in writing. This method was founded in the second century during *Ummayyad monarch’s*<sup>32</sup> reign in order to surpass the strict divorce rules laid down in the Qur’an<sup>33</sup>. Pronouncing *talaq* thrice in a single sitting is a sin according to the Prophet<sup>34</sup>.

Every form of divorce has laid a special mechanism of reconciliation of the spouse which clearly exhibits the stand of the Holy Qur’an on divorce. *Triple talaq* is absolutely un-Quranic and was strictly condemned by the Prophets and Caliphs<sup>35</sup>.

## B. AGREEMENT BETWEEN THE PARTIES<sup>36</sup>

In Islamic terms this kind of separation is called *Khul* and *Mubarat*. In *Khula* the wife makes an offer of annulling the matrimonial tie to the husband by offering to return him the dower<sup>37</sup> given to her during the marriage whereas in *Mubarat* both the parties consent to annul the marriage. In both of these methods the consent of the husband is crucial as without it the divorce can’t be enforced.

Another method through which divorce can be claimed is if during or after marriage husband and wife enter into an agreement specifying the power of wife to annul the

<sup>32</sup> Umayyad Monarch was second of the four major caliphates established after the death of Muhammad which lasted from 661-750 CE. <https://www.britannica.com/topic/Umayyad-dynasty-Islamic-history>.

<sup>33</sup> Supra 29.

<sup>34</sup> Supra 29.

<sup>35</sup> MAULAANA SAGIR AH. RAHMAANI, TALAQ KE ISTAMAL KA TARIQA 27-29 (1981).

<sup>36</sup> Supra 30.

<sup>37</sup> Dower means a sum or property delivered to the wife during marriage by her husband.

marriage again with some reasonable reason, but shall be agreed upon by the husband. This method of divorce is called as *Tawfeez*<sup>38</sup>.

### C. JUDICIAL SEPARATION

Section 2 of Dissolution of Muslim Marriage Act 1939 gives power to the women to claim for divorce<sup>39</sup>. This method is also referred *Faskh* to as power of the Muslim Kazi to pronounce divorce on the application of muslim wife whose Qur'anic basis lies in *Sura Nissa*<sup>40</sup>.

## DIVORCE EVOLVED AS A METHOD OF ABUSE

The Qur'an mentions certain rights for women after divorce like maintenance after divorce, 'waiting period' of three months in the matrimonial house, etc but as the sole motive of divorce is lost how come all these rights can sustain. By virtue of *triple talaq* the biggest drawback is increase of frequency of divorce because of the alleviated process. This has gradually evolved as a method of abuse towards women in the Islamic society by the men. More than 3, 80,000 cases of *triple talaq* were recorded 1985-2019 which gives out an average of 11,260 cases per year<sup>41</sup>. States like Telangana, Andhra-Pradesh, Maharashtra, Uttar-Pradesh, West-Bengal, etc witnesses 70% of total cases of *triple talaq* in India<sup>42</sup>. The famous Shah Bano case who hailed from Madhya Pradesh reported 22, 801 cases since 1985 reason being the then Rajiv Gandhi government's countermanding the Supreme Court verdict<sup>43</sup>. But since the BJP led government has passed Muslim Women (Protection of Rights of Marriage) Act 2019 a significant reduction in cases of *triple talaq* can be noticed as it not came down to just 1,039 cases reported last year<sup>44</sup>.

## POST DIVORCE CUSTODY OF CHILDREN

In the legal world words like guardianship and custody have two different meanings, same as Islamic world where guardianship is called *Wilayat* and custody is called as *Hidhanat*. Custody means possessing the child physically but in Islam *Hidhanat* means taking care and rising up a child on the other hand *Wilayat* means protecting a child.<sup>45</sup> The major difference between

<sup>38</sup> Mst. Zoilaara Khatoon v. Mohd. Ibrahim, A.T.R. 1981 S.C. 1243.

<sup>39</sup> Dissolution of Muslim Marriage Act 1939, Sec 2.

<sup>40</sup> Supra 16, Quran - Sura IV, (Nisaa).

<sup>41</sup> Manish Anand, *Law criminalising triple talaq brings down cases to 1K from 11K in a year*, THE NEW INDIAN EXPRESS, (Jul. 31, 2020, 08:37 AM), <https://www.newindianexpress.com/nation/2020/jul/31/law-criminalising-triple-talaq-brings-down-cases-to-1k-from-11k-in-a-year-2177128.html>.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Ayesha Rafiqq, *Child Custody in Classical Islamic Law and laws of contemporary Muslim World*, International Journal of Humanities and Social Sciences (2014),

these two concepts is that the former concerns with more of the emotional well-being of the child through nurturing whereas the latter concerns more about the decisions which might affect the present as well as future of the child<sup>46</sup>. *Hidhanat* is more mother oriented whereas *Wilayat* is more father dominated<sup>47</sup>.

In Islamic law laws relating to custody of law solely depends on two factors:

- Welfare of the child
- Reason as to why father or mother was disqualified from claiming custody of the child.

According to *Ibn Qayyam*<sup>48</sup>, the guardianship of a child can be distinguished under two heads<sup>49</sup>:

- On matters relating to money and marriage, father will prevail over the mother.
- Whereas on matters relating to nourishing and upbringing, mother would prevail over the father.

Even three principals were laid down by Prophet Mohammad on child custody:

- The mother posse preference over the child as long as she doesn't remarry<sup>50</sup>.
- In case both the parents practice different religion then the custody of child will be given to the parent who practices Islam<sup>51</sup>.
- After the age of 7, the child shall be given an option to choose either of his/her parent for his/her further custody<sup>52</sup>.

## RIGHT OF WOMEN AFTER DIVORCE

In countries like Egypt the marriage contract gives equal rights to both men and women but most of the women are not aware of those rights hence get dominated by the men<sup>53</sup>. The President of Egypt Mubarak signed a new law on 29 January 2000 which granted *Egyptian women the right to file divorce on 'incompatibility' without providing evidence of the harm caused. To file a "no-fault" divorce or "Khula", a woman is not required to provide grounds for filing the request, but she has to agree to forfeit her rights to alimony and her maintenance*

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[http://www.ijhssnet.com/journals/Vol\\_4\\_No\\_5\\_March\\_2014/29.pdf](http://www.ijhssnet.com/journals/Vol_4_No_5_March_2014/29.pdf); Zia H Shah, *Divorce and Child Custody in Islam*, THE MUSLIM TIMES (Mar. 21, 2017), <https://themuslimtimes.info/2017/03/27/divorce/>.

<sup>46</sup> Zahraa, M., & Malek, N., *The Concept of Custody in Islamic Law*, 13(2) Arab Law Quarterly 155-177 (1998), <http://www.jstor.org/stable/3381578>.

<sup>47</sup> Al-Zhayli, W., Op. Cit., Vol. 4, pp. 14041.

<sup>48</sup> Ibn Qayyam is the son of the principal of school of Jawziyyah. He was an important medieval Islamic jurisconsult, theologian and spiritual writer.

<sup>49</sup> Supra 37.

<sup>50</sup> 8 AL BAAHIQUI, SUNAN AL KUBRRA, DAKKAN 4 (1937).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Supra 17.

or “*mu’akhar*” as well as repay her advanced dowry or “*muqaddam*”. Muslim women are entitled to certain entitlements those are as follows:

- Not leaving a matrimonial house for a period of three months after divorce (known as *iddat*), (Quran 2:228, 65:4).
- Right to claim for maintenance for her infants and children like meals, clothes, health related stuffs, etc which can extend beyond three months.
- Denying her custody of her young children<sup>54</sup>

Jurists do agree that women can file a suit against her husband claiming all post-divorce entitlements from her divorced husband. It is a fallacy that Qur’an gives only men power to annul the marriage but in reality muslim women are also entitled to initiate the annulment of their marriage by paying her husband back some consideration, mostly dowry which the husband gave his wife during marriage, irrespective of his will. As discussed above the method is called *Khul*<sup>55</sup>. But the biggest flaw in this method is that the wife gets to proclaim divorce only if she gets permission of her husband or she has entailed herself with this power during marriage in her contract<sup>56</sup>. *Khul* is a method by which a wife can dissolve an unsuccessful marriage. It is in the words of The Holy Qur’an 2:229 which says “*There is no blame on either of them (the couple) if she gives something for her freedom*”.

## **DIVORCE LAW IN OTHER ISLAMIC COUNTRIES**

### ***Pakistan***

Section 7 (3) of the Muslim Laws Ordinance (VIII) 1961 of Talaq says “*unless revoked earlier, shall not be effective until the expiration of 90 days from the date of notice (under sub-section 1) is given to the Chairman of the \ Union Council*”. Under Sub-Section 4, “*the Chairman is to constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties*”. The greatest development noticeable from the ordinance is that it gives the husband time to think and open up opportunities to reconcile. Non submission of notice of *talaq* to the Chairman can be held as revocation of divorce. The main changes brought in by Muslim Family Laws Ordinance 1961 are as follows:

- Marriage Registration- Every marriage solemnized under Muslim Law shall be registered in accordance with the ordinance. Any failure to comply with the ordinance shall construe the wrong doer a simple imprisonment of three months or fine of Rupees 1000 or both.

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<sup>54</sup> Supra 44.

<sup>55</sup> Jamal J. Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation* 129, Brill (2009).

<sup>56</sup> Premchand Dommaraju, *Divorce and Separation in India*, 42(2) POPULATION AND DEVELOPMENT REV., 195-223 (2016), <http://www.jstor.org/stable/44015635>.

- Talaq- On pronouncement of divorce a notice of the same shall be provided to both Chairman as well as the Wife. Non-compliance to the same shall draw punishment of imprisonment extendable up-to one year or fine of 5000 rupees or both.
- Unless revoked earlier, talaq shall not be effective until the 90 days period has been passed. The period starts from the date when the husband submits the notice to the Chairman.
- Within 30 days of notice to the Chairman, the Chairman shall constitute an arbitration panel in order to reconcile the matter between the couple.
- If the wife is pregnant then divorce can't be pronounced until she delivers or 90 days duration is over, whichever comes first.

All these provisions are evidently drawn from the holy Qur'an which promotes reconcile between spouses.

### ***Syria***

Syrian Law Personal Statues 1953 has prohibited arbitrary pronouncement of divorce and if so done the wife is entitled to compensation equivalent to one year of maintenance which shall be in accordance with the financial position of the husband. The Syrian Law has also provided rights to muslim women to seek judicial divorce on following grounds:

- Husband not being able to fulfil sexual needs to the wife(Right forfeited if the defect was accepted by the wife except in the case of impotence).
- Loss of sanity of husband.
- If the husband went missing for more than one year.
- Inability of husband to maintain his wife.

After divorce the husband shall pay the wife maintenance known as *idda* for a period of nine month which might extend up to three years if the court finds out that the nature of divorce pronounced by the husband was arbitrary. Moreover when it comes to custody for boy until age of 9 and girls until age of 11 shall be retained to the mother.

### ***Sudan***

The divorce in the region of Sudan comes under the jurisdiction of Sudanese Personal Status laws. Divorce in here is also the same as other Islamic countries. In order to undergo divorce the husband shall pronounce "*I divorce you*" three times within a *iddat* period. After the completion of the period the court shall prepare official documents for the same which will be accepted by the Government and who in return will recognise the divorce. Apart from this in order to prohibit the abuse of *talaq* all three methods of approved *talaq* that is *hasan* and *ahsan* are recognised by the law. The third method through which Sudanese couple can annul

marriage is through *Tafriq*<sup>57</sup> which is the only method in which the court intervenes. Five grounds on which application for the same can be filed are:

- Physical or Mental Injury
- Irreconcilable difference
- Any physical defect of husband which got discovered after marriage
- Failure to maintain wife
- Imprisonment or absence of husband without justification for one year.

### **ABROGATION OF *TRIPLE TALAQ* IN ISLAMIC COUNTRIES<sup>58</sup>**

#### ***Algeria***

With a majority population of Sunni Muslim and Islam as State religion this country through amendment in 2005 amended Code of family Law 1984 Art 49 which says “*Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months*”.

#### ***Egypt***

A secular state with Sunni Muslim in majority amended Law of Personal Status 1929 whose Art 3 states that “*A Talaq accompanied by a number, expressly or impliedly, shall not be effective except as a single revocable divorce*”. Moreover Art 4 of the act also states that any symbolic form of divorce is inapplicable, unless the husband intends the same.

#### ***Jordan***

Code of Personal Status 1976 Art 90 of the State says that “*A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce*”. Only approved forms of divorce are applicable in the State which can be proved by Art 94 of the code which says that “*Every divorce shall be revocable except the final third, one before consummation and one with consideration*”.

#### ***Kuwait***

With Islam as its official religion with majority of Sunni Muslim, the State has abrogated *triple talaq* in all forms evident Art 109 of Code of Personal Status 1984 which states that “*If a Talaq is pronounced with a number (two, three) by words, signs or writing, only one Talaq shall take effect*”.

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<sup>57</sup> Tafriq is a form of divorce in which the court intervenes.

<sup>58</sup> Tahir Mahmod & Saif Mahmod (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012).

### ***Iraq***

With majority of Shia Muslims this Islamic country abrogated the practice of *triple talaq* by amendment of 1987 of Code of Personal Status 1959 whose Art 37 states that “(1) *Where a Talaq is coupled with a number, express or implied, not more than one divorce shall take place* (2) *If a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that*”.

Also countries like Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, UAE, Yemen, Indonesia, Malaysia, Philippines, etc have repealed irrevocable method of divorce<sup>59</sup>.

## **JUDICIAL APPROACH**

### ***Jiauddin Ahmed v. Anwar Begum***<sup>60</sup>

The crux case is claimed for maintenance u/s 125 of Code of Criminal Procedure (hereinafter to be referred as CrPC). Anwar Begum stayed with her husband Jiauddin Ahmed for 9 months after their marriage was solemnised and they also consummated. After that she alleged that her husband tortured her and hence she went to her parents who were daily workers. Her claim for maintenance was granted by First Class Magistrate of Tinsukia which was challenged by Jiauddin before Guwahati High Court on grounds that the divorce was pronounced by following the procedure of *Talaq-e-Biddat*. By referring to eminent scholars like Mahammad Ali, and Yusuf Ali ruled out Macnaghten observation which says “*there is no occasion for any particular cause for divorce, and mere whim is sufficient* ” which spurn up the concept of considering wife as chattel of husband. The Holy Qur’an clearly states that there shall be a strong reason for divorce and all attempts of reconciliation shall be made. Hence the court held that due to lack of evidence of pronouncement of *talaq*, lack of reasonable cause, no attempt of reconciliation and absence of arbitrator lead to an invalid divorce. Hence the court rewarded Anwar Begum maintenance from her husband.

### ***Must. Rukia Khatun v. Abdul Khalique Laskar***<sup>61</sup>

The Facts of the case involve a couple living together for three months and during the time they consummated but after that husband abandoned the wife, neglected her and refused to pay her maintenance. The wife moves a petition claiming for maintenance u/s 125<sup>62</sup> which was rejected by the Sub-Divisional Judicial Magistrate which further was challenged in front of Guwahati High Court. The husband claims that he divorced her through *talaq-e-biddat* on 12/04/1972 and also executed a talaknama. Validity of the divorce was challenged in the court of law. The bench observed that “It is a popular fallacy that a Muslim male enjoys, under the Quranic law, Unbridled Authority to liquidate the marriage. The whole Quran expressly *forbids*

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<sup>59</sup> Id

<sup>60</sup> Jiauddin Ahmed v. Anwar Begum, (1981) 1 GLR 358.

<sup>61</sup> Must. Rukia Khatun v. Abdul Khalique Laskar, (1981) 1 GLR 375.

<sup>62</sup> Code of Criminal Procedure, 1973, S.125.

*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'* (Quran IV: 34).

### ***Shayara Bano & Ors v. Union Of India & Ors***<sup>63</sup>

This landmark case has a significant role in development of divorce laws in India as it touched and criminalised one part of Islamic culture that is *talaq-e-biddat*. Para 21 of the case clearly states that *talaq-e-biddat* after interpretation of ‘verses’ of the Qur’an its quite evident that *talaq-e-biddat* is not in conformity with the unambiguous edicts of the Qur’an and hence can’t be termed as part of Muslim personal law board. The facts of the case involve Shayara Bano who was divorced through *talaq-e-biddat* in presence of two eye-witnesses Mohammed Yaseen and Ayaaz Ahmad by her husband Rizwan Ahmad. Following contentions were filed by the Petitioner: Pronouncement of *talaq-e-biddat* by her husband shall be declared void-ab-initio.

It was observed that *triple talaq* is a form of un-codified and only because it is been practiced from archaic it can upheld its validity as custom<sup>64</sup> and “*What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well*”<sup>65</sup>. The contention also arose as to whether personal laws can be interfered as they are protected by Art 25<sup>66</sup>. The justices couldn’t decide the balance between Art 25 and Art 14, 15 and 21<sup>67</sup>. As Sec 2 of Muslim Personal Law board authorises *triple talaq* which is violative of fundamental right of an individual hence it shall be declared unconstitutional. Moreover it didn’t form part of ‘essential religious practice’ hence can be repealed. Hence, the argument between Justice Nariman, and Justice Lalit came to a conclusion as Justice Joseph and by majority of 3:2 the *Triple-Talaq* was abrogated.

## **CONCLUSION AND RECOMMENDATION**

The *Shariah Law* which is based on *the Quran* and *the Hadith* is the religious law which forms the basis of Islamic traditions. Even the prophet criticized the practice of divorce which is evident from his sayings, that is “*Man who divorce often is cursed by the God*”.

The following study concludes with the fact that mere religious awareness and good conscience can drive out the problem of dominance of men in society and also gain women entitlements after divorce. The biggest criticism which the *triple talaq* concept faces is that it is very easy to annul the marriage which persuades women to live a dormant life under their husband. *Shariah Law* is claimed to be an offspring of the Holy Qur’an but some of its provisions are misinterpreted by the men and *triple talaq* is a classic example of that. In most of the cases the

<sup>63</sup> Shayara Bano and Ors. v. Union of India (UOI) and Ors., (2017) 9 SCC 1.

<sup>64</sup> Nazeer v. Shemeema, 2017 (1) KLT 300.

<sup>65</sup> Id.

<sup>66</sup> INDIA CONST. art 25. Art 25 gives freedom to its citizens of conscience and free profession, practice and propagation of religion.

<sup>67</sup> INDIA CONST. art 14, 15 and 21. Art 14 guarantees right to equality amongst citizens. Art 15 prohibits discrimination by State on the basis of race, caste, creed, sex, religion or place of birth. Art 21 gives right to life to its citizens.

women after divorce are afraid that denial of maintenance from the husband after divorce would create a problem in maintenance of her children, quite an often this fear is real In order to eradicate this issue the Islamic world has some duties to full fill:

- Means of mass media to be used in order to spread knowledge amongst both men and women of the Islamic world as ignorance of law is no excuse. The objective of the campaign should have the sole motive to give people a better and improved perspective.
- Civil and criminal sanctions on various destructive practices prevalent in the society which are conducted in the name of religion.
- These issues shall be addressed to the children as it forms the foundation of any human personality.

All these constructive measures can be used in order to curb the problem of divorce used as a weapon of abuse against women.

Even-though some might claim that these religious reforms infringe their cultural rights but the researcher infers from this study that an urgent of Uniform Civil Code as guaranteed by our Constitution<sup>68</sup> is needed for the hour in order to avoid such un-social practices and reduce the pain of the judiciary in adjudicating such religious cases as most religions in India have their personal law board.

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<sup>68</sup> INDIA CONST. Art 44.