IN THE SUPREME COURT OF INDIA

ORIGINAL CIVIL WRIT JURISDICTION

WRIT PETITION (CIVIL) NO. 118 OF 2016

IN THE MATTER OF:-

Shayara Bano …Petitioner

VERSUS

Union of India & Ors …Respondents

COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO. 7, ALL INDIA MUSLIM PERSONAL LAW BOARD

I, Mohammed Fazlurrahim, S/o. Mohammed Abdurrahim, aged about 59 years, R/o. Jagannath Shah Ka Rasta, Mohalla Handipura, Near Char Darwaza, Jaipur-302002, Rajasthan, presently at New Delhi, do hereby solemnly affirm and state as under:-

1. I am the Secretary of All India Muslim Personal Law Board (hereinafter referred to as the "answering Respondent" or 'Respondent No.7' or 'AIMPLB') which has been arraigned as Respondent No.7 to the above-captioned Writ Petition. I am conversant with the facts and circumstances of the present case. I have read a copy of the above-mentioned Writ Petition alongwith the annexures appended thereto and have understood the contents thereof. I have also been authorised by the answering Respondent to act on its behalf in the present proceedings. I am consequently competent to depose on behalf of answering Respondent by way of this affidavit.

2. At the outset, I wish to clarify that the present affidavit is being filed for the limited purposes of demonstrating that this Hon'ble Court has

already taken the view in several cases including the cases reported in *Krishna Singh v. Mathura Ahir* (1981) 3 SCC 689, *Maharishi Avadesh v. Union of India* (1994) Suppl. (1) SCC 713, *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125 and *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573 that as questions arising in the present petition do not fall within the judicial purview. Being thus limited in its scope, the present reply should not be deemed to be exhaustive and all such allegations, averments, contentions and/or statements as contained in the petition under reply which may not have been specifically traversed or denied by me herein but are contrary to the contents of this reply should not be deemed to be admitted by reason of mere non-traverse but should be treated as expressly denied. I also crave leave of this Hon'ble Court to file a further reply or replies if the situation so warrants or this Hon'ble Court so desires.

3. The above-captioned Writ Petition has been preferred by the Petitioner to challenge the practices of talaq-e-bidat (instantaneous Triple Talaq), nikah halala (bar against remarriage with divorced husband without an intervening marriage with another man) and polygamy as unconstitutional.

4. That the Answering Respondent filed an impleadment application being I.A. No. 7 of 2016 and this Hon'ble Court was pleased to allow the said application on June 29, 2016. Accordingly, AIMPLB was impleaded as Respondent No.7 in the present petition.

5. The Answering Respondent respectfully submits that the instant Writ Petition is entirely misconceived and fails to make out any cause of action

for interference by this Hon'ble Court in exercise of its original jurisdiction under Article 32 of the Constitution of India.

6. That by way of Preliminary submission, the answering Respondent submits that the Writ Petition of the Petitioner is misconceived and is based on misinterpretation of the law. It is submitted that the Petitioner seeks that this Hon'ble Court maybe pleased to declare the practice of Triple Talaq invalid, however, this Hon'ble Court has already dealt with the said issue and placed explicit measures to check this practice by laying the down test of "reasonable cause" and "prior reconciliation" in *Shamim Ara v. State of UP*, (2002) 7 SCC 518. The principles laid down in *Shamim Ara* are the law as declared by this Hon'ble Court and as such a binding precedent. However, with due respect, it is submitted by the answering Respondent that the observation/ratio of the decision in *Shamim Ara's case* does not correctly reflect the principles of the Shariah law on the subject. However, the answering respondent does not wish to reopen the discussion on the same in this proceeding and since the answering Respondent was not a party therein it duly reserves its right to take appropriate proceedings for curating observation/ ratio of the decision in *Shamim Ara's case*.

7. That the Petitioner has alleged that she was married on April 11, 2002 and that Respondent No. 5 illegally divorced her on October 10, 2015 by way of talaq-e-biddat (Triple Talaq). She also submits that since the solemnization of her marriage she has been continuously subjected to cruelty. However, the Petitioner fails to mention anywhere in her Petition as to whether she has challenged such illegal divorce on the grounds and tests laid down by this Court in *Shamim Ara v. State of UP*, (2002) 7 SCC

518. In the event that she was not willing to challenge the divorce but was seeking to obtain maintenance, she has made no averments whatsoever to show that she has exercised her rights under the Muslim Women (Protection of Rights on Divorce) Act, 1986. Moreover, the Petitioner makes no whisper as to why despite being continuously subjected to cruelty did she not avail of her rights under the law. It is submitted that the allegations made in the Petition *per se* amount to domestic violence for which the Petitioner could have availed of the remedies provided under the Protection of Women from Domestic Violence Act, 2005. It is submitted that without resorting to the effective remedies available under the Code of Criminal Procedure, 1973, The Protection of Women from Domestic Violence Act, 2005 and the Muslim Women (Protection of rights on Divorce) Act, 1986, the Petitioner has approached this Hon'ble Court under Article 32 of the Constitution of India. It is therefore submitted that the petition is not maintainable and should be dismissed. Such alternate remedies are more apt as appropriate judicial authorities can give effective and adequate remedy after hearing the say of the ex- husband of the Petitioner i.e. Respondent No.5 in the present Petition.

8. That in view of the aforesaid, the Petitioner has effective alternative remedies and it is submitted that the present petition should be dismissed in limine.

9. That apart from the aforementioned preliminary submissions, the Respondent No. 7 wishes to make the following submissions:-

(i) The questions raised in the present writ petition are matters of legislative policy.

(ii) Personal laws cannot be challenged as being violative of Part III of the Constitution.

(iii) Personal laws of a community cannot be re-written in the name of Social Reform.

(iv) Article 44 of the Constitution of India which envisages a Uniform Civil Code is only a directive principle of state policy and is not enforceable.

(v) The practices, sought to be reviewed by way of the present petition are protected by Articles 25 and 26 read with Article 29 of the Constitution of India.

(vi) Courts cannot supplant its own interpretations over the text of scriptures.

(vii) Unique importance has been attached to religious scriptures in the Indian legal system and in Indian culture.

(viii) Muslim Personal Law provides for the practices to be followed on the issues of marriage, divorce and maintenance and these practices are based on holy scriptures- Al – Quran and sources based on Al- Quran.

The questions raised in the present Writ Petition are matters of legislative policy.

10. It is submitted that the questions being examined by the Hon'ble Court in the present matter have already been examined by this Court in *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573. In

that case, *inter alia* the following issues were considered by this Hon'ble Court:-

(i) Whether Muslim Personal Law which allows Polygamy is void as offending Articles 14 and 15 of the Constitution.

(ii) Whether Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, is void as it offends Articles 13, 14 and 15 of the Constitution.

(iii) Whether the mere fact that a Muslim Husband takes more than one wife is an act of cruelty

While considering the above issues this Hon'ble Court declined to entertain the abovementioned issues stating that these were matters wholly involving issues of State Policies with which the Court will not ordinarily have any concern. The Hon'ble Court also held that these issues are matters which are to be dealt with by the legislature.

11. Even prior to the decision in *AWAG Case*, this Hon'ble Court in the case of *Maharshi Avadhesh v. Union of India*, 1994 Supp (1) SCC 713 had taken a similar view. In that case a petition under Article 32 of the Constitution of India was filed seeking:-

(i) A writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India.

(ii) To declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 Fundamental Rights and Articles 44, 38, 39 and 39-A of the Constitution of India.

(iii) To direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection.

This Hon'ble Court while dismissing the Writ Petition observed that- *"These are all matters for legislature. The Court cannot legislate in these matters."*

12. Further in *Reynold Rajamani v. Union of India* (1982 2 SCC 474), this Hon'ble Court considered the issue as to whether mutual consent can be read as a ground of divorce in the provisions of the Indian Divorce Act, 1869. The Hon'ble Court held that the grounds for divorce were stipulated in Section 10 of the Indian Divorce Act, 1869 and since "mutual consent" was not specified therein, this Hon'ble Court could not add that ground. It was submitted that this Hon'ble Court should adopt a policy of "social engineering" and should incorporate within the Indian Divorce Act, the provision which has been enacted in Section 28 of the Special Marriage Act, 1954 and Section 13-B of the Hindu Marriage Act, 1955, both of which provide for divorce by mutual consent. The Hon'ble Court while rejecting the argument stated that:-

> *"It is possible to say that the law relating to Hindu marriages and to marriages governed by the Special Marriage Act presents a more advanced stage of development in this area than the Indian Divorce*

Act. However, whether a provision for divorce by mutual consent should be included in the Indian Divorce Act is a matter of legislative policy. The courts cannot extend or enlarge legislative policy by adding a provision to the statute which was never enacted there."

.....

"It is for Parliament to consider whether the Indian Divorce Act, 1869 should be amended so as to include a provision for divorce by mutual consent."

13. Moreover in several cases concerning the the Hindu Marriage Act, 1955, this Hon'ble Court while dealing with the question as to whether divorce can be granted on the ground of irretrievable breakdown of marriage has held that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955 and unless this concept is pressed into services, the divorce cannot be granted. This Hon'ble Court has further opined that ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not. [*Ref:- Naveen Kohli v. Neelu Kohli* (2006) 4 SCC 558] In view of the above, it is submitted that if this Hon'ble Court proceeds to examine questions of Muslim personal laws and lays down special rules for Muslim Women in matters concerning marriage, divorce and maintenance, it would amount to judicial legislation. It is reiterated that while considering these very issues on previous occasions, this Hon'ble Court had itself declined to entertain the matters by taking the view that these issues were to be dealt with by the legislature and not judiciary. It is submitted that this Hon'ble Court has held in a plethora of judgments that the judiciary cannot usurp the functions of the legislature.

14. This Hon'ble Court in *Union of India v. Deoki Nandan Aggarwal*, (1992) Supp (1) SCC 323, held as follows:-

> *"It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."*

15. It is submitted that the rights of Muslim Women are already protected by virtue of Muslim Women (Protection of Rights on Divorce) Act, 1986. The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been upheld by this Hon'ble Court in *Danial Latifi & Anr. v. Union of India,* (2001) 7 SCC 740. In such a scenario, if this Hon'ble Court prescribes other parameters to govern the rights of Muslim women, it will amount to judicial legislation, which is not permissible.

16. The Muslim Women (Protection of Rights on Divorce) Act, 1986 provides for the rights of Muslim women in matters of divorce and maintenance. In view of such clear provisions, if this Hon'ble Court frames fresh provisions, it will amount to judicial legislation and will be violative of the doctrine of separation of powers.

17. Pertinently, the Muslim Personal Law (Shariat) Application Act, 1937 gives primacy to the Sharia law in respect of the subjects enumerated in Section 2 thereof irrespective of the contrary customs and usages. What is also of great significance is the expression –*"dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat and maintenance"* used in Section 2 recognises the fact that under Muslim Personal Law, a dissolution of marriage can be brought about by various means, one of which is *talaq*. Additionally it also re-affirms the position that Muslim Personal Law shall be applicable to the issues relating to marriage, dissolution of marriage and maintenance.

18. It is submitted that this Hon'ble Court in *C. Mohammad Yunus v. Syed Unnissa and Others* (1962) 1 SCR 67 has itself recognised that Muslim Personal Law (Shariat) Application Act, 1937 will have retrospective application. This Act provides an injunction against the Court and enjoins it to apply only Muslim Personal Law in all cases relating to the matters specified therein notwithstanding any custom or usage to the contrary. The Act simply provides that the "rule of decision" in cases where the parties are Muslims shall be Muslim Personal Law and endorses the already existing Shariat Law over and above customs and usages. Accordingly, if this Hon'ble Court now proceeds to define the boundaries of

Shariat Law, it would amount to over-stepping into the domain of the legislature.

Personal laws cannot be challenged as being violative of Part III of the Constitution.

19. This Hon'ble Court in *Krishna Singh v. Mathura Athir* (1981) 3 SCC 689, has held that the Part III of the Constitution does not touch upon the personal laws of the parties. This Hon'ble Court also observed that the High Court in applying the personal laws of the parties could not introduce its own concepts of modern times but should enforce the law as derived from recognized and authoritative sources. It is submitted that since Part III of the Constitution does not touch upon the personal laws of the parties, this Hon'ble Court cannot examine the question of constitutional validity of the practices of marriage, divorce and maintenance in Muslim personal law.

20. Further, the Hon'ble Bombay High Court in *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 84), has observed as follows:

> *"The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topics falling under personal law in item 5 in the Concurrent List—List III. This item deals with the topics of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of*

the personal law and yet the expression "personal law" is not used in Art. 13, because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Art. 13(1) at all."

21. This view has been noticed by this Hon'ble Court in *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573. In view of the position that provisions of personal laws cannot be challenged by the reason of fundamental rights, it is submitted that this Hon'ble Court cannot consider the constitutional validity of the practices of marriage, divorce and maintenance in Muslim personal law.

22. It is submitted that personal laws do not derive their validity on the ground that they have been passed or made by a legislature or other competent authority. The foundational sources of personal law are their respective scriptural texts. The Mohammedan Law is founded essentially on the Holy Quran and sources based on the Holy Quran and thus it cannot fall within the purview of the expression "laws in force" as

mentioned in Article 13 of the Constitution of India, and hence its validity cannot be tested on a challenge based on Part III of the Constitution.

23. As averred above, it is these foundational principles which are the basis of Muslim Personal Law and like any other religion, they are peculiar to Islam and cannot be challenged on the ground of being violative of Part III of the Constitution of India.

24. The Hon'ble High Court of Bombay, in *Narasu Appa Mali's Case* (*Supra*) has clarified that Article 13 of the Constitution of India does not provide for "personal laws". It has been clarified that the words "a custom or usage" in Article 13(3) cannot subsume personal laws. A Custom or usage is distinct from Personal Law and many a time, exceptions to personal laws. This is further supported by the fact that Entry 5 in List III expressly mentions the phrase 'personal law' which implies first, that the omission in Article 13(3)(a) was conscious and secondly, that the intention of the Framers was to leave it to the legislature to reform personal laws and not subject them to scrutiny by the judiciary. Further, Section 112 of the Government of India Act, 1915, one of the models that were before the Constituent Assembly in the drafting of the present Constitution used both the phrases custom and usage and personal law separately. The latter phrase was however, omitted in later drafts. Moreover, if personal laws were open to scrutiny under Article 13, both Article 17 and Article 25(2) (b) would be rendered redundant. This is because the evils that these Articles aim to curb would anyway be remediable as a violation of fundamental rights.

25. It is therefore submitted that since Part III of the Constitution does not touch upon the personal laws of the parties, this Hon'ble Court cannot

examine the question of constitutional validity of the practices of marriage, divorce and maintenance in Muslim personal law.

Personal laws of a community cannot be re-written in the name of Social Reform.

26. In *Sardar Sydena Taher Saifuddin Saheb v. State of Bombay* AIR 1962 SC 853, this Hon'ble Court observed that the exception carved in Article 25 (2) of the Constitution of India to the Freedom of Religion enabling the state to enact laws providing for *"social welfare and reform"* was not intended to enable the legislature to "reform" a religion out of its existence or identity.

27. It is further submitted that social reform and welfare has to be brought in gradually keeping in view if the community in relation to which such a reform was proposed is ready for the reform in question.

28. It is submitted that the institution of marriage is differently looked upon by different religions, and consequently the issues of marriage, divorce and maintenance are dealt with in different manners by different religions. While one community might be prepared to accept and work social reform another community may not be prepared for it.

29. In any event, even while bringing in such a social reform it is not permissible to change the entire practice or acts done in pursuance of such religion.

Article 44 of the Constitution of India which envisages a Uniform Civil Code is only a Directive Principle of state policy and is not enforceable.

30. Article 44 of the Constitution of India stipulates that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. It is submitted that Article 44 which envisages a Uniform Civil Code is only a Directive Principle of State Policy and is not enforceable. Further, this Article by necessary implication recognizes the existence of different codes applicable to different religions in matters of Personal Law and permits their continuance until the State succeeds in its endeavour to secure for all citizens a Uniform Civil Code. It is submitted that the framers of the Constitution were fully conscious of the difficulties in enforcing a Uniform Civil Code and thus they deliberately refrained from interfering with the provisions of the Personal Laws and laid down only a Directive Principle. In fact, the legislative history with regard to the Personal Laws also leads to the same inference. Clause 15 of Bengal Regulation IV of 1793 had provided that:

> *"In suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which the judges are to form their decisions."*

31. In addition, to the above, this Hon'ble Court has itself held in *Lily Thomas and Others v. Union of India and Others* (2000) 6 SCC 224 that this Court has no power to give directions for enforcement of the Directive Principles of State Policy as detailed in Part IV of the Constitution of India which includes Article 44.

32. Moreover, conflicting viewpoints of different religions on the issues of marriage, divorce and maintenance makes the vision contemplated in Article 44, a goal yet to be reached

The practices, sought to be reviewed by way of the present petition are protected by Articles 25 and 26 read with Article 29 of the Constitution of India.

33. It is submitted that the issue of Muslim Personal Law is a cultural issue which is inextricably interwoven with religion of Islam. Thus, it is the issue of freedom of conscience and free profession, practice and propagation of religion guaranteed under Article 25 and 26 read with Article 29 of the Constitution of India.

34. The protection of Article 25 and 26 is not limited to matters of doctrine or belief, but it extends to the acts done in pursuance of religion.

35. It is submitted that the practice of marriage, divorce and maintenance, differs in each religion. Each religion views these practices in a different context and therefore the practices in each religion are unique and peculiar to that particular religion only. In such circumstances, one cannot look at the validity of the practices of one religion or judge them as being unequal with the rights in another religion because the practices in each religion are peculiar to only that religion and these practices have been cloaked with the protection under Article 25,26 and 29 so as to preserve the uniqueness of each religion.

36. It is submitted that this Hon'ble court in *Syedna Taher Saifuddin Saheb v. State of Bombay*, 1962 Supp (2) SCR 496 had held that the protection of Articles 25 and 26 was not limited to matters of doctrine or

belief but they extended also to acts done in pursuance of religion and therefore contained a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. It was also held that what constituted an essential part of religion or a religious practice had to be decided by the Courts with reference to the doctrine of a particular religion and included practices which are regarded by the community as a part of its religion.

Courts cannot supplant its own interpretations over the text of scriptures.

37. In our constitutional scheme, it is oft-repeated truism that the preamble of the Constitution encapsulates basic values thereof. Amongst other freedoms guaranteed under the provisions of the Constitution, the most cherished one is the freedom of conscience as contained in Articles 25 and 26 of the Constitution. The preamble clearly enshrines values of liberty of thought, expression, belief, faith, worship. Further, Article 25 of the Constitution, guarantees freedom of conscience and freedom to profess, practice and propagate religion. Article 25 guarantees individual freedom of conscience subject to public order, morality and health and to the other provisions of the third part of the Constitutions. Article 26 of the Constitutions grants freedom to every religious denomination or any section thereof to manage its own affairs “in matters of religion”. Interpreting the aforesaid Articles, the Apex Court in the case of *The Commissioner, Hindu Religious Endowments, Madras V/s. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282, 1954 SCR 1005 has held that those Articles protect the essential part of religion and further that when a question arises as to what constitutes essential

part of religion, the same should primarily be ascertained with reference to the Doctrines of that religion itself.

38. Therefore Constitutional scheme clearly provides that judiciary which is one of the important organs of the State shall not lay down religion for any religious denomination or section thereof and whenever the Court is confronted with any religious issues, it will look to the religious books of a particular denomination held sacred by it. In other words, there is no scope for the Court to import its own views while dealing with the religious questions or scriptures or beliefs of any religious denomination.

39. In this context, the answering Respondent begs to draw the attention of this Hon'ble Court to the following judicial pronouncements:

a) *Aga Mohamad Jaffer Bindanim V Koolsoom Beebee & Ors.* (1898) ILR 25 Cal. 9

At 203-204 -*"They do not care to speculate on the mode in which the text quoted from the Koran, which is to be found in Sura II, vv. 241-242, is to be reconciled with the Law as laid down in the Hedaya and the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind 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. "*

b) *Baker Ali Khan V Anjuman Ara Begum* 30 I.A. 94

At 111:- "*Their Lordship think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to*

follow logically from ancient texts however authoritative, when the ancient doctors of he law have not themselves drawn those conclusions"

c) *Krishna Singh V Mathura Ahir* (1981) 3 SCC 689

"17. It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognized and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the Judgment of various High Courts, except where such law is altered by any usage or customs or is modified or abrogated by statue."

40. The Court have therefore consistently resisted the temptation to embark on hazardous adventure to interpret religious scriptures.

Unique importance has been attached to religious scriptures in the Indian legal system and in Indian culture

41. Before explaining different Ayats of Al-Quran, for the issues in the present Counter, it is necessary to understand status of religious scriptures assigned to them under Indian legal system / culture. The Indian Penal Code,1860 contains Chapter XV – offences relating to religion – which

inter alia has Section 295. The Supreme Court has in the case of *S. Veera Bhadharan vs. E. V. Rama Swami Naicker* reported in 1959 SCR 1211 widely interpreted Section 295 and has held that the words "*any object held sacred by any class of person*" must be given wide interpretation and should not be confined or limited to physical object like idols etc. and further unequivocally held that "Sacred books like Bible or Koran or Granth Saheb is clearly within the ambit of those general words"

42. It is respectfully submitted that Calcutta High Court in the case of *Chandanmal Chopra and another v. State of West Bengal* reported in AIR 1986 Cal. 104 has pithily observed:

> *"For Muslims the Koran is the "ipsissima verba" of God himself. It is God speaking to man not merely in 7th century Arabia to Mohammed but from all eternity to every man throughout the world including the individual Muslim as he reads it or devoutly holds it. It is the eternal breaking through into time, the unknowable disclosed, the transcendent entering history and remaining here, available to mortals to handle and to appropriate, the divine become apparent. To memorize it, as many Muslims have ceremonially done, and perhaps even to quote from it, as every Muslim does daily in his formal prayers and otherwise, is to enter into some sort of communion with ultimate reality."*

43. In the abovementioned case, the Calcutta High Court was confronted with the question as to whether it should issue a writ to the government for proscribing / banning Al-Quran on the ground that it contains provocative verses. In the said case, Calcutta High Court held that Al-Quran being sacred book and object held sacred by a class of

persons within the meaning of section 295 of the Indian Penal Code against such book, no action can be taken against Al-Quran under section 295 A of the Indian Penal Code. In this context, it is relevant to quote paragraph 30 of the said judgment:

> *“In my opinion the Koran being a sacred, Book and "an object held sacred by a class of persons" within the meaning of S. 295 of Penal Code, against such book no action can be taken under S. 295A. Section 295A is not attracted in such a case. Section 295A has application in respect of a sacred book which is protected under S. 295 of I.P.C, Any other interpretation would lead to absurdity. If any offence, within the meaning of S. 295 is committed, in respect of Koran then it is punishable. Such Book gets protection in view of S. 295. At the same time if it is open to take any such action under S. 295A against such Book, then the protection given under S. 295 will become nugatory and meaningless.”*

Muslim Personal Law provides for the practices to be followed on the issues of Marriage, Divorce and Maintenance and these practices are based on holy scriptures- Al – Quran and sources based on Al-Quran.

44. The discussion which follows is anchored in the Quran, for it is the primary source. Apart from the relevant Quranic verses, Hadith, the juristic rulings of Prophet Muhammad's Companions, and the consensus views of the Muslim community have also been cited for substantiating the points. According to the Quran and Hadith, these are the authentic sources of Islamic Shariah. It will be in order to make the following clarifications:

a) The Prophet's Hadith:

Hadith is next to the Quran as a major source of Islamic Shariah. This is borne out by both the Quran and the Prophet's assertions. Some relevant Quranic verses to this effect are quoted below:

i. *So accept whatever the Messenger gives you, and refrain from whatever he forbids you.* (Al-Hashr 59:7)

ii. *Believers! Obey Allah and His Messenger and do not turn away from him.* (Al-Anfal 8:20).

iii. *We never sent a Messenger but that he should be obeyed by the leave of Allah.* (Al-Nisa 4:64)

iv. *Whoever defies Allah and His Messenger must know that Allah is severe in punishment.* (Al-Anfal 8:13)

v. *It does not behove a believer, male or female, that when Allah and His Messenger have decided an affair they should exercise their choice. And whoever disobeys Allah and His Messenger has strayed to manifest error.* (Al-Ahzab 33:36)

All the above Quranic verses command that the Prophet's rulings must be obeyed.

b) Juristic Rulings of the Prophet's Companions

The Companions learnt the details of the Islamic faith directly from the Prophet and observed his conduct day and night. Jurists therefore consider their rulings a binding, next to the Quran and

Hadith. The Prophet is on record asking the Muslim community to accord especially high place to the Companions' rulings in the interpretation of Islam:

i. Arbaz ibn Sariyah reports that the Prophet said:*"My advice to you is that you should fear Allah and hear and obey the ruler, even if he be a black slave. He among you who outlives me will observe many dissensions. It is binding upon you to follow my way and after me, of my guided Caliphs. Adhere fast to it and observe it consistently. Shun making innovations. For anything new to faith is an innovation and every such innovation is error. (Abu Dawud, Kitab Al-Sunnah, Bab fi Luzum Al-Sunnah, Hadith No 4607)*

   The guided Caliphs are his four deputies who succeeded the Prophet as the head of state. All of them were his Companions i.e. Abu Bakr, Umar, Uthman and Ali (May Allah be pleased with them).

ii. Abdullah ibn Umar relates that the Prophet said: *"My Companions are like stars and guidance be sought from them. Whoever among you follows their rulings will keep pursuing the straight way."* (Musnad Abd ibn Humaid, 1,250. Hadith No 783)

iii. Abdullah ibn Umar records also the Prophet pointing to the straight way, saying: "*The straight way is the one which I and my Companions follow."* (Al-Tirmidhi, Bab ma jaa fi iftraq al-ummah, Hadith No.2541)

c) Consensus

i. Consensus signifies the agreement of all competent persons on an issue. These persons should be, in the opinion of the Muslim community, worthy of inferring rulings from the Quran and other sources of Shariah. Taken in this sense, consensus is an important source of Shariah. The following verse reinforces this point:

“As for him who sets himself against the Messenger and follows a path other than that of the believers even after true guidance had become clear to him, We will let him go to the way he has turned to, and We will cast him into Hell---an evil destination.” (Al-Nisa 4:115)

The above verse speaks of the way or the action adopted by Muslims. Scholars therefore hold consensus as synonymous with the way of Muslims. Thus it is mandatory to follow the way adopted by the leading members of the community.

d) The Prophet's Ahadith

i. Abdullah Ibn Umar recounts that the Prophet said: *"My community or Muhammad's community will not unanimously agree on something false. Allah helps the community."*(Tirmidhi, Kitab Al-fitan, Bab luzum al-jama'h, Hadith No2167)

ii. Abdullah ibn Masud states: *"When your opinion is sought regarding an issue, you should first consult the Quran. Unable to find any guidance in it, you should study Ahadith*

for guidance. If you are still unable to get it, you should study the Muslims' consensus view on that issue. If there is nothing on record, independent judgment should be exercised."(Al-Maqasid Al- Hasanah, 460 and Kashf Al-Khifa,2,488)

45. Thus as demonstrated above, all the sources of Muslim Personal law have been approved and endorsed by the Holy Quran and the practices of marriage, divorce and maintenance etc. are based on such sources all of which flow from the Holy Quran itself.

46. It is submitted that India is a patriarchal society, and therefore personal laws of all communities are aligned with the patriarchal notion, this is evident from the fact that for instance according to Hindu, Muslim and Christian personal law, the father is the natural guardian for a (legitimate) child, a married Hindu woman can only adopt if her husband is barred from adopting. Further, there are instances of systems of law prevailing in India giving apparently less favourable treatment to females. In the present day scenario, there are two kinds of systems prevailing in the society one being a patriarchal system and the other being a matriarchal system, in both the systems there has never been an absolute equality between the two sexes. While the matriarchal system favours the female, the patriarchal system bends towards the males. The rights and obligations of the sexes, therefore has always been settled as a result of the interplay of these societal forces. Following a system of patriarchy, though certain practices in Islam appear to be apparently less favourable to the female, since father is the head of the family, the personal law is devised in such a manner that the rights and obligations are adjusted to

create balance, for instance when Islam confers certain rights on the male, it also imposes obligations on him and while females are given lesser rights, no obligations are imposed on them, thereby creating harmony, even without disturbing balance.

47. In view of the above, it is submitted that the issues arising in the present matter can only be decided as per Muslim Personal Law, which derives its sanctity from the Holy Quran and Hadith.

48. It is humbly submitted that the four Imams of Islam namely Hanafi, Shafai, Maliki and Hanbali, are based on scriptures and they have authoritatively laid down principles as to how Muslims should organize their religious and social life. It is submitted that principles of Marriage, Talaq and Polygamy are inter woven with religious and cultural rights of a Muslims.

Re Triple Talaq

49. It is submitted that the Islamic injunctions on marriage seek to strengthen the marital ties. Islam always regarded divorce as a condemnable practice and the focus was also on the fact that both the parties should maintain the marital bond as far as possible. As per the Quran, divorce is essentially undesirable, yet permissible when needed as is evident by the following sayings of the Prophet (Pbuh):-

> *"Of all the things permitted by Allah, divorce is the most undesirable act."* (Sunan Abu Dawud, Bab Karahiya al- Talaq, 1, 526. Hadith no: 2179).

This position is reiterated by Abdullah Ibn Umar, "*In the sight of Allah, divorce is the most undesirable act amid lawful acts"*.

50. As per the Shariat, the objective behind marriage is to ensure for the couple a peaceful, cordial life. However, the Shariat recognises that in cases where both the parties develop such bitterness and hate that it is impossible for them to live together, it negates the very purpose of marriage. In such a situation therefore, the policy of Islam has been that it is better to dissolve the marital bond peacefully which will enable both of them to start their life afresh. Shariat, therefore, makes an allowance for divorce in order to ensure peaceful and amicable separation of spouses when it becomes impossible for them to reside together and provides several ways by which a marriage maybe terminated, one such way is pronouncement of Talaq by the husband Apart from Talaq, the marriage maybe terminated by way of Khula at the instance of wife or by way of Mubarat (i.e. divorce by mutual consent) or by way of Tafweed (which is essentially the delegation of power to pronounce talaq to the wife or any other person)and by way of Faskh (obtaining divorce from a Qazi Court).

51. The answering Respondent has published a Compendium of Islamic Laws and Part-II therein deals with the law of divorce. The preliminary note on "Divorce in Islam", reads thus:

> *"Marriage is a blessing, and when this relationship is established it is meant to subsist and be lasting. It is through this relationship that God grants children. Divorce terminates marital relationship and leads to several problems in the family. Divorce in itself is, therefore, an undesirable act. However, it is also true that if there is no temperamental compatibility between the parties, or the*

man feels that he cannot as husband fulfil the womans rights, or because of mutual difference of nature Gods limits cannot be maintained, keeping the marriage intact in such situations or to compel the parties by legal restrictions to continue in the marital bond may be more harmful for the society. The Shariat, therefore, regards divorce as permissible although it is an undesirable act.

Thus, uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin.

Similarly, imposing such restrictions on the right of divorce due to which the man is compelled not to divorce the wife despite his feeling that he cannot live a happy life with her is also not lawful.

The decision whether a man can live a happy life with his wife or not and whether divorce is necessary or not relates to the sentiments of the husband. The decision in this regard can, therefore, be taken by the husband himself. If the man is sure that he cannot have cohabitation as per rules, e.g., if he is impotent, or cannot fulfil marital obligations, or any other such situation is there, it will be necessary for him to pronounce a divorce. To divorce the wife without reason only to harm her, or revengefully due to the non-fulfilment of his unlawful demands by the wife or her guardians, and to divorce her in violation of the procedure prescribed by the Shariat, is irregular and undesirable."

In view of the above, it is clear that Islam does not give unfettered powers to the Husband to pronounce divorce and the divorce, if resorted to, should be for a reasonable cause.

52. It is humbly submitted that under Islam, marriage is a Sunnah act, a Sunnah Act includes all the traditions and practices of the Prophet Mohammad that have become models to be followed by Muslims. Divorce, on the other hand annuls that Sunnah Act. It is therefore in spirit, something undesirable under Islamic laws. (See *Baday Al-Sanai, 3, 90 ; Al-Fatawa al-Hindia, 1, 348, Kitab al-Talaq, Chapter 1; Radd al-Mukhtar, Kitab al-Talaq, 3, 338*).

53. Besides, several leading Islamic Jurists have maintained the view that essentially, divorce is undesirable, without a valid and compelling ground and that it is permissible only when needed. In this regard the answering respondent is relying on the following Islamic authorities:-

a) Nihayat al-Matlab, 14, 11. Statement number 8926 ;

b) Kashshaf al- Qana, 3, 319. Matba Sharqiyah, Cairo; Majmu al-Fatawa, 32, 1293 Suila an Al- Khula hal Huwa Talaq mahsub min al-Thalath ; and

c) Al- Mabsut lil Sarkhasi, 6, 2. Kitab al- Talaq

54. In view of the aforesaid, it is clear that Islam provides for divorce due to societal considerations, however, it is essentially something undesirable. There are several reasons to denounce divorce, for instance marriage prevents one from unlawful sex which is forbidden by all schools, and moreover divorce interferes with the proper upbringing of children. Thus, it

is maintained that recourse to divorce may be taken only in exceptional cases when it is hard to maintain the marital ties and when the objectives of marriage are not fulfilled.

55. Notwithstanding the fact that Islam provides that divorce should essentially be for a valid ground, it is submitted that even if divorce is pronounced irregularly without the existence of any valid reason, it will still result into termination of marriage. The Shariat however strictly reprimands such a practice and it is settled that as per Sharia, those men and women who seek to terminate a marriage without a valid reason would be deemed to have committed a sin by putting an end to a Sunnah Act without there being any compelling need or reason.

56. The present petition seeks to challenge the practice of only "Triple Talaq". Triple Talaq or *Talaq-e-biddat* comes into effect when three pronouncements are made in one go (Triple Talaq) either in one sentence or in three sentences signifying a clear intention to divorce the wife, for instance, the husband saying "I divorce you three times" or "I divorce you, I divorce you, I divorce you" or the much publicised "Talaq, talaq, talaq". Though several leading Islamic jurists and religious scholars (of Sunni persuasions) have opined that pronouncement of Triple Talaq in one go is undesirable and irregular however they have unanimously agreed that the effect of pronouncing Triple Talaq in one go is that it effectively terminates the marriage.

57. Historically also, whenever "Triple Talaq" was indeed pronounced, the marriage was terminated. For instance, if a person who had pronounced Triple Talaq in one go approached Caliph Umar, in order to punish the man for his sin, he ordered that the man be whipped and

thereafter ensured separation between the couple. Alqama recounts that someone came to Abdullah Ibn Masud, who was a companion of the Islamic prophet Muhammad and reported that he had divorced his wife 100 times. Taking serious note of the same, Abdullah Ibn Masud replied that Triple Talaq had already separated his wife from him and that all the other pronouncements constituted a sin on his part. In this regard the answering Respondent is relying on the following Islamic authorities:-

a) Musannaf ibn Abi Shaybah, Bab man kara an yatliq al rajal imratuhu thalatha fi maqad wahid wa ijaza dhalika alayhi. Hadith number: 18089]

b) Musannaf ibn Abi Shayba, Kitab al- Talaq, bab fi al rajal yatlaqu imratuhu miata aw alfa. Hadith number: 17800

58. The view that all three utterances of Triple Talaq are effective and validly terminate the marriage is accepted by all the four distinct schools of jurists, namely Hanafi, Shafai, Maliki, and Hanbali. In fact, several Islamic jurists and scholars have advocated the same view, for instance:-

a) The celebrated Hanafi scholar, Imam Abu Jafar Tahawi comments, while adducing arguments for the effectiveness of Triple Talaq in one go has categorically stated that this stance is also maintained by Imam Abu Hanifa, Imam Abu Yusuf, and Imam Muhammad.(Sharah Maani al- Aathar, 3, 59).

b) Allama Alauddin Kasani Hanafi while dealing with the issue of Triple Talaq in a single utterance has remarked that most of the Ulema take the innovative divorce as effective. (Baday al- Sanay, Fasl Hukm Talaq al- Bidaa, Kitab al- Talaq, 3, 153).

c) Furthermore, Allama Sehnoon Ibn Saeed, the famous Maliki jurist, has recounted that when he asked Imam Malik about the effectiveness of pronouncing divorce upon one's pregnant wife either thrice in one go or in three different sessions, Imam Malik replied in the affirmative. (Al- Mudawwana, 2, 68).

d) Allama Abu Ishaq Shirazi (d. 476 H), a representative Shafai jurist maintains: *"If one tells his wife with whom he did not have conjugal relations: "Triple Talaq be upon you", it will be effective. For he divorced her while she was his wife. Same holds true for his wife with whom his marriage was consummated.*" (Al- Muhadhdhab, 2,84).

e) Allama Ibn Qudama, a Hanbali jurist is of the view that if one divorces thrice with a single utterance, this divorce will be effective and she will be unlawful for him until she marries someone else. Consummation of marriage is immaterial. The validity of Triple Talaq is also endorsed by all Ahl Al Sunnah jurists. Allama Ibn Qudama adds that: *"This view is attributed to Abdullah ibn Abbas, Abu Huraira, Umar, Abdullah ibn Umar, Abdullah ibn Amr ibn Aas, Abdullah ibn Masud, and Anas. The same stance is shared by most of the successors and later scholars."* (Al- Mughni li Ibn Qudama, 10, 334)

f) Abu Bakr Jassas Razi considers it as even the consensus view, and points out: "*The Book, Sunnah, and the consensus view of classical authorities is that Triple Talaq is effective, even if pronounced in one go. The act in itself is, however, a sin*." (Ahkam al- Quran lil Jassas, 1, 459)

59. Almost 90% of Indian Muslims are Sunni Hanafi, and the rest 10% consist of Shafais, and Ahle – Hadees. Shafais endorse the Hanafi stance on this issue that Triple Talaq in one go constitutes effective Talaq and results in the immediate termination of marriage.

60. Even the Holy Quran, Hadith, and Companions' practices provide that the great four Imams namely Hanafi, Shafai, Maliki and Hanbali were also firm on the view that Triple Talaq in one go constitutes valid termination of marriage. The Quran declares:

> *"Divorce can be pronounced twice: then, either honourable retention or kind release should follow. .... Then, if he divorces her, she shall not be lawful to him unless she first takes another for a husband."*
>
> (Al- Baqarah 2:229 and 230)

61. It is humbly submitted that the number of divorce is not linked with one or more sessions. It is the number of times it is pronounced that effectuates Talaq. If one does so twice, it will count as two, and if thrice, it will be Triple Talaq. Imam Bukhari interprets the verse in the sense that Triple Talaq becomes effective. His chapter heading runs thus: "*The stance of those who take the Quranic statement: 'Divorce can be pronounced twice, then either honourable retention or kind release', to mean that Triple Talaq becomes effective."* (Bukhari, 2, 791)

62. There are several instances from Prophet's times depicting that Triple Talaq was always considered undesirable but effective, some of these instances, as stipulated in the Hadiths, are provided below:-

a) When Abu Hafs resorted to Triple Talaq, the Prophet (Pbuh) held it as valid. All the three pronouncements were made with a single word, as is specified by Daraqutni (Daraqutni, Kitab Al- Talaq wa Al-Khula wa Al- Aiyla, 4, 12, Hadith number 3922).

b) Anas recounts on Muadh's authority: "*We heard the Prophet (Pbuh) saying: O Muadh, whoever resorts to bidaa divorce, be it once, twice, or thrice, we will make his divorce effective*" (Daraqutni, 2, 444, Kitab al- Talaq wa Al- Khula wa al- Aiyla, Hadith number 4020, Al- Sunan Al- Kubra lil Nasai, Kitab Al- Khula wa al- Talaq, Hadith number 14932).

c) When Abdullah Ibn Umar divorced his wife once while she was having menses. The Prophet (Pbuh) asked him to retain his wife saying: "*You acted against Sunnah*." Abdullah ibn Umar asked: "*Had I resorted to Triple Talaq then, could I retain her?*" The Prophet (Pbuh) replied: "*No. Such an action on your part would have been a sin"* (Sunan Bayhaqi, 7, 334, Hadith number: 14955).

d) Similarly, yet another instance is of Aishah Khathmiya, who was Hasan's wife. Hasan pronounced upon her Triple Talaq. After her waiting period (Iddat) when he sent her a gift, she said: "*This is a very small gift from the beloved from whom I have been separated."* On learning this, Hasan broke into tears, saying: "*Had I not heard from my grandfather the prohibition about such a woman, I would have taken her back in marriage. He commanded that if one has pronounced Triple Talaq upon his wife, even if she is menstruating or in one go, he cannot remarry her, unless she marries another person.*" (Al- Sunan Al- Kubra lil Bayhaqi, Hadith number 14492).

63. In addition to the above, the practices followed by the Companions of Prophet are also an important source to understand the basic and essential practices of Islam as they throw an important light on Shariat. The practices followed by Companions of Prophet assume unique importance as admittedly, the Companions, had directly grasped the essentials of faith and thus they understood the Prophet's message better than anyone else. Some instances of the practices followed by the Companions are provided below:

a) When someone was presented before Caliph Umar who had resorted to Triple divorce in one go, he ordered his whipping and pronounced separation between the couple. (Musannaf ibn Abi Shayba, Kitab al- Talaq, Hadith no: 18089)

b) Another narrator reports Umar saying: "*Triple Talaq will suffice you.*" (Musannaf Abd Al- Razzaq, Kitab al- Talaq, Hadith number: 11340)

c) Abdullah Ibn Umar said: *"Whoever resorts to Triple Talaq, he disobeys his Lord and wife is alienated from him."*

d) Imran Ibn Hussain was asked about a person who divorced his wife by Triple Talaq in single session. He said that the person had disobeyed his lord his wife had become prohibited to him. (Musannaf Ibn Abi Shayba, Hadith no: 18087)

64. It is submitted that though pronouncement of Triple Talaq is considered to be a sin it is still a valid and effective form of divorce. In Islamic Jurisprudence many times an irregular or improper nature of an act does not affect the legal consequences of the Act. For instance, it is not lawful to appoint a sinner as a judge. However, if the state appoints a

sinner as a judge and he passes a judgment, that judgment will be effective, provided it is within the limits of Sharia. This point is discussed in Fatawa – e- Alamgir.

65. In view of the above, it is submitted that though Triple Talaq is the least appreciated form of terminating a marriage, yet is very much effective and in line with the Shariat law. It facilitates the couple to divorce themselves from the marital bond irrevocably and without elongating the procedure of separation. To presume, that each “Triple Talaq” is arbitrary and unreasonable is a fallacy of reason. The Shariat law intends to keep the painful process of separation/ divorce private in order to protect the dignity of either parties and to avoid mudslinging in public. It also protects the interest of the parties to move on without much bitterness and hatred towards each other.

66. Further, it is not unknown that securing separation through courts takes a long time; this further deters the re-marriage prospects of the parties. In addition to the above, in cases where serious discords develops between the parties and the husband wants to get rid of the wife, legal compulsions of time consuming separation proceedings and the high expenses of such a procedure may deter him from adopting such a course and in extreme cases he may resort to illegal criminal ways of getting rid of her by murdering her. In such cases, Triple Talaq, is a better recourse in comparison to these illegal ventures.

67. In addition to the above, it is pertinent to point out that the it is a misconception that Triple Talaq is always a result of haste and is a power which is freely misused by a Muslim male. In fact, over the years, the practice in the community is such that, usually the families of the spouses

intervene in case of any marital discord and only when all attempts of reconciliation fail and when the spouses want instant dissolution, does the male resort to usage of Triple Talaq.

68. Furthermore, there are innumerable instances where a Muslim wife seeks dissolution of marriage and approaches her husband seeking immediate dissolution by resorting to Triple Talaq.

69. Neither the Petitioner nor any of the interveners supporting the Petitioners have furnished any data or any authentic survey showing statistics as to how usage of Triple Talaq is arbitrary and is without any attempts of reconciliation or was at the instance of the wife. In fact, many times the Muslim man pronounces Triple Talaq at the instance of his wife as she does not want to be pressurised by her family members to reconcile with her husband during iddat period and therefore wants instantaneous divorce.

70. As averred above, it is submitted that the answering Respondent is not reopening the issue of prior reconciliation as a pre-condition to divorce as held by this Hon'ble Court in *Shamim Ara (supra)*. However, without expressing any opinion on the said issue, the answering Respondent is reserving its right to pursue its remedies to cure the observation or ratio of *Shamim Ara*, as and when required in the interest of justice.

Re Husband's right to pronounce Talaq

71. It is a truism acknowledged by all that there must be a provision for divorce. A marital tie is dependent upon mutual love and trust. If there is mutual hatred and mistrust, it will be distressing for the couple to continue the marital tie. Shariah has provision for divorce as an unwelcome

exigency. All legal systems in the world have a provision for it. Even those religions which envisage it as an irrevocable tie have yielded to making room for divorce.

72. The question that is in issue in the present matter is as to who is authorised to dissolve the marriage. There are five possibilities on this count.

a) Wife alone may have this right

b) Husband and wife both may have this right

c) Husband alone may have this right

d) Dar- ul- Qaza alone may have this right

e) Husband and Dar- ul- Qaza both may have this right

73. It is common knowledge that Shariah accords this right to men, as is clear from the evidence in the Quran, Hadith, and the Muslim consensus view.

74. Divorce is mentioned at various places in the Quran, and in each instance, husband exercises this power; as is clear from these Quranic passages:

a) Al- Baqarah, 2:232

b) Al- Baqarah, 2:236

c) Al- Talaq, 65:1

d) Al- Baqarah, 2:237

e) Al- Ahzab, 33:49

f) Al- Tahreem, 66:5

75. Numerous Ahadith underscore divorce as the husband's prerogative. Several cases were referred to the Prophet (Pbuh) in which he either got the wife released or the husband divorce in his presence or he directed him to divorce his wife.

a) Habiba Bint Sahal Ansariya, wife of Thabit ibn Qays, requested the Prophet (Pbuh) for her divorce. At this command, Thabit divorced her. Since in this case, Thabit was not at fault, the Prophet (Pbuh) asked Habiba to return to Thabit the orchard which he had given her at their marriage. (*Sunan Abu Dawud*, *Kitab al- Talaq,Bab fi al-Khula,* Hadith number: 2227; *Al-Sunan Al-Kubra lil Nasai, Kitab Al-Talaq, Bab al-Khula*, Hadith number 5627)

b) Thabit ibn Qays's other wife, Jamila bint Abdallah demanded divorce on the ground of wife-beating. Again, at the Prophet's command, Thabit divorced her. (*Al-Mujtaba min Al-Sunan lil Nasai,* Hadith number: 3497)

c) A woman of Mazina tribe was Abd Yazid's wife. She sought the Prophet's help in securing divorce. The Prophet(Pbuh) asked Abd Yazid to divorce her. (*Sunan Abu Dawad*. Narrator: Ibn Abbas. *Kitab al-Talaq,* Hadith number: 2196)

d) Uwaymar Ajlani complained to the Prophet (Pbuh) that he had seen his wife committing adultery. His wife denied this charge. In line with the Quranic command, the Prophet (Pbuh) initiated *lian* proceedings for the couple. Upon the completion of the process, Uwaymar said: "*If I retain her, I will be taken as a liar*." So in the Prophet's presence,

and without the Prophet's command, he pronounced Triple Talaq. (*Sahih al-Bukhari, Kitab al-Talaq*, Hadith number: 5259)

e) Abdullah ibn Umar divorced his wife during her menses. Umar mentioned this to the Prophet (Pbuh) who commanded Ibn Umar to take her back in marriage and to divorce her, if he wanted, only after her another monthly cycle and purification. (Ibid, Hadith number: 5251)

76. In the light of the above, all jurists unanimously agree that husband has the right to divorce. No jurist in Islamic history ever held a view to the contrary.

77. Shariah grants the right to divorce to husband because men have greater power of decision making. They are more likely to control emotions and not to take a hasty decision. Men are expected to behave thus on the following grounds:

a) Islam places the duty of earning livelihood on husband. He is obliged to meet the maintenance expenses of his family. He has to go out for earning bread. He stands in need of ensuring his wife's confidence for the upbringing and care of his children. Given this, he would not resort to divorce which would disintegrate his family.

b) All financial expenses arising out of divorce are to be borne by him, for example, dower which is generally a large sum of money. He has to pay maintenance expenses to wife during her waiting period. In the case of young children, mother has the right to bring up the son up to the age of 7 or 8 years, and daughter until she attains puberty. During this entire period, he has to pay his divorced wife for taking

care of his children. The amount should be sufficient to meet their expenses. This financial burden also deters him from resorting to divorce.

c) In Islam, mother enjoys a status higher than that of the father. The Prophet (Pbuh) metaphorically brought home the point saying that father is the door to Paradise while Paradise itself is under mother's feet. (*Sunan Al-Tirmidhi,* Narrator: Abi Darda. Hadith number: 1900; and *Musnad Shahab lil Quzai*. Narrator: Anas ibn Malik, 1, 102, Hadith number: 119). Children have innate love for mother. The above religious directive for mother's special place increases their love for mother. As the couple has children and they grow up, this too, bars father from resorting to divorce.

d) Shariah despises divorce without a compelling reason. The Prophet (Pbuh) condemned this act strongly. Jurists label it as a sinful act. Devout people, therefore refrain from it.

Re Obtaining Divorce from Courts

78. Further, entrusting the responsibility of divorce entirely to Court, apart from increasing the burden on the Judiciary, also suffers from certain other disadvantages:

a) At times, both husband and wife want separation. Both feel that they cannot live together. Yet, it takes very long to secure separation through court. As a result, they cannot begin their life anew. In the case of a Muslim couple, this hurts wife all the more. For husband may remarry while she may not be able to do so.

b) Securing separation through court entails that the weaknesses of the opposite party be brought into public domain. Some moral failings are considered more scandalous for women in our society. For example the charge against a male that he has loose conduct and temper may damage only a little his prospects of remarriage. However, husband's same charge publicly against his wife about her loose character may deprive her the chance of remarriage. She may be more harmed than benefitted by court proceedings.

c) Granting husband the right to divorce indirectly provides security to wife. Marriage is a contract in which both the parties are not physically equal. Male is stronger and female weaker sex. Man is not dependent upon woman for his protection. On the contrary, she needs him for her defence. If there develops serious discord between the couple and husband does not at all want to live with her, legal compulsions of time consuming separation proceedings and expenses may deter him from taking the legal course. In such instances, he may resort to illegal, criminal ways of murdering or burning her alive. Needless to add, a husband who does not fear God may do anything against his wife whom he hates. For only he is with her in the darkness of night. He has more chances of covering up his crime. Often do culprits get the benefit of doubt. This accounts for the rise in the cases of women being murdered and burnt alive. Dowry deaths are on the rise as well, as is clear from the data below:

Year	Number of cases
2005	6787

2006	7618
207	8093
2008	8172
2009	8383
Five years	39,053

d) Other factors also account for the above crime. However, the complications inherent in securing divorce is one important contributing factor.

e) Let this be clarified that even in the Western society wife alone does not have the right to divorce. However, as a result of gender parity and securing divorce through court alone, the divorce rate has shot up in the West. This is borne out by the following data indicating divorce rate in proportion to marriage:

1. Germany	39.4
2. UK	42.6
3. Russia	43.4
4. Czech Republic	43.3
5. Belgium	44.0
6. Denmark	44.5
7. USA	54.8
8. Sweden	54.9
9. Belarus	52.9
10. Austria	43.4
11. Norway	40.4
12. France	38.3
13. Netherlands	38.3
14. Hungary	37.5
15. Slovakia	26.9

16. Portugal	26.2
17. Switzerland	25.5

It is a misconception that Muslim Man enjoys unilateral powers in respect of Divorce

79. Coming to the misconception that a Muslim man enjoys unilateral and unbridled powers of divorce, it is clarified that the perception that Muslim women have little or no rights to divorce their husband is a mistaken belief.

80. Muslim law recognises delegation of this power from the husband to the wife, this is known as *Talaq-i-Tafweed*. Literally, *tafweed* means to delegate. A Muslim husband can delegate his power of pronouncing talaq to his wife or to any other person. [See *N.E Baillie, A Digest of Moohummudan Law, Vol. I, at pg.328;* Alī ibn Abī Bakr Marghīnānī ,*The Hedaya, Or Guide: A Commentary on the Mussulman Laws*, Book IV, Ch. III @ pg. 87, Dr. Nishi Purohit, *Principles of Mohammedan Law,* 2nd Edn. 1998, at pg. 201, Orient Publishing Company, Allahabad.]

81. However such delegation does not deprive the husband of his own right to pronounce a talaq. A Muslim husband may delegate the power absolutely or conditionally, temporarily or permanently. [See *N.E Baillie, A Digest of Moohummudan Law, Vol. .I, at pg. 238 and 109;* Dr. Paras Diwan, *Muslim Law in Modern India*, 9th Edn. 2005 at p. 86, Allahabad Law Agency, Faridabad (Haryana)]. A permanent delegation of power is revocable but a temporary delegation of power is not. The delegation must be made distinctly in favour of the person to whom the power is delegated; and the purpose of delegation must be clearly stated. This form of

delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court. [See Dr. Paras Diwan, *Muslim Law in Modern India,* 9th Edn. 2005 at p.86, Allahabad Law Agency, Faridabad (Haryana)]

82. An agreement made with the wife giving her such power will be deemed to be Tafweed and binding on the husband. Such a talaq, although made by the wife is, by virtue of delegation, really a talaq by the husband and operates effectively as a talaq by the husband himself. It does not require any declaration from a court of law. The power given to her is itself sufficient. [See *Mohd. Amin v. Mst. Himna Bibi* AIR 1931 Lah 134; B.R. Verma- *Islamic Law,* 6th Edn. 1986, p. 229, Law Publishers (India) Private Limited]

83. Where a wife is given the option to divorce herself under a Tafweed, she cannot be compelled to exercise her right. She may or may not exercise the right. Mere happening of an event under which, the wife is authorised to divorce herself is not sufficient to dissolve the marriage, the wife must exercise her right expressly. [*See Aziz v. Mt. Naro & Others* AIR 1955 HP 32]

84. Apart from the above, Muslim law also provides for divorce at the instance of wife, this is known as "*Khula*". Khula literally means redemption or to lay down. In law, it means laying down by a husband of his right and authority over his wife. [See Aqil Ahmad, *Mohammedan Law,* 21st Edn. ,2004 at pg. 184, Central Law Agency, Allahabad; Asaf A.A. Fyzee, *Outlines of Muhammadan Law,* 9th Impression, 2005 at pg. 163, Oxford University Press, New Delhi]. In law, it is laying down by a husband of his

right and authority over his wife for an exchange. [See *N.E Baillie, A Digest of Moohummudan Law, Vol. .I, at pg. 31*]

85. 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 marriage tie. In such a case, the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her mahr (due dower) and other rights or make any other arrangement for the benefit of the husband.

86. Khula signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property. Khula infact is thus a right of divorce purchased by the wife from her husband. [See Asaf A.A. Fyzee-Outlines of Muhammadan Law, 9th impression, 2005, p. 163, Oxford University Press, New Delhi]

87. Usually, *Khula* is with Husband's consent, however, in the event of serious discord between the couple, without any apparent reason, and if they are unable to live together on account of intense mutual hostility, in Imam Malik's opinion, judge is authorised to enforce *khula* even without the husband's consent. Dar-ul-Qaza in India follows this practice. The same is endorsed in the collection of the Islamic law compiled by the answering Respondent. In fact, Dar-ul-Qazas though being religious courts devoid of any sanction, are performing exemplary work for the community and are contributing towards reducing the increasing work load of the judiciary, particularly in matters relating to family laws.

88. It is a misconception that divorce in Muslim law is the prerogative and a unilateral right of the husband, apart from conferring the Muslim wife with the right to demand Khula. The Muslim law also recognises divorce by mutual consent known as “Mubarat”. Mubarat means “release” which puts an end to marital rights. The word Mubarat means an act of freeing one from another mutually. It is a mutual discharge from marriage tie. [See Dr. M.A. Qureshi, *Muslim Law,* 2nd Edn. 2002, p.83, Central Publications, Allahabad]. It is a divorce by mutual consent of the husband and wife. The aversion in Mubaraat is mutual and the proposal for divorce may emanate from either the husband or the wife.

89. After the completion of Khula or Mubarat, the marriage of the parties gets dissolved and their cohabitation becomes unlawful.

90. In addition to Khula or Mubarat, Islam also permits for dissolution of marriage by a decree of the Court. This kind of divorce is called Faskh, it refers to the power of Qazi to annul a marriage on the application of the wife.

91. Thus, in view of the above provisions, it is clear that Islam also bestows upon women, the power to seek separation from her husband. It is submitted that these avenues as provided under the personal law, save both the parties from engaging in a long battle before the state established courts and also enable them to save huge expenditures associated with obtaining divorce from state established courts. In a recent article by Jeffrey A. Redding, entitled *The Case of Ayesha, Muslim ‘Courts’, and the Rule of Law: Some ethnographic lessons for legal theory*, he re-counts a true story of a young muslim girl who preferred to obtain a *faskh* divorce rather than approaching a state- established court to obtain a decree of

divorce because it was more personal and cheaper to obtain a *faskh* from the *dar ul qaza*. Apart from being more economical, a divorce within the parameters of Muslim Personal law does not only guarantee speedy relief but also secures privacy of the parties which is often lost in judicial hearing before state established Courts and this is one of the primary reasons why Muslims prefer to resort to their own personal law in matters of marriage and divorce, rather than approaching the Courts and getting embroiled in long drawn battles.

92. Thus, the allegation that Muslim husband alone has unilateral right to divorce and the wife is a vulnerable party does not hold water. Islam treats the relationship of marriage in the form of a civil contract where both the parties are treated as separate individuals with separate but mutually co- existing rights and liabilities. The Shariat law provides clear distinction of role and responsibilities without making one over bearing upon the other. These distinctions are part of Quranic wisdom and do not prescribe to chauvinistic dogmas and manmade stereotypes in a given society.

Re Halala

93. In order to discuss, the practice of Halala, it is necessary to first discuss the forms of separation between a couple, from the viewpoint of Shariah. According to Shariah separation between a couple may take any of the following forms:

a) *Khula* i.e. separation between the couple by mutual consent. In this case wife foregoes some of her rights in order to secure divorce or she pays some monetary compensation. In principle, however, no male should divorce without a valid ground. Nor should any female

demand *Khula* without a valid ground. Nonetheless, it is not binding upon a woman to have any particular ground for demanding *Khula*. She may ask for it out of her dislike for him. If the husband accepts her demand, it brings an end to their marriage.

b) *Faskh* i.e. revocation of marriage. When wife applies to Dar ul Qaza for the revocation of marriage, complaining of the non-fulfillment of her any right or her husband's injustice or excess. As Dar ul Qaza upholds her complaint in the light evidence, it will revoke marriage.

c) *Ayla* i.e. an vow by husband to the effect that he will not have sexual relations with his wife in future or for at least four months. if he follows this oath for four months, his will stand divorced.

d) *Lian* i.e. a charge by husband that he saw with his own eyes that his wife committed adultery, though he does not have any evidence of the same. Then Dar ul Qaza will ask them to state four times under oath. For the fifth time husband will state: "*Allah's curse be upon me, if I level a false charge against her."* Wife will state: *" If this person is true in his charge, Allah's wrath be upon me."* At that stage Dar ul Qaza will revoke marriage.

e) *Talaq* i.e. Divorce. Husband may divorce his wife in one of the following forms:

   i. Husband may divorce her once, specifying the word talaq, saying “*I pronounced divorce once upon you*”. In this case he is entitled to back his wife in marriage before the expiry of the waiting period. This is revocable divorce.

ii. Husband may divorce her twice, specifying the word talaq. He may do so at one time or at two different times. In this case too it would be revocable divorce.

iii. *Talaq bain* i.e. irrevocable divorce: Husband may tell his wife "*I pronounce upon you talaq bain once*" or he may use some vague word which may be taken to mean divorce or any other thing, for example, he may say "*you are released*". It may refer to her release from serving him or that she is free to live in her parent's home or it might mean that she is released from the marital bond which is synonymous with divorce. If he confirms that he divorced by using the above words, it is an instance of irrevocable divorce. Marital ties between the couple can be resumed only by remarriage. However, husband may not unilaterally take her back in marriage. If irrevocable divorce is pronounced twice in succession, only one will be effective, the second one will be null and void. However, if one says: "I pronounce upon you two irrevocable divorce, it will come into effect, leaving room for remarriage.

iv. If one divorces his wife, without specifying thrice and only repeats his statement of divorcing thrice and clarifying that it was not his intention to pronounce triple divorce rather he intended divorce only once and he had repeated it for emphasis, it will be taken as revocable divorce. Husband will be entitled to take her back in marriage during the waiting period. After the waiting period, there is room for their remarriage through mutual consent.

94. In all there are eight forms, of which four are of divorce and another four of separation. In all these cases, the couple may remarry if they wish to do so. In these instances, the woman does not have to marry another person and only on separation from him she may remarry her former husband.

95. The ninth form of divorce is that husband may in one go or at different times, divorce his wife, specifying it as Triple Talaq or he may repeat the word divorce thrice and clarify that he did not repeat it for emphasis; his intention was to pronounce triple divorce. In the opinion of mainstream Muslim jurists (of Sunni persuasions), the triple divorce will come into force in the above instance. In this case, that woman would be lawful for her former husband only thus: she marries another person and before sexual relations with him or after it, her second husband dies or if the second husband has sexual relations and then divorces her.

96. The rationale behind this command there was no norm to govern divorce in the pre-Islamic period of ignorance. Husbands used to divorce wives repeatedly and took them back in marriage. This tormented her mentally and she could not secure release either. Islamic Sharia has therefore restricted the number of divorce to three, with the provision that one may take her back after one or two divorce. However, there is no provision taking her back after triple divorce. Furthermore, it has placed such a condition of her marriage with another person that if one is not sincere about retaining his wife, he dare not take her back without a valid reason and to treat her badly.

97. As to the second marriage after triple divorce *vide* Sura II, Verses 229-230 provide that:-

“Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah . But if you fear that they will not keep [within] the limits of Allah , then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah , so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers.”

“And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah . These are the limits of Allah, which He makes clear to a people who know.”

Re Polygamy

98. Coming to the practice of polygamy, it is submitted that the Quran, Hadith and the consensus view allow Muslim men to have up to 4 wives. Though polygamy is permitted, it is not obligatory or desirable, rather, jurists regard monogamy as a better practice in usual conditions. However, Polygamy meets social and moral needs and the provision for it stems from concern and sympathy for women.

99. In the pre-Islamic Arabia, Arabs practised unlimited polygamy. Islam restricted the number of wives to four. When Ghaylan Thaqafi embraced Islam, he had ten wives. The Prophet (Pbuh) directed him to retain any

four and release the rest. (*Sahih ibn Hibban*. Narrator: Ibn. *Bab Nikah Al-Kuffar*, Hadith number: 4157)

100. Likewise, when Nawfal ibn Muawiyah accepted Islam, he had five wives. The Prophet (Pbuh) asked him to retain only four and release the fifth one. (*Mafatih Al-Ghayb, Tafsir Surah Al-Nisa: 3*, 5, 42)

101. Abu Dawud reports: '*Harith ibn Qays says: "I had eight wives at the time of accepting Islam. When I mentioned this to the Prophet (pbuh) he asked he me to have only four and release the rest.*"' (*Sunan Abi Dawud*, Narrator: Wahb Al-Asadi. Hadith number: 2241)

102. As averred above, Islam allows men to have up to four wives. The Quran lays down this permission thus:

> *Marry the women that seem good to you: two, or three, or four. If you fear that you will not be able to treat them justly, then marry only one. (Al-Nisa, 4:3)*

The above verse makes it clear that one male is allowed to have up to four wives. The Prophet (Pbuh) himself had several wives. Many of his Companions had more than one wife. As already stated, those having more than four wives at the time of accepting Islam were asked to retain only four and release the rest. All jurists therefore maintain that one may have up to four wives. However, this permission is tied up with justice. Only he who can treat all of his wives equally in fulfilling his obligations to them may have more than one wife. The Quran says:

> *If you fear that you will not be able to treat them justly, then marry only one. (Al-Nisa, 4:3)*

103. There is a severe warning for him who does not treat his wives justly. The Prophet (Pbuh) cautioned: "*If one has two wives and does not treat them justly, he will appear on the Day of Judgement as one afflicted with paralysis.*" (*Al-Mustadrak lil Hakim, Kitab Al-Nikah,* Hadith number: 2759)

104. If one has more than one wife and does not treat them justly, the victim wife may move to court, demanding equality and justice. And if she does not want to live with her husband, she may ask for the annulment of marriage.

105. One can decide best whether he will be able to deal justly with them. It cannot be dictated by court or state. However, the latter may force one to do justice to them and reprimand him. In the Prophet's day, many Companions took more than one wife. However, for doing so, they did not take his prior permission. Nor did he chide them for having married without his permission.

106. Though, Islam permits polygamy, however, it does not encourage it. Islam deems it as valid, but not desirable. In the Prophet's era, frequent battles resulted in a large number of widows and orphans and accordingly many Companions had more than one wife. The Prophet (Pbuh) himself married several times for such considerations as the promotion of Islam and taking care of widows and orphans. Yet Muslim jurists maintain that one should rest content with a single wife. Allama Burhanuddin Marghinani (530-593 H) affirms the same:

> *If one has a wife and wants to take another wife and apprehends that he would not be able to deal with them justly, it is not lawful for*

him to take the second wife. If he is confident of doing justice to both of them, he may remarry. However, if he still does not take a second wife, he will get reward from Allah. For, he did not hurt the feelings of his first wife. Likewise, it is permissible for a woman to get married while the first wife is present. However, if she does not do so, she is entitled to Allah's reward. (Mukhtarat Al-Nawazil, 2, 84)

107. The Quran, no doubt, allows taking more than one wife. However, it does not prescribe it as something mandatory, or even desirable. Yet, since polygamy is endorsed by primary Islamic sources, it cannot be dubbed as something prohibited. The arguments for this stance are as follows:

a) The Quran proclaims: *"O Prophet, why do you forbid what Allah has made lawful for you? Is it to please your wives? Allah is Most Forgiving, Most Compassionat*e" (Al-Tahrim, 66:1)

   The aforesaid verse forbids that a lawful thing should be declared as unlawful by anyone. When even the Prophet (Pbuh) did not have this privilege, no one else can prohibit something lawful.

b) Elsewhere, the Quran says: "*Say, (O Messenger): 'Who has forbidden the adornment which Allah has brought for His creatures or the good things from among the means of sustenance?*'" (Al-Araf 7:32). One is thus not authorized to forbid what Allah has made lawful.

c) The couple, Bariarah and Mughith were slaves and married while they were slaves. Later, Barirah was freed while Mughith continued as a slave. In such a condition, wife is entitled to secure her divorce,

technically known in fiqh as *khiyaratq*. Abdullah Ibn Abbas reports that Baririah's husband was a slave named Mughith. I could see him crying, stalking Barirah with his tears rolling down his beard. The Prophet (Pbuh) asked Abbas: "*Are you not surprised that Mughith loves her so much whereas she does not?*" The Prophet (Pbuh) told Barirah that it was better for her to return to Mughith. She asked him whether it was his command. To this, he clarified that it was only his recommendation. Upon this, she told: "*I do not need this*." (*Sahih Al-Bukhari, Kitab Al Talaq,* Hadith number: 5383)The Prophet (Pbuh) could have ordered her to do so. However, he did not. For something which is not mandatory and is only permissible cannot be forced on anyone. Even the Prophet (Pbuh) is not authorized to forbid what is lawful.

d) Arabs took great pride in large sums of dower money which they fixed in order to flaunt their social status. Umar's following address is regarding his concern about the same:

   i. While addressing people, Umar praised and glorified Allah and said: "*Beware! Do not commit excess with regard to women's dower. I should not receive any report that one fixed a dower higher than that of the Prophet (Pbuh). If one does so, I will deposit the excess amount in state treasury."* When he came down the pulpit, a woman challenged him, saying: "*Which is more worthy of obedience: the Book of Allah, or your word?"* He replied: "*Allah's Book*". He then asked her to elaborate her stand. She replied: "*You forbade excessive dower payable to women whereas Allah says in His Book that even if you have given it in*

plenty to them, do not take it back." Umar exclaimed twice or thrice: "*Everyone has more insights into Islam than Umar*". He then returned to the pulpit and told people: "*I had asked you not to give excessive dower to women. Let it be known that you are free to do what you wish regarding your wealth."* (*Al-Sunan Al-Kubra lil Bayhaqi*, *Kitab Al-Nikah,* Hadith number: 14336)

108. Thus, it is clear from the above that something declared lawful by the Quran and Hadith, even if it be not something desirable, cannot be forbidden by State or by judicial pronouncement. For it amounts to denying people their due.

109. Although Shariah does not declare polygamy as mandatory, or even desirable, it is a reality that in certain exigencies it is preferable. The relevant points are as follows:

a) Polygamy is a Social Need

i. Generally, there is not any disparity between the birth-rate of boys and girls. However, the death rate for men is higher. For, it is mostly men who die in accidents. For example, in World War I, which lasted from 1914 to 1919, 8 million army men were killed. Then there were civilian casualties. These army men were male. World War II lasted from 1939 to 1945. It took a toll of 65 million deaths and disabilities. Majority of them were men. Germany was hit worst by this war. From 1920 to 1942, there had been 3 adult women for every man. According to the census in France in 1900, women outnumbered men by 4,23,709. Likewise, there were 644,796 surplus women in Austria. In the Iran-Iraq war, (1979-1988) 1 million women in Iraq and 82000 in Iran turned into

widows. Again usually men are victims of traffic and industrial accidents, and crimes. 90% of the long term prisoners are male. Men are awarded long term sentences for their heinous crimes which even deviant women cannot commit owing to their natural frailty. All these factors account for the higher number of women than men. USA has a safe traffic system. By dint of its superior defence technology, the US Army has fewer casualties than its opponents. According to a report, in1987, the female population there outnumbered men by 8 million.

ii. In other countries, there is disparity in the sex ratio with higher number of women as is evident from the Table below:-

Country	Men	Women
Austria	47.07	52.93
Burma	48.81	51.19
Germany	48.02	51.98
France	48.99	51.01
Italy	48.89	51.11
Poland	48.61	51.39
Spain	48.94	51.06
Switzerland	48.67	51.33
Soviet Union	46.59	53.41
Britain	48.58	51.42

(*Khatun-i Islam,* by Maulana Wahiduddin Khan cf. *Encyclopaedia Britannica*)

Undoubtedly, this ratio may be its reverse in some countries. The people there maybe monogamous. However, where women outnumber men and polygamy is not permitted, women will be

forced into leading a spinster's life. In sum, polygamy is not for gratifying men's lust; it is a social need.

b) Moral aspect

i. The moral aspect of polygamy is indeed important. Chastity and modesty is the essence of humanity. Man's social life stands out for the marital tie between man and woman. They act with utmost sincerity towards each other. Other creatures do not possess this sexual and emotional fidelity. Chastity is innate in the human nature, and is appreciated by every sane sensible person. This explains why one does not tolerate any profanity directed against his mother, wife, sister, and daughter. Polygamy ensures sexual purity and chastity. Whenever polygamy has been banned, it emerges from history that illicit sex has raised its head. Amid ancient civilizations, the Greek were forced to practice monogamy, yet there was no check on unlawful mistresses. (*Tarikh-i-Akhlaq-i Europe* by Daryabadi, p. 240)

ii. Judicious non-Muslim thinkers recognize the above. Dr Gustave Lee Bon, an authority on civilizations, observes: "*Monogamy in the west is to be found only in books. I am sure no one will deny that it does not exist in our society. I fail to understand why Orientals' lawful polygamy is considered inferior to the Westerners' illicit polygamy. In my opinion, the former is preferable.*" (*Tammadun-i Arab*, p. 366)

iii. Malik Ram, an intellectual of our country, made these worthy observations:

"Several arguments may be presented in support of polygamy. Generally, women outnumber men. Given this, in the case of monogamy, what is the fate of the surplus women? By denying them marriage, are we not inciting them and married men to commit immorality? If you do not give these women a chance to marry, you are pushing them to a life of ignominy, forcing them to lead a sinful life. For getting married is something natural. If society does not cater to their needs, they will turn against society and commit immoral acts clandestinely. In this case, you will have to give a legal status to illegitimate children. The choice is yours: on the one hand, there is woman in her role as an honourable life, queen of her home, and esteemed mother. In comparison, in the other scenario, she ends up as a contemptible mistress, without a home of her own, and as a stigma for society." (*Islamiyat*, pp. 161 and 162)

c) A Blessing, Not a Curse for Women

i. Concern and sympathy for women lie at the core of the provision for polygamy. If a woman is chronically ill or if her husband is bet upon taking a second wife because of her barrenness, or any valid or flimsy ground, and if the option of polygamy is not available to, him he will either divorce her which is something reprehensible, or he may indulge in illicit polygamy. An unlawful mistress is more harmful for social fabric than a lawful second wife. For the former, blackmails him. In all the above instances, polygamy is a blessing, not a curse for women. Polygamy is the

solution to the problem of divorced women and widows. It is possible only with the second wife's consent. For one cannot take a woman forcibly as his second wife. Women should appreciate this point that if the ratio of women is higher, would they prefer wedlock for fellow women, or let them be illicit mistresses of men, without any of the rights which a wife gets.

110. A common misperception in India is that the incidence of polygamy is higher among Muslims. Communal organizations vigorously spread this mischievous propaganda in order to instil fear psychosis in the majority community. The truth is however far from it. Dr Shaista Parveen carried out her doctoral study on polygamy in Indian society. She has cited several survey reports on the rate of polygamy, among various communities, of which a summary is reproduced below.

Community	1931-40	1941-50	1951-60
Tribals	9.35	17.53	18.98
Hindus	6.79	7.15	5.06
Muslims	7.29	7.06	4.31

1961 Survey

Community	Polygamy percentage
Tribals	15.25
Buddhists	7.97
Jains	6.72
Hindus	5.08

Muslims	5.07

1961 Samanta Banerjee Survey Report

Community	Polygamy percentage
Tribals	15.25
Hindus	5.06
Muslims	4.31

World Development Report (1991)

Community	Polygamy percentage
Tribals	15.25
Buddhists	7.97
Hindus	5.80
Muslims	5.73

Tamil Nadu Survey (1984)

Community	Polygamy percentage
Hindus	5.05
Muslims	4.20

111. Some other survey reports are also quoted in Dr Shaista Parveen's work. Common to all the surveys is the outstanding fact that the Muslims have the lowest rate of polygamy in India.

112. Additionally, it is submitted that the institution of Polygamy is not considered immoral in Sharia Law. Sharia Law proceeds on the principle

that the institution of monogamy is most desirable but cannot be made mandatory. In the Indian context it should be remembered that polygamy was widely prevalent amongst many non muslim communities as per their respective personal laws. However with passage of time some of those communities were subject to compulsory rule of monogamy. However, progressively, the Indian legal culture has acknowledged the existence of promiscuous sexual relationships within compulsorily monogamous marriages. Under the Protection of Women from Domestic Violence Act, 2005, every woman who is in a live in relationship with a man is given legal protection and is given the rights of claiming maintenance , residence etc under the said Act. Under the said Act, no distinction is made between a woman having living in relationship with a married man or a widower or a bachelor, therefore under the said Act a woman having living in relationship with a married man is entitled to all the protections from domestic violence. This clearly shows that promiscuous relationships by a married man with another woman are no longer considered immoral within the legal culture that has developed in India. It is rather strange that a law that recognises live-in relationships without marriage worthy of protection should frown upon a relationship which is formalised by the sanctity of marriage as immoral.

113. That it is humbly submitted that rights and duties of any society can be best understood by contextual analysis of the same. ‘Cultural Relativism’ is reality and pursuit of equality or justice cannot disregard the inherent injustice in dismissing a set of rules merely because they do not adhere to popular culture. In the present context, merely dismissing Sharia law as arbitrary without giving it due reading is both unjust and prejudiced.

Re Maintenance

114. Coming to the provisions of maintenance in case of a divorce, the same have been codified in Muslim Women (Protection of Rights on Divorce) Act, 1986. This act codifies and regulates the obligations due to a Muslim Woman divorcee by putting them outside the scope of Section 125 of the Code of Criminal Procedure, 1973.

115. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 opens up with a non obstante clause overriding all other laws and provides that a divorced woman shall be entitled to –

(a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband;

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

Under Section 3(2), the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a

reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1)(a) of the Act has been subjected to the condition of the husband having “sufficient means”.

116. Section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may

appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or anyone of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be.

117. This constitutional validity of this Act was challenged in *Danial Latifi and another v. Union of India* (2001) 7 SCC 740. This Hon'ble Court while upholding the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 held that:-

> *"(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.*
>
> *(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.*
>
> *(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as*

provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India."

118. This Hon'ble Court also rejected the argument that the Act was in violation of Article 14 as it deprived Muslim Women the benefit of Section 125 of the Code of Criminal Procedure, 1973. Rejecting the said argument, the Hon'ble Court observed that:-

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves

and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners."

119. The judgment in *Danial Latifi's case* has been subsequently been reiterated and re-affirmed by this Hon'ble Court in the cases of *Khatoon Nisa* v. *State of Uttar Pradesh and Others* (2014) 12 SCC 646 and *Shamim Bano v. Asraf Khan* (2014) 12 SCC 636.

120. Accordingly, if the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are closely seen, they appear to be equally or more beneficial than the one in Section 125 of the Code of Criminal Procedure, 1973 and it is submitted that the Act adequately provides for the maintenance of Muslim Women in case of divorce.

121. Thus, in view of the above, it is clear that Muslim Personal Law adequately provides for the rights of Muslim Women and the basis of this petition, which assumes that a Muslim man has right to unilaterally pronounce irrevocable talaq or to not pay any maintenance after iddat period, are myths and thus the present petition is entirely misconceived and deserves to be dismissed.

122. In the aforesaid premises, therefore, and in the interests of justice, the answering Respondent prays that this Hon'ble Court may be graciously pleased to dismiss the present Writ Petition.

123. The answering Respondent craves leave of this Hon'ble Court to add to, alter, amend and/or modify any of the averments made hereinabove. The answering Respondent also craves leave of this Hon'ble Court to file a further affidavit or affidavits or any document or documents if the situation so warrants or if this Hon'ble Court so desires.

124. The answering Respondent prays that this Hon'ble Court may be graciously pleased to take on record this counter affidavit.

DEPONENT

VERIFICATION

I, the above named deponent, do hereby solemnly verify that the contents of my aforesaid affidavit are true and correct to my knowledge. The legal submissions are based on advice of Counsel and believed by me to be true. I further state that nothing contained in my aforesaid affidavit is false, no facts have been suppressed and nothing material has been concealed therefrom.

Verified at New Delhi on this the ____ day of August, 2016.

DEPONENT

FILED BY:-

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