Kerala High Court
Nazeer @ Oyoor Nazeer vs Shemeema on 14 January, 2002

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 16TH DAY OF DECEMBER 2016/25TH AGRAHAYANA, 1938

WP(C).No. 37436 of 2003 (F)

M.C.NO. 2/2002 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT-I, KOLLAM

PETITIONER(S) :

NAZEER @ OYOOR NAZEER,
S/O. SULAIMANKUNJU, THUNDAVILA PUTHEN VEEDU,
PADANAYARAKUNNU, OYOOR P.O.

BY ADV. SMT.DAYA K. PANICKER

RESPONDENT(S) :

SHEMEEMA, D/O. UMAIBA BEEVI,
SAKKEER MANZIL, KAMPIKKADA,
PERUMPUZHA P.O., KOLLAM.

BY ADVS. SRI.JACOB SEBASTIAN
SRI.A.RASHID

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25-07-2016, ALONG WITH W.P(C).NO. 25318 OF 2015 AND CONNECTED CASES, THE COURT ON 16-12-2016 DELIVERED THE FOLLOWING:

Msd.

WP(C).No. 37436 of 2003 (F)

APPENDIX

PETITIONER(S)' EXHIBITS :

EXHIBIT P1: TRUE COPY OF THE PETITION DATED 14.01.2002.

EXHIBIT P2: TRUE COPY OF THE TALAK KURI DATED 07.07.2001.

EXHIBIT P3: TRUE COPY OF THE REGISTERED DEED NO. 3338/2000
DATED 28.06.2000.

EXHIBIT P4: TRUE COPY OF THE ORDER DATED 14.01.2003 IN
M.C.NO. 2/2002 OF THE JUDICIAL FIRST CLASS MAGISTRATE
COURT, KOLLAM.

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

'CR'

A.MUHAMED MUSTAQUE, J.

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W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015
and 11438 of 2016

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Dated this the 16th day of December, 2016

JUDGMENT

The Holy Quran says:"Allah desireth for you ease and desireth not hardship for you." (Chapter 2:185) and further adds: "ye hath chosen you and hath not laid upon you in religion any hardships"(Chapter 22:78). Yet, fallen creations made their professed divine law difficult for them to follow as these writ petitions depict. The practice of triple talaq denounced by this court in Mohammed Haneefa Vs. Pathummal Beevi [1972 KLT 512] as "sufferings of monstrosity for Muslim wives" still resound in this court hall as State failed to soothe outcry of hapless women even after four decades.

2. These writ petitions before me were filed by different persons. Though these writ petitions are premised on different facts and are for different reliefs, a common legal question in regard to triple talaq practiced in India emerges out of it justifying its disposal by a common judgment.

Translation of Holy Qur'an relied on in this judgment are of

1) Marmaduke Pickthall - The meaning of the Glorious Koran

2) Basheer Ahmad Mohiyidin. Qur'an: The Living Truth,

3) Ibn Kathir. Tafsir Ibn Kathir (Abridged) W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016

3. W.P.(C) No.37436 of 2003 is filed by a Muslim husband aggrieved by the proceedings initiated while his wife (former wife) under section 3 of Muslim Women (Protection of Right on Divorce) Act, 1986. The petitioner was proceeded in the above case alleging that the petitioner had divorced his wife by a talaq kuri on 7.7.2001 and therefore, the wife is entitled to monetary reliefs from the petitioner including maintenance during iddat period. The precise case of the petitioner in this writ petition is that he did not dissolve the marriage. According to him, talaq kuri sent by him is not a legally valid one and it cannot be acted upon. The learned Magistrate overruling the objection of the petitioner took the view that talaq kuri is legally valid after referring to the fact his former wife observed iddat as per the law. The learned Magistrate came to a conclusion that marriage has been dissolved by talaq. By the above proceedings, learned Magistrate awarded a sum of Rs. 3,03,205 to be recovered from the petitioner. In this writ petition petitioner challenges Ext.P4 order on the ground that divorce is not in accordance with Islamic law.

4. W.P.(C) Nos. 25318 and 26373 of 2015 & W.P.(C) No.11438 of 2016 are filed by persons professing Islam and their marriages ended in divorce by triple talaq. They approached this court aggrieved by the action of passport authorities in not accepting their request to change the spouse name in the passport consequent upon dissolution of marriage by triple talaq. The parties are not disputing their dissolution of marriage by triple talaq pronounced by the W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 husbands. The stand of the passport authorities is that they cannot merely rely upon unauthenticated documents and production of the divorce decree is necessary to correct the spouse name in the passport. The passport authority particularly takes this stand in the light of directions of Hon'ble Supreme Court in Seema Vs. Aswin Kumar [2006 2 SCC 578]. The Hon'ble Supreme Court in the above case directed the State Government to compulsorily register all marriages irrespective of religious ceremonies rites under which it was performed. It is to be noted that the Kerala State has issued the Kerala Registration of Marriages (Common Rule), 2008 to register such marriage. This is equally applicable to Muslims in the State and in the country. This court by interim order directed the passport authorities to correct the spouse details based on the admission of dissolution of marriage by the other spouse. This court also as per the order dated 8.9.2015 directed the State Government to place their views for framing rules for compulsory registration of the divorce effected without the intervention of the court. However, the State Government is unable to come out with any positive response. Though the issue related to triple talaq does not directly crop up in these writ petitions calling upon this court to decide the validity of triple talaq, this court cannot ignore while granting a relief based on admission, the fact that direction of this court would result in greater or lesser extent of injustice if it remains oblivious to the repercussions of the repudiation of marriage by volition of individual. It is obvious that a

community cannot bear the adversities W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 for long in its affairs, whose determination lies in the hands of individuals which are often permeated by human instincts and impulsiveness. The very purpose and object of law are to sway such human tendencies in determining their cause by State intervention applying an idea of dominant consideration of public welfare and wellbeing of society at large. The very notion of the State that has arisen in response to a question how human conduct should be regulated to avoid self interest and emotion. It is to be noted that marriage, a social institution, emerges in modern State beyond its boundary of bonded personal relationship. The State recognise marriage more as a social institution by attaching it with burden and welfare measures. The State dole out various schemes and benefits in recognition of the marriage. Thus bundle of legal rights from such an arrangement ennobled in public law as well demand State intervention and regulation in the affairs of individual in regard to marriage.

5. The triple talaq in one utterance has to be understood as on pronouncing three talaq by a husband in a stretch results in divorce for once and for all. It means it proceeds from the own will of the husband without there being any attempt to reconcile marital discord during the prescribed period in Holy Qur'an. To understand Islamic talaq in its puritan form as contemplated in Holy Qur'an , the idea of justice in Islamic law is relevant. The fundamental object of justice in Islam is observance of commands of God as part of piety and achieve satisfaction of excellence for the life after death. It defines role of W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 individual in its conduct to others in social arrangments. It involves mutual obligations and trust to achieve fairness among the people.The Qur'anic verses in Chapter 57: 25 dispalys generality of justice. It says: "We sent Our Messengers with clear signs and sent down with them the Book and the Measure in order to establish justice among the people". In chapter 4 and 5 ceratin verses of Qur'an refer to equality of justice to be observed among relatives, friends, allies and enemies, Qur'an puts as follows:

"O you who believe! Stand out firmly for justice, as witnesses to Allah, even if it be against yourselves, your parents, and your relatives, or whether it is against the rich or the poor..." (Chapter 4:135) In Chapter 5: 8 Qur'an says as follows " O you who have believed ; Be steadfast witnesses for Allah in fairdealing, and let not hatred/malice of any people provoke you from deviating justice,act justly that is nearer to your piety".

Thus, justice is a component of faith and considered as first pillar to achieve peace and prosperity in a society and in the State without there being a distinction based on article of faith, relation ,color , creed or monetary considerations. The Islamic law, thus conceptualizes justice as a virtue of fairness one required to possess in dealing with others. Fairness encompasses both procedural and substantial norms.It therfore negates the imposing will of 'one' on another except through an ordained manner, Shariah prescribes.

W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016

6. The law of marriage in Islam is more than a contract, though it is performed through a contract. Muslim has to hold marriage as an integral part of their religion. In a reported hadith (saying and

traditions of Prophet Muhammad), Prophet Muhammad explicitly told believers that marriage completes half of religion (http:www.dailyhadith.abuaminaelias.com). Renowned author Wael B.Hallaq in his book "Sharia" refers marraige in Islam "as a sanctioned social and legal institution being cornerstone of social order and communal harmony, for as an institution it simultaneously regulated sexual, moral and family relationship". In Chapter 30 : 21 Qua'ran says" And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought.". The marriage as a social institution is the requirement of both men and women and the onus to preserve it falls on both. Fairness in marriage as contemplated in Islam is an obligation of partners to fulfill caring relationship between them. In Chapter 4:1 Qur'an puts mutual obligations of both man and woman as follows:

" O mankind Be mindful of your duty to Lord, who created you from one single soul(Adam) and out of it , created its mate (Eve) and out of two He bestowed the earth with many men and women. And be mindful of your duty to Allah through whom you plead your mutual rights and your obligations in respect of ties of kinship, Verily, Allah is watching over you"

W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 Mutual obligation so ordained through aforenoted verses confirms that in Islam justice is not a lopsided virtue that could be used by men to oppress women on their capricious whims and fancies. In the context of sharia justice is understood to mean to giving everyone his or her entitlement. In Chapter 10 of Shari'ah Law An Introduction, Mohammad Hashim Kamali refers to justice as follows:

"Justice is generally understood to mean 'putting everything in its rightful place' and in the context of Shariah as 'giving everyone his or her entitlement'. Islams's unqualified commitment to impartial justice is manifested in numerous places in the Qur'an. We also note that the Quar'anic conception of justice is neither rigid nor rule-bound but open to a variety of considerations."

7. In the above backdrop first question that arises for consideration is whether triple talaq as permitted in India in one utterance is valid or not in the light of Quranic injunctions.

It would be useful to refer following commandments in Qur'an Chapter 2 "228. Women who are divorced shall wait, keeping themselves apart, three (monthly) courses. And it is not lawfulf for them that they should conceal that which Allah hath created in their wombs if they are believers in Allah and the Last Day. And their husbands would do better to take them back in that case if they desire a reconcilliation. And they (women) have rights similar to those (of men) over them in kindness, and men are a degree above them. Allah is Mighty, Wise.

W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016

229. Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them except (in the case) when both fear that they may not be able to keep within the limits imposed by Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin

for either of them, if the women ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whoso transgresseth Allah's limits: such are wrongdoers.

230. And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorce her it is no sin for both of them that they come together again if they consider that they are able to observe the limits of Allah. These are the limits of Allah. He manifesteth them for people who have knowledge."

Talaq literally means setting free(Basheer Ahmad Mohyidin. Qur'an:The Living Truth. Manas Edition P 49). However in Islamic law it is understood as the repudiation of marriage by the husband.The verses referred to above speak about the substantive right of the husband to divorce and method of effecting divorce.

W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 The method of divorce is as follows:

> i Divorce will be effective only on completion three menstrual cycles. This has been termed as a waiting period (verse 228) ii During waiting period it is possible to reconcile either through physical intimacy or otherwise. This waiting period is essentially to rule out pregnancy. However waiting period is not mandatory if marriage is not consummated. This is clear from Chapter 33:49 wherein it is stated as follows:

"O ye, who belive ! If ye wed believing women and divorce them before ye have touched them, then there is no period that ye should reckon. But content them and release them handsomely.

iii Once waiting period is over and marriage is not reconciled,the divorce will become effective. This is the first effective divorce. iv. However on an afterthought , if they want to unite again in marriage, they can restore the marital status after legalizing marriage through a new marriage contract. Again if it is found that marriage is unworkable, the husband has to follow the same method in effecting first divorce to divorce second time. Once the divorce is effected on a second time, it is not possible for the husband to return to wife to revive the marriage. (Chapter 2:228) Divorce is twice means, right of husband to revive marriage is lost on repudiation of marraige second time. This verse infact put an end to practice prevailing at that time , when the man had right to take back his divorced wife as long W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 as she was still in iddat period. In Qur'an Tafsir Ibn Kathir (abridged version Vol.1 P 635) it is stated as follows: "Divorce is Thrice This honorable Ayah abrogated the previous practice in the beginning of Islam, when the man had the right to take back his divorced wife even if he had divorced her a hundred times, as long as she was still in her iddah (waiting period). This situation was harmful for the wife, and this is why Allah made the divorce thrice, where the husband is allowed to take back his wife after the first and the second divorce (as long as she is still in her Iddah). The divorce becomes irrevocable after the third divorce, as Allah said:"

v)There is no necessity to pronounce talaq in all waiting period.Talaq pronounced during purity of wife at first instance is suficient to make talaq as valid on completion of waiting period. Dr Tahir Mahmood an eminent Indian Scholar in his book titled "Muslim Law in India And Abroad" (Second Edition) says there is no requirement to pronounce three talaq in consecutive three months. The learned Author after referring Islamic Scholar Ashraf Ali Thanwi explains as follows:

"It is an absolutely wrong belief that three talaqs have to be pronounced in three consecutive months. The misunderstanding emanates from the legal rule that any talaq - first, second or third - can be pronounced only when the wife is not in her menses (called the period of tuhr], which for pronouncing three W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 talaqs one after the other will obviously require about three months. It certainly does not lay down a general law." (Tahir Mahmood in Muslim Law in India and abroad, Second Edition Pages 129 to 130)

8. Qur'anic injunctions also prescribe procedure for Talaq and rights available to wife while effecting Talaq through following Chapters Chapter 65 :1 "65.1 O Prophet! When you (intent to) divorce women (your wives), divorce them (before) their prescribed periods, and compute the term (exactly). And be mindful of your duty to Allah, your Lord. And do not expel them from their houses, or let them go forth (themselves), unless they commit a plain filthy action. And such are the bounds set by Allah. Whoever transgresses the bounds of Allah, does verily wrong his (own) soul. You do not know whether Allah may cause to happen, some new event thereafter.

2. So when they are about to draw near their term (appointed), then retain them in a suitable manner; or part with them in a suitable manner. And take two honest persons from among you, as witnesses, and offer straightforward evidence before Allah. That is the admonition given to him who believes in Allah and the Last day. And He (Allah) will cause a means of salvation for him who is mindful of his duty to Allah.i W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 Chapter 4:35 "And if you apprehend a breach between the two, then send an arbitrator (to them) from his people, and an arbitrator from her people, if they both want reconciliation, Allah will bring about accord between them. Surely, Allah (is All Knowing), All Aware"

Chapter 4 : 128 "And if a woman fears of either ill treatment or aversion from her husband's part, then there is nothing wrong on both of them that they arrange reconciliation (as mutual agreement), in between themselves. And such settlement of reconciliation is best. And (you know that) men's souls are (always) prone to covetousness. But if you do good (towards the women), and be mindful of your duty (to Allalh) then (know that) Allah is surely aware of all what you do"

129. And you can never perform equitably between women (your wives) - if it is your ardent desire. So incline not with total aversion (towards one), so as to leave the other, hanging (i.e. Neither divorced nor married). And if you be reconciled and be mindful of your duty (to Allah), so Allah is surely The Most Forgiving, The Most Merciful.

These verses clearly establish the following:

i) Effecting divorce during menstrual period is prohibited. ii Wife has right of residence at husband `s house till the waiting period and husband has no right to evict her without any just cause.

iii) Talaq has to be pronounced in the presence of two witnesses

iv) Verses in Chapter 4 speak about conciliation as the method to W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 workout differences or resolution of the marital disputes. It shows that that spouses should attempt to avoid divorce and separations should be done in a decent manner. The verse in Chapter 4:35 refers conciliation should precede initiation of steps for divorce. Nature of conciliation is also mentioned involving members of the community. Quar'an emphasises dispute resolution in general through a peaceful manner in Chapter 49:9, 10, It says as follows:

9. "And if two parties of believers fall to fighting, then make peace between them. And if one party of them doth wrong to the other, fight ye that which doth wrong till it return unto the ordinance of Allah; then, if it return, make peace between them justly, and act equitably. Lo! Allah loveth the equitable.

10. The believers are naught else than brothers. Therefore, make peace between your brethren and observe your duty to Allah that haply ye may obtain mercy."

The conciliation as referred in Chapter 4:35 is the typical conciliation to be adopted in marital discord. The conciliation should be attempted before and after divorce (during waiting period - Iddah). In authentic hadith (saying of Prophet) it is stated that of the lawful acts the most detestable to Allah is divorce (Hadith No.217 Abdu Dawud) (http:// www.hadithcollection.com) Thus divorce is seen as last resort after attempted failure in conciliation.

9. It is to be noted that Qur'an nowhere approves triple talaq in one utterance and on the other hand promotes conciliation as best method to resolve the marital discord. The method and procedure of W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 divorce as above has been referred to by all leading Islamic scholars. They also have frowned upon triple talaq in single utterance to effect divorce saying that it revolts against Allah`s law. One of the eminent Islamic scholars Sheikh Yusuf al Qaradawi in his book 'The Lawful and the Prohibited in Islam' refers to method of divorce and holds that Triple talaq in single utterance is against God`s law. The relevant portion reads as follows (page 210).

"The Muslim is allowed three chances, that is to say, three pronouncements or acts of divorce on three different occasions, provided that each divorce is pronounced during the time when the wife is in the period of purity during which he has had no intercourse with her.

A husband may divorce his wife once and let the 'Iddah" pass. During the period of iddah they have the option of reconciliation without the necessity of remarriage. If, however, this waiting period expires without reconciliation, they are now fully divorced. Each of them is free to marry someone else or to remarry each other; should they want to remarry each other, a new marriage contract is required.

If after the first divorce the husband is reconciled with his wife but later hostility and conflict begin all over again, all efforts at reconciliation and arbitration resulting in failure, he may divorce her a second time in the same manner as described above In this case, too, he can return to her during the 'iddah' without remarriage, or after the iddah has expired through a new marriage contract.

But it may happen that although he is reconciled with his wife again after the second divorce, he may later divorce her for the third time. This W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 will then be a clear proof that the dislike between the two of them runs very deep and that they are incapable of living together. If this third divorce takes place, it is not permissible for the husband to return to his wife during her iddah, nor may remarry her after the iddah unless she has been married to another man, to live with him as a permanent and true wife, and he then subsequently divorces her. It is, however, totally prohibited for other man to marry and divorce her simply in order to make her halal for her first husband.

Those muslims who utter three divorce pronouncements at one time or in one statement are rebels against Allah's law and are deviating from straight path of Islam. Once the Prophet (pbuh) was informed about a man who had pronounced three divorces at one time. He got up in anger saying, "Are you defying Allah's Book even whereas I am still alive among you?". A man stood up and said. " O Messenger of Allah, shall I not kill him."

In Qur'an commentary of well known author Ibn Kathir it is commented as follows "Pronouncing Three Divorces at the same Time is Unlawful The last Ayah we mentioned was used as evidence to prove that it is not allowed to pronounce three divorces at one time. What further proves this ruling is that Mahmud bin Labid has stated as An-Nasar recorded - that Allah's Messenger was told about a man who pronounced three divorces on his wife at one time, so the Prophet stood up while angry and said W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 " The Book of Allah is being made the subject of jest while I am still amongst you?" (emphasis supplied) A man then stood up and said, "Should I kill that man, Messenger of Allah?"(Vol. 1 page 640) The book titled 'The Islamic Digest of Aqeedah and Fiqh' by Mahmoud Rida Murad states that Triple Talaq in single session is bid 'ee which means it does not conform with the teachings of Prophet. It is stated by him as follows "The bid'ee Divorce (1) The Divorce which does not conform with the respective Islamic judicial laws, that is, when the husband divorces his wife during her menstruation, or after having an intercourse with her, when pregnancy cannot be verified at that point. Or when the husband trebly divorces his wife in a single session by saying for example: "You are divorced, you are divorced, you are divorced". This type of divorce is improper, and a sinful act on the part of the husband.

The divorce takes effect when the husband issues triple divorce whether in a single sentence, or in a single session during the wife's purity from menstruation period. Such divorce would be considered as single-term-divorce associated with a sin on the part of the husband for giving three-in-one divorce." (page 212)

10. The sharia or Islamic law though did not refer to the constituent element of justice, by indicating fairness justice as in the context of divorce it means there must be every effort to preserve the

marriage. It presupposes divorce must be free from the arbitrary or W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 capricious action on the part of the husband meaning thereby, it must be on a reasonable cause and after adhering to reasonable procedure.

11. The judicial pronouncement by this Court and various other High Courts and Hon'ble Supreme Court clearly indicate the line of judicial disposition deprecating triple talaq without reasonable cause. Late V.R.Krishna Iyer as a judge of this court in his illustrious judgment in Yusuf Rowthan Vs. Sowramma [1970 KLT 477], Paragraph 7 reads as follows:

"The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce and this is a relevant enquiry to apply S.2. (ix) and to construe correctly S.2 (ii) of the Act."

Baharul Islam (J), his Lordship then as a Judge of Gouhati High Court after referring to various Islamic scholars in Jiauddin Ahmed v. Anwara Begum 1981 1 GLR 358 para 14 observed as follows: "The modern trend of thinking is to put restrictions on the caprice and whim of the husband to give talaq to his wife at any time without giving any reason whatsoever. This trend is in accordance with the Quranic injunction noticed above, namely that normally there should be avoidance of divorce, and if the relationship between the husband and the wife becomes strained, two persons-one from each of the parties should be chosen as arbiters who will attempt to effect reconciliation between the W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 husband and the wife; and if that is not possible the talaq may be effected. In other words, an attempt at reconciliation by two relations one each of the parties, is an essential condition precedent to talaq." In yet another Judgment of Baharul Islam (J), in Division Bench of Gauhati High Court in Must.Rukia Khatun Vs. Abdul Khalique Laskar (1981) 1 GLR 375 in paragraph 11, it was opined as follows: "11. In our opinion the correct law of 'talaq' as ordained by Holy Quran is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. In our opinion the Single Judge has correctly laid down the law in Criminal Revision No.199/77 (supra) and, with respect the Calcutta High Court in ILR Cal 833 and the Bombay High Court in ILR 30 Bom 537 have not laid down in the correct law."

In Shamim Ara Vs. State of U.P. [2002 (7) SCC 518]. The Hon'ble Supreme Court after referring to various judgments of High Courts held that law propounded by Baharul Islam (J) is the correct law regarding talaq by Muslim husbands.

The Division Bench of this court in Kunhimohammed vs. Ayishakutty [2010 (2) KHC 64].

"Following the decision of the Supreme Court Shamim Ara (supra) and the decision of the Division Bench in Ummer Farooque (supra), it is evident that compliance with the mandate of Ayat 35 of Sura IV that two arbiters must be appointed and an attempt for reconciliation by them W.P.(C)

Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 must precede the divorce is an essential, non-negotiable and unavoidable pre-requisite."

12. Triple talaq as practiced in India had its beginning during the period of second caliph Umar. During his period, certain women complained of action of their husbands pronouncing three talaqs in haste and treated it as single divorce for an excuse to take back the wife. Considering the rampant misuse of talaq, and its oppressive character, with an intention to put an end to the practice of taking back wives in a triple talaq pronounced in haste, by executive decision, Caliph Umar ordered that such talaq is irrevocable. In English Tafsir of Sayyid Abdul Ala Maududi discussed this practice in Chapter 65. "Ta'us and 'Ikrimah say that only one divorce takes place if divorce is pronounced thrice at once, and this very view has been adopted by Imam Ibn Taimiyyah. The source of his opinion is that Abu as-Sahba' asked Ibn 'Abbas: 'Don't you know that in the lifetime of the Holy Prophet (upon whom be Allah's peace) and Hadrat Abu Bakr and in the early period of Hadrat 'Umar a triple divorce was considered a single divorce? He replied: Yes." (Bukhari, Muslim). .And in Muslim, Abu Da'ud and Musnad Ahmad, Ibn Abbas's this statement has been cited: "In the lifetime of the Holy Prophet (upon whom be peace) and Hadrat Abu Bakr and during the first two years of the caliphate of Hadrat `Umar a triple divorce was considered a single divorce. Then Hadrat `Umar expressed the view: As the people have started acting hasty in a matter in which they had been advised to act judiciously and prudently, why should we not enforce this practice? So, he enforced It." But this view is not acceptable for several reasons. In the first place, according to several traditions lbn `Abbas's own ruling was against it, as we have explained above. Secondly, it is contrary to those Ahadith also, which have been reported from the Holy Prophet (upon whom be peace) and the major Companions, in which the ruling given about the pronouncing of a threefold divorce at one time is that all his three divorces become effective. These Ahadith also have been cited W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 above Thirdly, from Ibn `Abbas's own tradition itself it becomes evident that Hadrat `Umar had publicly enforced the triple divorce in the assembly of the Companions, but neither then nor after it the Companions ever expressed any difference of opinion. Now, can it be conceived that Hadrat `Umar could decide an issue against the Sunnah? And could the Companions also accept his decision without protest? Furthermore, in the story concerning Rukanah bin `Abd-i Yazib, a tradition has been related by Abu Da'ud, Tirmidhi, Ibn Majah, Imam Shafe`i, Darimi and Hakim, saying that when Rukanah pronounced three divorces on his wife in one and the same sitting, the Holy Prophet (upon whom be peace) asked him to state on oath whether his intention was to pronounce one divorce only, (That is, the two subsequent divorces were pronounced only to lay emphasis on the first divorce; the triple divorce was not intended to create separation permanently). And when he stated this on oath, the Holy Prophet gave him the right to take his wife back. `This brings out the truth of the matter as to what kind of divorces were considered a single divorce in the earliest period of Islam. On this very basis, the interpreters of the Hadith have explained the tradition of Ibn 'Abbas thus: As in the early period of Islam deceit and fraud in religious matters was almost unknown among the people, the statement of the pronouncer of a triple divorce was admitted that his real intention was to pronounce only a single divorce, and the two subsequent divorces had been pronounced only for the sake of emphasis. But when Hadrat `Umar saw that the people first pronounced three divorces in haste and then presented the excuse of pronouncing them only for the sake of emphasis, he refused to accept this excuse. Imam Nawawi and Imam Subki regard this as the beat interpretation of the

tradition from Ibn `Abbas, Finally, there is disagreement in the traditions of Abu aa-Sahba' himself, which he has related concerning the saying of Ibn `Abbas. Muslim, Abu Da'ud and Nasa'i have related from this same Abu as-Sahba' another tradition; saying that on an inquiry by him. Ibn `Abbas said: ` When a person pronounced a threefold divorce on his wife before consummation of marriage, it was considered a single divorce in the lifetime of the Holy Prophet (upon whom be peace) and Hadrat Abu Bakr and in the early period of Hadrat 'Umar," Thus, one and the same reporter has reported from Ibn 'Abbas traditions containing two divergent themes and this diversity weakens both the traditions." W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 A renowned Islamic scholar in India Moulana Wahidul Khan in his Urdu Book Hikmatul Islam refers to this practice allowing triple talaq by Caliph Umar.

This pragmatic method of divorce was followed in the early period of Islam. But towards the end of the period of the first Caliph, Hazrat Abu Bakr, some men, out of anger, began issuing three utterances of divorce in one sitting. At this time, this practice was an exception, but by the time of the latter half of the period of the Caliphate of Hazrat Umar, the second Caliph, it had become increasingly common.

In the face of this, and in his capacity as Caliph, Hazrat Umar decided to take action against this misuse of the law. Hence, in the case of some men he accepted their issuing three utterances of divorce in one sitting as constituting an irrevocable divorce. But along with this he also arranged for these men to be physically punished by being whipped on their backs.

This practice of Hazrat Umar was not based on any divine revelation. Rather, it was his own executive order, the intention behind which was to lessen, through stern punishment, such a form of divorce. And this is precisely what happened as a result. (Translation :Yoginder Singh - Islamic Voice Dec 2008) Dr.Thahir Mahmood in Muslim Law in India and Abroad also refers to this aspect as follows: (P 132).

"There is no verse in the Quran that can be interpreted or stretched to mean approval of the so-called triple talaq. As regards the Hadith, the Prophet was infuriated when somebody pronounced triple talaq and had W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 condemned it as "Playing with the book of God while I am still Alive". Years after the Prophet's demise his second Caliph, Umar, gave effect to triple talaq in some cases at the insistence of the wives, but after inflicting on the husband the traditional punishment of flogging. It is shocking that his action should have been treated as a binding precedent for giving effect to such an unlawful and repulsive action in every case, even against the wishes of a repentant husband and the aggrieved wife." "

Thus from a conspectus of understanding of Islamic law as above, it can be found that:

i) Triple talaq in one utterance is not valid according to Qur'anic injunction.

ii) It was allowed during the period of Caliph Umar by an executive order to alleviate the grievances of the women and not as a right to conferred upon the husband. This executive action was exercised

in a specified time in a special circumstances and therefore, it cannot apply as the general law regarding divorce by the husband.

Iii) Violation of Qur'anic injunction regarding triple talaq in one utterance is punishable under penal law.

13. This case only symptomize the harsh realities encountered by women belonging to Muslim community, especially of the lower strata. It is a reminder to the court unless the plight of sufferers is alleviated in a larger scheme through legislation by the State, justice will be a distant dream deflecting the promise of justice by the State "equality before the law". The State is constitutionally bound and W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 committed to respect the promise of dignity and equality before law and it cannot shirk its responsibility by remaining mute spectator of the malady suffered by Muslim women in the name of religion and their inexorable quest for justice broke all the covenants of the divine law they professed to denigrate the believer and faithful. Therefore, the remainder of the judgment is a posit to the State and contribution for settlement of the 'legal vex' which remains unconcluded more than four decades after this court's reminder in Mohamed Haneefas' case (supra)

14. The State is constitutionally obliged to maintain coherent order in the society, foundation of which is laid by the family. Thus sustenance or purity of the marriage will lay a strong foundation for the society, without which there would be neither civilisation nor progress. My endeavor in this judgment would have been over with the laying of correct principles related to triple talaq in Qur'anic perspective to declare the law and to decide the matter. However, I find the dilemma in this context is not a singular problem arisen demanding a resolution of the dispute between the litigants by way of adjudication. But rather it require a State intervention by way of legislation to regulate triple talaq in India. Therefore, settlement of law relating to talaq is necessary and further discussion is to be treated as an allude for the State to consider for possible reforms of divorce Law of Muslim in this Country. The empirical research placed herein justifies such course of action to remind the State for action. It is to be noted, had the Muslim in India W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 been governed by the true Islamic law, Penal law would have acted as deliverance to sufferings of Muslim women in India to deter arbitrary talaq in violation of Qur'anic injunction.

15. The empirical research conducted by many researchers brings home a fact that most of the parties are ignorant about the procedure and provisions relating to talaq as referred in Qur'an or sharia. A Senior District Judge of the Higher Judicial Service in the State of Kerala Dr.Kausar Edappagath in his research for the doctoral program had conducted empirical study related to the triple talaq by the husband. His research findings has been compiled and published as a book 'Divorce and Gender Equity in Muslim Personal Law of India'. In his book he refers as follows:

"The jurisprudential controversy regarding the validity and effect of the triple divorce formula apart, it remains a fact that a predominant majority of Muslims in the country have known it as the only 'Islamic' process of divorce. In a study conducted by Sabita Hussain in Darbhanga town in Northern Bihar it was found that majority of the women respondents (62 percent) were not aware of the true

'Quaran' provisions relating to talaq and the common form of divorce prevalent among the community was talaq-e-biddat. In yet another study conducted by Alkha Singh among 300 Muslim women, 150 each from Delhi and Lucknow, none of the respondents had knowledge about the true practice in Shariah for talaq. They all believed that the divorce is final and irrevocable by the pronouncement of the word talaq thrice in one breath. W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 In the present empirical study, the respondents' level of knowledge and awareness about the rules and regulations of talaq, as laid down in and traditions of the Prophet was ascertained. Majority of the divorced man and women possessed no knowledge about the correct law of divorce. Very few women were familiar with the true Muslim law and procedure of divorce. Only 8.5% women were aware that under true shariah law, the pronouncement of talaq must be preceded by reasonable cause,only 15% alone were aware that under true shariah law, the pronouncement of talaq must be preceded by an attempt of reconciliation. However, majority of the respondents of the Third and Fourth groups were not aware (sic.) of the same. Only 26.5% divorced men were aware that under true shariah law, the pronouncement of talaq must be preceded by reasonable cause and 29 percent of them were aware that it must be preceded by an attempt of reconciliation (see Table 5: Knowledge and Awareness about the Rules and Regulations of Talaq-Response of Divorced Women and Men, Columns: 5 a, 5. b). The finding further reveals that 84 percent of the divorced women and 72.5% the divorced men were unaware of the most laudable pattern of divorce (talaq-e- sunnat) (see Table 5. Knowledge and Awarness about this Rules and Regulations of Talaq - Response of Divorced Women and Men (Column 5 C.) However, 55 percent of the Third group and 85 per cent of the Fourth group communicated their awareness of the practice of triple divorce being contrary to the provisions of the Quaran.Only 8 percent and 5% percent, respectively, expressed their ignorance. 45 percent of the Third group stated that it is a valid form of divorce (see Table 6:Knowledge and Awareness about the Rules and Regulations of Talaq-Response of the Third & Fourth Groups, Column 6: c)The above findings indicate that common Muslims did not have clear knowledge about the correct law on divorce, while majority of the elite and educated class as well as the clerics have clear knowledge about it.

This study further shows that there is great divergence between the theory and practice of divorce, particularly talaq. There is evidence to show that the system of triple talaq is used by unscruplous men to get to rid of an unwanted wife without assigning any reason or being called W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 upon to account for their action to their wives or any other body. The common form of divorce prevalent among the population studied, irrespective of differences in eduction sect, social class, and rural or urban background, was talaq-e-biddat. In 88 percent of the cases, divorce took place through the pronouncement of talaq. Out of which, 84.7 percent were through triple pronouncement of talaq in one sitting. In 92.5 per cent of the cases, the divorced women considered divorce to have been arbitrary and without any reason; they had been divorced again their wishes. Only in 11.3 percent cases, talaq was pronounced in three clear intervals as stated in the Qur'an and all the Qur'anic formalities of talaq were observed only in 4 percent cases. In 24.3 per cent cases, talaq was given verbally, in 42.4 per cent cases, it was in writing, in 28.2 per cent cases it was communicated through a mosque commitee, and in 5.1 per cent cases, it was communicated through some intermediary. Majority of the husbands did not wait for three menstrual cycles to pronounce the final talaq. Almost all the respondents (92.5 per cent) agreed that their husband took initiative for divorce and thus had the upper hand to initiate divorce

(see table 7: Method and Modality Adopted for Divorce -Divorced Women's Response Columns : 7 a, 7 b. 7 c. 7 d, 7 e,) In the study conducted by Anindita Das Gupta among 40 divorced women, with a similar economic background, in the cirty of Gauhati in Assam, it was found that in 90 per cent of the cases the divorced women considered their divorce as having been arbitrary and without reasonable cause. In the study conducted by Muniya Raziq Khan among 200 Muslim women in Mirzapur District in Uttar Pradesh, it was revealed that almost all the divorces were pronounced at one sitting, pronouncing the word talaq thrice. Most of the respondents did not know the correct procedure for talaq. On the other hand, Nizar Ahmed Ghan's study in the state of Jammu & Kashmir shows that divorce among Muslims is not particularly common or easy in the state and Muslim husbands hardly finds it possible to be entirely arbitrary in exercising this power and that the incidence of arbitrary divorce in the state is very limited. (pages 95 to 97) These empirical studies establish triple talaq as practiced in India is W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 not in accordance with Qur'anic injunction.

16. This takes me to the question why the State is so hesitant to reforms. It appears from public debate that resistance is from a small section of Ulemas (scholars within the society) on the ground that sharia is immutable and any interference would amount to negation of freedom of religion guaranteed under the constitution. I find this dilemma of Ulema is on a conjecture of repugnancy of divine law and secular law. The State also appears as reluctant on an assumption that reforms of religious practice would offend religious freedom guaranteed under the Constitution of India. This leads me to discuss on facets of Islamic law. I also find it equally important to discuss about the reforms of personal law relating to triple talaq within the constitutional polity, as the ultimately value of its legality has to be tested under the freedom of religious practices.

17. This, however, begs the whole question whether personal law is a law within the meaning of Art.13 of the constitution and can it be subjected to intervention of the State. Constitution provides religious freedom to individual and to the denomination in which individual belongs. In British Era also personal law applicable to the communities was allowed to be practiced according to the choice of the communities. In Inayatullah v. Gobins Dayal [(1885) ILR 7 ALL. 775] Mahmood J. observed: "It is to be remembered that Hindu and Muhamedan Laws are so intimately connected with religion that they cannot readily be dissevered from it." W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 The Constituent Assembly discussions show that personal law has an intimate connection with religious freedom guaranteed under the Constitution. The personal law has to be understood as a social arrangement of men in a closed group (religious community) to shape their activities of interpersonal relationship either on a notion of divinely ordered commands or religious practices. The obvious reference to the custom or usage under Article 13 points out to the fact that constitution makers do not want to include personal law within the ambit of Article 13, as the same is intimately connected with liberty to practice religion of one's choice. The constitution makers, therefore, do not want to interfere with religious practice of such protected groups except on a satisfaction that such arrangement within the group would offend public order, morality or health. The freedom to intervene by the State in the matter of religious practice is so explained in Art.25 (1). The guarantee to practice religion under Article 25 (1) certainly would include in its meaning Personal Law connected to such affairs. The personal law and right to practice religion is so intimately intertwined and not so easily can be separated. These arrangements, therefore, never

intended to be interfered under the constitutional provisions unless its efficacy is required to be tested on the objectives stated in Article 25(1). Thus law referred in Article 13 and in Article 372 of the constitution must be either in the nature of a public rule of coercive order or such other nature explicitly stated in Article 13 and it does not take in any social arrangement within the social group or religious W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 community. The fundamental distinction between Personal Law and 'Law' within the meaning of Article 13 is drawn based on a manner in which behavior of men is regulated. If men are free to be governed by their own arrangement based on a religious belief, such permitted arrangement is to be called Personal Law. On the other hand 'Law' referred in Article 13 is a public Rule. The Public Rule I refer here as a legal order imposed on a subject in an exercise of sovereign function of the state for a framework to regulate the behavior of the subject. The freedom given to the protected groups has intimacy with the liberty granted to them under the Constitution. However, these arrangements once transcended into a positive command of the state certainly it will become 'law' within the meaning of Article 13 of the constitution of India. It is to be noted the requisite standard of constitutional efficacy of arrangement within the group has been defined in the Constitution itself. Therefore, it is not open for the state to test such arrangement based on outside-ethos or norms unrelated to the group. Any interference of such arrangement would certainly negate the religious freedom guaranteed under the Constitution. The Bombay Highcourt in the State of Bombay vs. Narasu Appa Mali [AIR 1952 Bom. 84] through Justice Chagla on a reasoning that Article 13 mentions about social arrangement of 'custom' or usage alone in the Article is a clear pointer to the intention of constitution makers to exclude the personal law from the purview of Article 13, it was further observed as follows: W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 "Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole." (Page 86)

18. The Hon'ble Supreme Court in Sri Krishna vs. Mathura Ahir and Others [AIR 1980 SC 707] held that fundamental rights under part III of the constitution does not touch upon the personal law of the parties. The Hon'ble Supreme Court in Ahmedabad Women Action Group (AWAG) and others Vs. Union of India [1997 (3) SCC 573] turned down the challenge regarding personal law on the ground of violative of fundamental rights. The Division Bench of this court in P.E.Mathew vs. Union of India [AIR 1999 Ker. 345] efficacy of personal law cannot be tested under part III of the Constitution. In the light of above discussions, it can be concluded that Article 25 protects freedom of a social group - community - based on religious practices or beliefs which include Personal Law. Therefore, having different personal law for different communities would not offend Article 14.

19. However, such a protected group or society cannot discriminate its members on gender basis without any support of religious precepts. Any unreasonable discrimination within the group based on gender certainly would deny equality before the law. The protection envisaged under the Constitution, therefore, cannot be extended to apply to the group beyond the boundaries of protection W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 envisaged under Article 25. The test of reasonableness equally would apply to such arrangement within the group. However such test of reasonableness has to be based on religious precepts of the groups not based

on any ethos outside the religion. Entry 5 in List III of the constitution is a clear pointer to the limitation of power of law making by the legislature. The State, therefore, can intervene in personal law to the permissible limit as discussed above either bringing legislation in tune with the religious precepts or doctrine or practices or by making secular law not repugnant to the religious practices or beliefs of a particular group. As noted in the earlier part of this judgment, the divorce may result in serious social repercussion. The worst affected are the children born in the wedlock. The empirical finding establishes that triple talaq as practiced in India in almost all the case is not by following Qur'anic injunctions and such practices are allowed in the name of religion, without its backing. It is not possible for the State to curb such practices by invoking penal law alone for the Muslims in India. The only way out for the State is to find out the meaning of rationale of the personal law and to regulate divorce in accordance with the purpose of law. This leads to the important question within the perspective of Islamic law as to the reforms in compliance with divine law as professed by Muslims. The resistance for the reforms as pointed out in earlier paragraphs of this judgment is on a notion of immutability of law of God. Therefore, I am of the view that the question relating to the reforms will have to be answered from Shariah perspective. W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016

20. Whether it is possible to reform the personal law of Muslims based on sharia.

If the State makes a law governing the divorce for Muslims in India that law made by the State is a State law, it can in no way be called a law encroaching upon God's law. Then the only question would be whether such law is repugnant to God's law and deny the right to practice religion. The immutability of sharia is, therefore, a fallacy and that does not arise as far as the law making is concerned within the constitutional scheme in India.Neither in Qur'an nor in the Hadith (life or sayings of the Prophet), which are the foundation of the Islmaic law, any form of Government is conceived to implement law. When Prophet passed away he did not name any one as his successor. Therefore, it is clear, in certain areas sharia law has to be articulated through human intervention as it only gives general guidelines. It is one thing to say that sharia is immutable and it is different to say that human intervention is possible to implement an understanding of shariah law. The divine revelation is different from human intervention articulating such divine revelation. This articulation of law through human intervention is, in fact, is called Fiqh. In the book written by Dr. Abu Ameenah Bilal Philips titled Evolution of Fiqh defines Fiqh as 'True understanding of what is intended' (page 1). In Mukhtasar-Al Quduri Hanafi Fiqh by Sami Jamal Mohiaddine 'fiqh' is referred to as jurisprudence and defined it as a practical implementation of sharia W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 through human understanding. Dr.Abu Ameenah Bilal Philips in his book on Fiqh (supra) has drawn distinction between fiqh and sharia as follows:

> 1.Sharee'ah is the body of revealed laws found both in the Qur'aan and in the Sunnah, while Fiqh is a body of laws deduced from Sharee'ah to cover specific situations not directly treated in sharee'ah law.
>
> 2.Sharee'ah is fixed and unchangeable, whereas Fiqh changes according to the circumstances under which it is applied.

3.The laws of Sharee'ah are, for the most part, general: they lay down basic principles. In contrast, the laws of Fiqh tend to be specific: they demonstrate how the basic principles of Sharee'ah should be applied in given circumstances. (Page 2)

21. The fiqh therefore, has to be understood as practical rules for implementation of Sharia made through human intervention by referring to sharia. As noted above sharia consists rules, as referred in Quar'an and Hadith. Hadith is based on the life, teaching and sayings of Prophet Muhammad. As far as the believer is concerned, sharia is immutable. Therefore, the point to be considered is whether sharia is ordained for adaptability and change. The fiqh acts as a pointer to the fact, certain types of law applicable to Muslim under sharia can be subjected to adaptation and change in tune with time. Dr.Bilal Philip in his book (supra) discuss about the difference characteristics of fiqh after the demise of Prophet. He observes as follows: "As we trace the historical development of Fiqh and the evolution of Madh-habs, we can see that Fiqh showed different characteristic trends W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 during different periods of political and socio-economic development. First, we can discern that the the outstanding characteristic of Fiqh during the period of the Righteous Caliphs was its realism; that is, it was based on actual problems rather than on hypothetical or imaginary ones. This realistic form of Fiqh was later referred to in Arabic as al- Fiqh-al-Waqi'ee (realistic fiqh) to distinguish it from the hypothetical fiqh advocated by the '"Reasoning People" (Ahl ar-Rai), who came to prominence in Kufah, Iraq, during the time of the Umayyads" (Page 41) The author also refers in the same about the triple talaq enforced during the period of Caliph Umar on account of change in social conditions. The author refers that fiqh was used to implement law according to the change in social conditions. He observes as follows: Owing to the tremendous influx of wealth from newly acquired territories, marriage (both single and multiple) became easier to contract and, consequently, divorce became alarmingly more frequent. To discourage abuse of divorce, Caliph Umar altered an aspect of the law. In the time of the Prophet the pronouncement of three divorce statements at any one time was considered to be merely one divorce statement and it was reversible. Caliph 'Umar declared such multiple pronouncements to be binding and therefore irreversible" (Page 43) In sharia Law written by Mohammad Hashim Kamali (supra) he states fiqh is concerned with manifest aspect of individual conduct and observes that certain areas of shariah provides adaptation and change W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 in tune with time and that can be elaborated by fiqh. His views are as follows:

"Shari'ah provides clear rulings on the fundamentals of Islam, its moral values, and practical duties such as prayers, fasting, legal alms(zakah), the hajj and other devotional matters. Its injunctions on the subject of what is lawful and unlawful, halal and haram are on the whole definitive, and so are its rulings on some aspects of civil transactions (mu amalat. But Shariah is generally flexible with regard to larger part of mu'amalats. criminal law (with the exception of the prescribed punishments, or hudud), government policy and constitution, fiscal policy, taxation, economic and international affairs. On many of these themes Shari'ah provides only general guidelines, which are elaborated in fiqh. "(emphasis supplied) Fiqh is defined as knowledge of the practical rules of Shari'ah which are derived from the detailed evidence in the sources. The rules of fiqh are thus concerned with the manifest aspects of individual conduct. The practicalities of conduct are evaluated on a scale of five values; obligatory, recommended, permissible, reprehensible and forbidden. The definition of fiqh

also implies that the deduction of the rules of fiqh from the Qur'an and Sunnah is through direct contact with these sources."(Page 41) The learned author also refers to circumstances in which fiqh occurs and states as follows:

"The rules of fiqh occur in two varieties. First, rules which are conveyed in a clear text such as the essentials of worship, the validity of marriage W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 outside the prohibited degrees of relationships, the rules of inheritance and so forth. This part of fiqh is simultaneously a part of Sharia'ah. Second, rules that are formulated through the exercise of Itjihad on parts of the Quran and Sunnah which are not self evident. Because of the possibility of error in this exercise, the rules that are so derived do not command finality. These are not necessarily a part of Shariah and the mujtahid who has reason to depart from them may do so without committing a transgression." (Page 42) He also states that fiqh can be divided into two categories. One is related to devotional matter and the other is relating to civil transaction. It is further stated as follows:

"The corpus juris of fiqh is divided into the two main categories of devotional matters (ibadat) and civil transaction (muamalat). The former is usually studied under the six main headings of cleanliness, ritual prayer, fasting, the hajj, legal alms (zakah) and jihad (holy struggle), and the schools of law do not vary a great deal in their treatment of these subjects. Juristic differences among the schools occur mainly in the area of muamalat. These are generally studied under the seven headings of transactions involving exchange of values (which subsume contracts), matrimonial law, equity and trusts, civil litigation, rules pertaining to dispute settlement in courts and administration of estates. This body of the law is generally subsumed under what is known, in modern legal parlance, as civil law." (Page 42) The author also states as follows :

"The jurists in all of these schools are on the whole in agreement over the binary division of the rules of fiqh into matters of worship(ibadat), whose principal objective is exaltation and worship of God Most High, closeness to Him, and earning of reward in the hereafter, and civil transactions W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 (mu'amalat), whose main objective is realization of benefit to mankind" (Page 43)

22. These discussions establish that rules related to the worship and certain specific rules, which are mandatory nature, cannot be subjected to any change. However, certain types of rules can be changed in tune with time. It is in that area sharia provides general guidelines, such change would be effected through exercise of human reasoning based on social changes, without there being a repugnance to the core values in the sharia. This process is ijithihad (independent reasoning). It is also interesting to note the comments of Hashim Kamli in his book referred to above, relating to the flexibility of sharia law :

> "But the shari'ah is generally flexible in regard to the larger part of mu'amalat, criminal law, government policy and constitution, referred to as siyasah shariyyah, fiscal policy, taxation, economic and international affairs. On many of these themes the Shari'ah only provides general guidelines whose details could be determined, adjusted and modified, if necessary, through the exercise of human reasoning and

ijtihad. The Shari'ah requires, for example, objective and impartial justice and it has laid down certain specific guidelines towards achieving it, but the methods, conditions and procedures that are applied towards the same end may be liable to change in the light of the changing experience and conditions of society." (Page 50) W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 He also quote Ibn Qayyim al-Jawziyyah a renowned 13th century Islamic jurist and states as follows:

"The Laws of Shariah, Ibn Qayyim al-Jawziyyah observed, are of two kinds:Firstly laws which do not change with the vicissitudes of time and place or the propensities of ijtihad, such as the obligatoriness of the wajibat (pl.of wajib), or illegality of muharramat(pl.of haram), the fixed quantities of inheritance and the like. They do not change and no ijtihad may be advanced so as to violate the substance and character of the Shari'ah in these areas. The second variety of laws are those which are susceptible to change in accordance with the requirements of public interest (maslahah) and prevailing circumstances, such as the quantum type and attribute of derrent punishments (al-ta'zirat).

The Lawgiver has permitted varation int hese in accordance with the dicates and considerations of maslahah' Qur'an covers every aspect of life of a man and law referred therein is more of a metaphysical nature for human to act in reality consistent with spirit and content. In the Book titled 'What is Shariah' written by Al-Haj A.D.Ajijola, the author refers about idealistic approach of Qur'an to a society as follows:

"However, Qur'an and Sunnah do not contain specific detailed provision of law governing all human activities. It is only in few cases that detailed provision is given, say, status of women and inheritance. Details of law governing human activities are left out.

That which has been left out i.e. the detailed law is meant to be devised by human reasoning in accordance with the prescribed W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 standards in Shariah and values in consonance with the frame work by mutual consultation Quar'an :100 and Qur'an 42:39 to meet the ever-changing needs of man when it should arise, always bearing in mind when extending its principles by reasoning that the overall standard is that maroof i.e.equity should be fostered and Munkar is to be eschewed.

The development of Islamic law from Shariah has been based on the principle of equity and good conscience with due regard to the state of the society and circumstances of the people."

23. It is a clear finding that certain types of law are amenable for change in tune with time. Another Islmaic scholar Khaled Abou El Fadl in his book 'Speaking in God's Name' discussed about

independent reasoning in accordance with time and places as follows: "Furthermore, the wealth and complexity of the indicators exemplify the vast expanse of God's Wisdom. The Diversity of the indicators is at the heart of the suitability of the Shari'ah for all times and places. The fact that the indicators and not usually precise, clear or one- dimensional allows humans to read the indicators in light of the demands of the time and place. So, for example, one of the founding fathers of Islamic jurisprudence, al-shafii (d.204/820 had one set of legal opinions that he taught properly applied in Iraq, and a different set of opinions that he taught applied in Egypt. Purportedly, al-shafi read the Divine indicators to require different results in Iraq and Egypt. Furthermore, we see the same kind of reasoning reflected in Malik B.Anas (d.179/795) argument that different juristic methods W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 have developed in different parts of the Muslim world, and that it would be wrong to try to unify or consolidate the various methods into one. This reasoning is also the genesis of the Islamic legaal maxim that states, "it may not be denied that laws will change with the change of circumstances (la yunkar taghayyur al-ahkam bi taghayyur al-zaman or al-ahwal), Following this logic, the jurists could argue that the Shari'ah is immutable and unchangeable, but the understanding and implementation of the Shari'ah (I.e.Fiqh) is, in fact, changeable and evolving. (Page 34) The author further refers as follows to change of law when operative cause changes as follows:

> "The derivation of the operative cause of a ruling (istikraj illat al
>
> --hukm) was important not only because it had become the method by which the law was extended to cover new cases, but also because it became of the primary instruments for legal change. If the operative cause changes or no longer exists, the law, in turn, must change. The islamic legal maxim al-illah taudur maa al-malul wujudan wa adaman) became substantially the same as the Latin maxim providing that the law is changed if the reason of the law is changed (mutata legis ratione mutatur et lex) (page 36)
>
> 24. The sharia, therefore is flexible in certain area, wherein it had only set out guidelines. Perhaps that area fall for consideration in these cases. It is not possible for me in this judgment to elaborate such W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 areas in which reforms is possible as it is beyond the scope of the judgment. The change effected regarding triple talaq during the period of Caliph Umar is one clear example of change being effected in tune with, social conditions The author Mohamed Hashim Kamali in Shariah Law (supra) refers to such change as follows :

"Essentially harmony with the spirit of the Shari'ah may at times even justify a certain departure from its letter. This may be illustrated by many of the policy decisions of 'Umar b. Al-Kattab. In one such decision, the caliph discontinued the share of the pagan friends of Islam (Mu'allafat al-qulub-persons of influence whose support was important for the victory of Islam) in Zakah (poor tax) revenues, and in another case he refused to assign the fertile lands of Iraq as war booty (ghanimah) to the warriors. The Quran had clearly entitled the mu'allafah to a share in zakah revenues and also the warriors to ghanimah. In both cases the caliph discontinued the entitlements

essentially on policy grounds. Concerning his first decision he went on record to say that "Allah has exalted Islam and it is no longer in need of their favour and regarding the second, he explained that he did not want to see the leading Companions be turned into landowners that may eventually divert their attention away from jihad. In yet another policy decision, the caliph Umar held that triple divorce was legally binding and those who pronounced it were liable to face the consequences of their conduct. This was his ruling not withstanding the Quar'anic declaration 'talaq is only twice' and the fact that during the time of the Prophet and that of the caliph Abu Bakr, a triple repudiation W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 uttered in a single pronouncement incurred only talaq. In taking this policy measure, which then became standard law, the Caliph wanted to prevent abuse of women as due to the change of circumstances, men would pronounce triple talaq and then leave their estranged wives in a State of Suspense. Change of circumstances also led caliph 'Umar to impose zakat' on horses despite the fact that the Prophet had exempted these animals, due to their vital role in jihad, from the payment of zakah. On this point, it is interesting to note that the caliph 'Umar b. Abd al-Aziz (d.719), in an effort to revive the early Sunnah, once again abolished the zakah on horses) (Page 229)

25. One argument that may arise, whether such changes could be effected by a political system not established under the Islamic law. Therefore,this question in fact has to be considered within the constitutional perspective, before considering it under sharia law. Nowhere in Islam, any form of Government or authority has been singularly pointed out as a political form of establishment. On the other hand Islam only laid down principles relating to the human life in every walks of his life till his death. Therefore, any form of the Government promoting the religious values must be honoured and obeyed by the believer. In an Article, "Islam and the challenge of Democracy" of Kahled Abou El Fadl published by Bosten Review states as follows: W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 "Democracy and Divine Sovereignty Although Muslim jurists debated political systems, the Quaran itself did not specify a particular from of government. But it did identify a set of social and political values that are central to a Muslim polity. Three values are of particular importance:pursuing justice through social co-operation and mutual assistance 'Qur'an49:13;11:119); establishing a non- autocaratic, consultative method of governance; and institutionalizing mercy and compassion in social interaction (6:12, 54; 21:107; 27:77;29:51;45.20). So all else equal, Muslims today ought to endorse the form of government that is most effective in helping them promote these values.) Our constitutional scheme is only intended to promote those values cherished by individuals, and Constitution remain supreme in securing those values. Therefore, it is not open for any Muslim to oppose any attempt on the part of the State within constitutional policy to make reforms not inconsistent with religious precepts. Any attempt to reform religion must be treated as an attempt to preserve freedom of religion, as guaranteed under the Constitution.

26. This is unusual case for me to decide not based on the minor premise of the facts involved, but ubiquitous matrix of law in which it lies; in a way such matrix is so subtle compelling the court to evolve justice otherwise it will become elusive to many to whom injustice have W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 been done in the name of religion. Therefore, this court is also of the view, while suggesting for reforms as a larger issue relating to the divorce can be resolved only after adverting to various types of repudiation of marriage recognised by Islamic Law.

It is important in this context to note to the right of the women to pronounce divorce; this is a counterpart of talaq by men. The right of the women is known as Khula. In fact in Chapter 2 Verse 229 refers right of men to pronounce talaq by husband alongside the right of wife to repudiate marriage by khula . As per the Qur'anic injunction, no consent of the husband is necessary. However the personal law in India insists women to obtain consent of the husband to exercise the right of khula. In his book Dr. Kauser Edapagath 'Divorce and Gender Equity' refers as follows .

> "But unfortunately, Muslim personal law, as it operates in India, does not allow a woman the right to khula without her husband's consent and, naturally, husbands, more often than not, exploit this for harassing women and also for extracting much higher compensation than justified. The courts in India have ignored the extremely liberal and pro-woman law of khula in Islam as if it were totally non-existent. This institution has remained eclipsed by the judicial ignorance of and the juristic prejudice against the law of Islam. Indian courts still follow an old 19th century case decided by Privy Council, which is nothing but a distorted view of the Muslim law of khula. In the said case it was held that divorce by khula would become effective only with the consent of the husband.

(Page 107) W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 It is astonishing while resistance has been made to retain triple talaq by husband in contrast to the Qur'anic injunction and there is no corresponding clamor to restore khula to the wife, which has been taken away by the operation of personal law in contrary to Qur'anic injunction.

27. Another form of divorce by wife is fasakh. This right of the wife to get divorce through the Kazi (Islamic judge) or judge. In Chapter 4:128 it is stated as follows:

> "If a woman feareth ill-treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better. But greed hath been made present in the minds (of men). If ye do good and keep from evil, lo! Allah is ever Informed of what ye do."

As seen from the above verse of quran, the fasakh must be preceded by an attempt to amicable settlement and it is only on failure of settlement, the right is given to wife to get a divorce through court. In Mohamedan Law by Ameer Ali Syed, refers to fasakh as follows: The power of the Kazi or Judge to pronounce a divorce is founded on the express words of Mohammed:"If a woman be prejudiced by a marriage, let it be broken off." (2) The Shiah Bihar-ul-Anwar also lays down that in case of nushuz (3) or shekak (4) arbitrators may be appointed to settle the disputes, or the Judge may intervene; and if no settlement can be effected, the marriage ought to be dissolved".

28. There is also another type of divorce by mutual consent. This is known as Mubaraat. The law relating to the mutual separation is referable in Chapter 2:229 of Holy Quaran. In Muslim Personal Law (Shariat) Application Act, 1937, divorce by mutual consent is also W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 referred. There are also various other types of repudiation of marriage, which are referred in Muslim Personal (Shariat) Application Act, 1937. I am not

referring on these aspects of the divorce. The Quranic injunctions, clearly allude to the fact that divorce is a last resort when there exists incompatibility between spouses except in the case of fasakh. The divorce by fasakh is possible if there exists any of the ground such as the assertion or ill-treatement, cruelty etc. Fasakh is possible only through intervention of the court or kazi under Islamic law. In the fasakh divorce is proceeded on existence of a ground for divorce. Therefore, shariah law provides that there must be a satisfaction by the court or kazi on existence of such ground for separation.

29. There are many critical areas where the Qur'an has not given specific directions to implement its purpose and objectives. This would clearly establish that those directives will have to be carried out in tune with time and social conditions, not in derogation of the purpose of the law. Zakath is an obligatory form of charity to purify oneself in his financial deeds. Zakath constitutes one of the five pillars of Islam. This has to be administrated by the State in accordance with the Islamic Law. There are eight types of beneficiaries who are entitled to receive the zakath from the State. Considering the nature of beneficiaries, it is not possible for the individual to identify such beneficiaries. Therefore, in the absence of Islamic State, Muslim society had come forward to collect zakath in collective form and distribute the same after W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 identifying the beneficiaries by a centralised authority which is formed into as a common body or entity. This type of body or entity even though not referred in Quar'an or Hadith, but formed so, to sub-serve the purpose of zakath and its distribution. Such a course is permitted by fiqh. The formation of body or entity is the necessity based on public purpose to sub-serve the law as a result of exercise of fiqh. This part of law making is known under Islamic law in maslahah.

"A Principal objective of the Shariah is realization of benefit to the people concerning their affairs both in this world and the hereafter. It is generally held that the Shariah in all of its parts aims at securing a benefit for the people or protecting them against corruption and evil." (Shari'ah Law An Introduction by Mohammed Hashim Kamali P 32) Law making based on public good (Maslahah) even though does not appear in Quran and Hadith, it is accepted as a principle based on general intent of justice conceptualised in Qur'an. Imam Gazzali born in 11th Century, is the one of the greatest theologian accepted by the muslim world had made remarkable contribution in this area in his celebrated book 'Al-Mustasfa - Min - Ilm Al- Usual. He restricted the functions of the 'Maslahah' to the area within the context of textual evidence or its agreement with the intent of shariah. "He made clear distinction between cases of Daruriyat (necessities), Hajiyat (needs) and Tahsiniyat, those concerning improvement. He confines the meaning of Maslahah to what may lead to the attainment of the aims of shariah and excludes what may be understood to be good in human terms only W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 without a sanction from textual evidence. That is why he views the Maslahah in terms not only of necessity but also universality and certainity." (See the Concept of Maslahah with Special Reference to Imam Ghazzali by Hayatullah, International Islamic University, Malaysia.)

30. In the light of the above discussion, there is no difficulty to hold that the right of divorce as permitted in Islamic Law to the husband and wife can be divested from them to restore it to the court. Entrustment to effect divorce through the court in no way would affect the practice of sharia law in accordance with Qur'anic injunction. If the operative cause of the law of permitting husband

and wife to effect divorce in accordance with the Qur'anic injunction failed; to achieve its objectives, in the form of Maslahah (public good), task of effecting divorce through court becomes inevitable to sub-serve the purpose of law. Therefore, I am of the view that the following suggestions in this regard would be beneficial.

Road map for reforms Islam provides clear guidance with regard to marriage and divorce. Islamic law as above obligate both husband and wife to fulfill the rights of each other and to maintain marriage as an institution for social purpose. Islam considers marital discord is not a rift between individuals but is a reflections of different thought process, feelings or perception which are attributable to variety of factors. It is inherent in human to have conflict of perceptions and disparities in outlook. Islam W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 thus allows divorce, if husband and wife are unable to reconcile after due process. The divorce effected by impetuous decision of husband often turned the tables on the wife pushing the wife into destitution and the children in a quandry. Adherence to process thus became substantive law of divorce. It is not a mandate any specific ground should exist for divorce except in the case of 'fasakh' Thus, due process is a substantive adherence before the divorce is effected. Non- adherence to the due process to sort out differences will render ultimate decision to effect divorce negatory. Thus, law recognise incompatibility between spouses is a ground for divorce. It has all trapping of modern version irretrievable breakdown of marriage. In that sense, a reform is possible for divorce among Muslims in India on the ground of irretrievable breakdown of marriage.

(i) (a) In Shariah Theory, Practice, Transformations by Wael B Hallaq refers on a possible reforms of divorce law of Muslims as follows:

> Modern Muslim codes continue to affirm the importance of the fiqh norm of mediation (tahkim or sulh) between husband and wife, a necessary step before the dissolution of a marriage is effected. In twentieth century codes, it has become formalized and homogenized in almost every country, and it has become an official requirement to be fulfilled before effecting any type of divorce, including - perhaps especially - talaq.

Needless to say, the necessity for mediation in pre-modern law was normative, both in the sphere of the qadi and in the social site in which W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 the marital conflict occurred. We simply do not know whether mediation was involved in the social context of talaq, although in all probability talaq did not reach the qadi in his official capacity of judge, and thus it would be difficult to see how the latter's official mediation (directly or by proxy) was involved. In today's civil codes, on the otherhand, mediation appears as a ubiquitous stipulation, formalized in specific procedural requirements." (Page 467) In Yousuf Rawthan (supra) Justice V.R.Krishna Iyer said on Islamic matrimonial jurisprudence as: "Indeed a deep study of the subject discloses as surprisingly rational, realistic and modern law of divorce." Dr.Tahir Mahmood refer to Islamic divorce as follows in his book Personal Laws in Crisis:

"The true Islamic law in fact stands for what is now known as the 'breakdown theory' of divorce. The Quaran did not specify any matrimonial offences. The Prophet of Islam laid down no bars to

matrimonial relief. The modern 'breakdown' theory of divorce precludes the courts from going into the causes of breakdown of marriage; the law-giver of Islam did not want the matter to be taken to the court at all, unless it became unavoidable for a wife due to the age- old predominance of man. Unequivocally declaring divorce to be abghad al mubahat (i.e. most detestable of all legally permissible things), the Prophet warned his people to keep away from it." (Page

74) W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 Thus possible reforms within law for granting divorce are on two grounds either on account of irretrievable breakdown or any other ground referable under fasakh for the wife.

(i) (b) It is to be noted mediation and conciliation have become part of administration of justice in India. This institutional practice will have to be integrated with the process of granting divorce on the ground of irretrievable breakdown of marriage. Apart from obtaining assistance from mediation in the present form, I am of the view for the purpose of considering the question of irretrievable breakdown of marriage, a tailor made procedure involving members of family and community should also be prescribed. Further, many of the causes for differences are due to physiological and psychological reasons. Therefore, medical assistance also be made part of such mechanism by engaging the assistance of clinical Psychologist or such other experts. The court's role in such process should be that of a supervisor as well as of an Adjudicator. On being satisfied that there exists irretrievable breakdown of marriage after resorting to all procedures as afore-noted, the court shall grant divorce.

31. Uniform Code of Marriage There are many areas in which religious laws can be reconciled with secular law without there being a conflict of each other. While emphasizing the need for national oneness in areas where it is possible, and allowing citizen to have their own identity based on religious practices or belief, endeavor shall be made for common code of conduct W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 to regulate behavior of subjects. The need for common civil Code though it is debated at different levels still it remains a mirage for want of agreement among different groups. This essentially arise out of misconception as to the secular law. It is possible to have a common code at least for the marriage law in India. It is to be noted in Mohamed Ahamed Khan vs. Shah Banu Beegum [1985 2 SCC 556] Hon'ble Supreme Court held as follows:

> It is also a matter of great regret that Article 44 of the Constitution has remained a dead letter. It provides that "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official action for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparaging loyalties to laws which have conflict of ideologies. No community is likely to bell the cat by making gratuitous concessions on the issue. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably has the legislative competence to do so. The counsel in the case whispered, political courage to use the

> competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 endurance of sensitive minds to the injustice to be suffered when it is so palpable."

In Sarla Mudgal, President, Kalyani v. Union of India [AIR 1995 SC 1531], it was held as follows:

> "The desirability of uniform code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change. Therefore, a unitfied code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalize the Personal Law of the minorities to develop religious and cultural amity"

There are many areas where there can be common civil code without there being repugnance or conflict between the religious law and secular law. The marriage law is one example for codification of law. While permitting parties to marry in accordance with religious rites there can be a common divorce law based on a ground of irretrievable breakdown of marriage. The book written by O.Chinnappa Reddy, the former judge of the Supreme Court under the title 'The Court and the Constitution of India, Summits and Shallows, suggests for uniformity of marriage and divorce law as follows:

> "This does not mean uniformity need not be sought even where uniformity is possible. For example, there are several areas even in the laws relating to marriage, divorce, etc. which can be exploited to bring about uniformity without treading on anybody's religious sentiments.

W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 There can be a law which makes registration of marriages compulsory whether the marriage is solemnized according to Hindu, Muslim, Christian, or other ritual, ceremony, or form. There can be a uniform law making judicial sanction or recognition necessary to validate any divorce. There can be an uniform law for the maintenance of wives, widows children and parents who are unable to maintain themselves, whatever religion they may profess." (Page 165)

(i) Litigation in family disputes (divorce) is focussed on individual positional barraging centered around preordained grounds in statutory provisions and it is not necessary what is reflected in it is the actual dispute. The process in litigation is in contrast of unity that contemplated to be secured in a marital bliss of shared values, culture etc as the ligation drives parties as adversary and at loggerheads with obstinate accusations leveled against each other making them to stay strong on grounds of divorce. Punching down adversary and treat him/her as enemy is the attitude in such process. This attitude is essentially developed as requirement to sustain in the platform of litigation

and the system itself driven the parties into such situation. Therefore, such situation cannot be countenanced as it betrays the social ethos of any civilized society. On the other hand, process in mediation, in contrast correspond to two directions from which one can attempt to reconcile relation on rational analysis of subjective and objective stand points.

W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016

(i) (a) One should think about aftermath of rejection of divorce petition on the ground canvassed a cruelty, adultery, etc., is it possible for the same people, who have asserted and denied the ground of cruelty and adultery in the divorce petition to reunite, to lead a life together after such dismissal. Time has come for a change for all to modernize the divorce law. There can be uniformity of divorce law by strengthening mediation and conciliation as referred above making it as an integral part of process of divorce.

(i) (b) Apprehension of uniform civil code on marriage, that it will offend shariah law is a myth as discussed in afore-noted paragraphs. The uniform civil code presupposes liberal multicultural society wherein one or more group cannot hold unjustifiable consideration over others. The marriage Law especially divorce Law need homogeneity for sustenance of marriage as a social institution which is a priority of the State. The State as a measure must strive to achieve meaningful action to sustain equilibrium towards national oneness in character of the society while giving freedom to keep different faith holders to identify themselves in individual and social life without limiting their right to remain as group. In secular state strength of any group is not based on what they could demand from the State, but how could they benefit themselves by strengthening the pillars of secular State. W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 In "Muslim Law in India and Abroad" by Dr. Tahir Mahmood, the author has given details of Muslim countries in which marriage law and divorce law have been reformed. It is stated by him as follows: Reforms in Other Countries "The law of divorce in all its aspects has been reformed by legislation over the years in several countries.

In Egypt, Iraq, Jordan, Kuwait, Lebanon, Morocco, Sudan and Syria, unilateral talaq is not effective if pronounced by a husband who is drunk, insane, imbecile, provoked, shocked, depressed, ill, uncontrollably angry, in sleep, or under duress - nor if it is used as an inducement, threat or vow, or is implied in an ambiguous or metaphorical expression.

The laws in Egypt, Iraq Jordan, Kuwait, Morocco, Philippines, Sudan, Syria, UAE and Yemen, have totally derecognised the concept of triple talaq - in all these countries every talaq [even if repeated thrice or qualified with the word "three"] effects only a single revocable divorce leaving room for its revocation during the wife's iddat and, failing that, for renewal of remarriage any time with her consent. The so- called device of halala for legalizing remarriage of the parties, which requires wife's intervening marriage to someone else followed by divorce from him, also stands abolished in all these countries. (P 145) In the light of the above, one has to wonder how equality before law has been denied to the Muslim women in India.

Reliefs

32. The W.P.(C) 37436 of 2003 is filed by the husband alleging that the triple talaq pronounced by him is not valid in accordance with Islamic law. Therefore, proceedings initiated before the Magistrate under section 3 of the Muslim Women (Protection of Right on Divorce) Act 1986 and consequent order will have to be set aside. This case W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 depicts the misuse of triple talaq, wife appears to have accepted the talaq and moved the Magistrate court on a folly created by husband. There are innumerable cases as revealed from the empirical data referred in the research in which neither party are aware of the procedure of talaq according to the personal law. This Court under Article 226 of the Constitution of India is not expected to go into the disputed questions of fact. The entire exercise in this judgment is to alert the State that justice has become elusive to the Muslim woman and the remedy thereof lies in codification of law of divorce. This court cannot grant any relief to the writ petitioner as the true application of the law to be considered in a given facts is upon the Court trying the matter. It is for the subordinate court to decide whether there was application of Islamic law in effecting divorce by triple talaq. Therefore, declining jurisdiction, this writ petition is dismissed. W.P.(C) Nos.25318 & 26373 of 2015 and 11438 of 2016 In these writ petitions question of validity of triple talaq does not arise. However this question was considered in larger perspective for the reason that if court grant any relief based on admission of the parties as to the repudiation of marriage by triple talaaq, that would amount to recognition of a triple talaq effected not in accordance with law, as this court has no mechanism to find out the manner in which talaq is effected. The Court cannot become a party to a proceedings to recognise an ineffective divorce in the guise of directions being given to passport authorities to accept the divorce. The legal effect of such W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 divorce has to be probed by a fact finding authority in accordance with the true Islamic law. Stamp of approval being given by the court by ordering passport authority to accept divorce effected not in accordance with the law, will create an impression that court transgressed its limits while directing a public authority to honour an act which was done not in accordance with law. Though in these writ petitions, considering the urgency of the matters, this court granted interim order directing the passport authorities to act upon the request of the petitioners. Considering the large number of similar reliefs sought before this court in various writ petitions, this court is of the view that the issue can be resolved only through a larger remedy of codification of law in the light of the discussion as above. In the light of interim order, these writ petitions are disposed of.

Conclusion:

Courts interpret law and evolve justice on such interpretation of law. It is in the domain of the legislature to make law. Justice has become elusive for Muslim women in India not because of the religion they profess, but on account of lack of legal formalism resulting in immunity from law. Law required to be aligned with justice. The search for solution to this predicament lies in the hands of the law makers. It is for the law makers to correlate law and social phenomena relating to divorce through the process of legislation to advance justice in institutionalised form. It is imperative that to advance justice, law must be formulated without any repugnance to the religious freedom W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 guaranteed under the Constitution of India. It is for the State to consider the formulation of codified law to govern the matter. Therefore, I conclude by drawing attention of those who resist any form of reform of the divorce law of Muslim

community in India to the following verses of Holy Quran. (Chapter 47:2) "And those who believe and do good works and believe in that which is revealed unto Muhammad - and it is the truth from their Lord-He riddeth them of their ill deeds and improveth their state."

"Thus we display the revelations for people who have sense" (Chapter 30:28) The Registry shall forward the copy of this judgment to Union Law Ministry and Law Commission of India.

A.MUHAMED MUSTAQUE JUDGE jm/ W.P.(C) Nos.37436 of 2003, 25318 & 26373 of 2015 and 11438 of 2016 The word "assertion" occurring in paragraph 28 at page 46 of the common judgment dated 16/12/2016 in W.P.(C)No.37436/2003 and connected cases is corrected and substituted by the word "desertion" and the word "negatory" occurring in paragraph 30 under the head "Road map for reforms" at page 49 of the judgment is corrected and substituted by the word "nugatory" as per the Suo Motu correction order dated 12/01/2017 in W.P.(C) No.37436/2003 and connected cases.

sd/ Registrar (Judicial) i