Talaq is a Reasonable and Justified System of Divorce for Muslim Women in India

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I. Introduction:

Family system of India is unique in the world. It reflects the way of life of Indian people. So also is marriage. It is the basic foundation of family system. Dissolution of marriage per se is unwelcome and unwanted. Even according to Prophet Muhammad, of all permitted things before the Almighty God in the world, divorce was the most detestable incident. "The lawful thing which God hates most is divorce" [2]. Divorce would ultimately lead to broken families resulting in disintegration of society. There is a serious concern of the sociologists as to how to prevent breaking of marriages and deal with its adverse effect. But when the marriage has failed, just it is not working, then conservatism should not come in the way to accept the reality. Acceptance of divorce is for the benefit of the family and greater interest of the society. But question is about the mode and ground for divorce? Talaq is a system of divorce in Muslim society. The common perception prevailing in the society is that by simply pronouncing it, a man can bring the marriage to an end, without any reason or valid reason whatsoever and whenever he wants. It is a word which takes the breath of the Muslim women away. It brings tears in the eyes of the Muslim women. It shatters the dreams of the women who dreamt of a very happy married life. It is also a word for which everyone looks Islam down and Muslim society as a whole. Is it true that talaq system signifies absolute, unbridled, unlimited and discretionary power of Muslim men to divorce their wives at their whims and caprices whenever they want? Is it the fact that talaq system is very much arbitrary against Muslim women which denies them equal justice justice? Is talaq system very much bad, unfair, unjust and unreasonable? Is talaq system a cause for which Muslim women is deprived of their fundamental rights and human rights? Does talaq system go against cardinal principles of Constitution of India or does Constitution permit this customary practice of pronouncement of talaq to be continued? Is there is any restriction over the power of Muslim men to dissolve marriage by just triple pronouncement of talaq? Hence, 'Talaq' needs a comprehensive discussion to find out the answers of these questions.

II. An Overview of Talaq in Law and in Practice:

"Talaq" simply means dissolution of marriage by the husband. There are

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2 Mishkat, II, 209, 21 2; Robson, I, 696,698; cited in THE PILLARS OF ISLAM, translated by Asaf A. A. Fyzee, Vol II, Oxford University Press, New Delhi, 2004

two forms of talaq under customary Muslim Law. A. Talaq-al-Sunnat: This form has two modes. First is Talaq-Ahsan. This mode consists of a single pronouncement of 'talaq' made during tuhr or period of purity (when the woman is free of her menstrual circles) when sexual intercourse did not take place. It must be followed by abstinence from sexual intercourse for the remaining period of iddat. A talaq in ahsan becomes irrevocable and complete on the expiration of the iddat period. Second is Talaq-Hasan. This consists of three pronouncements of 'talaq' during three successive tuhrs, no sexual intercourse takes place during any three of the tuhrs (the first pronouncement should be made during one tuhr, second pronouncement is during next tuhr and the third during the succeeding tuhr). A talaq in hasan becomes irrevocable and complete on the third pronouncement, irrespective of iddat. Until a talaq becomes irrevocable, the husband has the option to revoke it which may be done either expressly by saying that it has been revoked or impliedly by resuming sexual intercourse with the wife. B. Talaq-al-Biddat: There are two modes of this form. The first mode is three pronouncements made at any time either in one sentence "I give you talaq thrice" or in separate sentences "I give you talaq", "I give you talaq" "I give you talaq". Second mode is a single pronouncement made, by clearly indication an intention irrevocably to dissolve the marriage- "I give you talaq irrevocably". This mode becomes irrevocable immediately after it is pronounced even before iddat. Moreover, even it if it is pronounced in the period of tuhr or not, it does not matter, talaq becomes effective and valid[3].

This Talaq-al-Biddat attracts bitter criticism in India as being undemocratic, unilateral, arbitrary and whimsical. The husband cannot reconsider his decision. It confers on the Muslim husband the privilege to discard his wife whenever he chooses to do so for reasons good or bad; indeed for no reason at all. In one Pakisthan television serial, the man playing the part of the husband pronounced talaq to his wife in the serial. In real life they were husband and wife. The Ulemas declared the dissolution of their marriage and the only way for the man to reclaim his wife was for her to undergo the ordeal of an intermediate marriage, consummation of that marriage and divorce by the second husband[4]. Bollywood's saddest triple talaq involves actress Meena Kumari and her husband Kamal Amrohi. Thier marriage said to be turbulent, ended abruptly when in a fit of rage, Amrohi pronounced "talaq, talaq, talaq" to a shocked Meena Kumari. Soon, after, Amrohi regretted his angry outburst and wanted to recall his divorced wife, Meena. Kazis told him that unless Meena Kumari contracted another marriage, consummated it and her second husband divorced her voluntarily, he could not marry her. Kamal Amrohi tried a short cut. He ordered his own secretary, one Baqer to marry

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3 Sheikh Fazlur vs Musammat Aisha (1929) 8 Patna 690 relying on para 74 of the Hedaya.

4 Arun Showrie, World of Fatwas, p-440;cited in Muslim Marriage & Succession in India: A Critique with a Plea for Optional Civil Code, Eastern Law House, Calcutta,1996

Meena and then divorce her for the purpose of paving the way for Amrohi's remarriage with Meena. Trouble began after the marriage when Baqer refused to give a triple talaq to his famous wife Meena Kumari. Amrohi was at his wits end. Rumour has it that Amrohi was blackmailed into coughing up a large amount of money to get Meena Kumari free from Baqer. Amrohi then remarried Meena Kumari[5]. Looking at the deep-rooted injustice to Muslim women, a concern was raised by V.Khalid.J: "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity? The question is whether the conscience of the leads of the public opinion of the community will also be disturbed"[6]?

III. Talaq, Holy Quran and Interpretations:

III. I. Quranic Injunctions on Talaq:

"If ye fear a breach-Between them twain-Appoint two arbiters-One from his family- And the other from hers-If they seek to set things right-Allah will cause-Their reconciliation- For Allah hath full knowledge-And is acquainted-With all things"[7]. The word 'breach' is very much significant. It means the breach of matrimonial or conjugal rights which one spouse expects from the other and the other spouse is not fulfilling. It also means the breach of matrimonial or conjugal duties by another spouse who in under obligation to perform. Simply, it means that there must be some breach of matrimonial rights or duties i.e. the spouses should not be cruel or inhuman to each other, both of them should not desert each other, they should not have extra-marital affair with others etc. Without that breach the husband cannot pronounce talaq. That is the mandate of Holy Quran.

"O Prophet! When ye- Do divorce women,- Prescribed periods,- And count (actually)- Their prescribed periods;- And turn them not out- Of their houses, nor shall-They (themselves) leave,- Except in case they are- Guilty of some open lewdness,- Those are limits- Set by Allah: and any- Who transgress the limits-Of Allah, does verily- Wrong his (own) soul- Thow knowest not if- Perchance Allah will-Being about thereafter- Some new situation"[8]. Here also talaq is allowed only in case if wife is guilty of some open lewdness and exceeds the limits of matrimonial relationship, the husband is allowed to pronounce talaq. The commentary of Presidency of Islamic Research says that 'every facility has to be

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5 Talaq and the Tragedy Queen, Rinki Bhattacharya, The Lawyers Collective, Vol-8, 1993, Page-10

6 S.A.Kader, Muslim Marriage & Succession & Succession in India: A Critique with a plea for Optional Civil Code, Eastern Law House, Calcutta,1996, p-37

7 Verse 4:35.Holy Quran

8 Sura 65, Ayat 1. Holy Quran (English Translation of the Meanings and Commentary) edited by Presidency of Islamic Research), published under the auspices of the Ministry of Hajj and Endowments, Kingdom of Saudi Arabia.

given for reconciliation till the last moment and impediments are provided against hasty impulses leading to repute'.

"A divorce is only-Permissible twice; either hold-The parties should either hold-Together on equitable terms-Or separate with kindness.-It is not lawful for you,-(Men), to take back-Any of your gifts (from your wives)-Except when both parties-Fear that they would be-Unable to keep the limits-Ordained by Allah-If ye (judges) do indeed- Fear that they would be-Unable to keep the limits-Ordained by Allah"[9]. About these verses, the comment is: "where divorce by mutual compatibility is allowed, there is danger that parties might act hastily, then, repent and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with reconciliation in between) are allowed. After that the parties must definitely make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and forbearance-to hold together on equitable terms, neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage" [10]. The doctrine of "limits" reminds that if wife violates the matrimonial rights or does not perform her part of conjugal duties, the husband is allowed to pronounce talaq. This matrimonial right and duty are very sacrosanct and mandatory. What is the purpose of marriage if the wife does not co-operate and value the relationship? Marriage institution will lose its purposes due to this non-performance.

III. II. Compendium of Islamic Laws:

This book is one of the authorities to clear the doubts looming large on the meaning and explanation of 'talaq'. It says: ".....Divorce in itself is therefore an undesirable act. However, it is true that if there is no temperamental compatibility between the parties, or the man feels that he cannot as husband fulfil the woman's rights, or because of mutual difference of nature God's limits cannot be maintained, keeping the marriage intact in such situations or to compel the parties by legal restrictions to continue in the marital bond may be more harmful for the society. The Shariat, therefore, regards divorce as permissible. Thus, uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin. Similarly, imposing such restrictions on the right of divorce due to which the man is compelled not to divorce the wife despite his feeling that he cannot live a happy life with her is not lawful. ".....If the man is that he cannot have cohabitation as per rules, i.e. he is impotent or cannot fulfil marital obligations, or any other such situation is there, it will be necessary for him to pronounce a divorce. To divorce the wife without reasons only to harm her, or revengefully due to the non-fulfilment of his unlawful demands by the wife or her guardians and to divorce her in violation of

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9 Sura 29, Ayat 229 Holy Quran (English Translation of the Meanings and Commentary), edited by presidency of Islamic Research) published under the auspices of the Ministry of Hajj and Endowments, Kingdom of Saudi Arabia.

10 *Ibid*, Explanation 256

the procedure is haram (absolutely prohibited)" [11].

IV. Interpretation of Quran Verses:

IV. I. Interpretation of Quranic Verses by Islamic Scholars:

"The Prophet pronounced talaq to be the most detestable thing before the Almighty God of all permitted things. If talaq is given without any reason it is stupidity and ingratitude to God" as observed by Amir Ali[12]. "The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy, but in the absence of serious reasons, no Muslim can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or puts her away from the simple caprice, he draws upon himself the divine anger, for "the curse of God", said prophet "rests on him who repudiates his wife capriciously" as observed by Ibrahim Halebi[13]. Maulana Mohammad Ali says: 'this verse lays down the procedure to be adopted when a Case for divorce arises. It is not for the husband to pit away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made to the public. The judge is required to appoint two Arbitrators, one belonging to the wife's family and the other to the husband's. These two Arbitrators will find out the facts but their objective must be to effect reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam. From what has been said above, it is clear that not only must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his wife mere caprice is a grave distortion of the Islamic institution of divorce[14]. Ahmad. A. Galwash says "the Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife by her indocility or her bad character renders the married life unhappy but in the absence of serious reasons, no man can justify a divorce, either in the eye of the law or the religion. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the cause of God, says Prophet, rests on him who repudiates his wife capriciously[15].

IV. II. No Mention of Talak-Al-Biddat in Quran or Hadith:

Most surprising and revealing fact about the much debated Talaq-al-Biddat

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11 Divorce in Islam, Compendium of Islamic laws, Part-II, published by The All India Muslim Personal Law Board as cited in Dogdu vs Rahimbi, II (2002) *DMC* 315 (FB)s

12 Ameer Ali's Treaties on Mohammedan Law as referred in Dagdu vs Rahimbai case.

13 Ibrahim Halebi on Multeks as referred in Dogdu vs Rahimbai case

14 Commentary on Holy Quran by Maulana Mohammad Ali as referred in Dogdu vs Rahimbai case; See also observation of Abdulla Yusuf Ali, cited in Dogdu vs Rahimbai case.

15 Ahmad. A.Galwash in THE RELIGION OF ISLAM as cited in Yusuf vs Swaramma case

is that there was no mention of it either in Quran or Hadith. According to Holy Quran, talaq is 'Talaq-al-Sunnat with its two modes. Talak-al-Biddat came into practice in the Muslim society in 2nd century. "Talak-ul-biddat was introduced in the 2nd century of Mohamedan era. It was then that the Omayyade monarchs finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice endeavoured to find an escape from the strictness of the law and found in the pliability of the jurists a loophole to effect their propose" as observed by Syed Ameer Ali[16]. What would consequence be of disapproved from of talaq? "The capricious and irregular exercise of power of divorce which was left to the husbands was strongly disapproved of by the Prophet. It was brought to him that one of his disciples had divorced his wife pronouncing the three talaqs at one and the same time, the Prophet stood up in anger and declared that the man was making a plaything of the words of God and made him take back his wife" [17].

V. Supreme Court and Various High Courts of India vis-a-vis Talaq:

In Jiauddin Ahmed vs Mrs. Anwara Begum, Baharul Islam.J says "in my view the correct law of talaq ascordained by Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family and the other from the husband's. If the attempts fail, talaq may be effected" [18]. In Rukia Khatun v. Abdul Khalique Lascar, Baharul Islam. J C.J once again says about Sura IV Verse 35 "it appears that there is a condition precedent which must be complied with before the talaq is effected. The condition precedent is when the relationship between the husband and the wife is strained and the husband intends to give 'talaq' to his wife, he must choose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation with a time gap so that the passions of the parties may calm down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give 'talaq'. The 'talaq' must be for a good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret" [19]. The Bench sums up its final decision in by saying that "in our opinion the correct law of talaq as ordained by Holy Quran is: firstly that talaq must be for a reasonable cause; secondly that it must be preceded by an attempt at reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the another by the husband from him. If their attempts fail, 'talaq' must be effected".

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16 As cited by S.A.Kader in Muslim Marriage & Succession in India: A Critique with a plea for Optional Civil Code, Eastern Law House,1996 Calcutta, p-37

17 Ibid, p-38

18 (1981) *GLR* 358

19 (1981) 1 *GLR* 375, *See* also, *Zeenat Fatema Rashid* v. *Md. Iqbal Anwar,* II (1993)DMC 499 (DB)

In Saleem Basha v. Mrs.Mumtaz Begum, S.M.Siddick. J observes "A. Talaq must be for a reasonable cause; B. It must be preceded by an attempt at reconciliation (by nominees of both the houses) and C. Talaq must be effected if the said attempt failed" [20]. Dogdu v. Rahimbai is another case of this kind. In this case Bombay High Court observes "it is not that the husband is at free will to resort to any of these modes at any time and without assigning any reasons. If the husband feels that his wife does not care for him, she is incompatible, she does not listen to him, she does not love him and she refuses to cohabit with him, she engages in cruel behaviour, she is unfaithful or for any reasons, he has the right to give talaq to his wife but following certain procedure. Firstly, he has to make it known to his wife about any of these reasons and she must be given time to change her behaviour, the husband has to resort to the process of conciliation by informing to her father or any other parental relations. Two arbiters, one from wife and one from the husband are required to be appointed and it shall be the duty of the Arbiters to bring in settlement between the parties so that they live together happily and in spite of these efforts having been made if the discord still persists to an irreparable level there is no alternative but to separate and it is at this stage that the husband has the right to give talaq to his wife. The stage of reconciliation with the intervention of the arbiters is a condition precedent for effecting talaq either in Ahsan or Hasan" [21]. The court continues to say that "in all disputes between the husband and the wife the judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other failing which divorce is to be effected. Therefore, though it is the husband, who pronounces the divorce, he is as much bound by the decision of the judges as his wife. This shows that the husband cannot repudiate the marriage at his will. The case must be first referred to two judges and their decision is binding. Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by the Arbitrators, one from the wife's family and the other from the husband's. If the attempts failed, talaq may be effected" [22]. In Shamim Ara v. State of U.P[23], the Supreme Court of India echoed and endorsed the same view about talaq. In this case "there are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq". As a consequence neither the marriage between the parties stands dissolved nor does the liability for payment of maintenance comes to an end. Kerala High Court also holds the same view, by following the doctrine of Stare Decisis, in Ummer Farooque v. Naseema case, where ratio of Shamim Ara v. State of U.P case was followed. "But this can no

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20 II (1999) *DMC* 206
21 II (2002) *DMC* 315 (FB)
22 *Ibid*, page 315
23 AIR 2002 SC 3551

longer be accepted in view of the authoritative pronouncement of the Supreme Court in Shamim Ara v. State of U.P. In that decision the Apex Court accepted the view of the Division Bench decision of the Gauhati High Court in Must. Rukia Khatun v. Abdul Khalique. Baharul Islam. J. Observes that to be valid talaq it should be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters; one from the wife's family and the other from the husband's side and if the attempts fail talaq may be effected. The Supreme Courtaccepted the view of, V.R.Krishna Iyer, J., by holding that it is a popular fallacy that a muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. The Holy Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. Justice Krishna Iyer has referred to various authorities to show that divorce was permissible in Islam only in extreme situations where reconciliation even has failed. In Shamim Ara' case, the Supreme Court disapproved the action of the Judge for relying on the affidavit of the husband in some civil suit wherein he had stated that he had divorced the wife"[24]. V.R.Krishna Iyer, J says that "The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions"[25].

VI. Reforms in Islamic Countries where Talaq-Al-Biddat is Absolutely Prohibitted or Restricted:

In Algeria divorce cannot be effected except by a judgment of the Qadi which must be preceded by an attempt at reconciliation[26]. In Turkey, the law abrogates all forms of extra-judicial divorce and provides that either party can seek divorce through court on stated grounds. No divorce shall take place except through court and it shall grant divorce only after through enquiry into the cause of the rift between the husband and the wife and after failure to effect reconciliation[27]. South Yemen also prohibits unilateral divorce. No divorce can be pronounced except the permission after making a reference to a people's Committee and exhausting all possibilities of reconciliation between the two parties and only on coming to the conclusion that the continuance of married life is impossible[28]. In Malaysia the law says that either party would file an application in the court desiring a divorce. The court shall grant the divorce (if the other spouse consents) after if it is satisfied that the marriage has irretrievably broken down. Application of divorce without the consent of other spouse, conciliatory committee shall be appointed and if no reconciliation is possible, the court shall pass orders. The divorce by a man by the pronouncement of talaq outside the court and without its permission is

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24 2005 (4) *KLT* 565
25 A.Yusuf vs Sowramma, AIR 1971 Ker 270
26 Section 49, Algerian Family Code, 1984
27 Section 30, Tunisian code of Personal Status, 1956
28 Article 25, South Yemen Family Code, 1974

absolutely prohibited in this country[29]. In Indonesia, a divorce shall be effected only by court and the court shall not permit it before attempting reconciliation and only for sufficient reasons indicating total breakdown of the marriage[30]. In Bangladesh and Pakisthan, any man who wishes to divorce his wife, shall, after the pronouncement of talaq, give the Chairman of the Arbitration Council notice in writing and shall provide a copy to the wife. Within thirty days of the receipt of the notice the chairman shall constitute an Arbitration Council for bringing reconciliation between the parties" [31].

VII. Rights of Muslim Women to Divorce:

VII. I. Same Rights for the Muslim Wives:

Most frequently asked question is: "Is there any similar talaq system for Muslim wives just like Muslim husbands"? There is a separate system for Muslim wives to repudiate the marriage. It is "khoola", explicit in the Holy Quran and Hadith. Hence, there is no question of discrimination. Khoola is a divorce at the instance of the wife, in which she gives a consideration to the husband for her release from the marriage tie. In such a case the terms and conditions are matters of arrangement between the husband and the wife. A khoola is effected by an offer from the wife to compensate the husband if he releases her from the marriage, and acceptance by the husband of the offer. Once the offer is accepted, it becomes a single irrevocable divorce. There is one of confusion that the Muslim women cannot get khoola unless the husband gives his consent for it. So Muslim wives getting khoola absolutely depends upon the discretionary power of the husbands. This impairs the dignity of the women and grossly violates the right to equality of the women. It is also some sort of buying that divorce from her husband. It means that even if there are justified reasons for the wife to ask for khoola but it is not a matter of right for herself. It is not true as there is no discretionary power of the husband to give or not to give his consent. 'Khoola' cannot be denied if there are justified reasons. The wife has to buy a divorce is also not wholly correct. Deeper study indicates that it is a rational, realistic and modern law of divorce.

The same Quranic injunction of "If ye fear a breach....." and its interpretation applies in "khoola" case also. It means that there must be breach of matrimonial rights of the wife by the husband. Only then the wife can ask for "khoola", otherwise not. Secondly, in case of the aspirant wife for "khoola" also, she has to follow the same procedures of reconciliation, to give peace a chance to sort out the differences. If the reconciliation fails, the wife is allowed to go for "khoola". In this situation, giving consent by the husband is merely a formality. Once Prophet said that "if a woman be prejudiced by a marriage, let it be broken off" as cited by V.R.Krishna

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29 Section 47 &124, Islamic Family law (Federal Territory) Act 1984

30 Section 38, The Law of Marriage, 1974

31 Section 7, The Family Laws Ordinance, 1961(is in force in both the countries)

Iyer.J in Yusuf v. Swaramma case. Dr. Galwash also observes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting reconciliation have failed, the parties may proceed to dissolution of marriage by "talaq" or "khoola". Consistently with the secular concept of divorce, the law insists that at the time of talaq the husband must pay off to the wife and at the time of khoola the wife has to surrender to the husband her dower or abandon some of her rights, as compensation. The first "khoola" case in Islam when "the wife of Thabit-ibn-Quais came to the Prophet and said "O Messenger of God, I am not angry with Thabit for his temper or religion; but I am afraid that something may happen to me contrary to Islam; on which account I wish to be separated from him". The prophet said "Will you give back to Thabit the garden which he gave to you as dower"? She said, "Yes". Then Prophet asked Thabit to take the garden and give her divorce at once". This tradition tells that Thabit was blameless and that the proposal for separation came from wife who was apprehensive of not fulfilling the bounds set by God. Prophet permitted 'khoola' after return to the husband dower as compensation for the release. Second case of 'khoola' came from Asma, wife of Prophet, who asked for divorce from him and prophet released her as she had desired. In these two instances, it can be absolutely inferred that it was a matter of right for the wife. This is the same view of Pakistan's Supreme Court. In Mst. Balqis Fatima v. Najmul Ikram, it opines: "Under Muslim Law, the wife is entitled to 'khoola' as of right, it she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union". That's why Holy Quran says: "And women shall have rights-Similar to the rights-Against them, according-To what is equitable."

VII. II. Judicial Divorce Exclusively for Muslim Women:

According to Dissolution of Muslim Marriage Act, 1939 a Muslim woman may ask for divorce when (a) The whereabouts of the husband are unknown for a period of four years; (b) Failure of the husband to provide the maintenance of the wife for a period of two years; (c) Sentence of imprisonment on husband for a period of two years; (d) Failure to perform marital obligations without reasonable cause; (e) Impotence of the husband; (f) Insanity of the husband; (g) Repudiation of marriage by the wife; (h) Cruelty of the husband-(i) habitually assaults her or makes her life miserable by cruelty or conduct even if such conduct does not amount to physical ill-treatment; (ii) associates with woman of evil repute or leads an infamous life ; (iii) attempts to force her to lead an immoral life;(iv) disposes of her property or prevents her exercising her legal rights over it; (v) obstructs her in the observance of her religious profession or practice; (vi) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Holy Quran; etc[32]. Muhammad Zafrullah, who associated with drafting of the bill, observes "the grounds on which 'Khoola' may be obtained by a married woman

32 Dissolution of Muslim Marriage Act 1939

under the Muslim Law in very definite, clear and precise terms"[33]. So judicial divorce on these grounds is based on "khoola". Recent example of khoola mode of divorce is first wife of Shoaib Malik, Ayesha gets khoola form of divorce from him when the latter decided to marry Sania Mirza during the subsistence of first marriage.

VIII. Constitution of India and Talaq:

VIII. I. Constitutional Validity of Talaq-Al-Biddat:

Right to equality is a fundamental right guaranteed by Article 14 of the Constitution of India. It is also one of the basic structures of Constitution which cannot be damaged and destroyed. Right to equality means non-discrimination. For the practice of Talaq-al-Biddat, right to equality of Muslim women is violated in two ways. Firstly, discrimination is on the basis of gender. They are not on equal standing with Muslim men who are allowed to exercise whimsical and arbitrary power over them. Secondly, it is discrimination on religion. Women in other religious communities are in a better position. They are not subjected to any kind of arbitrary dissolution of marriage. Moreover, as right to equality also means non-arbitrariness, practice of Talaq-al-Biddat is itself negation of equality. Hence, the personal law which allows the practice of Talaq-al-Biddat with the sanction of the "State" does violate fundamental right and becomes unconstitutional. It is a point of debate whether personal laws should conform to the fundamental rights. Article 13, Constitution of India says that "All laws in force in the territory of India immediately before the commencement of this Constitution of India, in so far they are inconsistent with the provision of Part III, shall to the extent of inconsistency, be void. Accordingly, only "laws in force" which are inconsistent with the fundamental rights are void. What is "laws in force"? It is laws passed in the territory of India immediately before the commencement of the Constitution and not previously repealed, notwithstanding, that any such law or any part thereof may not be then in operation either at all or in particular areas. The argument that Muslim personal laws are not amenable to the Constitution, because only "laws in force" must conform to the fundamental rights not the "laws"[34]. As a result Talaq-al-Biddat being customary law is protected from being struck down even though otherwise it is unconstitutional i.e. violation of Articles 14 and 21. Article 372 even permits the customary laws to be continued without any disturbance of judicial scrutiny. But the fact remains that the customary law of Talaq-al-Biddat is in practice not because of the fact that the Muslims in India have been following them as a valid custom. It is due to the reason that there was one "laws in force" i.e. Shariat Application Act 1937, passed by Indian Parliament before independence which made it mandatory in some matters and optional in some other matters to follow

33 As referred by V.R. Krishna Iyer J in *Yusuf* v. *Sowramma* Case

34 See Article 13 (1), (2) and (3) (a) and (b)

customary law. Moreover, truth is that Article 372 allows all laws in force in the territory of India to be continued subject to the other provisions of the Constitution, unless altered, repealed or amended. Hence, any customary law ultra-vires the provisions of the Constitution becomes like talaq-al-biddat is absolutely void.

VIII. II. Supreme Court of India on the Issue of Personal Law v. Fundamental Rights:

In a famous judgment in John Vallamattom v. Union of India, Apex Court observes: "Article 372 per force does not make a pre-constitution statutory provision to be unconstitutional. It merely makes a provision for the applicability and enforceability of pre-constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities"[35]. The court further observes: "It is further trite that the law may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation"[36]. C. Masilamani Mudaliar v. the Idol of Sri Swaminathashwami, Thirukoil[37] the court says, "...the Preamble of the Constitution, Fundamental Rights and Directive Principle are a Trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments or the society". Those two cases were about personal laws of Hindus and Christians.

IX. Conclusion:

Effort is to be initiated to enliven the Trinity of justice- equality and liberty with dignity of human beings. The Constitution guarantees right to equality as a fundamental right. The personal laws conferring inferior status on women are anti-thesis of it. Personal laws are derived from the religious scriptures. These must be consistent with the Constitution lest they became void under Article 13. Democracy, development and respect for universal declaration of human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for women are inalienable, integral and indivisible part of it. The full development of personality, fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and cultural, social and economic development.

CEDAW also reiterates that discrimination against women violates the principles of equality, respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life; hampers the growth of the personality and makes more difficult for the full development of

35 2003 AIR SCW 3536

36 Ibid, page 3549

37 AIR 1996 SC 1697

potentialities of women[38]. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India, Universal Declarations of Human Rights and CEDAW.

After analysing all the relevant Quranic injunctions, judgments of Supreme Court and various High Courts of India, the observations of the renowned jurists, it is found that talaq means talaq-al-sunnat. This talaq-al-sunnat, according to Holy Koran, is reasonable, just, fair and good as a system of divorce in Muslim law. In no uncertain terms it can be inferred that 'Talaq' as it is in Holy Quran not biased against women and discriminatory. Rather it is for their protection against arbitrary and hasty decision of the husbands to end the matrimonial relationship. It is to ensure the true and actual disputes should lead to divorce by talaq. People should be enlightened about the actual system of talaq. For talaq, the Muslims must follow the Quranic injunctions in letter and spirit. Talaq-al-biddat, is a distortion of the Quranic injunctions. Quran never allows arbitrary talaq, without justified reason and reconciliatory process. This is not written anywhere in Quran. This form does not even find place in Hadith. Leaned Islamic scholars do have reservation about it. Judiciary does not accept it. Many Islamic countries absolutely prohibited talaq-al-biddat or put some restrictions. There is no question of violation of right to freedom of religion if talaq-al-biddat is banned. Personal law is based on religion and considered as religious practices, but the right is not absolute. The State can make or amend laws including personal laws, to reform the society or regulate secular activity which may be associated with religious practice.

The basic problem is that wrong or partial understanding; dictate of conservationist and fundamentalist forces, true meaning of Holy Quran is under shadow. Eventually, this distorted view gets perpetuated in the society. In this way, social evil starts to develop and spread with their horns in the society and women always become victim of the social evil. They are denied of their fundamental constitutional rights, and basic human rights. This is the root cause of gender injustice and gender discrimination in the society. The time has come to read, understand, be enlightened and practice true Quranic injunctions in society in matters of divorce. Talaq-al-biddat is unconstitutional for violation of right to life, under Article 21, Constitution of India. "The right to life includes the right to live with human dignity and all that goes along with it"[39]. The practice of arbitrary talaq-al-biddat impairs the dignity of Muslim women. They are allowed to be treated by their husbands like sub human beings or imbecile-no prestige, no honour. In the light of Universal Declaration of Human Rights and CEDAW, in an era of democracy and post modernism, they are treated wrongly and unfairly and just cannot be accepted.

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38 *See* also, Preamble and Article 1, 2 and 3 of CEDAW

39 Bhagwati. J. *Francis Coralie* v. *Union Territory of India*, (1981) 1 SCC 688

No doubt Talaq-al-biddat is a social evil. What is the way to convince the large sections of the society to eradicate it? If the changes in the society come from within, it is better. Experience also shows that if the reform or change is thrusted upon, it would not bring desired results. Secondly, unless the society is sensitised to accept the reform, every initiative of reform would be a futile exercise. That is why, to make the society aware and sanitise the people to accept reform from within, it is always better to rely on the religious texts and doctrines i.e. Quranic principles and instances from Hadith about actual and approved system of talaq. People would accept it very easily from the core of the heart.