TRIPLE TALAQ : AN ANALYTICAL STUDY WITH EMPHASIS ON SOCIO-LEGAL ASPECTS (1994). By Furqan Ahmad. Regency Publications, New Delhi. Pp. xvi + 250. Price Rs. 225.

THE AUTHOR of the book under review[1] has produced a timely, deeply researched, and useful monograph on a much debated topic in the field of Muslim personal law administered in India. The book is well printed on good paper with an attractive get up.

The work has eight chapters. Also, there is a useful bibliography, table of cases and index along with a glossary of Arabic words.

Perhaps the last two chapters in the book, *viz.*, chapter 8 [2] concerned with reforms in the Muslim World in which he has dealt with legal changes in Egypt, Iraq, Jordan, Morocco and North Yemen and the valuable Epilogue[3] in which he has discussed possible paths to reform that are open to courts and legislatures in India, are the most important in the book. These should be of interest to every court, lawyer or social reformer who has to deal with the question of *talaq*.

A merit of the book is that the author does not avoid or try to escape mentioning authorities that oppose his point of view. He clearly disfavours the *talaq-e-biddat* [triple talaq]. He has, it appears, correctly summarised the views of the "Four Great" *Sunni* jurists, (Imams) Abu Haneefah, Malik, Shafaee, and Imam Ahmad Ibn Hanbal, who in general all seem to accept the legal validity of the triple *talaq* with minor variations.[4] This would appear to disable an Indian court today, in a *Hanafi* case, from availing of the mandate conferred by the consensus of the *Ulema* of this subcontinent, achieved in 1936, under the inspiration of the late great Maulana Ashraf Ali Thanvi, in 1936, and recorded in the Statement of Objects and Reasons well as of the Muslim Marriages Act 1939. This important and relevant document might with advantage have been printed along with the Act, that is printed in appendix V of the book.[5] No doubt, as the author points out the Jafery [*Shiah*] schools as well as the Ahl e Hadith[6] hold the triple *talaq* illegal. All the schools hold it to be immoral. But the intervention of the legislature seems called for to restore the unquestionable *Quranic* position. For this, under present circumstances, a fresh consensus of the *Ulema*, [as earlier took place in 1936-39] would perhaps be required by the political leadership before they would move Parliament in the matter. This may be a cumbersome process but it seems to be inescapable. Meanwhile Muslim public opinion has expressed itself

1. Furqan Ahmad, *Triple Talaq : An Analytical Study with Emphasis on Socio-Legal Aspects* (1994).
2. *Id.* at 114-24.
3. *Id.* at 125-36.
4. See, *id.* at 38-9.
5. See, *id.* at 161.
6. See, *id* at 82-4, 101-2, 124, 127.

overwhelmingly in favour of change in the law. It would, perhaps be overstraining the bounds of judicial propriety to attempt to enforce, by judicial decree, the views of the *Shiahs* and Ahl-e-Hadith on the majority without following this process. The position of a Pakistani court in such a case is different from that of an Indian court. In Pakistan the court is, by law, expressly empowered to apply a *Quranic* rule. But as John Bright said, in the British Parliament, on 13 December 1847 "The reason why the law is carried into effect in England is because the feeling of the people is in favour of it and every man is willing to become and is in reality a peace office in order to further the ends of justice". These words, substituting "Muslim" for "English" are peculiarly applicable to the situation in India.

Perhaps the most that an Indian court can at present do is to disarm the triple *talaq* by overruling the Privy Council judgment in *Rashid Ahmad's* case, mentioned by the author[7] which he rightly calls harsh.

The author has set out the judgment of Narayana Pillai J. of the Kerala High Court,[8] in *Khadisa* v. *Mahammed*.[9] The learned judge has, it is submitted rightly, followed the view of Mulla. He has, it seems, turned Nelson's blind eye to the *dicta* of the Privy Council. Mulla's view is as follows :

"A marriage without fulfillment of the prescribed conditions is irregular not void."

Later on the author says[10a] "The view expressed by Mulla is neither supported by any Quranic injunction nor by any other authentic source of Islamic law." Here the learned author seems, with respect, to have erred. Mulla has followed and cited Baillie.[11]

In giving their judgment the Privy Council in *Rashid Ahmad's* case, overlooked the most authoritative source of the *Hanafi* Muslim law in this subcontinent,*viz.*, the *Fatawa Alamgiri*. This is a compilation made by a commission of scholars under the aegis of the Emperor Aurangzeb Alamgir, later promulgated by an Imperial *Farman* as the law of the land. Fortunately we have an excellent English Digest of the *Fatawa Alamgiri* compiled by Neill Baillie that has been relied upon by all courts, including the Privy Council, for the past hundred years. A reference to the *Fatawa Alamgiri*, in Baillie's *Digest* thereof, shows that the Privy Council committed a grave error leading to a flagrant injustice in this case. The *Hanafi* law, according to Baillie, makes a fundamental distinction between marriages that are void (*batil*) and those that are merely irregular (*fasid*).[12] A void [*batil*] marriage is one where a man tries to marry a woman whose marriage with him can never be legitimised, *e.g.*, a woman within prohibited degrees (*muharrima*). On the other hand there are various kinds of irregular [*fasid*] marriages, that can be regularised. Baillie mentions a number of cases of irregular [*fasid*] marriages, *viz.* :

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7. See, *id.* at 9, 87.

8. *Id.* at 95.

9. 1979 K.L.T. 878.

10. M. Hidayatullah and Arshad Hidayatullah (ed.). *Mulla's Principles of Mohammedan Law*, vol. I, p. 261 (1990).

10*a*. See, *id.* at 95.

11. *Supra* note 10 at 15.

12. Baillie, *Digest* vol. 1, cited in *id.* at 150.

(*i*) A marriage solemnised without two witnesses. This is *nikah fasid* that becomes regular on consummation;

(*ii*) where a man marries two sisters at the same time. This can be regularised by the divorce or death of one of them The popular novel, "*My Feudal Lord*" deals with such a case;

(*iii*) where a Muslim woman marries a non-Muslim man or a Muslim man marries a non-Muslim or non-*Kitabia* woman. This can be put right by the man or the woman [as the case may be] converting to Islam or to one of the monotheistic faiths known as *Ahl-e-Kitab* which according to *Hanafi* authorities, includes the Arya Samaj Hindus.[13]

(*iv*) where a man has married a thrice repudiated woman [presumably so done in the *bidai* form [*tal e bida'taq*] and has thereafter continued to live with her despite the requirement of her first going through the procedure of marriage with a stranger and then getting divorced. In such a case, say the *Hanafi* doctors, the marriage is *fasid* [irregular] and not *batil* [void]. So the children in such a case are legitimate.[14] The distinguished jurists who compiled the *Fatwa Alamgiri* cited by Baillie, perhaps took the view that *only three Quranic Divorces would attract the full rigour of the Quranic prohibition against remarriage after three divorces.*[15]

Unless it be shown that Baillie has mistranslated or misquoted the *Fatawa Alamgiri*, the view taken by the learned author on this point seems erroneous, and, perhaps should be corrected in a subsequent edition.

This criticism has been elaborated at some length due to its importance. Apart from this the book is extremely valuable and should be on the table of every judge and lawyer dealing with triple *talaq*. It is a contribution to scholarship.

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13. *Id.* at 153.
14. *Id.* at 150, 151.
15. *Id.* at 276.

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