

Women living under muslim laws النساء في ظل قوانين المسلمين Femmes sous lois musulmanes

International solidarity network

Réseau international de solidarité

Central Coordination: Boite Postale 20023, 34791 Grabels Cédex, France.

Coordination for Asia: 68, Tipu Block, New Garden Town, Lahore, Pakistan.

Coordination for Africa: P.O. Box 73630 Victoria Island, Lagos, Nigeria.

Women Living Under Muslim Laws

is a network of women whose lives are shaped, conditioned or governed by laws, both written and unwritten, drawn from interpretations of the Koran tied up with local traditions.

Generally speaking, men and the State use these against women, and they have done so under various political regimes.

Women Living Under Muslim Laws

addresses itself

to women living where Islam is the religion of the State, as well as to women who belong to Muslim communities ruled by minority religious laws,

to women in secular states where Islam is rapidly expanding and where fundamentalists demand a minority religious law, as well as to women from immigrant Muslim communities in Europe and the Americas,

and to non Muslim women, either nationals or foreigners, living in Muslim countries and communities, where Muslim laws are applied to them and to their children.

Women Living Under Muslim Laws

was formed in response to situations which required urgent action, during the years 1984-85

The case of three feminists arrested and jailed without trial, kept incommunicado for seven months, in Algeria, for having discussed with other women the project of law known as "Family Code", which was highly unfavorable to women.

The case of an Indian sunni woman who filled a petition in the Supreme Court arguing that the Muslim minority law applied to her in her divorce denied her the rights otherwise guaranteed by the Constitution of India to all citizens, and called for support.

The case of a woman in Abu Dhabi, charged with adultery and sentenced to be stoned to death after delivering and feeding her child for two months.

The case of the "Mothers of Algiers" who fought for custody of their children after divorce.

amongst others...

The campaigns that have been launched on these occasions received full support both from women within Muslim countries and communities, and from progressive and feminists groups abroad.

Taking the opportunity of meeting at the international feminist gathering "Tribunal on Reproductive Rights" held in Amsterdam, Holland, in July 1984, nine women from Muslim countries and communities: Algeria, Morocco, Sudan, Iran, Mauritius, Tanzania, Bangla Desh and Pakistan, came together and formed the Action Committee of Women Living Under Muslim Laws, in support of women's struggles in the concerned contexts.

This Committee later evolved into the present network.

The objectives of **Women Living Under Muslim Laws** are

- * to create links amongst women and women's groups (including those prevented from organising or facing repression if they attempt to do so) within Muslim countries and communities,

- * to increase women's knowledge about both their common and diverse situations in various contexts,

- * to strengthen their struggles and to create the means to support them internationally from within the Muslim world and outside.

In each of these countries till now women have been waging their struggle in isolation.

Women Living Under Muslim Laws aims at

- * providing information for women and women's groups from Muslim countries and communities

- * disseminating this information to other women from Muslim countries and communities

- * supporting their struggles from within the Muslim countries and communities, and make them known outside,

- * providing a channel of communication amongst women from Muslim countries and communities.

These objectives are fulfilled through

- * building a network of information and solidarity

- * disseminating information through "Dossiers"

- * facilitating interaction and contact between women from Muslim countries and communities, and between them and progressive and feminists groups at large.

- * facilitating exchanges of women from one geographical area to another in the Muslim world.

**Shah Bano
and the Muslim Women Act
a Decade On:
The Right of the Divorced Muslim Woman to *Mataa***

Edited by Lucy Carroll

Preface by Danial Latifi

**Shah Bano
and the Muslim Women Act
a Decade On**

Women Living Under Muslim Laws *'Readers and Compilations'* Series

This English language series includes WLUML publications which are organised thematically or by geographical region.

Harsh Kapoor, Series Editor

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India

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Foreword

The Shah Bano Hullabaloo in India

Danial Latifi

There are a billion Muslims spread over many countries in every continent of the globe. Indonesia has the largest number. Next comes India with a seventh of this tally. Third comes Bangladesh and fourth Pakistan. The religious centre of the Islamic world is Mecca. Its intellectual centre is Cairo. The Shiites have their centre in Iran. In many countries Muslims form a majority. In some they constitute minorities. In some western countries they are reported to be the group with the highest growth-rate. Yet everywhere there is a paucity of information about them. The seemingly inexplicable reaction of a volatile section of Muslims on an issue like the *Shah Bano*¹ case that appeared to be of small importance to non-Muslims did nothing to contribute to enlightenment.

Many in India and abroad who were shocked at the seemingly excessive reaction of some Muslims over the *Shah Bano* case are unaware that in 1995 the Bangladesh High Court at Dhaka gave an even stronger and more far-reaching judgment, securing alimony to divorced women, based upon the same verse of the Quran (II:241) that caused such a hullabaloo in India in 1985. This judgment seems to have been accepted without protest by the overwhelmingly Muslim population of Bangladesh.

What did the *Shah Bano* case decide? The only new point of law decided by the Supreme Court of India in that case is best stated in the words of the learned judges themselves. After setting out some verses of the Holy Quran, notably chapter II verse 241, and the translation of these by various scholars, including Abdullah Yusuf Ali, the learned judges (Y.V. Chandrachud, C.J.; D.A. Desai, E.S. Venkatramiah, O. Chinappa Reddy, and Ranganath Misra JJ.) observed:

1. *Mohd. Ahmad Khan v. Shah Bano Begum*, (1985) 2 Supreme Court Cases 556 = All India Reporter 1985 Supreme Court 945. The full judgment is reproduced below, pp. 75-89.

[1] These Ayats [verses] leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for, or to provide maintenance to the divorced wife. [2] The contrary argument does less than justice to the teachings of the Quran. [3] As observed by Mr. M. Hidayatullah in his introduction to Mulla's *Principles of Mahomedan Law*, the Quran is *Al furqan*, that is one showing truth from falsehood and right from wrong.²

The Judges also made some suggestions to the Government of India and Parliament concerning enactment of a Uniform Civil Code. This was a routine exercise dear to some members of the judiciary. It was not suggested or argued at the Bar. The Government and Parliament made it plain that they would not follow this suggestion unless the communities affected asked for it. Thus it is difficult to believe that these remarks alone could provoke a violent outburst. In any event, these were mere *dicta* devoid of any binding force, such as our judges are, sometimes, over apt to make. The Government and Parliament hastened to clarify that no such measure would be undertaken without the consent of the communities affected.

As regards the first of the three propositions laid down by the Court, based upon the translation of Allama Abdullah Yusuf Ali, it may be noted that the authenticity of this work is almost universally accepted in the Muslim World. The learned editors of the latest edition of *The Holy Quran, English Translation of the Meaning and Commentary*, published from the Mushaf Al Madinan an Nabawah, (published by the Royal Authority of King Fahd, Keeper of the Two Holy Mosques at Mecca and Madina), in their preface at page vi state that (for a long time before the instant work) "The translation by the late Ustadh Abdullah Yusuf Ali was . . . chosen for its distinguishing characteristics, such as a highly elegant style, a choice of words close to the meaning of the original text, accompanied by scholarly notes and commentaries."

A seal upon the meaning of the crucial expression in verse II:241 has been set by the great jurist Imam Al Shafei, reproduced elsewhere in this work.³ Thus it is difficult to appreciate how anyone could adopt the position taken by some of those who criticized the Supreme Court's judgment.

The second proposition has been commented upon by the learned Pakistani scholar, Maulana Rafiullah Shahab, elsewhere in this collection⁴ and little needs to be added to what he has said. As

2. AIR 1985 Supreme Court 945, p. 952. Numbering in brackets added.

3. Below p. 31.

4. Below p. 53.

regards the third proposition, again it is difficult to find fault with the learned judges of the Supreme Court.

Thus it is difficult to find a rational explanation for the outcry that the learned pontiffs and their supporters mounted in the aftermath of the *Shah Bano* judgement.

The *Shah Bano* case sharply divided the independent Muslim intelligentsia from the reactionary pontiffs and their henchmen. At a reception hosted by a foreign embassy in New Delhi, Mrs. Humayun Khan, wife of the Pakistan envoy at New Delhi, told me, "Five Muslim Ambassadors from five Muslim countries were at my husband's house last night. They all agreed that the Supreme Court of India correctly decided the meaning of the Holy Quran." An impressive list of former Indian diplomats and vice-chancellors of universities met the Prime Minister, Mr. Rajiv Gandhi, and asked him to go slow with any legislation contemplated to nullify the Court's decision.

During the apogee of this agitation and controversy, in February 1986, I was invited to address a mass meeting of 25,000 Muslims at Calcutta, in the open air Netaji Stadium. I supported the Supreme Court decision. As soon as I read out Imam Shafei's ruling on this question, the large audience expressed their satisfaction at the decision of the Supreme Court. Shortly afterwards, in the municipal elections, they voted *en masse* for the Marxist party and government that had openly stood by the Supreme Court. But the politicians in New Delhi had set their course.

Nevertheless, it is undeniable, as noticed by the eminent Judge and Jurist, former judge of the Supreme Court, Justice Krishna Iyer, that there occurred at this time an unprecedented uproar that echoed throughout the country and, indeed, the media world. This provoked even a sober and sympathetic observer like him to comment:

The fundamentalist fusillade, fuelled by the "red flag" of "religion in danger" has inaugurated a "jurisdictional *jihad*" against the Court. The argument is that Muslim Personal Law is of Koranic vintage to be handled with care exclusively by Kazis and Ulema, unpolluted by heathen robes of the highest Court. This sacerdotal logic takes one to the silent legitimacy of the militant pleas that even Parliament cannot legislate on Muslim Personal Law. Bluntly put, behind this obscurantism is a poisonous political theory, a new testament of the dead two nation theory, a hard core negation of the secularity, integrity and authority of the State to adjudicate or legislate for Muslims.⁵

5. *Manthan Quarterly*, New Delhi, July 1986, pp. 35 fol, at p. 38.

Ironically, their outcry had precisely this result, which the prelates with their habitual myopia failed to foresee. Parliament speedily enacted the Muslim Women (Protection of Rights on Divorce) Act (1986) regulating the so-called sacred matters, materially altering the law. This was done with the blessings, not against the protest, of the *ulema*! Whatever else they may have achieved, the *ulema* succeeded in tearing with their own hands the mask of infallible interpreters of the Holy Quran from their faces. The damage to their prestige appears irreparable. The *ulema* further succeeded in establishing, by their own volition, another precedent of interference by the legislature in Muslim Personal Law.

Perhaps all this advances the cause of Reformation in the Islamic World. Its immediate impact on the cause of women's rights is more uncertain. This depends largely on the course the Courts and Judges will take. For the time being this is difficult to predict.

There is yet no judicial consensus on the interpretation of the Act of 1986 and exactly what, if any, rights it conferred on the divorced Muslim Women. All that is clear is that it deprived her of access to Section 125 of the Criminal Procedure Code — the provision on which Shah Bano had based her claim.

As Dr. Lucy Carroll correctly points out, some progressive and liberal judges have interpreted the Muslim Women (Protection of Rights on Divorce) Act (1986) in a manner beneficial to the divorced women, with the result that the Muslim husband was rendered subject to a financial liability far greater than that to which he had been subject under section 125 of the Criminal Procedure Code. Other courts have taken a different view. They have started with the assumption that the Muslim Woman Act was intended to overrule the decision of the Supreme Court in the *Shah Bano* case and have interpreted it in a manner derogatory to the interests of the divorced woman, denying her the rights affirmed by the Supreme Court of India in the *Shah Bano* case and recently confirmed by the High Court of Bangladesh.

A way forward seems to lie in the Supreme Court of India addressing the matter. As its former Chief Justice, Mr. Hidayatullah, has suggested in his excursus at page 240 of the last (19th; 1990) edition of Dinshaw Faridunji Mulla's *Principles of Mahomedan Law* put forth by him before his death, it is not premature to suggest that the Supreme Court must deal with petitions challenging the Muslim Women Act that have been waiting examination since 1986, must take occasion to offer a definitive interpretation of that statute.

But as has been said elsewhere in this volume, Bangladesh shows the way. Much will depend on the activity of the women themselves and their organizations.

This volume may help conscious women and their partisans to arm themselves for this struggle — which will be protracted and fierce. It is a worthy cause.

We should be grateful to those responsible for producing this volume for their excellent selection. The scholarly articles by Dr. Lucy Carroll in this book deserve special commendation. The contribution of Harsh Kapoor in the compilation of this volume also merits praise.

The WLUMML has performed a signal public service by producing and publishing this book on *Shah Bano* and the Muslim Women Act. This book will be valuable not only to activists in the Women's movement but also, on account of its juristic accuracy, to lawyers and judges who have to deal with these matters. As one who had some association with this case in 1985-86 I feel proud and privileged that the publishers have asked me to write this foreword.

Danial Latifi

Senior Advocate, Supreme Court of India
A-20 Neeti Bagh, New Delhi 10049
1st January 1997

Introduction

Lucy Carroll

One decade after the Indian Supreme Court, in the famous (or infamous) *Shah Bano* case¹ upheld the award of maintenance under the provisions of the (secular) Criminal Procedure Code, 1974, to a divorced Muslim woman, against the (totally irrelevant) argument that such post-*iddat* maintenance was contrary to Muslim law, and the (hopelessly untenable) argument that the uncodified Muslim law took precedence over legislation passed by Parliament;

nine years after the Government of Rajiv Gandhi capitulated to the demands of fundamentalist spokesmen and forced through Parliament the Muslim Women (Protection of Rights on Divorce) Act, designed and intended to reverse the Supreme Court judgment in *Shah Bano* and to deny to Muslim divorced women (simply on the basis of their religion) the limited protection against destitution conferred on all women by section 125 of the Criminal Procedure Code in 1974;

the High Court Division of the Bangladesh Supreme Court, of its own volition, took up the question of the interpretation of Quran II:241 and handed down the extremely important decision which is reproduced below.

This decision deserves wide publicity in India and provides the backdrop for a progressive and liberal interpretation of both section 127(3)(b) of the Criminal Procedure Code, 1974, and section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Some enlightened judges of the State High Courts, applying ordinary rules of statutory interpretation, informed by constitutional edicts, have demonstrated that essentially the same conclusion as that reached in Bangladesh follows logically from the terms of the Muslim Women Act itself. A selection of these judgments is reproduced in Part 3 of this volume.

1. *Mohammad Ahmed Khan v. Shah Bano Begum*, All India Reporter 1985 Supreme Court 945.

Perhaps to the surprise of many, in-depth analysis of the ambiguous and ill-drafted Muslim Women Act, so hastily pushed through Parliament in early 1986, may produce provocative and exciting insights — as demonstrated by decisions of some of the judges called upon to interpret and apply that statute in cases coming before their courts. There is, unquestionably, an interpretation of the Act which will actually do what the title asserts it was intended to do — *protect and preserve the rights of divorced Muslim women*. Inter alia, this means that it will not be necessary to strike down the entire Act as unconstitutional, although at least sections 4, 5, and 7 must be eliminated.

It is quite shocking to note that the petitions challenging the constitutionality of the Muslim Women Act, filed in the Supreme Court immediately after its enactment have not been called up for hearing during the course of more than eleven years! Meanwhile, the problems escalate and the intolerable (and unconstitutional) inequality introduced by denying to Muslim divorced women, simply on the basis of their religion, access to the relief provided to all other Indian divorced women by section 125 of the Criminal Procedure Code, 1974, is cruelly exaggerated by the diverse interpretations of the Act reached by the various High Courts: in some States a divorced Muslim women may obtain “provision” (*mataa*) for the post-*iddat* period; in others she can get nothing beyond maintenance for the *iddat* period.

The Muslim Women (Protection of Rights on Divorce) Act is a central statute; it must be interpreted and applied uniformly throughout the Republic of India. The only way to ensure this uniformity is for the Supreme Court to pronounce on the matter. It is not even necessary for that Court to wait for a party to bring a case up in appeal; the Supreme Court must be reminded of the Writ Petitions that have been pending before it for more than a decade, and encouraged to call them up for immediate hearing.

As the documents collected in the second part of this volume demonstrate, there has from the beginning been impressive and informed support from within the Muslim community for the change introduced in the Criminal Procedure Code in 1974, extending the minimal protection against destitution afforded by these provisions to encompass the destitute divorced woman. Likewise, in 1986 there was impressive opposition from within the Muslim community to the ill-conceived and politically-motivated Muslim Women (Protection of Rights on Divorce) Act, rushed through Parliament with little debate and a three line whip. The government of the day, for its own reasons, listened to only one side of the argument, and women, not for the first time, were made the scape-goats of male political greed.

A decade on, the events of 1985-1986 may be more dispassionately analysed and the hollow sham of the claims of both the Muslim reactionary forces and the Congress government to speak on behalf of the Indian Muslim community (including its female members, who, after all, comprise one-half of that community) are more easily perceived.

The Bangladesh decision must also be carefully perused by the public and jurists in Pakistan where — in spite of the recommendations of the Commission on Marriage and Family Laws in 1956;² in spite of the public support for the *Shah Bano* decision by a leading Pakistani *alim*;³ and in spite of the dramatic reinterpretation of Hanafi law which gave Pakistani women the right to enforce payment of arrears of maintenance covering a period of up to six years⁴ — nothing has been done to protect the destitute divorced woman.

WLUML are grateful to Danial Latifi, Seema Mustafa and Javed Anand — all of whom were personally involved in the legal and political events of 1985-1986 — for their valuable contributions to this volume.

Stop Press

While in India the struggle for minimal protection for the divorced woman — a matter, one might have thought, concluded by the revelations of fourteen and a half centuries ago — continues, Bangladesh has moved on to question the institution of polygamy. In another dramatic judgment, reproduced in the Stop Press section, a Divisional Bench of the Bangladesh High Court, has found section 6 of the Muslim Family Laws Ordinance (which permits polygamous marriage with the prior permission of an arbitration council) “against the principle of Islamic law,” and recommended that “this section be deleted and replaced with a section prohibiting polygamy.”

2. See below, pp. 51-52

3. See below, pp. 53

4. *Sardar Muhammad v. Mst. Nasima Bibi*, PLD 1966 (WP) Lahore 703; *Rashid Ahmad Khan v. Mst. Nasim Ara*, PLD 1968 (WP) Lahore 93; and *Muhammad Nawaz v. Mst. Khurshid Begum*, PLD 1972 Supreme Court 302.

Part 1

Md. Hefzur Rahman

v.

Shamsun Nahar Begum

47 (1995) Dhaka Law Reports 54 High Court Division

Mohammad Gholam Rabbani and Syed Amirul Islam, JJ.

Civil Revisional case No. 2067 of 1992.

Decided 9 January 1995

Judgment

Mohammad Gholam Rabbani J: The petitioner and the two opposite parties, Nos. 1 and 2, in this Rule are respectively named Md. Hefzur Rahman, Shamsun Nahar Begum and Shaon Mia, a minor. The petitioner married the first opposite party on 25.3.85. The dower money was fixed at Taka 50,001.00. Second opposite party, a son, was born out of this wed-lock on 15.12.87. Subsequently, the petitioner divorced the first opposite party on 10.8.88.

2. On 2.11.88 first opposite party for herself and on behalf of her minor son, the second opposite party, instituted Family Court Suit No. 60 of 1988 in the Family Court and the Court of Assistant Judge, Daudkandi, claiming the said dower money and maintenance at Taka 1,000.00 per month for each of them.

3. The Family Court decreed the suit directing the petitioner to pay Taka 48,000.00 as the balance dower-money, to pay Taka 3,000.00 to the first opposite party as the maintenance for the iddat-period of three months and to pay Taka 1,000.00 each month for the maintenance of the second opposite party.

4. On appeal preferred by the petitioner being Family Appeal No. 2 of 1991, the learned District Judge, Comilla, reduced the amount of maintenance to Taka 600.00 per month for each of the opposite parties.

5. This Rule under section 115 of the Code of Civil Procedure was issued at the instance of the petitioner as to why the amount of maintenance should not be further reduced.

6. No one appears to support the Rule. Heard Mr. Md. Abdul Jabbar for the opposite parties and perused the records. It appears that none of the Courts below has given its reasoning for the amount

fixed by them as the maintenance per month. Nether of the parties adduced any evidence upon which amount monthly maintenance can be determined and fixed. Nevertheless we are not precluded from determining the amount. It is in the record that the petitioner is a typist in the Ministry of Finance. Neither in his deposition nor in his written statement the petitioner, we find, refuted the claim of maintenance at Taka 1,000.00 per month for each of the opposite parties as made in the plaint. We can, under the circumstances, call in aid of our personal knowledge. We, therefore, hold that each of the opposite parties is entitled to get from the petitioner an amount of Taka 1,000.00 per month as maintenance commensurate with the status and means of the petitioner. We further hold that the learned District Judge acted illegally in reducing the amount abruptly without assigning any reason whatsoever.

7. Now we address ourselves to a *suo motu* legal query as to whether the first opposite party could have claimed maintenance beyond the period of iddat. The relevant materials are as hereunder:

Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence; but if they leave (the residence), there is no blame on you for what they do with themselves. Provided it is reasonable. And God is Exalted in Power, Wise.

For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.

Thus doth God make clear His Signs to you, in order that ye may understand.

Quran, Second Sura Baqara, verses 240-242. (These and the other verses to be quoted subsequently are quoted from *The Holy Quran: Text, Translation & Commentary* by Abdullah Yusuf Ali.)

Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her edit Maintenance is not due to a woman after her husband's decease

Hedaya, translated by Charles Hamilton, Book IV, Chapter XV, Section 3, p. 145.

A woman revocably repudiated is entitled to maintenance, clothing, and a place to reside in during her iddat, day by day It would seem, however, that after the death of her husband she has no right to a residence except in the single case of her being pregnant.

Digest of Mohammudan Law (compiled and translated from authorities in the original Arabic) by Neil B.E. Baillie, Part Second, Book II, Chapter VII, Section Sixth, pp. 169-170.

8. Quran is the text book of Islam. It is the Words of God revealed to the last Prophet Mohammad (peace be on him) in Arabic language from time to time during the period of twenty-three years of his last

part of life. The word "Quran" means "This is the Book which is read". It has one hundred and fourteen "Sura", maybe termed as "Chapter", each having a particular name and containing unequal number of "ayat" or verses. To quote Quran:

This Quran is not such as can be produced other than by God. (Tenth Sura Yunus, verse 37.)

9. In fifty-fourth Sura Qumar God repeats four times, the same verse:

And we have made the Quran easy to understand and remember: then is there any that will receive admonition?

Quran itself prescribes its rule of study:

He it is who has sent down to thee the Book: in it are verses basic or fundamental. They are the foundation of the Book: others are allegorical. But those in whose hearts is perversity follow the part thereof that is allegorical, seeking discord searching for its hidden meanings, but no one knows its hidden meanings except God and those who are firmly grounded in knowledge say 'We believe in the Book, the whole of it is from our Lord': and none will grasp the Message except men of understanding. (Third Sura Al Imran, verse 7.)

10. Thus, according to Quran as quoted above, its verses are "easy to understand." That is to say, Quran prescribes rule of literal construction of its verses. This rule is a universal one. The first and elementary rule of construction is that it is to be assumed that the words and phrases have been used in a statute in their ordinary meaning and that every word in a statute is to be given a meaning.

11. Then there is a proviso or exception. Quran says that its verses are of two qualities (a) basic and fundamental and (b) allegorical. Quran allows study of its verses of the quality in (a) in accordance with the aforesaid rule of literal construction. But it disallows application of this rule in respect of its verses of the quality in (b) on the ground, "no one knows its hidden meanings except God" warning that searching for their hidden meanings shall be treated as "seeking discord."

12. This literal study of the Quran is discouraged by a section of Muslims. They insist that the readers should follow any of the interpretations given by the recognised early scholars. They go further by saying that the door of interpreting Quran is now closed.

13. This view was echoed and accepted by the Privy Council in a case reported in ILR 25 Cal. 9 (*Aga Mahomed Jaffer Bindanim vs. Koolsoom Beebee and others*). In this case the Privy Council did not follow the clear text of Quran as quoted above first by us, "Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence", as against the law on the subject

stated in Hedaya and by Baillie and quoted above by us on the reasoning that their Lordships “do not care to speculate on the mode in which the text quoted from the Koran, which is to be found in Sura II, verse 240, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie’s Imameea. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.”

14. This dictum of the Privy Council quoted above pronounced about one hundred years ago in 1897 AD cannot be followed on three grounds.

15. Firstly, the learned Judges in the Privy Council were non-Muslims and they were anxious to decide such issues in accordance with the laws as propounded by the Muslim jurists rather than independently, disregarding the Muslim jurists.

16. Secondly, Article 8(1A) of the Constitution of Bangladesh, contained in Part II under the heading “Fundamental Principles of State Policy”, states that absolute trust and faith in the Almighty Allah shall be basis of all actions. It indicates that Quranic injunctions shall have to be followed strictly and without any deviation.

17. Thirdly, Quran urges:

Those to whom we have sent the Book study it as it should be studied; they are the ones that believe therein. (Second Sura Baqara, verse 121.)

This verse directs continuous study of the Quran which is in conformity with the dynamic, progressive and universal character of Islam.

18. We now like to quote an observation from a decision of the Lahore High Court reported in PLD 1960 Lahore 1142 (*Mst. Rashida Begum v. Shahan Din & others*) in support of our above views as hereunder:

Thus it is quite clear that reading and understanding the Quran is not the privilege or the right of one individual or two. It is revealed in easy and understandable language so that all Muslims if they try may be able to understand and act upon it. It is thus a privilege granted to every Muslim which cannot be taken away from him by anybody, however highly placed or learned he may be, to read and interpret the Quran. In understanding the Quran one can derive valuable assistance from the commentaries written by different learned people of yore, but then that is all. Those commentaries cannot be said to be the last word on the subject. Reading and understanding the Quran implies the interpretation of it and the interpretation in its turn includes the application of it which

must be in the light of the existing circumstance and the changing needs of the world. . . .

If the interpretation of the Holy Quran by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed. . . .

19. We, thus, come to the conclusion that a civil Court has the jurisdiction to follow the law as in the Quran disregarding any other law on the subject, if contrary thereto, even though laid down by the earlier jurists or commentators, maybe of great antiquity and high authority, and though followed for a considerable period. Under the Hindu Law clear proof of usage can outweigh the written text of law. But it is not in the case of Islamic law. For it is an article of faith of a Muslim that he should follow without questioning what has been revealed in Quran and disobedience thereof is a sin.

20. Now let us consider the literal meaning of the first part of verse no. 241 of Sura Baqara as quoted above. The Arabic text may be written in English letters hereunder:

Wa lil-mootalla kate mataaon bil-maarooof.

21. The dictionary meaning of these words are as follows:

“mootallakat” -- a woman who is divorced.

“mataaon” -- house-hold stuff, utensils, goods, chattels, provision, convenience.

“maarooof” -- known, recognised, honourable, good, befitting, a kindness.

(See respectively page 91, 136 and 96 of *The Dictionary and Glossary of the Koran* by John Penrice.)

22. So we find that a woman who is divorced is entitled to household stuff, utensils, goods, chattels, provision, convenience which is known, recognised, honourable, good, befitting, a kindness. Abdullah Yusuf Ali is, therefore, correct in translating the expression “mataaon bill maarooof” as “maintenance should be provided on a reasonable scale.” One of the meanings of the word “maarooof” is “recognised”. But for this one should not be confused. This meaning is to be considered with regard to the amount of maintenance and not with regard to the period of maintenance. This is apparent in view of the fact that Quran directs a woman who is divorced to undergo a period of iddat elsewhere (Second Sura Baqara, verse 228) and herein Quran directs a man to give maintenance in case he divorces his wife. These two legal provisions are, therefore, independent of each other and are addressed to two persons of different status.

23. Considering all the aspects we finally hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person.

24. In the result this Rule is disposed of without cost on the terms that the judgment and decree dated 20.4.92 passed by the learned District Judge, Comilla, in Family Appeal No. 2 of 1991 are set aside and those dated 30.10.90 passed by the learned Judge of the Family Court and the learned Assistant Judge, Daudkandi, in Family Court Suit No. 60 of 1988 are restored with the modification that the plaintiff-opposite party No. 1 Shamsun Nahar Begum and the plaintiff-opposite party No. 2 Shaon Mia shall get maintenance at Taka 1,000.00 each per month from the defendant-petitioner Md. Hefzur Rahman till respectively she remarries and he attains majority.

Shah Bano: Bangladesh Shows the Way

A.G. Noorani

[*Communalism Combat*, April 1996]

On January 9, 1995, the High Court Division in Bangladesh ruled that a Muslim husband is bound, after divorcing his wife "to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period; that is to say, till she loses the status of a divorcee by remarrying another person."

The judgement was delivered by Justices Mohammed Gholam Rabbani and Syed Amirul Islam, both devout Muslims, as is obvious from their respectful treatment of Quranic verses. Incidentally, their judgement was brief, to the point, and was free from the kind of florid prose that marred the judgement of our Supreme Court in the Shah Bano case.

They went straight to the relevant Quranic verses (240-242, second Sura Baqara). They provide *inter alia* that "for divorced women maintenance (should be provided) on a reasonable (scale). This is a duty of the righteous."

But this is not what Digests of "Mohammadan" law prepared during the British Raj said. What we had was not Muslim law (*shariah*) but Anglo-Mohammadan law. The Privy Council made matters worse still. It ruled in 1987 [sic; should read 1897] that "It would be wrong for the court . . . to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."

Both the Supreme Courts of Pakistan and Bangladesh departed from this view. In 1960 the Lahore High Court held that "these commentaries cannot be the last word on the subject" or else "the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time."

The Bangladesh ruling goes so far as to hold that a woman who is divorced "is entitled to house-hold stuff, utensils, goods, chattels,

provision." There is no reason why Indian courts should consider themselves bound to follow antiquated commentaries on Muslim law.

They can consider the Quranic provisions in the light of modern translations and modern writings on the Quran. Properly construed, not only the Muslim law of maintenance of divorced women but the entire law on polygamy and divorce will be shown to be devoid of Quranic authority.

The Shah Bano Case:

Written arguments on behalf of the Respondent [Shah Bano] Criminal Appeal No. 103 of 1981 in the Supreme Court of India

Danial Latifi, Senior Advocate
S.Shaukat Husain, Advocate

1. The main question in this reference is the correctness of the decision of this Hon'ble Court in *Bai Tahira's* case (1979) 2 SCC 316 and in *Fazlunbai's* case (1980) 4 SCC 125 regarding Section 127(3)(b) of the Code of Criminal Procedure 1973 read with section 125 of the said Code.

2. The material portion of section 127(3)(b) provides that a Maintenance Order, passed under section 125 shall be cancelled where:

The woman has been divorced by her husband and . . . she has received, whether before or after the date of the said Order, the whole of the sum which, under any customary or personal law, applicable to the parties, was payable on such divorce.

3. The sums which under the Muslim personal law are payable upon divorce to the wife from the husband are as follows: --

(a) Where she is *mafruzah* (i.e. one whose *mahr* has been fixed at the time of marriage) such *mahr*; and, where she is one who has been given in marriage without any *mahr* being fixed, then an amount of *mahr-ul-mithl* (proper dower) determined by the Court;

(b) Maintenance due during the *iddat* period; and

(c) *Mataa* due under the command set forth in the verse 241 of Sura II (*Surat ul Baqr*) of the Holy Quran which is translated as follows: --

241. And for divorced women, let there be a fair provision. This is an obligation on those who are mindful of God. (Al-Quran, rendered into English, by Dr. Syed Abdul Latif. Hyderabad, India, 1969, page 28.)

4. It is submitted that this amount, *mataa*, referred to in verse II:241 of the Holy Quran, is included in the sum which under the personal law applicable to the parties, who are Muslims, is payable on divorce.

5. Although this institution of *mataa* has not always been kept in the forefront by writers on Muslim Personal Law, it is clearly founded

on the text of the Holy Quran, which is the highest source of law for all sects of Muslims. Besides, there is ample and respectable juristic authority of commentators on the Holy Quran to sustain it as a binding obligation upon husbands of all divorced women.

6. Two reputed authorities who have dealt with this matter are Maulana Baizawi (obit. 1286 A.C.) and Ibn Katheer (obit 1373 A.C.). The relevant portion of the Arabic text of these Commentaries is reproduced as Annexure 'A' (1) hereto along with the translation, Annexure 'A' (2).¹ These Commentators have declared that the obligation upon the husband of paying *mataa-un-bil-maarooif* (reasonable provision) to his divorced wife is imperative and binding, and not merely optional. They have further opined that such obligation exists in all cases, whether the wife be *mafruzah* (vide supra para 3) or *mafawwadah* (i.e. divorcee by virtue of exercise of delegated power) or whether she be one divorced before consummation of marriage (*mutallaqata qabl-al-masees*) or one divorced after consummation (*madkhoola-biha*). The jurists have reached this conclusion after comparing and contrasting the text of the Holy Quran II:241 (earlier set out) with the text of the earlier verse, namely II:236. That earlier verse reads: --

236. No blame shall attach to you if you divorce your women before you have touched them or settled the dower (*mahr*) on them; but make (reasonable) provision for them -- the affluent in circumstances according to his means and the straightened according to his means as considered fair. This is an obligation on those who act kindly. (Al-Quran, op. cit., page 27.)

7. The Commentators point out that whereas, in verse II:236 the obligation is stated to be only upon "those who are kind" (*alal mohsineen*), in the second verse, II:241, where the obligation is enlarged to cover all categories of women, it is also made binding upon all the God-fearing men (*alal muttaqeen*). This means that the obligation, mentioned in the second verse, II:241, is binding upon all Muslims.

8. Apart from their own reasoning, which, it is submitted, is unimpeachable, the commentators cite in support of the view that the obligation, mentioned in verse II:241, is obligatory and universal, the opinions of such jurists as Imam Shafei, Saeed Ibn Jubair, Ibn Jarir Tabari and other elders.

1. The Ibn Katheer text and translation are reproduced below, p. 31.

9. It may be noted that the opinion of Imam Shafei particularly is acceptable to all the Schools of Sunni (including the Hanafi) jurisprudence. This well established rule is referred to in the Statement of Objects and Reasons of Act VIII of 1939, the Dissolution of Muslim Marriages Act, 1919, which states²:

The Hanafi jurists have clearly laid down that in cases where the application of the Hanafi law causes hardship, it is permissible to apply the provisions of Maliki, Shafei or Hanbali Law.

10. The same view has been expressed, perhaps with even greater force, by Imam Jafar al-Sadiq the highest authority among all schools of Shiah jurisprudence. Imam Jafar al-Sadiq also has the distinction of having been the teacher of the illustrious Imam Abu Hanifa, founder of the Hanafi School of jurisprudence. The views of Imam Jafar al-Sadiq are set out by Professor Fyzee in his *Compendium of Fatimid Law* (Simla, 1969) at page 67. As Professor Fyzee states, "Imam Jafar al-Sadiq held it (*mataa-un-bil-maarooḥ*) to be obligatory (*farida wajiba*) and always decreed its payment." He further states, "The *mataa* should be a generous donation."

11. The decisions of this Hon'ble Court in *Bai Tahira's* case and in *Fazlunbai's* case earlier referred to fully conform to the above view of the Commentators Maulana Baizawi and Ibn Katheer and to the views of Imam Shafei, Imam Jafar al-Sadiq and other authorities. They also correctly expressed the intention of the Legislature when enacting section 127 of the Code of Criminal Procedure. Reference may, in this connection, be made to the Debate in the Loksabha on Tuesday the 11th December, 1973, and particularly to columns 312-313, and 317-318 of the Official Reports and to the answer made, at the bottom of column 317, by the Hon'ble Minister, Shri Ram Niwas Mirdha to the Hon'ble Shri Jyotirmoy Bosu, that:

If that [i.e. Shri Jyotirmoy Bosu's contention] holds good, this provision may not come into operation.

Shri Jyotirmoy Bosu had relied precisely on verse 241 of chapter II of the Holy Quran, earlier mentioned.

Drawn by:
Danial Latifi
Senior Advocate

Filed by:
S. Shaukat Husain
Advocate

2. The full text of this Statement is reproduced below, p. 33.

Imam Shafei on Al Quran II:241

وقوله
”والمطلقات متاع
بالمعروف حقاً
على المتقين“
قال عبد الرحمن
بن زيد بن أسلم
لما نزل قوله تعالى
”متاعاً بالمعروف
حقاً على المحسنين“
قال رجل: إن شئت
أحسننت ففعلت و
إن شئت لم أفعل“
فأنزل الله هذه الآية
”والمطلقات متاع
بالمعروف حقاً
على المتقين“
وقد استدل بهذه الآية
من ذهب من العلماء
إلى وجوب المتعة
لكل مطلقة سواءً
كانت مفوضة أو مفروضاً
لها أو مطلقة قبل المسيس
أو مدخولاً بها
وهو قول عن الشافعي
رضي الله عنه

Commentary on the Holy Quran by Ibn Katheer (d. 1373 A.C. Damascus)

Translated by Danial Latifi

wa qaola huu
"WA LIL MUTALLAQATI
MATAAUN BIL
MA'AROOFE
HAQQAN ALAL
MUTTAQEEN"
qaala 'Abdur Rahman
bin Zaid bin Aslam
lamma nazala
qaola huu Ta'ala
"MATAAUN BIL
MA'AROOFE
HAQQAN ALAL
MOHSINEEN" (II. 236)
qaala rajulun
"in sheto ahsanto
fafa 'alato wa
in sheto lam af'al"
fa anzala Allaaho
haaza hil aayaha
"WA LIL MUTALLAQATI
MATAAUN BIL
MA'AROOFE
HAQQAN ALAL
MUTTAQEEN" (II. 241)
wa qad istadalla
ba haaza hil ayaha
man zahabe min al
ulamaae
ila wujuub il mata'ata
likulle mutallaqaatin
sawaan
kaanat mufawwazatan
aw mafuzan laha
aw mutallaqatan
qabl al masiis
aw madkhoolan bihaa
wa hua quaolun
'an AL SHAFEI
razi Ullaah alaeh.

Regarding the Ayat
"AND FOR DIVORCEES
REASONABLE PROVISION
IS DUE FROM
THE RIGHTEOUS"
Said Abdur Rahman
bin Zaid bin Aslam
"When God revealed
the Ayat
'REASONABLE PROVISION
IS DUE FROM
THE KINDLY (II. 236)
someone said
'If I wish to be kind
I may pay and
otherwise not'.
Then God revealed
this Ayat:
'AND FOR DIVORCEES
REASONABLE PROVISION
IS DUE FROM
THE RIGHTEOUS'" (II. 241)
And because
of this Ayat
a group of scholars
hold MATAA obligatory
in all cases
whether
of divorce by delegation
or of Mahr paid
or of those divorced
before consummation
or those after
consummation
so held
IMAM AL SHAFEI
God bless him and his !

[Extract from]
Statement of Objects and Reasons

**Issued with the Bill which became the Dissolution of Muslim
Marriages Act, 1939**

[*Gazette of India*, 1936, Part 5:154]

There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases to which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafi'i or Hanbali Law. Acting on this principle the *ulema* have issued *fatwas* to the effect that in cases enumerated in clause 3, Part A of this Bill [which became section 2 of the 1939 Act], a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called *al-Hilat al-Nijiza* published by Maulana Ashraf Ali Saheb who has made an exhaustive study of the provisions of Maliki law which, under the circumstances prevailing in India, may be applied to such cases. This has been approved by a large number of *ulama* who have put their seals of approval on the book.

As the Courts are sure to hesitate to apply the Maliki law to the case of a [non-Maliki] Muslim woman, legislation recognizing and enforcing the above mentioned principle is called for in order to relieve the sufferings of countless Muslim women.

Divorced Muslim Women in India:

Shah Bano, the Muslim Women Act, and the Significance of the Bangladesh Decision¹

Lucy Carroll

For divorced women maintenance [or provision] (should be provided) on a reasonable (scale). This is a duty on the righteous.²

There can be no dispute concerning the fact that the Muslim husband is legally liable for the maintenance of his wife; indeed, it is the economic responsibility imposed upon the husband which is urged to justify his dominance in the matrimonial relationship.³ Yet for Hanafi women, the right to maintenance is particularly difficult to enforce. This for two reasons: (1) The Hanafi jurists regard arrears of maintenance as forfeit in the absence of a court order directing the husband to pay a specified regular sum as maintenance for his wife, or an agreement between the parties concerning the wife's maintenance.⁴ (2) In common with the other schools of Muslim law, the Hanafis do not recognize any concept of alimony, payable for an indefinite period to the divorced wife.

Thus when a Hanafi wife takes proceedings against her husband for maintenance, the odds are very high that he will respond to her summons by cutting his losses and promptly divorcing her (exactly as Shah Bano's husband did). The woman will only be able to recover

1. Much of the material in this essay has been extracted from chapters on "Reform in India: Maintenance for Divorced Women, 1974," and "Reaction in India: The Muslim Women (Protection of Rights on Divorce) Act, 1986," in volume III (divorce) of my forthcoming work on *Muslim Family Law in South Asia*.

2. Quran, II:241 (Yusuf Ali, trans.).

3. See Quran, IV:34: -- "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and *because they support them from their means*. Therefore, the righteous women are devoutly obedient" (Yusuf Ali, trans.; emphasis added.)

4. The problem of arrears of the wife's maintenance is a peculiarity of Hanafi law; the other Sunni schools and Shia law regard arrears as recoverable from the date the failure to maintain commenced.

maintenance for the period from the date of the institution of her suit (because Hanafi law does not countenance recovery of arrears of maintenance) until the conclusion of her *iddat* (because dissolution of the marriage brings to an end the husband's liability for maintenance beyond the *iddat*), i.e., a matter of only a few months.

While a Muslim wife or a Muslim child may sue for maintenance in a civil suit (in which the uncodified Muslim law would be applied), the expense and delays of such a course rendered that option meaningless to women and children in urgent and immediate need. The most important provisions concerning maintenance for well over a century have been those found in the Code of Criminal Procedure, 1898, and its predecessors. These provisions authorize the magistrate, in summary proceedings, to order a husband to maintain *his wife during the subsistence of the marriage*, and a father to maintain his minor (legitimate and illegitimate) children. The object is simply to prevent vagrancy and destitution, to prevent women being forced into prostitution and children into crime or begging in order to survive. The wife (or child) applying for maintenance under the Code must be unable to maintain herself (itself) and the amount the magistrate can award as maintenance is limited by statute. The Criminal Procedure Code is a secular statute applying to Indians of all religions or denominations; its provisions concerning maintenance do not necessarily coincide with the rights available to the parties under their personal law, rights which they could pursue in a civil court.⁵

The maintenance provisions of the Criminal Procedure Codes, including the Code of 1898, did not permit recovery of arrears of maintenance for any period prior to the date of the woman's institution of her petition, and only authorized maintenance orders in favor of *married* women and children. The divorce ploy, therefore,

5. E.g., a Muslim wife does not have to be impoverished and unable to maintain herself in order to sue her husband for maintenance in the civil court; she must be unable to maintain herself in order to pursue the remedy under the Criminal Procedure Code. An illegitimate child cannot claim maintenance from his Muslim father in a civil suit (since Muslim law does not recognize the putative father's obligations toward his offspring), but may obtain a maintenance order from the magistrate under the Criminal Procedure Code.

Ironically, the law applicable to Christians in British India was the English common law, which imposes upon a father only a moral, not a legal, obligation to maintain his children. Thus a Christian child could not obtain maintenance from his father in a civil suit; the magistrate could, however, issue a maintenance order against the father. See Lucy Carroll, "'Justice, Equity and Good Conscience' and Maintenance for Children of Christian Parents," *All Pakistan Legal Decisions (Journal)*, 45(1993):13-15.

exonerated the Muslim husband whether his wife pursued her claim for maintenance in the civil court or in the magistrate's court.⁶

When in the early 1970s India undertook the task of replacing the old Criminal Procedure Code, 1898, with a new and up-dated statute of the same name, women's organizations in general and Muslim women in particular organized petitions to bring to the attention of Parliament the necessity of altering the terms of the old section 488 of Chapter XXXVI⁷ in order to offer protection and succour to divorced women. They succeeded in convincing the Joint Parliamentary Committee which was considering the Bill, and an amendment was introduced by the Committee in section 125 of the Bill (the section equivalent to section 488 of the 1898 Code) which added a new definitional clause defining the word "wife" as used in the chapter concerning maintenance. "'Wife,'" declared the Bill as thus amended, "includes a woman who has been divorced by or has obtained a divorce from, her husband, and has not remarried." Under this provision, the magistrate would be authorized to order an ex-husband to pay maintenance (not exceeding Rs. 500 a month) to his impoverished ex-wife who was unable to maintain herself; the extra-judicial, unilateral *talaq* would no longer suffice to exonerate a Muslim husband from his responsibilities.⁸

The proposed change in section 125 of the new Code, although opposed by Muslim members, was accepted by both Houses of Parliament. The Muslim spokesmen took their objections to the Prime Minister. Curiously, and in a procedure totally unprecedented, the Code of Criminal Procedure was, in December 1973, brought again before

6. Even if the husband did not *talaq* his wife immediately and suffered a maintenance decree or order to be issued against him, he retained the right to divorce her at any time and bring the maintenance payments to an end. A maintenance decree or order in favor of a Muslim wife did not survive the dissolution of the marriage.

7. S. 488(1) and (2) from the Code of 1898 read as follows: -- "(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself . . . a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding Rupees 500 in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs. (2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance."

8. Although after the Hindu Marriage Act of 1955, the Hindu woman divorced in judicial proceedings could be awarded maintenance (alimony) by the matrimonial court, the magistrate's jurisdiction under the new section 125 of the Criminal Procedure Code would assist the Hindu woman whose husband did not comply with the civil court's decree and defaulted on his alimony payments. It also could assist Hindu women of those castes which prior to 1955 had customs of extra-judicial divorce, which customs were explicitly recognized by the Hindu Marriage Act.

the Parliament which had already passed it, in order that the government might propose an amendment of section 127, which deals with alterations in a maintenance order. The relevant portion of the new clause proposed to be added to this section read:

127. . . .

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that: --

. . . .

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said [maintenance] order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, --

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband of the woman;

(c) the woman has obtained a divorce from her husband and that she voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

There can be little doubt that clause 127(3)(b) was designed to exclude Muslim divorcees who had been paid their *mahr* or dower ("the sum which under any customary or personal law applicable to the parties, was payable on divorce") from the minimal protection afforded to divorced woman of all other communities. There was obviously a reluctance to make the clause more specific and to identify Muslim women by reference to their religion, since such express wording would render the clause liable to impeachment on constitutional grounds, as violative of Article 14⁹ and/or Article 15(1)¹⁰ of the Indian Constitution.

The Indira government's amendment of section 127 was rubber stamped by the Parliament it controlled.

The immediate factor influencing the government's dramatic about face and its capitulation to the objections of Muslim communalists was clearly the forthcoming election in the Prime

9. Article 14: -- "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

10. Article 15: -- "(1) The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them (3) Nothing in this Article shall prevent the State from making any special provision for women and children."

Minister's home state of Uttar Pradesh, where the Muslim community represents an important factor in any political calculations and where Congress was wont to regard the Muslim electorate as a "vote bank" whose loyalty it commanded. It is indicative of the political powerlessness of women that even such minimal protection as was sought to be provided by the new section 125 of the Criminal Procedure Code, 1974, should be bargained away by male politicians (whose actions were overseen and endorsed by a female Prime Minister).¹¹

The Code of Criminal Procedure, 1974, and the Courts

Although it might have appeared -- as it clearly did both to the Muslim parliamentarians who supported the amendment of section 127 and to those leftist parliamentarians who opposed the amendment -- that the effect of the revised section 127(3) would be to exempt Muslims from the provisions of section 125 as they applied to divorced women once payment of the *mahr* outstanding on termination of the marriage and maintenance for the period of *iddat* were proved, the matter did not end here. It is the duty of the Courts to interpret the meaning and scope of legislation and the lurking ambiguity in the terms of the statute virtually guaranteed that the question would arise in litigation.

The controversies arose when a husband, who had paid his divorced wife's *mahr* and *iddat* maintenance, claimed exception from a magistrate's maintenance order on the basis of section 127(3)(b). The central question was thus whether *mahr* constituted a sum "under any customary or personal law applicable to the parties payable on divorce," remittance of which (regardless of how minuscule the amount) would absolve a Muslim husband from his liabilities, and negate the rights of a Muslim divorcee under section 125. Not surprisingly, the various High Courts arrived at different and incompatible conclusions when faced with the necessity of construing the provisions of the new Code in regard to maintenance applications by divorced Muslim women.

The question inevitably reached the Supreme Court in 1979: *Bai Tahira v. Ali Hussain Fissalli Chothia*.¹² Giving judgment on behalf of the three-member Bench, Justice Krishna Iyer emphatically, and in a

11. The unseemly bargaining was also indicative of the tenuous commitment of politicians of the ruling party to the ideals of the secular state, ideals enshrined in the Indian Constitution and essential for the peace, security, and stability of the Indian union. The intensified Hindu communalism of the 1980s and 1990s was nurtured on the communal politics of the Congress party.

12. All India Reporter (hereinafter "AIR") 1979 Supreme Court 362; Krishna Iyer, Tulzapurkar, & Pathak, JJ.

highly quotable judgment written in his distinctive style, found in favor of the divorced woman. A second case reached the Supreme Court a year later: *Fuzlunbi v. Khader Vali*.¹³ The High Court (against whose decision the woman appealed) had sought to distinguish the case before it from the binding judgment of the Supreme Court in *Bai Tahira*, inter alia, on the ground that the husband in the 1979 case "did not raise any plea based on Sec. 127(3)(b)." Whether or not this plea had been explicitly raised in 1979, the question certainly had been emphatically answered by the Supreme Court -- a fact which the Supreme Court was not reticent in pointing out in the course of overruling the decision of the High Court and finding again in favor of the divorced woman. Again the decision of the three-member Bench was written by Justice Krishna Iyer.

Shah Bano¹⁴ and the Supreme Court

Shah Bano, the third case involving the rights under section 125 of the 1974 Code of a Muslim woman divorced by *talaq* to reach the Supreme Court, gave rise to controversy that was to shake the nation. The case initially came before a two-member Bench of the Supreme Court, which was bound to follow the previous decisions in the 1979 and 1980 cases, each of which had been decided by a Bench of three judges. Alternatively, if the smaller Bench did not prefer to follow the existing precedent and believed that the question involved required reconsideration, the judges could request the Chief Justice to constitute a larger Bench to hear the case.¹⁵ This was the course the initial Bench chose to follow.

This unfortunate referring opinion, delivered in 1981 (four years before the case was heard and decided by the larger Bench -- a Bench of five members, chaired by the Chief Justice himself) intimated to Muslim religious and communal spokesmen that the earlier decisions might be overturned, and they hastened to involve themselves in order to share the glory as defenders of Islam. Several Muslim communal organizations (including the Muslim Personal Law Board) applied for and were granted permission to address the Bench which would hear the *Shah Bano* case and busily prepared their arguments. When the decision went against them, they refused to accept the authority of the Supreme Court to supersede their (self-assumed) position as the sole authoritative interpreters of Muslim law, and the

13. AIR 1980 Supreme Court 1730; Krishna Iyer, Chinnappa Reddy, & A.P. Sen, JJ.

14. *Mohammad Ahmed Khan v. Shah Bano Begum*, AIR, 1985 Supreme Court 945; Chandrachud, C.J.; Desai, Chinnappa Reddy, Venkataramiah, & Ranganath Misra, JJ.

15. i.e., a Bench of more than three members, which would have authority to overrule the 1979 and 1980 judgments.

Supreme Court's rejection of their (untenable) argument that Muslim law superseded the secular law of the Indian State. Without the advance notice, and the aroused hopes and expectations, provided by the unfortunate opinion of the two-Member Bench referring the case to the Chief Justice with the request that he assign it for hearing before a larger Bench, the *Shah Bano* decision would have undoubtedly passed as peacefully as had its predecessors.

Civil Suits for Maintenance: The Family Courts

Prior to the establishment of the Family Courts, the major disadvantage of civil proceedings for maintenance was that a suit for maintenance is unlikely to be filed unless the wife has been deserted and is in serious need. Civil litigation may be very protracted; if the situation is immediate and urgent, the delays involved in obtaining relief through the civil courts may render this course totally impractical. The paucity of reported decisions in which a wife claimed maintenance in a civil suit as opposed to the plethora of decisions concerning applications for maintenance orders filed in the magistrate's court underlines the point in a very striking manner.

For more than a century, in everyday practical terms, the most important law concerning maintenance was that found in the provisions of the Criminal Procedure Code entitling destitute and deserted wives and children to obtain maintenance orders in summary proceedings before magistrates. The statute itself precludes the award of arrears accumulated prior to the institution of the proceedings and the 1898 Code (repealed and replaced in India, but still applicable in Bangladesh) only encompasses the lawfully married wife, not a divorcee.

As long as practical considerations dictated that maintenance claims would be pursued in the magistrate's court, and as long as the applicable statute explicitly ruled out both arrears of maintenance and post-*iddat* maintenance, there was no scope for either question to be agitated.

One of the effects of the (Pakistan/Bangladesh) Muslim Family Laws Ordinance, 1961, was to provide a new, convenient, and expeditious forum (the *ad hoc* Arbitration Council) before which the question of arrears of maintenance could be agitated. The result was that -- the question having been raised before a forum competent to answer it and that answer having been endorsed first by the Lahore High Court and eventually by the Supreme Court of Pakistan -- the Hanafi wife in Pakistan is legally entitled to obtain (in civil proceedings before a civil court or in proceedings under the Muslim Family Laws Ordinance before an Arbitration Council) arrears of maintenance from the husband who has failed or refused to maintain

her. This extremely welcome conclusion was founded upon a reconsideration of the classical Hanafi position.

However, since the Muslim Family Laws Ordinance (like the Criminal Procedure Code, 1898) only deals with married women, it did not provide a forum before which the question of post-*iddat* maintenance could be agitated. Theoretically, the Family Courts, established in Pakistan in 1965 and in India and Bangladesh two decades later, did provide such a forum. The advantage does not appear to have been pressed by women (or more accurately, perhaps, by the lawyers advising them).

Nevertheless, in 1995 a Divisional Bench of the Bangladesh High Court took up the question *suo motu* in the course of dealing with a civil revision from a Family Court and laid down as law binding on all subordinate courts (including, of course, the Family Courts) that under Muslim law the husband is obliged to maintain his divorced wife until she dies or remarries.¹⁶ It reached this conclusion on the basis of Quran II:241 and the reference there to the "*mataa*" due a divorced woman.

***Mataa*: the classical interpretation**

The word "*mataa*"¹⁷ which appears in the Quran II:241, is translated "maintenance" by Yusuf Ali.¹⁸ The usual word for maintenance is "*nafaqa*." Several other translations of this verse were cited to the Supreme Court in *Shah Bano* and quoted in that judgment. E.g.:

For divorced women also there shall be *provision* according to what is fair. This is an obligation binding on the righteous. [Muhammad Zafrullah Khan, trans.; emphasis added.]

And for the divorced woman (also) a *provision* (should be made) with fairness (in addition to her dower); (this is) a duty (incumbent) on the reverent. [Dr. Allamah Khadim Rahmani Nuri, trans.; emphasis added.]

For divorced women a *provision* in kindness: A duty for those who ward off (evil). [Marmaduke Pickthall, trans.; emphasis added.]

The Hanafis interpret "*mataa*" very narrowly. The same word appears in verse 236 of chapter II of the Quran, which (together with verse 237) deals with divorce before consummation of the marriage:

16. *Mohammad Hefzur Rahman v. Shamsun Nahar Begum*, 47 (1995) Dhaka Law Reports 54; Mohammad Gholam Rabbani & Syed Amirul Islam, JJ. The decision is reproduced above, pp. 19-24.

17. Not to be confused with the very similar word referring to the temporary marriage recognized by Ithna Ashari law.

18. Yusuf Ali's translation of this verse is given at the commencement of this essay.

There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means -- a *gift of reasonable amount* is due from those who wish to do the right thing.

And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted . . . and the remission (of the man's half) is the nearest to righteousness¹⁹

Reading the injunction contained in II:241 against the background of these verses, the Hanafi jurists concluded that the *mataa* (provision; gift) is only obligatory when the woman has been divorced before consummation in circumstances where no *mahr* has been set (i.e., in circumstances where, had the marriage been consummated, she would have been entitled to the proper *mahr* or the *mahr* of her equals). It is, however, "laudable" to give the divorced woman a "present" in other cases as well.²⁰ I.e., it is not contrary to, or prohibited by, Muslim law, even as narrowly interpreted by the Hanafi jurists, that the husband should make some "consolatory offering" to his divorced wife. The mandatory *mataa* or gift due to the woman divorced both before consummation and before an amount of *mahr* had been settled, is defined by the classical Hanafi jurists in terms of three items of clothing, the fabric of which depends on the economic position of the husband.²¹

The other Sunni schools and the Shias regard *mataa* as something (in addition to her *mahr*) that the husband is obliged to provide to his wife in every case of divorce by *tafaqh*.²² The fourteenth century Shafi jurist, Ibn Katheer (as translated and quoted by Danial Latifi),²³ said of *mataa* in his commentary on the Quran:

Said Abdur Rahman bin Zaid bin Aslam: -- "When God revealed the Ayat 'reasonable provision is due from the kindly [II:236],' someone said, 'If I wish to be kind I may pay and otherwise not.' Then God revealed this Ayat: -- 'And for divorcees reasonable provision is due from the righteous [II: 241].'"

19. Quran, II:236-237 (Yusuf Ali, trans); emphasis added.

20. Burhanuddin al-Marginani, *Hedaya* (trans. by Charles Hamilton, 1790; Grady edn. 1870), pp. 46-47.

21. N.B.E. Baillie, *A Digest of Moohummudan Law* (2nd edn., London, 1875) vol. I, pp. 97-98.

22. Alexander Russell & Abdullah Suhrawardy, *A Manual of the Law of Marriage* (trans. of *Mukhtasar* of Sidi Khallil; n.d.), p. 215. Ruxton, p. 133. Nawawi, *Minhaj-et-Talibin* (trans. by E.C. Howard from the French edn. of L.W.C. Van Den Berg; reprinted Lahore, 1977), p. 313.

23. The Senior Advocate who appeared on behalf of the woman in the *Shah Bano* case.

And because of this Ayat a group of scholars hold *mataa* obligatory in all cases whether of divorce by delegation [*talaq-i-tafwid*] or of *mahr* paid or of those divorced before consummation or those [divorced] after consummation. So held Imam Al Shafi. God bless him and his.²⁴

In Malaysia, where Shafi law is followed, the divorced wife is entitled to *mataa* in addition to *iddat* maintenance and her *mahr*. The amounts awarded under this head are not large, but the Malaysian wife is also entitled to a division of matrimonial property on divorce. The latter derives from Malaysian customary law and has been incorporated into Malaysian Muslim law.²⁵

In Egypt, where generally Hanafi law is followed, the codified law dealing with marriage and divorce was amended in 1979 to provide that the wife divorced without fault and without her consent would be entitled to obtain (in addition to her *mahr* and *iddat* maintenance) *mataa*, defined as an amount equivalent to not less than two years' expenses and subject to no maximum limit. The amount of *mataa* shall be determined with reference to the means of the husband, the circumstances of the divorce, and the duration of the marriage. If necessary or convenient, the *mataa* may be paid by installments. The Explanatory Note to the amendment observes that in the classical law payment of *mataa* was not obligatory (except in the case of a woman divorced before both settlement of the amount of *mahr* and consummation). It then explains:

In these days when the morality of persons have declined . . . the divorced wife might find herself in need of assistance beyond what she can get from the maintenance for the period of *iddat* to enable her to overcome the effect of divorce. The payment of *muta'ah* can help in this respect and . . . the necessity for such payment can act as a deterrent to hasty divorce.²⁶

During the course of the *Shah Bano* furor, a Pakistani *alim* who authors a regular column in the *Pakistan Times*, took occasion to address the topic of *mataa* and Sura II, verse 241, remarking that in the early days of Islam:

24. The Arabic and Danial Latifi's translation are set out above, p. 31.

25. See Ahmed Ibrahim, "Ancillary Orders on Divorce in the Shariah Courts of Malaysia," *Islamic & Comparative Law Quarterly*, 7(1987): 185-216.

26. Quoted in Ahmad Ibrahim, "Provision for Divorced Women Under Islamic Law," *PLD 1986 Journal* 234-239, p. 238. Ahmad Ibrahim is actually quoting the Explanatory Note issued with the Egyptian statute of 1985, but this was virtually identical to the Note issued in 1979. (In 1985 the Act of 1979 was declared unconstitutional due to procedural irregularities in the manner in which it had been brought upon the statute book. The Act was immediately re-enacted with a couple minor changes and the 1985 Act was declared of retrospective effect from the date of the striking down of the 1979 statute.)

Muslims . . . always paid a handsome amount to their divorced wives so that someone may contract marriage with them for the sake of this money. Servants were provided to those divorced women who had passed the limit of marriageable age. The expenses of this servant were always borne by the divorcing husband. If the husband is expected to pay the expenses of a servant [for his ex-wife], he can do so in respect of maintenance allowance for her.²⁷

Mataa and Shah Bano

The Bangladesh decision, with its unambiguous endorsement of *mataa*, brings us full circle, back to the (Indian) *Shah Bano* decision and the (Indian) Muslim Women (Protection of Rights on Divorce) Act.

The *Shah Bano* litigation concerned only the interpretation of section 127(3)(b) of the *Indian Criminal Procedure Code, 1974*. The Indian Supreme Court on two previous occasions had interpreted that section and held that the remittance of customary or personal law sums “payable on divorce” did not automatically indemnify the husband against a maintenance order under section 125 unless the sum so paid constituted an adequate substitute for the maintenance allowance otherwise available under section 125. The *Shah Bano* case merely provided an opportunity for this position to be summarily confirmed.

The husband in *Shah Bano* claimed to be exempt from the operation of section 125 on the ground that Muslim law excused him from any responsibility toward his divorced wife beyond payment of any *mahr* due her and an amount to cover maintenance during the period of *iddat*, and argued that section 127(3)(b) conferred statutory recognition on this rule of Muslim law. In retrospect, it is easy to remark that the Indian Supreme Court should not have permitted itself to be drawn into an argument concerning Muslim law, which was irrelevant in the circumstances; all the Supreme Court needed to do was to endorse the interpretation of section 127(3)(b) which had already been twice declared by that same court.

The argument based on Muslim law, so vehemently urged by the appellant husband, supported by the Muslim Personal Law Board, the Jamaat-i-Islam, and the Jamat-Ulema-Hind (which had been granted permission to appear before the Supreme Court as interveners), was countered by counsel appointed to represent Shah Bano, Danial Latifi. This rejoinder raised the matter of *mataa* (provision) and the wording of the Quran, II:241: “For divorced women maintenance [or provision] (should be provided) on a reasonable (scale). This is a duty on the righteous.”

27. Rafiullah Shahab, article from *Pakistan Times*, reprinted in *Times of India*, 3 March 1986 and reproduced below, p. 53.

The Supreme Court concluded that "These Aiyats [verses of the Quran] leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran." Having already held that section 127(3)(b) did not indemnify the Muslim husband against a maintenance order under section 125 if his ex-wife were in need and unable to maintain herself, and that the provisions of the Criminal Procedure Code would take precedence over the rules of Muslim law if the two were in conflict, the conclusion that Muslim law obliged the husband to maintain his ex-wife merely meant that there was no conflict between the terms of the Code and the rules of Muslim law.

The Muslim Women (Protection of Rights on Divorce) Act, 1986

The self-appointed spokesmen of Muslim opinion were not pleased and, having girded their loins to fight the battle in the court house, they immediately took the agitation to the streets. The Congress government of Rajiv Gandhi wavered and manoeuvred and eventually capitulated; the Muslim Women (Protection of Rights on Divorce) Act was forced through Parliament with a three line whip and the obvious intention of overruling the *Shah Bano* decision and preserving Muslim votes for Congress.

The Muslim Women Act unambiguously -- and in complete disregard of constitutional guarantees -- deprived divorced Muslim women, simply on the ground of their religion, of access to the relief provided by section 125 of the Criminal Procedure Code, relief to which they had theretofore enjoyed; relief which all non-Muslim divorced women continue to enjoy. In place of the remedy provided by section 125, the Act appeared to offer the divorced Muslim woman the right to her *iddat* maintenance from her husband, and the right to pursue various and sundry of her relatives (defined as heirs to her by the personal law of succession) for maintenance, and, failing such relatives, the right to claim maintenance from the State Wakf Board. A more complicated search for sustenance it is difficult to conceive!

However, in other respects the Act is very curiously and ambiguously drafted. The important section is section 3, which declares that the divorced woman is entitled to obtain from her former husband "maintenance," "provision," and *mahr*, and to recover from his possession her wedding presents and dowry (*jahez*); and authorizes the magistrate to order payment and/or restoration of these sums or properties. The crucial provision is found in section 3(1)(a), which states that the divorced woman "shall be entitled to":

a reasonable and fair provision *and* maintenance to be made and paid to her within the *iddat* period by her former husband. [Emphasis added.]

The wording appears to imply that the husband has two separate and distinct obligations: (i) to make a "reasonable and fair provision" for his divorced wife; and (ii) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance," but on the time by which an arrangement for payment of "provision" and "maintenance" should be concluded, i.e., "within the *iddat* period."

On this reading, the Act only excuses from liability for post-*iddat* maintenance a man who has already discharged his obligations of "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's *mahr* and restored her dowry, etc. as per sections 3(1)(c) and 3(1)(d). The whole point of *Shah Bano* was precisely that the husband had not made "a reasonable and fair provision" for his divorced wife, even if he had paid the amount agreed as *mahr* half a century earlier and provided *iddat* maintenance; he was therefore ordered to pay a specified sum monthly to her under section 125 of the Criminal Procedure Code.

Rather than reversing the Shah Bano decision, it could be argued that the Muslim Women (Protection of Rights on Divorce) Act codified it!

That the phrase appearing in section 3(1)(a) of the Muslim Women Act -- "a reasonable and fair *provision* and *maintenance*" -- encompasses two different things is indicated, firstly, by the use of two different verbs -- "to be *made* and *paid* to her within the *iddat* period." Clearly, "a fair and reasonable provision" is to be "made," while "maintenance" is to be "paid." Secondly, section 4 of the Act, which empowers the magistrate to issue an "order for payment of maintenance" to the divorced woman against various of her relatives contains no reference to "provision." Obviously, the right to have "a fair and reasonable provision" made in her favor is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance."

Thirdly, the interveners on behalf of the husband in *Shah Bano* could not refute the words of the Quran, II:241; all they could do was to contend that Yusuf Ali's translation of *mataa* as "maintenance" was incorrect and to point out that other translations employed the word "provision." This the Supreme Court termed "a distinction without a difference" -- as indeed it was on the facts of the case before it: whether *mataa* was rendered "maintenance" or "provision," there was no pretence that the husband in *Shah Bano* had provided anything at all by way of *mataa* to his divorced wife. In the Lok Sabha debates after the judgment, Ibrahim Sulaiman Sait (speaking in

support of overruling the *Shah Bano* decision by statute), while apparently conceding that a divorced Muslim woman was entitled to *mataa*, argued that *mataa* "is a single or one time transaction. It does not mean payment of maintenance continuously at all."²⁸ This concession supports the argument that the word "provision" in section 3(1)(a) of the Muslim Women Act incorporates *mataa* as a right of the divorced Muslim woman distinct from and in addition to *mahr* and maintenance for the period of *iddat*.

Thus, even assuming (without conceding) that the "maintenance" referred to in section 3(1)(a) is confined to maintenance for the period of *iddat*, there still remains the question of "provision." This "provision" (*mataa*) is neither defined by the Act nor subjected to a statutory maximum. The determination of what constitutes, on the facts of any given case, "a reasonable and fair provision" rests completely in the discretion of the magistrate. Section 3(3) of the Act instructs the magistrate to determine what would constitute "reasonable and fair provision and maintenance" with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage.

There is no reason why "reasonable and fair provision" could not take the form of the regular payment of alimony to the divorced woman. *Again, rather than reversing the Shah Bano decision, it could be argued that the Muslim Women (Protection of Rights on Divorce) Act codified it!*

However ironic it may appear, there is an interpretation of the Muslim Women Act which -- to the dismay of its backers and the surprise of many of its opponents -- may actually do what the title suggests it was intended to do: protect the interests of the divorced Muslim woman. Of necessity (and in the hope of avoiding obvious constitutional hurdles) the Muslim Women Act was dressed up to look like a piece of "reformist" legislation, codifying part of Muslim law in the interest of a class of disadvantaged Muslim women, whose rights required definition and protection. The disguise, in the result, might prove too convincing.

Perhaps the Supreme Court of India will be fortified by the Dhaka decision when it faces -- as it eventually must; the conflicting judgments emanating from the various High Courts require resolution and fundamental constitutional questions must be answered -- the

28. *Lok Sabha Debates*, 23 August 1985, col. 406. Of course, a woman would ordinarily prefer a lump settlement; allowing payment to be made in installments is an indulgence granted to the husband, not a favour to the wife. Few husbands possess sufficient financial liquidity to be able to make "fair and reasonable provision" for an ex-wife in the form of a lump sum divorce settlement.

task of interpreting the Muslim Women Act. Perhaps so fortified, the Indian Supreme Court will see its way clear to preserve that part of the Muslim Women Act which, by means of an enlightened approach, can be construed so as to confer a real boon on Muslim women.

[Extracts from]
**Report of the Commission on Marriage
and Family Laws**

[*Gazette of Pakistan, Extraordinary, 20 June 1956*]

.....

The Commission is not authorised or prepared to tamper with the Shariat but its members and hundreds of Muslims who have answered the Questionnaire issued by the Commission, have exercised their judgment freely in matters that pertain to Fiqh. Law is ultimately related to life experiences which are not a monopoly of the theologians only. There are recorded cases in which un-learned women corrected the Khalifa who gratefully acknowledged his error of judgment. If Muslim society has to become genuinely free and dynamic again, offering itself as a model for all other types of democracy, that original spirit of Islam has to be revived.

There is no question of amending the basis of the laws about marriage and family relations as promulgated in the Holy Book or any clear and authentic injunctions which could be derived from the Sunnah. The members of the Commission as well as those from all spheres of society and different intellectual levels who have pondered over the Questionnaire and sent replies have acted with the conviction that it is not explicit Islamic injunctions that are to be amended or altered; they are only to be liberally and rationally interpreted and properly implemented. . . .¹

1. *Gazette of Pakistan, Extraordinary, 20 June 1956, pp. 1205-1206*

Divorce by Husband

Question No. 5.

5. Should it be open to a matrimonial and family laws court, when approached, to lay down that a husband shall pay maintenance to the divorced wife for life or till her remarriage.?

The commission was of the opinion that such a discretion should be vested in the matrimonial court, and that a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children. Of course it would be open to a matrimonial court to refuse to sanction any maintenance if the woman is at fault.²

Summing up

Having dealt with specific questions in detail we would like to make some concluding remarks to indicate that we have always kept the injunctions of the Holy Quran and the Sunnah in view in proposing certain reforms. We have given no new rights to women. An effort has been made to provide machinery for the implementation of rights that have already been granted to women and children by the Holy Quran and the Sunnah. . . .³

Islam very justly claims to be a simple and liberal creed, and apart from a very few categorical injunctions, adumbrated in broad outline its basic principles, aspirations and trends, are based on natural and substantial justice. The Quran says that previous societies perished because they were burdened with too much inflexible law and too much unnecessary ritual, which the Holy Book has stigmatized as chains and halts. Life is a creative and adaptive process and it requires more of vision and less of inflexible rules. The original simple and liberal spirit of Islam must be revived and for guidance we have to go back to the beginning of Islam when it was yet free from accretions. Later multiplications of laws and codes may be studied as facts of historical importance, but can never be identified with the totality of Islam. As the great sage-philosopher of Islam Allama Iqal said, "Islam is more of an aspiration than a fulfilment," meaning thereby that its implementation at any epoch of history in any particular socio-economic pattern is only a moment in the dialectic of its history. No progressive legislation is possible if Muslim assemblies remain only interpreters and blind adherents of ancient schools of law. . . .⁴

2. *Ibid.*, p. 1215.

3. *Ibid.*, p. 1229.

4. *Ibid.*, p. 1231.

A Pakistani View of Muslim Law

Rafiullah Shahab

[*Times of India*, 3 March 1986]¹

The *Shah Bano* case is being heatedly discussed in the Indian press nowadays and glimpses of this discussion are reported in our press off and on.

This case related to a divorced Muslim woman who requested the Indian Supreme Court to compel her husband to pay maintenance allowance to her. The court in the light of Clause 125 of the Indian Constitution (it is in fact Section 125 of the Criminal Procedure Code--Editor, TOI) granted her request.

However, the husband did not accept this decision and managed to get a *fatwa* from the *ulema* that this court decision was against the teachings of Islam and an undue interference in the family laws of the Muslim community. This *fatwa* was given wide publicity and Muslims in various parts of the country have started an agitation against the decision the court. They are demanding a repeal of this decision and their exemption from Clause 125. Some of the *ulema* have requested the Indian Prime Minister for a personal meeting to discuss the issue.

On the other hand, the association of Indian lawyers and judges have condemned the attitude of the Muslims in this respect. They have treated the agitation of the Muslim masses as a challenge to the sanctity of the courts. This situation has provided a chance for the opponents of Islam to pass derogatory remarks about the faith. Shah Bano was divorced after passing a major part of her life with her husband. They maintain that a religion which opposes the provision of maintenance allowance to an old helpless divorced woman cannot be a true religion and in this respect the Indian Constitution is better for it makes such provisions. Such a state of affairs demands that a thorough study of the issue be made in the light of the teachings of Islam.

1. Originally appeared in *The Pakistan Times*.

Fatwa in Haste

It seems that the verdict (*fatwa*) against the decision of the Indian Supreme Court was issued in haste. Had the relevant parties studied the details of Islamic law in this respect their attitude would have been different. Actually this verdict is based on the views of those jurists who believe that divorce ends the relations between the husband and wife. Resultantly she is not entitled to any maintenance allowance after divorce, the reason being that they treat maintenance allowance as a sort of compensation for enjoying the company of the wife. However, the verdict of the Hanafi jurists in this respect is totally different. According to the principles laid down by them in various similar cases a woman after divorce is entitled to claim maintenance allowances.

The basic principle in this respect is that maintenance allowance is not a compensation for conjugal rights. It is actually a sort of reward or a present. (*Al-Bahr Al-Ra'i* by Allama Ibne Najeem, vol. IV, p. 186.) It is unfortunate that in the Shah Bano case the difference between compensation (*muawaza*) and reward (*silla*) was ignored. It made it an intricate problem. This difference can be better illustrated by the concrete example of the emoluments of a government servant. The pay drawn by him is compensation for the work done by him during his service while at the end of his service he is rewarded with pension for which he performs no work.

This principle of the Hanafite is based on the following verse of the Holy Quran: "And for the divorced women provision (must be made) in kindness. This is incumbent on those who have regard for duty." (*Al-Baqrah*, 241.)

According to a number of the Muslim jurists, including of course the Hanafite, this provision is made in addition to the dower-money due to the wife and its payment is compulsory. (*Tafsir Kabir*, vol. VI, pp. 148 and 72.)

There is a difference of opinion about the details of this provision: the word "*mataa*" used for this purpose has been defined differently by different authorities. According to Hazrat Abdullah Bin Umar a payment of 30 dirhams to the divorced woman is sufficient for this purpose, while Hazrat Obne Abbas considered that the best form of *mataa* is the provision of a paid servant to the divorced wife who should serve her during her remaining life. Usually the husbands paid handsome amounts to their divorced wives so that these may help them in contracting a second marriage. Hazrat Hassan Bid Ali provided 20,000 dirhams or dinars and a water-skin full of money to his divorced wife for this purpose. (*Al-Jama Lal Ahkam Al-Quran*, vol. III, p. 201.)

Ancient Practice

In the light of this tradition good Muslims in the early periods of realm always paid a handsome amount to their divorced wives so that someone may contract marriage with them for the sake of this money. Servants were provided to those divorced women who had passed the limit of marriageable age. The expenses of this servant were always borne by the divorcing husband. If the husband is expected to pay the expenses of a servant, he can do so in respect of payment of maintenance allowance to her.

.....

In the light of these details it is suggested that the *ulema* should study this issue in the light of the teaching of the Quran and Sunnah.

Part 2

Selection of Articles and Documents Concerning *Mataa*, Cr.P.C.*, Shah Bano, and the Muslim Women Act

* Cr.P.C. stands for the Indian Criminal Procedure code.

Text of Chapter IX (Maintenance Orders) Criminal Procedure Code Act II of 1974

[India]

Statute

125. (1) If any person having sufficient means neglects or refuses to maintain --

- (a) his wife, unable to maintain herself, or
- (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself;
- (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself; or
- (d) his father or mother, unable to maintain himself or herself;

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female, if married, is not possessed of sufficient means.

Explanation. -- For the purposes of this Chapter --

- (a) "minor" means a person who, under the provisions of the India Majority Act, 1875, is deemed not to have attained his majority.
- (b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation. -- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they were living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

126. (1) Proceedings under section 125 may be taken against any person in any district --

- (a) where he is; or
- (b) where he or his wife resides; or
- (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner, prescribed for summons cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made

is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

127. (1) On proof of a change in the circumstances of any person, receiving under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, father or mother as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that --

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, --

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the civil Court shall

take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

128. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

Muslim Husband's Liability under Ss. 125 & 127 Cr.P.C.

T.M. Abdullah, Advocate, Tellicherry, Kerala

[1977 Kerala Law Times 18]

On the rulings in *Kunhi Moyin v. Pathumma* (1976 KLT 87) and *Muhammad v. Sainaba* (1976 KLT 71) Mr. Fazlul Huq, Advocate, in his article in the journal section of 1977 KLT dated 24th January argues that if a Muslim husband proves that he has paid his divorced wife the full dower as per verse 236 or 237 of chapter 2 of the Holy Quran, the maintenance for the '*iddah*' period and a reasonable or honourable provision or gift as per verse 241 of chapter 2, he should get relief under S. 127 from paying maintenance till the wife's death or remarriage because they are all that is payable to her under Shariat on divorce.

The short question is: Are they payable on divorce under personal law (Shariat) or customary law of Muslims? Where the Shariat law applies, customary law to the contrary is irrelevant.

Dower meaning '*mahr*' is promptly payable on marriage or may be deferred depending upon the will of the wife. If the whole *mahr* has been promptly paid immediately on marriage or at any time during coverture, no portion of it will remain to be paid on divorce. Verses 236 and 237 of chapter 2 envisage paid *mahr*. *Mahr* will not necessarily remain to be paid on divorce; it arises not by divorce.

Maintenance for the *iddah* period does not arise by reason of divorce. It is an extension of the obligation subsisting during coverture to maintain the wife upto the period of 3 monthly courses just to see if there is any sign of pregnancy in the woman by the divorcing husband. If there is, then the waiting period is extended until delivery and the maintenance also is extended until then. It is therefore a price for waiting and not a compensation for snapping the tie of marriage. Their incidence is not at the time of divorce.

So, the dower and the *iddah* maintenance are out of account for relief under S. 127 Cr.P.C. What remains is the command for making a reasonable or honourable provision for the divorced wife contained in

chapter 2 verse 241 of the Holy Quran as cited by the learned author of the article. The verse 241 occurs disjointedly away from the verses dealing with dower and *iddah* and can be reasonably construed to refer to contexts other than dower and *iddah*.

The reasonable or honourable provision for the divorced wife may take the form of a lump sum allowance or [be paid] by instalments. The amount and the method may be a matter of agreement between the ex-husband and ex-wife. Satisfaction of the ex-wife in this regard may serve as a ground of relief in S. 127.

Views on Maintenance for Divorced Women¹

Danial Latifi and Syed Ameenul Hasan Rizvi

[1981 *Islamic and Comparative Law Quarterly* 142-144]

On 18 October, 1980, the Department [of Islamic and Comparative Law, Indian Institute of Islamic Studies] held its first seminar on one of the burning socio-legal issues of the day, viz., the question of maintenance of divorced wives under the new Criminal Procedure Code of India (1973) and its relation with the parallel rules under Islamic jurisprudence. The seminar was well attended. Its two main speakers were Syed Ameenul Hasan Rizvi and Danial Latifi. Resume of both the talks follow. --Ed. [Islamic and Comparative Law Quarterly]

Danial Latifi

Speaking in Urdu, Latifi forcefully supported the decision of the Supreme Court of India in *Bai Tahira v. Ali Hussain*,² where Krishna Iyer, J., had interpreted section 127(3)(b) of the 1973 Code of Criminal Procedure in a very special manner saying that the sum paid to the divorced wife under personal law referred to in the said provision of the code should be "more or less sufficient to do duty for maintenance allowance," otherwise it could be considered for the reduction of the maintenance rate but could not "annihilate" it. Latifi based his arguments on the verse of the Quran saying:

. . . . [Arabic omitted.]

(And for divorced women let there be a fair provision. This is an obligation of those who are mindful of God.)³

He had said in an earlier work that the judgment in *Bai Tahira* was

1. Reproduced with the permission from *Islamic and Comparative Law Quarterly*, I(1981), pp. 142-144.

2. AIR 1979 S.C. 362 (decided on 6 October 1978). [This was the first case involving the rights of a divorced Muslim woman under the new Criminal Procedure Code to reach the Supreme Court. -- ed.]

3. Quran, II:214, tr. by Maulana Abul Kalam Azad, II, *Tarjuman al Quran*, 109 (1967).

“entirely consistent with the verse of the Holy Quran” and that since it “restored to the Muslim woman her Quranic right as set forth in this verse Everyone who is a votary of the Holy Quran shall applaud it.”⁴ The judgment was also, in his view, “in conformity with the opinion of Imam Shafi, Said bin Jubayr and other Elders.”⁵ In support of this assertion he had referred to the commentaries on the Quran by Ibn Kathir and Allama Baydawi.⁶

At the seminar Latifi maintained his viewpoint and further developed his aforesaid arguments.

Syed Ameenul Hasan Rizvi⁷

Rizvi in his paper read at the seminar pointed out that *mataa-i-maruf* spoken of in the Quran did not, in *ulama's* opinion, mean maintenance and also that the verse was, according to them, merely “recommendatory in nature and not mandatory.” Referring to the opposition to the principle of section 125 of the 1973 Code during the parliamentary debates on it, Rizvi said:

The conflict that had arisen between the Islamic law and the Code of Criminal Procedure was resolved by the insertion of clause (b) to sub-section 3 of section 127 of the Code. However, the conflict has been relivened by the Supreme Court through its judgment in *Bai Tahira's* case. This judgment defeats the entire purpose of clause (b) in sub-section 3 of section 127 which was inserted on the representation of Muslims.

The burden of Rizvi's argument at the seminar was that, though the interpretation of section 127(3)(b) made in *Bai Tahira* could not get support from the Quranic verse on *mataa-i talaq*, proper legislation could be enacted to enable the courts to make use of that verse for redressing the grievances of divorced women in suitable cases. He concluded:

Having stated the position of a divorced wife's right to maintenance according to Sharia, I would like to share an idea with this distinguished gathering. I have framed a hypothetical question which is: suppose an Islamic state makes a law through which a right is conferred on the divorced woman to move the court of law for a decree in her favour for awarding to her the *mataa-i talaq* to be paid by her former husband as envisaged by the Quran. The law leaves it to the discretion of the court

4. See his contribution on Muslim law to *XIV Annual Survey of Indian Law*, 139-143 (1978).

5. *Ibid.* at fn. 13a.

6. *Ibid.*

7. Editor, *Radiance Viewsweekly*, Delhi.

whether or not to award her the *mataa* and also the quantum and mode of payment of it. Will such legislation be against the Sharia? In my humble opinion such a law will not conflict with the Sharia and will be valid. I may also take this distinguished gathering in confidence and say that I have already consulted a few *ulema*, who have endorsed my opinion in the matter.

[Editorial comment]

Note that while Latifi invoked the *mataa* verse (Quran, II:241) to argue that the terms of section 125 of the new Criminal Procedure Code were in keeping with the dictates of Muslim law, Rizvi objected that *mataa* does not mean "maintenance."

However, Rizvi went on to propose legislation granting the divorced Muslim woman *mataa* -- legislation which, in his view, would "not conflict with the Sharia and will be valid." Since Rizvi's proposed statute would leave the "mode of payment" of *mataa* to the determination and discretion of the court, there is no reason why *mataa* might not take the form of periodical payments, just as a maintenance order under the Cr.P.C. Whether such payments are termed "*mataa*" or "maintenance" makes little difference to the woman receiving them, although apparently terminology is extremely important to the men liable (or potentially liable) to make such payments.

Note also that Rizvi's suggested legislation would go further toward benefiting the divorced woman than section 125 of the Cr.P.C. -- (firstly) in that there is no statutory maximum which the court must not exceed in making its award (the amount awarded as *mataa* being left completely to the discretion of the court), and (secondly) in that *mataa* would (presumably) be available to all divorced women, not merely those totally impoverished and destitute (as is the case with maintenance orders under the Cr.P.C.). In these circumstances, it is difficult to see how any objection can possibly be taken to section 125 of the Cr.P.C., which places a lesser burden on fewer men.

If "reasonable and fair provision" in section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is equivalent to *mataa*, the legislation Rizvi proposed in late 1980 was enacted less than six years later, and merely remains to be properly and liberally interpreted.

Supreme Court Decisions on Maintenance to Muslim Divorcees: Bai Tahira and Fuzlunbi

O.V. Abdulkhader, Advocate, Tellicherry, Kerala

[1982 AIR Journal 115]

The Supreme Court judgments in the above two cases (AIR 1979 SC 362 and AIR 1980 SC 1730) enabling the divorcee Muslim to receive maintenance, even despite payment of *mahr* (dower) have evoked much discussion and rethinking.

How far do these rulings reflect the religious tenets of Islam? Are these a departure from its ideals?

To begin with, chapters (sura) II and LXV of the Quran deal with divorce and period of waiting. Verses 232 and 234 of chapter II may be mentioned. Of this, verse 234 deals with *iddah* on the death of husband. Verse 240 of chapter II lays down that widow should be bequeathed a year's maintenance and residence. The very next verse admits of no doubt. It (verse 241) runs thus: "For the divorced women maintenance should be granted on a reasonable (scale). This is the duty of the righteous." The verse does not fix any period for maintaining the divorced wife. Chapter LXV is captioned 'Divorce.' Verse 2 there opens thus: "Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms" Verse 6 of the said chapter runs "Let the women live (in *iddah*) in the same style as you live according to your means. Annoy them not so as to restrict them." In verse 7 there is the direction "Let the man of means spend according to his means and the man whose resources are restricted, let him spend according to what God has given him."

From the verses of chapter LXV, one cannot draw the conclusion that the period of maintenance ends with the period of waiting. This chapter is said to have been revealed around the 6th year after Hijra (A.H.), though the chronology is not important according to Yusuf Ali. Another commentator Pickthal has suggested that its chronology is uncertain. We may remind ourselves that though chapter II is said to have been revealed around the second year of Hijra, some of the

verses there might have been revealed later according to Yusuf Ali. Regarding abrogation of revelations verse 106 of chapter II is worthy of attention: "None of Our revelations do We abrogate or cause to be forgotten but We substitute something better or similar. Knowest thou not that Allah hath power over all things?" The commentary on this verse by Yusuf Ali is noteworthy: ". . . . If we take it in a general sense it means that Allah's Message from age to age is always the same but that its form may differ according to the needs and exigencies of the time. That form was different as given to Moses and then to Jesus and then to Muhammad. Some commentators apply it also to ayat (verse) of the Quran. There is nothing derogatory in this if we believe in progressive revelation. . . . There may be express abrogation, or there may be 'causing or permitting to forget.' How many good and wise institutions gradually become obsolete by efflux of time? Then there is the gradual process of disuse or forgetting in evolution."

In interpreting Quranic verses or for that matter any other religious text, we must be guided by the spirit permeating the holy book. The spirit of the holy text has to be applied with reference to the conditions prevailing at a particular period of history. The sayings and traditions of the Prophet enable us to imbibe the spirit of the Quran. But all the reported sayings and traditions are not authentic. There are however some accepted sayings of the Prophet. One relates to the disclaimer by him of any infallibility to his utterances. Another accepted tradition is quoted at p. 183 of Sayyid Amir Ali's *Spirit of Islam*. "When Muaz was appointed as Governor of Yemen, he was asked by the Prophet 'by what rule he would be guided in his administration of the province?' 'By the law of the Quran,' said Muaz. 'If you find no direction therein?' 'Then I will act according to the example of the Prophet.' 'But if that fails?' 'Then I will exercise my own judgment.' The Prophet approved highly of the answer of his disciple and commended it to other delegates."

Divergent opinions among the early doctors of Islam, the four schools of thought of the Sunni system, the different sub-sects of the Shia sects -- these are suggestive of the virility and inquiring nature of the early devotees of the religion. But the subsequent centuries have witnessed stagnation of thought. "The present stagnation of the Musalman communities is principally due to the notion which has fixed itself on the minds of the generality of Muslims that the right to the exercise of private judgment ceased with the early legalists, that its exercise in modern times is sinful, that a Muslim in order to be regarded as an orthodox follower should belong to one or the other of the schools established by schoolmen of Islam and abandon his judgment absolutely to the interpretation of men who lived in the 9th

century and could have no conception of the necessities of the Twentieth Century." Amir Ali in *Spirit of Islam*, at pp. 183, 184 so wrote about 1910. Joseph Schacht in his *Introduction to Islamic Law* (1964) has expressed the same opinion (p. 75) adding (pp. 110-111): "The situation in which the modernist lawyers of Islam find themselves is essentially that which prevailed at the end of the first and at the beginning of the second century Hijra. Islamic jurisprudence did not grow out of an existing law, it itself created it; and once again it has been the modernist jurist who prepared, provoked and guided a new legislation. It had been the task of early specialists to impose Islamic standards on law and society. The real task which confronts the contemporary jurists, beyond their immediate aim of adapting traditional Islamic law to modern conditions, is to evaluate modern social life and modern legal thought from an Islamic angle."

If the traditional concept of the waiting period is examined it will be noticed that the wife is disabled from marrying during the period and so the husband is liable to maintain the ex-wife. It is a small and necessary extension of the traditional concept, if maintenance is extended up to the re-marriage of divorcee. This will be in conformity with verse 241 of chapter II quoted above. As for literal observance of Quranic prescription, the purists have no qualms in institutionalising instant triple *talaq* for which there is no authority in the Quran. The direction to settle breach between the couple by arbiters for husband and wife, contained in chapter IV verse 35 has nowhere been given effect to by the purists.

Dower or *mahr* is a nuptial gift to wife at the time of matrimony. Verse 229 of chapter II and verse 24 of chapter IV forbid that the husband should take back on divorce any gifts made to the wife at the time of marriage. Suitable gift may be made to the wife if the marriage is not consummated (verses 236-237 of chapter II). Regarding dower the *Hedaya* states thus: "A marriage is valid although no mention be made of the dower by the contracting parties because the term *nikah* in its literal sense, signifies contract of union which is fully accomplished by the junction of a man and woman" -- p. 44. In the evocative language of the Supreme Court in AIR 1980 SC 1730: "Indeed dower focuses on marital happiness and is an incident of connubial joy." Regarding *mahr* prevailing in India the following is an extract from A.A.A. Fyze in his *Outlines of Muhammadan Law*, 1974, p. 135: "Among the Muslims of India two distinct tendencies are to be found in society. In some cases, as in the case of Solaymani Bohras, the dower is Rupees 40/-, it being considered a point of honour not to stipulate for a higher sum than the minimum fixed by the Prophet for his favourite daughter Fathima, the wife of Ali, namely 500 dirahams.

Among certain other communities there are dowers of anything between a hundred and thousand rupees. Amir Ali mentions amounts between four and forty thousand rupees. An altogether different tendency is to be found in Uttar Pradesh and also in some parts of Hyderabad Deccan, where the absurd rule appears to be that the nobler the family, the higher the *mahr*, regardless of the husband's ability to pay or capacity to earn."

Are the concepts of payment of maintenance during *iddah* and payment of dower identical with the concept of payment of the whole of the sum payable on divorce under any personal or customary law referred to in S. 127(3)(b) of Cr.P.C. 1973?

Under that provision, when an order has been made under S. 125, in favour of a woman who has been divorced by or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that . . . (b) the woman has been divorced by the husband and that she has received, whether before or after the date of such order, the whole of the sum, which under any customary or personal law applicable to the parties, was payable on such divorce, cancel the order.

In order to attract that provision, the customary or personal law must carry a stipulation regarding payment of some consideration to effect divorce. The concept of dower is, in short, that of a nuptial gift, i.e. payment at or about the time of solemnisation of marriage. It may be paid in full at that time or a portion may be deferred for payment on termination of marriage by death or divorce. To treat such payment of (balance of) dower as equivalent to any assumed consideration for divorce will throw open the Pandora's box.

If the whole of the dower is paid at the time of solemnisation of marriage, there will be nothing payable on divorce. Will this be a case of advance payment of "the whole" of the amount payable on divorce? If portion is paid as prompt dower, will the portion deferred answer the description of the "whole of the sum" under the provision? Will a stipulation to pay a nominal dower -- as is the practice in Kerala and some other States -- satisfy the underlying idea of payment of maintenance? If no provision at all is made for payment of dower at the solemnization of marriage, will the disability apply? Also proof of a stipulation to pay dower, apart from routine description of some dirhams as dower will not be available with the Kazis solemnizing marriage, it is felt. Fabrication of records will be the rule if payment of dower is treated as equivalent to payment mentioned in the section.

Lastly S. 127(3) contemplates three categories for terminating maintenance. Clauses (a) & (c) cover two cases originating from the ex-wife and clause (b) covers case originating from the ex-husband. In so

far as clause (b) is concerned, it will apply only to cases when husband divorces the wife. Where the wife has obtained the divorce, the bar will not apply and she is eligible for permanent alimony under S. 125 as well as to dower under S. 5 of Dissolution of Muslim Marriages Act. The distinction drawn between the case of a wife divorced by the husband and the case of a wife obtaining divorce under the above mentioned Act is unconvincing.¹ It is a discrimination that cannot stand the test of reasonable classification.

S. 127(3)(b) operates on a different norm from the provisions for dower and maintenance for *iddah* under Muslim Law. It will be heart-breaking to Muslim divorcee to deny her the benefit of S. 125 on highly dubious grounds.

1. And totally impractical: the wife's right to proceed under s. 125 of the Cr.P.C. (in spite of section 127) in situations where she obtains a judicial divorce under the Dissolution of Muslim Marriages Act, 1939, will be negated by the husband simply pronouncing a *talaq* before her divorce litigation has concluded. -- LC.

Mohd. Ahmed Khan v. Shah Bano Begum

(1985) 2 Supreme Court Cases 556

Y.V. Chandrachud, C.J.; D.A. Desai, O. Chinnappa Reddy,
E.S. Venkatarmiah, and Ranganath Misra, JJ.

Criminal Appeal No. 103 of 1981.
Decided 23 April 1985.

Judgment

Chandrachud, C.J. — This appeal does not involve any question of constitutional importance, but that is not to say that it does not involve any question of importance. Some questions which arise under the ordinary civil and criminal law are of a far-reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment. "*Na stree swatantramarhati*" said Manu, the Law-giver: The woman does not deserve independence. And, it is alleged that the "fatal point in Islam is the degradation of women."¹ To the Prophet is ascribed the statement, hopefully wrongly, that "Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly."

2. This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally, but to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code in the court of the learned Judicial magistrate (First Class), Indore, asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978, the appellant divorced the

1. Selections from Kuran, Edward William Lane, 1843; reprint 1982, page xc (Introduction).

respondent by an irrevocable *talaq*. His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, that he was therefore under no obligation to provide maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3,000 in the court by way of dower during the period of *iddat*. In August 1979 the learned Magistrate directed the appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July 1980, in a revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

3. Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But is the only price of that privilege the dole of pittance during the period of *iddat*? And is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of *iddat*, the mere fact that he has paid something, no matter how little, absolves him forever from the duty of paying adequately so as to enable her to keep her body and soul together? Then again, is there any provision in the Muslim Personal Law under which a sum is payable to the wife "on divorce"? These are some of the important, though agonizing questions which arise for our decision.

4. The question as to whether Section 125 of the Code applies to Muslims also is concluded by two decisions of this Court which are reported in *Bai Tahira v. Ali Hussain Fidaalli Chothia*² and *Fuzlunbi v. K. Khader Vali*.³ These decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under Section 125. But a Bench consisting of our learned brethren, Murtaza Fazal Ali and A. Varadarajan, JJ., were inclined to the view that those cases are not correctly decided. Therefore, they referred this appeal to a larger Bench by an order dated February 3, 1981, which reads thus:

As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in *Bai Tahira v. Ali Fidaalli Chothia*² and *Fuzlunbi v. K. Khader Vali*³ require reconsideration because, in our opinion, they are not only in direct contravention of the

2. (1979) 2 SCR 75 : (1979) 2 SCC 316 : 1979 SCC (Cri) 473 : AIR 1979 SC 362.

3. (1980) 3 SCR 1127 : (1980) 4 SCC 125 : 1980 SCC (Cri) 916 : AIR 1980 SC 1730.

plain and unambiguous language of Section 127(3)(b) of the Code of Criminal Procedure, 1973, which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of *iddat* has been observed. The decision also appear[s] to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 — an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three Judges.

5. Section 125 of the Code of Criminal Procedure which deals with the right of maintenance reads thus:

125. (1) If any person having sufficient means neglects or refuses to maintain —

(a) his wife, unable to maintain herself, or

(b) * * *

(c) * * *

(d) * * *

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife . . . , at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit

Explanation. — For the purposes of this Chapter —

(a) * * *

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) * * *

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided * * *

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation. — If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

6. Section 127(3)(b), on which the appellant has built up the edifice of his defence reads thus:

127. Alternation in allowance. — (1) * * *

(2) * * *

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that —

(a) * * *

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, —

(i) in the case where such sum was paid before such order, from the date on which such order was made;

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman.

7. Under Section 125(1)(a), a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding five hundred rupees. By clause (b) of the Explanation to Section 125(1), "wife" includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that Section 125 is a part of the Code of Criminal Procedure, not of the civil laws which define and govern the rights and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of those persons to maintain themselves are the objective criteria which determine the applicability of Section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. True, that they do not supplant the

personal law of the parties but, equally, the religion professed by the parties or the state of the personal law by which they are governed cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Clause (b) of the Explanation to Section 125(1), which defines "wife" as meaning a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Section 125 is truly secular in character.

8. Sir James FitzJames Stephen who piloted the Code of Criminal Procedure, 1872, as Legal Member of the Viceroy's Council, described the precursor of Chapter IX of the Code in which Section 125 occurs, as "a mode of preventing vagrancy or at least of preventing its consequences." In *Jaguar Kauai v. Jaswant Sing*,⁴ Subba Rao, J., speaking for the Court said that Chapter XXXVI of the Code of 1898 which contained Section 488, corresponding to Section 125, "intends to serve a social purpose." In *Nanak Chand v. Shri Chandra Kishore Agarwala*,⁵ Sikri, J., while pointing out that the scope of the Hindu Adoptions and Maintenance Act, 1956, and that of Section 488 was [sic] different, said that Section 488 was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties."

9. Under Section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that right could be defeated by the husband divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to Section 125(1), which provides that "wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Even in the absence of this provision, the courts had held under the Code of 1898 that the provisions regarding maintenance were independent of the personal law governing the parties. The induction of the definition of "wife"

4. (1964) 2 SCR 73, 84 : AIR 1963 SC 1521 : 1963 (2) Cr LJ 413.

5. (1970) 1 SCR 565 : (1969) 3 SCC 802 : AIR 1970 SC 446.

so as to include a divorced woman lends even greater weight to that conclusion. "Wife" means a wife as defined, irrespective of the religion professed by her or by her husband. Therefore, a divorced Muslim woman, so long as she has not remarried, is a "wife" for the purpose of Section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her.

10. The conclusion that the right conferred by Section 125 can be exercised irrespective of the personal law of the parties, is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to Section 125(3) of the Code. That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance notwithstanding the offer of the husband, if he is satisfied that there is a just ground for passing such an order. According to the Explanation to the proviso:

If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

It is too well-known that "A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular." (See *Mulla's Mahomedan Law*, eighteenth edition, paragraph 255, page 285, quoting *Baillie's Digest of Moohummudan Law* and *Ameer Ali's Mahomedan Law*, fifth edition, vol. II, page 280.) The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that Section 125 overrides the personal law, if there is any conflict between the two.

11. The whole of this discussion as to whether the right conferred by Section 125 prevails over the personal law of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. The argument that by means of Section 2 of the Shariat Act, XXVI of 1937, the rule of decision in matters relating, *inter alia*, to maintenance, "shall be the Muslim Personal Law" also proceeds upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, insofar as it lies in our power, we wanted to set at rest, once for all, the question whether Section 125 would prevail over the personal law of the parties, in cases where they are in conflict.

12. The next logical step to take is to examine the question, on which considerable argument has been advanced before us, whether there is any conflict between the provisions of Section 125 and those of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.

13. The contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the period of *iddat*. In support of this proposition, they rely upon the statement of law on the point contained in certain text books. In *Mulla's Mahomedan Law* (eighteenth edition, para. 279, page 301), there is a statement to the effect that "After divorce, the wife is entitled to maintenance during the period of *iddat*." At page 302, the learned author says:

Where an order is made for the maintenance of a wife under Section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of *iddat*. The result is that a Mahomedan may defeat an order made against him under Section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat*.

Tyabji's Muslim Law (fourth edition, para. 304, pages 268-269) contains the statement that:

On the expiration of the *iddat* after the *talaq*, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code.

According to Dr. Paras Diwan:

When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of *iddat*. . . . On the expiration of the period of *iddat*, the wife is not entitled to any maintenance under any circumstances. Muslim law does not recognize any obligation on the part of a man to maintain a wife whom he has divorced. [*Muslim Law in Modern India*, 1982 edition, page 130.]

14. These statements in the textbooks are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, *who is unable to maintain herself*. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent, both in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay *mahr* to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 *dirhams*,

which is equivalent to three or four rupees (*Mulla's Mahomedan Law*, eighteenth edition, para. 286, page 308). But, one must have regard to the realities of life. *Mahr* is a mark of respect to the wife. The sum settled by way of *mahr* is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject-matter of Section 125. That section deals with cases in which a person, who is possessed of sufficient means, neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of *iddat*, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of *iddat*, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of *iddat*, despite the fact that she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of *iddat*. If she is unable to maintain herself, she is entitled to take recourse of Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

15. There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelation believed to have been communicated to Prophet Muhammed, as a final expression of God's will." (*The Quran*, interpreted by Arthur J. Arberry.) Verses (Aiyats) 241 and 242 [of Sura II] of the Quran show that there is an obligation on Muslim husbands to provide for their divorced wives. The Arabic version of those Aiyats and their English translation are reproduced below:

Arabic version

Ayat No. 241
WA LIL MOTALLAQATAY
MATA UN
BIL MAAROOFAY
HAQQAN
ALAL MUTTA QUEENA

Ayat No. 242
KAZALEKA
YUBAIYYANULLAHO
LAKUM AYATEHEE LA
ALLAKUM TAQELOON

English version

For divorced women
Maintenance (should be
provided)
On a reasonable (scale).
This is a duty
On the righteous.

Thus doth God
Make clear His signs
To you: in order that ye may
understand
(See *The Holy Quran*, [trans.] by
Yusuf Ali, Page 96.)

The correctness of the translation of these Aiyats in not is dispute, except that the contention of the appellant is that the word "*mata*" in Ayat No 241 means "provision: and not "maintenance." That is a distinction without a difference. Nor are we impressed by the shuffling plea of the All India Muslim Personal Law Board that, in Ayat 241, the exhortation is to the "*mutta queena*," that is, to the more pious and the more God-fearing, not to the general run of the Muslims, the "*muslminin*." In Ayat 242 the Quran says: "It is expected that you will use your common sense."

16. The English version of the two Aiyats in Muhammad Zafrullah Khan's *The Quran* (page 38) reads thus:

For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand.

17. The translation of Aiyats 240 to 242 in *The Meaning of the Quran* (vol. I, published by the Board of Islamic Publications, Delhi) reads thus:

240-241: Those of you who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All-Powerful, All-Wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

242: Thus Allah makes clear His commandments for you: It is expected that you will use your common sense.

18. In *The Running Commentary of the Holy Quran* (1964 edition), by Dr. Allamah Khadim Rahmani Nuri, Ayat 241 is translated thus:

241: And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower): (This is) a duty (incumbent) on the reverent.

19. In *The Meaning of the Glorious Quran, Text and Explanatory Translation*, by Marmaduke Pickthall, (Taj Company Ltd., Karachi) Ayat 241 is translated thus:

241: For divorced women a provision in kindness: A duty for those who ward off (evil).

20. Finally, in *The Quran Interpreted*, by Arthur J. Arberry, Ayat 241 is translated thus:

241: There shall be for divorced women provision honourable — an obligation on the god fearing.

So God makes clear His signs for you: Happily you will understand.

21. Dr. K.R. Nuri in his book quoted above, *The Running Commentary of the Holy Quran*, says in the preface:

Belief in Islam does not mean mere confession of the existence of something. It really means the translation of the faith into action. Words without deeds carry no meaning in Islam. Therefore the term "believe and do good" has been used like a phrase all over the Quran. Belief in something means that man should inculcate the qualities or carry out the promptings or guidance of that thing in his action. Belief in Allah means that besides acknowledging the existence of the Author of the Universe, we are to show obedience to His commandments.

22. These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran. As observed by Mr. M. Hidayatullah in his introduction to *Mulla's Mahomedan Law*, the Quran is *al-furqan*, that is, one showing truth from falsehood and right from wrong.

23. The second plank of the appellant's argument is that the respondent's application under Section 125 is liable to be dismissed because of the provision contained in Section 127(3)(b). That section provides, to the extent material, that the Magistrate shall cancel the order of maintenance, if the wife is divorced by the husband and, she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce." That raises the question as to whether, under the Muslim Personal Law, any sum is payable to the wife "on divorce." We do not have to grope in the dark and speculate as to which kind of a sum this can be because, the only argument advanced before us on behalf of the appellant and by the interveners supporting him, is that *mahr* is the

amount payable by the husband to the wife on divorce. We find it impossible to accept this argument.

24. In *Mulla's Principles of Mahomedan Law* (eighteenth edition, page 308), *mahr* or dower is defined in paragraph 285 as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage." Dr. Paras Diwan in his book, *Muslim Law in Modern India* (1982 edition, page 60), criticizes this definition on the ground that *mahr* is not payable "in consideration of marriage" but is an obligation imposed by law on the husband as a mark of respect for the wife, as is evident from the fact that non-specification of *mahr* at the time of marriage does not affect the validity of the marriage. We need not enter into this controversy and indeed, Mulla's book itself contains the further statement at page 308 that the word "consideration" is not used in the sense in which it is used in the Contract Act and that under the Mohammedan Law, dower is an obligation imposed upon the husband as a mark of respect for the wife. We are concerned to find whether *mahr* is an amount payable by the husband to the wife on divorce. Some confusion is caused by the fact that, under the Muslim Personal Law, the amount of *mahr* is usually split into two parts, one of which is called "prompt," which is payable on demand, and the other is called "deferred," which is payable on the dissolution of the marriage by death or divorce. But the fact that deferred *mahr* is payable at the time of the dissolution of marriage cannot justify the conclusion that it is payable "on divorce." Even assuming that, in a given case, the entire amount of *mahr* is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But the payment of the amount is not occasioned by the divorce, which is what is meant by the expression "on divorce," which occurs in Section 127(3)(b) of the Code. If *mahr* is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the marriage. Therefore, no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that *mahr* is an obligation imposed upon the husband as a mark of respect for the wife, is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry a woman for love, looks, learning or nothing at all. And he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable "on divorce."

25. In an appeal from a Full Bench decision of the Allahabad High Court, the Privy Council in *Hamira Bibi v. Zubaida Bibi*⁶ summed up the nature and character of *mahr* in these words:

Dower is an essential incident under the Mussulman law to the status of marriage; to such an extent that is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called *prompt* payable before the wife can be called upon to enter the conjugal domicile; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce.

26. This statement of law was adopted in another decision of the Privy Council in *Syed Sabir Husain v. Farzand Hasan*.⁷ It is not quite appropriate and seems invidious to describe any particular Bench of a Court as "strong," but we cannot resist the temptation of mentioning that Mr. Syed Ameer Ali was a party to the decision in *Hamira Bibi*⁶ while Sir Shadi Lal was a party to the decision in *Syed Sabir Husain*.⁷ These decisions show that the payment of dower may be deferred to a future date as, for example, death or divorce. But that does not mean that the payment of the deferred dower is occasioned by these events.

27. It is contended on behalf of the appellant that the proceedings of the Rajya Sabha dated December 18, 1973 (volume 86, column 186), when the bill which led to the Code of 1973 was on the anvil, would show that the intention of the Parliament was to leave the provisions of the Muslim Personal Law untouched. In this behalf, reliance is placed on the following statement made by Shri Ram Niwas Mirdha, the then Minister of State, Home Affairs:

Dr. Vyas very learnedly made certain observations that a divorced wife under the Muslim law deserves to be treated justly and she should get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of the Muslims through the Criminal Procedure Code. If there is a demand for change in the Muslim Personal Law, it should actually come from the Muslim Community itself and we should wait for the Muslim public opinion on these matters to crystalize before we try to change this customary right or make changes in their personal law. Above all, this is hardly, the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the ambit of clause 125, but a limitation is being imposed by this amendment to clause 127,

6. 43 IA 294, 300, 301 : AIR 1916 PC 46 : 38 All 581 : 18 Bom LR 999.

7. 65 IA 119, 127 : AIR 1938 PC 80 : 1938 ALJ 141 : 40 Bom LR 735.

namely, that the maintenance orders would cease to operate after the amounts due to her under the personal law are paid to her. This is a healthy compromise between what has been termed a conservative interpretation of law or a concession to conservative public opinion and liberal approach to the problem. We have made an advance and not tried to transgress what are the personal rights of Muslim women. So this, I think should satisfy hon. Members and whatever advance we have made is in the right direction and it should be welcomed.

28. It does appear from this speech that the Government did not desire to interfere with the personal law of the Muslims through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystalize on the reforms in their personal law. However, we are not concerned with the question whether the Government did or did not desire to bring about changes in the Muslim Personal Law by enacting Sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression "wife" to include a divorced wife. It also introduced another significant change by providing that the fact that the husband has contracted marriage with another woman is a just ground for the wife's refusal to live with him. The provision contained in Section 127(3)(b) may have been introduced because of the misconception that dower is an amount payable "on divorce." But that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce.

29. It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in *Bai Tahira*² (Krishna Iyer, J., Tulzapurkar, J., and Pathak, J.) and *Fuzlunbi*³ (Krishna Iyer, J., one of us, Chinnappa Reddy, J., and A.P. Sen, J.) are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance in the interpretation of statutes meant to ameliorate the conditions of suffering sections of the society. We have attempted to show that taking the language of the statute as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125, and that *mahr* is not a sum which, under the Muslim Personal Law, is payable on divorce.

30. Though *Bai Tahira*² was correctly decided, we would like, respectfully, to draw attention to an error which has crept in the judgment. There is a statement at page 80 of the Report [SCC p. 321, para. 11 : SCC (Cri) p. 478], in the context of Section 127(3)(b), that "payment of *mahr* money, as a customary discharge, is within the cognizance of that provision." We have taken the view that *mahr*, not

being payable on divorce, does not fall within the meaning of that provision.

31. It is a matter of deep regret that some of the interveners who supported the appellant, took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorcee should maintain herself. The facile answer of the Board is that the Personal Law has devised the system of *mahr* to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephews and cousins, to support her. This is a most unreasonable view of law as well as life. We appreciate that Begum Temur Jehan, a social worker who has been working in association with the Delhi City Women's Association for the uplift of Muslim women, intervened to support Mr. Danial Latifi who appeared on behalf of the wife.

32. It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." There is no evidence of any official activity 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 a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this 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, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that 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 endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

33. Dr. Tahir Mahmood in his book, *Muslim Personal Law* (1977 edition, pages 200-202), has made a powerful plea for framing a uniform civil code for all citizens of India. He says: "In pursuance of

the goal of secularism, the State must stop administering religion-based personal laws." He wants the lead to come from the majority community, but we should have thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to the Muslim community:

Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state's legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India.

At a seminar held on October 18, 1980, under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies, New Delhi, he also made an appeal to the Muslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce (see *Islamic and Comparative Law Quarterly*, April-June, 1981, page 146).

34. Before we conclude, we would like to draw attention to the *Report of the Commission on Marriage and Family Laws*, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question 5 (page 1215 of the *Report*) is that:

a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children.

The *Report* concludes thus:

In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution — a question which will require great intellectual effort, and is sure to be answered in the affirmative."

35. For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under Section 127(1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

Muslim Jurisprudence and Shah Bano Case

Danial Latifi¹

[March 1986 *Radical Humanist* 11-13]

I have the greatest sympathy, and may I say respect, for some of the learned Muslims who have been agitated over the *Shah Bano* judgment of the Supreme Court.

During the Dark Ages of *Islam*, when Islamic republican and democratic institutions and values were assailed by the dynastic ambitions of the Omayyab, the Abbasids, the Seljuk Turks, the Osmanlis and others, the Ulema, sometimes at great risk and sacrifice, tried to hold aloft the banner of the values proclaimed by the Quran and the Prophet.

So after the 4th Century A.H. by consensus door of *Ijtihad* was closed. Henceforth the rulers (and the judges they appointed) were restricted to the settled jurisprudence and not permitted (except under very strict conditions) to exercise individual judgment from first principles i.e. from the Quran, despite the clear injunctions of the Prophet to the contrary. This was a correct step at the time to save what was left of the Shariat after the depredations of dynastic rulers and corrupt judges. Courageous Judges and Ulema sometimes opposed the ambitious rulers.

An illustration of this is the courage shown by the illustrious Abul Hasan, Chief Justice of Ghazni who spurned the gift and returned the offer made to him of the gold looted by Mahmud of Ghazni from Indian temples. He declared that these wars were waged contrary to the Quran and the Sunna of the Prophet. (See *Bahaigi i Tarikh e Aal e Subuktagin* cited by Prof. Mohd. Habib in *Sultan Mahmud of Ghazni*, 2nd Ed, Delhi 1967 P vi-vii).

We have seen similar figures under our own Republic particularly during the Emergency.

1. A Senior Advocate, Supreme Court of India, Shri Latifi appeared for Shah Bano Begum in the now famous case.

Through the centuries of Islam five illustrious figures have stood above the din of controversy. These are the great jurisconsults: Imam Jafar as Sadiq (who is absolutely acceptable to all Shiah) and the big four Sunni Masters: Imam Abu Hanifa, Imam Malik, Imam Ibn Hanbal and Imam Shafei. Among the Sunnis, the rule provided that a Qazi administering the Hanafi law could apply, in a given case a rule of Maliki Hanbale or Shafei law, if in his opinion justice and equity so required. Such a selective application of rules of law was *not* considered *Ijtihad*.

In the *Shah Bano* case, I shall presently show, both the opinions of Imam Shafei and Imam Jafer as Sadiq sustain the view taken by the Supreme Court.

So no *Ijtihad* has taken place.

It is a separate question whether in Republican Indian conditions, sufficient freedom, independence and enlightenment exist to permit our judges, with due caution, to exercise *Ijtihad*. Constitutionally of course they have the right. It is a matter of judicial statesmanship for them to exercise this great power judiciously.

The reference in the *Shah Bano* judgment to Uniform or Common Civil Code was unnecessary and unfortunate. On our side we did not raise it. It was Ahmad Khan's Chief Counsel who remarked, casually, that he, personally, was in favour of a uniform Civil Code. It was his "whisper" that was picked up by the Court.

I shared some critics' unhappiness at the wrong context in which the Prophet's remark that "woman was made from the crooked rib" was cited by Chandrachud CJ. I believe that in the entire history of humanity the Prophet was the greatest friend and champion of women's rights. But one cannot altogether blame Mr Chandrachud for getting a wrong impression about the Prophet from some of the unfortunate statements of the self-proclaimed champions of Islam who are out and out male chauvinists. Let us hope Mr. Chandrachud will in time learn better.

But all this does not falsify the Supreme Court's basic finding.

It was God's will that the woman's right to *mataa*, clearly declared in the Holy Quran should be proclaimed by Chandrachud CJ and not by the Ulema whose duty it was.

That *mataa* is an obligatory duty on the husband is beyond doubt. Such is the Ruling of both Imam Jaffar as Sadiq and Imam Shafei. If the citations are desired I can furnish them as well as the relevant Arabic texts vide Annexure to this article. But the words of the Quran II.241 are plain enough.

There remains the question whether *mataa* is a lump sum or a recurring payment. Steingass' Arabic Dictionary gives both *usufruct* and *property* as the meaning of *mataa*. In the *Shah Bano* Case the Court did not decide this question either way because Ahmad Khan, the Appellant, who was relying on Section 127 of the Code of Criminal Procedure to obtain cancellation of the Magistrate's Order passed under Section 125, granting maintenance to Shah Bano, admittedly had paid neither lump sum nor a recurring allowance to his divorced wife. Once held that *mataa* was part of the sum payable under the personal law upon divorce by a husband to his divorced wife, then the *mataa* had to be paid before the maintenance Order could be cancelled. The question whether *mataa* must in all cases be a lump sum or whether it can be a recurring payment also will have to be decided in a Civil case and not in a case under the Code of Criminal Procedure, such as *Shah Bano's* Case was. The matter is still open for decision, as a careful reading of the judgment will make clear.

I agree that Islamic law retains, for the woman's ultimate protection, the responsibility of her paternal family for her maintenance. That is a reinforcement of the guarantee that she shall never and in no circumstances be abandoned. But that does not exempt the husband from responsibility towards the woman who has sacrificed and devoted to him the best years of her life and, maybe, mothered his children. To impose such a burden of compensation on the husband is fully in accord with Islamic equity. We cannot forget that the opening words of the Holy Quran, after the Surat ul Fateha, are "*Zalika Kitabo la Reba Fihe Hudallil Muttageen.*" (Behold the Book unimpeachable for the guidance of the Muttageen). So the entire Quran is addressed to the Muttageen. Those who are not Muttageen need not read the Quran.

There could be nothing more specific than Sura II Ayat 241. There one must agree with the Supreme Court.

To say that marriage in Islam is a dissoluble union does not mean that it is not contemplated as a lifelong union. The Quran itself prescribes mutual inheritance rights between husband and wife. The Prophet never divorced any wife. He declared divorce to be the greatest sin.

It is unfortunate that some of the *ulema* have forgotten his teachings and talk lightly of divorce.

The Holy Quran is God's Message to Humanity. It is not a secret document. Nor is it anybody's monopoly. The *fatwas* of a lakh of mullas cannot wipe out a single verse of it. Muslims should be grateful to the Supreme Court for enforcing it on our straying brethren. The Muslim Personal Law (Shariat) Application Act (1937) and also the

Dissolution of Muslim Marriages' Act 1939 oblige the Court to enforce the injunctions of the Holy Quran where applicable, in the matters enumerated in the Shariat Act. These do not include circumcision or trimming of beards as some of our MPs seem to think!

The paramount obligation imposed by the Quran on everyone, above all Muslims, is justice and generosity to all persons with whom one has dealings. It cannot be emphasised too strongly that Islam regards a woman as, also, a *person*. That is all that the Supreme Court has held. It is sad that this seems to displease some people.

An Open Letter to the Muslims of India¹

Kamila Tyabji

[1986]

So Shah Bano has been “persuaded” not to accept the bare subsistence allowance from her husband that the Court had awarded her!

Pierre Crabites, a leading American judge in Cairo, has said of the founder of Islam: “The Prophet Mohammad was probably the greatest champion of women’s rights the world has ever seen;” yet today his followers in India are unable to support the granting of Rs. 179 per month as maintenance in spite of all the exhortations in the Quran itself that “to a divorced woman a reasonable maintenance is due.”

And now it is suggested that we have shariat courts all over the country! In a community riddled by poverty and ignorance, instead of setting up technical schools and training centres and workshops we desperately need, money is to be poured into courts -- when we are already paying for one judicial system.

Would it not be infinitely more worthwhile for Muslims to get together sensibly and decide what their law *is*, so that they could then insist that the courts enforce it?

During the last few days the Muslim community has shown a remarkable solidarity in expressing their love for the shariat and their own personal law. But what we love is what is laid down in the Quran, and what was further expounded by the Prophet Muhammad. Is this the law we are following?

For example, the Prophet himself had allowed a woman a divorce when she wanted one -- but millions of Muslim women in India are denied such a right; and yet a man can obtain one (even though the

1. Reproduced from Asghar Ali Engineer, ed., *The Shah Bano Controversy* (Hyderabad: Orient Longman Ltd, 1987) pp. 223-224.

Prophet had described divorce as "hateful") by just saying "I divorce you; I divorce you; I divorce you," thrice even if he is drunk at the time! Is this the Muslim law?

The Islamic idea of dower (*mahr*) is a settlement on the *wife* by the husband at the time of marriage; but Muslim youths today ardently pursue an alien type of dowry, of which *they* and not their wives are the beneficiaries. Is this the Muslim law?

The Quran, whilst allowing that a man may marry more than one wife, expressly stated that he may do so only if he can treat them both equally; and added for good measure that, as he would never be able to treat them equally, it is better if he marries only one. But today in India all thoughts of equality are forgotten, and one finds men abandoning their wives (or sending them back to their father's house) and marrying again with complete impunity. Should the first wife ask for a divorce, she not only forfeits her *mahr* but has to pay a heavy price for the privilege. One listens in vain for a whisper from our *maulanas*, saying that such second marriages are either void or bigamous! What *is* the Muslim law?

What makes the situation tragic is that there are perfectly simple, and legitimate, ways *in the Muslim law itself* by which these wrongs could be righted -- and which have been adopted by Muslims in almost all countries except ours. One effective way would be for bodies like the Jamaa-i-Islami, the Muslim Personal Law Board, etc., to declare that, in future, *at the time of all Muslim marriages certain clauses would be presumed in the nikahnama* (marriage contract). That marriage is a contract is indisputable in Muslim law -- and innumerable women's meetings have voted for a standard *nikahnama*.

Some such action by Muslim leaders and *maulanas* would establish their sincerity and credibility, and bring our law into line with the advanced Muslim countries. Without that, it would appear that it is only we, and not they, who are seeking to preserve the nobility and purity of our religion -- whilst they are clinging on to the accretions of centuries of male chauvinism. It is they, not us, who are bringing disrepute to the founder of Islam, and it is they who are throwing the Muslim law to the wolves.

Memorandum¹ by Committee for Protection of Rights of Muslim Women

[24 February 1986]

This memorandum was submitted to the Prime Minister of India on February 24, 1986. The signatories to the memorandum were : Sahba Hussain (Lecturer, I.P. College, Delhi); Salima Tyabji (Editor, Oxford University Press); Imrana Quadeer (Reader, JNU); Azra Kidwai (Lecturer, Delhi University); A.J. Kidwai (Former Vice Chancellor, Jamia Millia and present Director, Mass Communications Centre); Irfan Habib (Professor, AMU); Zoya Hasan (Reader, JNU); and Danial Latifi (Senior Advocate, Supreme Court of India).

We consider it an important gain of our independence struggle that it led to the establishment of a secular state which contrasts with the situation prevailing in our neighbouring countries, as well as in most of the newly liberated countries of the third world.

Today, however, the secular fabric of our society is under severe pressure from various quarters. In our view the stable foundation of our secular polity can be strengthened not by offering concessions to communal/sectarian groups and interests with a view to achieving short-term political or electoral gains, but through positive and principled interventions which would preserve our secular identity. This course would best ensure the interests of all sections of our society, including the minorities. We view the specific question of the *right to maintenance of divorced Muslim women* in this perspective.

We believe that Muslim women have the right to maintenance -- a right that they enjoy in several Muslim countries, through the rational and progressive interpretation of Islamic principles, as in Morocco, Iraq, Egypt, Turkey, Libya, Tunisia, Syria and Algeria. The

1. Source: The Memorandum originally appeared in *Mainstream*, 8 March 1986 and is reproduced from Asghar Ali Engineer, ed., *The Shah Bano Controversy* (Hyderabad: Orient Longman Ltd., 1987), pp. 217-221.

interpretation being put forward by a section of the Muslim religious leadership in India, on the other hand, expresses a backward-looking perspective. We therefore specifically recommend the following for a careful and comprehensive consideration of the Government of India.

I

1. We emphasize the necessity of safeguarding the interests of all sections of the minorities. That is why the demand to exclude Muslim women from the purview of section 125 of the Cr.P.C. (under which a divorced woman is entitled to take maintenance from her husband) would adversely affect both the rights and interests of Muslim women.

2. There is no provision in Muslim law which directly or indirectly prohibits a former husband from paying maintenance to his ex-wife after the *iddat* period. It is therefore erroneously argued that maintenance beyond the *iddat* period is contrary to the shariat.

3. Prior to the inclusion of section 125 of the Cr.P.C. which came into force in 1973 [sic; read "1974"], there was a provision for maintenance in section 488 in the old Cr.P.C. But there was no liability of payment to a divorced wife. Taking advantage of this lacuna many Muslim husbands divorced their wives when an application for maintenance was filed and thus escaped the liability to payment. To prevent this abuse and the hardship it caused to women, section 125 has rightly put the liability on the husband to pay maintenance even if he divorces his wife. However, it is given only in cases where husbands possess sufficient means to pay the maintenance allowance. The liability of the husband to pay maintenance, even if he divorces his wife, would act as an effective deterrent against hasty and irresponsible divorces. This is another reason why this provision should not be diluted.

4. The introduction of section 127(3)(b) was a concession to the unreasonable demands of certain vested interests, who wanted to deny maintenance beyond the *iddat* period, on the plea that the *mahr* and maintenance during the *iddat* period would suffice. We consider this inimical to the interests of divorced Muslim women.

II

1. We feel that the right to maintenance beyond the period of *iddat* is an important and a positively helpful provision which provides security to a divorced woman. Evidence from different parts of the country indicates that a large number of Muslim women particularly belonging to poorer families are divorced and deserted. This can be corroborated by a survey of cases registered in rescue homes. This, in

our view, reinforces the need for Muslim women particularly to have recourse to section 125.

2. Regardless of the rights and privileges that Islam may have conferred on Muslim women, they should not be denied the rights guaranteed by the Indian Constitution based on the recognition of equality, justice and fraternity of all citizens. It is imperative in a secular polity like ours to go beyond the rights conferred by various religions in order to evolve laws which would provide justice and succour to all women, irrespective of their religious beliefs.

III

1. Whereas criminal laws in their entirety apply to every community, it is really surprising that only one of its positive provisions -- relating to women's rights -- should be sought to be deleted on the dubious assumption that it is contrary to the Muslim personal law. The Muslim personal law, for instance, stipulates specific punishments for crimes such as theft, robbery and rape which are rightly not accepted and are not applied. Likewise, the more humane civil and secular laws should be applied to all women regardless of their faith, and notwithstanding a conservative interpretation of personal laws by a section of their community.

2. Section 125 is a criminal law applicable to all citizens. Though the right to maintenance is a civil right, it forms a part of the criminal law so as to prevent a divorced woman from becoming a destitute. The provision of section 125 Cr.P.C. seeks to prevent vagrancy which would occur in the case of poor Muslim women. Most women who seek maintenance have no means of livelihood. For them and for their children, maintenance is an absolute economic necessity.

IV

1. The judgment of the Supreme Court in the *Shah Bano* case had led to an intensive controversy particularly among Muslims. It is evident that those Muslims who have opposed the judgment have done so in the name of religion. They have used all the platforms available to them to reassert their weakening hold on Muslim public opinion, and have sought to exploit religion for sectional and communal political ends. They have taken advantage of the sense of insecurity among Muslims, caused by the persistence of communal riots and by discrimination in jobs and vocations. We feel that the growing influence of such exploitative communal elements should be effectively curbed, and they should be prevented from suppressing the rights of Muslim women under the cover of some religious decrees which are neither authentic nor consistent with the

humanistic and rational spirit of Islam which lays considerable emphasis on the elevation of the status of women.

2. It is noteworthy that many important sections of Muslim public opinion, particularly among the educated and professional groups and segments have supported the right to maintenance. These include the intelligentsia, lawyers, teachers, social workers and even experts in the shariat like Mirza Hamidullah Beg, the late Justice Murtuza Fazal Ali, Justice Khalid, former judge of the Supreme Court, Bahrul Islam, former chief justice of the Calcutta High Court, S.A. Masud, judge of the Ahmedabad High Court, Sattar Qureishy, Supreme Court advocate, Danial Latifi and A.G. Noorani. In the light of their views and judgment the Government would do well to consult a wider range of enlightened Muslim opinion, including competent jurists and legal experts in Islamic law, before arriving at a decision on the matter.

3. Several articles and letters have appeared in the Urdu press, particularly in the *Quami Awaz* in which several women and men have strongly supported the right to maintenance under section 125 Cr.P.C. An attitude survey of Muslim women conducted by the Institute of Islamic Studies, Bombay, revealed that a large number of Muslim women also favour changes in rules relating to marriage, divorce and maintenance.

4. Equally, the experience of women's organizations working among Muslim women indicate that many amongst them have supported the right to maintenance. In our view, if avenues are open to them they would come forward to take advantage of this right, for at present the legal scales are heavily tilted against them. It is worth recording that an increasing number of cases for maintenance are being filed by Muslim women all over the country. In Calicut, for example, 200 such cases are filed every year. This is an indication of both their support and need for maintenance. We believe that they should continue to receive state protection for the right to maintenance which is in accordance with the true spirit of Islam. In fact, experts have quoted extensively from the Quran to this effect. These include the learned commentaries and translations of the Quran made by Maulana Abdul Kalam Azad, Allama Abdullah Yusuf Ali, Ahmed Reza Khan Bareilvi and Fateh Muhammad Jullundhari. Reference should also be made to the Report of the Pakistan Government Commission on Family Laws.²

2. Extracts from the Report of the Pakistan Commission on Marriage and Family Laws are reproduced on pages 51-52 of this volume.

V

1. It has been brought to our notice that the Government is sympathetic to the suggestions of a section of the *ulama* and some Muslim leaders who have argued that the responsibility of maintenance after *iddat* should be shouldered by the father, or, in his absence, either by the brothers or the relatives, or alternatively, the responsibility is to be shared by the Muslim community as such. We understand that the Government is also examining the possibility of incorporating the provisions regarding maintenance (according to Muslim usage in India) into the Cr.P.C. through legislation. In support of such a move it is asserted that it would place Muslim women on a stronger footing and, in addition to their *mahr*, enable them to claim not only maintenance from their paternal/maternal family, but also enable them to have their claims legally enforced. Frankly we do not share such optimism. Indeed we consider such a move as retrogressive, and one which might well act as impetus to divorce amongst Muslims, particularly among the poorer sections.

2. The suggestion that Muslim women after divorce should have legal recourse only to her own family and not to her husband for maintenance is ludicrous. It would imply that a marriage contract for a Muslim woman involves only obligations and no rights, which is totally contrary to the concept of *nikah* which essentially is a contract implying rights and obligations for both the parties. This means that after the woman has given the best of her life to her husband and raising his family she can be discarded and have no recourse to maintenance from her husband.

3. It seems extremely unlikely and unrealistic that a destitute woman would fight a legal battle against her own family for maintenance. The natural recourse of a woman in such circumstances is to fall back on her family for sustenance. If such support is not forthcoming it seems to us impractical that she be advised to file a suit against members of her own paternal/maternal family. With the breakup of the joint family system and the pressures of the economic crisis caused by galloping inflation, the woman may not like to add to the burden of her wider family. It is rarer still for the community to come forward to help her live with dignity. It is, however, possible that women who would not be welcomed in their father's and relatives' homes would find their position a little more secure if a monthly allowance, even if it is a niggardly sum of Rs. 200, was given to them.

4. Exonerating the husband from all responsibility of maintenance for a wife whom he had divorced for his own reasons is against the principles of social justice. The parents of the divorced woman cannot

be expected to shoulder the responsibility and burden of their daughter who has been deserted/divorced for no fault of theirs.

5. Any attempt to change, alter or modify section 125 will hit the poor and the needy. The proposed law will violate Article 14 of the Indian Constitution which guarantees equal protection before the law: the State shall not deny to any persons equality before the law or the equal protection of the laws within the territory of India. Any law which violates Article 14 would be void.

VI

1. We understand the Government is considering the codification of Muslim personal law which, in its judgment, would protect women by making the payment of *mahr* commensurate with an increase in the husband's income. We do not believe this to be right. We fear that *mahr* will become a legal substitute for maintenance. *Mahr*, in most cases, is a paper transaction. Its fixation in the Indian subcontinent is more of a ritual and a formality rather than a realistic assessment of the genuine requirements in the event of a divorce. At any rate, the amount of the *mahr* is often most inadequate for anybody's lifelong maintenance. Given the status of most women, it is neither possible for the family to fix a reasonable amount of *mahr* nor desirable to insist on a larger *mahr* figure as the prospect of divorce is not taken into account at the time of the marriage. So, the question arises, can the divorced/deserted wife be debarred from further maintenance from her husband even if the amount paid to her is nominal

2. We believe that *mahr* cannot absolve a husband of his liability to further maintain his divorced/deserted wife. *Mahr* is merely a consideration of money given at the time of marriage by the husband to the wife, as a token of his regard and responsibility. It can neither be a reasonable substitute for maintenance nor can it be treated as a final settlement in the event of divorce.

VII

1. Several Muslim countries have interpreted the Muslim personal law over the centuries in accordance with the spirit of Islam, and the specific requirements of their polity and society. It can be argued that this indeed is consistent with the ideas of justice, tolerance and compassion that the Quran enjoins on all Muslims. For instance, Syria, Iraq, Pakistan, Bangladesh and Sri Lanka, in particular, have modified Muslim family law and have set up arbitration councils to decide on its various aspects. India is among the few nations where the Muslim personal law continues to determine rules relating to polygamy, inheritance, and instant divorce. We are of the firm opinion that

reforms in such areas, along with the right to maintenance, would enable Muslim women to acquire the rights and dignity they have been denied for so long.

We call upon the Government of India to ensure that the rights guaranteed by the Indian Constitution to women are upheld. We emphasize this in relation to the Muslim women particularly, who have been subjected to discrimination for so long. In our opinion, to deprive them of the rights granted by secular laws would be a retrograde measure. We therefore reiterate that under no circumstances should section 125 Cr.P.C. be repealed or any amendment introduced to exclude Muslim women from its beneficial purview.

Memorandum¹

Before the Hon'ble Prime Minister of India

Islamic Shariat Board, Calicut, Kerala

[1 February 1986]

Most Respected Sir,

Sub: Amendment of section 125 of Cr.P.C. -- Bill before the Parliament to exclude Muslim divorcees from the ambit of law -- Retention of the existing provision an imperative necessity -- Plea for amendment unacceptable -- Submissions regarding.

A strong public feeling is gaining ground among Muslims of India in support of the Supreme Court verdict in the *Shah Bano* case. The opposition to, and the hue and cry raised against the verdict of the Supreme Court by certain sections of the Muslim community are motivated by political and other considerations, rather than by a pious desire to uphold the sanctity of Muslim law. Most of these laws are inconsistent with and repugnant to the true shariat. The Holy Quran and precepts of the Prophet ordain extraordinarily fair treatment to women and make it obligatory on the husband to make reasonable provision for the maintenance of his divorced wife.

2. The verdict of the Supreme Court in the *Shah Bano* cases does not in any way contravene the injunctions of Islam on the subject. The views expressed by the commentators of the Quran and the eminent theologians, recognized by the Islamic world, corroborate the verdict of the Supreme Court. The considered opinions of the authorities, ancient and modern, are given in the Annexure.

3. In view of these facts, we pray that the Government may be pleased to refrain from any action entailing the exclusion of divorced Muslim women from the purview of section 125 of the Cr.P.C.

With respectful regards.

Yours sincerely,

P.V. Shoukat Ali
Chairman
Islamic Shariat Board

1. Reproduced from Asghar Ali Engineer, ed., *The Shah Bano Controversy* (Hyderabad: Orient Longman Ltd, 1987), pp. 212-214.

Annexure

Opinions of Islamic Authorities on the Liability of the Husband to Provide Maintenance for his Divorced Wife

1. Maulana Abdul Kalam Azad, in his *Tarjumanul Quran*, comments as follows: "Quran takes occasion to re-emphasize that proper consideration should be shown to the divorced woman in every circumstance. This repeated call for consideration to woman was for no other reason than that her position deserved due attention since she was comparatively weaker than man and her interests needed to be properly safeguarded" (*Tarjumanul Quran*, vol. 2, p. 109. Trans. and ed. by Syed Abdul Latif; Asia Publishing House, 1967).

2. Shah Waliullah Dahlavi (born 1702), the well-known theologian of India, in his commentary on the Holy Quran gives the meaning of the verses II:240 and 241 thus: "It is the obligation of those who ward off evil to give the divorced woman just and fair provision for life, i.e. maintenance and accommodation. Allah explains thus His decrees, so that you may understand."

3. Shaikul Hind Allama Mahmood Hassan Deobandi, another eminent theologian of India, in his Urdu translation of the Holy Quran, gives the meaning of verse II:241 thus: "It is the obligation of those who ward off evil to pay maintenance to the divorced woman as per provisions of law."

4. Muhammad Asad, a world renowned scholar and commentator of the Holy Quran and of Sahihul Bukhari, states in his note on verse II:241: "The amount of alimony -- payable unless and until they remarry -- has been left unspecified since it must depend on the husband's financial circumstances and on the social conditions of the times" (Muhammad Asad, *The Message of the Quran*, note 231, p. 54; Darul Andulus, Gibraltar, 1984).

5. Muhammad Abdu and Rasheed Rida, the torch-bearers of Islamic renaissance in Egypt, in their widely accepted commentary on the Holy Quran, *Al-Mahar*, records that the Prophet's grandson Imam Hasan gave 20,000 dirhams and a huge jar full of honey when he divorced his wife, and comments, "This was their practice" (vol. 2; p. 431).

6. Shaik Mustafa Assabai, a well-known theologian who delivered a series of lectures on Islam at Damascus University in 1961-62, expressed his opinion on the right of the divorced woman thus: "If the divorced woman is of marriageable age, maintenance should be paid till her remarriage; if she is old, it should be paid till her death" (*Al Mar athu-bynal-fiqhi-val-Qanum*, p. 146). For reasons given in detail, he rejected the Government regulation that the payment of maintenance should be limited to a period of one year after *iddat*.

7. Imam Qurtubi, in his commentary on the Holy Quran, explains the reason for ordering payment of maintenance to the divorced woman thus: "Payment of maintenance is ordered for the reason that disrespect has been shown against the marital contract" (Imam Qurtubi, *Commentary on Quran*; vol. 3, p. 229).

8. Baidavi, in his widely-read commentary on the Holy Quran, further explains the reason for enjoining maintenance and holds the view that the quantum of maintenance is to be determined by the Government. "Maintenance is made obligatory so as to remove despair and grief caused to the woman by separation as a result of divorce. The quantum of maintenance is to be determined by the Government authority" (Baidavi, *Commentary on Holy Quran*, vol. 1, p. 110).

9. According to the author of *Thafseer Roohul Bayan*, maintenance is a recompense payable to the divorced woman: "Allah has ordered payment of maintenance as a recompense against the hardship imposed on the divorcee due to separation." (*Thasfeer Roohul Bayan*, vol. i, p. 375).

10. Imam Hasan Basari and Atha ubn Abi Rabah were prominent disciples of the Prophet's immediate disciples (Thabi an). They were great theologians and commentators of the Quran. They lived 1200 years ago. Hasan Basari says: "There is no time limit regarding payment of maintenance. It should be paid according to one's capacity" (Ibn Hazam, *Muhalla*, vol. 10, p. 248; A.D. 994-1064).

11. Athaubn Abi Rabah says: "I do not know that there is any fixed time limit for payment of maintenance" (*ibid.*, p. 248).

12. Lisanul Arab is the most prestigious Arabic lexicon written about 700 years back. This lexicon gives the meaning of *mataa* as below:

It has no time limit, for Allah has not fixed any time limit for the same. He has only enjoined the payment of maintenance.

All the above commentators of the Holy Quran and the well-known authorities quoted above are unanimous that the husband is under an obligation to provide reasonable maintenance to a divorced wife till she is remarried. Therefore the provision under section 125 of Cr.P.C. making it obligatory on the husband to provide maintenance for his divorced wife who is unable to maintain herself does not in any way override the laws of Islamic shariat on the subject.

13. Codification of Personal Laws in terms of Islamic Shariat. The laws known as personal law of Muslims in India are merely based on case law. The personal laws seriously depart from the basic concepts of the Islamic shariat. The Holy Quran and precepts of the Prophet form the basic tenets of the shariat. Personal laws are mostly inconsistent with and often repugnant to the true tenets of Islam. Codification of the Islamic shariat in terms of the Holy Quran and true precepts of the Prophet and enactment of the same is therefore an imperative necessity. The main objective of our Islamic Shariat Board is such a codification.

Chairman
Islamic Shariat Board

Public Statement by Leading Figures of the Muslim Intelligentsia in India¹

[8 March 1986]

We, the undersigned

DEMAND

- 1) that section 125 of the Cr. P. C. shall not be changed;
- 2) that the right of divorced Muslim women to claim maintenance from their husband or former husbands shall be preserved.

HOLD

- 1) that the exoneration of the husband from all responsibility for maintenance of divorced women is contrary to the provision and spirit of section 125 of the Cr. P. C. which is meant for indigent women and seeks to prevent destitution;
- 2) that the Government must ensure that rights guaranteed by the Constitution to women are upheld.

Signatories

1. Khwaja Ahmad Abbas (*Writer & Film-maker*)
2. Salim Ali (*Biologist, Ornithologist, MP*)
3. Moonis Raza (*Vice Chancellor, Delhi University*)
4. Abid Hussain (*Member, Planning Commission*)
5. Obaid Siddiqui (*Professor, TIFR*)
6. Rais Ahmed (*Educationist, Ex-Vice Chairman, UGC*)
7. Shabana Azmi (*Film Actress*)
8. Javed Akthar (*Filmscript Writer*)
9. Ali Sardar Jafri (*Poet*)
10. Saeed Mirza (*Film-maker*)

1. Originally appeared in *Mainstream*, 8 March 1986, and is reproduced from Asghar Ali Engineer, ed. *The Shah Bano Controversy* (Hyderabad: Orient Longman Ltd., 1987), pp. 215-217.

11. *Rasheeduddin Khan (Professor JNU)*
12. *Irfan Habib (Professor, AMU)*
13. *Bashir Husain Zaidi (former V.C., AMU)*
14. *M. A. Halim (Speaker, W. B. Assembly)*
15. *Badr-ud-din Tyabji (Ex-ICS)*
16. *E. Alkazi (Ex-Director, National School of Drama)*
17. *Zahoor Qasim (Secretary, Dept. of Ocean Development)*
18. *A. Rahman (Scientist)*
19. *Asghar Ali Engineer (Director of Institute of Islamic Studies)*
20. *Rashid Talib (Journalist)*
21. *Danial Latifi (Supreme Court Advocate)*
22. *Bashiruddin Ahmed (Senior Fellow, CSDS)*
23. *Shaharyar (Poet)*
24. *Ghulam Sheikh (Painter)*
25. *Kamila Tyabji (Chairman, Women's India Trust)*
26. *M. S. Agwani (Professor, JNU)*
27. *A. J. Kidwai (Director, Mass Communications)*
28. *Salman Haider (IAS)*
29. *Saeed Naqvi (Journalist)*
30. *Saleem Peeradina (Poet)*
31. *Seema Mustafa (Journalist)*
32. *Maqbool Ahmed (Professor, AMU)*
33. *Muzaffar Ali (Film-maker)*
34. *Mohibbul Hasan (Professor)*
35. *Anwar Azeem (Writer)*
36. *Najma Zaheer Baquir (Professor, JNU)*
37. *Anees Jung (Journalist)*
38. *Mushirul Hasan (Professor, Jamia Millia)*
39. *Feisal Alkazi (Theatre Director)*
40. *Zahida Zaidi (Professor, AMU)*
41. *Sajida Zaidi (Professor, AMU)*
42. *Iqtidar Alam Khan (Professor, AMU)*
43. *Shamshad Husain (Painter)*
44. *Hasan Suroor (Journalist)*
45. *Roshan Alkazi (Director, Art Gallery)*
46. *Moin Shakir (Professor, Marathwada University)*
47. *Amal Allana (Theatre Director)*
48. *Shaukat Kaifi (Film Actress)*
49. *Ali Baquir (Fellow, CSDS)*
50. *Jafar Zaheer (Aviation Consultant)*
51. *Aslam Qadeer (Professor, AMU)*
52. *Y. M. Adil (Film Writer)*
53. *Shafiq Naqvi (Writer)*
54. *Javed Alam (Reader, Himachal University)*
55. *Naseem Hasan (Social Scientist)*

56. Salima Tyabji (Editor, OUP)
57. Muzammil Hussain (Artist)
58. Hasan Kutty (Documentary Filmmaker)
59. Fatima Al Talib (Director, Advertising Agency)
60. Sameera Agha (Personnel Executive, TFAI)
61. Sahba Hussain (I. P. College, Delhi University)
62. Zoya Hasan (Reader, JNU)
63. Zakia Zaheer (Social Worker)
64. Ghazala Ansari (Professor, AMU)
65. Ziaul Hasan (Journalist)
66. Ali Ashraf (Writer & Freedom Fighter)
67. Sadia Dehlvi (Editor, Shama)
68. Tahera Hasan (AIR Broadcaster)
69. Abida Samiuddin (Reader, AMU)
70. Shad Bano Ahmed (Professor, AMU)
71. Imrana Qadeer (Reader, JNU)
72. K. Azeem (Journalist)
73. Sughra Mehdi (Reader, Jamia Millia)
74. Azra Kidwai (Lecturer, Delhi University)
75. Sakina Hasan (Retd. Reader, Delhi University)
76. Syed Zaidi (Reader, Delhi University)
77. Amir Hasan (Professor, AMU)
78. Hindal Tyabji (IAS)
79. Saba Zaidi (TV Producer)
80. Shahla Haider
81. Askari Imam
82. S. A. Qayyum (Director, Arab Cultural Centre)
83. Laila Tyabji
84. Syeda Saiyadain (Writer)
85. Aijazuddin Ahmed (Professor, JNU)
86. Atiya Habib (Reader, JNU)
87. Habibur Rehman Kidwai (Reader, Jamia Millia)
88. Sayera Habib (Reader, AMU)
89. Kishwar Shabbir Khan (Professor, AMU)
90. Mehmood Reza
91. Maimoona Jafri (Reader, AMU)
92. Fauzia Mujeeb (Reader, AMU)
93. Q. M. Usmani (Reader, AMU)
94. Farhan Mujib (Reader, AMU)
95. Mehmood Haq (Professor, AMU)
96. Arif Rizvi (Reader, AMU)
97. Izhar Hussain (Professor, AMU)
98. S. S. Rizvi (Publishing)
99. Bilquees Musavi (Reader, AMU)
100. Shireen Moosvi (Reader, AMU)

101. *S. Husain (Professor, AMU)*
102. *Tasneem Usmani (Librarian, American Centre)*
103. *Muzaffar Alam (Reader, AMU)*
104. *Rafa Zaheer (Social Worker)*
105. *Masooma Ali (Lecturer, Delhi University)*
106. *R. A. Khan (Reader, Jamia Millia Islamia)*
107. *Uzra Bilgrami*
108. *Asma Manzar (Civil Service)*
109. *Manzar Khan (Asst. Manager, Oxford University Press)*
110. *Rashida Siyar (Personnel Officer)*
111. *Latifa Nazir (Women's India Trust, Bombay)*
112. *Hamida Merchant (Women's India Trust, Bombay)*
113. *Akhtar Bano Sirajuddin*
114. *Mumtaz Begum*
115. *Ansari Shahraz*
116. *Birjees Kasim*
117. *S. S. Rizvi (Joint Secretary, Dept. of Agriculture)*
118. *Syed Zaidi (Oxford University Press)*

Text of Muslim Women (Protection of Rights on Divorce) Act, 1986

[India]

[19 May 1986]

Statute

1. *Short title and extent.* -- (1) This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. *Definitions.* -- In this Act, unless the context otherwise requires,

(a) "divorced woman" means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law;

(b) "iddat period" means, in the case of a divorced woman, --

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier [sic];

(c) "Magistrate" means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974), in the area where the divorced woman resides.

(d) "prescribed" means prescribed by rules made under this Act.

3. *Mahr or other properties of Muslim woman to be given to her at the time of divorce.* -- (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to --

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

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

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

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

(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that --

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be

recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. *Order for payment of maintenance.* -- (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso

to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

5. *Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974.* -- If, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such an affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation. -- For the purpose of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

6. *Power to make rules.* -- (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the foregoing power, such rules may provide for --

(a) the form of the affidavit or other declaration in writing to be filed under Section 5;

(b) the procedure to be followed by the Magistrate in disposing of applications under this Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters;

(c) any other matter which is required to be or may be prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of

no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. *Transitional provisions.* -- Every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure, 1973 (2 of 1974), pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

The Muslim Women (Protection of Rights on Divorce) Act 1986:

A Retrogressive Precedent of Dubious Constitutionality¹

Lucy Carroll

[1986 *Journal of Indian Law Institute* 364]

The Indian society is peculiar in its nature, in its treatment of women. A divorcee carries with her many disqualifications. A girl in her teens divorced by her husband, can thereafter expect only a man in his midfifties as husband or will have to remain unmarried throughout her life, while a husband who has divorced his wife, can get a girl of sweet-seventeen, the next day. It will not be far from truth to say that in the case of marriage and divorce, this society continues to be a man's society. We can take judicial notice of the fact, of several young girls suffering the agony of life with all its privations and penury for no fault of theirs, after they are divorced by their husbands and it is such hard cases that perhaps induced and impelled the supreme law making body of this country to enact the provisions contained in section 125 of the new Code [of Criminal Procedure, 1973]. Ours is a peculiar society, where women suffer manifold disabilities while men have always an upper hand.²

Introduction

The Muslim Women (Protection of Rights on Divorce) Act 1986 drafted hastily with little consultation and rushed through Parliament with little debate and a three-line Whip, was designed to pacify a segment of Muslim opinion which had expressed dissent from the decision of the Supreme Court in *Mohd. Ahmed Khan v. Shah Bano Begum*.³ The Act is open to criticism on at least five grounds, namely, that it (i) fails to embody accurately Muslim law; (ii) fails to provide a realistic and practical alternative solution to the genuine hardships faced by divorced Muslim women; (iii) is ambiguously and ineptly drafted; (iv) opens a Pandora's box by establishing a dangerous and

1. Reprinted from *Journal of the Indian Law Institute*, 28(1986):364-376.

2. *Kunhi Moyin v. Pathumma*, 1976 K.L.T. 87 at 92 (per V. Khalid J.).

3. A.I.R. 1985 S.C. 945.

retrogressive precedent; and (v) is *prima facie* unconstitutional. This note will focus on the latter three of these five points.

Drafting Curiosities

Shorn of its arbitrary and prejudicial terms depriving Muslim divorcees of the protection to which they have, equally with all other divorced Indian women, heretofore been entitled under section 125 of the Code of Criminal Procedure 1974 (hereinafter referred to as the code), the 1986 Act could possibly be seen as a small step towards codification of Muslim personal law, the first such step in nearly half a century after passing of the Dissolution of Muslim Marriages Act 1939. In this light, the 1986 Act might have constituted a welcome move, were it not for the inept and ambiguous manner in which it has been drafted.

The preoccupation with the question of maintenance for divorced wives resulting from the *Shah Bano* controversy must not be permitted to obscure the fact that the 1986 Act appears to affect the maintenance rights of children. The curiously drafted section 3(1)(b) of the Act reads:

Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—

...

where she herself maintains the children born to her before or after the divorce, a reasonable and fair *provision and maintenance* to be made and paid by her former husband *for a period of two years from the respective dates of birth of such children*⁴

Under Muslim law, the mother, irrespective of the fact that she and the children's father may be divorced, has a preferential right to the custody of the infant children of the marriage. In *Hanafi* law this right continues until a son reaches the age of seven years and a daughter the age of puberty. The father is responsible for the maintenance of his children during their minority, irrespective of the fact that they are in the custody of their mother. Sub-section (b) of section 3(1) of the Act would more appropriately have read as follows:

[W]here she has custody of infant children of the marriage, reasonable and fair remuneration for herself (in addition to maintenance for each of the children as long as that child remains a minor in her custody) during the period that the children or any one of them is below the age of two years.

Had it been so drafted, the sub-section would have reflected not only the Muslim law of maintenance of children, but also its provision

4. Emphasis added.

to the effect that infants should be nursed for two years and the mother be paid by her husband for rendering this service. This payment is clearly in addition to both the wife's right to be maintained by her husband and the maintenance provision for divorced wives.⁵

Given the obvious intention of the 1986 Act to oust the provisions of section 125 of the code, section 3(1)(b) raises the question of what will happen to infants in the custody of their divorced mother after they reach the age of two years? The Act requires the father to give the mother something as long as the child is below two years of age and if she herself maintains the child, but it does not even require that this sum be equivalent to the woman's expenditure on the child's maintenance. Do the sponsors of the Act really intend to "reform" Muslim personal law so as to absolve a Muslim man from financial responsibility not only for his divorced wife but also for his minor children in her custody? Or to force the woman to lengthy and protracted civil proceedings in order to realize maintenance for the children, denying her the more expeditious route afforded by the code?

The wording of section 3(1)(a) is even more ambiguous: "a reasonable and fair provision *and* maintenance to be made and paid to her within the *iddah* period by her former husband."⁶ This appears to imply that the husband has two separate and distinct obligations, viz., (i) to make a "reasonable and fair provision" for his divorced wife, and (ii) to provide "maintenance" for her. The emphasis of this section is not on the *duration or nature* of any such "provision" and "maintenance," but on the time by which an arrangement for payment of "provision" and "maintenance" should be concluded, i.e., "within the *iddah* period.

On this reading, the Act only excuses from liability for *post-iddah* maintenance a man who has already discharged his obligations of "reasonable and fair provision" *and* "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's *mahr*, etc., as per section 3(1)(c) and 3(1)(d). The whole point of *Shah Bano* was precisely that the husband had *not* provided "a reasonable and fair provision" and "maintenance" for his divorced wife; he was therefore ordered to pay Rs. 179.20 a month to her under section 125 of the code.

Nevertheless, it is clear that the draftsmen of the 1986 Act intend it to overrule *Shah Bano* and bar a Muslim divorcee from proceeding

5. Enjoined by *Sura II*, verse 241 of the *Quran*.

6. Emphasis added.

under section 125 of the code, unless her husband agrees that her rights shall be determined under it instead of the 1986 Act. No other divorced woman's right to proceed under section 125 is dependent upon the consent of her ex-husband.

The Pandora's Box

Section 125 of the code provides, *inter alia*, that a divorced woman may apply to the magistrate for a maintenance order against her former husband if she is unable to maintain herself and he is possessed of sufficient means. The husband in *Shah Bano* sought to escape the application of this section on the ground that provision of maintenance to a divorced wife beyond the *iddah* period was contrary to Muslim law. He failed in the Supreme Court but succeeded in Parliament: the explicit purpose of the (grossly mistitled) Muslim Women (Protection of Rights on Divorce) Act is to exclude divorced Muslim women from the protection afforded to women of all other religions, and to exempt Muslim men from the obligations imposed on men of all other religions, by section 125 of the code. This ill-advised legislation constitutes a precedent, the repercussions of which have not been fully appreciated.

Shah Bano is not only not the first case involving a Muslim divorcee claiming maintenance under section 125 of the code,⁷ but, it is further not the first time that tenets of Muslim personal law have been pleaded in an attempt to exempt Muslims from the anti-vagrancy provisions of the Criminal Procedure Code. More than a century ago, in a case involving an application under section 536 of the Code of Criminal Procedure 1872 by a *mutah*⁸ wife for a maintenance order against her husband, the Calcutta High Court held:

[T]here is no dispute that, according to the Shia law, a *mutta* wife is not entitled to maintenance. But it is contended by Mr. Ameer Ali [appearing as counsel for the wife] that this provision of the Shia law cannot interfere with the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure.

7. It is not even the first such case to reach the Supreme Court: see *Bai Tahira v. Ali Hussain Fidaalli Chothia*, A.I.R. 1979 S.C. 362; and *Fazlunbi v. K. Khader Vali*, A.I.R. 1980 S.C. 1730. See also Lucy Carroll, "Muslim Family Law in South Asia: Important Decisions Regarding Maintenance for Wives and Ex-wives," *Islamic and Comparative Law Quarterly*, 95-113 (1981).

8. *Mutah* marriage is contracted for a specific period on payment of a specified *mahr*. During the subsistence of the contract, the *mutah* wife has neither a right to maintenance from her husband nor a right to succeed to his property on his death, unless the contract itself in terms confers one or both of these rights on her. *Mutah* marriage is not recognized by *Sunnis*.

We think that this contention is correct. A right to maintenance, depending on the personal law of the individual, is a right capable of being enforced, and properly forms the subject of a suit in a Civil Court. But we think that *this right, depending of the personal law of the individual, is altogether different from the statutory right to maintenance given by s. 536 in every case in which a person, having sufficient means, neglects or refuses to maintain his wife.*⁹

Given the precedent of the 1986 Act, shall we now look forward to a (mistitled) "Muslim *Mutah* Wives (Protection of Rights) Act," exempting *Shia* husbands from any liability under the code for maintenance of wives married in *mutah* form during the subsistence of the marriage?

Section 125 of the present code, like its predecessors, obliges a father to maintain his illegitimate child. Muslim law places no responsibility on a man for the maintenance of his illegitimate off-spring.¹⁰ Yet this liability has been part of the code and is as applicable to Muslims as to any other section of the population for over a century. There have been cases where Muslim men attempted to argue that this provision of the code could not apply to them because it was contrary to Muslim law.¹¹ In no case has such an argument been accepted.

Given the precedent of the Muslim Women (Protection of Rights on Divorce) Act, shall we now look forward to an outcry from the same section of the Muslim community when the next decision ordering a Muslim father to maintain his illegitimate child is handed down? And to a (mistitled) "Muslim Illegitimate Children (Protection of Rights) Act," exempting Muslim men from any liability under the code for maintenance of their illegitimate children?

Further, since 1949 the Criminal Procedure Code has entitled a wife to claim maintenance from her husband while refusing to live with him if he has married another wife or keeps a mistress. Muslim law does not recognize the mere fact of the husband's remarriage as a legal ground on which the first wife can refuse to live with

9. *In re Luddun Sahiba: Luddun Sahiba v. Mirza Kumar Kudar*, I.L.R. 8 Cal. 736 at 737-38 (1882); emphasis added. For further litigation between the parties see *Mohd. Abid Ali Kumar Kudar v. Ludden Sahiba*, I.L.R. 14 Cal. 276 (1886).

10. In Islamic law, of course, the father of an illegitimate child would be subject to severe criminal penalties which however are not enforced in India. It could be suggested that the "trade off," substituting liability for maintenance of the child for the harsh criminal sanctions of Muslim law, is such that no man should reasonably complain.

11. E.g., *Km. Nafees Ara v. Asif Saadat Ali Khan*, A.I.R. 1963 All. 143.

him.¹² Again there have been cases where Muslim husbands have argued that this provision of the code could not apply to them because it was contrary to Muslim law.¹³ Again the courts have declined to accept this argument.

Delivering judgment for the Supreme Court in a 1981 case, *Sirajmohmedkhan v. Hafizunnisa Yasinkhan*,¹⁴ and surveying the case law on section 488/125 of the Criminal Procedure Code, Murtaza Fazal Ali J. quoted the following passage from a decision he had given in 1958 as a judge of the Jammu and Kashmir High Court:

Before the [1949] amendment, the fact of the husband's marrying a second wife or keeping a mistress was not by some High Courts considered a just ground for the first wife's refusal to live with him, although it was taken into account in considering whether the husband's offer to maintain his first wife was really '*bona fide*' or not.

The amendment is clearly intended to put an end to an unsatisfactory state of law utterly inconsistent with *the progressive ideas of the status and emancipation of women*, in which women were subjected to a mental cruelty of living with a husband who had taken a second wife or a mistress on the pain of being deprived of any maintenance if they chose to live separately from such a husband.¹⁵

Contentions that the second marriage took place with the consent of the first wife¹⁶ or because of her refusal to live with her husband¹⁷ have not saved a Muslim husband from a maintenance order under sections 488/125 in favor of his first wife.

Shall we now look forward to an outcry from a section of the Muslim community when the next decision ordering a Muslim

12. Of course, Muslim law demands that a man treat co-wives equally. This is so patently impossible that many modern scholars have concluded that the *Quranic* verses in fact enjoin monogamy. "[T]he conviction is gradually forcing itself on all sides, in advanced Moslem communities, that polygamy is as much opposed to the teachings of Mohammed as it is to the general progress of civilised society and true culture." Ameer Ali, *The Spirit of Islam* 230 (11th impression, 1978). See also *Itwari v. Smt. Asghari*, A.I.R. 1960 All. 684.

13. E.g., *Syed Ahmad v. Naghath Parveen Taj Begum*, A.I.R. 1958 Mys. 128; *Shahulameedu v. Subaida Beevi*, 1970 K.L.T. 4.

14. A.I.R. 1981 S.C. 1972.

15. *Biro v. Behari Lal*, A.I.R. 1958 J. & K. 47 at 49; emphasis added. Quoted in *ibid.* at 1979.

16. *Abdul Ghaffar v. Bibi Hafiza Khatoon*, A.I.R. 1968 Pat. 307.

17. *Mohorunnissa v. Abdul Salam*, 1974 Cri. L.J. 78; *Syed Ahmad*, *supra* note 13.

husband to maintain his first wife¹⁸ who refuses to share her husband's attentions and her matrimonial home with a co-wife is handed down? And to a (mistitled) "Muslim Co-Wives (Protection of Rights) Act," exempting Muslim men from the provisions of section 125 of the code, concerning maintenance for a wife who refuses to cohabit with her husband and his other wife?

Examples can also be found in other statutes. It is not inconceivable, for instance, that a section of Muslim opinion could take exception to the Child Marriage Restraint Act 1929, which presently imposes criminal penalties on those who marry, as well as on those who arrange the marriage of, a girl under eighteen years of age. Shall we look forward to a (mistitled) "Muslim Girls (Protection of Rights) Act," excluding the Muslim child from the protection of the Child Marriage Restraint Act, asserting her "right" to be married at the age of nine, and absolving her "husband" and guardians from criminal charges?

Even a statute specifically dealing with and codifying Muslim personal law could come under attack if Muslim personal law is conceived of as having been unalterably defined for all time in the tenets of the uncodified *Hanafi* law applied by the South Asian courts in the nineteenth century. Does not the Dissolution of Muslim Marriages Act overrule the textbook interpretations of *Hanafi* law? To quote from the statement of objects and reasons issued with the bill which subsequently became the 1939 Act:

There is no provision in the Hanafi Code of Muslim law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India.¹⁹

The Dissolution of Muslim Marriages Act unquestionably constituted a departure from the *Hanafi* law as laid down in the texts which the courts of the day considered authoritative. Will it now fall under the scrutiny of Muslim reactionaries?

It is very difficult to argue that the 1986 Act is not a precedent for these and similar retrogressive moves, relegating Muslim girls and

18. Or indeed, a second wife married in the presence of the first. The 1949 amendment has been held equally applicable whether it is invoked by the first wife or by the second wife. *Hafijjabi v. Abdul Aziz Kadirka*, 1983 Cri. L.J. 931 (Bom.); *Tejabai v. Shankarrao*, A.I.R. 1966 Bom. 48.

19. *Gazette of India*, 1936, pt. V, p. 154.

women — citizens of the Socialist Secular Democratic Republic of India — to a legal position inferior not only to that of other Indian women, but also to that of Muslim women in other countries, including the neighboring Islamic Republic of Pakistan. It is equally difficult to suggest that all or any of these moves would enjoy the support of Muslim public opinion in India. Indeed, it is clear that such opinion is very far from being unanimously in favor of the 1986 Act.

Further, the precedent of the success scored by Muslim reactionaries in achieving the enactment of the 1986 Act will scarcely be lost on the corresponding sections of other communities. A section of the Sikh community has apparently been demanding recognition of their own personal law. At present, Sikhs are classified as Hindus for the purpose of the Hindu code legislation. According to a report²⁰ Sikh personal law, as defined by the Akalis, permits the husband plural wives and prohibits divorce, just as did the unreformed Brahmanical Hindu law.

Constitutionality

In their referring opinion in *Shah Bano*, Murtaza Fazal Ali and A. Varadarajan JJ. suggested that the earlier decisions of the Supreme Court on the same point²¹ were contrary to “the fundamental concept of divorce of the husband and its consequences under the Muslim law which has been expressly protected by S. 2 of the Muslim Personal Law (Shariat) Application Act 1937 — an Act which was not noticed by the aforesaid decisions.”²²

This question may be easily answered. The Shariat Act deals with conflict between customary law and Muslim law and lays down a choice of law rule for the courts in civil cases involving Muslim parties in circumstances where no statutory provision is applicable. The Act was designed to secure to Muslim women the rights which Muslim law conferred upon them but which customary law negated. The statement of objects and reasons accompanying the bill which became the Act of 1937 asserted:

[T]he status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organizations have therefore condemned Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will

20. *Manushi*, Aug.-Sept. 1983, p. 45.

21. i.e., *Bai Tahira* and *Fazlunbi*, *supra* note 7.

22. Quoted in *supra* note 3 at 947.

automatically raise them to the position to which they are naturally entitled.²³

The Shariat Act did not codify the Muslim personal law and certainly did not place a permanent embargo on reform or alteration in the uncodified law as defined and applied by the courts of fifty years ago. The Act is of no assistance in elucidating the phrase used in section 127(3)(b) of the code ("the sum which, under any customary or personal law applicable to the parties, was payable on such divorce"), and offers no guidance whatsoever in the interpretation of sections 125 and 127 of the code. Reference to the Act in this context is unhelpful and irrelevant.

It is interesting to note that the question concerning the Shariat Act raised by Murtaza Fazal Ali J. was discussed thirty years ago in a Pakistan case. The judgment of B. Z. Kaikaus J. is worth extracting at some length. He observed:

As pointed out by Mahmood J. *In the matter of the petition of Din Muhammad*²⁴ this section [i.e., s. 488 of the code of 1898] creates a statutory right to maintenance irrespective of nationality or creed. As the personal laws of adherents of various religions do not contain uniform provisions as to maintenance of wives and children the right created by this section will obviously not coincide with the right given by personal law in all cases. If we compare this section with Muslim Law it will be found that while in some cases it confers a right which the Muslim Law does not recognise, in others it refuses to recognise a right to maintenance where Muslim Law will grant one. It will be observed that the section gives even an illegitimate child a right to maintenance. Under Muslim Law an illegitimate child has no right of maintenance against its natural father. . . . I may also, in this connection refer to a recent amendment of the Criminal P. C. in India, whereby it has been provided that the fact that a husband has contracted a second marriage would be "sufficient cause" for the wife to refuse to live with him within the meaning of this section, although under Muslim Law this would not be a valid ground. It cannot be said that this amendment is inconsistent with the original section.

The argument that it is only where under the Muslim Law a right of maintenance exists that section 488 will apply is really an impossible one

A subsidiary argument has been raised that if section 488 gives a right to maintenance even in cases where the Muslim Law disentitles a person to maintenance, section 488 is overridden by section 2 of the Muslim Personal Law (Shariat) Application Act, 1948, as amended in 1951, because by virtue of that section the personal law has to be applied in all

23. *Gazette of India*, 1935, pt. V, p. 136.

24. I.L.R. 5 All. 226 (1883).

questions relating to maintenance. The argument is based on a misapprehension. . . . *The object of the Muslim Personal Law (Shariat) Application Act was not to override any statute but to abrogate custom where there was a clash between custom and personal law. . . . There can be no doubt that on the law as it stands, the provisions of Muslim law do not override any statute.* If I were to accept the argument of the learned counsel a large number of statutes, in which I might include the Punjab Colonization of Government Lands Act, the Punjab Tenancy Act, and the Punjab Jagirs Act, would be *ultra vires* and no longer law.²⁵

While the Shariat Act did not guarantee that Muslim personal law as interpreted and applied at the time of its enactment would continue unaltered (if it had done so, the Dissolution of Muslim Marriages Act passed two years later would have been *ultra vires*), the Indian Constitution — which takes precedence over statutory law and controls legislative power²⁶ — clearly envisages reform of all personal laws. The Constitution is solicitous in its regards for the weaker sections of society, *inter alia*, specifically subjecting the fundamental rights guaranteed by articles 15 and 25 to the right of the state to make “special provision for women and children;”²⁷ and to provide “for social welfare and reform.”²⁸

The extension of section 125 of the code to include divorced women cannot be challenged by reference to the Shariat Act; the more immediate question is whether the 1986 Act can survive a challenge on constitutional grounds?

I would submit that a classification which excludes divorced Muslim women alone from the protection which all divorced women heretofore enjoyed under section 125, is an arbitrary and unreasonable differentiation and violates the equality before the law guaranteed by article 14. Further, it is a classification based solely on religion, and thus violative of article 15(1). There is neither any real and substantial difference between the situation faced by indigent women, both Hindu and Muslim, following a divorce, nor any justification for differentiating women in such a situation on the basis of religion.²⁹ It certainly cannot be contended that Muslim women are

25. *Syed Mushaf Husain Shah v. Mst. Hamida Begum*, P.L.D. 1957 Lahore 220 at 223-224; emphasis added. See also *Isak Chanda Palkar v. Nyamatbi*, 1980 Cri. L.J. 1180.

26. See art. 13.

27. Art. 15(3).

28. Art. 25(2)(b).

29. “While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.” *State of Bombay v. F. N. Balsara*, A.I.R. 1951 S.C. 318 at 326, per Fazl Ali J., quoting *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

any less in need of the protection afforded by section 125 than are Hindu women, or women of any other religion or of no religion at all.

Various statutes reforming Hindu law have been challenged on constitutional grounds, the allegation being that they violated article 15 by discriminating against Hindus on the basis of religion and/or violated article 25 interfering with the practice of the Hindu religion.³⁰ These challenges were rejected, *inter alia*, on the ground that the discrimination was not *solely* on the basis of religion, that also involved was the fact that Hindus were subject to a distinctive system of personal law peculiar to them *before* the reforming Act. The reforming Act only recognized a classification already in existence and reformed this distinctive personal law.³¹ The argument is not available in the present situation. Prior to the Muslim Women (Protection of Rights on Divorce) Act, *all divorced Indian women* were subject to a single national law embodied in section 125 of the code, irrespective of what additional or different rights (if any) might be available under their respective personal laws. To exclude a section of women, identified by religion and by religion only, from the scope of the national law to which they were previously subject is, I would submit, to discriminate against them on the grounds of religion contrary to article 15(1).

Another argument used to uphold the Hindu Acts was that the legislation was intended for the benefit of the class of persons to which the Act in question was applicable. "It will be a travesty of the truth to say that it is directed against that class and discriminates against them," asserted the Andhra Pradesh High Court in repelling a constitutional challenge levied against the Hindu Marriage Act.³² Again, this argument is not available to support the 1986 Act, which severely penalizes, rather than benefits, Muslim women. To paraphrase the Andhra Court, it would be a travesty of truth to say that the Act is *not* directed against Muslim women as a class and that it does *not* discriminate against them.

A third argument used in favor of the Hindu reform legislation was that in imposing monogamy on Hindus and thus bringing them into

30. E.g., *Srinivasa Aiyar v. Saraswathi Ammal*, A.I.R. 1952 Mad. 1931 (Madras Hindu [Bigamy Prevention and Divorce] Act 1949); *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84; (Bombay Prevention of Hindu Bigamous Marriages Act 1946); *H. B. Singh v. T. N. H. Ongbi Bhani Devi*, A.I.R. 1959 Manipur 20 (Hindu Marriage Act 1955); *Ram Prasad Seth v. State of U.P.*, A.I.R. 1957 All. 411; A.I.R. 1961 All. 334 (Hindu Marriage Act); *G. Sambireddy v. G. Jayamma*, A.I.R. 1972 A. P. 156 (Hindu Marriage Act).

31. See the *Srinivasa Aiyar, Narasu Appa Mali, H. B. Singh, G. Sambireddy* cases, *ibid.*

32. *G. Sambireddy*, *ibid.* at 161.

line with groups already subject to a rule of monogamy, the legislation constituted "a step towards the establishment of a uniform Civil Code, the cherished goal of Article 44 of the Constitution."³³ Again, this argument is not available in support of the 1986 Act, which is a step in the *opposite* direction. Section 125 of the code is a national, secular law applicable to all Indians; the 1986 Act seeks to exclude Muslim women from the protection of the code and to subject them to an alternative statute which, in spite of its pretentious title, offers them a lesser degree of protection and relegates them to an inferior position vis-a-vis their non-Muslim sisters with whom they have been, in this respect, on terms of equality.

On the other hand, a supposed "right" of a Muslim man to discard his wife with impunity and with no financial responsibility toward her, even if the divorce leaves her in desperate straits, can no more be defended as an integral part of the Muslim religion, or the practice of that religion, than could the right formerly enjoyed by Hindu men to marry again in the presence of the first wife be defended as an integral part of the Hindu religion. Indeed, given the sacramental nature of Hindu marriage and the religious necessity of a son, the Hindu husbands objecting to a rule of monogamy were able to muster much stronger arguments than the Muslim husband, objecting to a rule enjoining a minimal degree of financial responsibility for discarded wives, can possibly put forward. The Hindu husbands failed in their contentions.

The founders of the nation had a vision of a society free from (i) the disabilities of caste, (ii) exploitation, and (iii) discrimination on the basis of sex, race, religion, place of birth, language. This vision of social development and progress which permeates the Constitution is forward — toward unity, equality and a uniform civil code. There is no constitutional sanction for retrogressive moves. The right conferred upon *all* Indian women by section 125 of the code cannot now be denied to a *class* of Indian women identified solely by religion. To the extent that the 1986 Act purports to do exactly this, it is squarely and surely caught by section 13(2) of the Constitution.

Concluding Remarks

The salutary extension in 1974 of the anti-vagrancy provisions of the Criminal Procedure Code to cover indigent divorced women, including Muslims, fulfilled a need long felt and dealt with a social problem long apparent. More than a century ago the Calcutta High Court observed:

33. *Ibid.*

The fact that the power of divorce, given by the Mahomedan law, may be so exercised as to defeat the intention of the legislature as expressed in s. 234 Act 4 of 1877 [i.e. Presidency Magistrates Act], and other similar enactments, may go to show that *further legislation is required*, but it cannot affect the law as it stands.³⁴

Nothing has occurred in the intervening century to render such “further legislation” any less necessary than it was in 1879. What has distinguished the period since the 1879 Calcutta decision has been the growth of “progressive ideas of the status and emancipation of women”³⁵ — ideas enshrined in the Indian Constitution, and endorsed by the distinguished jurist, Justice Fazal Ali. To quote again from his judgment, in *Sirajmohmedkhan v. Hafizunnisa Yasinkhan*:

[T]he outmoded and antiquated view [was] that the object of section 488 was to provide an effective and summary remedy to provide for appropriate food, clothing and lodging for a wife. This concept has now become completely outdated and absolutely archaic. After the International Year of Women when all the important countries of the world are trying to give the fair sex their rightful place in society and are working for the complete emancipation of women by breaking the old shackles and bondage in which they are involved, it is difficult to accept a contention that the salutary provisions of the code are merely meant to provide a wife merely with food, clothing and lodging as if she is only a chattel and has to depend on the sweet will and mercy of the husband.³⁶

Although that particular case was concerned with separate maintenance for a wife who refused to live with her husband on the ground that he was impotent, the sentiments expressed are no less applicable to the situation of a divorced woman, particularly a woman divorced unilaterally and extra-judicially “at the sweet will . . . of her husband” as if she were “only a chattel.” Not even the staunchest supporter of the 1986 Act could possibly contend that the *talaq* as practised in India conforms with the injunctions of *Quranic* law. It is indeed a manifestation of the “peculiar” nature of Indian society, reflected upon by V. Khalid, J. that the *Shah Bano* controversy led, not to an Act reforming *talaq*, but to an Act further enhancing the rights of men and depriving Muslim women of the minimal succor available to them under section 125 of the code. As he observed: “Ours is a peculiar society, where women suffer manifold disabilities while men have always an upper hand.”³⁷

34. *Abdur Rohoman v. Sakhina*, I.L.R. 5 Cal. 558 at 562 (1879); emphasis added.

35. *Supra* note 14 at 1979.

36. *Ibid.* at 1976.

37. *Supra* note 2.

Postscript

Inaugurating a seminar on sexual bias in the law on 15 September 1984, Justice Murtaza Fazal Ali "read chapter and verse from the Quran to prove that it ordained the husband to pay maintenance to the divorced wife."³⁸

38. Quoted in *Indian Express*, 16 September 1984.

Writ Petition No. 868 of 1986

In the Supreme Court of India

(1) Danial Latifi (2) Mrs. Sona Khan (Petitioners)

v.

The Union of India (Respondent)

To the Hon'ble Shri P.N. Bhagwati, Chief Justice of India, and his Companion Justices of the Supreme Court of India

The humble Petition of the petitioners above named most respectfully sheweth

1. That the Petitioners are Muslim citizens of India and are legal activists interested in the cause of Muslim women, divorcees and others and also in the advancement of Muslim society in equal partnership with all other citizens. They are both members of the All India Lawyers Union, the former being president thereof.

2. That the Muslim Women (Protection of Rights on Divorce) Act 1986, (hereinafter called "the Act"), having impiously overridden and repealed the Muslim Personal Law (Shariat), including, where affected, the Holy Quran, the Sunna, Hadis and *fiqh*, is itself purely a creature of statute and is thus totally subject to the permissible legislative parameters laid down in Articles 12, 13(2), 243, 246 and other Articles of the Constitution of India.

3. That the Act is a discriminatory measure calculated to disrupt and divide the most exploited and vulnerable section of our people, the class of *Destitute Divorced Women Unable to Maintain Themselves* protected by Section 125 of the Code of Criminal Procedure, now also by the Family Courts Act 1984, whose benefit is sought to be denied to destitute Muslim women unable to maintain themselves by the Act as appears hereinbelow.

4. That apart from being prejudicial and discriminatory in its substantive provisions the Act is also procedurally discriminatory by reason of being segregatory and by tending to aggravate a situation of apartheid whereby the weakest section, namely the women of the

minority community, would per se be prejudiced (as illustrated by their exclusion from the Family Courts Act 1984).

5. That the most important section of the Act, namely section 3(1) thereof, reads as follows:

3(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to

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

6. This sentence as enacted is almost incomprehensible. It consists of jumbled expressions, most inconsiderately and sadistically calculated to aggravate the anxieties and uncertainties of most unfortunate and oppressed destitute divorced women at a traumatic moment in their lives. Even when it confers rights, this is done in a left handed way, contrary to the Quranic injunctions requiring *qaulun sadeeda* (unambiguous expression) in all communications (vide Quran XXXIII:70). While in one interpretation this provision of the Act appears to conform to the interpretation put on the Quranic text II:241 by this Hon'ble Court, statements made by Government spokesmen in Parliament, that this Bill was intended to "remedy" the situation created by an allegedly wrong interpretation of the said verse by this Hon'ble Court is likely to confuse those charged with administering the law. Hence this section requires clarification by this Hon'ble Court at the earliest possible moment in the interests of unfortunate destitute women.

7. That in the circumstances the said provision in section 3(1) of the Act must be construed as specifying two heads of charge upon the husband to be paid to the wife within the *iddat* period, namely

ONE a reasonable and fair provision

and

TWO maintenance

These amounts, unfortunately mentioned in the same sentence, although required to be paid within the *iddat* period are not a provision for the *iddat* period but a reasonable and fair provision and maintenance for the rest of the woman's life.

8. The said expression appears to give effect in part to the Quranic injunction for *mataaun bil maroof* referred to in the Holy Quran chapter II, verse 241 and earlier considered by this Hon'ble Court in *Mohd Ahmed Khan v. Shah Bano Begum*. Unfortunately speeches made by Ministers of the Government (including the Law Minister) in Parliament and elsewhere have wrongly alleged that this Hon'ble

Court has misinterpreted the said Ayat.¹ This has created confusion and has denigrated this Hon'ble Court.

9. It is further necessary to clarify, following the ruling of this Hon'ble Court in the case of *Savitri v. Govind* (1985) that proceedings under this Act being essentially civil proceedings (aided by criminal procedure), section 6 of the Punjab Laws Act and corresponding other laws in various States will apply and also Order XXXIIA and Order XXXIX of the Code of Civil Procedure, so that, inter alia, ex-parte and interim relief may be granted to the needy divorced woman by any Court in the area where she resides, whether civil or criminal.

10. It may further be clarified by this Hon'ble Court that, in accordance with the juristic principle *interest reipublicae ut sit finis litium*, the substantive rights declared by the Act in favour of the divorced woman, in particular relief against court fees, may be availed of not only in the Magistrate's Court, but also in any Court and in any proceeding where she and the husband are parties, including civil proceedings under the Dissolution of Muslim Marriages Act 1939, and also the Family Courts Act (No. 66 of 1984) so that the woman may not be compelled to resort to a multiplicity of jurisdictions to enforce her rights arising out of a single transaction, namely her divorce. Such a ruling by this Hon'ble Court would bring immeasurable relief to women besides helping to reduce the backlog of cases pending in the various Courts, by having a single adjudication in respect of one transaction, in whichever Court it happens to come up, whether civil or criminal.

That the petitioners therefore submit that the said Act is liable to be struck down on the following amongst other grounds:

(a) That the Act in its totality is void as infringing Articles 14, 15, 25, 26, 27, 29, 30 of the Constitution and also Parts IV and IVA thereof. It infringes the sovereign concepts of equality before the law and equal protection of the laws.

(b) That the divorced woman's right to "a reasonable and fair provision" mentioned in section 3 of the Act must be reasonable and just with reference to her needs for the rest of her life and not merely the *iddat* period, and that, in the case of *talaq-e-bidat* it must include an extra compensation to the woman. That even when so favourably construed the Act fails to give full benefit of the Holy Quran II:241,

1. A comparison of the speeches in parliament by two government ministers -- Arif Mohammad Khan on August 23, 1985 (*Lok Sabha Debates*, August 23, 1985, cols. 405-442) and Z.R. Ansari on 12 December 1985 (*Lok Sabha Debates*, 20 December 1985, cols. 382-402) -- illustrates the dramatic and unprincipled about face executed by the government then in power.

which, correctly understood, grants the divorced woman a flexible provision, which may be a lump sum or a recurring maintenance, as appropriate in a given case. This is also the position under other personal laws and there is no reason why a Muslim woman should not enjoy the benefit of this option.

(c) That section 4 of the Act is discriminatory not only against the divorced Muslim women but also against the relations of the said women upon whom an unreasonable and discriminatory burden is cast of maintaining the divorced women which members of other communities, similarly situated, do not have to bear.

(d) That the provision regarding maintenance of minor children by the father only till the age of two is inconsistent with the provision that a father must maintain a daughter all her life after divorce. The said provision is anti-Shariat, discriminatory and contrary to human rights.

(e) That section 5 of the Act is void because it arbitrarily infringes the rights of donors of *wakfs* of having their benefactions diverted to purposes other than those declared in the *wakf* foundation. It is also a violation of the rights of the citizens at large not to be taxed for a sectarian purpose as provided in Article 27 of the Constitution.

(f) That the provisions of sections 4 and 5 of the Act would not only encourage *talaq* but also female prenatal infanticide. Thus it would militate against two of the causes to which the Holy Prophet of Islam dedicated a great part of his life.

The Petitioners therefore PRAY that this Honorable Court may be pleased to grant appropriate relief herein under Article 32 of the Constitution, and in particular to declare the Act void and/or to assure to destitute Muslim divorces the option to avail of section 125 of the Code of Criminal Procedure. The uncertainties and ambiguities in the Act may also be clarified in the interests of the divorced women.

Danial Latifi
Sona Khan
Petitioners

Appendix

Mataa in Other Countries

Summary of Statutes

(Extracts from : *Statutes of Personal Law in Islamic Countries*,
Tahir Mahmood [2nd ed., 1995], pp. 261-262, and p. 191.)

. . . . Under the laws of some countries a divorced wife is entitled to receive from her former husband what is called *mut'a*. This concept is referred to in the Quran (II:241) and has been rendered into English as 'consolatory gift,' 'compensation' and 'indemnity.' *Mut'a* is, thus, basically different from regular maintenance of the divorcee. In the case of dissolution of an unconsummated marriage contracted without a specific *mahr*, only *mut'a* is payable and no *mahr* or maintenance of *idda* can be claimed. This rule is enforced in Jordan, Lebanon, Morocco and North Yemen. In some other countries *mut'a* has to be paid -- in addition to *mahr* and maintenance of *idda* -- where after the consummation of marriage a man inflicts on her a *talaq-i-ta'assuf* (arbitrary divorce) against her wishes and without any fault on her part. The following provisions are notable in this regard:

(i) in Malaysia, to a woman who has been divorced "without just cause" the court can grant, by way of *mut'a*, a sum that may be "fair and just" -- the law being by and large the same in Brunei;

(ii) a woman who has been "arbitrarily divorced" by her husband may be awarded, by way of *mut'a*, maintenance of one year in Jordan, two years in Egypt and three years in Syria - - payable in a lump sum or in instalments depending on the financial condition of the husband;

(iii) in Algeria and Morocco a husband who divorces his wife at whim shall pay her *mut'a* in conformity with his financial condition;

(iv) in Kuwait, Somalia and South Yemen where the husband is responsible for the termination of marriage by *talaq* or *faskh* the court may grant to the wife up to one year's maintenance;

(v) in Tunisia and Turkey a married person -- husband or wife -- who insists on divorce against the wishes of the other spouse and without his or her fault can be directed to suitably indemnify the aggrieved spouse; a recent Turkish law allows award of maintenance to a divorced spouse beyond one year from divorce if she/he is needy;

(vi) in India a divorced wife can seek from her husband a "fair and reasonable" provision through speedy criminal proceedings.

[(vii) section 41 of the Indonesian Law of Marriage, 1974, provides that " In the event of a divorce [T]he court may also direct the former husband to pay alimony to the divorced wife."]

***Mut'ah* [in Malaysia and Singapore]**

(Statement prepared for this publication by Professor Ahmad Ibrahim, July 1997)

The payment of a consolatory gift on divorce or *mut'ah* is enjoined in the Holy Quran. It is stated to the effect:

a) For divorced women *mut'ah* should be provided on a reasonable scale. This is a duty on the righteous.

(Surah al Baqarah (2): 241)

b) There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them a suitable gift the wealthy according to his means and the poor according to his means - a gift of a reasonable amount is due from those who wish to do the right thing. "

(Surah al Baqarah (2): 236)

The law has been codified in the States of Malaysia. In the Federal Territories it is provided by Section 56 of the Islamic Family Law (Federal Territories) Act, 1984, that in addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband may apply to the Court for *mut'ah* or a consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to Hukum Syara'. Similar provision has been enacted in Selangor, Negeri,

Sembilan, Perak, Penang, Terengganu, Johor, Perlis, Sabah and Sarawak.¹

In Kelantan and Malacca, it is provided that in addition to her right to apply for maintenance, a wife who has been divorced may apply to the Court for a *mut'ah* or consolatory gift and the Court may, after hearing the parties, order the husband to pay such amount as may be appropriate and just in accordance with Hukum Syarak if satisfied that the wife has been divorced without just cause.²

In Kedah, the provision reads " Other than her right to a claim for maintenance a female who has been divorced without any just cause by her husband may apply for a *muta'ah* to the Court and the Court may after hearing both parties order the former husband to pay her an appropriate and fair amount of money if it is satisfied that the female has been divorced without just cause".³

In Sabah, it is provided that in addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband, may apply to the court for *muta'ah* or consolatory gift. The Court may after hearing the parties and upon being satisfied that the woman has been divorced without just cause order the husband to pay such sum as may be fair and just according to Hukum Syarak.⁴

A similar provision but in Bahasa Malaysia has been enacted in Sarawak.⁵

In Singapore, it is provided that a woman who as been divorced by her husband may apply to the court for a consolatory gift or *muta'ah* and the Court may after hearing the parties order payment of such sum as may be just and in accordance with the Muslim law.⁶

1. Selangor Islamic Family Law Enactment, 1984, S. 56; Negeri Sembilan Islamic Family Law Enactment, 1983, S 56; Perak, Islamic Family Law Enactment, 1984, S. 52; Penang Islamic Family Law Enactment, 1985, S. 56; Terengganu Administration of Islamic Family Law Enactment, 1985, S. 55; Johor Islamic Family Law Enactment, 1990, S. 56;

2. Kelantan Islamic Family Law Enactment, 1983, S. 44. Malacca Islamic Family Law Enactment, 1983, S. 44.

3. Kedah Islamic Family Law Enactment, 1984, S. 47.

4. Sabah Islamic Family Law Enactment, 1992, S. 58.

5. Sarawak Undang-Undang Keluarga Islam, 1991, S. 55.

6. Singapore Administration of Muslim Law Act, S, 52 (2).

South Africa

(Abstracted from material furnished to WLUML by the Women and Human Rights Documentation Centre, Belville, South Africa *)

In *Moegamat Faud Ryland v. Theorayah Edros* (decided 13 August 1996), the Supreme Court of South Africa (Cape of Good Hope Provincial Division) ruled that a Shafi wife is entitled to *mataa* or a consolatory gift when the husband terminates the marriage by *talaq* without just cause. Significantly, the point had been conceded by experts and counsel on *both* sides. The questions (i) whether the wife in this particular case qualified for *mataa* (the husband argued that the *talaq* had been occasioned by the wife's adultery or unduly intimate relations with three men); and (ii) how the *mataa* should be determined or calculated (the wife claimed an amount equivalent to thirty months' maintenance) were not answered in this round of the litigation.

* Gender Law Programme (Legal Resources Centre), Ed. Capacity Building Workshop on the lessons from *Ryland v. Edros*. Breakwater Lodge, Cape Town: 23 April 1997, 86pp.

Part 3

Selection of Liberal Judicial Interpretations of the Muslim Women Act, 1986

Muslim Women Benefited: Shah Bano Revisited

Danial Latifi

[*The Lawyers*, December 1988]

Two important judgments, one of the Gujarat High Court and the other of the Kerala High Court, have interpreted the Muslim Women (Protection of Rights on Divorce) Act in a manner that will greatly benefit divorced Muslim women. Danial Latifi comments on these two important decisions.

Two important, recently reported judgments of the Gujarat and Kerala High Courts have rounded off the controversies sparked by the famous *Shah Bano* judgment of the Supreme Court¹ and the enigmatic Muslim Women (Protection of Rights on Divorce) Act, 1986.

Thanks to the wise, creative and juristically sound approach of the judges who decided these two cases, some of the apprehensions voiced by many, including this writer, have happily been belied and, despite residual minor excrescencies in the law, Muslim women have, overall, been greatly benefited by the forensic, agitational and legislative exertions of the years 1985-1986. The objective of a common civil code has also been placed in its correct perspective and, in a small but significant legal segment, the path thereto has been cleared.

The judgments are respectively *Arab Ahmad bin Abdullah v. Arab Bail Mohamuna Sauyadbhari*,² decided in the Gujarat High Court on 13 February 1988 by M.B. Shah, and [*Ali v. Sufaira*],³ decided in the Kerala High Court on 1 July 1988 by K. Sreedharan, J. They will be referred to as the Gujarat and Kerala cases respectively.

1. Mohd. Ahmad Khan v. Shah Bano Begum, AIR 1985 SC 945.

2. (1988) 29 (1) Gujarat Law Reporter : AIR 1988 Gujarat 141. The decision is reproduced in full below pp. 149-174.

3. 1988 (2) Kerala Law Times 94. The decision is reproduced in full below pp. 175-184.

These judgments are, happily, free from exuberances of expression offensive to Muslim sentiment that, regrettably, marred the epoch-making pronouncement of the Supreme Court in the *Shah Bano* case.

Act Protects Muslim Women

Both judgments emphasize the rubric of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter called the MWA), proclaimed in its Preamble as "An Act to protect the rights of Muslim women who have been divorced by or obtain divorce from their husbands and to provide for matters connected therewith or incidental thereto." The Kerala judgment states, "from this Preamble it is evident that the legislature wanted to protect the rights of divorced Muslim women. These ladies are to be well protected. They are not to be left as destitutes. Vagrancy is to be prevented."

Judicial interpretation of the MWA must take its cue from the declared objects of the legislation, both judgments rightly hold.

As a sequitur from the above, both judgments declare that the rights conferred upon Muslim women by the MWA are additional to and not substitutive of women's existing rights under the law.

Both judgments hold that the MWA does not purport to nullify the Supreme Court's ruling in the *Shah Bano* case. Nor does the Act in any way take away any of the substantive rights granted to divorced Muslim women by the Holy Quran as declared by the Supreme Court in the *Shah Bano* case. Both the judgments hold that the *Shah Bano* judgment and the law therein declared retain full force and are binding on all courts.

In the Gujarat case, Shah J. had before him two special criminal applications, both filed by former husbands aggrieved by orders passed by magistrates directing them to pay maintenance to their divorced wives after the expiry of the *iddat* period. One of these was an order passed under Section 125 of the Criminal Procedure Code prior to the MWA. The other was passed afterwards.

Shah J. formulated the questions before him thus:

1. Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, hereinafter referred to as the Muslim Woman Act, the orders passed by the Judicial Magistrate, 1st Class, under Section 125 of the Criminal Procedure Code ordering the husband to pay maintenance to the wife are nullified?
2. Whether the Muslim Women Act takes away the rights which are conferred upon the divorced women under the personal law as interpreted by the Supreme Court in the case of *Mohd. Ahmad Khan v. Shah Bano Begum*?

3. Whether the Muslim Women Act provides that a divorced woman is entitled to have the maintenance only during the *iddat* period, i.e. only for the *iddat* period?

Adverting to the position of a divorced wife under Muslim personal law, Shah J. referred to the ruling of the Supreme Court in *Shah Bano Begum's* case and said:

The Supreme Court rejected the contention that under the Muslim personal law, the former husband is liable to provide maintenance to his divorced wife only for the *iddat* period and held as under:

“The argument of the appellant (husband) that, according to the Muslim personal law, his liability to provide maintenance of his divorced wife is limited to the period of *iddat*, despite the fact that she is unable to maintain herself, has therefore to be rejected. . . .”

The Supreme Court then referred to the Holy Quran, Chapter II verses (ayats) 241 and 242 which are reproduced as under:

Ayat No. 241

Arabic version

wa lil motallaqatay
mataa un
bil maaroofay
haqqan
alal mutta queena

English version

For divorced women
Maintenance (should be provided)
On a reasonable (scale).
A duty
On the righteous.

....

The Supreme Court thereafter held that these ayats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. In view of this interpretation given by the Supreme Court, it is apparent that the Parliament has made provision in Section 3(1)(a) which states that a divorced woman is entitled to have a reasonable and fair provision from her former husband. . . . In my view, it is not open to me to take any contrary view in view of the law laid down by the Supreme Court. Further, it should be noted that the decision in the case of *Shah Bano Begum* is of the Bench consisting of five hon'ble judges.

Mahr Not Enough

Shah J. then refers to the Supreme Court negating the contention of the husband "that once the '*mahr*' or dower amount is paid, that would take care of the requirements of the divorced woman" and its further holding that "*mahr* is not a sum which, under the Muslim personal law, is payable on divorce," within the meaning of Section 127(3)(b) of the Code of Criminal Procedure.

In this connection I may take the liberty to reproduce what I have written elsewhere:

The proposition "on" [occurring in Section 127(3)(b)] as held by the Supreme Court in this context means that the payment must be in "consequence of divorce" which is not the case with *mahr*, as the Court rightly held. This conclusion is supported by the view of the English Court of Criminal Appeal, delivered by Lord Goddard CJ, with whom concurred Hilberry and Parker JJ, in *Beaumont*⁴, followed in *Harman*⁵ by Lord Parker CJ, concurring Donovan and Salmon JJ.

Even if the Court had accepted the appellant's contention that *mahr* was such a sum as he claimed, yet it could not have constituted "the whole of the sum payable on divorce" in view of the earlier finding that *mataa* in any event was such a sum which the appellant had not paid.⁶

Shah J. further observes that "it seems that because of observations of the Supreme Court [in *Shah Bano's* case urging codification], Parliament has made the beginning and has codified the rights of the divorced Muslim wife [in the MWA]. This is borne out by the objects and reasons of enacting the Muslim Women Act," which are then set out by the learned judge.

Gujarat Case Conclusions

Shah J. concludes:

From the foregoing discussion the following conclusions emerge:

(a) Under the Muslim Women Act a divorced woman is entitled to have a reasonable and fair provision from her former husband. Reasonable and fair provision would include provision for her future residence, clothes, food and other articles for her livelihood. She is also entitled to have reasonable and fair future maintenance. This is to be contemplated and visualized within the *iddat* period. After contemplating or visualizing it, the reasonable and fair provision and maintenance is to be made and paid to her on or before the expiration of the *iddat* period. This contemplation may depend upon the prospect of remarriage of the

4. (1957) 1 KB 577.

5. (1959) 2 KB 134.

6. Danial Latifi, Annual Survey of Indian Law, 22(1985), 399-400.

divorced woman. If the former husband fails or neglects to make or pay a reasonable and fair provision and maintenance, then the divorced woman is entitled to recover it by filing an application under Section 3(2) of the Act. The determination of reasonable and fair provision and maintenance depends upon the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. This conclusion is inescapable in view of the different phraseology used by the Parliament in Section 3(1) and its clauses and Section 3(3). Section 3(1)(a) contemplates reasonable and fair provision and maintenance. Section 3(3) lays down objective criteria for its determination. Under Section 3(1)(b) reasonable and fair provision and maintenance is to be made and paid only for a period of two years from the respective dates of birth of children. . . . [But] Parliament has not prescribed any such period under Section 3(1)(a). Section 4 only provides for reasonable and fair maintenance. Apart from this, even Section 5 gives option to the parties to be governed by the provisions of Sections 125 to 128 of the Criminal P.C.

(b) Under Section 4 of the Muslim Women Act a divorced woman is entitled to get maintenance from her relatives such as her children or her parents or from the Wakf Board if she is not able to maintain herself after the *iddat* period from the provision and maintenance made and paid by her former husband.

(c) As per the provisions of Section 5 the application filed under Section 3(2) of the MWA by a divorced woman can be disposed of by following the provisions of Sections 125 to 128 of the Criminal P.C. if the divorced woman and her former husband file affidavits to that effect.

(d) Under Section 7 of the Muslim Woman Act all applications filed by a divorced woman under Section 125 or under Section 127 of the Criminal procedure Code which are pending for disposal before the Magistrate on the date of the commencement of the Act are required to be disposed of by the Magistrate in accordance with the provisions of the said Act.

(e) There is no provision in the Muslim Women Act which nullifies the orders passed by the Magistrate under Section 125 or 127 of the Criminal Procedure Code ordering the husband to pay maintenance to the divorced woman or takes away the vested rights which are crystalized by the orders passed under Section 125 or 127 of the Criminal Procedure Code.

Shah J. disposed of the two matters, both pertaining to maintenance claims of divorced Muslim women against their former husbands pending before him (the particular facts of each case need not detain us) in the light of the principles enunciated by him above. In view of the importance of the matter, several learned counsel who appeared for interveners, besides those who appeared for the parties to the special criminal applications were heard. The members of the Bar so appearing have, manifestly made a constructive contribution to the discussion resulting in the judgment.

Pay Reasonable and Fair Provision

In the Kerala case, Sreedharan J. points out:

But this Act [the MWA] now states that they [the husbands] must pay maintenance for the period of *iddat* and also should make a reasonable and fair provision for her. This "provision" should be for the future of the lady. Even after the provision having been made by the former husband, if the lady becomes unable to maintain herself, then a situation envisaged by Section 4 of the Act will come into operation. According to me, Section 4 of the Act does not absolve the former husband from making a "reasonable and fair provision" for the lady's life.

Citing the Quranic injunctions (in Chapter II verse 237): "Do not forget liberality between yourselves," and further in verse 241 (*ibid*): "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous," and verse 242: "Thus doth God make clear his signs to you, in order that ye may understand," the learned judge continues:

From this it is clear that the Muslim who believes in God must give a reasonable amount by way of gift or maintenance to the divorced lady. That gift or maintenance is not limited to the period of *iddat*. It is for her future livelihood because God wishes to see all well. The gift is to depend on the capacity of the husband. The gift, to be paid by the husband at the time of divorce, as commanded by the Quran, is recognised in sub-clause (a) of Clause (1) of Section 3 of the Act. This liability is cast upon the husband on account of the past advantage received by him by reason of the relationship with the divorced woman or on account of the past disadvantage suffered by her by reason of matrimonial consortium. It is in the nature of a compensatory gift or solatium to sustain the woman for her life after the divorce. In accordance with the principles of Islamic equity the said provision or compensation or support from the former husband is wife's right. This right has been given legislative recognition in the above provision. So I find it difficult to accept the argument that the only liability of the former husband is to pay maintenance to the divorced Muslim woman during the period of *iddat* only.

There is every reason to hope and expect that the reasons and conclusions contained in these two luminous judgments will be upheld by the Supreme Court.

Arab Ahemadhia Abdulla
v.
Arab Bail Mohmuna Saiyadbhai,

AIR 1988 Gujarat 141.

M.B. Shah, J.

Special Criminal Application Nos. 586 of 1987,
with 81 of 1988.

Decided 18 February 1988

Judgment

Order: — In these petitions the questions which arise for determination are:

(1) Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, hereinafter referred to as the "Muslim Women Act," the orders passed by the Judicial Magistrate, First Class, under S. 125 of the Criminal P.C. ordering the husband to pay maintenance to the wife are nullified?

(2) Whether the Muslim Women Act takes away the rights which are conferred upon the divorced woman under the Personal Law as interpreted by the Supreme Court in the case of *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945?

(3) Whether the Muslim Women Act provides that a divorced woman is entitled to have the maintenance only during the *iddat* period i.e. only for the *iddat* period?

As these questions are of importance, a number of learned advocates intervened in the matter and they ably rendered assistance.

2. For deciding the aforesaid questions, it would be necessary to refer to the preamble of the Act which reads as under:

An Act to protect the rights of Muslim Women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

From this preamble one thing is apparent that the Act is enacted to protect the rights of Muslim Women who have been divorced by, or have obtained divorce from, their husbands. This is as clear as anything could be. In simplest language the Parliament has stated that the Act is for protecting the rights of Muslim Women. It does not provide that it is enacted for taking away some rights which a Muslim

Woman was having either under the Personal Law or under the general law i.e. Ss. 125 to 128 of the Cr.P.C. The aforesaid preamble further provides that it is also enacted for making other provisions for matters connected therewith or incidental thereto.

3. Keeping this in mind, we have to consider the provisions of S. 3. As this section requires to be interpreted, it would be necessary to refer to it in its entirety. S. 3 is as under:

3.(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to —

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

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

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

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

(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that —

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the *needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband* or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

(Emphasis added.)

S. 3(1) begins with non-obstante clause "notwithstanding anything contained in any other law for the time being in force" and provides that a divorced woman shall be entitled to have from her former husband —

- (i) a reasonable and fair provision;
- (ii) a reasonable and fair maintenance;

which is to be made and paid to her *within the iddat period*.

4. Clause (b) of sub-s. (1) provides for a reasonable and fair provision and maintenance to be made and paid for a period of two years from the respective dates of the birth of such children. This Cl. (b) specifies the period for which she is entitled to get maintenance for her children. The period *is limited only to two years from the respective dates of birth of such children*. So the specific period is provided for which she is entitled to get provision and maintenance for her children. In addition to the above, she is entitled to get "*mahr* or dower" amount under Cl. (c) and all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends under Cl. (d).

5. The crucial question which would require determination is whether under S. 3(1)(a) a divorced woman is entitled to get a reasonable and fair provision and maintenance only during the *iddat* period or beyond it? No specified period for which she is entitled to get reasonable and fair provision and maintenance is fixed under the Act, nor S. 3(1)(a) provides that for a particular period she is entitled to get the said amount. The learned advocates who are appearing on behalf of the former husband submitted that a divorced woman is entitled to get provision and maintenance from her former husband within the *iddat* period only and that word "within" should be read

as "during" or "for." In my view, this submission cannot be accepted for the reasons which I would narrate hereafter after referring to other provisions of the Act.

6. Under sub-s. (2) of S. 3 a divorced woman is entitled to file an application before a Magistrate if the former husband has not made and paid to her a reasonable and fair provision and maintenance, *mahr* or dower due or has not delivered the properties given to her as stated in sub-s. (1)(d). Sub-s. (3) provides how the Magistrate is required to proceed with the said application. The Magistrate has to be satisfied that (i) her husband was having sufficient means and (ii) has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children. After taking into consideration the aforesaid facts, he can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to (a) the needs of the divorced woman, (b) the standard of life enjoyed by her during her marriage and (c) the means of her former husband. If the *mahr* or dower amount or the properties referred to in Cl. (d) of sub-s. (1) have not been delivered to her, then under sub-s. (3)(b) he is required to direct the former husband to make payment of such "*mahr* or dower" or deliver all such properties as referred to in Sec. 3(1)(d). From this sub-sec. it is clear that objective criteria are laid down by the Legislature for determining reasonable and fair provision and maintenance to be paid to the divorced woman i.e. the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. After taking into consideration all these facts he is required to determine the amount and pass appropriate order. This sub-section nowhere provides that the determination of reasonable and fair provision and maintenance is only for the *iddat* period.

7. The other important section which requires consideration is S. 4 which is as under:

4. (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

This section also begins with non-obstante clause i.e. "notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force." Therefore, it clearly means that whatever might have been provided under S. 3 or in any other law for the time being in force, the divorced woman is entitled to file an application for grant of maintenance if she has not remarried after the *iddat* period and is not able to maintain herself after the *iddat* period, meaning thereby that even if she has received reasonable and fair provision and maintenance from her former husband, if she has not remarried after the *iddat* period and is not able to maintain herself after the *iddat* period, she can file an application for grant of maintenance and the Magistrate can pass an order respecting such of her relatives who are entitled to inherit her property on her death according to Muslim law to pay maintenance at such periods as he may specify in his order. Again it should be noted that S. 4(1) provides for payment of reasonable and fair maintenance only and not for "reasonable and fair provision and maintenance." Sub-s. (2) of S. 4 provides that where the divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-s. (1) or such relatives or any of them have not enough means to pay the

maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives, the Magistrate can direct the State Wakf Board established under S. 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, to pay such maintenance as determined by him under sub-s. (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

8. From Ss. 3 and 4 broadly speaking it can be said that the following rights are conferred upon a divorced woman:

(1) She is entitled to have a reasonable and fair provision and maintenance from her husband. This is to be made and paid to her within the *iddat* period. The determination of reasonable [sic; insert here "provision and maintenance is to be made with reference to"] the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. Apart from this she is entitled to have "*mahr*" or "dower" and the return of her properties.

(2) If she has not remarried after the *iddat* period and is not able to maintain herself, then she is entitled to her maintenance (maintenance only) from her relatives who are entitled to inherit her properties on her death, at such periods as directed by the Magistrate.

(3) If her relatives are not in a position to pay such maintenance, she is entitled to get it from the Wakf Board at such periods as specified by the Magistrate.

9. The next question which would require determination is, whether this "reasonable and fair provision and maintenance" is limited only up to the *iddat* period or whether it is to be made and paid to her after visualizing or contemplating her future needs? The learned advocates who are appearing on behalf of the former husbands vehemently submitted that the period is limited and it is only for the *iddat* period. As against this, the learned advocates appearing on behalf of the divorced woman submitted that the Parliament has provided for making reasonable and fair provision and payment of reasonable and fair maintenance to the divorced woman after visualizing and contemplating her future needs. That amount is to be paid by her former husband or provision is required to be made by her former husband within the *iddat* period. Heavy reliance was placed by the learned advocates for both the sides on the decision of the Supreme Court in the case of *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945. Learned advocates appearing on behalf of the former husbands submitted that in view of the decision of the Supreme Court in the aforesaid case the Parliament has enacted the

Muslim Women Act to take away the rights of a Muslim divorced woman as decided by the Supreme Court as well as her right to get maintenance under S. 125. As against this, Mr. Pandya the learned Government Pleader and Public Prosecutor, and other learned advocates submitted that nowhere the Act provides that the personal rights conferred upon a Muslim divorced woman or the rights conferred upon her under Ss. 125-127 are taken away or are in any way adversely affected. On the contrary, they submitted that in conformity with the view expressed by the Supreme Court in the aforesaid case the Parliament has codified the rights of a Muslim divorced woman.

10. Taking into consideration the objects and reasons for enacting the Muslim Women Act as well as the preamble and the plain language of S. 3, it cannot be said that Muslim Women Act in any way adversely affects the personal rights of a Muslim divorced woman as laid down by the Supreme Court in *Shah Bano's* case. In *Shah Bano's* case the Supreme Court in para. 11 has stated as under:

We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, in so far as it lies in our power, we wanted to set at rest, once for all, the question whether S. 125 would prevail over the personal law of the parties, in cases where they are in conflict.

(Emphasis added.)

Thereafter in para. 13 the Court referred to the contention of the husband that the liability of a husband to maintain a divorced wife is limited to the period of *iddat*. The Court further referred to the quotations from *Mulla's Mahomedan Law* and other authors and in para. 14 held that the statements in the aforesaid Text Books were identical [sic; read "inadequate"] to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife *who is unable to maintain herself*. The Court held that the statements extracted from the above Text Book which lay down that the husband has no obligation to maintain his wife after *iddat* period are not only incorrect but unjust and they would not apply to cases in which a divorced woman is unable to maintain herself. The Court held:

We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of divorced wife.

The Court rejected the contention that under the Muslim Personal Law the former husband is liable to provide maintenance to his divorced wife only for *iddat* period and held as under:

The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact that she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to S. 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of S. 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.
(Emphasis added.)

The Court thereafter referred to the Holy Quran and verses (Aiyats) 241 and 242 [of Sura II] which are reproduced as under:

Arabic version

*wa lil motallaqatay
mata un*

*bil maaroofoy
haqqan
alal mutta qeena*

*kazaleka yubaiyyanullaho
lakum ayatehee la allakum
taqeloon*

English version

Ayat 241 [of Sura II]

For divorced women
Maintenance (should be
provided)

On a reasonable (Scale)

This is a duty

On the righteous.

Ayat 242 [of Sura II]

Thus doth God

Make clear His Signs

To you: in order that you may
understand.

There was some controversy with regard to the English version of the word "*mataa*." Some state it to be "maintenance" and some state it to be "provision." It should be noted that S. 3(1)(a) provides for reasonable and fair provision and maintenance. May be that the Parliament wanted to be doubly sure about the exact meaning of the word "*mataa*" and, therefore, it provided for reasonable and fair provision and maintenance. The Court further referred to an English version of the aforesaid two Aiyats by different authorities. One is that of Muhammad Zafrullah Khan's "The Quran" (p. 38) which reads as under:

For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand.

For our purposes it is not necessary to refer to other quotations. The Court thereafter held that these Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make

provision for or to provide maintenance to the divorced wife. In view of this interpretation given by the Supreme Court it is apparent that the Parliament has made provision in S. 3(1)(a) which states that a divorced woman is entitled to have a reasonable and fair provision and maintenance from her former husband. The learned advocates appearing on behalf of the husband submitted that this enunciation of law by the Supreme Court is not in accordance with the Personal Law as interpreted on different occasions by different authorities. They also wanted to rely upon some decisions of the various Courts. In my view it is not open to me to take any contrary view in view of the law laid down by the Supreme Court. Further, it should be noted that the decision in the case of *Shah Bano* (AIR 1985 SC 945) is of the Bench consisting of 5 Hon'ble Judges.

11. The Court further negated the contention of the husband that once the "*mahr*" or "dower" amount is paid, that would take care of the requirements of divorced woman. The Court after considering the Privy Council decisions and the Bill which led to the amendment of the Cr.P.C. held that the decisions of the Supreme Court in the cases of *Bai Tahira v. Ali Hussain Fidaalli Chothia*, AIR 1979 SC 362, and *Fuzlunbi v. K. Khader Vali*, AIR 1980 SC 1730, are correct and held that there is no escape from the conclusion that a divorced Muslim wife is entitled to fair and reasonable maintenance under S. 125 and that "*mahr*" is not a sum which, under the Muslim Personal Law, is payable on divorce.

12. In para. 32 the Court held that it was a matter of regret that Art. 44 of the Constitution has remained a dead letter as there was no evidence of any official activity for framing a common Civil Code for the country. It further observed as under:

It is the State which is charged with the duty of securing a uniform civil Code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that 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.*
(Emphasis added.)

13. Therefore it seems that because of the aforesaid observation of the Supreme Court the Parliament has made the beginning and has codified the rights of Muslim divorced wife. This is borne out by the objects and reasons of enacting the Muslim Women Act which are as under:

The Supreme Court, in *Mohd Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945, has held that although the Muslim Law limits the husband's

liability to provide for maintenance of the divorced wife to the period of *iddat*, it does not contemplate or countenance the situation envisaged by S. 125 of the Cr.P.C., 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of *iddat*, but if she is unable to maintain herself after the period of *iddat*, she is entitled to have recourse to S. 125 of the Criminal P.C.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. *Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests.* (Emphasis added.)

14. Even the preamble of the Muslim Woman Act recites to the same effect.

15. The Parliament also codified that in addition to reasonable and fair provision and maintenance, the wife is entitled to get "*mahr*" or "dower" amount. That means that the Parliament also approved the observation of the Supreme Court that "*mahr*" amount is not the amount which is to be paid to a divorced woman at the time of divorce or for taking divorce. As the Supreme Court has held that the said amount is payable as a mark of respect for the wife and is to be paid to her at the time of marriage or it can be paid in two parts, one of which is called "prompt" which is payable on demand and the other is called "deferred" which is payable on dissolution of the marriage by death or by divorce. The Parliament, therefore, provided under S. 3(1)(c) that a divorced woman is entitled to have an amount equal to the sum of "*mahr*" or "dower" agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law. This means without any doubt that the Parliament also considered that "*mahr*" or "dower" is not the amount which is payable for taking divorce or for maintenance of the divorced woman. Hence it can be said that whatever is laid down by the Supreme Court in *Shah Bano's* case (AIR 1985 SC 945) is codified by the Parliament by enacting the Muslim Women Act. The Parliament has also taken care to see that a divorced woman gets back all properties given to her before or at the time of marriage or after the marriage by her relatives or friends and that is provided in S. 3(1)(d).

16. Further, if we consider the phrase used by the Parliament in S. 3(1)(a) i.e. "reasonable and fair provision and maintenance to be made and to be paid to her," it seems that the Parliament intended to see that the divorced woman gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown

on the streets without a roof over her head and without any means of sustaining herself and her children. The word "provision" itself indicates that something is provided in advance for meeting some needs. In the Webster's New Twentieth Century Dictionary, Second Edition, the following meanings are given to the word "provision:"

1. providing, preparing, or supply of something.
2. something provided, prepared, or supplied for the future.
3. (pl) a stock of food and other supplies assembled for future needs.
4. preparatory arrangements or measures taken in advance for meeting some future needs.

This means that at the time of giving divorce the Muslim husband is required to visualize or contemplate the extent of the future needs and make preparatory arrangement in advance for meeting the same and, therefore, the Parliament has provided that reasonable and fair provision is to be made and paid to her. May be that the provision can be made that every month a particular amount be paid to the wife; may be that residential accommodation for her can be provided; may be that some property be reserved for her so that she can purchase articles for livelihood. Reasonable and fair provision may include provision for her residence, provision for her food, provision for her clothes and other articles. The husband may visualize and provide for residential accommodation till her remarriage. That means, a provision for residential accommodation is made. Apart from the residential accommodation, for her clothes, food and also for other articles some fixed amount may be paid or he may agree to pay it by instalments. That would also be a provision. Therefore, the "provision" itself contemplates future needs of divorced woman. If the husband is rich enough, he may provide separate residential accommodation. In other cases, he may provide rented accommodation and that can be said to be a provision for residential accommodation. Therefore there is no substance in the contention of the learned advocates appearing for the husbands that under S. 3(1)(a) divorced woman is entitled to provision and maintenance only for *iddat* period. The Parliament has further emphasized that apart from reasonable and fair provision, reasonable and fair maintenance is also required to be made and paid to her. It has further prescribed the objective criteria for determining what would be reasonable and fair provision and maintenance for her in sub-s. (3) which provides that the Magistrate shall determine reasonable and fair provision and maintenance having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and means of her former husband, meaning thereby that if the former husband is a millionaire, he is bound to make provision in accordance with his

means. Hence it can be said that the limitation of S. 125 of the Criminal P.C. that maintenance up to Rs. 500/- is to be paid is not there in this provision. Therefore, something more is given to the Muslim divorced woman and her rights are fully protected as stated in the objects and reasons and preamble of the Muslim Women Act.

17. The learned advocated appearing on behalf of the husbands submitted that the word "within" used in S. 3(1)(a) should be read as "for" or "during." In my view, this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before," "not beyond," "not later than." In the Concise Oxford Dictionary the word "within" is given the meaning as under:

3. Not beyond, not too far for, not transgressing so as not to pass or exceed, subject to,
4. Not too far for, near enough to affect or be affected by, not further off than,
5. In a time no longer than, before expiration or since beginning of.

In the Webster's New Twentieth Century Dictionary, Second Edition, also the word "within" is given the meaning as under:

2. in the limits of, compass of; not beyond in distance, time, degree, etc.; as, within my sight, within one's income.
3. inside the limits of; not exceeding; not overstepping, etc.; as, within the law.

The word "within" came up for construction before the Division Bench of the Bombay High Court in the case of *Commr. of Income tax v. Ekbal & Co.*, AIR 1945 Bom 316. In that case the Court held that whereas "within" the stated period must mean what it says, something less than the moment of expiration. The Court further held that "within 30 days" is within two points of time, one at which the period begins and the other at which it expires. Therefore, the word "within" which is used by the Parliament under to Muslim Women Act would mean that on or before the expiration of *iddat* period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife. If he fails to do so, then the wife is entitled to recover it by filing an application before the Magistrate as provided in sub-s. (2) of S. 3 but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the *iddat* period or that it is to be paid only during the *iddat* period and not beyond it.

18. The aforesaid conclusion is further fortified by the provisions of S. 5 of the Muslim Women Act which reads as under:

5. If, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such an affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation. — For the purpose of this section, “date of the first hearing of the application” means the date fixed in the summons for the attendance of the respondent to the application.

It gives option to the parties either to be governed by the procedure under Ss. 125 to 128 of the Criminal P.C. or under the provisions of the Act. This would prima facie mean that there is no inconsistency or repugnancy between the general provisions of Ss. 125 to 128 and the Muslim Women Act. If there was inconsistency, the Parliament would not have given any option to the parties. Further, if S. 3(1)(a) is interpreted to mean that the former husband is bound to provide maintenance only for *iddat* period, then in no set of circumstances it can be expected that a former husband would pay future maintenance because it is difficult to imagine that the person who has given divorce to his wife would be so chivalrous as to agree to pay future maintenance. The result would be that in almost all cases divorced woman would like to be governed by the provisions of S. 125 and the former husband would refuse to be governed by the provisions of S. 125. Can it be imagined that the Parliament would pass an Act which gives absolute discretion to the former husband and leave[s] a divorced woman at his mercy and sweet will? Normally divorces are given because there are disputes between the parties. In that set of circumstances it is difficult to imagine that the husband would agree to pay future maintenance if there is no specific provision in the Muslim Woman Act. If that interpretation is accepted, then S. 5 would be redundant or otiose. Normally the provisions of the Act should be interpreted in such a manner as not to render any of its provisions otiose unless there are compelling reasons for the Court to resort to that extreme contingency. Therefore also it would be just and proper to hold that S. 3(1)(a) provides that the former husband is bound to make reasonable and fair provision and maintenance after taking into consideration the future needs of the divorced woman.

19. Mr. Pandya, the learned Government pleader and Public Prosecutor, rightly pointed out that the whole purpose and object of the Act is to specify or codify the law and not to take a way the rights which are crystallized by the Supreme Court in the case of *Shah Bano*, (AIR 1985 SC 945). If the Parliament really intended to nullify the

decision of the Supreme Court, it would have specifically stated so in the objects and reasons or would have provided it specifically in the Muslim Women Act itself.

20. Further, even applying the well known principles of construction of statutes also, the result would be the same. The intention of the Legislature has to be gathered by reading the statute as a whole. This is a rule which is now firmly established for the construction of the statute. Therefore, if we read different phrases used in S. 3(1)(a), 3(1)(b), 3(3) and S. 4 as well as S. 5 of the Act together, it would be clear that the Parliament wanted that the divorced woman is fully protected if she does not remarry and she gets adequate provision and maintenance from her former husband and/or maintenance from her relatives or Wakf Board in case of necessity. Section 3(1)(a) provides for reasonable and fair provision and maintenance to be made and paid by her former husband within the *iddat* period. Section 3(1)(b) provides reasonable and fair maintenance for the children only for a period of 2 years. Section 3(3) lays down the objective criteria for deciding the future needs of the divorced woman and directs the Magistrate to determine reasonable and fair provision and maintenance depending upon the means of her former husband. Further, in case of the inability of the wife to maintain herself even from the said provision and maintenance made and paid to her by her former husband, she can get it from her relatives or from the Wakf Board. Section 5 of the Act gives option to the parties to be governed by the provisions of Ss. 125 to 128. From this it is abundantly clear that the phrase used in S. 3(1)(a) deals with future needs of the divorced woman and on that basis reasonable and fair provision and maintenance is required to be made and paid to her by her former husband. Further, the words and phrases used by the Parliament are to be construed in the ordinary and natural sense. It would be worthwhile to refer to the Interpretation of Statutes by Maxwell, Twelfth Edition, Chapt. 2, which reads as under:

The first and most elementary rule of construction is that it is to be assumed that words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and second is that the phrases and sentences are to be construed according to the rules of grammar. "The length and detail of modern legislation," wrote Lord Evershed M.R., "has undoubtedly reinforced the claim of literal construction as the only safe rule." If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

The rule of construction is "to intend the Legislature to have meant what they have actually expressed." The object of all interpretation is to discover the intention of Parliament, "*but the intention of Parliament must be deduced from the language used,*" for "*it is well accepted that the beliefs and assumption of those who frame Acts of Parliament cannot make the law.*"

(Emphasis added.)

21. Mr. Pandya further referred to "Statutory Interpretation" by Francis Bennion and referred to Para. 137 (p. 325) which reads as under:

Prima facie the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the literal meaning (as defined in S. 91 of this Code).

and para. 140 which reads as under:

It is presumed to be the legislator's intention that the court, when considering, in relation to the acts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. *If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.*

(Emphasis added.)

22. As against this, the learned advocates appearing on behalf of the husbands submitted that before interpreting the section the Court has to consider the history of the enactment and the reason why the Act was brought in. According to their submission, to nullify the interpretation given by the Supreme Court in *Shah Bano's* case (AIR 1985 SC 945) the Parliament has enacted the Muslim Women Act. In my view, even if we take into consideration the legislative history for enacting the Muslim Women Act, it is clear that the Act is to codify and protect the rights of Muslim divorced wife. It was rightly submitted by the learned advocates Mr. Pandya and Mr. D.K. Shah that the Act nowhere provides or states that it is enacted to nullify the decision of the Supreme Court in *Shah Bano's* case. It nowhere states that the rights which are given to a Muslim divorced wife under the Personal Law are in any way adversely affected by the present enactment. As discussed above, the objects and reasons for enactment specifically state that the Muslim Women Act is enacted to specify the rights which the Muslim divorced woman is entitled to have at the time of divorce and to protect her interest. This is also further clear from the preamble of the Act. Further, the plain grammatical meaning of S. 3(1)(a) would be that the divorced woman is entitled to have a reasonable and fair provision and maintenance from her former

husband. That provision is to be made and maintenance is to be paid to her within *iddat* period. So the time limit is prescribed during which the husband is bound to carry out his obligation towards his divorced wife. As stated above, the word "provision" in the context of the Act would mean the action of providing something before hand or arranging in advance to meet the needs of the divorced wife. May be, that provision can be made for her residence or her maintenance or for her other needs such as clothes, food and such other things depending upon the means of the husband. If the husband is millionaire, the amount is to be determined accordingly. The Parliament seems to have intentionally used the word "provision" because at the time of giving divorce the husband may visualize that the wife is likely to remarry. If she is likely to remarry then provision can be made only for a limited period. It may depend in some cases on the age of the woman, children, her appearance and health. If she is a middle-aged woman having children, she may not have any chances of remarriage. If the intention of the Parliament was to take away some rights which were crystallized by the decision of the Supreme Court in *Shah Bano's Case*, then the Parliament would not have used the phrase which it has used in S. 3(1)(a) i.e. reasonable and fair provision and maintenance to be made and paid. The draftsman would have conveniently stated that a divorced woman is entitled to have maintenance during the *iddat* period. In S. 4 it has been provided that a divorced woman is entitled to get maintenance (only) at such periods as the Magistrate may specify. In S. 3(1)(a) no periods are specified.

23. Mr. Oza, learned advocate appearing on behalf of the wife, rightly relied upon the decision of the Supreme Court in the case of *Municipal Council, Palai, v. T.J. Joseph*, AIR 1963 SC 1561, wherein the Court has held that it is equally well settled that there is a presumption against an implied repeal because there is assumption that the Legislature enacts laws with complete knowledge of existing laws obtaining on the same subject and failure to add a repealing clause indicates that the intention was not to repeal existing law. It would be worthwhile to reproduce the relevant discussion in para. (9) of the said decision which reads as under:

It is undoubtedly true that the legislature can exercise the power of repeal by implication. But it is an equally well-settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject, the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course, this presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together. As has been observed by *Crawford on Statutory Construction*, P. 631, Para. 311:

“There must be what is often called ‘such a positive repugnancy between the two provisions of the old and the new statutes that they cannot be reconciled and made to stand together.’ In other words they must be absolutely repugnant or irreconcilable. Otherwise there can be no implied repeal . . . for the intention of the legislature to repeal the old enactment is utterly lacking.”

If we consider Ss. 1 to 7 nowhere it is provided that the rights which are conferred upon a Muslim divorced wife under Personal Law are abrogated, restricted or repealed. It is presumed that the Muslim Women Act is enacted with deliberation and full knowledge of existing law on the subject. Therefore, it would be reasonable to conclude that the Parliament in passing the Muslim Women Act did not intend to interfere with or abrogate any rights of the divorced wife. Further, the implied repeal will take place in the event of clear inconsistency or repugnancy. As such there is no inconsistency or repugnancy in the Muslim Women Act and the law laid down by the Supreme Court.

24. It is also a well recognized rule of interpretation of statutes that as far as possible statute should be interpreted so as to respect the vested rights of parties. While dealing with Ss. 21 and 22 of the Hindu Adoptions and Maintenance Act, the Supreme Court in the case of *Raja Gopala Rao v. Sitharam Amma*, AIR 1965 SC 1970, held that prior to the enactment of Hindu Adoptions and Maintenance Act, a concubine was entitled to claim maintenance from the estate of the paramour and if the rights of maintenance were acquired by her or illegitimate sons of the deceased, those rights are not affected by the provisions of Ss. 21 and 22 of the Act. While dealing with this aspect the Court has held as under:

Now, before the Act came into force, rights of maintenance out of the estate of a Hindu dying before the commencement of the Act were acquired, and the corresponding liability to pay the maintenance was incurred under the Hindu law in force at the time of his death. *It is a well recognised rule that a statute should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction.* See Craies on Statute Law, 6th Edn. (1963), p. 397. We think that Ss. 21 and 22 read with S. 4 do not destroy or affect any rights of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu Law in force at the time of his death.
(Emphasis added.)

25. In the present case the Muslim Women Act is for codification of the Law dealing with Muslim divorced woman’s right of maintenance and, therefore, unless the existing law is altered by express words the court should respect the vested rights. It further should not hold that the Act is going beyond codification.

26. The learned advocate Mr. J.G. Shah submitted that the Muslim Women Act is for protecting the weaker section of one community and is a beneficial legislation, hence even if two interpretations are possible the Courts should liberally interpret the section in favour of the weaker section without doing any violence to the language used by the Parliament. For this purpose he relied upon the decision of the Supreme Court in the case of *Workmen of F.T. & R. Co. v. Management*, AIR 1973 SC 1227. In that case the Supreme Court dealt with the provisions of S. 11-A of the Industrial Disputes Act, 1947. In that case the Supreme Court held that it is well settled that in construing the provision of a welfare legislation, Courts should adopt what is described as a beneficent rule of construction. If two constructions are reasonably possible to be placed on the section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employees, has to be preferred. The Court further considered the aspect whether a long chain of the decisions of the Supreme Court laying down various principles in relation to adjudication of disputes by Industrial Courts arising out of orders of discharge or dismissal were altered or not by a clear expression in the section. The relevant discussion is in para. 31 of the said judgment and it is as under:

We cannot accept the extreme contentions advanced on behalf of the workmen and the employers. We are aware that the Act is a beneficial piece of legislation enacted in the interest of employees. It is well settled that in construing the provisions of a welfare legislation, courts should adopt what is described as a beneficent rule of construction. If two constructions are reasonably possible to be placed on the section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employees, has to be preferred. Another principle to be borne in mind is that the Act in question which intends to improve and safeguard the service conditions of an employee, demands an interpretation liberal enough to achieve the legislative purpose. But we should not also lose sight of another canon of interpretation that a statute or for the matter of that even a particular section has to be interpreted according to its plain words and without doing violence to the language used by the legislature. Another aspect to be borne in mind will be that there has been a long chain of decisions of this Court, referred to exhaustively earlier, laying down various principles in relation to adjudication of disputes by industrial courts arising out of orders of discharge or dismissal. *Therefore it will have to be found from the words of the section whether it has altered the entire law, as laid down by the decisions, and, if so, whether there is a clear expression of that intention in the language of the section.*
(Emphasis added.)

27. Therefore, in my view, taking into consideration the plain language used by the Parliament in S. 3(1)(a) that a divorced woman is entitled to have a reasonable and fair provision and maintenance to

be made and paid to her within the *iddat* period by her former husband, it would clearly mean that her husband is bound to make reasonable and fair provision for her and also is bound to provide for maintenance and that this provision and maintenance should be made and paid to her within *iddat* period, but it cannot be said that the Parliament wanted to provide maintenance only for *iddat* period. In any set of circumstances even if other interpretation is possible as discussed above, this law is to protect the rights of the Muslim divorced woman and not to take away her personal rights under the Muslim Law as interpreted by the Supreme Court in *Shah Bano's* case (AIR 1985 SC 945). While construing a welfare legislation a liberal construction should be placed on the provisions so that the purpose of the legislation may be allowed to be achieved rather than frustrated or stultified. Benignant provisions enacted by the Legislature having regard to the modern age have to be interpreted in meaningful manner which serves rather than defeats the purpose of the legislation. Therefore also the interpretation which is beneficial to the divorced woman should be accepted.

28. Further, wherever the Parliament intended to provide maintenance and provision for a limited period, it has done so specifically. This is apparent if we refer to S. 3(1)(b). Clause (b) provides provision and maintenance only for a period of two years from the respective dates of birth of children. It cannot be assumed that the Parliament has used different phraseology in two clauses of the same section unintentionally. On the contrary it can be said that where different phraseology is used in different clauses of the section, it can be presumed that the Parliament used it in order to confer different benefits. Reference may be made to Maxwell on "The Interpretation of Statutes," Twelfth Edition, p. 282:

From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning. "Where the Legislature," said Lord Tenterden, C.J., "in the same sentence uses different words, we must presume that they were used in order to express different ideas."

29. Apart from different phraseology used in S. 3(1)(a) and 3(1)(b), if we refer to sub-sec. (3) of S. 3, it would be abundantly clear that Magistrate is required to pass an order on the application of the divorced woman. There is no limitation on him that he should determine reasonable and fair provision and maintenance only for the *iddat* period otherwise there was no necessity to provide in sub-sec. (3) that the Magistrate should take into consideration whether the husband was having sufficient means and also to take into consideration the needs of the divorced woman. This objective criteria

laid down by the parliament i.e. the Magistrate should take into consideration the needs of the divorced woman would undoubtedly indicate that the future needs of the divorced woman are required to be taken into consideration. The future needs would by no stretch of imagination mean her past needs during the *iddat* period. As the application under S. 3(2) is required to be filed by the divorced wife after the *iddat* period if the husband fails to provide a reasonable and fair provision and maintenance within the *iddat* period, there was no necessity to provide that the Magistrate should consider the needs of the divorced woman because that application would come up for determination before the Magistrate after the *iddat* period is over. On the contrary the Parliament has emphasised that apart from the needs of the divorced woman, the Magistrate should take into consideration the standard of life enjoyed by the divorced woman during her marriage and the means of her former husband. This requirement also indicates that the Magistrate is required to determine the requirement of the wife after taking into consideration the means of her husband. If the husband is sufficiently rich, then the provision and maintenance would be such that it would be possible for the divorced woman to live with the same standard of living which she enjoyed during her marriage. Therefore, from this sub-sec. (3) also it can be said that "reasonable and fair provision and maintenance" is to be determined by taking into consideration the future needs of the divorced wife and not by taking into consideration what she required during the *iddat* period and, therefore, it can be said that under S. 3(1)(a) divorced woman is entitled to have reasonable and fair provision and maintenance for her future needs depending upon number of imponderable circumstances such as likelihood of remarriage, her age, and her expectancy of life and means of her former husband.

30. The learned advocates appearing on behalf of husbands relied upon S. 4 of the Act and submitted that after the *iddat* period is over, the divorced woman is entitled to get maintenance not from her husband but only from her relatives or from the Wakf property. In my view, this submission is without any substance because S. 4 again begins with non obstante clause and it provides that notwithstanding anything contained in the foregoing provisions of this Act i.e. S. 3, a divorced woman is entitled to file an application for getting maintenance from her relatives or from the Wakf Board, as the case may be, if she is not in a position to maintain herself. The essential preconditions for filing an application under S. 4 would be —

- (i) she must not have remarried after the *iddat* period; and
- (ii) she is not able to maintain herself after the *iddat* period which may be even after a lapse of 10 years of divorce.

In my view, the Parliament contemplated that even if reasonable and fair provision and maintenance is made and paid to the divorced woman within the *iddat* period, yet she can file an application for maintenance if she is unable to maintain herself from the amount received by her or provision made by her former husband as required under S. 3(1)(a). Section 4 provides for only "reasonable and fair maintenance" while S. 3(1)(a) and (b) provides for reasonable and fair provision and maintenance. Apart from the fact that two different phraseologies are used in Ss. 3 and 4, S. 4 contemplates a situation where the divorced woman is not in a position to maintain herself after receiving maintenance in lump sum from her husband or provision which was found to be reasonable and fair at the time of taking divorce. In that case she is entitled to file an application for maintenance and get it from her relatives such as her children or her parents. If they are not in a position to pay it, then she can claim it from the Wakf Board. Take for an example, in some cases where it is thought that divorced woman is likely to remarry and provision and maintenance is made and paid to her on that basis, but subsequently it turns out that she is not in a position to remarry for some reasons. Further, if the provision which was made for her and the maintenance paid to her is not sufficient to maintain her and she is not in a position to maintain herself, then she can file an application under S. 4 of the Muslim Woman Act. But it would not be open to her to approach the Magistrate for getting maintenance from her former husband. Take another instance wherein both the parties visualize that there are no chances for remarriage of divorced woman and reasonable and fair provision is made for her future maintenance and yet, for some accidental reasons, she is required to spend all the amount, then in that case she cannot ask her former husband to pay further maintenance. This may happen because of some unforeseen illness such as cancer or such other disease or due to accidental injuries wherein the divorced woman is required to spend huge amount for curing herself or her minor children.

31. Therefore, reading Ss. 3 and 4 together it is abundantly clear that the Parliament wanted to fully protect the divorced woman so that she does not become destitute or is not thrown on the streets without roof over her head and without any means for sustaining herself and her children.

32. Mr. Momin, learned advocate appearing on behalf of the husband, submitted that if this was the intention of the Parliament, then there was no necessity of enactment of Muslim Women Act because S. 125 of the Criminal P.C. as interpreted by the Supreme Court in *Shah Bano's* case (AIR 1985 SC 945) gives her right to claim maintenance from her former husband. He also submitted that the

law laid down in *Shah Bano's* case provides that Muslim divorced woman is entitled to have maintenance from her former husband if she is unable to maintain herself under the Personal Law. Taking into consideration the objects and reasons it is clear that the Parliament wanted to specify or codify the Personal Law and protect the Muslim divorced woman so that there may not be any controversy over it in future. Further, under S. 125 of the Criminal P.C. the maximum amount which a divorced woman would get is only Rs. 500/- even though her former husband is a rich person. Therefore to give her full protection or benefit, this Act is enacted and her rights are specified. The Parliament has set at rest the controversy which has arisen because of *Shah Bano's* case. It has not only provided for reasonable and fair provision and maintenance to the divorced woman and her minor children, but it has also specifically provided that she is entitled to get "*mahr*" or "*dower*" amount from her former husband. Therefore, this Act has set at rest the controversy that "*mahr*" or "*dower*" amount is paid to the divorced woman by the former husband for her future maintenance after divorce. The Parliament has not stopped there. It has further provided that she is entitled to get back all her properties which she had received before or at the time of her marriage or after her marriage from her relatives, her friends or her husband or relatives of her husband or his friends. So if the property is given by her husband or any of the relatives of her husband or his friends such properties are also required to be given to her.

33. Mr. Momin and Mr. Pathan further submitted that if the Parliament wanted to provide for future maintenance to the divorced woman, then the Parliament would not have provided that the said amount should be paid within the *iddat* period but instead of that the Parliament would have specified the time. It seems that the Parliament has provided that the provision and maintenance should be made within *iddat* period and should be paid within *iddat* period because during that period divorced woman is not entitled to remarry and *iddat* period varies as provided in S. 2(b). Therefore the Parliament has provided that it should be paid within *iddat* period and not during specified period. But this S. 3(1)(a) is abundantly clear that within the *iddat* period the former husband is bound to make provision and pay maintenance to his divorced wife. She is entitled to reasonable and fair provision and maintenance depending upon her future needs and means of her husband as well as standard of life enjoyed during her marriage.

34. Next it was contended that in view of the provisions of Muslim Women Act, the orders passed by the Magistrate under S. 125 of the Cri.P.C. are non-est. This submission is also without any substance.

There is no section in the Act which nullifies the orders passed by the Magistrate under S. 125 of the Cri.P.C. Further, once the order under S. 125 of the Criminal P.C. granting maintenance to the divorced wife is passed, then her rights are crystalized and she gets vested right to recover maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provision in the Muslim Women Act. Under S. 5 an option is given to the parties to be governed by the provisions of Ss. 125 to 128 of the Cri.P.C. This section also indicates that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystalized before the passing of the Act. Section 7 only provides that every application by divorced woman under S. 125 or 127 of the Cri.P.C. which is pending before the Magistrate on the commencement of the Act shall be disposed of (subject to the provisions of S. 5 of the Act) by the Magistrate in accordance with the provisions of this Act. Relying upon this section, on the contrary, the learned advocates appearing on behalf of wife rightly submitted that S. 7 of the Act clearly indicates that there is no inconsistency between the provisions of Muslim Women Act and the provisions of Ss. 125 to 128 of the Cri.P.C. The provisions of Muslim Women Act grant more relief to the divorced woman depending upon the financial position of her former husband. Further, it is a well-known rule of interpretation of law that remedial amendments have to be liberally construed so as not to deny their efficacy and it is the duty of the Courts to avoid a conflict between two sections. The Court will interpret a statute as far as possible, agreeable to justice and reason and that in case of two or more interpretations, one which is more reasonable and just will be adopted, for there is always a presumption against the law maker intending injustice and unreason. . . . The provision in a statute will not be construed to defeat its manifest purpose and general values which animate its structure. (*B.P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmick*, (1987) 2 SCC 407: AIR 1987 SC 1010 referred to. *Madhav Rao Scindia v. Union of India*, AIR 1971 SC 530, also referred to). In my view, as discussed above, the Special Act confers more benefits upon the divorced woman and the provisions are not in any way inconsistent or repugnant with the provisions of Ss. 125 to 128 of the Cri.P.C. Further, under S. 3(2) the Parliament has given a mandate to the Magistrate to dispose of the application filed by the divorced woman within one month of the date of filing of the application. If the Magistrate finds it impracticable to dispose of the application within such period, he is required to record reasons for it and dispose of the said application after the said period. Even R. 5 of the Muslim Women (Protection of Rights on Divorce) Rules, 1986 provides that the application is required to be disposed of as expeditiously as possible and once the examination of witnesses has begun the same shall be

continued from day-to-day until all the witnesses in attendance have been examined unless the Courts finds that adjournment is necessary for which reason are to be recorded. That means the Parliament has provided that top-most priority should be given to the application filed by the divorced woman and it should be disposed of as far as possible within one month from the date of filing of such application. This further shows that the Parliament was mindful of the fact that proceedings under S. 125 of the Cr.P.C. are prolonged for number of years.

35. Apart from this expeditious disposal of the matter, it would be worthwhile to note that no appeal or revision is provided against the order passed by the Magistrate under S. 3 or 4 of the Muslim Women Act. This would mean that the Parliament wanted to see that divorced woman gets relief at the earliest without there being any delay and without there being any stay from the appellate or revisional authority. Hence, it cannot be said that the orders passed under S. 125 of the Cr.P.C. become void or are non est because of the Muslim Women Act.

36. From the aforesaid discussion the following conclusions emerge:

(a) Under the Muslim Women Act a divorced woman is entitled to have a reasonable and fair provision from her former husband. Reasonable and fair provision would include provision for her future residence, clothes, food and other articles for her livelihood. She is also entitled to have reasonable and fair future maintenance. This is to be contemplated and visualized within the *iddat* period. After contemplating or visualizing it, the reasonable and fair provision and maintenance is to be made and paid to her on or before the expiration of the *iddat* period. This contemplation may depend upon the prospect of remarriage of the divorced woman. If the former husband fails or neglects to make or pay a reasonable and fair provision and maintenance, then the divorced woman is entitled to recover it by filing an application under S. 3(2) of the Act. The determination of reasonable and fair provision and maintenance depends upon the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. This conclusion is inescapable in view of the different phraseology used by the Parliament in S. 3(1) and its clauses and S. 3(3). S. 3(1)(a) contemplates reasonable and fair provision and maintenance. Section 3(3) lays down objective criteria for its determination. Under S. 3(1)(b) reasonable and fair provision and maintenance is to be made and paid only for a period of two years from the respective dates of birth of children. While the Parliament has not prescribed any such period under S. 3(1)(a). Section 4 only

provides for reasonable and fair maintenance. Apart from this, even S. 5 gives option to the parties to be governed by the provisions of Ss. 125 to 128 of the Criminal P.C.

(b) Under S. 4 of the Muslim Women Act a divorced woman is entitled to get maintenance from her relatives such as her children or her parents or from the Wakf Board if she is not able to maintain herself after the *iddat* period from the provision and maintenance made and paid by her former husband.

(c) As per the provisions of S. 5 the application filed under S. 3(2) of the Muslim Woman Act by a divorced woman can be disposed of by following the provisions of Ss. 125 to 128 of the Criminal P.C. if the divorced woman and her former husband file affidavits to that effect.

(d) Under S. 7 of the Muslim Woman Act all applications filed by a divorced woman under S. 125 or under S. 127 of the Cr. P.C. which are pending for disposal before the Magistrate on the date of the commencement of the Act are required to be disposed of by the Magistrate in accordance with the provisions of the said Act.

(e) There is no provision in the Muslim Women Act which nullifies the orders passed by the Magistrate under S. 125 or 127 of the Cr.P.C. ordering the husband to pay maintenance to the divorced woman or takes away the vested rights which are crystalized by the orders passed under S. 125 or 127 of the Cr.P.C.

In view of the aforesaid discussion, there is no substance in the contentions raised by the learned advocates for the petitioners in these Special Criminal Applications.

37. In Special Criminal Application No. 81 of 1988 the divorced woman filed Miscellaneous Criminal Application No. 89 of 1985 in the Court of the Chief Metropolitan Magistrate, Ahmedabad, claiming maintenance and by the order dated 30-4-1986 the Metropolitan Magistrate fixed the maintenance at the rate of Rs. 250/- per month. The petitioner-husband has not filed any revision application against that order. Subsequently the husband preferred Criminal Miscellaneous Application No. 96/86 for cancellation of the order passed by the Metropolitan Magistrate under S. 125 of the Criminal P.C. on the ground that the order passed under S. 125 of the Cri.P.C. would be non-est in view of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The learned Chief Metropolitan Magistrate, Ahmedabad, rejected the said application by the order dated 17-6-87 on the ground that vested rights are not taken away by the Act and that the Muslim Women Act has no retrospective effect. Against that order the husband preferred Criminal Revision Application No. 101 of 1987 before the Sessions Court, Ahmedabad. It was rejected by the

learned Additional City Sessions Judge, Ahmedabad, by his judgment and order dated 26-1-88. Against that order the petitioner husband has filed this Special Criminal Application.

38. Notice was issued to the wife respondent No. 1. At the request of the learned advocates for both the parties, the matter was fixed for hearing.

39. Similarly, in Special Criminal Application No 586 of 1987 the present respondent No. 1 who is the divorced wife of the petitioner filed Miscellaneous Criminal Application No 338 of 1984 in the Court of the Judicial Magistrate, First Class, Porbandar. By the order dated 30-10-1985 the learned Magistrate ordered the petitioner to pay maintenance to the respondent No. 1 at the rate of Rs. 300/- per month. Against that order the petitioner filed Criminal Revision Application No. 25 of 1985 in the Court of Additional Sessions Judge, Porbandar, who by his judgement and order dt/- 28-9-1986 rejected the said revision application. Against that judgment and order passed by the learned Additional Sessions Judge, Porbandar, this Special Criminal Application is filed.

40. In this Special Criminal Application (i.e. Special Criminal Application No 586/87) the learned advocate for the petitioner-husband submitted that in view of the Muslim Women Act, the order passed by the learned Judicial Magistrate, First Class, Porbandar, granting maintenance to respondent 1 requires to be quashed and set aside on the ground that it is nullified by the provisions of the Act.

41. As discussed above, the orders passed by the learned Magistrate under S. 125 of the Cr.P.C. are not nullified or the Muslim Women Act does not take away vested rights. These petitions, therefore, require to be rejected.

42. Hence Special Criminal Application No. 81 of 1988 is rejected. Notice discharged.

43. Special Criminal Application No. 586 of 1987 is rejected.

Order accordingly.

Ali v. Sufaira

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Sreedharan, J.

Criminal Revision Petition Nos. 222 of 1987, 90 of 1988, etc.
Decided 1 July 1988

Legal Decision

Judgment

Order: — These Criminal Revision Petitions arise out of proceedings initiated under the Muslim Women (Protection of Rights on Divorce) Act, 1986, hereinafter referred to as “the Act.” CrI. R.P. 222/87 is filed by a former husband challenging the order directing him to pay maintenance during the period of *iddat* and a further sum as reasonable and fair compensation to the divorced lady. CrI. R.P. Nos. 90/88 and 150/88 arise out of one and the same proceeding. The divorced woman filed a petition before the learned Magistrate u/s 3 of the Act claiming a sum of Rs. 3,00,00/- [sic] towards reasonable and fair provision for her life, Rs. 22,500/- towards maintenance for the period of *iddat*, Rs. 11,500/- towards the cost of five sovereigns due to her as *mahr* and for the return of properties mentioned in the schedule which were taken by the former husband or to pay its value amounting to Rs. 15,00,000/-. The learned Magistrate directed the former husband to pay Rs. 22,500/- by way of “reasonable and fair provision and maintenance” to be paid u/s 3(1)(a) of the Act and Rs. 451/- by way of *mahr*. The divorced lady challenges that order in R.P. 90/88 while the former husband has preferred CrI. R.P. 150/1988. CrI. R.P. 197/88 is at the instance of another former husband. He challenges the order passed by the learned Magistrate directing him to pay a sum of Rs. 1500/- as maintenance for the period of three months for observing *iddat* and Rs. 2,500/- as fair and reasonable compensation, both u/s 3(1)(a) of the Act, a sum of Rs. 3,600/- for the maintenance of the child for two years u/s 3(1)(b) of the Act, Rs. 1500/- as *mahr* u/s 3(1)(c) and a sum of Rs. 3000/- u/s 3(1)(d) of the Act. These Criminal Revision Petitions, though arise out of three different proceedings are dealt with in this common order because same questions arise for consideration. The most important aspect that arises for consideration is regarding the extent of the liability cast on a Muslim husband at the time of divorce.

2. In *Mohd. Ahmed Khan v. Shah Bano Begum & Others* (1985 (2) SCC 556) the main argument raised on behalf of the ex-husband was whether the payment of maintenance upto the period of *iddat* plus payment of *mahr* contracted for, would conclude all responsibilities of the husband under the personal law which is referred to in S. 127 of the Code of Criminal Procedure. The court then went into the question whether the Muslim personal law imposes no obligation upon the husband to provide for the maintenance of his divorced wife. The court took the view that the statements contained in the textbooks on Muslim Personal Law are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife who is unable to maintain herself. Consequent on the said decision there arose a situation which necessitated the passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986. S. 3(1) of the Act enumerated the various rights to which a Muslim woman is entitled to at the time of divorce. It reads:

3. *Mahr or other properties of Muslim woman to be give to her at the time of divorce* — (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to —

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

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

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

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

Sub-clause (a) provides that a Muslim woman who has been divorced is entitled to “a reasonable and fair provision and maintenance” to be made and paid to her within the *iddat* period by her former husband. The argument advanced by the learned Counsel representing the former husbands is that they need pay maintenance to the lady only for the period of *iddat*, that they are not to make any “reasonable and fair provision” for that lady. The argument is that their liability under the Act ceases by paying maintenance for the period of *iddat*. In other words the argument is that “provision” and “maintenance” used in the above clause connote the same, that is maintenance pure and simple. In support of this argument the

learned Counsel relies on the observations made by their Lordships in paragraph 15 of the judgment in *Mohd. Ahmed Khan v. Shah Bano Begum & Ors.* (1985 (2) SCC 556) that the distinction between the words "provision" and "maintenance" is without any difference. Here it is necessary to understand the true scope and effect of those words used in S. 3 of the Act.

3. It is well settled that the foremost task of a Court in the interpretation of statutes is to find out the intention of the legislature. Where the words are clear and unambiguous no question of contradiction may arise. It may safely be presumed that the legislature intended what the words plainly say. Even where the words of the statutes appear to be prima facie clear and unambiguous it may sometimes be possible that the plain meaning of the words may not convey the intention of the legislature. The court should find out the intention of the legislature. The intention may be gathered from several sources. The first source from which it can be gathered is the statute itself. Then comes the preamble to the statute. The statement of objects and reasons for the legislation may also throw considerable light in finding out the intention. After ascertaining the intention of the legislature the court is duty bound to give the statute a purposeful or functional interpretation. The court must strive to interpret the statute as to promote and advance the object and purpose of the enactment.

4. The reason for a statute can be discovered from external and internal aids. External aids are statement of objects and reasons when the bill is presented to the Parliament, the reports of Committees which preceded the bill, reports of Parliamentary Committees, etc. Internal aids are the preamble, the scheme and the provisions of the Act. Preamble of the Act is:

An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

From this preamble it is evident that the legislature wanted to protect the rights of divorced Muslim women. Those ladies are to be well protected. They are not to be left as destitutes. Vagrancy is to be prevented.

5. The objects and reasons of the enactment as published in Gazette of India Extraordinary, Part III, S. 2, dated 25-2-1986, inter alia reads:

This decision [*Mohd. Ahmed Khan v. Shah Bano Begum and Others*, AIR 1985 SC 945] has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced

woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely: —

(a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of *iddat* by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to *mahr* or dower and all the properties given to her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of *mahr* or dower or the delivery of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of *iddat*, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The said objects and reasons also state in unmistakable terms that the purpose of the enactment is to protect the interests of divorced Muslim women. The divorced Muslim women are thus entitled to a reasonable and fair provision and maintenance. According to the learned Counsel appearing for the former husbands, the words "provision" and "maintenance" mean one and the same thing. So, S. 3(1)(a) of the Act provides only for the payment of maintenance within the period of *iddat*. If this argument is accepted the said sub-clause could have been worded, "maintenance to be paid to her within the *iddat* period by her former husband." The words "*a reasonable and fair provision and*" appearing at the beginning of the sub-clause (a) and "*made and*" appearing after the words "maintenance to be" would become redundant.

6. In interpreting a provision in a statute it is important to remember that the Parliament does not waste its breath unnecessarily. The Parliament is not expected to use unnecessary expressions. The courts are duty bound to examine and give meaning to every word of

the statute in its context. In other words the statutes have to be construed so that every word has a place and everything is in its place. A statute should be construed in such a manner that no sentence or word should become superfluous or insignificant. No word should be rejected as un-meaningful if it will not result in absurdity. We cannot assume a mistake in an Act of Parliament. Legislature is deemed not to waste its words or to say anything in vain. The presumption is always against superfluity in a statute. So the attempt should be to give meanings to all words used in the clause. The Parliament must be taken to have decided to provide the divorced woman with maintenance for the period of *iddat* and also a reasonable and fair provision for her. Both these should be paid and made to her during the *iddat*. (Vide *M/S Girdhari Lal and Sons v. Balbir Nath Mathur and Others*, AIR 1986 SC 1499; *Reserve Bank of India v. Peerless General Finance and Investment Company Ltd. and Ors.*, AIR 1987 SC 1023; *Utkal Contractor and Joinery Pvt. Ltd. and Ors. v. State of Orissa and Others*, AIR 1987 SC 1454.)

7. As per the provisions referred to earlier the former husband is to make a reasonable and fair provision and to pay maintenance to the divorced woman. Mulla in the *Principles of Mahomedan Law*, 18th Edition, paragraph 279 states:

After divorce, the wife is entitled to maintenance during the period of *iddat*. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce.

As commentary to this Section it is stated therein:

Where an order is made for the maintenance of the wife under S. 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of *iddat*. The result is that a Mahomedan may defeat an order made against him under S. 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat*.

Thus it would appear that a divorced Muslim woman is entitled to maintenance from her former husband only for the period of *iddat*. This liability of the former husband is undisputed. The Quran also enjoins the former husband to discharge this obligation. In *Shah Bano's* case the Supreme Court extended this obligation in the case of divorced ladies who are unable to maintain themselves till her death or remarriage. The Parliament by this Act wanted to save the former husbands from that burden. But the Act now states that they must pay maintenance for the period of *iddat* and also should make a reasonable and fair provision for her. This "provision" should be for the future of the lady. Even after the provision having been made by

the former husband, if the lady becomes unable to maintain herself then a situation envisaged by S. 4 of the Act will come into operation. According to me S. 4 of the Act does not absolve the former husband from making a "reasonable and fair provision" for the lady's life.

8. If the Parliament intended to recognise the liability of a former husband as those stated by Mulla in the above quoted passage only the same could have been provided in sub-clause (a) of clause (1) of S. 3 of the Act by using fewer words. Instead of that, the Parliament wanted the husband to make "a reasonable and fair provision" for the divorced Muslim woman's future as well. As per Webster's Third International Dictionary the word "provision" means:

a gift by will or deed to one as heir who would not be heir otherwise.

The word "provision" came up for judicial interpretation before the Supreme Court in *Metal Box Company of India Limited v. Their Workmen* (AIR 1969 SC 612). Their Lordships stated:

an amount set aside out of profits and other surpluses, not designed to meet a liability, contingency, commitment or diminution in value of assets known to exist at the date of the balance sheet is reserve but an amount set aside out of profits and other surpluses to provide for any known liability of which the amount cannot be determined with substantial accuracy is a provision.

Thus the word "provision" means an amount set apart towards a known liability, the amount which cannot be determined with accuracy. The known liability of a husband is to provide for the future of the divorced Muslim woman. He will not be in a position to determine the amount with substantial accuracy. It is for that purpose he has to make provision. That provision in my view will be entirely different from the maintenance due to the divorced Muslim woman for the period of *iddat*. The word "maintenance" as per Webster's Third New International Dictionary means:

the act of providing means of support for someone; means of sustenance; designed or adequate to maintain a living body in a stable condition without providing reserves for growth, functional change, or healing effect.

This is entirely different from "provision."

9. The above is supported by the Quran as well. Translation and Commentary on the Holy Quran by Abdulla Yusuf Ali in [Sura II] Ayat No. 236 states:

There is no blame on you
If ye divorce women
Before consummation
Or the fixation of their dower,

But bestow on them
(A suitable gift),
The wealthy
According to his means,
And the poor
According to his means;
A gift of a reasonable amount
Is due from those
Who wish to do the right thing.

Ayat 237 [of Sura II] states:

And if ye divorce them
Before consummation,
But after the fixation
Of a dower for them
Then the half of the dower
(Is due to them), unless
They remit it
Or (the man's half) is remitted
By him in whose hands
Is the marriage tie;
And the remission
(Of the man's half)
Is the nearest to righteousness
And do not forget
Liberality between yourselves.
For God sees well
All that ye do.

From this, it is clear that the Muslim husband who divorced the lady must be very liberal to the woman and should give her substantially for her future. Ayat 241 [of Sura II] states:

For divorced women
Maintenance (should be provided)
On a reasonable (scale).
This is a duty
On the righteous.

Ayat 242 [of Sura II] provides:

Thus doth God
Make clear His Signs
To you; in order that
Ye may understand.

From this it is clear that the Muslim who believes in God must give a reasonable amount by way of gift or maintenance to the divorced lady. That gift or maintenance is not limited to the period of *iddat*. It is for her future livelihood because God wishes to see all well. The gift is to depend on the capacity of the husband. The gift, to be paid by

the husband at the time of divorce, as commanded by the Quran, is recognised in sub-clause (a) of Clause (1) of S. 3 of the Act. This liability is cast upon the husband on account of the past advantage received by him by reason of the relationship with the divorced woman or on account of the past disadvantage suffered by her by reason of matrimonial consortium. It is in the nature of a compensatory gift or solatium to sustain the woman for her life after the divorce. In accordance with the principles of Islamic equity the said provision or compensation or support from the former husband is wife's right. This right has been given legislative recognition in the above provision. So I find it difficult to accept the argument that the only liability of the former husband is to pay maintenance to the divorced Muslim woman during the period of *iddat* only.

10. Learned Counsel appearing for the petitioners in CrI. R.P. Nos. 222/87 and 150/88 raised an argument that the learned Magistrate has no power to order anything more than maintenance for the period of *iddat*, replying on clause (4) of S. 3 of the Act. As per clause (4) if the former husband fails to comply with the order passed by the Magistrate, he can be sentenced to imprisonment and the Magistrate can issue warrant for levying the amount of maintenance or *mahr* or dower. Except for realisation of these amounts no coercive step is contemplated by the said clause. According to Counsel, if the Magistrate was entitled to order anything more than maintenance, *mahr* or dower, the court should have been invested with authority to realise that amount as well. In the absence of such a power, according to Counsel, it must be taken that the court has no jurisdiction to direct a former husband to make a reasonable and fair provision for the future of a divorced Muslim woman. I do not find it possible to agree with this argument. A divorced Muslim woman has got the right to approach the Magistrate for an order directing her former husband to return all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends. The Magistrate is duty bound to adjudicate on that claim. The order directing former husband to return those properties has to be made by the Magistrate in case he comes to the conclusion that the former husband is retaining possession of those properties. No provision is made in clause (4) of S. 3 of the Act for executing that part of the order either. That does not mean that the Magistrate is not to adjudicate on the claim coming u/s 3(1)(d) of the Act. Similarly the Magistrate has to direct former husband to make a reasonable and fair provision for the future of the divorced Muslim woman.

11. Yet another argument advanced by the learned Counsel appearing for the former husbands in the above cases is that the

words "provision and maintenance" must be read disjunctively. In support of this argument they relied on the decision in *M. Satvanarayana v. State of Karnataka & another* (1986 (2) SCC 512). In this case their Lordships observed:

The expression "and" has generally a cumulative effect, requiring the fulfillment of all the conditions that it joins together and it is the antithesis of "or."

This observation, I am afraid, goes against the argument advanced by the learned Counsel. The words appearing on either side of the word "and" must be taken to have been joined together by it. Those words must be taken to represent two different categories. If those two words stand for two different objects and they are joined together, then the word "provision" must mean something other than "maintenance." Viewed in that manner it is evident that a divorced Muslim woman is entitled not only to maintenance for the period of *iddat* but also to a reasonable and fair provision for her future livelihood, from her former husband. By the Act the former husband is freed from the liability to maintain the divorced woman who is unable to maintain herself for the rest of her life or [until] remarriage. But he must make a reasonable and fair provision for the future of the lady over and above the maintenance to be paid for the period of *iddat*.

12. In view of what has been stated above, I hold that u/s 3(1)(a) of the Act a divorced Muslim woman is not only entitled to maintenance for the period of *iddat* from the former husband, but also to a reasonable and fair provision for her future. The Magistrate should pass orders giving effect to this intention of the Legislature.

13. The learned Chief Judicial Magistrate, Calicut, has failed to adjudicate on the rights of the divorced woman under sub-clauses (a) and (d) of Clause (1) of S. 3 of the Act in M.C. 42/1987. Therefore I set aside the order of the court below, which is under challenge in Criminal Revision Petition Nos. 90/1988 and 150/1988. M.C. 42/1987 will be taken back to file and disposed of in accordance with law and in the light of what is stated herein before, after affording the parties an opportunity to let in all their evidence.

14. In CrI. R.P. 222/87 the former husband challenges the order awarding maintenance and reasonable and fair provision to the divorced woman. That order is strictly in compliance with the provisions contained in the Act and it calls for no interference. Accordingly R.P. 222/1987 is dismissed.

15. In Criminal R.P. 197/88 the former husband challenges the order awarding maintenance to the divorced lady for the period of

iddat. According to Sri P.C. Mohsin, learned Counsel representing the former husband, the order can provide only for a reasonable and fair provision for the future of the lady and not maintenance even for the period of *iddat*. The court below awarded Rs. 1500/- towards maintenance for the period of *iddat* and Rs. 2,500/- as reasonable and fair compensation. According to Counsel, no Muslim lady is entitled to claim past maintenance. The period of *iddat* expired long prior to the initiation of the proceedings before the court. So the learned Magistrate should not have awarded any amount towards maintenance. I find no merit in this contention. As per S. 3(1)(a) of the Act, maintenance is to be paid within the period of *iddat* by the former husband. On his failure the wife can approach the Magistrate. So the petition to the court can ordinarily be filed subsequent to the expiry of the period of *iddat*. Her claim cannot be defeated on the ground that it relates to the past maintenance since the period of *iddat* has expired. This I find no merit in this contention. Since I have already found that the former husband is liable to pay maintenance for the period of *iddat* as also to make a reasonable and fair provision for her future livelihood, the order passed by the learned Magistrate is proper. The learned Magistrate directed the former husband to pay ["a sum of Rs. 1500/- as maintenance for the period of three months for observing *iddat* and Rs. 2500/- as fair and reasonable compensation, both u/s 3(1)(a) of the Act,"] Rs. 3600/- under S. 3(1)(b), Rs. 1500/- under S. 3(1)(c) and Rs. 3000/- under S. 3(1)(d) of the Act. In the facts and circumstances of the case the said order cannot be said to be illegal, improper or erroneous. Hence, I find no ground to interfere with the same.

16. The result, therefore, is Crl. R.P. Nos. 222/87 and 197/88 are dismissed. The order challenged in Crl. R.P. Nos. 90/88 and 150/88 is set aside and the matter remanded back to the court below for fresh disposal in accordance with law and in the light of observations made earlier in this order.

Aliyar v. Pathu

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U.L. Bhat & Pareed Pillay, JJ.

Criminal Revision Petition No. 564 of 1986
Decided 3 August 1988**Judgment**

Order: — Respondents herein, divorced wife and minor children, obtained an order against the revision petitioner, former husband of the first respondent and father of respondents 2 and 3, under S. 125 of the Code of Criminal Procedure (for short "the Code") directing the revision petitioner to pay maintenance to the children at the rate of Rs. 25/- and Rs. 20/- per month, respectively. The claim of the divorced wife was rejected. The Sessions Court in revision directed the former husband to pay maintenance to the divorced wife at the rate of Rs. 55/- per month and the order was confirmed by the High Court in 1984 [i.e. before the Muslim Woman Act]. Respondents herein subsequently filed C[ivil] M[iscellaneous] P[etition] No. 2292/84 under S. 127 of the Code seeking alteration, by way of enhancement, of the quantum of maintenance ordered to be paid to them on the ground of change of circumstances such as increase in cost of living etc. Revision petitioner filed a counter denying the alleged change of circumstances. The learned Magistrate passed an order enhancing the quantum of maintenance payable to the respondents to Rs. 100/-, Rs. 50/- and Rs. 40/- per month respectively. This order is now challenged.

2. Learned Single Judge who heard the revision petition has referred the same to a Divisional Bench in view of the contention that the application under S. 127 of the Code should have been disposed of not under the provisions of [the Cr.P.C., but under those of] the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act").

3. The Act came into force on 19-5-1986. S. 7 of the Act requires that every application by a divorced woman under Ss. 125 or 127 of the Code pending before any Magistrate on the commencement of the Act shall notwithstanding anything contained in the Code, and subject to the provisions of S. 5 of the Act, be disposed of by such Magistrate in accordance with the provisions of the Act. The

contention is that since the application under S. 127 of the Code was pending before the Magistrate on the date of coming into force of the Act, the same should have been disposed of under S. 3 of the Act. According to learned counsel for the revision petitioner, under S. 3 of the Act, maintenance is payable by the former husband to the divorced wife only for the period of *iddat* and not for the post-*iddat* period and hence the lower court should have cancelled the order directing the former husband to pay maintenance to the divorced wife for the period beyond the *iddat* period. Learned counsel further made it clear that the enhancement of quantum of maintenance ordered for the children is not challenged.

4. S. 3 of the Act read thus:

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to —

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

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

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

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

(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that —

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine

as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

5. We asked learned counsel for the revision petitioner what particular advantage his client hopes to derive by the application of the provisions of the Act, since S. 3 of the Act entitles a divorced woman to have a reasonable and fair provision made, to have *mahr* or dower amount paid and to have all the properties given to her as contemplated therein. Learned counsel submitted that the divorced Muslim wife is not entitled to maintenance beyond the period of *iddat* and apart from maintenance for the period of *iddat* no other provision is required to be made under S. 3(1)(a) of the Act and in order to do justice between the parties revision petitioner should be permitted to raise this contention even at this belated stage. Learned counsel was unable to say if *mahr* or dower has been paid or if the properties have been delivered.

6. Sub.-s. (1) 3 declares what divorced woman is entitled to in the context of divorce. Her rights are enumerated in clauses (a) to (d). She is entitled to a *reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband* and where she herself maintains the children, she is entitled to reasonable and fair provision and maintenance to be made and paid by the former husband for a period of two years from the dates of birth of the children. She is entitled to get an amount equal to the sum of *mahr* or dower agreed to be paid to her, at the time of marriage or at any time thereafter according to Muslim law. She is entitled to all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any of his relatives or friends. This is the mandate of S. 3(1) of the Act.

7. Clause (b) of S. 3(1) of the Act cannot be invoked here; it creates right in the mother, when she herself maintains the children, to make a claim in regard to the children for a period of two years from the respective dates of birth of the children. That is a right conferred on the mother and does not affect the right of the children to make a claim under S. 125 of the Code, either through the mother or otherwise. The Act does not take away such right. S. 7 requires only an application by a divorced woman under S. 125 or 127 of the Code to be disposed of under the Act. S. 7 does not contemplate an application under S. 125 or 127 of the Code filed by or on behalf of the children either by the mother or by anyone to be disposed of under the Act. The right of and the remedy available to the children under S. 125 or 127 of the Code are unaffected by the Act.

8. We are concerned mainly with clause (a) of S. 3(1) of the Act. It contemplates two distinct and separate matters, namely, *making of a reasonable and fair provision* and *payment of maintenance for the iddat period*. The sum and substance of the contention of the former husband in this case is that the *provision* and *maintenance* refer to the same thing, that is, maintenance for the period of *iddat* and the divorced wife is not entitled to any provision other than maintenance during the period of *iddat* or to any provision after the period of *iddat*. Sreedharan, J., in the decision in *Ali v. Sufaira* (1988 (2) KLT 94) has rejected a similar argument. With great respect we are inclined to agree with this view.

9. Under clause (a) of sub-s. 3(1) of the Act, divorced wife is entitled to *reasonable and fair provision to be made* and *maintenance to be paid* within the *iddat* period. The clause emphasizes that *provision* is to be made and *maintenance* is to be paid. Of course *provision* is to be made to secure livelihood of the wife. That need not be in the shape of money: it could be in the shape of provision by grant of immovable property or other valuable assets or other income yielding property. *Provision* has to be made within the *iddat* period; it has to be fair and reasonable. *Provision* must certainly be capable of being realised or secured by her. Besides the *provision* to be made, she is also entitled to be paid *maintenance during the period of iddat*. The expressions *reasonable and fair provision* and *maintenance to be made* and *paid* cannot be understood to have been used disjunctively. In the context "and" cannot mean "or." The two expressions convey different ideas and give rise to two different connotations. The argument is that just as maintenance is to be paid to cover the needs of the divorced woman during the *iddat* period, reasonable and fair provision is to be made only for the *iddat* period. Relevant part of clause (a) cannot be read as "reasonable and fair provision or maintenance." According to learned counsel, there is no difference

between *reasonable and fair provision* and *maintenance*. If there is no difference between the two ideas and they mean the same thing, one of the expressions is redundant; there is no justification to take the view that the introduction of the words *reasonable and fair provision* by the Parliament was intended to be a meaningless exercise. It must necessarily have a different connotation.

10. This view receives support from the back-drop of the Act. The Supreme Court observed in *Shah Bano's* case (1985 2 SCC 556) that under the Muslim law husband has a duty to pay maintenance to the divorced wife even for the post-*iddat* period. The Supreme Court referred to the expression *mataa* in aayat 241 [of sura II] of the Holy Quran and the argument that it means *provision* and not *maintenance* and held that this was a distinction without a difference. This gave rise to agitation by a section of the Muslim male population. To contain the agitation, settle the controversy and protect the rights of divorced women, legislation was introduced in Parliament and the Act was thereby enacted. It was thought that thereby the feelings of that section of the Muslim community would be assuaged. It is significant to note that the preamble of the Act declares that the Act was intended *to protect the rights of Muslim women* who have been divorced by or have obtained divorce from their husbands and to provide for matters connected thereto or incidental thereto. The same concern to protect the interests of the divorced Muslim woman is reflected in the "State of Objects and Reasons" of the Act, which states, inter alia, that "this decision (in *Shah Bano's* case) has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and *to protect her interests.*" Since the main purpose of the statute is to protect the interests of the divorced Muslim woman, even if there is any ambiguity in the language of the statute, or even if two interpretations are equally possible, that interpretation which is reasonable and would protect the interests of divorced Muslim women has to be adopted by the court. In the present case there is no ambiguity or uncertainty in S. 3(1)(a). The words used are plain, clear, certain and unambiguous; they clearly involve declaration of two separate and distinct rights, that is, to obtain maintenance for the period of *iddat* and to have a reasonable and fair provision made.

11. What does *provision* mean? Does it have the same meaning as *maintenance*? We will examine this aspect having regard to the observations in *Shah Bano's* case and later intervention of the Parliament during the period of the post-*Shah Bano* agitation. We think it necessary to delineate the fine distinction between the two

ideas. *Maintenance* is generally intended to mean lodging, boarding, medical attention, and other necessities of life, but not merely necessities of life. In the case of children, the expression would naturally include cost of education also. *Provision* according to Chambers 20th Century Dictionary means — “act of providing; measures taken before hand.” *Provide* according to the same dictionary means — “to make ready before hand, to prepare for future use.” In Willin Dickles on Accountancy, Third Edition, at page 184 it is stated that “provision means the amount set aside out of profits and other surpluses” In *Metal Box Company of India Ltd. v. Their Workmen* (AIR 1969 SC 612), the Supreme Court, in the context of the Income Tax Act stated:

An amount set aside out of profits and surpluses to provide for any known liability of which the amount cannot be determined with substantial accuracy is a provision.

This view has been followed by the Supreme Court in *Workmen of William Jacks & Co. Ltd. v. The Management* (AIR 1971 SC 1821) and in *Vazir Sultan Tobacco Company Ltd.’s case* (132 ITR 559). *Provision* is the amount set aside to provide for known liability which cannot be quantified accurately; it is a provision for future use. Besides paying maintenance to the divorced wife for the *iddat* period, former husband has to provide reasonably and fairly for the future needs of the divorced wife . . . after the period of *iddat* period and till her marriage or death.

12. Sub-sections (2) and (3) of S. 3 support the view that *provision* and *maintenance* connote different matters. Sub-s. (2) enables divorced woman or her authorised agent to make an application to the Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be. When a reasonable and fair provision has not been made or maintenance or *mahr* or dower has not been paid or properties have not been delivered, on an application as aforesaid, the Magistrate is enabled by sub-s. (3) to make an order on his due satisfaction, directing the former husband to pay such reasonable and fair provision and maintenance as he may determine as fit and proper . . . or as the case may be for the payment of such *mahr* or dower or the delivery of properties . . . to the divorced woman. The legislature has taken pains to keep the two ideas of *provision* and *maintenance* distinct and separate in these sub-sections also.

13. It is argued on the strength of sub-s. (4) that the implementation of the order of the Magistrate can be only regarding maintenance and, therefore, legislature could not have intended that the divorced wife is entitled to a *provision* as distinct and separate from *maintenance*. Sub-s. (4) indicates that if the order of the

Magistrate is not complied with without sufficient cause, the Magistrate may issue a warrant for levying *the amount of maintenance or mahr or dower due in the manner provided for levying fines* under the Code and may sentence such person in the manner provided. Sub-section (4) refers to the failure to comply with the order passed under sub-s. (3). The order under sub-s. (3) relates not merely to payment of maintenance or *mahr* or dower but also to payment of reasonable and fair provision and delivery of properties. The warrant for levying is mentioned in connection with non-payment of maintenance. Sub-section (4) does not mention *provision* in this connection, maybe because *provision* can be a provision for payment of money or *by settling apart property or asset of any description* and there cannot be any warrant for levying in enforcement of a direction for setting apart property or other asset.

14. If the non-mention of "provision" in S. 3(4) must lead to the conclusion that Parliament did not intend that the former husband should apart from paying maintenance for the *iddat* period make a reasonable provision for post-*iddat* period, what conclusion is to be drawn from the omission in S. 3(4) to provide for implementing the order of the Magistrate for delivery of property referred to in S. 3(1)(d)? Does it follow that the Magistrate cannot effectuate or implement the order passed for delivery of property? It cannot be that Parliament which has been concerned to protect the rights and interests of divorced woman intended that the order for delivery of property is to remain a dead-letter or should have the effect merely of a declaratory decree to effectuate which the divorced woman has to file a civil suit for recovery of property. In the absence of specific provision in the Act, we have to examine the provisions of the Code and the inherent, implied or ancillary powers of the Court.

....

19. We will now advert to . . . [a] decision of the Supreme Court, which, in our opinion, has settled the position. In *Savithri v. Govindsingh Rawat* (AIR 1986 SC 984). the Court considered whether Magistrate, on an application under S. 125 of the Code has jurisdiction to pass an interim order of maintenance. The Court held —

. . . it is the duty of the court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. *In the absence of any express prohibition*, it is appropriate to construe the provisions in Chapter IX as *conferring an implied power on the Magistrate* to direct the person against whom an application is made under S. 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. . . . *Every court must be deemed to possess by necessary intendment all such powers as are necessary to make*

its orders effective. This principle is embodied in the maxim 'udi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest' (where anything is conceded, there is conceded also anything without which the thing itself cannot exist). . . . Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something also will be supplied by necessary intendment. (emphasis supplied)

This decision clearly supports the proposition that criminal courts have inherent or implied powers.

20. Courts, civil or criminal, are constituted for the purpose of administering justice in accordance with law. Codes of procedure, civil and criminal, have been enacted to regulate the procedural aspects and to ensure that enquiries and trial are held in accordance with principles of fair play. Provisions of the Codes are designed to further the ends of justice and not to frustrate the ends of justice. The legislature has tried to lay down elaborate rules in respect of all matters specifically mentioned in the Codes. Yet it has to be appreciated that it is not humanly possible for any legislature to visualise, anticipate and provide for all matters and contingencies that may arise in courts for all times. Ever-changing needs and situations may require judicial determination; it cannot be that courts are powerless to act in the absence of specific provisions in the Codes. Courts have since olden times evolved theory of inherent, implied or ancillary powers and applied the same to regulate their proper and effective functioning and in the discharge of their duties to get over technicalities and to secure ends of justice. The challenge of administering justice is often met by invocation of inherent powers resting on never changing principles of reason and fair play. . . .

21. Inherent powers of courts are in addition to powers specifically conferred on them. They are complementary to these powers. Courts are free to exercise these powers, when the exercise of these powers is not in any way in conflict with what has been expressly provided by the Code or against the intention of the legislature. See *Padamsen v. State of U.P.* (AIR 1961 SC 218) and *Mahoharlal v. Raja Seth Hiralal* (AIR 1962 SC 527). . . .

22. It is a well known rule of statutory construction that a tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions for the purpose of doing justice between the parties unless there is any indication to the contrary in the statute. See *Brindlays Bank Ltd. v. Central Govt. Ind. Tribunal and others* (AIR 1981 SC 606). An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. (See *Sutherland's Statutory Construction*, third edition, articles 5401

and 5402.) Where an Act confers jurisdiction, it impliedly also grants the power of doing all such acts of employing such means, as are essentially necessary to its execution. (See *Maxwell on Interpretation of Statutes*, eleventh edition at p. 350.) Every court is deemed to possess such inherent power, in the absence of any provision either prohibiting or providing for the exercise of such power, in respect of any matter as is really essential for its effective and smooth functioning in accordance with law. Such power is inherent in its very constitution. This power, naturally, has to be exercised sparingly and with due care and caution and only in appropriate cases, either to give effect to orders of court or to prevent abuse of process of court or to secure the ends of justice; it has to be exercised judiciously and not arbitrarily or capriciously. The exercise must be based on sound general principles and not in conflict with them or with the intention of the legislature as indicated in the statutory provisions.

23. It must necessarily follow that a divorced woman who secures an order for delivery of property as contemplated in S. 3(1)(a) and 3(2)(a) of the Act is entitled to approach the Magistrate's court to implement the order and secure to her possession of the property. The court, in the absence of an appropriate provision in S. 3(4) of the Act, has the duty and jurisdiction to effectuate and implement the order in exercise of its inherent or implied or ancillary powers. Therefore, the omission pointed out in S. 3(4) is of no moment and does not lead to the conclusion that the Parliament intended to confer on the divorced wife the right only to secure maintenance for the *iddat* period and not reasonable provision for the post-*iddat* period.

24. Learned counsel for the revision petitioner placed strong reliance on S. 4 of the Act to support the contention that the former husband has no liability to make any provision for the post-*iddat* period. S. 4 reads thus:

4. *Order for payment of maintenance.* — (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the

Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

25. S. 4 of the Act is an enabling provision. If the divorced wife has not remarried and is unable to maintain herself after the *iddat* period, the Magistrate may direct her relatives as would be her heirs on her death to pay such reasonable and fair maintenance to her as he may deem fit. It shall be payable by such relatives in the proportion in which they would inherit her property. There is a special provision regarding the exclusive liability of the children and, in their absence or inability to pay, on the parents. The ultimate liability is cast on the State Wakf Board. S. 4 does not contemplate order being passed directing the former husband to pay maintenance for the post-*iddat* period. S. 4 has to be read along with S. 3, for both sections form part of the legislative scheme enacted to protect the rights and interests of the divorced Muslim woman. Under S. 3, former husband is liable for the payment of maintenance for the *iddat* period and to make reasonable and fair provision for the post-*iddat* period. Quantification has to be made, under sub-section (3)(b) of S. 3, having regard to the needs of the divorced woman, standard of living enjoyed by her during her marriage and the means of her former husband. Former husband may die; his means may be slender and the reasonable and fair provision made for the future may not be adequate. The provision might not for some reason or the other be enforced. In all these contingencies (the narrative is not exhaustive but only illustrative), the constitutional directive in the directive principles of state policy

(specifically Articles 38 and 39) would require measures to avoid destitution of the woman. Parliament has devised a strategy for providing additional safeguards to protect the interests of the divorced woman. If in spite of reasonable and fair provision made for the post-*iddat* period, she faces destitution, S. 4 comes to her rescue. We do not agree that the scheme of S. 4 casting on relatives of the divorced woman liability for maintenance should lead to a narrow and technical interpretation of S. 3

26. Learned counsel for the contesting parties seek support for their contentions on the relevant parts of the Holy Quran. Learned counsel have invited our attention to various editions and translations of the Holy Quran. We propose to refer only to the most authoritative texts:

The Holy Quran, translation by Abdullah Yusuf Ali, at page 96

Ayat no. 241

For divorced women
Maintenance (should be provided)
On a reasonable (scale)
This is a duty on the righteous.

Ayat no. 242

Thus doth God
Make clear His Signs
To you: in order that ye may understand.

The Quran, [translation] by Md. Safrullah Khan (page 38)

For divorced woman also there shall be *provision* according to what is *fair*. This is an obligation binding on the righteous. Thus does Allah make His Commandments clear to you that you may understand.

(emphasis supplied)

The Meaning of Quran (vol. I), published by Board of Islamic Publications, Delhi

Ayats 240-241 —

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way: Allah is All-Powerful, All-wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

Ayat 242 —

Thus Allah makes clear His Commandments for you: it is expected that you will use your commonsense.

Running Commentary of the Holy Quran (1964 edn.), by Dr. Allanadh Khadim Rahmani Nuri

Ayat 241 —

And for the divorced woman (also) a *provision* (should be made) with *fairness* (in addition to her dower). (This is) a duty (incumbent) on the reverent.

(emphasis supplied)

Holy Quran, Translated by Mohammed Ali

Ayat 241 —

And for the divorced woman, *provision* (must be made) in *kindness*. This is incumbent on those who have regard for duty.

(emphasis supplied)

27. Almost all the translations are unanimous in regard to the content and meaning of ayat 241, namely, that a fair or reasonable provision should be made for the divorced woman. S. 3 of the Act has incorporated therein the expression "*reasonable provision*," as distinguished from the expression "*maintenance*," evidently moving away from the observation of the Supreme Court in *Shah Bano's* case that distinction between the two expression is without difference. The Parliament also appears to have accepted the traditional view that right to maintenance ceases after the expiration of *iddat* after *talaq*. Parliament dissociated itself from the view expressed by the Supreme Court in *Shah Bano's* case that "*provision*" and "*maintenance*" mean the same thing and, therefore, divorced woman is entitled, according to the personal law, to maintenance even after expiration of *iddat* period. Parliament intended to make it clear that the divorced woman is entitled to maintenance only for the *iddat* period but is entitled to a distinct and reasonable provision for the post-*iddat* period. This is the only reasonable construction to be placed on S. 3 of the Act on a consideration of the plain tenor of the provisions of the Act, the mischief sought to be avoided, the object sought to be achieved, the *Shah Bano* case and its aftermath.

28. We, therefore, hold that S. 3 of the Act will not relieve the former husband of all his responsibilities for the post-*iddat* period. He has to make a reasonable and fair provision for the divorced wife for the post-*iddat* period.

29. If the revision petitioner is to be permitted to raise this new plea at this belated stage (he did not raise this plea before the learned magistrate), the case will have to go back for further

pleadings and further evidence to work out the rights of the divorced wife under S. 3 of the Act. Revision petitioner has been negligent in not raising the plea at the appropriate state. In these circumstances, we do not permit him to raise the plea at this belated stage.

30. In the result, we find no ground to interfere and dismiss the revision petition.

Ahammed v. Aysha

1990 (1) Kerala Law Times 172

Jagannadha Raju, J.

Criminal Revision Petition No. 246 of 1988.

Decided 21st December 1989

Judgment

Order: — This is a revision filed by the former husband of the petitioner in M.C. No. 75 of 1987 on the file of the First Class Judicial Magistrate, Taliparamba. In this revision the husband complains that the order of the Magistrate directing him to pay Rs. 12,000/- towards reasonable and fair provision and maintenance during the *iddat* period and also a sum of Rs. 101/- towards *mahr* is illegal and not maintainable. The petitioner's counsel contends that in these proceedings which emanated on a petition under S. 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act 25 of 1986) (hereinafter referred to as "the Act"), it is the bounden duty of the court to go into the question of means of the husband and then pass the orders as contemplated under the various sub-sections of S. 3. If the wife is in affluent circumstances when compared to the husband, there is no need to pass an order. In the present case the court passed a composite order without specifying what amounts are payable under different heads mentioned in S. 3(1) of the Act. He contends that while the petitioner, the former husband, is only a salesman getting Rs. 440/- per month, the wife is in more affluent circumstances. She owns property, gets income from the property and she is also in receipt of remittances from her sons through the earlier marriage who are now employed in gulf countries. It is contended that the composite or the consolidated order is passed by the Magistrate without going into the question of the capacity of the husband to pay the amount and the relative financial position of the spouses. The petitioner's counsel places strong reliance upon *Ali v. Sufaiya*, 1988 (2) K.L.T. 94, a single Judge decision of this court, which dealt with the scope and ambit of S. 3 of the Act. The petitioner's counsel also places reliance upon various decisions of the different High Courts and the Supreme Court which deal with petitions for maintenance under the Hindu Marriage Act, under S. 125 of the Cr.P.C., and S. 488 of the old Cr.P.C. and claims that the husband can be

directed to pay maintenance only where the wife is unable to maintain herself. As there is no finding to the effect that the petitioner's divorced wife is unable to maintain herself, the order under S. 3 should not have been passed.

2. On behalf of . . . [the divorced woman, counsel] argues that proceedings under S. 3 of the Act will have to be dealt with without reference to the principles applicable for granting maintenance under the Cr.P.C., Hindu Marriage Act, etc. This Act does not contemplate the inability of the wife to maintain herself. He also contends that the Revision Petitioner is a partner in a business and hence he is certainly having the means to pay the amounts ordered to be paid by the Magistrate.

3. The point for consideration is whether the order passed by the Magistrate is in conformity with the provisions of S. 3 of the Act.

4. The point: It should be remembered that this Act 25 of 1986 came into the statute book as a result of the epoch making decision of the Supreme Court in *Shah Bano's* case, (1985) 2 SCC 556. The Act is meant to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands. S. 3 is the most important section. The language of S. 3(1) clearly indicates that notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to the four items mentioned in clauses (a), (b), (c) and (d) of sub-section (1). Subsection (2) lays down that where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or anyone duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties. Sub-section (3) is very important. It reads as follows:

(3) Where an application has been made under sub-section (2), by a divorced woman, the Magistrate may, if he is satisfied that —

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her

former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman.

5. It is significant to remember that under this sub-section there is no requirement of the inability of the wife to maintain herself as in the other enactments. The Act has the over-riding effect, notwithstanding anything contained in any other law for the time being in force. If we compare S. 3 of the Act with similar provisions for maintenance in the other enactments, we find that in S. 125 of the Cr.P.C. the person has to pay maintenance when he has sufficient means and [has] neglected or refused to maintain his wife and children. He is called upon to pay maintenance to his wife or children who are unable to maintain themselves. S. 24 of the Hindu Marriage Act which deals with maintenance pendente lite and expenses of proceedings contemplates the respondent being paid "the expenses of the proceedings and monthly maintenance which shall be determined having regard to the petitioner's own income and the income of the respondent" and which the court finds reasonable. S. 25 deals with permanent alimony and maintenance. It introduces the standard of "having regard to the respondent's own income and other property, if any, the income and other property, of the applicant," the court shall order payment of alimony. [sic] This strict standard whereby the inability of the wife is taken into account is not there in S. 3 of the Act. Under the Indian Divorce Act, Ss. 36 and 37 deal with alimony pendente lite and permanent alimony. Under S. 36 a wife is entitled to file a petition for alimony pending the suit and the only limitation is that the alimony pending the case shall not exceed one-fifth of the husband's average net income for the three years next preceding the date of the order. That section does not contemplate negating the right of the wife for alimony pendente lite in case she is in affluent circumstances or that she has income of her own. Under S. 37 which provides for permanent alimony, it is the duty of the court to see that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, it thinks reasonable. It is significant to remember that Ss. 36 and 37 do not disentitle a wife with property and separate income from receiving either alimony pendente lite or the permanent alimony. If we compare and contrast the provisions of S. 3 of the Act with similar provisions in the other enactments, we find that even a millionaire wife who lives in luxury and affluence is certainly entitled to claim maintenance and other reliefs from her former husband under S. 3. There is no requirement of the wife being unable to maintain herself for granting maintenance or for payment of fair and reasonable provision as contemplated under S. 3.

6. In the present case the petitioner's divorced wife claimed the *mahr* amount of Rs. 101/- which she claims has not been paid to her. She also claims Rs. 5000/- as maintenance for the *iddat* period and a sum of Rs. 25,000/- as reasonable and fair provision. The court found that the petitioner is liable to pay maintenance during the *iddat* period and that he is liable to make reasonable and fair provision and that he is liable to pay the *mahr* amount. But in the order, there is no discussion as to the means of the former husband and what exactly are the incomes he is getting. There is only a reference to the fact that he is getting Rs. 440/- per month as salary for his work as a salesman in General Hardwares, at Taliparamba. Without going into the question of his having "sufficient means" or going into the question of "the means of the former husband" a consolidated order is passed directing the former husband to pay Rs. 12,000/- towards reasonable and fair provision and maintenance for the *iddat* period. A direction was also given directing the revision petitioner to pay Rs. 101/-, the *mahr* amount fixed at the time of marriage.

7. The record reveals that except the salary of Rs. 440/- which is admitted by the former husband, there is no other evidence to show that he is possessed of any other properties or that he has any other income. The evidence in this case reveals that the house jointly constructed by the revision petitioner and the divorced wife has been conveyed to the wife for a price. In these circumstances the means of the husband should only be determined as Rs. 440/- per month. In this view of the matter directing him to pay Rs. 12,000/- towards reasonable and fair provision and maintenance during the *iddat* period appears to be most improper. Under the Act S. 2(b) prescribes the *iddat* period as 3 lunar months. So for three months the husband should be made to pay a reasonable maintenance. Considering his income at Rs. 440/- per month and considering the fact that the revision petitioner and the divorced wife alone are the members of the family, it would be just and proper to fix the maintenance at Rs. 150/- per month. So for the period of *iddat* he is liable to pay Rs. 450/- for three lunar months. As regards the reasonable and fair provision which the husband is bound to make considering his income at Rs. 440/- per month, I feel if a lumpsum amount of Rs. 9,000/- is provided which covers the five years maintenance at the rate of Rs. 150/- per month the ends of justice would be satisfied. So I hold that the revision petitioner is liable to pay to the divorced wife Rs. 9,000/- towards reasonable and fair provision. The husband is certainly bound to pay a sum of Rs. 101/- which is the *mahr* amount.

8. In the result, I modify the order of the trial court as follows: —
(1) The revision petitioner shall pay to the wife the *mahr* amount of Rs. 101/-. (2) The revision petitioner shall pay the divorced wife Rs.

450/- towards maintenance during the *iddat* period. (3) The revision petitioner shall pay Rs. 9,000/- towards reasonable and fair provision.

The revision petitioner will have three months time to pay all these amounts giving credit for the amount already deposited as per the interim orders of this Court

Usman Khan Bahamani

v.

Fathimunnisa Begum,

AIR 1990 Andhra Pradesh 225 (Full Bench) : Dissenting Judgement

Ramanujulu Naidu, Sardar Ali Khan, and Bhaskar Rao, JJ

Cri. M.P. Nos. 146, 147, 2466, 2396, 3915, 1916 and 3167
of 1989 and Criminal Petn. Nos. 1151, 1134, 1972 and 1173
of 1989 and Cri Revn. Case No. 308 of 1989

Decided 5 March 1990; final order 19 March 1990.

[Paras. 1 to 43 comprise the leading majority judgment of Sardar Ali Khan, J.; para. 44 is the statement of concurrence by Ramanujulu Naidu, J. The dissenting judgment of Bhaskar Rao, J., is set out below.]

Dissenting Judgment

45. I have had the benefit of going through the judgment of my learned brother Sardar Ali Khan, J., as agreed to by Justice Ramanujulu Naidu. With great respect to my learned brothers, I should express my inability that I am not able to toe myself in line with the view expressed by them on the question,

"(2) Whether the maintenance contemplated under Section 3(1)(a) of the Act of 1986 is restricted only for the period of 'iddat' or whether a fair and reasonable provision has to be made for future also within the period of *iddat*?"

I may make it clear that though I held a contra view in Cri. Revision Case No. 577/87 D/-31-3-89 (reported in 1989 (2) Andh LT 275: 1989 Cri. LJ 2285) that the maintenance contemplated by Section 3(1)(a) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "The Act") is not confined to the *iddat* period only, I am now convinced on further enlightenment that the Legislature intended payment of maintenance only for the *iddat* period and not beyond that. However, on the latter limb of the question, whether a fair and reasonable provision has to be made for future also within the period of *iddat*, I am clearly of the opinion that the answer should be in the positive and positive only.

46. On the other two questions, namely, whether a divorced Muslim woman can claim maintenance under Section 125 of the Code [of Criminal Procedure] from her former husband even after passing of the Act of 1986 and how far Sections 125 to 128 of the Code can be held to be applicable after coming into force of the Act of 1986 and

what should be the mode of disposal of the cases pending before the Courts under these sections, I have absolutely no divergence of opinion with my learned brothers. I, with great respect, agree with my learned brothers that a divorced Muslim woman cannot claim maintenance under Sec. 125 Cr.P.C. after passing of the Act and that Sections 125 to 128 Cr.P.C. are not applicable after coming into force of the Act save in so far as the parties opt for their applicability under Sec. 5 of the Act.

47. It is the decision of the Supreme Court in *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945 that gave rise to the present legislation of [sic] enacting the Muslim Women's (Protection of Rights on Divorce) Act, 1986. The Supreme Court held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of *iddat*, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court, therefore, held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. Accordingly, the Court concluded that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of *iddat*, but if she is unable to maintain herself after the period of *iddat*, she is entitled to have recourse to Sec. 125 Cr.P.C.

48. The statement of objects and reasons in bringing out the Act reads:

2. This (Supreme Court's) decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests.

The main object of the legislation, thus, is to protect the rights of the Muslim women on divorce. Title of the enactment also refers to the 'Protection of Rights on Divorce.' In so far as husband's obligation to pay maintenance is concerned, the Muslim law as also the decision of the Supreme Court confines it to the period of *iddat* only. The only right apart from the one under Muslim Law to which a divorced Muslim woman is entitled to, as was held by the Supreme Court in the above *Shah Bano's* case, is to have recourse to Sec. 125 of the Code of Criminal Procedure for maintenance even after expiration of the period of *iddat* if the woman is not able to maintain herself. In so far as payment of maintenance during the *iddat* period is concerned, the personal law stood settled and there was absolutely no controversy on the issue. The right to maintenance held to be available even after the expiration of the period of *iddat* under Sec. 125 Cr.P.C., is only if the woman is unable to maintain herself, and this right is crystallised after

the pronouncement by the Supreme Court. No doubt, as stated in the statement of objects and reasons, this decision vesting the right to maintenance under Sec. 125 Cr.P.C. gave rise to some controversy. This controversial state of affairs did not relate to the liability of the husband to pay maintenance for the *iddat* period and therefore the corresponding right of the Muslim woman did not call for any protection since it was never under erosion. What was sought to be controverted or eroded by means of some furore was with reference to the newly accrued right on its crystallisation that the Muslim woman, if unable to maintain herself, is entitled to have recourse to Sec. 125 Cr.P.C., even after the *iddat* period. This much of crystallisation, though not exactly in the same form and under the same provision, but in substance something over and above the liability to pay maintenance during the *iddat* period, was under the need and warrant of protection which the legislation intended to do by embedding in Section 3(1)(a) of the Act the liability of the husband to make a reasonable and fair provision, apart from maintenance.

49. Before analysing the term “a reasonable and fair provision” occurring in Sec. 3(1)(a) of the Act, it is very much necessary to extract Sec. 3 to the extent relevant. It reads:

3. Mahr or other properties of Muslim woman to be given to her at the time of divorce. — (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to —

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

Now, the question is, as regards the meaning of “a reasonable and fair provision and maintenance to be made and paid” as it occurs in the above section. The contention on one hand is that “provision and maintenance” have to be read together in a compendious form. This submission is sought to be fortified by referring to Quranic verse 241 [of Sura II] wherein the word “*mataa*” occurs, the meaning of which is “Maintenance (should be provided).” Since “*mataa*” as interpreted by the Supreme Court takes in both “maintenance” and “provision,” the Legislature it is submitted to avoid any confusion couched the language in S. 3(1)(a) by clubbing the words “provision” and “maintenance” together without meaning them to be distinct and separate items. The argument, *ex facie*, sounds too far fetched and is incapable of being reconciled with (i) the preamble of the Act, (ii) the following Section 4 of the Act wherein the term used is only “reasonable and fair maintenance” (the word “provision” is omitted) and (iii) Section 5 of the Act which provides an option to the parties for being governed by Sections 125 to 128 of the Code of Criminal Procedure.

50. It is basically the intention of the legislature that provides the lever for purposes of interpretation of any statute. No doubt, there are several sources to find out the intention. They can as well broadly be divided into (i) external aids and (ii) internal aids. External aids consist of statement of objects and reasons, earlier reports of commission, if appointed, reports of Parliamentary Committees, etc. A reference is already made to the statement of objects and reasons. The internal aids have got to be gathered from the preamble of the statute and on an harmonious construction of different provisions in the statute. The preamble of the Act reads:

An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

Thus, this is an Act intended to protect the rights of the Muslim women on their divorce. Question of protecting a right arises only on its recent acquisition and that too when it is under a threat of erosion. In so far as the question of payment of maintenance for the *iddat* period is concerned, there was never any dispute as regards it, that was not a recent acquisition nor it was under a threat of erosion at any time earlier to the making of the present legislation. The furore among the Muslim community, in other words the controversy, was with regard to the liability of the husband to pay maintenance beyond the *iddat* period under Sec. 125 Cr.P.C., if she is unable to maintain herself. This was the newly crystallised right as per the Supreme Court's pronouncement and in regard to which there was much controversy. Thus, this newly crystallised right was the subject matter of controversy and resultantly under a threat of erosion, and accordingly needed or warranted protection, may be in the same form or in a balancing different form. The option, however, as regards the form is left out to the parties themselves by Section 5 of the Act. In this background of protection, the resultant provisions are Section 3(1)(a) and Section 5 of the Act, the former casting a liability on the husband to make a reasonable and fair provision apart from the payment of maintenance within the *iddat* period and the latter leaving the option to the parties to be governed by Sections 125 to 128 of the Code of Criminal Procedure. If it is simply a question of payment of maintenance for the *iddat* period that the [sic; read "was"] truly intended by Section 3(1)(a) and nothing more, neither the Legislature would have wasted its breath by incorporating the liability of making a provision reasonable and fair, apart from paying maintenance in Section 3(1)(a), nor would it have allowed Section 5 to remain otiose on the statute since no Muslim husband with minimum commonsense would opt for governance by the provisions of Secs. 125 to 128 of the Code of Criminal Procedure in the absence of any corresponding or balancing liability cast on him by one or other

provision in the statute. It is equally important to note that Section 4 of the Act which reads:

4. Order for payment of maintenance. — (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law *to pay such reasonable and fair maintenance* to her as he may determine

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate . . . the Magistrate may, by order, direct the State Wakf Board . . . functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1)"

significantly omits the word "provision" from the term "a reasonable and fair provision and maintenance." The liability under Sec. 4 either of the relatives or of the Wakf Board is just to pay reasonable and fair maintenance. Section 4 does not contemplate making of fair and reasonable provision in contra-distinction from Sec. 3. Therefore, the argument that provision and maintenance mean one and the same and they should be read in a compendious form is not worthy of appreciation. These two or ["are"] distinct and different items as submitted by the learned Advocate General. Further the reasonable and fair provision contemplated by this section to be made within the *iddat* period is for a period much beyond the *iddat* whereas the maintenance to be paid within the *iddat* period is for the *iddat* only.

51. I am not able to concede to the argument that the liability of the husband, even if making of provision is different and distinct from paying of maintenance, is confined to the period of *iddat* only and that in no case either of the two could run beyond the *iddat* period. The words in Sec. 3(1)(a) "within the *iddat* period" lay stress on the urgency in making or paying and they cannot be read as confining the liability to the limited period of *iddat*, save in so far as maintenance is concerned since the Muslim Law is settled on that aspect. Interpreting the distinct liability of making a reasonable and fair provision as having been confined to the period of *iddat* would not only render the very Section 5 on the statute otiose but also defeats the specific purpose of casting that liability on the former husband by Section 3(1)(a) in contra-distinction from Sec. 4 whereunder the liability of either the relatives or the Wakf Board is only to pay maintenance and there is absolutely no liability to make any provision under Sec. 4 of the Act. Incidentally, no doubt, there advanced a submission whether it would be possible to make or fix up a provision apart from paying

maintenance within the *iddat* period so as to cover-up the necessities of life of the divorcee for the entire period of her remaining life or until she gets remarried. No doubt, there does appear to be some inconvenience but the question is whether such an inconvenience is a dominant factor to render a contra interpretation, which otherwise is a total absurdity. Means of remedy would surely follow the event. For an apprehended event, being not able to presently comprehend a means of remedy, is it proper to relieve of a benefit available otherwise to the divorcee under a statute, that too a beneficial legislation. The Supreme Court in *Mysore State E. Board v. Bangalore W.C. & S. Mills*, AIR 1963 SC 1128 clearly laid down that inconvenience is not a decisive factor in interpreting a statute.

52. It is also crucial to notice that the Legislature cannot be said to be not apprehensive of this inconvenient situation not only in arriving at but also in making a reasonable and fair provision. Having been apprehensive only, it introduced Sec. 5 in the statute to enable the parties to choose governance by Sections 125 to 128 of the Code of Criminal Procedure.

53. The learned Advocate General brought to our notice a decision of the Kerala High Court in *Ali v. Sufaira* (1988) 3 Crimes 147. The question raised before the Kerala High Court is exactly the same as discussed herein. After a threadbare discussion of several points involved the Kerala High Court held that under Sec. 3(1)(a) of the Act a divorced woman is not only entitled to maintenance for the *iddat* period from her former husband but also to a reasonable and fair provision for her future. I am in absolute agreement with the reasoning given therein and the conclusions arrived at. As a matter of fact, the said decision covers substantially and fully the issue under discussion in my judgment.

54. Before parting with this it is equally important to notice the meaning of the words "provision" and "maintenance." According to Webster's Third New International Dictionary, the word "provision" means:

a gift by will or deed to one as heir who would not be heir otherwise.

Our Supreme Court had also the occasion in *Metal Box Company v. The Workmen*, AIR 1969 SC 612 to interpret the word "provision." It is stated (Para. 15):

An amount set aside out of profits and other surpluses, not designed to meet a liability, contingency, commitment or diminution in value of assets to exist at the date of the balance sheet is reserve but an amount set aside out of profits and other surpluses to provide for any known liability to which the amount cannot be determined with substantial accuracy is a provision.

The word "provision," thus, means an amount set apart to meet a known liability, the amount of which cannot be decided with accuracy. The known liability under Sec. 3(1)(a) of a husband is to provide for the future of the divorced Muslim woman. The amount is not capable of being decided with substantial accuracy. This provision, thus, is surely different and distinct from maintenance due to the Muslim divorced woman for the *iddat* period.

55. The word "maintenance" as per Webster's Third New International Dictionary means:

the act of providing means of support for someone; means of sustenance; designed or adequate to maintain a living body in a stable condition without providing reserves for growth, functional change, or healing effect.

56. As seen the meaning of the words "provision" and "maintenance" is distinct and different from one another and therefore the contention that they both mean one and the same is not tenable.

57. Questions do arise as to the period to which and the amount for which the husband is liable to make a provision. In so far as the period is concerned surely it is much more beyond the *iddat* period and for the future of the divorced wife. As to the amount or extent of making the provision, the factors are almost similar as those that govern the fixation of maintenance. The state of condition as to the health or education of the divorced wife is a dominant factor in arriving at the extent or amount of the provision as also the period for which it is to be assessed. For instance, the divorced wife may be a student of medicine, engineering, etc.; or she may be an in-patient or suffering from some chronic disease at the crucial time. These are simply different examples. In such and similar cases it would be doing harm to the beneficial legislation if the provision is confined to the *iddat* period on the ground that maintenance has got to be so. The amount or extent to which and the period for which the husband is liable to make a provision depends on the facts and circumstances of each case and there cannot be a general or common ruling on these aspects. Accordingly I am of the firm view that the maintenance contemplated by Sec. 3(1)(a) of the Act is limited to the *iddat* period while the fair and reasonable provision to be made in terms of the same section runs for the future much beyond the *iddat* period. As mentioned in the opening paragraph, except to this extent as regards the effect and import of the term "reasonable and fair provision" in Sec. 3(1)(a) of the Act, I express my absolute concurrence with regard to the rest of the conclusions and the reasoning issued therefore in the judgment of my learned brother, Sardar Ali Khan, J.

Part 4

Overview

Overview

How did we get here? Where do we go from here?

Seema Mustafa

Shah Bano and the Muslim Women Act a Decade on : The Right of the Divorced Muslim Woman to Matala is a major step forward in the struggle for gender justice. The documentation of the various aspects — domestic and international, political and social, legal and economic — of the controversial Supreme Court judgement granting maintenance rights to the divorced Muslim woman is simply invaluable for those seeking a re-interpretation of the Muslim Personal Law in India which will make it an instrument for the protection of the woman. The information carried in this volume gives sufficient argument for countering the mischievous propaganda of the Muslim fanatics in India, whose case basically rests on the propositions that (a) maintenance is anti-Islam and (b) modernistic judgements are an assault on Islam by an essentially Hindu state. Both arguments are effectively demolished by this volume with sufficient parallels being drawn from Islamic countries to make the fanatical claim ineffective. It has conclusively established, through legal discourse, that the divorced woman's right to *matala* is absolute. There are some differences in opinion to the extent and amount and this definitely needs to be defined in the Indian context. But to state that maintenance itself is un-Islamic is basically to insist that the Muslim Personal Law, as viewed by the Indian custodians of Islam, self-appointed and otherwise, may be exploited to create destitution but is not concerned with the resolution of the resultant problems.

The *Shah Bano* controversy was a turning point in the contemporary history of communal politics in India. It effectively brought out the confusion within the Congress government at the time about secularism and secular polity. The government used one central Minister to support the judgement granting maintenance to the divorced Muslim woman in Parliament. Within hours, it had a change of thought and fielded another central Minister to attack the

judgement. It had succumbed to what it interpreted as the pressures of the constituency (in crude terms, the Muslim vote bank) to reject the secular for the ultra-conservative. The controversy also brought out the disarray in secular thought which tried to combat the fanatical onslaught from many platforms and in different voices. The result was that secular opinion was unable to distance itself from the position taken by the conservative Hindu right wing Bharatiya Janata Party (BJP). As one involved in the street campaign against the government's decision to legislate against the court verdict, one remembers sitting through emergent meetings to discuss possible strategies to demarcate the secular opinion from the fanatical demands that sounded almost similar. We tried hard, but now when one looks back we did not succeed, and in the public perception there was little to choose between the secularists who had mixed the entire issue with the general demand for a Uniform Civil Code, and the BJP which was using the occasion to raise its usual anti-Muslim banner.

The political appeasement of the Muslim opinion [Editor: read appeasement of a vocal segment of Muslim politicians], encouraged hard-liners within the Congress and outside to press for a similar gesture in favour of the Hindu constituency. Secular protest was completely eclipsed at the time by the almost tidal Hindu reaction, partly genuine, partly generated, against what it perceived to be the government's complete subjugation to minority demands. The Rajiv Gandhi government was reminded of the overwhelming, unprecedented majority it had secured in the Lok Sabha largely as the result of a consolidated Hindu vote. An irresponsible government, which had few, if any, moorings in secular polity, appreciated the cold logic of this argument and opened the locks of the Babri Masjid-Ram Janambhoomi dispute at Ayodhya in Uttar Pradesh.

The clock has not turned back since then. The Babri Masjid was demolished by Hindu insurgents, under a Congress government, on December 6, 1992. The secular state of India fought back, this time with more care, maturity and vision. Academics, lawyers, journalists, social activists united in the cities to mount an offensive against the Hindu fascists. Through the rubble of the mosque also arose a more informed Muslim opinion, with intellectuals and liberals from this community taking the lead to assert their opinion for perhaps the first time in independent India. The *Shah Bano* protest had just about a handful of Muslim names to give it a certain legitimacy in the political world where such identities do matter. After the demolition of the mosque hundreds of liberals gathered to denounce the role of Muslim leaders and to insist upon the need for education, health and above all gender equality. Seminars and meetings were held in Delhi, Bombay, Lucknow, Baroda, Ahmedabad, Surat to insist upon the need

for reform in the Muslim Personal Law so as to make it more gender just and an instrument for the protection rather than the destitution of the Muslim woman. Secular groups joined this initiative which has acquired a momentum of its own, particularly now that most secularists, including even the Left parties, have agreed that a Uniform Civil Code can definitely be put on the back burner of reform. The initiative for change has to come from within.

It is thus, against this briefly sketched background that the exhaustive documentation here presented has to be seen. *Shah Bano* was a case that figures in all meetings on the question of reform and gender justice. There are a number of lessons to be drawn from it, details of strategy that have to be improved upon, in what is going to be a long drawn out battle for equality between man and woman on India soil.

Where do we go now? The most important immediate step in sorting out the confusion surrounding the Muslim Women Act and its impact on the rights of Indian Muslim woman is to impress upon the Supreme Court the urgent necessity of dealing with the (too-long ignored) petitions challenging this statute on constitutional grounds, and of providing an authoritative interpretation of those sections which may survive constitutional scrutiny. On the one level, the Act introduced an unacceptable discrimination based solely on religion — and thus openly violative of constitutional standards — between divorced Muslim women and divorced women of any other religion regarding access to the minimal protection against destitution provided by the secular Criminal Procedure Code. On another level, varying interpretations of the statute by State High Courts have introduced an additional, and unacceptable, discrimination between Muslim women subject to the *same national law* depending on the particular state of the Union in which they found themselves. National laws must have a common national meaning, and this can only be propounded by the Supreme Court of the land.

Part 5

Stop Press

Another dramatic pronouncement from the High Court of Bangladesh.

Bangladesh High Court held that Islam does not approve polygamy; thus, section 6, Muslim Family Laws Ordinance (permitting polygamy with prior permission of Arbitration Council) "is against the principle of Islamic law." Court recommended that section 6, MFLO, be deleted and replaced by a new section prohibiting polygamy.

Jesmin Sultana v. Mohammad Elias

(1977) 17 Bangladesh Legal Decisions 4

Mohammad Gholam Rabbani
and M. Bazlur Rahman Talukder, JJ.

Civil Revision No. 4591 of 1995.

Decided 26 November 1996

Judgment

[Synopsis: *The parties married in May 1992 but separated a few months later. The wife brought a suit against her husband for payment of prompt mahr and maintenance. The marriage contract fixed the mahr at Tk. 1,50,000/-, of which Tk. 60,000/- was prompt. The trial court decreed the prompt mahr and maintenance of Tk. 500 per month.*

On appeal by the husband, the lower appellate court reduced the prompt mahr to Tk. 40,000/-. The wife appealed. The husband disputed the wife's claim to maintenance, alleging that she had left his house of her own volition and without lawful cause.

The High Court held that the reduction in the amount of the prompt mahr was unlawful and restored the full amount.

Considering the wife's claim for maintenance, the High Court continued: —]

Mohammad Gholam Rabbani J: Petitioner [wife] has annexed with the supplementary affidavit a certified copy of an application dated 6.3.96 filed by her husband before the Chairman of the local Union Council seeking permission under section 6 of the Muslim Family Laws Ordinance to take a second wife, alleging that she is sickly and incapable to perform conjugal relations. From this attitude of her husband it is not difficult to hold that the petitioner was compelled to leave her husband and so she is entitled to get maintenance which both the courts below have fixed at Tk. 500/- per month. We affirm the decree of maintenance.

Section 6 of the Muslim Family Laws Ordinance states that no man, during the subsistence of an existing marriage, shall, except with the previous permission of the Arbitration Council, contract another marriage. But this section does not declare the second marriage as illegal or invalid, but only prescribes simple imprisonment for one year and fine on conviction for violating the provision of section 6. We, therefore, find it necessary to examine the issue as to whether Islam truly approves polygamy, or, more properly speaking, polygyny.

Since long, we find, there have been great difference of opinion regarding this issue and that arose while interpreting verse 3 of Sura Nisa as hereunder:

If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly, then only one.

Abdullah Yousuf Ali in his book, *The Holy Quran: Text, Translation and Commentary*, gives the following notes on the above-quoted verse:

Notice the conditional clause about the orphans, introducing the rules about marriage. This reminds us of the immediate occasion of the promulgation of this verse. It was after [the battle of] Uhud, when the Muslim community was left with many orphans and widows The occasion is past, but the principles remain. Marry the orphans if you are quite sure that you will in that way protect their interests and their property, with perfect justice to them

The unrestricted number of wives of the ‘Times of Ignorance’ was now strictly limited to a maximum of four provided you could treat them with perfect equality, in material things as well as in affection and immaterial things. As this condition is most difficult to fulfil, I understand the recommendation to be towards monogamy.

Thus “to be able to deal justly” is the condition precedent to marry more than one woman. Some of the commentators held that the expression implies equality in love and affection, and such equality being impossible in the weakness of human nature, the permission to take another wife amounts virtually to a prohibition. Others took the narrow view and held that equality means only equality in maintenance and lodgement.

We reject the narrow view of the meaning of the expression “to be able to deal justly” in view of the Hadith in *Sahih Al-Bukhari* as hereunder:

Narrated Al-Miswar bin Makhrame: I heard Allah’s Apostle (sm) who was on pulpit saying, “Banu Hashim bin Al-Mughira have requested me to allow them to marry their daughter to Ali bin Abi Talib, but I don’t give permission, and will not give permission unless Ali bin Abi Talib divorces

my daughter, because Fatima is a part of my body and I hate what she hates to see, and what hurts her, hurts me." [Hadith no. 157 in vol. III, translated by Dr. Mohammad Muhsin Khan.]

So Prophet of Islam (sm) did not allow his son-in-law Ali to take another wife as that would hurt his daughter Fatima, obviously on the understanding that Ali "shall not be able to deal justly" with the two women. And who else is to be followed other than the Messenger of Allah (sm) about whom Allah certified, "he commands them what is just and forbids them what is evil." (Seventh Sura Araf, verse 157.)

It is to be remembered that after the battle of Uhud in A.H. 3, verse 52 of thirty-third Sura Ahzab was revealed in A.H. 7 as hereunder:

It is not lawful for you to marry more women after this, nor to change them for other wives, even though their beauty attract you, except your right hand should possess (as hand maidens), And God doth watch over all things.

Prophet did not marry after this except a handmaiden named Mary. To Prophet she bore a son who died in infancy.

Polygamy is prohibited in Tunisia under the law of Personal Status, 1957. According to Tunisian jurists, "to be able to deal justly" is an injunction legally enforceable and under the modern social and economic conditions this essential condition for polygamy is incapable of fulfilment. So we find that section 6 of the Muslim Family Laws ordinance is against the principle of Islamic law. We recommend that this section be deleted and be substituted with a section prohibiting polygamy. Let a copy of this judgment be sent to the Ministry of Law.

Editorial Note:

The passage quoted in the Bangladesh judgment from Yusuf Ali's note to Quran IV:3 actually combines the two notes Yusuf Ali referenced to that verse. The second, correctly quoted by the Court, reads (emphasis added):

The unrestricted number of wives of the "Times of Ignorance" was now strictly limited to a maximum of four provided you could treat them with *perfect equality, in material things as well as in affection and immaterial things. As this condition is most difficult to fulfil, I understand the recommendation to be towards monogamy.*

We would draw attention to the fact that this note has been drastically edited in the edition of Yusuf Ali's work published by the Amana Corporation (Brentwood, Maryland, U.S.A.) and the International Institute of Islamic Thought (Herndon, Virginia, U.S.A.). In this edition the words and sentence italicized in the passage as set out above have been omitted and the truncated note reads merely:

The unrestricted number of wives of the "Times of Ignorance" was now strictly limited to a maximum of four provided you could treat them with equality.

This considerably diminishes both the meaning and the force of Yusuf Ali's statement — a statement even more relevant in 1998 than when originally made in 1934.

The Amana/IIT edition of Yusuf Ali is the edition most readily available today, at least outside of South Asia, and is widely distributed free or at subsidized prices by various Muslim organizations and the Embassies of various Muslim countries. It is unfortunate that the editors of this edition have assumed for themselves the privilege of tampering with the valuable notes which Yusuf Ali incorporated with his translation of the Quran.

Part 6

Epilogue

Epilogue

The Final Irony: Reform in Neighbouring Islamic Republics; Stagnation in Secular India

Javed Anand

Though neither seems to appreciate it, secular India as a whole and Indian Muslims in particular should be extremely grateful to the judiciary and the people of neighbouring, Islamic Bangladesh. Two historic judgments delivered by the Dacca High Court in the last two years have put into sharp focus the sheer hypocrisy of the *ulema* and Muslim political leaders in India and the total untenability of their obstinate defense, supposedly in the name of Islam, of clearly inhuman and blatantly male supremacist, anti-women family laws in the country.

In the January 1995 verdict, a two-judge bench of the Bangladesh High Court, comprised of Justice Gholam Mohammed Rabbani and Justice Syed Amirul Islam, ruled that "a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person."

More recently, in December 1996, another two-member bench of the same court, comprised of Justice Gholam Mohammed Rabbani and Justice M. Fazlur Rahman Talukder, has asked lawmakers in Bangladesh to pass a new law prohibiting polygamy because the "under the modern social and economic conditions . . . [the] essential condition [of just and equal treatment, under which the Quran permitted more than one wife to men] is incapable of fulfillment."

The Dacca High Court's pronouncements, whether on the question of maintenance or of polygamy, are in perfect consonance with the Quranic injunctions as interpreted by several highly-respected Islamic scholars as also with existing legislation in many Muslim societies today. Both verdicts from Bangladesh have come from Muslim judges relying exclusively on relevant verses from the Quran. Equally significant, neither of these rulings have evoked the "Islam in danger" battle-cry from any quarter in Muslim majority Bangladesh. But none

of this is of any consequence to the well-entrenched, all-male orthodoxy in India which evidently believes that "true Islam" now survives only in the midst of the largest concentration of "infidels" in the world.

An overview of Muslim politics in post-Ayodhya India produces a gloomy picture: given the, as yet, very tenuous hold of liberal, progressive, pro-reform sentiments among Indian Muslims, and the vote-bank compulsions of the country's "secular" politicians, the *ulema* and Muslim male politicians will, in the foreseeable future, continue to interpret the Quran from a male perspective and deny to divorced Muslim women what is theirs by right in Islam — *mataa* (post-*iddat* provision or maintenance).

Until recently, many had assumed that while demolishing the Babri Masjid in Ayodhya, Hindu fanatics had simultaneously, if unintentionally, buried the traditional Muslim leadership under the debris of the same desecrated structure. Having paid a very heavy price for the counter-belligerence of mindless *mullahs* and self-seeking politicians with their life, limb and property, ordinary Muslims, it appeared, were as sick of their self-appointed messiahs as of the saffron brigade. For the first time since Independence, conditions seemed ripe for the rise of a sober, rational, moderate, liberal voice among Muslims.

In the immediate aftermath of December, 1992, the expected seemed to be happening. In Delhi, homes of some fire-breathing Muslim leaders were stoned. Within days of the subsiding of the pogrom against Bombay's Muslims in January, 1993, over 2,500 of them, including intellectuals and slum-dwellers, issued a joint press statement, denouncing Ahmed Bukhari, the *naib-imam* of Delhi's Jama Masjid, for his call to the country's Muslims to greet Republic Day, January 26, that year, with black flags.

A few hundred Muslims from Delhi, Bombay, Aligarh and some other cities, who assembled in the Capital on January 19 to give birth to the "Muslim Intelligentsia," also criticised the *naib-imam's* ill-conceived plan and appealed to the community to ponder over where the militancy-for-militancy approach of its traditional leadership had landed them.

For the first time, a Mr. Muslim could step inside a Muslim *mohalla* in many parts of the country and speak, sometimes in the presence of a *moulvi saheb*, on forbidden topics without fear of being hounded out as a heretic. In a refreshing departure from the past, the shock treatment the community had received from the enemy without — Hindu communalists — appeared to have forced open its mind also to the problems within.

In May 1993, the Ahl-e-Hadith sect inadvertently triggered a national debate by merely reiterating its long-held belief through one of its regular publications that the practice of triple *talaq* (the Muslim male's privilege of being able to divorce his wife on whim and in an instant by simply pronouncing the magical mantra "*talaq*" three times in a single breath) was un-Islamic.

In response to the initial voices demanding an end to this blatantly anti-women practice, the *ulema* declared that the media was deliberately raking up an "unnecessary controversy" to divide the community and warned that any Muslim who opened his/her mouth on the subject was guilty of aiding and abetting the enemies of the community. But the "*fatwa*" failed to stem the flood of articles and letters to editors by Muslim women and men in different publications throughout the country. Even Urdu newspapers were forced to open their pages to the demand that the *ulema* declare the obnoxious practice of triple *talaq* un-Islamic.

The *ulema*, of course, did nothing of the kind. Instead, they took the ingenious position that instant divorce, "though theologically repugnant, remained legally valid in Islam"! Some retained the fond hope that an appropriate pronouncement on the subject will be made at the national meet of the All India Muslim Personal Law Board due to be held in Jaipur, Rajasthan, in October, 1993. The board did meet as scheduled but what emerged from it was not the anticipated denunciation of triple *talaq* but the decision to form Shariah Councils in every district in the country to educate Muslims on the Quranic injunctions on marital issues and to undertake arbitration in case of family disputes.

How would a *moulvi saheb* member of a local Shariah council be of any help to a woman whose husband has pronounced triple *talaq* on his wife, when the *moulvi saheb* himself believes that what the man had done was, "though theologically repugnant, legally valid"? The Board shed no light on the subject.

The only outcome of the Board's meeting was a media splash that India's Muslims now proposed to set up a parallel Shariah court system in India, arousing fears in the average Hindu that the followers of Islam in their midst were determined to distance themselves from the mainstream and bypass the official legal system.

Less than two years later, in 1995, the Muslim clergy's response to a judgment of the Supreme Court was in many ways reminiscent of the "Islamic fervour" of 1985 following the apex court's ruling in the *Shah Bano* case. The Supreme Court had then upheld the verdicts of the lower courts observing that the elderly Shah Bano Begum, who had been divorced by her husband, Mohammed Ahmed Khan, was

entitled to maintenance from him beyond the *iddat* period under section 125 of the new Criminal Procedure Code.

In upholding the maintenance order in favor of Shah Bano, the Supreme Court had relied on the same verses of the Quran on the basis of which the Dacca High Court, in January 1995, based its judgment of much more profound import (e.g., the post-*iddat* maintenance now a matter of right for divorced Bangladeshi women is not restricted in terms of amount, as is a maintenance order issued under the CrPC). But, while the latter verdict produced no tremors in Bangladesh, the court ruling in India nearly a decade earlier had triggered a virtual *jehad*. The emotion-charged, countrywide movement forced the then Prime Minister Rajiv Gandhi into reversing the apex court's verdict through the passage of the Muslim Women (Protection of Rights on Divorce) Act in 1986.

(Though not directly pertinent to the present paper, it is common knowledge that the arm-twisting of Rajiv Gandhi by the Muslim leadership in 1985-86 subsequently proved to be a highly potent weapon in the Hindu communal arsenal to tarnish the country's Muslims as a community with no respect for the law of the land and whose loyalties lay beyond India's borders. Worse still, within weeks of the passage of the Muslim Women's Bill by Parliament, the gates of the disputed Babri Masjid were reopened after nearly 40 years on the order of a district magistrate to enable Hindu worship of the Ram Lalla idol. This communal "balancing" act by Rajiv Gandhi's government spurred the Ramjanambhoomi movement which left in its six-year-long trail a whole chain of riots in different parts of the country and culminated in the demolition of the Babri masjid and widespread violence against Muslims).

While ruling on Shah Bano's plea for maintenance, the Supreme Court, unfortunately, had made some sweeping remarks on the status of women in Islam which provided a handle to the Muslim orthodoxy. A division bench of the apex court repeated the same mistake in 1995 when in their ruling on three petitions from Hindu women whose husbands had converted to Islam merely to marry a second wife,¹ one of the judges, Justice Kuldeep Singh, virtually cast aspersions on the Muslim community's loyalty to the nation.

Undoubtedly, some of Justice Singh's observations smacked of anti-Muslim prejudice. But what concerns us here is the reaction of the Muslim religious and political leadership to the court's direction to the Union government to file an affidavit by August 1996 informing the

1. *Smt. Sarla Mudgal, President, Kalyani v. Union of India*, AIR 1995 Supreme Court 1531.

judiciary what action the executive had taken towards meeting its constitutional obligation to bring about a uniform civil code applicable to all citizens of India.

At an all-India protest meet that followed, Maulana Asad Madni, the president of the Jamiat-e-ulema-Hind threatened that if any attempt was made to interfere in the "Allah-given" personal law of Muslims, if anyone dared "awaken the sleeping tiger," every adult Muslim would marry four Muslim women and produce such an abundance of children as to overwhelm the Hindus in India (sic, precisely the same illogical argument that Hindutva has effectively used against "proliferating" Muslims).

In the "Save the Shariat" meetings subsequently organised by the All India Muslim Personal Law Board and other Muslim bodies over the next few months, the clergy threatened a *jihad* — Muslims could bear the loss of life or property, but when their religion is in danger, the entire community would be ready to shed its life.

As if no lesson had been learnt from the previous decade, the Muslim religious leadership's reaction in 1995 was reminiscent of its belligerent behaviour following the *Shah Bano* judgment a decade earlier. The only difference was that this time the petitioners were Hindu women protesting against the bogus conversion of their Hindu husbands to Islam. There was no Shah Bano, a Muslim, to build a movement against, to target, hound, harangue, and finally bludgeon into withdrawing from a battle she had already won.

In the years before the *Shah Bano* judgment, the demand for a uniform civil code to replace the separate personal laws applicable to different religious communities in the matter of marriage, divorce, maintenance, inheritance, custody and adoption was frequently made by secular forces and women's groups who believed this was the only way to forge gender solidarity and to ensure justice for Indian women who were being discriminated against in different ways by all the prevailing personal laws.

But specially after the *Shah Bano* controversy, the secular demand for a uniform law for all citizens was appropriated by Hindu communalists and its pro-women thrust transmuted into a weapon against Muslims. For women's groups, the uniform civil code was necessary to ensure justice; for Hindutva, it became an acid test of Muslims' willingness "to join the national mainstream" and to abide by the laws of the land.

In practice, Hindutva's insistence on a common civil code has been used, very conveniently, by Muslim male chauvinists to justify their intransigence against any change in family laws. Because the chief

proponents of change in the last decade have been parties and organisations whose antipathy to Islam and Muslims is too well-known, the “Islam in danger” cry of the *ulema* and opportunist Muslim leaders in response has carried greater credibility with ordinary Muslims. This resistance, in turn, has reinforced in the popular perception Hindutva’s propaganda about Islam and Muslims as an intolerant, fanatical, anti-women lot.

If the Muslim hostility to the idea of a uniform civil code is to some extent understandable given the communalisation of the demand, it could be argued that both morally and strategically, the most effective way of blunting Hindutva’s campaign would be an intra-community initiative for reform — ban on triple *talaq* and polygamy, maintenance for divorced Muslim women, codification of Muslim personal law — to ensure greater gender justice while remaining within the framework of Islam. But it is evident from the development of the last few years that reform is the last thing on the mind of the *ulema* in India.

In 1995, a group of Muslim women from Bombay constituted themselves into a group to work on a model *nikahnama* (marriage contract).² The object of this perfectly Islamic exercise was simple: through dialogue to get the all-male Muslim Personal Law Board to endorse this model *nikahnama*. It was hoped that once this happened, the popular use of the model *nikahnama* would provide some protection to a Muslim woman. A draft of the proposed marriage contract was submitted to the Board about a year ago after several discussions with some of its representatives. Nothing has been heard on the subject since then.

2. The contract mentioned is reproduced in Lucy Carroll and Harsh Kapoor, *Talaq-i-Tafwid: The Muslim Woman’s Contractual Access to Divorce* (Grabels, France: WLUML, 1996), pp. 99-101. This contract is really quite innocuous. It stops far short of binding the husband to a monogamous relationship, or conferring on the wife a right of *talaq-i-tafwid*; and does not effectively protect the wife from being pressurized into renouncing her *mahr* (which could be done e.g. by rendering necessary the consent of her near relatives to any such transaction) or incorporate stipulations concerning post-*iddah* provision for the woman in case of divorce. See other *nikahnamas* reproduced in Carroll and Kapoor, op. cit.

Also reproduced in the *Talaq-i-Tafwid* volume (pp. 95-98) is the marriage contract drawn up more than fifty years ago by Professor A.A.A. Fyzee and Begum Sharifa Hamid Ali, a prominent worker in the cause of women’s rights. It should be noted that when Professor Fyzee himself republished the contract in his pamphlet, *The Reform of Muslim Personal Law in India* (Bombay: 1971) he added (p. 23) the important comment: “It may be [further] provided . . . that the husband shall provide alimony to the wife from the end of the *iddah* till the date of her remarriage or death, as the case may be. It is better to fix the alimony; and it is suggested that the alimony should be one-third of the income of the husband. It may be mentioned that this is altogether apart from obligation of the husband to maintain his wife till the period of *iddah*, or, if she is enceinte, till the birth of her child.” — LC.

In short, the *ulema* in India continue to remain totally hostile to any change whatsoever in the existing Muslim personal law. Their stand is simple: Our personal law is God-given and immutable; therefore, Muslims will never tolerate any interference in it by any human agency. No one knows it better than the *ulema* and Muslim politicians themselves that they lie when they say what they say. But who is to call their bluff?

It is futile to expect anything from political parties in India which swear by secularism. This is because, one, social reform is not on the agenda of any party in India; and, two, secularism may be fine as a credo, but since numbers matter in electoral politics, the temptation for politicians to cultivate "vote-banks" along caste and community lines is irresistible. Since the large majority of the Muslim masses are under the sway of the clergy, which leader would want to jeopardise his party's electoral prospects by alienating the *ulema* and the *moulvi sahebs*? Political expediency demands that the community be allowed "to decide on its own internal affairs."

If secular politicians in general have to be cautious in their approach, the predicament is worse for a Muslim politician who in most parts of India cannot expect to win an election except from a Muslim majority constituency. He is therefore under even greater pressure to keep the clergy on his side.

Courts offer the only hope in the foreseeable future.

In view of the current fragility of the political scenario, a legislative impasse may characterise politically sensitive matters, therefore the courts ought to take the initiative. The immediate priority must be a thorough examination of the Muslim Women (Protection of Rights on Divorce) Act, 1986, assessing its provisions vis-a-vis constitutional mandates and providing a definitive interpretation of its vague clauses, if and to the extent that they (or some of them) survive scrutiny on constitutional grounds. Until that happens, maintenance for the aggrieved daughters of Islam in India will remain a game of chance rather than an established legal right.