Syed Khalid Rashid's

MUSLIM LAW

V.P. Bhartiya

Fifth Edition

Eastern Book Company

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Syed Khalid Rashid's

Muslim Law

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Preface

The Fifth Edition of the book is in your hands with the case law brought up to December 2008. Some more recent developments pertaining to the resolutions passed by the Muslim Personal Law Board and other parallel organisations have been noted and discussed. It is a welcome sign that the Ulema is now increasingly reviewing old customs and adopting or suggesting modernisation to cope up with existing social norms and expectations. One more latest example is the decision taken by the Islamic Fiqh Academy in New Delhi in February 2008 to "recognise the right of a Muslim girl to repudiate a marriage contract with a boy who does not suit to her choice or which was forced on her against her will". It is a different matter that many organisations will cross swords now over this decision; what is welcome is the willingness of the seniors amongst the society to discuss the social problems instead of keeping mum in the name of "ancient custom". And every practice is not a custom, far less a "religious, sublime, indispensible" custom. For example objection to photograph for election identity card (see *M. Ajmal Khan* v. *Election Commission*, (2007) CLT 55). Moreover there is something like duty to advance national interest. The book tries to spur thinking in this direction. The learned readers' comments are most welcome.

As ever Shri Vijay Malik and the staff of the Eastern Book Company has been very helpful in the preparation of this edition also.

Indore **—V.P. Bharatiya**

Preface to the Fourth Edition

The Third Edition of the book received encouraging response, and the book was soon out of print. But more than this what clinched the decision to bring out the fourth edition was the tremendous development in Muslim Law that took place through the judicial decisions since the publication of the last edition. Landmark decisions affecting and changing some of the socially incongruous concepts relating to divorce, Mehar, maintenance, remarriage on motivated conversion, *wakf* beneficiaries, *Wakf* Boards, pre-emption, primogeniture, etc. have been delivered since the publication of the third edition. It is gratifying to note that the latest decisions have substantially reinforced the academic stand we adopted in the previous editions of both English and Hindi versions. This edition incorporates these latest developments.

Case law has not been just pasted, it has been digested, lucidly analysed and briefly imbibed in the text. Some more opinions of academic jurists have also been included. Students of LLB and LLM will hardly find anything lacking or overlooked in this edition. Still, readers' suggestions are most welcome particularly criticism.

The author is highly indebted to Shri Vijay Malik of Eastern Book Company and his staff for the helping hand they extended in preparing and shaping this book so excellently.

Jodhpur **—V.P. Bharatiya**

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The Concept and Background of Muslim Law

In a dark period of history when nothing but ruin, squalor and desolation remained of what were once great civilisations, when oppression, exploitation and the right of might prevailed, when human rights had ceased to be recognised, when superstitious and hedonic cults were followed at many places and man was still terrified of the forces of nature and gave a very low place to himself in the scheme of creation, was born Muhammad, the Prophet of Islam, on Monday the 12th Rabi-ul-Awwal (corresponding to the 29th August 570 A.D.) in the desert country of Arabia.[1]

1. The relevance of the study of Muslim Law in contemporary world

The importance of the study of Muslim Law can be estimated from the fact that it is applicable to some 15 crore Muslims in India, 12 crore in Pakistan and 13 crore in Bangladesh. Muslims in some twenty countries of Asia, Africa and Europe, follow Muslim Law. In other words, one-sixth of the total world population is following Islam. And if there is anything which is characteristic of and fundamental to that religion, it is the *Shariah*, or the Islamic Law.

Islamic Law gradually spread with the expansion of the Ottoman Empire in Asia, Africa and Europe and under the influence of the Delhi Sultan and the Mughals in the Indian subcontinent.

> "By the end of the medieval ages, the Islamic legal system stood the stress and strain of political vicissitudes and socio-economic upheavals in several parts of the world. The repercussions of the two World Wars, the fall of the Ottoman Empire and abolition of the Caliphate in Turkey, colonial expansion of Great Britain and France, emergence of small sovereign States in West Asia resulting into the growth of Arab nationalism, the rise of communism in Central Asia and some parts of Europe ceded by the Ottoman rulers, the social reform movements in Egypt, Iran and Indonesia, independence and partition of the Indian subcontinent, and numerous other

1. Athar Husain, *The Prophet of Islam* (Hamdard National Foundation, Delhi) at p. 1.

events of history led to revolutionary changes in the jurisdiction and scope of the traditional law of Islam."[2]

It is really surprising how *Shariah* has succeeded in preserving its basic character even in the face of all these odds and upheavals.

Law and religion in Islam are so intimately connected that they cannot easily be separated. The two streams of *Shariah* and *Fiqh* flow in a single channel. Today in Islam this is the greatest difficulty. *Shariah* embraces both law and religion, sometimes pulling each other in the opposite direction. The needs of the changing times placed yet another stress on the fabric of Islamic Law, and then it began melting. It was predictable because "laws are like metals in the crucible of time and circumstances; they melt, they gradually solidify into different shapes; they remelt and assume diverse forms. This process of evolution is coterminous with human society. Nothing is static except that which is dead and lifeless. Laws can never be static"[3]. Muslim Law is rising to the occasion because it has inbuilt corrective mechanism. The various stages of development reached in different countries of the world may be better understood by classifying these countries into three different groups:[4]

(*i*) The countries where classical Muslim family law remains unchanged to this day. These are Saudi Arabia, Yemen, Bahrain, Kuwait, Afghanistan, Maldive Sultanate, Chad, the Gambia, Gold Coast, Uganda, Sierra Leone, Guinea, Mali, Mauritania, Niger, Senegal and Somalia. In Europe, Greece and Yugoslavia are under a treaty obligation to take "all necessary measures in relation to Moslems to enable question of family law and personal status to be regulated in accordance with Muslim usage".

(*ii*) The countries where Islamic family law has been completely abandoned by modern statute law. These are Turkey, Albania, Kenya, Tanzania, Soviet Union and the six Central Asian Republics of the Soviet Union. It is, however, noteworthy that the Civil Codes of Turkey, Tanzania and Kenya do not conflict with the basic principles of the Islamic family law.

(*iii*) The countries where Islamic family law has been reformed through legislative process either by adopting provisions of the various schools of Islamic Law or by subjecting some of its institutions to certain regulatory measures. These are Lebanon, Egypt, Sudan, Jordan, Syria, Tunisia, Morocco, Algeria, Iraq, Iran, India, Pakistan, Malaysia, Indonesia, Singapore, Ceylon and Brunei.

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2. Tahir Mahmood, *Family Law Reform in the Muslim World* at p. 2.
3. Fyzee, *A Modern Approach to Islam* (Asia 1963) at p. 87.
4. See, *Family Law Reform in the Muslim World* at pp. 2-8.

These reforms in the sphere of family law represent a phenomenon of outstanding significance. They provide at once a mirror of social change in the Muslim world; and a measure of the progress of modernism in Islam, where law and theology always go hand in hand.

Thus, the *Shariah*—whether in its original or a somewhat modified form—still represents the family law of nearly 425 million Muslims. Second, that it survives in the Civil Codes of a number of Muslim States, and still represents the basic law throughout most of the Arabian peninsula. Third, that it represents a coherent, well documented and independent system of law which will amply repay comparative study. Fourth, that it still holds the key to the future, for on their attitude to this law the future development of the Muslim countries must largely depend.[5]

2. Conditions in Pre-Islamic Arabia

In the South-West of Asia, there is a peninsula known as Arabia. It is just like a tableland surrounded by Syro-Babylonian plain in the North, by Persian Gulf and the Sea of Oman in the North-East, by the Indian Ocean in the South, and by Red Sea and Gulf of Suez on the South-East. A vast sea of sand engulfs the whole peninsula, punctuated by bare rocks devoid of vegetation and occasionally by oases of palm trees and fields that look like islands amidst the surrounding desolation.

The burning sun and the hot sands are things to which the Arab has to grow accustomed. The rising and setting sun and the shadows it casts by day, and the position of the moon and the stars by night, are his sole guides. The Arab roams about in the desert sands in search of water or pasture, and in doing so the spirit of independence and characteristics peculiar to desert nomads is born in him. If his land is inhospitable, he considers hospitality one of the greatest virtues. Being born free, he is courageous and brave. Vendetta is his master passion. Once, describing the physical characteristics of the Arabs, Baron de Larrey, Surgeon General to Napoleon, remarked:

> "Their physical structure is in all respects more perfect than that of the Europeans, their organs of sense exquisitely acute; their size above the average of men in general; their figure robust and elegant, their colour brown, their intelligence proportionate to their physical perfection and without doubt superior, other things being equal, to that of other nations."

The Arabs are the purest surviving type of the Semites.[6]

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5. Anderson, "Significance of Islamic Law in the World Today", (1960) 9 *American Journal of Comparative Law* at pp. 191, 197.
6. Fyzee, at pp. 2-4, "*Arabs*" in *Encyclopaedia Britannica*, Vol. II (13th Edn.) at p. 284.

The Arabs themselves divide into the races who have peopled the peninsula into three grand sub-divisions, namely (*i*) the *Arab-ul-Baidah*, the extinct Arabs; (*ii*) the *Arab-ul-Ariba* or *Mutariba*, original Arabs, true Semites, whom tradition represents to be descended from Kahtan, and who, in their progress towards the South, destroyed the aboriginal tribes; and the *Arab-ul-Mustariba* or naturalised Arabs who, either as peaceful immigrants or as military colonists, introduced themselves into the peninsula, and who intermarried and settled among the original (*Mutariba*) Arabs.

(*i*) A form of marriage in which a man asks another for the hand of the latter's ward or daughter, and then marries her by giving her a dower. This form has been sanctioned and approved by Islam too.

(*ii*) A man desiring noble offspring would say to his wife: "Send for so and so (naming a famous man) and have intercourse with him." The husband would then keep away from her society until she had conceived by the man indicated and would only return to her when the pregnancy became apparent.

(*iii*) Several men, less than ten, used to go to a woman and have sexual connection with her. If she conceived and gave birth to a child, she would send for them, and they would be all bound to come, and then she would say: "You know what has happened. I have now brought forth a child. O so and so! (naming whomsoever of them she chose), this is your son." The person to whom the child was ascribed was bound to accept its paternity.

(*iv*) There were prostitutes who used to fix at the doors of their tents a flag. If a woman of this class gave birth to a child, the men who frequented her tent would be called and physionomists used to decide to whom the child belonged.

Islam had rejected all but the first form of marriage.

Before Islam, a woman was not a free agent in contracting marriage. It was the right of her father, brother, cousin or any other male guardian to give her in marriage, whether she was old or young, widow or virgin. There was even a practice prevalent of marrying women by force. There was also a custom of inheriting a deceased man's widows by his heirs, who used to divide them among themselves like goods.[7] There was no restriction as to the number of wives, which was exclusive of the number of slave girls which a man might possess. Husbands possessed unlimited powers to divorce. Sometimes they renounced their wives by means of "suspensory divorce", whereby the women were not free to marry again. The husbands were free to revoke the divorce and resume marital connection. Adoption among the Arabs was also prevalent. The birth of a daughter was regarded as calamity because of the degraded status of

7. Fyzee, at pp. 2-4, "*Arabs*" in *Encyclopaedia Britannica*, Vol. II (13th Edn.) at p. 284.

women. Thus many fathers used to bury their daughters alive as soon as they were born. On the death of an Arab his possessions devolved on his male heirs capable of bearing arms, all females and minors being excluded. The heirship was determined by consanguinity, adoption or compact.[8]

It is against this background that we shall see the far-reaching and humane reforms brought about by the Prophet and Islam. A study of the Chapters on Marriage, Dower, Divorce and Inheritance of this book will amply testify as to the improvements effected by Islam, particularly the way in which it has elevated the position of women.

3. Sources of Muslim Law

Among the Indian writers of books on Muslim Law, Abdur Rahim's *Muhammadan Jurisprudence* gives the best description of the sources of Muslim Law. But the difficulty is that his description covers exactly hundred pages, and it becomes difficult for an average student to grasp it fully. Briefly stating, Abdur Rahim's classification of the sources is as follows:

(*i*) Koran;
(*ii*) Hadith (Tradition);
(*iii*) Ijma (Consensus of Opinions);
(*iv*) Customs and Usages;
(*v*) Juristic Deductions:
  (*a*) Qiyas (Analogy),
  (*b*) Istihsan (Juristic Equity),
  (*c*) Istislah (Public Good),
  (*d*) Istidlal (Process of Inferring),
  (*e*) Ijtihad and Taqlid (Interpretation and Imitation).

A recent publication of an Arab writer, however, describes more precisely the above sources and should be preferred. Abdur Rahim's book written in 1911 could in no way grasp some of the modern theories.

Sobhi Rajab Mahmassani in his *Falsafat Al-Tashri Fi Al-Islam* (The Philosophy of Jurisprudence in Islam)[9], gives the following classification of the sources of Muslim Law:[10]

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8. The term "compact" signifies a custom by which two parties used to enter into a contract that, on the death of one of them, the surviving party of the contract would be an heir to the deceased or receive a certain fixed amount out of the estate. *See*, Abdur Rahim, *Muhammadan Jurisprudence* at p. 15.
9. The book has been translated into English from the original Arabic by Farhat J. Ziadeh and published in London (1961).
10. Mahmassani, at pp. 60-135.

A. SHARIAH SOURCES

(*i*) Koran,

(*ii*) Hadith or Sunnah (Tradition),

(*iii*) Ijma,

(*iv*) Qiyas,

(*v*) Equity and the absolute good:

- (*a*) Istihsan,
- (*b*) Al-masalih al-mursalah,
- (*c*) Istidlal and Istishab,

(*vi*) Ijtihad and Taqlid.

B. EXTRANEOUS SOURCES

(*i*) Legal Fiction;

(*ii*) Positive Legislation;

(*iii*) Custom.

A discussion of the above sources follows in the sequence. It is mainly based on Abdur Rahim, Mahmassani and Vesey Fitzgerald's books.

A. SHARIAH SOURCES

(*i*) **The Koran.**—Every word of Koran is that of God, communicated to the Prophet Muhammad through Gabriel (the angel). The Koran is not and does not profess to be a code of law or even a law book, nevertheless, it would be a mistake to overlook its influence in shaping the Islamic legal principles. The Koran exercised this influence in four different ways:

(*a*) Sometimes when the Prophet was faced with legal problems, he used to seek Divine guidance, and the answers which he received through Divine revelations formed a definite legal element in the Koran.

(*b*) The non-legal texts of Koran which deal with morality and conscience have an effect on the legal science of Islam. For example, the Koran says, "They will ask thee concerning wine and gambling. Say, in both is sin and advantage to men. But the sin thereof is greater than the advantage."

(*c*) It is explicitly stated in numerous texts of the Koran that the Law of God has also been revealed earlier. Therefore, it becomes probable that the early Muslims might have taken some help from other legal systems. Qiyas and logical deductions used by the Islamic lawyers have something common with the Rabbinical (Jewish) legal system.

(*d*) The Koran gave the idea that law is the direct Commandment of Allah. Since He is one, His law must be a 'single whole'. It is interesting to

see that in their search for this 'single whole', the builders of the Islamic legal system have developed a very elaborate legal science.

(*ii*) **Hadith or Sunnah (Tradition).**—Abdur Rahim classified Traditions into the following three categories:

(*a*) HADITH MUTWATIR (CONTINUOUS).—Those which have received universal acceptance and are narrated by an indefinite number of men belonging to the categories of Companions, Successors and Successors of Successors.

(*b*) HADITH MASHHOOR (WELL KNOWN).—These were reported by a limited number of Companions in the first instance and thereafter fulfilling the conditions of a continuous tradition.

(*c*) HADITH AHAD (ISOLATED).—These rest upon the testimony of one or more narrators, who are limited in number; not fulfilling the conditions of either of the above two classes.

The importance of *Hadith* as an important source of Muslim Law has been laid down in the Koran, emphasised by the Prophet, recognised by his immediate successors and other companions, and accepted by all the important orthodox Muslim jurists.[11]

The Koran says: "Whatever the Prophet gives accept it, and whatever he forbids you abstain from it." (49 : 7). It also says: "He does not speak out of his desire. It is nought but the revelation revealed (to him)."

The Prophet once said to his followers: "So long as you hold fast to two things which I have left among you, you will not go astray: God's Book, and His messenger's *Sunnah*."

The successors of the Prophet followed the practice of the Prophet. If they did not know of any decision of the Prophet on a subject, they made enquiries from the companions about it and if any of them informed them of any *Hadith* on the subject, they decided the case accordingly. They, however, always tested the reliability of the traditions.

All the important orthodox Muslim jurists are unanimous in upholding the validity of *Hadith* as a source of Islamic Law.

Before closing the discussion on Traditions, it seems appropriate to point out the recent so-called 'Modern Theories' regarding Traditions whereby those bigwigs as Snouck Hurgronje, Goldziher and Schacht have tried to convince that every Tradition is unreliable unless otherwise proved, is not only wrong but an attempt to represent Traditions as an edifice created by forgery and fabrication. In the second edition of his book, Fyzee tacitly agreed with the 'Modern

11. Dr. M. Zubayr Siddiqui, "The Importance of *Hadith* as a source of Islamic Law", *Studies in Islam*, (January 1964) 19 Vol. I, No. 1, Quarterly Journal of the Indian Institute of Islamic Studies, New Delhi.

Theories', but a more detailed study of the problem prompted him to condemn the above attitude of orientalists in the third edition of his book. He accepts that "a large number of traditions ascribed to the Prophet and their chain authorities are not reliable. This is not some New Revelation. The Islamic authorities themselves recognise that a number of such stories are *daif* (weak; not to be relied upon). Now this fact, duly exaggerated, has produced two unfortunate results, the orthodox *ulema* consider it as an attack on the *Shariah* by totally destroying one of its principal foundations, namely *Sunnah*. On the other hand, the superficial student of the law considers the theory a godsend, and takes the opportunity to repeat *ad nauseum* some ill-considered remarks by serious scholars, and to represent the *Hadith* as an edifice created by forgery and fabrication:

> "Both views appear to be wrong. The Islamic science of *Hadith* has not been and cannot be demolished by orientalists labouring under the handicaps of imperfect knowledge and lack of faith... Generalisations impugning a system which has lasted fourteen centuries and created a stable pattern of social behaviour and a well-defined path of spiritual discipline, should be undertaken with due hesitation, and not without exhaustive examination of all the relevant facts."[12]

The same view has been expressed by another modern author, Mahmassani. He says that the existence of false Traditions should not be taken to imply, as a number of orientalists have alleged, that every tradition should be considered false until the contrary is proved. The doctors of the science of traditions did not accept traditions uncritically. In their criticism of narrators, and in their search for chains of authority, accuracy and trustworthiness, they had established a scientific and truthful criterion which made study in this field reliable and trustworthy.[13]

(*iii*) **Ijma (Consensus of Opinions).**—*Ijma* has been defined as the agreement of the Muslim jurisconsults in any particular age on a juridical rule. The authority of *Ijma* as a source of law is founded on Koranic and *Sunnah* texts; one each of which are given here:

> "O ye who believe; Obey God and obey the Prophet and those of you who are in authority, and if ye have a dispute concerning any matter refer it to God and the Prophet." (Koran 4 : 59)

> "There can be no consensus on error or misguided behaviour amongst my people." (Tradition)

Ijma has been classified into three types:

(*a*) *Ijma* of the Companions of the Prophet;

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12. Fyzee, vi-vii.
13. Mahmassani, at p. 76.

(*b*) *Ijma* of the Jurists; and

(*c*) *Ijma* of the People.

While the first type is universally accepted and is incapable of being repealed, the other two types are somewhat disputed.

The Shia School did not accept *Ijma* except when it emanated from the family of the Prophet or unless the jurisconsults were endorsed in their consensus by the infallible Shia Imam. Sunnis, on the other hand, hold that since Koran enunciated only a few rules of law which, after the death of the Prophet, who used to give guidance, are by no means sufficient to cover the numerous questions of day to day developments, *Ijma* becomes necessary in the circumstances. As the learned alone are competent to make such deductions, their opinion on any question must be of valid authority.

Ijma may be constituted by decision expressed in words or by practice. Both are equally authoritative.

A few of the important requirements for the validity of *Ijma* are: (*a*) It shall not come into conflict with Koran or *Hadith*; (*b*) Once a question is determined by *Ijma*, it cannot be reopened by individual jurists; (*c*) One *Ijma* may be reversed by a subsequent Ijma; and (*d*) When the jurists of an age have expressed only two views on a particular question, a third view is inadmissible.

In the opinion of Abdur Rahim, there is one serious defect in the rules regarding *Ijma*. It is the omission to provide a definite and workable machinery for the selection of the jurists who are qualified to take part in *Ijma*, and for ascertaining, collecting and preserving the results of their deliberations in an authoritative form.[14]

Ijma has made a worthy contribution to Islamic Law since it has made possible changes to suit the needs of changing times and usages, and inasmuch as it has been influenced by the opinions of jurists in all cases not provided for in the Koran or the traditions, or where those provisions were not explicit.[15]

(*iv*) **Qiyas (Analogy).**—With the conquests and the expansion of the Islamic State, and as centuries went by, new cases occurred which were not provided for in the Koran, the *Sunnah* or the *Ijma*. The jurists found themselves compelled, in seeking solutions, to have recourse to reason, logic and opinion. Analogy thus became the fourth source of the Islamic Law.[16]

Qiyas or analogy is a process of deduction by which the law of a text is applied to cases which though not covered by the language, are governed by the reason of the text. Hanafis define it as:

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14. Abdur Rahim, at pp. 135-136.
15. Mahmassani, at p. 78.
16. *Ibid*, at p. 79.

"An extension of law from the original text, to which the process is applied, to a particular case, by a common *illat* or effective cause, which cannot be ascertained merely by interpretation of the language of the text."[17]

The following example would make the above rule clear:

Strong drink, for example, is prohibited by explicit provisions. The cause for the prohibition is the intoxicating effect. If we assume that wine had not been explicitly prohibited, we are still able to equate it by analogy to strong drinks in general, since the cause for the prohibition is the effect of intoxication, to which both give rise. Similarly if there is no intoxication, there is no prohibition.[18]

Abdur Rahim says that all the four Schools of the Muslim Law accept the authority of *Qiyas* as a source of law.[19] But Mahmassani declares that it was one of the causes of conflict between the Schools. The Imamiyah Shia rejected it; Daud-al-Zahiri and his followers did likewise; however, the majority of jurists and the Zaydiyah Shia accepted it.[20] In fact the main point of difference was the extent to which analogy could be relied upon.

Arguments against *Qiyas*.—The anti-analogy group alleged that there was no need for it because the Koran was sufficient. They quoted the following texts:

"And we revealed the book unto thee as an exposition of all things." (Koran 16 : 89)

"We have neglected nothing in the book." (Koran 6 : 38)

"The affairs of Israelites were in proper order, until those born of slave girls increased in numbers, and began to deduce from what had been laid down, things which had never been laid down, and thus they, themselves went astray and led others astray."

Arguments in support of *Qiyas*.—The pro-analogy group contends that the first two texts cited above are valid, and it is accepted that the guidance for every Muslim in all matters has to be found in Koran, but they argue that the law relating to few questions alone are expressly laid down in the Koran, and as regards the rest, it merely affords indications from which inferences have to be drawn.

As to the warning contained in the last mentioned text, they argue that the power of making *Qiyas* is only given in the hands of Muslim jurists, who have to be qualified in many respects and have to conform to many strict rules. In the circumstances, these jurists cannot be equated for the ignorant slave-born Israelites whose deductions were arbitrary and wild.

17. Abdur Rahim, at p. 138 citing *Jaudih*, 302.
18. Mahmassani, at p. 79.
19. Abdur Rahim, at p. 137.
20. Mahmassani, at pp. 79-80.

In their support, the pro-analogy group cite many Koranic texts and traditions, a few of which are as follows:

> "As for these similitudes we cite them for mankind but none will grasp their meaning save the wise." (Koran 29 : 43)
>
> "Learn a lesson, O ye who have vision to see." (Koran 59 : 2)
>
> "Give your rulings in accordance with the (provisions of the) Book and the *Sunnah* if such are available. If you do not find such provisions, have recourse to your opinion and interpretation." (Tradition)

The analogy is based on very strict logical and scientific principles and thus it should not be confused with opinions based on mere whims.

(*v*) **Equity and the absolute good.**—Under this head may be grouped those sources which have their origin in equity or absolute good. Mahmassani says:

> "Real justice and equity are the basis of the *Shariah*, because it is divine in origin and comprises in its rules the fundamental principles of religion, morality, and economic transactions. It was natural, therefore, that these rules should overlap and be influenced by one another. It was natural also that the sources, bases, sciences and studies of these rules should be integrated in one whole".[21]

We shall now discuss briefly these sources.

(*a*) ***Istihsan* (*Preference*).**—*Qiyas* has been accepted as a definite source of law, and it cannot be easily overridden. But in the presence of a basis stronger than *Qiyas*, such as a text of Koran, *Hadith* or *Ijma*, the *Qiyas* would be set aside and the 'stronger basis' would be adopted through juristic preference or Istihsan. The following example shall make the principle clear:

The sale of a non-existent thing, namely a thing which is not in existence at the time of the signing of the contract, is void. Since benefits and services, according to the Hanafi School, are not considered in existence at the time of the contract, the contract of hire was considered as the sale of a thing which is not in existence and therefore, by analogy, void. However, the contract of hire was sanctioned by the Koran, the *Sunnah* and *Ijma*. All these are bases which are more substantial than analogy. Thus, analogy was set aside and transactions of hire were considered permissible through "preference".[22]

This sort of deduction, namely the setting aside of analogy in the presence of a stronger source, is called *Istihsan* or preference.

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21. Mahmassani, at p. 84.
22. *Ibid*, at p. 85.

Istihsan gave an elasticity and adaptability to *Shariah*. "In fact", says Abdur Rahim: "if we call analogical deductions the common law of the Muhammadans, then *Istihsan* may be relatively styled their equity."[23]

(*b*) ***Al-masalih al-mursalah (Public Interest)***.—Imam Malik approved 'public interest'as one of the sources of the *Shariah*. He named this new source *al-masalih al-mursalah*. These interests have not been covered by any text of the *Shariah* and therefore are considered as *mursal* i.e. set loose from those texts.

Mahmassani gives many examples to illustrate this rule; a few of these are as follows:[24]

(*i*) The imposition of taxes on the rich in order to meet the costs of the army and to protect the realm.

(*ii*) If the infidels in war should shield themselves in advance by Muslim prisoners of war, public interest permits the killing of the Muslim prisoners of war in the course of fighting the infidels, if such action should be found essential to contain and ward off the foe and to protect the interests of the Muslim people as a whole.

Abdur Rahim says that the Maliki jurists never took full advantage of this principle, and many followers of that School consider the doctrine to be too vague and general to be useful in making legal deductions.[25]

(*c*) ***Istidlal and Istishab.***—*Istidlal* or deduction is an effort to reach at some rule acting on certain basis. It connotes a special source of law derived from reason and logic. An example of deduction by logic is as follows:

Sale is a contract; the basis of every contract is consent; it is necessary therefore that consent be the basis of sale.[26]

This source of law is mainly recognised by Malikis and Shafiis, while Hanafis regard it as only a special mode of interpretation.

Istishab literally means permanency. Technically, it is used to denote the things whose existence or non-existence (proven in the past) should be presumed to have remained as such for lack of establishing any change.

As an example of *Istishab* may be mentioned the case of a man who has disappeared, and whose whereabouts are not known. The Shafiis would treat such a man as living for all purposes of the law until his death is proved, so that his estate will not be distributed among his heirs, and he will be allotted his share in the estate of a person from whom he is entitled to inherit, and who happens to die during his disappearance. The Hanafis say that the presumption that a

23. Abdur Rahim, at p. 164.
24. Mahmassani, at p. 88.
25. Abdur Rahim, at p. 166, citing *Mukhtasar*, Vol. I at pp. 281-9.
26. Mahmassani, at p. 90.

particular state of thing continues until the contrary is proved is valid only to the extent it serves to protect existing rights, and not for establishing or creating a new right. Therefore, in the above case they would agree with the Shafiis so far that they would not allow the property of the man who has disappeared, to be distributed among the heirs, but they would not recognise his right to inherit from the person who has died since the man's disappearance.[27]

(*vi*) Ijtihad and Taqlid.—*Ijtihad* (interpretation) in the linguistic sense means the expanding of effort. As a technical term it means effort in seeking and arriving at rules from the various sources of law. It is the opposite of *Taqlid* (imitation) where the opinions of others are followed without understanding or scrutiny.

Since Islamic Law has been derived from the Koran, the *Sunnah*, *Ijma*, *Qiyas*, *Istihsan*, etc., interpretation or *Ijtihad* serves as a medium in deducing rules from these sources.

Towards the end of the Abbasid period, however, Sunni jurists declared that the "door of interpretation" was closed. The reasons were—(*i*) absence of qualified persons competent to make *Ijtihad*, and (*ii*) a belief that the exposition of principles by the four Sunni Schools was sufficient to meet all the future requirements.

Ijtihad has been applied more extensively by the Imamiyah Shias than by the followers of the Sunni Schools. To the Shias, the door of interpretation has always been wide open, and still is.

B. Extraneous Sources

Those sources which have not been mentioned by the classical jurists, but which have an impact in the evolution of Muslim Law, are termed as extraneous sources. These sources are the direct legislation by the State, customs and usages, and legal fiction.[28]

(*i*) Legal fiction.—We find many examples of legal fictions in the opinions of Roman jurists and in the precedents of English courts. They are all based upon the contention that the old law remains ostensibly unaltered, while, in reality it has undergone changes and modifications. In Islamic Law too, there are such instances.

The inhabitants of Bukhara had been accustomed to long-term leases of land. But as the Hanafi School did not approve long-lease contracts for orchards, recourse was made to a legal fiction whereby the orchard was sold and the vendor retained the right to redeem it.

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27. Abdur Rahim, at pp. 167-168.
28. Mahmassani, at p. 105.

This form of sale was obviously a legal fiction to circumvent the prohibition of long-lease contracts. Mahmassani gives many other such examples and shows that legal fiction can also be a source of law.[29] At the same time he also says that this source is approved by Hanafis and some Shafiis only, while Malikis, Hanbalis and a majority of Shafiis do not approve of it.

(*ii*) **Positive legislation.**—The history of the Islamic States shows that the Caliphs and the Sultans enacted laws either directly or indirectly whenever public interest called for such action. The legality of such legislation is based on Koran and tradition:

> "O ye who believe! Obey God and the Prophet and those of you who are in authority." (Koran 4 : 59)

> "He who obeys me obeys God and he who disobeys me disobeys God; he who obeys the emir obeys me and he who disobeys him disobeys me...." (Tradition)

It must, however, be borne in mind that not every command of a King should be followed, but only those which are right and just. *Shariah* also places certain limits on the Sultan's jurisdiction to issue such laws.

(*iii*) **Customs and usages.**—Before the advent of Islam in Arabia, customs were the basis of the entire social life, religion, morality, trade and commerce. No codified law existed.

After the advent of Islam, Koran and the tradition took place of the custom, which lost much of its importance. Nevertheless, it influenced the growth and formation of *Shariah* in several ways:[30]

(*a*) Several texts, particularly traditions are based on usages.

(*b*) A part of the *Shariah* based on tacit or silent approval of the Prophet comprises many of the Arab customs.

(*c*) Imam Malik says that the customary conduct of the citizen of Medina was a sufficient *Ijma* to be relied upon in the absence of other texts.

(*d*) In the course of their conquest, when the Arabs came upon customs hitherto unknown to them, and which were not in conflict with any of the *Shariah* texts, those customs made inroads into the *Shariah* by means of *Ijma*, *Istihsan*, etc.

The practice of a few individuals or of a limited class of men will not become custom. Nor would a usage acquire the force of law so long as it is confined to a particular locality and has not found general acceptance. The custom has authority so long only as it prevails, so that the custom of one age has no force in another age. There is agreement of opinion among the Sunnis,

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29. *Ibid*, at pp. 120-124.

30. Mahmassani, at p. 132.

that custom overrides Qiyas (analogy), and remains legally operative even if it is opposed to a rule of law based on Qiyas.[31]

Here, the enactment of the Muslim Personal Law (Shariat) Application Act, 1937 deserves our attention. It was passed with the express purpose of repealing those customs which though contrary to Muslim Law came to be prevalent among Indian Muslims. Custom has thus now little to do with the development of Muslim Law. However, the Shariat Act, 1937 allows Muslim Law to be superseded in matters of (*i*) agricultural lands; (*ii*) testamentary succession among certain communities; and (*iii*) charities, other than *wakf*. These exceptions, particularly that in case of testamentary succession, require a serious re-examination. If *intestate* succession has been guaranteed by Section 2 of the Act to be governed by Muslim Law, it is illogical and strange to allow *testate* succession to be governed by customs which may be opposed to Muslim Law.

4. The birth of Shia and Sunni sects

"The unhappy schism", says Ameer Ali, "which at this moment divides the Islamic world into the two great sects of Shias and Sunnis, owed its origin to secular causes which led ultimately to a wide divergence in their juridical conceptions".[32] It is interesting here to trace the reasons which led to the formation of Shia and Sunni sects and then the establishment of different schools of law among themselves.

It was on the question of *Imamat* (leadership of Muslim Commonwealth) that the difference between Shias and Sunnis arose. Shias do not accept the authority of the *Jamat* (or the universality of the people) to elect a spiritual chief who could supersede the claims of the persons indicated for this purpose by the Prophet himself. Sunnis contend that the Prophet never indicated any person to act as the spiritual chief, and he should be elected. Difference on this point assumed new dimension when immediately after the death of the Prophet it became necessary to elect a Caliph or successor to assume the leadership of Muslims. The kinsmen of Muhammad, who were called Hashimites, asserted that since Ali was a member of the Prophet's family who had also been pointed out by the Prophet as his successor, he should become the Caliph. The other group of Muslims, known as Koreshites, insisted on election, and elected Abu Bakr to the office of the Caliph. After three years Abu Bakr died and Omar succeeded him. On his death the Caliphate was offered to Ali "on condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely on his own judgment." Another companion of the Prophet,

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31. Abdur Rahim, at pp. 136-137.
32. Ameer Ali, *Mohammedan Law*, Vol. 1 (3rd. Edn., 1904) at p. 33.

Osman, consented to the terms imposed by the electoral body and became the third Caliph. The political events that took place during his Caliphate elucidate the history of the deplorable schism which divided the Muslim world into two sects.

Osman's good nature made him a tool in the hands of his kinsfolk. Soon they dominated over him. His uncle, Hisham, and especially Hisham's son, Merwan, in reality governed the country, only allowing the title of Caliph to Osman, and the responsibility of the most compromising measures, of which he was often wholly ignorant. Osman married his daughter to Merwan and made him his *vazir*. He also made his uterine brother Walid, the Governor of Kufa; his foster brother Abdullah-ibn-Saad-ibn-Surrah, the Governor of Egypt and confirmed Muawiyah in the governorship of Syria. All these persons were shortly to play very important roles.

Things in Egypt were not moving in the right direction. A deputation of twelve thousand Egyptians came to Osman with their grievances. They were turned back with the assurance that their grievances could be looked into. On their way back, however, they intercepted a letter written by Merwan, instructing Abdullah-bin-Abisarah to massacre them in a body. Enraged at this treachery, they turned back to Medina and killed the Caliph.[33] This story has been proved baseless by Mr Athar Husain in his book on Khulfai Rashideen. Upon Osman's death, Ali was elected to the office of the Caliph. It was a signal for Muawiyah to raise the standard of revolt. But soon he was defeated in one battle after another by the troops of Ali. He appealed to arbitration which was agreed upon by Ali. Abu Musa-al-Ashaary represented Ali, and Amir-ibn-ul-Aas acted on behalf of Muawiyah. Ameer Ali graphically describes the events which followed:

> "Amir led Abu Musa to believe that the removal of both Ali and Muawiyah, and the nomination of another person to the headship of Islam, was necessary to the well-being of the Muslims. The trick succeeded; Abu Musa ascended the pulpit and solemnly announced the deposition of Ali. After making this announcement he descended aglow with the sensation of having performed a virtuous deed. And then Amir smilingly ascended the pulpit vacated by Abu Musa, the representative of Ali, and pronounced that he accepted the deposition of Ali, and appointed Muawiyah in his place. Poor Abu Musa was thunderstruck; but the treachery was too patent, and the Fatimides refused to accept the decision as valid. Both parties separated vowing undying hatred towards each other. Ali was shortly after assassinated...(and it enabled Muawiyah) to consolidate his power both in Syria and Hijaz. On the death of Ali, Hasan, his eldest son, was raised to the

33. Ameer Ali, *The Spirit of Islam* (London 1965 first published in 1922) at pp. 294-95.

Caliphate. . . Before many months were over, he was poisoned to death."[34] And Muawiyah became the Caliph.

During Muawiyah's time, the followers of the House of Muhammad began to be called "Shias" or "adherents". Later on, during the Abbasides period, the person who gave preference to election over hereditary succession assumed the name of *Ahl-us-Sunnat wal Jammat* (People of the Traditions and the Assembly).

Up to this time the difference between the two sects was mainly political. Now it began to assume legal and doctrinal form. Some of the important grounds of difference were as follows[35]:

Shias reject all traditions not handed down by Ali or his immediate descendants—those who had seen the Prophet and were well acquainted with him.

According to the Shia doctrine, the oral precepts of the Prophet are in their nature supplementary to the Koranic ordinances, and their binding effect depends on the degree of harmony existing between them and the laws of the Koran.

The Sunnis, on the other hand, base their doctrines on the entirety of the traditions. They regard the harmonious decisions of the successive Caliphs and of the general assemblies of Muslims (*Ijma-ul-Ummat*) as supplementing the Koranic rules and regulations, and as almost equal in authority to them.

The Shias repudiate entirely the validity of all decisions not passed by their own spiritual leaders and *Imams*. In the application of private or analytical judgment, and in drawing conclusions from the ancient precedents, they also differ widely from the Sunnis.

Among Sunnis, religious and state affairs are the same; the Caliph is the *Imam*—temporal chief and also the spiritual head.

According to Shias it is not so. Partly in consequence of the mysterious disappearance of their last *Imam*, and the existing belief that he is still alive, and partly owing to the "frequent repression from which they have suffered", the Shias have entirely dissociated the secular from the spiritual power. For them, religion and the State are entirely distinct from each other.

34. Ameer Ali, *The Spirit of Islam* (London 1965 first published in 1922) at pp. 294-95.
35. *Supra*, n. 26 at pp. 36-38.

5. The Schools of Muslim Law

(*i*) SUNNI SCHOOLS

(*a*) The Hanafi School.—This is the most important of the four Schools of the Sunnis. Its founder was the Great Imam Abu Hanifa. The main features of this School are[36]:

(1) Less reliance on traditions unless their authority is beyond any doubt;

(2) Greater reliance on *Qiyas*;

(3) A little extension of the scope of *Ijma*; and

(4) Evolving the doctrine of Istihsan, i.e., applying a rule of law as the special circumstances required.

Among the most famous disciples of Abu Hanifa were: Abu Yusuf and Imam Muhammad. Through them the Hanafi School spread to fame. The credit for recording the jurisprudence of the Hanafi School is due to the Imam Muhammad. The disciples of Abu Hanifa also had pupils who achieved renown; they included Hilal, Ahmad-ibn-Mubir and Abu Jafar.

This School is followed in Syria, Lebanon, Turkey, Egypt, Afghanistan, Pakistan, India, China, etc. Its adherents constitute more than one-third of the Moslems of the world.

(*b*) The Maliki School.— Imam Malik is the founder of this School. The main distinctions of this School are as follows:

(1) Acceptance of Tradition which were, in the opinion of Imam Malik, authentic, even if the Tradition carried the authority of only one narrator.

(2) Acceptance of the practices of the people of Medina and of the sayings of the Companions of the Prophet.

(3) Recourse to analogy (*Qiyas*) only in the absence of an explicit text.

(4) Making use of a source unique to this School, known as *al-masalih al-mursalah* (public interest).

The pupils of Imam Malik included Imam Muhammad and Imam Shafii.

Medina was the birthplace of the Maliki School and from there it spread throughout the Hijaz, North Africa and Spain. It is still predominant in Morocco, Algeria, Tunisia and Tripalitania, the Sudan, Bahrain and Kuwait.

(*c*) The Shafii School.—This School owed its origin to the efforts of Imam Shafii, who during the early part of his academic career was a follower of Imam Malik. However, his journeys and experiences changed his views and led him to begin a school of his own. This School was a compromise between the Hanafi

36. Verma, at p. 6.

and Maliki Schools. Mahmassani beautifully sums up the philosophy of this School in the following words:

> "He (Imam Malik) would accept the four sources of Law; the Koran, the *Sunnah*, consensus, and analogy. He would also accept *Istidlal*. However, he rejected what the *Hanafi* School called *Istihsan* (preference) and what the Maliki School called *al-masalih al-mursalah* (public interest)".[37]

Imam-al-Shafii was the first to compile the sources of law. His most famous pupil was Ahmad-ibn-Hanbal.

This School is followed in many parts of Egypt, Syria and Lebanon (particularly in the city of Beirut) and also in Iraq, Pakistan, India, Indo-China, Java and among the Sunni inhabitants of Iran and Yemen. It is predominant in Palestine and Jordan.

(*d*) **The Hanbali School.**— The founder of the fourth Sunni School is Imam Hanbal. He was a more strict follower of the traditions than others and restricted Qiyas and Ijma within narrow limits. The foundation of this School rests on five main sources[38]:

(*i*) The Koran;

(*ii*) The *Sunnah*;

(*iii*) The *Ijma* of the Companions of the Prophet, if there was nothing to contradict them, and the saying of certain of the Companions when these were consistent with the Koran and the *Sunnah*;

(*iv*) *Zaif* and *Mursal* traditions i.e. traditions having a weak chain of transmission, and lacking in the names of some of the transmitters; and

(*v*) *Qiyas*, whenever it was necessary.

This School is the least widespread of all the Sunni Schools. Today, it is the official School of the Kingdom of Saudi Arabia, and has followers numbering about fifty lakhs in the Arabian Peninsula, Palestine, Syria, Iraq, and other countries.

Extinct Schools.—There were many Sunni Schools which came to an end with the passing of time. The three most important of such extinct schools are[39]:

(1) The Awzai School (died 2nd Century A.H.),

(2) The Zahiri School (died 8th Century A.H.), and

(3) The Tabari School (died 15th Century A.H.).

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37. Mahmassani, at p. 27.
38. *Ibid*, at p. 30.
39. See *Ibid*, at pp. 33-34.

(*ii*) SHIA SCHOOLS OR SECTS

As discussed above, the main reason which gave birth to Shia and Sunni Schools was the dispute over *Imamat* (leadership of Muslims).

The question of who should be *Imam* caused the Shias to split amongst themselves, and to form rival sects. The most important of these sects, which cannot be properly called Schools, are:

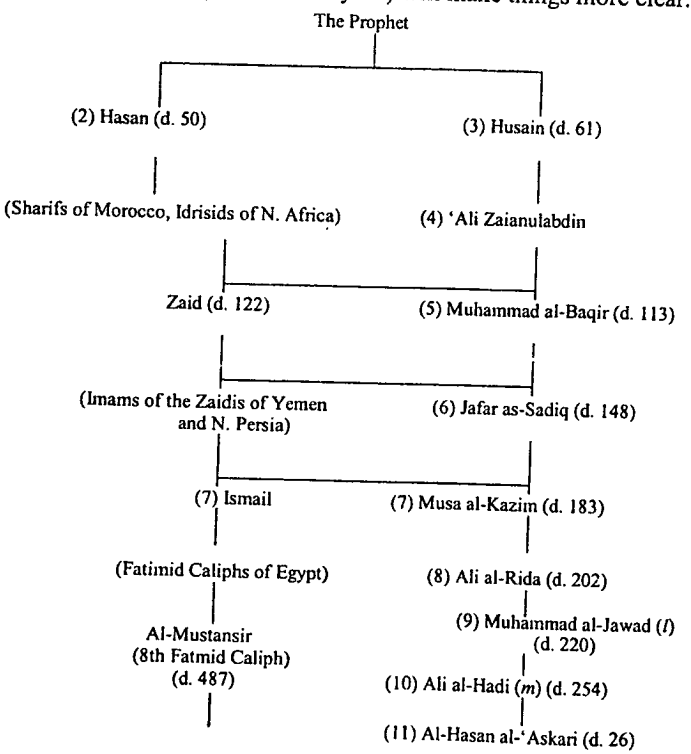
(*a*) The Imamiyah Shia or (Ithna Ashriyah);

(*b*) The Zaidiyah Shia; and

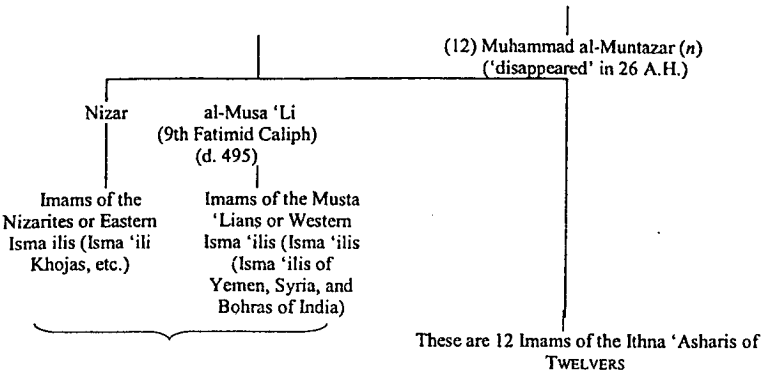
(*c*) The Ismailiya Shia.

Mahmassani says that the followers of all these sects were in agreement that the post of *Imam* should belong to the family of the Prophet. There was no dispute over the first four *Imams*: Ali, his two sons Hasan and Husain, and Zainul Abidin, son of Husain. But they split over the succession after the four *Imams*.[40]

The following chart (taken from Fyzee) will make things more clear:



40. Mahmassani, at p. 36.



As already stated, the Shias became divided into sub-sects on the question of succession after the fourth *Imam*, Ali Zainulabidin. One of his sons, Zaid was accepted as *Imam* by a certain group who were called the Zaidis. They recognise the principle of election as the basis of succession. The majority of the Shias followed Muhammad al-Baqir and after him Jafar as-Sadiq. After the death of Jafar, another split took place; the majority followed Musa al-Kazim and six *Imams* after him, thus making twelve *Imams* in all (hence, their name, "Twelvers" or *Ithna Asharis*). The last of these *Imams* is believed to have disappeared and to be returning as the *Mehdi* (Messiah). After the death of Jafar, a minority of the Shias did not acknowledge Musa al-Kazim, but followed his elder brother, Ismail, and are now known as Ismailis or "Seveners". The Ismailis believe that the *Imam* cannot completely disappear. He is hidden from the sight of those whose vision does not possess the real penetration.[41]

The *Imam* is the central figure in the Shia world. On him are focussed the hopes of the world, the love and devotion which is due to the Prophet and the passion and tragedy of Karbala. He is the "leader" (*Imam*), not the *Khalifa* (successor of the Prophet). He is the perfect man (*al-insanu'l Kamil*) and acts as a link between Man and God. He is the final authority in both law and religion.[42]

The vast majority of the Shias hold the *Imam* inferior to the Prophet. For Zaidis, the *Imam* is nothing more than "right guide" The Ismaili Bohras place the *Imam* definitely below the Prophet. However, al-Hilli, the author of *al-Babul-Hadi Ashar*, claims that the *Imam* is equal to the Prophet. Then there are Nizari Ismailis who consider the *Imam* higher than the Prophet. The Indian Nizari Ismailis who are known as Ismaili Khojas (followers of the Agha Khan) go a step further and declare the *Imam* to be an incarnation of God Vishnu. "But certainly most of the Ismaili Khojas would not subscribe to this creed in its

41. Fyzee, "Shii Legal Theories", in LME at pp. 114-15.
42. *Ibid*, at p. 115.

literal sense and are aligning themselves increasingly with the orthodox Muslim faith".[43]

Here it is interesting to note a recent decision of the Supreme Court that has defined the religious position and powers of the spiritual head of the Dawoodi Bohras, particularly in the context of his power to excommunicate a member of his sub-sect vis-à-vis fundamental rights guaranteed under the Constitution.

The Dawoodi Bohras believe that due to persecution, Imam Tyeb (the 21st *Imam*) went into seclusion and that an *Imam* from his line will appear. They also believe that an *Imam* always exists although at times he may be invisible to his believers.

When the 21st *Imam* went into seclusion, the 20th *Imam* directed that a *Dai* be appointed to carry on the mission of the *Imam* so long as the *Imam* should remain in seclusion. The *Dais* are known *Dai-ul-Mutlaq*, that is, the vicegerent of *imam* on earth in seclusion. In the present case it was held that Sardar Syedna Taher Saifuddin Saheb, as *Dai-ul-Mutlaq*, has not only civil powers as head of the sect but also ecclesiastical powers as religious leader of the community. He has also powers of excommunication. It was contended that the power was out of date and opposed to human rights as embodied in the "Universal Declaration of Human Rights". The Supreme Court, however, held "that where an excommunication is itself based on religious ground such as lapse from the orthodox religious creed or doctrine or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community through its religious head, "of its own affairs in matters of religion", and therefore cannot be challenged as ultra vires the Constitution.[44]

The Shia sects rejected all such traditions which were not received from the family of Ali and his decendants. According to them, *Ijma* is "consensus of the infallible *Imam*, not merely the consensus of jurists". Ithna Ashariyah Shias allow *Qiyas*, while others give it only a secondary importance. On the point of *Ijtihad*, the Shias say that only *Imam* can be a *mujtahid* (i.e., one who is competent to make *Ijtihad*), and not every person having some rigid qualifications as Sunnis claim.

6. 'Shariat'and 'Fiqh'

"Shariah is based on wisdom and is meant for the worldly and spiritual benefit of the people and means complete justice for all and absolute kindness

43. *Supra*, n. 32 at pp. 118-119. See also, *Advocate General* v. *Mohd. Husen Huseni*, 1866 Bom 323.
44. *Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 858.

and wisdom. Hence, we cannot consider that code of law a law of Shariah in which there is cruelty instead of justice, hardship, in place of leniency, loss instead of advantage and foolishness in place of reason".[45]

There are two different conceptions of law. One is that law is divine, like Hindu and Muslim Laws, and the other is that law is man made, such as all the modern legislations.

According to Romans, law is nothing but rules of human intercourse conceived by man as being most conducive to the welfare of a community. These become binding when the majority of that community express their approval.

The Muslim jurists, however, contend that there is no other basis of law than the solution to be given to the philosophical problem of certitude (*ilm-ul-yaqin*) in the matter of Good and Evil, or (*beauty*) Husn and ugliness (*Qubh*). What is morally beautiful must be done; what is morally ugly must not be done. That is Law or *Shariat*. The determination of the beauty or ugliness of a thing, however, is a legal question. And who can answer it? Not man. The Muslim jurists deny it. Human views and judgments are always and on all things at variance, precisely because a criterion of solid, absolute certitude is a thing far above the reach of human understanding. Must then, the consequence be drawn that law is a thing of which the benefit is denied to man? No. There exists the infinite wisdom of God, who reveals to man the necessary basis of law. From time to time extraordinary beings appeared on earth. One of such beings was the Prophet Muhammad. God revealed to him the science of Good and Evil as it was contained in the Koran.[46]

There then is to be found absolute ethical certitude—the solid basis of law. But not only there. It is also to be found in the sayings and deeds of the Prophet.

But the task of the builders of Muslim Law was far from finished. Because, Koran and *Hadith* provided only the raw material with which to build the legal fabric; and which has to be built.

Imagine that white is the colour of moral beauty, black the colour of moral ugliness, and grey the colour of things neither beautiful nor ugly. The task of the Muslim jurist is to classify the immense colourless mass of human actions, and to paint them white, black or grey. How shall he do it? By acting upon the following reasoning; God being 'absolute wisdom' cannot prescribe anything but what is morally beautiful; cannot forbid anything but what is morally ugly; cannot allow anything but what, at the very least, is in between beautiful and ugly. Working still further, the Muslim jurists finally evolved fivefold

45. Ibn Qayyin, Bidyat-ul-Mujtohid, Idarat al-Musannifin, Rabwah (1958) as cited by K.N. Ahmad, *Muslim Law of Divorce* (1978) at p. 13.

46. Fyzee, at p. 32.

classification of the nature of human actions, as being either strictly enjoined, or simply advised, or permitted, or unadvised, or strictly forbidden. Islamic jurisprudence calls these Five Qualifications as *al-Ahkam-al-Hamsa*.[47]

Shariat (the path to be followed) as a technical term, thus means the canon law of Islam, embracing all human actions. For this reason it is not 'law' in the modern sense. It is more ethics than law. It is fundamentally a doctrine of duties, a code of obligation. In it, the legal considerations are of secondary importance. It gives more weight to a religious evaluation of all the affairs of life.

Fiqh literally means 'intelligence'. It is the name given to the whole science of jurisprudence, because it implies the *independent exercise of intelligence* in deciding a point of law.

When Mua'zz was leaving to assume the governorship of a province, the Prophet asked:

> "According to what shall thou judge?"
> He replied:
> "According to the Stricture of God (Koran)."
> "And if thou findest nought therein?"
> "According to the Tradition of the Messenger of God."
> "And if thou findest nought therein?"
> "Then shall I interpret with my reason.'
> And thereupon the Prophet said:
> "Praised be God who has favoured the messenger of His Messenger with what His Messenger is willing to approve."

The above conversation is extremely important as it lays down the limitation on the freedom of thought of a lawyer while exercising his own judgment or discretion. Any liberal interpretation may be made within the folds of Koran and Tradition. It also shows the scope of direct examination and free interpretation of Koran and Tradition. Muslim jurists have clearly defined the limits within which free interpretation may be allowed. Thus, they hold that where the will of the divine reason has been clearly expressed, human reason may not interfere.

Muslim jurists define *Fiqh* as "the knowledge of one's right and obligation derived from the Koran or *Hadith*, or deduced therefrom, or about which the learned have agreed".

From the above definition it is clear that the science of Muslim Law or *Fiqh* is based on Koran and *Hadith* and analogical deduction (*Qiyas*). The last line of the definition, *about which the learned have agreed*, shows that Ijma or consensus of opinion among the learned, is also a source of *Fiqh*.

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47. *Ibid.*

Fiqh has been divided into two parts: (*i*) The *Usul* (literally meaning the roots of law) which deals with the first principles of jurisprudence, and (*ii*) The *Furu* which deals with particular injunctions or the substantive law.

Distinction between 'Shariat'and 'Fiqh'.—Shariat is a wider circle, it embraces in its orbit all human actions, whether legal or otherwise, whereas *Fiqh* is the narrower circle, and deals with legal acts. Shariat owes its existence to the Koran and *Hadith*, while *Fiqh* is mainly erected by human try. In other words, the path of Shariat is laid down by God and his Prophet: The edifice of *Fiqh* is erected by human try. In the *Fiqh*, an action is either legal or illegal. In the Shariat there are various grades of approval or disapproval.

Apart from the above narrow distinctions, there is not much to separate Shariat from *Fiqh*. It is because "Hindu and Muhammadan Laws are so intimately connected with religion that they cannot readily be dissevered from it".

7. Development of Muslim Law[48]

Abdur Rahim divides the course of Muslim Law into four distinct periods. This classification has generally been approved by the writers on Muslim Law.

PERIOD I—A.H. 1 TO 10: LEGISLATIVE PERIOD

This is the most important period so far as Koran and *Hadith* are concerned. Most of the legal verses of the Koran were revealed at this time and some of the Prophet's most important judicial decisions and traditions relate to that period. These are the texts on which the superstructure of the four Sunni Schools has been constructed.

PERIOD II—A.H. 11 TO UMMAYADS: THE PERIOD OF COLLECTION AND INTERPRETATION

This period extends from the date of the Prophet's death to the foundation of different Schools. It roughly covers the time of the companions of the Prophet and their successors. The two significant points of this period are:

(*i*) Collection of the Koran and *Hadith*, and

(*ii*) Commencement of the study of law as a science.

(*i*) The collection and editing of the text of Koran took place during this period. The texts of the Koran till then had been preserved either in the memories of the companions of the Prophet, or by being inscribed on bones, date-leaves and tablets of stone. The collection and consolidation of texts was undertaken; but several different versions came into being. Thus, third Caliph Usman appointed Zaid, a companion of the Prophet, to collect and edit the text

48. Largely based on Abdur Rahim, at pp. 16-47; and Fyzee, at pp. 25-28.

of Koran. It is that Koran, Usman's edition—which exists absolutely pure and without corruption to this day. The remaining editions were destroyed.

The traditions were not, however, collected by the authority of the State as was done in the case of the Koran. Their collection was left to the piety and private enterprise of the muslims.

(*ii*) During the Ummayad period, there began a systematic study of the law and tradition. The Muslim jurists and the then recently introduced sciences of divinity and logic helped in evolving a science of Muslim jurisprudence. It is during this period that law has been classified under different subjects, and the use of technical phraseology has been introduced. This tradition continued during the Abbasid period too.

The second period is characterised by the close adherence to the spirit and ordinances of Islam. In the hands of the first four Caliphs, the law, though still to be separated from religion, became imbued with principles of practical application.

A review of the first century of Islam.—In the words of Schacht[49], the first century of Islam is in many respects the most important and also the most obscure period in the history of Islamic Law. In their function as the supreme rulers and administrators, the Caliphs acted to a great extent as the lawgivers of the community. This 'administrative legislation'. however, was hardly concerned with modifying the existing customary law.

Towards the end of the period of the Caliphs of Medina, the Islamic community was rent by political schisms, and Kharjis, Shias and Sunnis came into being.

During this period the ancient Arab idea of *Sunnah*, that is, precedent, made inroads in Islam. The Arabs were, and are, bound by tradition and precedent. Whatever was customary was right; whatever the forefathers had done deserved to be imitated. This ancient Arab concept of *Sunnah* was to become one of the central concepts of Islamic Law.

During the greater part of the first century, Islamic Law did not as yet exist. Law as such fell outside the sphere of religion, and attracted attention only when it came into clash with some religious command. Where a mode of behaviour did not come in clash with Islam, it was allowed to flourish undisturbed. This attitude of the early Muslims accounts for the widespread adoption of the legal and administrative institutions and practices of the territories conquered by the Muslims. Hand in hand with the retention of legal institutions and practices went the reception of new legal concepts. For example, the concept of the *opinio prudentium* of Roman law seems to have provided the model for the highly

49. Schacht, *An Introduction to Islamic Law* (Oxford 1964) at pp. 15-22.

organised concept of the 'consensus of the scholars'(*Ijma*). Schacht goes on to show the extent to which Islamic Law is indebted to Roman law. But a strong refutation of this theory comes from Mahmassani, who after examining in detail the similarities and differences between the Islamic and the Roman systems concludes that similarities are very trivial in comparison with their differences. Moreover, these similarities are not in themselves a proof that the former had been influenced by the latter. Furthermore, the Muslim jurists adopted a negative attitude towards Roman law in view of their belief in the divine origin of the *Shariah*. Mahmassani strongly contends that apart from a few slight influences "it is undoubtedly a fact that the *Shariah* is independent of, and not borrowed from, any other system. It has its own special origins and its own glorious history. The delegates of Al-Azhar University to the International Conference on Comparative Law held at The Hague in 1937 succeeded in convincing the Conference to adopt a resolution to this effect".[50]

PERIOD III—FROM ABBASIDS TO A.H. 200: THE PERIOD OF THE DEVELOPMENT OF LAW AND FOUR SUNNI SCHOOLS

The third period is important because of the following three events:

(*i*) development of four Sunni Schools;

(*ii*) a systematic and scientific study of law; and

(*iii*) collection of traditions.

(*i*) During this period there appeared the four schools of Sunnite law. The principles of these four schools are substantially the same, and they differ from each other merely in matters of detail. These schools have already been discussed in Section 3 of this chapter.

(*ii*) The work which had been done by the foremost jurists of the third period, especially Abu Hanifa, Shafii and Malik is of twofold character. Not only are many rules of law traced to their dicta, but they were the first to formulate the principle of the science of *Usul*, i.e. Islamic jurisprudence.

The main object of the science of *Usul* is to discuss rules relating to the interpretation of texts of the Koran, *Hadith* and *Ijma*, and making analogical deductions from these three sources in cases not falling within the three.

The need of such a science in the Muslim system cannot be gainsaid. Because, the only law making that there has been among the Muslims was during the lifetime of the Prophet. The only other means left of expanding the laws have been juristic interpretation and deduction. A science of the nature of *Usul* which leads to the knowledge of law is, therefore, of great practical value.

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50. Mahmassani, at p. 145.

(*iii*) The work of collecting the traditions took place during this period, and the collection of Bukhari and Muslim, for instance, came to be recognised as authoritative. From the latter half of the third until the earlier part of the fourth century A.H., the task of collecting and sifting the traditions was undertaken in the same spirit of comprehensiveness which characterised the work of Abu Hanifa, Shafii and Malik in the domain of jurisprudence (*Usul*).

The traditions have greatly influenced the Islamic jurisprudence. The Hanafi jurists freely employ traditions to support their propositions.

Important aspects of the second century of Islam.—Reasoning was inherent in Islamic Law from its very beginning. Nevertheless, all this individual reasoning, says Schacht[51] started from vague beginnings, without direction or method, and moved towards an increasingly strict discipline during the period under review.

Ra'y (opinion) is the name given by Arab jurists to individual reasoning. When it is directed towards achieving systematic consistency, it is called *Qiyas* (analogy). When it reflects the personal choice of the lawyer guided by his idea of appropriateness, it is called *Istihsan* (preference). The use of individual reasoning in general is called *Ijtihad* or *Ijtihad al-ra'y*.

During the whole of the second century of Islam, technical legal thought developed very rapidly from its crude beginnings. First, it tended to become more and more perfected. Second, it showed an increasing dependence on traditions, as a greater number of traditions came to be accepted as authoritative. Third, religious and ethical considerations tended to merge into systematic reasoning, and both tendencies became inextricably mixed.

The development of four Sunni Schools is an important event that took place during this century. Imam Malik extensively used reasoning in combination with tradition. Abu Hanifa seems to be the sort of a "Theoretical Systematizer" who achieved considerable progress in technical legal thought. A high degree of reasoning, often somewhat ruthless and unbalanced, with little regard for practice, is typical of Abu Hanifa's legal thought as a whole. This is why an appreciable part of it was found defective and was rejected by his disciples—Abu Yusuf and Shaybani. In Shafii, legal reasoning reached its zenith. Shafii's fundamental dependence on traditions from the Prophet implied a different way of Islamicising the legal doctrine. In theory, Shafii distinguished sharply between the argument taken from traditions and the result of systematic thought. In his actual reasoning, however, both aspects are closely interwoven; he shows himself tradition bound and systematic at the same time, and we may consider this new synthesis typical of his legal thought.

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51. *Supra*, n. 34 at pp. 37-48.

PERIOD IV—A.H. 200 TO THE PRESENT DAY: PERIOD OF "TAQLID"

After the establishment of four Sunni Schools, there has been no independent exposition of Muslim Law, and jurists have been busy, within the limits of each school, in developing the work of its founders.

At the close of the fourteenth century we arrive at the age of commentators and annotators. The commentaries not only explained texts but also added greatly to law. In fact, it is only in the writings of these commentators that it is possible to find the doctrines of the different Schools expounded in their fullness.

The contribution of the Muslims of India to the legal literature has not been very considerable, but *Fatawa-i-Alamgiri*, compiled under the order of Aurangzeb in the eleventh century A.H., is as great an achievement of learning, industry and research as perhaps any legal literature can boast of.

The classification of the lawyers of this period is very elaborate; seven different grades are recognised, beginning from *Imams* as founders down to the ordinary *Mufti* (jurisconsult). The later lawyers were considered lower in grade and incompetent to exercise independent judgment. That is, the doors of *Ijtihad* (independent interpretation) are regarded as closed for all practical purposes.

But there is nothing in the theory of Islam, says Abdur Rahim, to force the principle of blind imitation (*Taqlid*) on the Muslims. In fact, it is only due to political and other causes that they still consider themselves bound by older views, while the letter of law allows them liberty to develop their system of jurisprudence. Therefore, unless a bold step is taken, as suggested by Dr. Iqbal, in his *Reconstruction in Islam*, the Shariat will remain a fossil. Recent changes and developments in Muslim Law effected by different Islamic countries are indicative of a new trend.

II

Muslim Law as Applied and Interpreted in India

Against the backdrop of the claim of inflexibility of Muslim Law, it is interesting to note the following observation of A.A.A. Fyzee—

> *I do revere the great interpreters of Islam, but I crave their indulgence if I cannot share their beliefs, for belief is at bottom a matter of individual conscience. I cannot agree that they are the keepers of my conscience. It is the duty of the scholars of each age to interpret the faith of Islam in their own times.*[1]

1. Introduction

Not the whole body of Muslim Law is applicable in India, but only a portion of it is applied to Muslims through the courtesy of the State. It is to denote this body of law that many authors have used the expression "Muhammadan Law" in place of Islamic or Muslim Law. Some have branded it as Anglo-Muhammadan Law. But it seems more appropriate to call it Indo-Muslim Law, or briefly, Muslim Law. The term 'Muhammadan Law' is a misnomer and gives a very wrong impression. Fyzee sharply contends that "the religion taught by the Prophet was Islam, not Muhammadanism; and the people who believe in it are Muslims not Muhammadans. By Muhammadan Law (however) is meant that portion of the Islamic Civil Law which is applied in India to Muslims as a personal law". It is difficult to agree with his logic. When according to his own argument, the followers of Islam are known as Muslims, not Muhammadans, then their personal law should be known as Muslim Law, irrespective of the fact that certain authors and Judges have preferred the expression Muhammadan Law. Fyzee happens to be one of them, and rightly deserves to be branded as a 'pedant' by the middle-aged lady referred to by Fowler. Tahir Mahmood considers both terms 'Muslim' and 'Islamic' as incorrect, for according to him the Arabic term 'Muslim' can apply only to human beings and not concepts, and

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1. Fyzee in *A Modern Approach to Islam* (1963) as cited by Tahir Mahmood in his *A.A.A. Fyzee's cases in the Muhammadan Law of India, Pakistan and Bangladesh* (2nd Edn., 2005 Oxford University Press, New Delhi) at pp. 7-8.

by the term 'Islamic' is meant the Shariat or *Fiqh* in its pristine (classic) 'purity'. Without getting boggled by these niceties, we have preferred the term Muslim Law to indicate the law applicable to Muslims as of today.

2. Historical

Early contacts of the Arabs with India.—Since time immemorial, spices and other articles from India and South-East Asia had been in great demand in Egypt and southern Europe. The business was mainly in the hands of the Arabs. Trade continued after the Arabs had embraced Islam. The conquest of Sind by Muslims was not for the sake of empire building, but for something else. When certain Arabs died in Ceylon, the local ruler sent their widows and children to Arabia, with gifts and letters of goodwill for Hajjaj (661-714 A.D.), the powerful viceroy of the eastern provinces of the Umayyad empire. Unfavourable winds drove the vessels carrying the gifts and others to the shores of Debul in Sind. Here, hostile men attacked, plundered the gifts, and took the Muslim women and children as captives. An enraged Hajjaj demanded from Dahar, the ruler of Sind, the release of the prisoners and restoration of the booty. However, he received a negative reply. Thereupon Hajjaj persuaded the Caliph to authorise punitive measures against Dahar. Two expeditions against Dahar failed, but the third, headed by Mohammad-ibn-Qasim, succeeded in conquering Sind. The local population was, however, treated with utmost consideration, as reflected in a letter written by Hajjaj:

> "They have been taken under our protection, and we cannot in any way stretch out our hands on their lives or property. Permission is given to them to worship their Gods. Nobody must be forbidden and prevented from following his own religion. They may live in their houses in whatever manner they like."[2]

The historians attach little importance to the Arab rule in Sind; yet its indirect effects are many and far-reaching. For example, the political arrangements made by Mohammad-ibn-Qasim with non-Muslims provided the basis for later Muslim policy in the subcontinent. By the time Muslim rule was established in Lahore and Delhi, Islamic Law had been crystallised and contained strict provisions regarding idol-worshippers. The fact that those provisions were not followed and the Hindus were treated as "people of the book" (*Ahl-e-Kitab*) by Muslim kings was largely due to the fact that they had been given this status by Mohammad-ibn-Qasim and that for centuries this liberal practice had been built up in Sind and Multan.[3]

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2. Ikram, *Muslim Civilization in India*, edited by A.T. Ambric (Columbia University Press 1964) at pp. 6-12.
3. *Ibid*, at pp. 19-20.

Position of Muslim Law during the Sultanate and Mughal periods.— The Sultans of Delhi were, generally speaking, strict adherents to the Islamic Law (*Shariah*). The reign of Iltutmish was noted for jurists well versed in the law and practice of *Shariah*. The *Kazis* administered justice according to *Shariah*. Appointed by the Central Government they were completely independent of the Provincial Governors. It was the *Hedaya* of Central Asian lawyer, Burhanuddin-al-Marghianani, which was the standard legal textbook in Muslim India under the Delhi Sultans. This great legal textbook remained the basis of Muslim Law for centuries, and was finally translated into English by officials of the East India Company. With the efforts made by Firoz Tughlaq to run the Government according to Islamic Law, it became necessary to have summaries of Islamic Law in Persian, the Court language of Muslim India. A large number of manuals thus came into being. The earliest was in the times of Balban, followed by others during the Tughlaq period. But the most comprehensive compilation of Muslim Law prior to the compilation of *Fatawa-i-Alamgiri* was *Fatawa-i-Tatar Khania*, named after the pious nobleman, Tatar Khan, who sponsored the compilation prepared by a Committee of *ulema*, it consisted of thirty volumes.[4]

Whenever any Delhi Sultan attempted to introduce new elements into law, they dared not violate any of its essential requirements and probably public opinion did not assist them in establishing traditions repugnant to the basic principles of the *Shariah*.[5]

The position of Muslim Law remained unchanged during the Mughal period, with the sole exception of Akbar's reign, when he tried to interpret Muslim Law according to his own notions. Up to Akbar's time, the application and interpretation of Islamic Law was the responsibility of the *ulema*. Sometimes, Akbar's own view of law clashed with that of *ulema*, but he had to stomach the view of the *Ulema*. Akbar was troubled by the general legal position which gave so much power to the *Ulema*. He explained his difficulties to Shaikh Mubarik, the father of Faizi and Abul Fazal, and a liberal minded Alim. He, along with other *ulema*, drew up a brief but important *Fatwa* to the following effect.

> "...should, therefore, in the future, religious question comes up, regarding which the opinions of the *mujtahids* are at variance, and His Majesty, in his penetrating understanding and clear wisdom, be inclined to adopt, for the benefit of the nation, and as a political expedient, any of the conflicting opinions, which exist on that point, and issue a decree to that effect, we do hereby agree that a decree shall be binding on us and on the whole nation.

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4. *Supra*, n. 1, at pp. 102-103.
5. M.B. Ahmad, *Administration of Justice in Medieval India* (Aligarh 1941) at p. 99.

Further we declare that should His Majesty think it fit to issue a new order, we and the nation shall likewise be bound by it, provided always that such order be not only in accordance with some verse of the Koran, but also of real benefit to the nation."[6]

According to Maulana Abul Kalam Azad, the central idea of the document was in line with traditional Islamic political theory.[7] In practice, however, Akbar became an autocrat. Many of his practices and regulations differed widely from the normal Muslim practices. During Jehangir's time, no serious efforts were made to undo Akbar's religious policies. But with the advent of Shah Jahan's reign, the apathy and indifference that had characterised Jehangir's attitude disappeared, and the regime was marked by attempts to run the administration according to Islamic Law. This trend continued during the rest of the Mughal period.

Muslim Law under the East India Company.—An effort to apply the whole of Muslim Law was made under Aurangzeb (1658-1707 A.D.) as part of the orthodox reaction against the curious religious experiments of Emperor Akbar. This was the position when the East India Company in 1772 decided to claim soverign rights and the power of jurisdiction outside its 'factories'. The Company felt disinclined to foist "English ideas on a people who were not used to them". Thus though Magistrates replaced the *Kazis* in British India, they were until 1864 assisted by *molvis*, who gave a rendering of Muslim Law on the point in issue. Their version might have been accepted or rejected by the magistrate. Yet, during the initial stages, when the Magistrates, wholly relied upon *molvis*, they went so far "as to apply the *hadd* punishment of cutting off the hand for theft."[8]

In a despatch to the Court of Directors, dated 3rd November 1772, Warren Hastings wrote:[9]

> "We have endeavoured to adopt our regulations to the manners and understandings of the people (of India) and the exigencies of the country, adhering, as closely as we are able, to their ancient usages and institutions."

According to Fyzee, this policy was dictated by three main considerations:[10]

(*i*) Maintenance of the old structure, as it was under the Muslims,

(*ii*) Security in social conditions so as to facilitate trade, and

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6. *Supra*, n. 1, at pp. 158-159.
7. Abul Kalam Azad, *Tazkirah* (Calcutta 1919) at p. 20.
8. Schacht, footnote 1 at p. 95.
9. M.B. Ahmad, *Administration of Justice in Medieval India* (Aligarh 1941) at p. 281, *citing* Home Miscll. Records 529 at p. 320.
10. Fyzee, at pp. 55-56.

(*iii*) A desire not to interfere with the religious susceptibilities of Hindus, Muslims and others.

The Muslim Law, though successively replaced, remained the basis of criminal law, applicable to all inhabitants in Bengal and other Muslim parts of British India until 1862. The Islamic Law of Evidence was not entirely abolished until 1872.[11] As regards the law of family and inheritance and matters relating to *Wakf*, gift, pre-emption etc., the continued validity of the *Shariah* for Muslims was guaranteed by Section 7 of the famous Regulation of 1780. It was laid down in Section 27, "That in all suits regarding inheritance, marriage and caste, and other religious usages or institutions, the laws of the Koran with respect to Muhammadans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to." By and large, this regulation still holds the field.

There are certain enactments like the Mussulman Wakf Validating Act, 1913 which reaffirm the continued applicability of Muslim Law to Muslims, yet others like the Dissolution of Muslim Marriages Act, 1939 and the Shariat Act, 1937, which though professing to apply Muslim Law to Muslims, yet make certain innovations in the law. As a whole, however, the attitude towards Muslim Personal Law in India is to maintain and apply it in its pristine purity.

If any sect of Muhammadans has its own rule, that rule, generally speaking, should be followed with litigants of that sect, as laid down by the Privy Council in *Rajah Deedar Husain case*[12], where the question related to the right of succession to the estate of a Shia Muhammadan.[13]

3. Shariat Act of 1937

The Muslim Personal Law (Shariat) Application Act, 26 of 1937 is by far the most important legislation in the closing years of British rule in India. The Act almost abolished the legal authority of custom among the Muslims of British India for reasons best stated in the Statement of Objects and Reasons:

> "For several years past it has been the cherished desire of the Muslims of India that customary law should in no case take the place of the Muslim Personal Law. The matter has been repeatedly agitated in the press and also on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Muslim religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary law is a misnomer since it has not any sound basis to stand on and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be the characteristic of all laws. The status of the Muslim women under the so-called customary law is

11. Schacht, at pp. 94.
12. 2 MIA 441.
13. Abdur Rahim, at p. 37.

simply disgraceful. As the Muslim Women Organisations have condemned the 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 the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this, the present measure, if enacted, would have very salutary effect on society, because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of customary law."

The position of Muslim women, in few cases, was seriously undermined by the then prevailing customs. Inheritance in particular had continued to be ruled by custom, often excluding women, among numerous communities of Muslims. The Shariat Act aimed at correcting such defects.

The Shariat Act, 1937 came into operation on 7th October 1937, and is applicable throughout India. It applies to every Muslim, of whatever sect or school, but curiously enough, the word 'Muslim' is nowhere defined by it. It applies to all kinds of properties, except: (*a*) agricultural lands; (*b*) testamentary succession in certain communities; and (*c*) charities, other than *Wakf*.[14]

Section 2 of the Act is important and deserves a detailed study. It runs as follows:

"Notwithstanding any custom or usage to the contrary, in all questions (save question relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubarat'at*, maintenance, dower, guardianship, gifts, trust and trust properties and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

The object of the above Section 2 is firstly to abrogate custom and usage which may be contrary to the principles of Muslim Law and, second, to grant certain exceptions. Fyzee says that the words 'intestate succession' clearly show that the power of testamentary succession enjoyed by certain communities is not taken away. These communities are Khojas and Memons. Thus, they may follow a custom which allows the disposition of even whole of property by way of will, and which is clearly un-Islamic. On the other hand, if a female receives property and by customary law the property is to revert to the heirs of the last male owner,

14. Fyzee, at p. 58.

such custom being contrary to Islamic Law, is abolished and she holds it in all respects as an heir under Muslim Law.[15]

In an important case[16] the Bombay High Court held that when Section 2 refers to trusts and *wakfs*, it not merely refers to trusts and *wakfs inter vivos* but also includes testamentary *wakfs* and trusts. Thus, on the one hand, if a Khoja Muslim who is governed by the Hindu Law in matters of succession, can give away the whole of his property by way of 'will'[17] notwithstanding the provisions of the Shariat Act, on the other hand the validity of such a trust or *wakf* by way of 'will' can only be determined by Muslim Law and not by Hindu Law.

It will be noticed that Section 2 excludes from its purview "agricultural land" and "charities and charitable institutions and charitable and religious endowments". It is because these subjects are within the competence of State Legislatures. Mulla feels that "the exception of agricultural land is very important as only a small portion of the land of India can be excluded from this category, and the law as it stood before the passing of the Act must continue to be applied thereto. The exception is so expressed as to cut down the effect of all the subsequent words, e.g., if the question relates to agricultural land, the Muhammadan Law is not made the rule of decision in a question regarding gift.[18]

It is noteworthy that the West Pakistan Muslim Personal Law (Shariat) Application Act, 5 of 1962, does not allow the above exception, and also says that Muslim Law will govern not only 'intestate' but also 'testate' succession.[19]

Regarding adoption, wills and legacies, Section 3 of the Act empowers every Muslim, who is competent to contract under the provisions of the Indian Contract Act, 1872, to adopt the law of the Shariat for himself or herself and also for his or her minor children and their descendants. Thus, the Act differentiates adoption, wills and legacies from other subjects of personal law mentioned in Section 2. Unlike customs relating to the latter, those regarding adoption, wills and legacies have not been wholly abrogated by its provisions. Respecting these matters, the Act only gives an option to the Muslims to adopt Islamic Personal Law if they so desire.[20]

Now, if the basic idea behind the Shariat Act was to abrogate customs which were contrary to Muslim Law, it appears curious, to say the least, that many

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15. *Ibid*, at pp. 58-59.
16. *Ashrafalli* v. *Mahomedalli*, AIR 1947 Bom 122: 48 Bom LR 642.
17. The custom by which the Khojas of Bombay can under their customary law dispose of the whole of their property is in contravention of the Muslim Law as to 'Wills', where it is prohibited to dispose of more than one-third of property by 'Will'.
18. Mulla, at p. 4.
19. *See* the chart facing at p. 4 in Tayabji.
20. See, *Family Law Reform in the Muslim World* at p. 169.

things have been left on the sweet wish of parties to follow the Muslim Law or not. Whatever might have been the reason for the inclusion of this provision, it is in direct negation of the Act itself. Sections 2 and 3 of the Act require re-examination and must be amended to bring them in harmony with the spirit of the Act.

The Shariat Act is not retrospective, that is, it has no validity prior to 7th October 1937, the date of its commencement.

Impact of Shariat Act on various business communities.—Khojas are Ismaili Shias of the Nizarian Branch. They were originally Hindus hailing from Sind and Kutch. When Sind came under Muslim influence, many Hindus embraced Islam due to efforts of Pir Sadruddin, a missionary sent to Sind by Shah Islam, one of the ancestors of His Highness Aga Khan, who is at present the religious head of the community.

After the passing of the Shariat Act, 1937, the Khojas are governed by Muslim Law in all matters enumerated in Section 2 of the Act including *intestate* succession, but they are not so governed in matters of *testamentary* succession and *agricultural* land. Thus, a Khoja can still dispose of whole of his property by way of will.

Bohras (literal meaning: merchants) are Ismailis and are divided into Daudis and Sulaymanis and some smaller branches. The present religious head is Mullaji Saheb of the Daudi Bohras, who is recognised as their *Dai-ul-Mutlaq* (Supreme head) by all factions of Bohras. Before the Shariat Act, Bohras were following certain non-Islamic customs in matters of inheritance. But after 1937, they are wholly governed by Muslim Law.

Memons are divided into two groups, the Cutchi Memons and the Halai Memons. While Halai Memons are governed by Hanafi Law, the Cutchis were first subject to Hindu Law in regard to succession and inheritance, but by the Cutchi Memons Act, 1920 they were given an option either to subject themselves to Muslim Law of Inheritance or remain as they were. After the Shariat Act, 1937 they retained their customary right to dispose of the whole of their property by will, unless a declaration under Section 3 was made, in which case they were to be governed by Hanafi Law. Shortly afterwards, however, the Cutchi Memons Act, 1938 subjected them to Hanafi Law. The net result is that today Cutchi Memons are governed by Hanafi Law in all matters, with only those exceptions that are allowed under the Shariat Act itself.

4. The Dissolution of Muslim Marriages Act, 1939

There is no provision in the classical Hanafi Law, which applies to a majority of Muslims in India, to enable a married Muslim woman to obtain a decree from the court dissolving her marriage if the husband neglects to maintain her, makes her life miserable, and under certain other such circumstances. Since

the Hanafi jurists clearly laid down that if Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafii or Hanbali Law, acting on this principle, the *Ulema* have issued *Fatawa* to the effect that in certain cases, as enumerated in Section 2 of the above Act, a married Hanafi Muslim woman may obtain from court a decree dissolving her marriage. Thus, the Act of 1939 consolidates the provisions of Muslim Law relating to dissolution of marriage by judicial decree. A fuller discussion of this Act will come in the Chapter on Divorce.

5. The present position

During the framing of the Constitution an effort was made by the Muslim members of the Constituent Assembly to carve out a guarantee in the provision dealing with the fundamental right to religious freedom (Article 25) to the effect that the personal laws of any community would not be altered; however, the final form of the words incorporated in Article 25 (1) and (2) did not create any exception in favour of any community in the matter of social reforms. The right to religious freedom in Article 25(1) is expressly made subject to the State power of social reforms in Clause (2). The parameters of this power are defined by the expression 'secular' in sub-clause (*a*) to Clause (2). Secular means mundane, temporal, non-spiritual.[21] The objective of the framers was voiced by Ambedkar in these words:

> "After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequalities, discriminations and other things, which conflict with our fundamental rights."[22]

Article 44 of the Constitution enjoins on the State to try to secure for the citizens a uniform civil code. The Constitution vests the Parliament and the State legislatures with legislative power on 'all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law', including, inter alia, matters like 'marriage and divorce, infants and minors; adoption, wills, intestacy and succession; joint family and partition' (Item 5, List III, Schedule VII of the Constitution). Besides this legislative potency, there are express manifestations in our Constitution of the judicial power of interpretation, reconstruction and recreation of laws, customs and usages in order to adopt, enact and give unto ourselves the spirit of the Constitution in our perennial life.

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21. *See*, V.P. Bharatiya, *Religious Freedom and Personal Laws* in Madhav Menon (Ed.) National Convention on Uniform Civil Code for all Indians, Bar Council of India Trust, New Delhi 1986 at p. 65.
22. Constituent Assembly Debates, (CAD), Vol. VIII at p. 781.

It is dubiously claimed that codification amounts to encroachment on religion. In one view, 'In the Islamic system the authority to enact laws primarily belongs to God and He alone has the supreme legislative power...' Thus, according to the Muslim conception of law, there is no legislative power in the State. Since the codification is the systematic arrangement of laws the power of codification remains outside the jurisdiction of the State.[23]

In 1964, when the 26 Session of the International Congress of Orientalists was held in New Delhi, a symposium on "Changes in Muslim Personal Law" was also held, in which eminent jurists and *Ulema* took part. Although some of the participants of the symposium felt the need of certain minor changes, yet the agency to implement such changes could not be decided. Mr M.C. Chagla, who was in the chair, strongly argued "that public opinion and the Parliament of a secular State were competent to make changes in all laws of a secular nature"[24], but the other view was equally strong that "a body of representative *Ulema* who were not under the influence of the Government should be asked to propose any changes that were necessary".[25] However, even before the inception of the Constitution of free India, the following laws enacted by the British Government of India had already modified, altered and affected the traditional Muslim legal system: The Indian Penal Code, the Criminal Procedure Code, the Indian Evidence Act, the Indian Contract Act, the Usury Laws Repeal Act, the Usurious Loans Act, the Freedom of Religion Act, the Mussulman Wakf Validating Act, 1913 and 1930, the Cutchi Memons Act, 1920 and 1942, the Wakf Act, 1923, the Child Marriage Restraint Act, 1929, Muslim Personal Law (Shariat) Application Act, 1937, Dissolution of Muslim Marriages Act, 1939, Jammu and Kashmir State Muslim Dower Act, 1920, besides some State laws for registration of Muslim marriages. And after the Constitution came into force the Criminal Procedure Code (Amendment) Act, 1973 (Sections 125-128), and the Muslim Women (Protection of Rights on Divorce) Act, 1986. The latter Act was a sequel to the famous Supreme Court verdict in *Shah Bano case*.[26] One is reminded of the Mussulman Wakf Validating Act, 1913 passed to override the Privy Council decision in *Adul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry*.[27] In *Bhau Ram* v. *Baijnath*[28] also the Supreme Court had discarded the orthodox law on pre-emption on the ground of vicinage as unconstitutional.

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23. Aquil Ahmad, *Text Book of Mohammedan Law* (Central Law Agency, Allahabad 1982) at p. 24.
24. *Daily Bulletin*, XXVI Session of the International Congress of Orientalists, 9th January 1964, (New Delhi) at p. 11.
25. *Daily Bulletin*, XXVI Session of the International Congress of Orientalists, 9th January 1964, (New Delhi) at p. 11.
26. *Mohd. Ahmed Khan* v. *Shah Bano*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.
27. 22 IA 76 (1894-95).
28. AIR 1962 SC 1476.

In his pioneering research work Family Law Reform in the Muslim World, Tahir Mahmood enumerates the countries; these are Turkey, Albania, Tanzania, Zanjibar, Kenya, Philippines and Soviet Union. Those which have reformed it are Turkey under Ottoman Empire, Lebanon, Egypt, Sudan, Jordan, Syria, Tunisia, Morocco, Algeria, Iraq, Iran, Pakistan, Brunei, Malaysia and Indonesia (countries with Muslim majority), Cyprus, Israel, Singapore, Ceylon and India.[29]

In the face of these facts, how does the *Ulema* rationalise its antipathy to reforms through legislation? The All India Muslim Personal Law Convention held in Bombay in December 1972 passed a resolution stating that while a wholly or predominantly Muslim legislature of an Islamic country was competent under the Islamic legislative principle of consensus (*Ijma*) to adopt the traditional *Shariah* to the changed social conditions by the method of legislation, similar exercise by the legislature of a non-Muslim country like India was antithetic to the Islamic concept of immutable Muslim Law.[30]

The *Shah Bano*[25] decision restirred public opinion against the apathy of the *Shariah* to mitigate the plight of the Muslim women. During the debate in the Lok Sabha on the debatable reformative measure—the Muslim Women (Protection of Rights on Divorce) Bill (now Act of 1986) the Law Minister reiterated the promise envisaged in the Constitution to promulgate a uniform civil code, with the innovative suggestion that it would be optional now. Even the time-tested hollowness of this promise spurred the vociferous leaders of Muslim fundamentalists like Shahabuddin (MP) to assert that a uniform civil code would be counterproductive at this stage, instead of accelerating the process of the national integration, would work as a divisive force. In public debate the idea of codification is often confused with the idea of change in the Shariat, there is a fear among Muslims that it would be unsafe to leave such codification to Parliament, which has a non-Muslim majority. According to him therefore the Muslim Law should be codified by Muslim jurists and *Ulema* to prevent "arbitrary interpretation" and bring about uniformity in the application of laws. Maulana Syed Abdul Hasan Ali Nadvi, President of the 'All India Muslim Personal Law Board' was also of the view that Islamic Law applied to Indian Muslims should remain unadulterated by extraneous laws and legal concepts. Bohra reformist Ali Asghar Engineer finds that the general feeling among Muslims is that a common civil code is synonymous with a Hindu code, especially when the demand comes from communal Hindus. There is no need for a common civil code, what is important, according to him, is justice to women. Tahir Mahmood feels that the high degree of consciousness currently prevailing

29. Tahir Mahmood, *Family Law Reform in the Muslim World*, ILI (1972) at pp. 3-8.

30. See, *Dharmayug*, 8-4-1973, and also Tahir Mahmood, *Common Civil Code, Personal Laws and Religious Minorities in Minorities and the Law*, Mohammad Imam (Ed.), ILI (1972) at p. 468 et. seq.

among Muslims can be exploited to make them accept the idea of codification of their personal law. He warns, however, that the Muslim community would want an assurance that codification will not mean abolition of its personal law. The scope of the Muslim Law is at present diverse and varies from region to region. Therefore the first need was to apply it all over the country on a uniform basis, the next step was to codify all that was best in the various schools of the Shariat and draw up a uniform Muslim code. Towards that end the *Ulema* entrusted the Muslim Personal Law Board the task of 'codifying' Muslim Personal Law. An Islamic scholar Mufti Fasil-ul-Rehman Hila Osmani prepared such a code in 1989 in the form of a book *Islamic Qanoon*. 'Codification' in its legal sense would be a misnomer here, for the object of the work is to compile Islamic viewpoint on the basis of jurisprudence and *Sunnah* on marriage, divorce and inheritance, and 'present Islamic tenets and laws in their true perspective'. The explanations of Islamic legal terms and concepts are expected to help the courts in correctly applying Muslim Personal Law.[31]

The *Shah Bano*[25] debate inspired the Bar Council of India Trust also to think that non-government professional institutions had a useful role to play in educating public opinion and mobilising social action for social reform and solidarity. This realisation persuaded the Bar Council of India to venture a national convention on uniform civil code through which it could present to the nation a draft proposal for legislation for wider discussion and debate. The convention was held in New Delhi in October 1986.[32] A large number of learned jurists discussed various personal laws of all major communities in India and pointed out the areas where there was need for reforms. Thus customary or statutory rules governing marriage, judicial separation, divorce, dower, maintenance of destitute relations, adoptions, guardianship, inheritance, succession were analysed and drawbacks, comparative merits and demerits were weighed and suggestions for improvements made keeping in view the contemporary social values of common appeal. However, as experience could foretell, the boat floundered on the rock of fundamentalism. As one social worker of great eminence has remarked 'the academic debate on the uniform civil code is more a debate on the Muslim Personal Law. It is hardly a debate from the secular point of view and therefore, not a debate on uniform civil code. Changes in the family law are accepted or rejected in terms of what is posited or seen to be posited in the Muslim Personal Law'.[33] From uniform civil code the penultimate discussion wheeled to compulsory versus optional common civil code. In the face of stout and loud resistance by Tahir Mahmood, Justice Beg

31. See, the *Indian Express*, 17-5-1985 and 29-6-1986 (New Delhi Ed.).

32. The Working Papers, Legislative Proposals, Draft Code and Explanatory Notes have been published by the BCI under the title 'National Convention on Uniform Civil Code for All Indians' under the editorship of N.R. Madhava Menon.

33. Vasudha Dhagamwar, *Towards Uniform Civil Code*, Ibid, at p. 29.

and other Muslim participants, the element of 'compulsory' common civil code had to be deferred to more appropriate time in future and the alternative of optional code to be preferred.[34]

6. Who is a Muslim

If Muslim Law is to be applied to a Muslim, the natural question that arises is: who is a Muslim? There is a lot of difference between the viewpoint of law courts and theologians.

Among theologians themselves, there are three different views on the subject:

(*i*) a Muslim is one who believes in the Prophethood of Muhammad;

(*ii*) everyone who believes in *Kalima*, that is, there is no God but God and Prophet Muhammad is His Messenger, is a Muslim; and

(*iii*) a Muslim is one who believes not only in the above two but also conforms to certain other standards, for example, he believes in the following fivefold classification of human actions, namely—

(*a*) *Farz*, acts the omission of which is punished and the doing of which is rewarded;

(*b*) *Mustahab*, acts the doing of which is rewarded but the omission of which is not punished;

(*c*) *Jaiz* or *Mubah*, acts the doing of which is simply permitted and which carry neither reward nor punishment;

(*d*) *Makruh*, acts which are disapproved but are largely valid; and

(*e*) *Haram*, acts which are strictly prohibited and punishable.

The courts of law, however, never ventured to enter into this essentially theological controversy. Their attitude is simple:

> "Every person who believes in the unity of God and the mission of Muhammad as a Prophet is a Mussulman to whatever sect he may belong."[35]

This simple definition of a Muslim has been propounded by Justice Ameer Ali in his book on Muslim Law first and since then it has been invariably followed by different High Courts, as we will see below.

The question before the Madras High Court in *Narantakath* v. *Parakkal*[36] whether Ahmadiyas, the followers of Ghulam Ahmad of Qadiyan were Muslims or not. The Court cited a passage from the writings of Ghulam Ahmad in which he says:

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34. For the social reform power of the State in the allied field, *see*, V.P. Bharatiya, *Religion—State Relationship and Constitutional Rights in India* (Deep & Deep, New Delhi 1987) at Ch. 6.

35. *Jiwan Khan* v. *Habibi*, AIR 1933 Lah 759, *Held*: Shias are Muslims.

36. AIR 1923 Mad 171.

"We are Muslims by the grace of God: Mustafa, the Holy Prophet of Arabia, is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God which is called Koran: Every Prophethood has found its culmination in that Messenger of God whose name is Muhammad. The revelation and inspiration that we receive have not been granted us independently, but it is through him that we have received this gift."

Moreover, the form to be signed at the time of initiation into Ahmadiya sect runs as follows:

"I bear witness that there is no God but Allah. He is one, having no partner, and Muhammad is the Servant and Messenger of God."

All this seems to involve a plenary acceptance of Muslim faith. If it is alleged that Ahmadiyas add or subtract something from the pristine pure principles of Muslim faith, no authority exists to show which doctrines of Islam are regarded as fundamental or the extent to which additions to them, deviations from them or inconsistencies with them are permitted.

Keeping these facts in view, the Madras High Court observed:

"Private judgment and analogical deduction are, in appropriate circumstances and to a greater or less extent, legitimate methods of ascertaining the law as recognised in the textbooks, and we have not been shown how they are not also legitimate in theology, so long as fundamental principles are maintained."

Justice Krishnan seconded his brother Judge Oldfield, and in a separate judgment cited with approval the following passage from Ameer Ali's book:

"Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mahomed is a Moslem subject and is subject to the Mussulman Law. So long as the individual pronounces the *Kalma of Tavhid*, the Credo of Islam, it is not necessary for him or her to observe any of the rites and ceremonies or to believe in particular doctrines, which imply *Iman* or belief."[37]

To the same effect are the opinions of Abdur Rahim in his *Mahomedan Jurisprudence* (p. 249) and of Justice Mahmood in *Queen Empress* v. *Ramzan*[38].

In a recent case of *Shihabuddin* v. *K.P. Ahammed*[39], it has once again been contended that Qadiyanis or Ahmadiyas are not Muslims. In a learned judgment delivered by Justice V.R. Krishna Iyer it was held that—

"Ahmad claimed to be a Prophet, not a plenary one but secondary to the holy Prophet and did accept Muhammad as Messenger of God...Looking at

37. Ameer Ali, ii at p. 36.
38. ILR (1885) 7 All 461.
39. AIR 1971 Ker 206.

the issue devoid of sentiment and passion and in the cold light of the law, I have no hesitation to hold that the Ahmadiya sect is of Islam and not alien."

To the argument that many Muslims in Malabar regard Ahmadiyas as non-Muslims, he answered:

> "Islam is an international religion, as it were, and is not confined to Malabar or India... It would be extraordinary if on a narrow view of what people in one region think a sect were to be excommunicated, thus leading to the grotesque sequel of a person being un-Islam in Malabar but devout Mussulman in Pakistan and in other countries. Consensus in this context must, therefore, mean a broad unanimity in the Islamic world as it were. That obviously has not been attempted or achieved by way of proof in this case."[40]

Justice Iyer cited with approval a passage from Mulla's book to the effect that a person born a Muslim remains a Muslim until he renounces Islam. The mere adoption of some Hindu form of worship, however, does not amount to such a renunciation. For one to be a Muslim it is not necessary that he should be an orthodox believer in that religion; it is sufficient if he professes Islam in the sense that he accepts the unity of God and the prophetic character of Muhammad.

The same view has been taken in cases decided in Pakistan.[41]

We may sum up the present position in India as follows:

According to *Shariah* a child born of parents, either of whom is or both of whom are Muslims, is presumed to be a Muslim. In India, however, a child born of a Muslim father is presumed to be a Muslim but not a child of a Muslim mother and non-Muslim father, as was held by the Privy Council in *Skinner* v. *Orde*, (1871) and by the Oudh High Court in *Mohd. Azim Khan* v. *Saadat Ali*, (1931).

A Muslim remains a Muslim unless he renounces Islam.

A non-Muslim may embrace Islam and become a Muslim by conversion. It is not necessary to go into the motives of the convert,[42] because there is no test or gauge to determine the sincerity of religious belief.[43] As to the question whether observance of any particular ceremony is essential before conversion may be said to be effected, the Privy Council avoided to make a definite reply. It simply said: "Their Lordships do not think it necessary to determine whether the performance of any ceremony is essential before a convert can be said to have

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40. *Ibid*, at p. 209.
41. See *Atia Waris* v. *Sultan Ahmad Khan*, PLD 1959 Lah 205; *Maula Baksh* v. *Charul*, PLD 1952 Sind 54 etc.
42. See, *Resham Bibi* v. *Khuda Bakhsh*, AIR 1938 Lah 482.
43. *Abdool Razack* v. *Aga Mohd.*, (1893) 21 IA 56: 21 Cal 666, and Ameer Ali, ii at p. 22.

embraced the Moslem faith".[44] But in the words of Lord MacNaghten in *Abdool Razack* v. *Aga Mohd.*[45], formal profession of Islam is enough, unless it could be shown to be colourful and fraudulent or the whole of the convert's conduct and the evidence of surrounding facts is such as to run counter to the presumption of conversion to Islam.[46]

7. Categories of Muslims and applicability of Muslim Law

Muslims in India can be divided into three categories:[47]

(*i*) The ordinary Muslims to whom the whole body of Muslim Law applies.

(*ii*) Muslims who are not subject to Muslim Law in all respects, but who are governed by custom in certain matters. These are, for example, the Khojas, the Sunni Bohras of Gujarat and Molesalam Girasias of Broach. These communities preserve to some extent their own customary laws.

(*iii*) The amphibious communities which are not wholly Muslims. These are, for example, the Satpanthis and Pirpanthis of Gujarat, Kutch and Khandesh, who follow the Atharva Veda and worship tombs of Muslim saints in Pirana; observe Ramadhan, repeat the *Kalima* and bury their dead both with Hindu and Muslim prayers. Their religious status, on which depends the question of applicability of Muslim Law on them, is likely to raise some very difficult questions of law.

Subject to the above conditions, Muslim Law applies uniformally over all Muslims in India.

8. Rules of interpretation

General rules.—Majority of Muslims in India are Hanafis. The courts presume every Muslim to be a Hanafi unless otherwise contended.[48] Now, the question is: whether a Hanafi may adopt certain rules from any of the other three Sunni Schools, namely, Maliki, Shafii or Hanbali? Abdur Rahim thinks that it is not open to anyone on his own to choose one and to reject the other from the principles of different schools. "So far as a layman, that is, one who has not made a study of law and religion is concerned, his duty is to follow the guidance of the learned, and it will be sufficient if he consults and acts upon the opinion of the man most noted for his religious learning that may be available to him, and,

44. *Mahbub Singh* v. *Abdul Aziz*, AIR 1939 PC 8.
45. (1893) 21 IA 56: 21 Cal 666.
46. Fyzee, *citing* Tyabji and Wilson, at p. 64.
47. This is largely based on Fyzee at pp. 64-67.
48. See, *Bafatun* v. *Bilaiti Khanum*, (1903) 30 Cal 683; *Khamarunnissa* v. *Fazal Hussain*, (1997) 1 ALT 152.

according to the Malikis and the Shias and the earlier Hanafi jurists, even if the person whom he consults happens to belong to a School of theology other than his own."[49]

From this, Fyzee infers that the equality among various schools is so firmly established "that it is open to a follower of one school to adopt on a particular point of law the interpretation by the jurists of any other Sunnite school in preference to that of his own.[50] He supports his contention by saying that the great scholar Shibli Numani, though a Hanafi, adopted the Shafii School for a short while during a voyage to Europe.[51]

According to Abdur Rahim, a Hanafi *Kazi* may decide a case according to the Shafii law. But this liberty is not open to the present day law courts and law officers. Fyzee disapproves of it and characterises it as "a narrow outlook". It is submitted, however, that the present position is best suited to the times. The institution of *Kazis* is no more and an arbitrary selection of principles by law courts from various schools would create much uncertainty in the law.

Interpretation of Koran.—*Aga Mahomed* v. *Koolsom Bee Bee*, (1897) is the leading case on this point, in which the Privy Council observed that the interpretation of a passage of Koran as attempted by Mr Justice Ameer Ali could not be accepted if it comes in clash with the recognised textual authorities on Muslim Law. It was observed:

> "(Their Lordships) do not (think it proper) to speculate on the mode in which the text quoted from the Koran, which is to be found in Sura II, VV. 241-2, 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*....It would be wrong for the Court on a point of this kind (the right of widow to inherit) to attempt to put their own construction on the Koran in opposition to the express ruling of commentators such great antiquity (as the *Hedaya and the Fatawa-i-Alamgiri*)."

The courts cannot refuse to administer any established principle of law simply because it may not sound quite modern.[52] The Koran has amply been commented upon by eminent scholars for fourteen centuries, and authoritative commentaries are available for consultations.

Interpretation of *Hadith* and ancient texts.—The question before the Privy Council in *Baker Ali Khan* v. *Anjuman Ara*[53], was whether a Shia Muslim can create a *wakf* by will. While answering this question in the affirmative the

49. Abdur Rahim, at pp. 172-173, *citing* Mukhtasar, ii at p. 309.
50. Fyzee, at p. 78.
51. Fyzee, *citing* Sayyid Sulayman, *Hayat-i-Shibli*, 287 (Azamgarh 1943) at p. 78.
52. See, *Veerankutty* v. *Kutti Umma*, 1956 Mad 1004.
53. (1903) 30 IA 94.

Privy Council examined the decision of Mahmood, J., in which that great Judge had taken a contrary view, and observed:

> "There are...special difficulties in accepting the inference drawn by Mahmood, J., from the definition and conditions of a *wakf* as laid down in the ancient Shia texts. The more important of those texts have long been accessible to all lawyers. In none of them does the author himself draw the conclusion that the creation of a wakf by will is excluded. Nor has that conclusion been drawn by any modern writers who have collected and translated those texts."

From this and other similar arguments the Privy Council deduced a general principle of the interpretation of *Hadith* and ancient texts, and said:

> "In *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry*, (1894), in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying on ancient texts of the Muhammadan Law, and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when those proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed on fresh texts newly brought to light, or on fresh logical inferences newly drawn from, old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions."

The above rule laid down by the Privy Council is well and good, but the Council itself once departed from this principle, and Fyzee points out this departure with a bit of sarcasm:

> "...In *Abul Fata* v. *Russomoy*, by holding that family *wakfs* were void, their Lordships departed from the principles of the Muhammadan Law of *wakf*, misapplied a rule of English law to the Muslim institution of *wakf*, and overruled a long line of Muslim jurists, both modern like Mr Justice Ameer Ali and ancient, too numerous to mention. Poetic justice was, however, done when they themselves were overruled by an Act of the Indian Legislature" (the Mussulman Wakf Validating Act, 1913).[54]

Seen in this context, the observation of Mr Justice Chagla in *Ashrafalli* v. *Mahomedalli*[55] that "Muslim texts should be so applied as to suit modern circumstances and conditions", is open to serious doubts. The courts are bound to rely on the interpretation put by recognised jurists and in the case of conflict, on their comparative authority.[56]

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54. Fyzee, at p. 82.
55. AIR 1947 Bom 122: (1945) 48 Bom LR 642.
56. See, *Aziz Banu* v. *Mohd. Ibrahim Husain*, AIR 1925 All 720.

Comparative authority of Hanafi jurists.—There are occasions when on a particular question of law, the three leading exponents of the Hanafi Law, namely, Imam Abu Hanifa and his two disciples Abu Yusuf and Imam Muhammad, may differ. In those disputed cases, the following rules of interpretation have to be followed:

(*i*) In *Abdul Kadir* v. *Salima*[57], it was held by Mahmood, J., that where Abu Hanifa and his two disciples differ, the opinion of the disciples prevails.

(*ii*) In the same case it was held that where there is a difference between Abu Hanifa and Imam Muhammad, that opinion has to be accepted which coincides with the opinion of Abu Yusuf.

(*iii*) When the two disciples differ from each other and from their master, the authority of Abu Yusuf is generally preferred. Because, in the view of Mahmood, J., the opinion of Abu Yusuf, who held a high judicial office, should be given due weight as the other two (Imam Muhammad and Abu Hanifa) never took part in the actual administration of justice.

The above rules of interpretation are not inflexible. Delivering the judgment in *Anis Begam* v. *Mohd. Istafa*[58], Sir Shah Sulaiman, C.J., struck a note of caution in the following words:

> "If one finds a question well threshed out and in later centuries a particular interpretation adopted by the leading doctors and textbook writers, it would not be proper for us in the twentieth century to go behind such a consensus of opinion, and decide a point contrary to such opinion, on the ground that the majority of the three *Imams* favoured that view in the earlier centuries... Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view... But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions without expressing any preference for either, then it is implied that the conflict of opinion was still continuing without any general concurrence having been attained, and it would then be open to choose whichever of the opinions appears to be the sounder and better adopted to the conditions and needs of the times."

From the above it follows that in case of a disputed question of opinion and in the absence of any specific rule of interpretation to be followed, the Court is competent to arrive at its own conclusion and to choose any opinion, subject to the principles of justice, equity and good conscience.

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57. ILR (1886) 8 All 149.
58. ILR 1933 All 743.

9. Islamic Courts

The All India Muslim Personal Law Board has decided to establish Islamic courts in all States of the country and to set up mobile Islamic courts for rural areas. This decision was taken by the said Board at its meeting at Jaipur in October 1993. According to Maulana S. Nizamuddin, General Secretary of the Board, it was expected that all Muslims would refer their disputes in family matters to these courts and abide by their decisions. Founder member of the Board Mojahidul Islam Qasmi, who is also the General Secretary of the All India Milli Council said that the need for re-establishing Islamic courts was being felt for a long time because of the long process the judicial system involved. The courts were functioning since 1921 in States like Bihar and Orissa and in some cities also like Hyderabad, Bangalore, Nasik, Belgaum and Lucknow. Some members of the Board felt that the announcement of setting up the chain of Islamic courts should be viewed in the context of the 'threats' which members of the minority community 'perceive' in the Government attempts 'to interfere' in the Muslim Personal Law, and Shariat. The Board's decision was also viewed in the same context as a reply to the demand by certain political parties for a uniform civil code.

These Islamic courts or "darulkhaja" would be governed by the Muslim Personal Law and Shariat and will make any attempts by anyone to impinge on the personal law at a later stage virtually impossible. These courts will also ensure speedier and cheaper justice.

The Board has also disapproved the offer of the Prime Minister to pay salary of the *Imams* of the mosques if the Wakf Boards' financial position does not allow them to do so. The offer of the Prime Minister was a sequel to the decision of the Supreme Court in the *All India Imams' case* (infra) fixing the responsibility on the *Wakf* Boards to pay living wages to the *Imams*. The Personal Law Board's General Secretary Nizamuddin opined that the Board viewed that it was below the dignity of the *Imams* to become paid servants of the Government which in consequence may bring the mosques under government control, which was totally unacceptable. The community should itself bear the responsibility to maintain their *Imams* respectably. The *Imams* present in the open session of the Board themselves voted against the Government's offer. A few members thought the task of meeting the expenses of the salaries of a few lakh *Imams* running into crores of rupees would prove Herculean for the impoverished Wakf Boards.[59]

The All India Congress Committee Minority Cell Chairman Tariq Anwar considers the proposed move to establish Islamic courts as a retrogatory step which would take the community backward alienating it further from social

59. *The Indian Express*, (New Delhi), 11-10-1993.

mainstream. Even in Islamic countries there is no separate judiciary. The Communist Party of India leader Farooqui also thinks that there is no scope for parallel judicial system of separate religious courts. But Mohammed Yunus Saleem, a Janata Dal Member of Parliament and an ex-Governor of Bihar saw nothing startling about the Board's proposal. The General Secretary of the Muslim Majlis Mushawrat Ahmad Ali Qasimi said that the cause for the controversy is the use of the English word 'court'. The motion proposed to establish *Shariai Adalaten* which are like *panchayats*. Their decisions are not final and one may go to the regular courts. Such *panchayats* are popular in Bihar, he said.[60]

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60. *Ibid*, 12-10-1993.

III

Marriage

(Nikah)

1. Pre-Islamic background

The relationship of sexes in pre-Islamic Arabia was in an uncertain state. Regular form of marriage in the sense as we understand today was very rare. Instead, there flourished such types of sexual unions which may only be branded as prostitution, adultery or polyandry. Abdur Rahim lists the following types of "marriage" (if they may be so-called) prevalent in those days:

(*i*) A custom according to which a man would say to his wife: "Send for so and so (naming a famous man) and have intercourse with him." The husband would then keep away from her society until she had conceived by the man indicated, but after her pregnancy became apparent, he would return to her. This originated from a desire to secure noble offspring.

(*ii*) Several men, less than ten, used to go to a woman and have sexual connection with her. If she conceived and was delivered of a child, she would send for them, and they would be all bound to come. When they came and assembled, the woman would address them saying: "You know what has happened. I have now brought forth a child. O so and so! (naming whomsoever of them she chose), this is your son." The child would then be ascribed to him and he was not allowed to disclaim its paternity.

(*iii*) Several men used to visit a woman who would not refuse any visitor. These women were prostitutes and used to fix at the doors of their tents a flag as a sign of their calling. If a woman of this class conceived or brought forth a child, the men that frequented her house would be assembled, and physionomists used to decide to whom the child belonged.

In the latter two types of "marriage", what differentiates them from ordinary prostitution is the emphasis placed on establishing the paternity of the child born out of such loose sexual unions. Today, no prostitute could legally or

customarily establish the paternity of her child in any person, more so if the person happens to disclaim the paternity.

In addition to these, some other corrupt forms of marriages were:

(1) A man would purchase a girl from her parents or guardian for a fixed sum.

(2) *Muta* (temporary) marriages were widely prevalent, so much so that in the beginning of Islam, even the Prophet tolerated them as a matter of policy but later on he prohibited them.

(3) A pre-Islamic Arab was allowed to marry two real sisters at one and the same time.

Islam reformed these old marriage laws in a sweeping and far-reaching way. In *Sura* IV of the Koran, some of the regulations regarding marriage are laid down. The relevant passages are:

> "Marry not the woman whom your father has or had married, for this is shameful and abominable and evil way."
>
> "Forbidden to you are your mothers, your daughters, your sisters, your aunts, paternal and maternal, the daughters of your brother and sister, your foster-mother and foster-sisters, the mother of your wives and the step-daughters who are in your care, born (of) your wives, with whom ye have had intercourse—but if ye have not had intercourse with them, it is not a sin for you—and the wives of the sons, who are your offspring, also ye marry two sisters at the same time, except what is already past; Allah is gracious and merciful."

Prophet Muhammad abrogated those various forms of marriage except the one in which a dower was paid and the man asked the parents of the woman for her hand. The Prophet declared that dower was due to the woman, and is symbol of respect of husband towards his wife. The consent of woman in marriage was made essential. The wife was made a sharer in the inheritance. In short, she was not to be treated henceforth as a chattel.

2. Definitions of marriage

Let us first examine some of the various definitions of a Muslim marriage and then to see which of them is most suitable:

HEDAYA: "*Nikah* in its primitive sense, means carnal conjunction. Some have said that it signifies conjunction generally. In the language of the law it implies a particular contract used for the purpose of legalising generation."[1]

1. *Hedaya*, at p. 25.

AMEER ALI:	"Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity."[2]
JUSTICE MAHMOOD:	" Marriage among Muhammadans is not a sacrament, but purely a civil contract."[3]
M.U.S. JUNG:	"Marriage though essentially a contract is also a devotional act, its objects are the right of enjoyment, procreation of children and the regulation of social life in the interest of the society."[4]
ABDUR RAHIM:	"The Muhammadan jurists regard the institution of marriage as partaking both of the nature of *ibadat* or devotional acts and *muamlat* or dealings among men."[5]

Among all the above definitions, Abdur Rahim's definition is the most balanced one. By using the two ingenious words *ibadat* and *muamlat*, he has summarised the whole concept of Muslim marriage in one sentence. Let us approve of this definition, and proceed to see why Muslim marriage is not purely a civil contract, as Mahmood, J., emphasised, or as to why it is not solely a way to procreate children.

3. Nature of Muslim marriage

The judgment in *Abdul Kadir* v. *Salima*[6], is one of those classic pronouncements of the illustrious Mr Justice Mahmood, the first Indian Judge of the Allahabad High Court, which has acquired so great a reputation that its *obiter dicta* carries the legal sanctity of *ratio decidendi*. The case is one on the restitution of conjugal rights, yet Justice Mahmood's observations on—

(*i*) nature of marriage,

(*ii*) husband's liability to pay dower,

(*iii*) matrimonial rights of the husband and wife, and

(*iv*) general rules of interpreting Hanafi Law,

have won universal recognition not only of various High Courts but also of the Privy Council and the Supreme Court.

Describing the nature of Muslim marriage, Mahmood, J., says:

"Marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Koran, yet the Muhammadan Law does not positively

2. Ameer Ali, *Mohammedan Law* (Students 7th Edn.) at p. 97.
3. *Abdul Kadir* v. *Salima* (1886) 8 All 149 at p. 154.
4. Jung, *Dissertation* at p. 1.
5. Abdur Rahim, at p. 327.
6. AR (1886) 8 All 149.

prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case.

That (the above) is an accurate summary of the Muhammadan Law is shown by the best authorities, and Mr Baillie, at page 4 of his Digest, relying upon the texts of the *Kanz*, the *Kifayah* and the *Inayah*, has well summarised the law; Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But *it was also instituted for the solace of life*, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness. The pillars of marriage, as of other contracts, are *Ejab-o-Kubool*, or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance."

The *Hedaya* lays down the same rule as to the constitution of the marriage contract, and Mr Hamilton has rightly translated the original text: "Marriage is contracted—that is to say, is effected and legally confirmed—by means of declaration and consent, both expressed in the preterite." "

From the above, Justice Mahmood could not be held to have taken the view that Muslim marriage is nothing but purely a civil contract. Yet this is precisely what he is accused of holding. When he approves of Baillie's view that marriage is also for the solace of life, he is himself highlighting another aspect of marriage, that is, its social aspect.

The amount of dower which becomes payable after marriage must not be confused with consideration in the context of civil contract. Justice Mahmood himself is sounding a note of caution when he says in the same decision:

"Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage...the dower of the Muhammadan Law bears a strong resemblance to the *denatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan Law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic textbooks of Muhammadan Law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and the sale is the typical contract which Muhammadan jurists are

accustomed to refer to in illustrating the incidents of other contracts by analogy."

From what Justice Mahmood has said up to this point, he can only be accused of neglecting the religious aspect of marriage.

Seen from the religious angle, Muslim marriage is an *ibadat* (devotional act). The Prophet is reported to have said that marriage is essential for every physically fit Muslim who could afford it. Moreover, the following traditions may also be considered:

"He who marries completes half his religion; it now rests with him to complete the other half by leading a virtuous life in constant fear of God."

"There is no mockery in Islam."

"There are three persons whom the Almighty Himself has undertaken to help—first, he who seeks to buy his freedom; second, he who marries with a view to secure his chastity; and third, he who fights in the cause of God."

"...whoever marries a woman in order that he may retain his eyes—God putteth a blessedness in her for him, and in him for her."

The Prophet is reported by some of the writers to say that marriage is equal to *jehad* (holy war); it is sinful not to contract a marriage; it is a *Sunnah*; and it is obligatory on those who are physically fit.

Now, if marriage is nothing but a civil contract, then keeping in view the above traditions we could say: He who enters into a civil contract completes half of his religion; the Almighty Himself has undertaken to help the person who enters into a civil contract; civil contract is equal to *jehad*; it is obligatory on every physically fit Muslim to enter into a civil contract; and so on. All these inferences are patent absurdities, and are untenable. Which means Muslim marriage is something more than a civil contract.

Seen in this context, Muslim marriage ceases to look as purely a civil contract or a means only to procreate children. In the words of Baillie, marriage is "for the solace of life... It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death-illness."[7] In the words of Ameer Ali, marriage is "for the protection of society, and in order that human beings may guard themselves from foulness and unchastity." Al-Ghazali, the famous jurist and philosopher, regards marriage as a means "of attaining nearness to God".

In the famous case of *Anis Begam* v. *Mohd. Istafa*[8] Sir Shah Sulaiman, C.J., observed: "Marriage (in Islam) is not regarded as a mere civil contract, but a *religious sacrament* (too)."

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7. Baillie, at p. 1.
8. ILR 1933 All 743.

disagree with the sweeping observation of the learned Judge that 'Any attempt by him to ascertain any further information or to refuse to perform the marriage on any other ground, is prone to impinge on the rights of the parties to the marriage and would be in excess of the powers and duties ascribed to him under Law.'[15] Besides 'opining about the validity or otherwise of the dissolution of the marriage brought about by the parties themselves' — as mentioned by the Court itself[16], the *Kazi* can keep an eye on the claims of citizenship/nationality of the contracting parties, the hidden purpose of the marriage between a girl of Indian citizenship and a male of foreign nationality, misuse of conversion to hoodwink legal restrictions on marriage; he can insist on simultaneous registration of marriage. Now the Supreme Court has held[17] that marriages of all persons who are Indian citizens belonging to various religions should be made compulsorily registerable in their respective States, where the marriage is solemnised. The highest court notes with approval the view of the National Commission for Women that compulsory registration will, inter alia, deter parents from selling young girls to any person including a foreigner, under garb of marriage. Should a *Kazi* mutely perform such marriage or report it to the State? Andhra Pradesh itself has a law requiring compulsory registration of marriages.[18] Thus a *Kazi* can play an important role by assisting the State in protecting national security. Now in some states the *Imams* are receiving emoluments from Wakf Boards[19], may be the Welfare State comes out in future with a scheme to protect the legitimate interests of the *Kazis*.

There was one suggestion at the BCI convention that registration of marriages must be made compulsory for all marriages in India.[20] Prima facie this secular procedure does not interfere with religious rituals, if any. Like the municipal laws requiring birth and death registration, it is a post facto civil formality rendering evidentiary value to a traditional form of marriage. Difficulty may arise if the Shias interpret it as an extension of the Sunni prescription of two witnesses to a marriage. Since, however the witnesses signing before the marriage registrar would be testifying to only the factum of registration and not at the traditional wedding, the objection would be tenuous.

The above suggestion at the Convention has now received a very strong support by the Supreme Court of India in its decision in *Seema* v. *Ashwani Kumar*[21]. Entries 5 and 30 in List III of the Seventh Schedule to the Constitution

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15. *Ibid.*
16. *Ibid.*
17. *Seema* v. *Ashwani Kumar*, (2006) 1 KLT 791 (SC).
18. Further see below.
19. *See* Ch. IX.
20. *See*, B. Sivaramayya, *Marriage, Registration of Marriages and Decrees of Nullity*, in Menon (Ed.) *Uniform Civil Code*, *op. cit.*, at p. 91 et seq. and at p. 116.
21. (2006) 1 KLT 791 (SC).

of India give concurrent power to the Union and the States to make laws on 'marriage and divorce and vital statistics' inter alia, which are subjects of personal law. The registration of marriages would come within the ambit of the expression 'vital statistics' in Entry 30. 'The Convention on the Elimination of All Forms of Discrimination Against Women' adopted by the United Nations General Assembly in 1971 had recommended compulsory registration of marriages. India had satisfied the Convention in 1993 with some reservations. Five States provide for compulsory registration — Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh. Further Assam, Bihar, West Bengal, Orissa and Meghalaya — five States — provisions appear for voluntary registration of Muslim marriages. In Uttar Pradesh also it appears that the State Government has announced a policy providing for compulsory registration of marriages by the Panchayats and maintenance of its records relating to births and deaths. Under the Special Marriage Act, 1954, which applies to the Indian citizen irrespective of their religion each marriage is registered by the Marriage Officer specially appointed for the purpose. The registration of marriage is compulsory under the Indian Christian Marriage Act, 1872; the marriage register is maintained by the concerned Church. The Parsi Marriage and Divorce Act, 1936 makes registration of marriages compulsory. Section 8 of the Hindu Marriage Act, 1955 provides for registration, which is made voluntary. In Goa, Daman and Diu the 1911 Law of Marriages is in force, the Hindu Act is not yet extended. The Foreign Marriage Act, 1969 also provides for registration of marriages. The State of Jammu and Kashmir has its own Jammu & Kashmir Hindu Marriage Act, 1980 as well as J&K Muslim Marriages Registration Act, 1981. The latter provides that post the Act Muslim marriages shall be registered within 30 days of the *Nikah*. But the irony is that the Act awaits enforcement. The State has again a separate Act for Christian Marriage and Divorce (1957); this also provides for registration. The States of Haryana, Uttar Pradesh, West Bengal and the Union Territories of Pondicherry and Chandigarh have framed rules under the Hindu Marriage Act.

Although this long list of legislative efforts on paper, the ground level status of implementation worries the National Commission for Women, which indicated in the affidavit filed before the Supreme Court that the Commission is of the opinion that non-registration affects most and hence it supports legislation for compulsory registration. Such a law would be of critical importance to various women related issues such as:

(*a*) Prevention of child marriages and to ensure minimum age of marriage;

(*b*) Prevention of marriages without the consent of the parties;

(*c*) Check illegal bigamy/polygamy;

(*d*) Enabling women to claim their right to live in the matrimonial house, maintenance, etc.;

(*e*) Enabling widows to claim their inheritance rights and other due benefits after the death of the husband;

(*f*) Deterring desertions by husbands; and

(*g*) Deterring sale of daughters/girls to persons and foreigners under the garb of marriage.

The Supreme Court added further that if the record of marriage is kept, disputes regarding solemnisation would be avoided; it would provide a strong evidence of the factum of marriage; it has a great evidentiary value in the matters of custody of children, right of those children, age of the parties; it would be in the interest of the society if marriages are made compulsorily registrable.

Accordingly, the Supreme Court said, 'we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States where the marriage is solemnised'.

Accordingly, the Supreme Court directed the States and the Central Government to notify within 3 months the procedure for registration. For this rules may be framed; before enforcing them objections may be invited from the public. On enforcement, an authorised officer shall keep a register of marriages, in which age, marital status shall be clearly stated. False declaration shall be made punishable. The object of the said rules shall be to carry out the directions of this court. The Governments shall ensure that these directions are carried out immediately. As and when the Central Government enacts a comprehensive statute, the same shall be placed before the Supreme Court for scrutiny.

Thus, at law, marriage is a civil contract, at religion it is not a sacramental performance, but at social custom it is imbibed with some religious traits. Muslims in India hail from a highly religious oriented ethnic stock and therefore naturally they embedded some religious traits into the ceremonies of marriage. Since the source of Muslim Law is the Koran, in one sense the law of nuptial contract is also 'a religious law', as the Muslims like to emphasise in reference to their 'personal law'. One of the reasons for this insistence may be to insulate the marriage law from 'interference' by civil authority of the State.

4. Formalities of a valid marriage

Marriage may be constituted without any ceremonial; there are no special rites, no officiants, no irksome formalities.[22] Nevertheless, following conditions are necessary:

(*i*) Offer on the part of one party to the marriage.

(*ii*) Acceptance by the other party.

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22. Fyzee, at p. 91. *Abdul Rahim* v. *Julaiga Beevi*, (2001) 4 CLT 440.

Note.—The offer and acceptance may be made by the parties, or by their agents, if both are competent. In case of legal incompetency, like minority or unsoundness of mind, the guardians may validly enter into a contract of marriage on behalf of their wards.[23] And where the girl is a minor, her 'consent' has no value, that 'marriage' would be a nullity and the father would be entitled to the custody of her person as her legal guardian—as held in *Shabnoor Mohammad Tahseen* v. *State of U.P.*[24]. The Allahabad High Court held this in a writ petition by the father for her custody against the claim of Respondent 4 that as 'husband' he had the right to her custody. On the basis of a school leaving certificate accepted as genuine by the Court, she was proved to be minor. As such she had no right to enter into marriage contract on her own free will; she as minor could be given in marriage only by her father; Kazi was in knowledge of this fact; she could not be allowed to live with husband against mandate of Holy Koran.

(*iii*) Presence of two witnesses where the parties are Hanafis; no witnesses are required if parties are Shias.

(*iv*) The words with which the marriage is contracted must be clear and unambiguous.

(*v*) The proposal and acceptance must both be expressed in one and the same meeting.

In certain cases where man and woman are living as husband and wife, the question may arise whether they are presumed to be married.

According to the recognised view, if the cohabitation is continuous and prolonged, the man and woman may be treated as husband and wife. The same presumption will also be there in the case where the man acknowledges the woman as his wife, or the child born of the union as legitimate.

But where impediments of a nature which render a valid marriage between the parties as impossible, are present, no presumption of marriage may arise. Thus, where the woman is non-*Kitabiya*, related to the man within the prohibited degrees of relationship, the wife of another person, and so on, she cannot be presumed to be the wife. In a case where a Buddhist Burmese lady cohabited with a Muslim male for some time, the Privy Council observed that no presumption of marriage in such a case could arise.[25] Similarly, cohabitation with prostitute cannot give rise to the presumption of marriage.[26]

Thus, the essential conditions of a valid marriage may be summarised as follows: "*Ijab* (offer), *qubul* (acceptance), *baligh* (adult age or puberty), *rashid* (sound mind not *majnum* or non-compos mentis) parties—i.e. groom and bride, or when minor their guardians, two witnesses (in Hanafi Law, not Shia Law), and same meeting (that is at one session complete). The completion of this contract which commences with proposal or demand in marriage and ends with the consent is called *aqd*." (Ameer Ali).

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23. Fyzee, at p. 91. *Abdul Rahim* v. *Julaiga Beevi*, (2001) 4 CLT 440.
24. (2007) 1 All LJ 183.
25. See, *Abdool Razack* v. *Aga Mohd.*, (1893) 21 IA 56: 21 Cal 666.
26. *Mohd. Amin* v. *Vakil Ahmed*, 1952 SCR 1133.

5. Legal effects of a valid marriage

Baillie gives a description of the legal effects of marriage[27], but the systematic treatment of this point by Fyzee has been adopted here for convenience.[28] There are nine legal effects flowing from a valid marriage:

(*i*) Sexual intercourse becomes lawful and the children born of the union are legitimate;

(*ii*) the wife becomes entitled to her dower;

(*iii*) the wife becomes entitled to maintenance;

(*iv*) the husband becomes entitled to restrain the wife's movements in a reasonable manner;

(*v*) mutual rights of inheritance are established;

(*vi*) the prohibitions regarding marriage due to the rules of affinity come into operation;

(*vii*) the wife is not entitled to remarry after the death of her husband, or after the dissolution of her marriage, without observing *iddat*;

(*viii*) where there is an agreement between the parties, entered into either at the time of the marriage or subsequent to it, its stipulations will be enforced, insofar as they are consistent with the provisions or the policy of the law; and

(*ix*) neither the husband nor the wife acquires any interest in the property of the other by reason of marriage.

6. Stipulations in marriage contract

Certain ante and/or post-nuptial conditions may be appended to a marriage contract. These conditions must be legal, reasonable and not opposed to the spirit of Islamic Law. The parties could modify or rescind these conditions at any time they like; it is because marriage is mainly a civil contract. In cases where illegal and unreasonable condition is attached with a marriage contract, the condition alone and not the marriage itself will be treated as invalid.

The following are the typical valid conditions attached with a marriage contract:

(*i*) The condition agreed upon by the guardians of minors whose marriage has been so contracted, that the wife could divorce the husband in case he takes a second wife without her consent.[29]

(*ii*) "I (the husband) accordingly agree that if I forsake the *Malak-o-Badar* community or am expelled from it by the spiritual head, my wife may

27. *See*, Baillie, at p. 13.

28. Fyzee, at pp. 116-117.

29. *Marfatalli* v. *Zahedunnissa*, AIR 1941 Cal 657.

get a divorce from me pronounced by a person appointed by her on my behalf which divorce I will accept as valid."

It was held that the condition is valid, and is not opposed to Muslim Law.[30]

(*iii*) It will be a valid condition if it says that the wife would be entitled to separate maintenance if her relationship with the husband becomes strained. Such a condition is not against the public policy.[31]

(*iv*) It can validly be agreed upon that the wife shall live in her parent's house and shall not be removed elsewhere, and in the case of dissension with the husband, he would pay a monthly allowance to her as maintenance and will allow her to remain in her parent's house.[32]

(*v*) The wife may validly stipulate to be allowed to leave her husband's house in case of his misbehaviour or cruelty.[33]

(*vi*) The husband authorised the wife to seek divorce in the event he mistreats her, her parents or her relations. Long afterwards, the husband instituted a criminal proceeding against his wife and her parents. The complaint proved frivolous. The wife exercised her right to seek divorce and sent a notice to this effect to her husband. The husband did not receive the notice.

It was held that the fact whether husband received notice or not is immaterial. The eventuality in which he has allowed his wife to seek divorce is present and she is not affected in any way by the non-service of the notice.[34]

(*vii*) It is a valid condition through which the husband stipulates that he would earn his livelihood and maintain his wife and would live in a house approved by the wife and her parents, and on his failure in doing so, the wife may seek divorce.[35]

There are many conditions, however, which because of their illegal or unreasonable character cannot be appended to a marriage contract. Some of the most typical illegal conditions are:

(*i*) A stipulation binding the husband to live in his wife's or wife's parents' house.

(*ii*) An agreement for future separation between the husband and wife, and payment of maintenance during such separation.

(*iii*) An agreement through which the husband has been divested of his power of divorce.

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30. *Fida Ali* v. *Sanai Badar*, AIR 1923 Nag 262.
31. *Muinuddin* v. *Jamal Fatima*, AIR 1921 All 152.
32. *Sakina* v. *Shamshad Khan*, AIR 1936 Pesh 195.
33. *Banney Sahib* v. *Abida Begum*, AIR 1922 Oudh 221.
34. *Samserannessa* v. *Abdul Samad*, AIR 1926 Cal 1144.
35. *Mohd. Yasin* v. *Mumtaz Begum*, AIR 1936 Lah 1716.

(*iv*) An agreement which gives liberty to the wife to visit immoral places.

(*v*) A condition negativing the mutual right of inheritance, or wife's right to dower and maintenance.

(*vi*) A condition that the wife will permanently live with her parents.

(*vii*) A condition that the wife will be free to leave her husband's residence and may live elsewhere.

No exhaustive list of legal and illegal conditions can ever be drawn. And neither there is a need of any. The validity of any given condition can be tested at once by asking: Is it reasonable, legal, moral, Islamic and conforming to the basic legal incidents of the marriage?[36] A very interesting novel objection was raised by a husband about the validity of his wife's marriage! To resist the claim of his wife for maintenance allowance for her and her child, the husband in *Amina* v. *Hassan Koya*[37] took the plea that his wife had concealed her pregnancy at the time of marriage and therefore their marriage was not valid. The lower court had upheld her marriage. The wife was five months pregnant at the time of their marriage. The husband's contention that she had concealed this fact could not convince the Supreme Court, particularly when the stage was so advanced. Further, he continued with such marriage without raising any objection, attended to his wife at the time of delivery, gave his name to the child born, brought up the child for nearly four years, and now, after four and half years filed for divorce. In view of these facts, held, the respondent was aware of the pregnancy of the appellant at the time of marriage, and therefore the marriage was valid.

7. Classification of marriages[38]

Marriages may be either:

(*i*) valid,

(*ii*) void, and

(*iii*) irregular.

(*i*) **Valid.**— A valid marriage is one which conforms in all respects with the legal requirements, and there should be no prohibition affecting the parties.

When all the legal conditions are fulfilled, the marriage is called *Sahih* or 'correct', that is, a marriage in which no prohibitions affect the parties. Prohibitions may be either permanent or temporary. If they are permanent, the marriage is void, if temporary, it is irregular.

(*ii*) **Void.**—A marriage which has no legal results is termed as void. A marriage forbidden by the rules of blood relationship, affinity or fosterage is

36. Saksena, 172, Citation of cases may be seen there.

37. *Amina* v. *Hassn Koya*, (2003) 6 SCC 93: 2003 SCC (Cri) 1276.

38. Fyzee, at pp. 112-115, and Tyabji, at pp. 162-164.

void. Similarly, a marriage with the wife of another, or remarriage with a divorced wife, without observing the strict rules set for this occasion, is void.

Legal effects of a void marriage.—A *Batil* or void marriage is an unlawful connection which creates no mutual rights and obligations between the parties. As Fyzee observes, it is a semblance of marriage without the reality. Being no marriage at all, the Muslim woman can have it declared void at any time and the man can create no hindrance against her action. The woman gets no right to dower. If either party dies during the period of this union, the other acquires no right of inheritance. Neither can enforce any marital obligations against the other, e.g., the man cannot compel the woman to submit to his company. The children of such marriage are not legitimate. But according to *Radd-ul-Muhtar*, if they have consummated the marriage, the woman would be entitled to her dower (*mahr-ul-misl*).

(*iii*) **Irregular.**—A marriage may be either lawful or unlawful. Unlawfulness may be either absolute or relative. If the unlawfulness is absolute, the marriage is void. If it is relative, it is an irregular marriage.

The following are irregular marriages:

(*a*) A marriage without witnesses;

(*b*) A marriage with a woman undergoing *iddat*;

(*c*) A marriage prohibited by reason of difference of religion;[39]

(*d*) A marriage with two sisters, at the same time;[40] and

(*e*) A marriage with a fifth wife.

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39. Very recently the Kerala HC has held in *Shamsudeen M. Illias* v. *Mohd. Salim M. Idris*, AIR 2008 Ker 59, that a marriage of Muslim male with a Hindu woman is invalid-*fasid*. Such marriage is not void (*Batil*), only invalid (irregular) and therefore the offspring of such marriage is legitimate, resulting in entitling the child to inherit the property of the father. The woman however has no such right in the property of the 'husband'; yet, on consummation she is entitled to get dower. Even her conversion to Islam does not change her position as to inheritance. The court also held that such 'marriage' can be presumed from prolonged and continued cohabitation and living together under one roof as husband and wife. Earlier the Karnataka HC had laid down similar law in *Imamhussain* v. *Jannathi*, (2007) 6 AIR Kar R 243. The Madhya Pradesh HC emphasised that in absence of evidence it cannot be held that irregular marriage (between Muslim male and Hindu woman) became legal on account of conversion of the woman (plaintiff) to Islam —*Puniyabi* v. *Sugrabi*, AIR 2008 MP 781 (NOC).

40. The rule is that the bar of unlawful conjunction (*mawa bain-al-maheamain*) renders a marriage irregular and not void. Since a marriage which is temporarily prohibited may be rendered lawful once the prohibition is removed, such a marriage is irregular (*fasid*) and not void (*batil*)-so is the view of *Fatwa-i-Alamgiri*, and was followed by Bombay High Court in 1917 in *Tajbi* v. *Mowla Khan*, ILR (1917) 41 Bom 485, and further reinforced by the Supreme Court in *Chand Patel* v. *Bismillah Begum*, (2008) 4 SCC 774: (2008) 2 SCC (Cri) 490. The court held under Hanafi Law applicable to Muslims in India, such irregular marriage continues to subsist till legally terminated. Wife and children of such marriage would be entitled to maintenance under S. 125 of CrPC.

In Shia Law, all the above irregular marriages are treated as void, because Shia Law does not recognise the distinction between irregular and void marriages. A marriage is, according to that system, either valid or void.

The issues of an irregular marriage are treated as legitimate and are entitled to inherit. But there are no rights of inheritance between the husband and the wife. The wife is entitled to dower if the marriage is consummated, and has to observe *Iddat* for three courses.

The irregular marriages may be made regular by removing the impeding irregularity, which must not be of a permanent nature. Marriages contracted within the relationship of consanguinity, affinity and fosterage cannot be validated. Similarly, marriage with a woman whose husband is living would not become valid even after the death of the first husband, because the marriage is void *ab initio*. Other types of marriages may, of course, be validated by removing the temporary irregularity. Thus, a marriage in the absence of witnesses becomes regular on consummation; marriage without free consent, by ratification with free consent: marriage with a non-Muslim, by conversion to a religion which could make the marriage valid; marriage by a person who has already four wives, by death or divorce of any wife reducing the number to four; marriage prohibited by unlawful conjunction, by terminating the marriage which creates this prohibition.

Muta marriages.—"It is lawful among Shias", says Wilson, "to enter into a contract of (so called) marriage for a limited period, which may be for a term of year, a month, a day or even part of a day."[41]

The marriage dissolves of itself, on the expiration of the term of marriage. If no time limit is expressed, the marriage is presumed to be permanent.

The number of wives that can be taken into *Muta* marriage is unlimited. The ceiling of four wives does not apply here.

A Shia male may contract *Muta* with a Muslim, Christian, Jewish or Parsi (fire-worshipper) woman, but not with a woman following any other religion. A woman may not contract *Muta* with a non-Muslim.

The amount of dower must be specified in the contract of Muta otherwise the agreement is void.

The child born of a *Muta* marriage is legitimate and capable of inheriting from the father.[42] But, in the absence of an express agreement, neither party to a *Muta* is entitled to inherit from the other. Maintenance is not due to the *Muta* wife unless it has expressly been agreed upon.

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41. Wilson, at p. 446.

42. In this respect it is different from "legalised prostitution". Certain critics allege that the Muta marriage is nothing but a 'marriage for pleasure'. Nevertheless, it must be appreciated that in prostitution, neither the child so born is legitimate nor is entitled to inherit from the father.

Fyzee says that the old Arabian custom of *Muta* was justified as being useful in times of war and travels. But the Prophet prohibited it and later on Caliph Umar suppressed it ruthlessly. Among the Shias themselves, only Ithna Ashari School recognises it, and it is rejected by every other Muslim School. The practice is not common in India, and in Lucknow, Rampur and other places where there is a Shiite population, ladies of better class do not contract *Muta* marriage.[43]

Essential requirements of Muta.—From the above we can see that (*a*) period and (*b*) dower are the two main conditions of *Muta*. As to (*a*) period—*Muta* being a temporary marriage in essence, it is necessary that the *Muta* contract must specify the period of the enjoyment. The fixed period can again be extended by a new contract. It can also be presumed to be extended unless disproved. For example, *A* married *B* under *Muta* form for 2 years. Even after the expiry of that period, *A* and *B* continued to live together without entering into a new contract. Living like this a child is born to them in the fourth year. The husband *A* dies in the fifth year. It will be presumed that the *Muta* had lasted for 5 years and the child was legitimate.[44] But suppose *A* and *B* contract a *Muta* marriage for (*i*) unspecified time—that is mention of period is omitted, intentionally or unintentionally, or (*ii*) specified for lifetime. Will such contract result into *Muta* or *Nikah*? According to a decision by the Hyderabad High Court[45], in both cases a permanent *Nikah* will result. Fyzee does not agree with this.[46] As to the second, he says that fixation of a period in marriage contract destroys the concept of *Nikah* as understood in Islamic Law. As to the first, in his opinion the deciding factor should be intention of the parties rather than the form of the words. The Privy Council had also held in *Shoharat Singh case* (supra) that where cohabitation of a man and a woman commenced with a *Muta* and there was no evidence as to the term of the marriage, the proper inference, unless disproved, would be that *Muta* continued during the whole period of cohabitation. As to (*b*) dower; being a short-term contract, the element of dower is rightly emphasised. The dower must be specified, otherwise the contract is void. The wife's right to dower arises as soon as the marriage is consummated. She can claim the whole amount. But if she chooses to abandon the husband before the end of the fixed period, she must suffer a proportionate cut in the dower.

Now we may note in the form of a table the points of distinction and similarity between *Muta* and *Nikah*:

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43. *See*, Fyzee, at p. 112.
44. *Shoharat Singh* v. *Jafri Bibi*, 24 IC 499 PC.
45. *Shahzada Qanum* v. *Fakher Jung*, AIR 1953 Hyd 6.
46. Fyzee, *Outlines of Muhammadan Law* (4th Edn., Oxford, Delhi) at p. 120.

	Muta	*Nikah*
1.	A temporary marriage.	A permanent marriage.
2.	Basically the object is pleasure.	A socio-religious union.
3.	Recognised by Shias only.	Recognised by Shias and Sunnis both.
4.	Period is fixed by agreement. Being a temporary arrangement a fixed period is its essential ingredient.	It is essentially a union for life, subject to divorce. Fixation of period shifts it to the former category.
5.	Dower must be specified otherwise it is a void agreement, for it is a *quid pro quo* for a short time services of the woman.	Dower may be implied if not specified. Does not become void if no dower specified. For the idea is that the woman may get it anytime during the lifelong duration.
6.	An unconsummated *Muta* would entitle the wife to one-half dower only.	Whether consummated or not, *Nikah* entitles the wife to full dower—both prompt and deferred.
7.	No minimum limit to dower, depends on terms of contract.	Hanafi Law recognises a minimum limit of ten *dirhams*.
8.	Ipso facto termination of the contract on expiry of the term (period). No formality of termination required. Time limit is the limit of relationship.	No such automatic termination, as no time limit is fixed.
9.	Earlier termination is possible by paying the wife the *hibba-i-muddat*, i.e. gift for the unexpired period.	No question of 'earlier' termination, for the term 'earlier' is relative to time limit. Dissolution of marriage is of course possible.
10.	Divorce is not recognised.	Divorce is recognised for the purpose of dissolution.
11.	No provision for maintenance of the wife, for she is not regarded as dependent (Shia Law).	Wife by *Nikah* is entitled to maintenance.
12.	But a wife by *Muta* is entitled to maintenance under Section 125 CrPC.	So also a wife by *Nikah* is entitled to maintenance under Section 125 CrPC.
13.	No right of inheritance to the wife or husband in respect of each other's property.	Reciprocal right of inheritance exists.
14.	Children are legitimate.	Children are legitimate.

	Muta	*Nikah*
15.	Children have right of inheritance.	Children have right of inheritance.
16.	No limit to number of wives.	Number is fixed at four only.

8. Prohibitions to marry in certain cases

Tyabji gives the following nine grounds on which Muslims are prohibited from intermarrying with each other:

(*i*) **Consanguinity.**—A Muslim is prohibited to marry—

(*a*) his own ascendants or descendants;

(*b*) his father's or mother's descendants; and

(*c*) the sisters or brothers of any ascendant.

(*ii*) **Affinity.**—It is unlawful for a Muslim to marry[47]—

(*a*) ascendants or descendants of his wife; and

(*b*) the wife of any ascendant or descendant.

(*iii*) **Fosterage.**— A child is called the "foster-child" of the woman who not being the child's mother, has nursed the child whilst it was under two years of age. The woman is called the "foster-mother".

Muslim Law prohibits marriage within certain limits of fosterage. A man may not, for instance, marry his foster-mother or his foster-sister.

(*iv*) **Unlawful conjunction.**—It may be because of two things:

(*a*) Number, or

(*b*) Relationship between co-wives.

(*a*) *Number.*—Muslim male may marry any number of wives not exceeding four; but a Muslim woman can marry only one husband, if she marries with a second husband, she may be punished under Section 494, Indian Penal Code.

(*b*) *Relationship between co-wives.*—A man is forbidden to have two wives *at the same time*, so related with each other by consanguinity, affinity or fosterage, that they could not have lawfully intermarried with each other if they had been of different sexes.

From the above it comes out clearly, for instance, that it is unlawful to marry two sisters at the same time, or to marry the sister of the wife during the wife's

47. A man may marry the descendant of a wife, with whom the marriage has not been actually consummated. Under Hanafi, Hanbali and Shia Law illicit intercourse has the same effect in establishing prohibition by affinity as the consummation of a lawful marriage. *See*, Tyabji, 124.

lifetime. In the leading case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[48] the Calcutta High Court held that such unions were void. However, the High Courts of Bombay, Madras, and Lahore, and the Chief Court of Oudh declared them to be merely irregular.[49]

(*v*) **Iddat.**—A widow, a divorced woman or a woman who is pregnant by illicit intercourse are prohibited from remarrying or marrying during the period of *iddat*.

The object of *iddat* is to ascertain whether the woman is pregnant or not and to ascertain the paternity of the child. The period of *iddat* in case of (*a*) the marriage dissolved by death is 4 months and 10 days or, if the woman is pregnant, till delivery, whichever is longer; and (*b*) the marriage is consummated and dissolved by divorce, it is three courses, or till delivery in case of pregnancy.

For example, *H* has four wives, *A, B, C* and *D*. He divorces *A* after consummation of the marriage with her. It is not permissible to *A* to marry another husband, *nor to H to marry another wife, during A*'s *iddat*. *H* also cannot marry *A*'s sister, during *A*'s *iddat*. A marriage contracted during the *iddat* is not void, but irregular.

(*vi*) **Divorce.**—After the husband has pronounced three talaks against his wife, their marriage is irrevocably dissolved, and they are prohibited from remarrying each other unless and until (*a*) the woman is lawfully married to a second husband, (*b*) her marriage with her second husband is actually consummated, (*c*) it has been lawfully dissolved, and (*d*) the woman observes *iddat*.

(*vii*) **Difference of religion.**—Under Hanafi Law, a man may marry a Muslim woman or a *Kitabiya*[50], but a Muslim woman cannot marry anyone except a Muslim.

A Muslim, therefore, cannot marry an idolatress or a fire-worshipper; and a Muslim woman cannot marry even a *Kitabi*. Among the Shias, however, no one can marry a non-Muslim in the *nikah* form, but the male can contract a *Muta* marriage with a *Kitabiya* (including a fire-worshipper).[51]

Ameer Ali says that the marriage between a Muslim and a Hindu woman "whose idolatry is merely nominal and who really believes in God" should not be unlawful but irregular. Fyzee cites Mulla as saying that "the present position appears to be that the *nikah* of a Muslim man with an idolator or a fire-

48. ILR (1895) 23 Cal 130.

49. Fyzee, at p. 113.

50. A *Kitabi* is a man, and a *Kitabiya* a woman who believes in a revealed religion possessing a Divine Book. In India, these terms apply only to Jews and to Christians, each of whom possesses a revealed Book (*Kitab*). *See*, Tyabji, at p. 142, and Fyzee, at p. 97.

51. *Ibid*, at p. 97.

worshipper is irregular and not void". However, in view of the clear texts of law and Koranic provisions, such a broad view can only be introduced by legislation. The court could not, and should not accept this view by means of liberal interpretation alone.

(*viii*) **Supervening illegality.**—If one of the parties to a marriage becomes a fire-worshipper, or an idolator, or the husband becomes a Christian[52], then the marriage becomes invalid by what is known as supervenient prohibition.[53]

(*ix*) **Pilgrimage.**—Under the Ithna Ashari and Shafii Law, a man who has gone to perform *Haj* (pilgrimage) and has entered the sacred enclave of *Kaba* after putting on the pilgrim's dress (*ahram*), may not enter into a contract of marriage.[54]

(*x*) There is yet another prohibition, not so important in the context of modern day society, yet relevant for the Indian society. It is the doctrine of *Kafa* (equality of spouses). According to *Hedaya*, marriage must be contracted among equals "because cohabitation, society and friendship cannot be completely enjoyed excepting by persons who are each other's equal as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite, therefore, that regard be had to equality with respect to the husband, that is, the husband should be the equal of the wife". The Hanafis accordingly hold that *equality* between the two parties is a necessary condition in marriage, and that an ill-assorted union is liable to be set aside by a decree of the Judge. According to *Radd-ul-Muhtar*, the test of equality applies to the husband and not to the wife, for a husband can raise her to his own rank, however high.

Under the Hanafi Law, there are six requisites to equality:

1. *Nasb* (family or descent).
2. Islam.
3. Profession.
4. Freedom (free or slave).
5. Honesty.
6. Means.
7. (According to *Fatawa-e-Hamidia*: Potency).

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52. In *Imam Din* v. *Hasan Bibi*, (1906) 41 Punj Rec 309 (No. 85), it was pointed out that a male Muslim could marry Christian woman, but a Muslim woman could not marry a Christian male.
53. Supervenient illegality also becomes effective if the parties to a marriage come to acquire a foster relation within the prohibited degrees. But since foster relationship are uncommon in India, the matter is of academic interest only.
54. Under Shia Law, a deliberate breach of this rule debars that man and woman from ever becoming husband and wife.

(*i*) the marriage has been fraudulently or negligently contracted; or

(*ii*) an improper dower has been fixed; or

(*iii*) the other partner is not equal (in status, etc.) to the minor. (*See* further p. 121 infra)

11. Restitution of conjugal rights

The leading case on this point is *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum*[60]. It was observed in this case that if either party to a marriage contract has withdrawn from the society of the other without any valid reason, or has neglected to perform the marital obligations, the aggrieved party may bring a suit in a civil court for the restitution of conjugal rights. Thus, where a wife refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights. This right, however, is not absolute. There are a number of valid defences available to a wife in a suit for restitution of conjugal rights. She may prove that:

(*i*) it is unsafe for her to live with her husband because of his cruelty; or

(*ii*) the husband grossly neglects the performance of the marital obligations; or

(*iii*) the marriage is irregular; or the husband has been made an outcaste by his community.

(*i*) **The defence of cruelty.**—If cruelty constitutes such a potent and valid defence that a wife may lawfully deprive herself to her husband, although cohabitation is one of the fundamental ingredients of marriage, it becomes necessary to understand the real meaning and import of the term 'cruelty'.

In a recent case,[61] the Allahabad High Court observed:

> "Indian Law does not recognise various types of cruelty such as 'Muslim' cruelty, 'Christian' cruelty, 'Jewish' cruelty, and so on, and that the test of cruelty is based on the universal and humanitarian standards, that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety and health..."

Those actions of the husband which are held to amount to cruelty are as follows[62]:

(*a*) actual violence of such character as to endanger personal health and safety of the wife, or creates a reasonable apprehension of such violence;

(*b*) a treatment, falling short of actual violence, but such as to jeopardise health or sanity of the wife;

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60. (1867) 11 MIA 551: 74 IC 166.

61. *Itwari* v. *Asghari*, AIR 1960 All 684.

62. *See*, Tyabji at p. 166, and Fyzee, at pp. 117-118.

(*c*) false charges of immorality and adultery and throwing insults on the wife;[63]

(*d*) charging with adultery (with subsequent apology); once striking; using abusive language; stripping house of furniture and charging wife with theft;[64]

(*e*) husband's second marriage, if the court feels that the circumstances are such as to make it inequitable for the court to compel the first wife to live with him.[65]

"The onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first...and in the absence of cogent explanation the court will presume, under modern conditions, that the action of the husband in taking a second wife involved cruelty to the first, and it would be inequitable for the court to compel her against her wishes to live with such a husband."

Fyzee comments that this strong judgment shows clearly that since the passing of the Dissolution of Muslim Marriages Act, 1939, the courts have leaned heavily in favour of the wife in all these cases, and restitution cannot be had by the husband unless the wife is clearly in the wrong.[66]

(*ii*) **The neglect of matrimonial obligations.**—Abdur Rahim says that the wife has a right corresponding to that of the husband to demand the fulfilment of marital duties towards her. This includes proper accommodation separate from the husband's relations and to be maintained in a way suitable to his own means and the position in life of both. She is further entitled to the payment of her dower.

If the marriage has not been consummated, then all the authorities on Muslim Law agree that the wife may validly refuse to cohabit, and the restitution of conjugal rights may be refused unless the husband pays the prompt dower.

After the consummation, however, she has no such right, as held by Imam Muhammad and Abu Yusuf and approved by Mahmood, J., in *Abdul Kadir* v. *Salima*[67], overruling previous rulings to the contrary. According to Abu Hanifa, such a right is available to her even after consummation, but this view is not being followed in India. Because, as pointed out by Sir Shah Sulaiman, C.J., in *Anis Begam* v. *Mohd. Istafa*[68]:

"Owing to the prevalent practice, the amounts of dower fixed in this country are often unduly high and beyond the means of the husband. To

63. See, *Husain Begam* v. *Mohd. Rustam Ali Khan*, ILR (1906) 29 All 222.
64. See, *Armour* v. *Armour*, (1904) 1 All LJ 318.
65. *Itwari* v. *Asghari*, AIR 1960 All 684.
66. Fyzee, at pp. 118-119.
67. ILR (1886) 8 All 149.
68. 1933 ILR All 743.

allow to the wife the right of refusing to live with her husband even after consummation, so long as any part of the prompt dower remains unpaid would, in many cases where the husband and wife quarrel, amount to an absolute option to the wife to refuse to live with her husband and yet demand a maintenance allowance. This would dislocate domestic life."

***(iii)* Other grounds.**—A demand for the restitution of conjugal rights may be rejected if it is proved that the marriage is irregular, or the husband has been made an outcaste by his community. These excommunication can be made by the heads of certain Shia sects; in India, by Syedna Burhanuddin and Agha Khan.[69] Also where, though, there is no satisfactory evidence of actual physical cruelty, yet there is a reasonable presumption that the husband's suit was for getting hold of wife's property.

In *Hamid Husain* v. *Kubra Begam*[70], it was held that if wife's return to her husband would endanger her health and safety, a suit for restitution of conjugal rights could not succeed.

Conditional restitution.—In *Anis Begam* v. *Mohd. Istafa*[71], it has been held that when the husband keeps a mistress in the same house with his wife, and treats the wife cruelly, restitution can be granted only by imposing certain conditions on the husband.

Sir Sulaiman. C.J.. observed·

"There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case...there is certainly a possibility that the story told by the defendant that she was beaten with *lathis* and shoes might not be true, but I have no hesitation in holding that the fact that Mst Hibia, a mistress, was kept in the same house with the wife is fully established and I do not believe the denial made by the husband nor do I accept the statements of his two brothers, who, admitting the presence of Mst Hibia in the house, tried to explain it away by saying that she was a mere maid servant....I have no hesitation in holding that the husband misbehaved in this way that he kept a mistress in his house along with his wife and caused mental pain to her in consequence and that he must have, when quarrels ensued, treated his wife cruelly; and that as the quarrels were not and could not be patched up, so long as Mst Hibia remained in the house (the wife) had reasonable apprehension of injury to her person.

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69. *Vide* judgments of the Privy Council and the Supreme Court.
70. ILR (1918) 40 All 332.
71. ILR 1933 All 743.

I think that the wife is fully justified in refusing to go and live with her husband so long as there is no undertaking not to keep any mistress in the house; she can go to live with him only if a separate house is given to her. Further, I think that in order to protect her safety it is necessary that she should have the option of keeping one female servant and one male servant, according to her choice, in the house...

I would accordingly allow the appeal in part and impose conditions on the decree for the restitution of conjugal rights."

As we observed, the current judicial trend is more humanitarian and alive to the sufferings of the wife. Thus, in *Shakila Banu* v. *Gulam Mustafa*[72], the Bombay High Court held that in a suit filed by husband for restitution of conjugal rights the defendant wife's evidence about cruelty does not require corroboration. In *Raj Mohd.* v. *Saeeda*[73], the facts were that the defendant was staying away from the plaintiff-husband. She filed a suit against the husband claiming maintenance for herself and her children from him. The husband also filed a suit for restitution of conjugal rights. During the pendency of this suit the husband married a second wife. Against this background the court held that it had to be borne in mind that the decision in a suit for restitution of conjugal rights did not entirely depend upon the right of the husband. The court should also consider whether it would make it inequitable for it to compel the wife to live with her husband, and if so the remedy may be refused. 'Our notions of law must be brought in conformity with the modern social conditions'.

Very recently Justice Harun-Ul-Rashid of the Kerala High Court expressed his sentiments on polygamy thus: "The mandate (can marry second etc.) issued by Prophet Mohammed was intended to save the destitute and to protect their belongings. Even after fifteen centuries, some people of our country seem to be very particular in following the aforesaid tenets of Islam unmindful as to whether such circumstances exist or not. People of the community contract more than one marriage mostly for their personal pleasure. There is no system in our country to ascertain and decide whether such persons are eligible to contract more than one marriage during the subsistence of the first marriage.[74] We submit that the *Kazi* can be a useful agency in dissuading the intending person. Further, a procedure can be devised by which, on receiving information from the *Kazi* or the existing wife, the Family Court call such person and advise him to abandon his intention. Requirement of registration of marriage can help considerably in awakening awareness".

Now let us take note of the following dictum of the Allahabad High Court:

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72. AIR 1971 Bom 116.
73. AIR 1976 Kant 200.
74. *Saidali K.H.* v. *Saleena*, (2008) 3 KLJ 637 Kerala HC.

"The third marriage itself did not amount to violation if the Koranic injunction of treating all wives equally unless she lived with him and proved inequality of treatment."

The Court held in this case that since the defendant-wife did not live with the husband even for a single day since he married the third wife, she could not plead the ground of cruelty under Section 2(*vii*) of the Dissolution of Muslim Marriages Act, 1939 as a counter-offensive to the husband's suit for restitution of conjugal rights. The Court however accepted on equitable grounds her prayer for execution of the decree for payment of prompt dower before the execution of the decree for restitution of conjugal rights in his favour.[75]

Though physically experiencing the pangs of cruelty in the house of a bigamous or polygamous husband may be a prerequisite for the remedy of dissolution of marriage under this statute according to this judgment, another door of escape from such humiliating experience has been widened by the courts in recent times while applying another secular statute. Section 125 of the Criminal Procedure Code, 1973 provides that if a person having sufficient means neglects to maintain his wife (inter alia) who is unable to maintain herself, a First Class Magistrate may order him to make a monthly allowance for her maintenance. Further, if he conditions her maintenance on her living with him, she may resist the condition, if he has contracted marriage with another woman or keeps a mistress.

Applying this provision of law to an abandoned wife the Supreme Court held in a landmark case *Mohd. Ahmed Khan* v. *Shah Bano Begum*[76] that the explanation to the second proviso to Section 125(3) of the Code of Criminal Procedure 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.

Begum Subanu v. *A.M. Abdul Gafoor*[77] involves more directly the problem of an attempt to force reunion on the wife, through a sequel to a maintenance suit under Section 125(3) of the Code of Criminal Procedure. The husband had taken a mistress, not married again. He asked the wife (the petitioner) to come and live with him. She refused on the ground that the second marriage (*sic*) entitled her under law [Section 125(3)] to live separately and claim maintenance. His main defence was that since his personal law permitted him to take more than one wife his second marriage could not afford a legal ground for the appellant to live separately and claim maintenance. On these facts the Supreme Court gave the following opinion:

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75. *Syed Ahmad Khan* v. *Imrat Jahan Begum*, AIR 1982 All 155.
76. (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.
77. (1987) 2 SCC 285: 1987 SCC (Cri) 300: AIR 1987 SC 1103.

"A right has been conferred on the wife under the explanation to live separately and claim maintenance from the husband if he breaks his vows of fidelity and marries another woman or takes a mistress. It matters not whether the woman is a legally married wife or a mistress... The explanation [Section 125(3) CrPC] contemplates two kinds of matrimonial injury to a wife, viz. by the husband either marrying again or taking a mistress. The explanation places a second wife and a mistress on the same footing and does not make any differentiation between them on the basis of their status under matrimonial law. The purpose of the explanation is not to affect the rights of a Muslim husband to take more than one wife...but to place on an equal footing the matrimonial injury suffered by the first wife...from the point of view of the neglected wife, for whose benefit the explanation has been provided, it will make no difference whether the woman intruding into her matrimonial bed is another wife permitted under law to be married and not a mistress. In fact from one point of view the taking of another wife portends a more permanent destruction of her matrimonial life than the taking of a mistress by the husband. Be that as it may, can it be said that a second wife would be more tolerant and sympathetic than a mistress so as to persuade the wife to rejoin her husband and lead life with him and his second wife in one and the same house? It will undoubtedly lead to a strange situation if it were to be held that a wife will be entitled to refuse to live with her husband if he had taken a mistress but she cannot refuse likewise if he has married a second wife. The explanation has to be construed from the point of view of the injury to the matrimonial rights of the wife and not with reference to the husband's right to marry again. The explanation has therefore to be seen in its full perspective and not disjunctively. Otherwise it will lead to discriminatory treatment between wives whose husbands have lawfully married again and wives whose husbands have taken mistress."[78]

The above extract has been taken here for its significance as a judicial step towards liberating the wife from male dominance via law. Restitution of conjugal rights is a civil law remedy, and as such the State cannot allow it to be made a vehicle of persecution. The Supreme Court has rightly accorded recognition to the wife's constitutional right to personal liberty. She can claim that her most intimate relationship with her husband should be ensconsed in absolute privacy and no one else should interpolate into this privacy. When another woman trespasses into this field it amounts to the violation of her personal liberty, and she may refuse to pay this cost.[79]

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78. *Ibid*, at pp. 1107-08 (AIR).

79. In *Saroj Rani* v. *Sudarshan Kumar*, (1984) 4 SCC 90: AIR 1984 SC 1562, the Supreme Court held that S. 9 of the Hindu Marriage Act, 1956 which was the law for restitution of conjugal rights, did not violate Article 21 of the Constitution, as the sanction for non-performance of the decree was by way of attachment of property under Rule 32, Order 21 of the Civil Procedure Code, which was unlike the decree for specific performance of contract. Thus, said the Court,

12. Polygamy in Islam: A critique[80]

It is generally regarded that Muslims are freely allowed by their religion to contract four marriages at a time and they generally do so to satisfy their baser instincts and lust. It is submitted that nothing could be more erroneous than this. Neither Islam favours polygamy nor the Muslims prefer polygamous unions.

In Islam, monogamy is a general rule while polygamy is only an exception. The Koran commands:

> "Marry such women as seems good to you, two, three or four; but if you fear that you cannot do justice (between them) then marry only one,—this is better so that you may not deviate from the right path." (Koran 4 : 4)
>
> "And it is not in your power to do justice between wives, even though you may covet it; but keep yourself not aloof from one with total aversion, nor leave her like one in suspense... ' (Koran 5 : 4)

These commandments of the Koran shall be seen in the context of the pre-Islamic Arabian customs which placed no restriction as to the number of wives. Islam limited the number to four and presented monogamy as an ideal form.

But Islam, claiming to be a universal religion having world-wide mission, had to look into the requirements of all ages, circumstances, countries and civilisations. There are certain ordinances in the Code of Islam, which shall be looked on as auxiliary or remedial, to meet the contingency of place and time. and the code lays down proper restrictions as to their use. Rules regarding polygamy come within the category of *remedial ordinances.*

There are certain factors under which polygamy becomes inevitable.

Individual factors.—In the case of wife's barrenness, perpetual illness, unsuitability for cohabitation, etc. the alternatives available to a man of monogamous society, are:

(*i*) either to take the action of divorcing the wife, or

(*ii*) to wait for that far-off eventuality of the death of the wife, or

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the only sanction was financial in nature, and the provision served a social purpose as an aid to the prevention of break up of marriage.

Though this decision overrules the Andhra Pradesh High Court verdict in *Sareetha* v. *Venkata Subbaiah*, AIR 1983 AP 356, it may be carefully noted that not only the Supreme Court nowhere subdues the wife to the physical coercion by the husband under the cover of restitution of conjugal rights, instead, by routing S. 9 through the financial side, leaves personal liberty unhampered.

80. This topic has been prepared with the help of the following sources: M.U.S. Jung: *The Muslim Law of Marriage* (*Monograph*), at pp. 21, 31-2 (Allahabad 1926).

M Mazharuddin Siddiqui, *Women in Islam* (Lahore 1952); Jalal Uddin Umri, *Islam Mein Aurat Ka Muqam* (Rampur, n.d.); M.I. Zafar: 'Polygamy' Islamic Literature, July 1955 at pp. 37-43.

A. De Zayas Abbasi: 'Woman in Islam', *Islamic Literature*, January 1954 at p. 41. Ameer Ali: *The Spirit of Islam* (London 1965 first published in 1922).

(*iii*) to abandon the hope of an issue and desire of cohabitation.

Could not we prefer to take a second wife, instead of torturing ourselves, or leaving a helpless wife? A situation to the contrary could only lead to such tragedies as that of Josephine, whom Napoleon was forced to divorce, against his wishes, because she was not able to procreate an heir to the throne, or that of Soraiya, the queen of Shah of Iran, whose only fault was her alleged barrenness, and the Shah had to divorce her in compliance with a custom of the Iran's royal family, that a queen who fails to provide an heir to the throne should be divorced and replaced by another.

Polygamy in Islam is only a remedy which comes into play when an emergency warrants or an opportunity arises.

Biological and psychological factors.—There are certain individuals who have a more active sexual impulse than others. For them polygamy is necessary. It is the only way to check adultery, concubinage and prostitution, and many sexual offences which have become so common today. In his book, *Sex Life and Faith*, Dr. Rome Landen observes:

> "In an imperfect world such as we live in, polygamy must be considered both natural and legitimate. To eliminate polygamy we should first have to change the entire character of our civilisation, then the nature of man, and finally nature herself. In most cases I found that polygamous behaviour and polygamous longing went hand-in-hand with an essentially monogamous nature of marriage. On the evidence of history and science, it is imperative that polygamy should be recognised more honestly."

Prof N.W. Ingells in an essay *Biology of Sex*, writes that man as a social animal is anything but monogamous. And "one would have great difficulty in explaining, biologically, such a sudden change of heart: The transition to a single wife."

The evidences on the basis of present day practices show that West is de facto polygamous. Because, on the one hand, if polygamy is prohibited, there are easy and frequent divorces, on the other hand there is the practice of living together.

After the World War II, when a majority of the male adult population of Germany perished in War, the proportion of females became so high that, in the absence of polygan y, millions of bastards were born of illegal unions. The problem was so great and so real that the then West German Government had to pass a special law, authorising illegitimate children to inherit from their parents. So, why not legalise polygamy and save millions of souls from the ignominy of being called bastards, and give them the right to inherit from those who gave them their bodies. It would tend to improve morality and enhance the sanctity of marriage.

Who developed polygamy?—Islam has never developed polygamy. Instead, it curtailed its extent and made it an instrument to be used in exceptional circumstances.

Before Islam, many Prophets came to this earth. Many of them married a number of wives. Jacob and Joseph and his brothers were born of different wives; and Solomon had contracted many marriages. Abraham had at least two wives.

Polygamy was a recognised institution among 'Medes', Babylonians, Assyrians and Persians. Moses allowed polygamy among Israilites, because it was already prevalent among them. It was customary among the tribes of Africa, Australia and the Mormons of America. The Hindu Law does not restrict the number of wives. In fact the laws of Manu lay down specific conditions for celebrating subsequent marriages:

> "A barren wife may be superseded in the eighth year; she whose children (all) die, in the tenth; she who bears only daughters, in the eleventh; but she who is quarrelsome, without delay."[81]

Polygamy was observed among the Ethenians, the most civilised and most cultured of all nations of antiquity. Among them, the wife was transferable, marketable, and, a mere chattel. Romans observed it until it was forbidden by the laws of Justinian. But even afterwards it continued till very recently, when public opinion abolished it.

Thus, it would be a reprehensible mistake to suppose that the Prophet of Islam originated and legalised polygamy. On the contrary, the cautious and prudent steps that he had taken in this connection must be appreciated. He limited the unbounded licence of polygamy and accepted it only as an exception to the general rule of monogamy.

The proper course of action.—The advocates of changes in Muslim Personal Law in India contend that polygamy should be abolished. But before venturing to undertake such a sweeping change, they should investigate the percentage of Muslim population in India who have more than one wife.[82] Because, they might be trying to eradicate a non-existent evil. "In India", says M.U.S. Jung, "as the Muslim male population is in excess of females, polygamy is not practical for all, and further those who consider it morally objectionable provide against it by a special clause in the marriage contract..." Add to it the economic hardships of today and see how many Muslims are practising polygamy.

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81. Manu, 9: 81.
82. Among the Indian Muslims, 95 men out of every 100 are monogamists. *See*, Ameer Ali, *The Spirit of Islam* at p. 332.

The utmost that can be done in this connection is to ensure that the real Islamic spirit behind polygamy is being followed. Certain statutory restrictions and limitations in the way of contracting the second or subsequent marriages may be imposed.

Necessary it is because of the growing tendency among Muslims to ignore Koranic injunctions relating to polygamy. Some of the West Asian countries have introduced reforms in this regard, but sufficient it would be to give here the reforms effected in Pakistan whose social conditions are very much similar to Indian conditions.

Section 6 of the Muslim Family Law Ordinance, 1961 of Pakistan deals with polygamy and lays down as follows:

"6(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall, any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under sub-section (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.

(3) On the receipt of application under sub-section (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of prescribed fee, prefer an application for revision, in the case of West Pakistan, to the Collector and, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall—

(*a*) pay immediately the entire amount of dower, whether prompt or deferred, due to existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(*b*) on conviction upon complaint be punishable with simple imprisonment which may extend to one year or with fine which may extend to five thousand rupees, or with both."

There is yet another suggestion, in contrast to measures adopted in Pakistan given recently in a Seminar on Muslim Law.[83] According to it, the court should have power to restrain a man who is already married from taking a second wife where it is established that he is not in a position to support both. This suggestion seeks to enforce that part of the Koranic requirement which is amenable to objective assessment prior to the contracting of a bigamous marriage. It would be noted that this proposal does not oblige a man to give any reasons as to why he wants to take a second wife. This ipso facto does away with any need of listing the circumstances which could justify such a step. This matter should be left to individual discretion, because, needs and circumstances justifying plurality of wives are delicate and sometimes subjective in nature. Emotional urges, the nature of disability from which the first wife is suffering or the social considerations prompting a second marriage, all belong to the private sphere of one's life. Their exposure will not only destroy the peace of homes, but the fear of such an exposure may also drive some people unwillingly to divorcing the first wife, causing hardships to her and the children.

It is also feared that obliging the man to justify his intention by giving convincing reasons would give the courts in this country far more powers of restraining this practice than desirable.

The above proposal also does not require taking permission from the first wife. Of course it hurts when her husband takes a second wife. It hurts her emotionally. It could also hurt her economically. The suggestion safeguards her against the latter hurt alone. The emotional injury must be weighed against the interests of the husband, the second wife, and the society in general. A matter involving the interests of several parties should not be decided with reference to what happens to one party only. It is admittedly at the cost of the first wife, to some extent, that Islam permits polygamy. But it does so in view of the higher interests of the society.

Relevant to the present Indian conditions is the remark of Ameer Ali, that in those countries (like India and Pakistan) where the conditions of society are different, where the means which, in advanced communities, enable women to help themselves are absent or wanting, polygamy must necessarily continue to exist.[84]

A Jurists Poll on Polygamy—In the Seminar on Muslim Personal Law in India held in the Indian Law Institute at New Delhi in 1972 different views were expressed on the topic of polygamy. J.N.D. Anderson, a leading Western exponent of Muslim Law was 'firmly convinced that a complete prohibition of polygamy, *if coupled with the husband's unrestricted right to unilateral divorce,*

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83. *See*, Nejatullah Siddiqi, "Restraints on Polygamy and Muslim Personal Law", in *Islamic Law in Modern India* (Indian Law Institute 1972) at pp. 147-56.

84. *The Spirit of Islam* at p. 230.

would be a retrograde step, for it would mean a man determined to marry a second wife would feel compelled to divorce his first wife'. Therefore, he opines, 'it would be more beneficial to the Muslim women to permit polygamy under specified conditions (which would include a full consideration of the attitude adopted by the first wife), and to grant a wife who so chose a right to claim a divorce in such cases'. He advances one suggestion 'fully consonant with Muslim principles' to indirectly restrict polygamy in practice, namely, legislation enforcing registration of all marriages (both Hindu and Muslim) by means of a statutory contract, which would itself include suitable conditions. Where one of such conditions is that the husband would not in fact exercise his Muslim right of polygamy, that stipulation must be regarded valid and effective. According to Hanbalis, while the sacred law permits a husband to marry second time, it does not enjoin this, and therefore, the well known maxim operates—'A Muslim is bound by his stipulations'.[85]

Kamila Tyabji categorises the practice of polygamy into five socio-ethnical groups. First, desertion followed by bigamy—where the husband abandons his first wife to her fate and goes off to marry another woman. Second, driving out the wife (without divorcing) and contracting another marriage. Third, dominating the wife into silence and remarrying. Fourth, fraudulent conversion to Islam to remarry. And fifth, the deserving second marriage—where the old, ailing, first wife consents to remarriage. Tyabji then asks, 'do the first four kinds confirm to the polygamy verse in the Koran'.[86]

S. Jaffer Hussain brings out clearly the legal disadvantages resulting from bigamy—one, the wife obtains the right of delegated divorce (*Talaq-al-Tawfid*) and two, she would be entitled to refuse to rejoin the husband. By recognising the wife's right to inflict these consequences on the bigamous husband the courts have played an important role in controlling polygamy. Thus, both pre-nuptial and post-nuptial agreements which gave right to the wife to get a divorce if the husband took a second wife, were held to be valid.[87] In *Saifuddin case*[88] the Assam High Court held the stipulation in the *Kabinnama* that if the husband brought his formerly married wife to stay with him without the second wife's consent, the latter would have an irrevocable option to divorce him. This right of delegated divorce could be exercised at any time, as the wrong done to her was a continuing one.[89] Even without such stipulation, the wife has another remedy—

85. Anderson, *Muslim Personal Law in India*, in Tahir Mahmood (Ed.), Islamic Law in Modern India, ILI (1972) 34 at p. 38.

86. Kamila Tyabji, *Polygamy, Unilateral Divorce and Mahr in Muslim Law As Interpreted in India*, supra at pp. 142-43.

87. S. Jaffer Hussain, *Judicial Interpretation of Islamic Matrimonial Law in India*, supra at pp. 176-77, and n. 20 (*Ibid*) — *Sainuddin* v. *Latifannessa Bibi*, ILR (1919) 46 Cal 141; *Sadiqua* v. *Ataullah*, AIR 1933 Lah 685; and *Saifuddin Sekh* v. *Soneka Bibi*, AIR 1955 Ass 153.

88. *Saifuddin Sekh* v. *Soneka Bibi*, AIR 1955 Ass 153.

89. *Ayatunnesa Beebee* v. *Karan Ali*, ILR (1909) 36 Cal 23.

successfully warding off a decree for restitution of conjugal rights. In *Itwari* v. *Asghari*, the Allahabad High Court held in forceful words:

> "A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so and seeks the assistance of the civil court to compel the wife to live with him against her wishes on pain of severe penalties...she is entitled to raise a question whether the court, as a court of equity ought to compel her to submit to cohabitation with such a husband."[90]

Tahir Mahmood remarked: "It is irrelevant for cultural identity whether a Muslim can torture his first wife by contracting a bigamous marriage against her wishes and without necessity, or a wife can tease her husband throughout his life by exploiting his inability to pay dower. These and other drawbacks in the existing personal law cannot be considered essential ingredients of the Muslim culture. On the contrary these are stigmatic of the fair name of Islamic civilisation."[91]

Summing up the position we find that (*i*) the Koranic Law permits restricted polygamy, but does not enjoin it on the Muslims. As such, it is not an essential matter of religion; This is also the pronouncement of the Supreme Court in a recent case related to the Panchayati Raj Act, 1994 of the State of Haryana[92]. The Act disqualified a person having more than two living children from contesting election to the Panchayat. The petitioner contended that the Act violated his right to religious freedom as guaranteed by Article 25 of the Constitution. Disallowing this contention the Supreme Court said that true, the Muslim Law allows a Muslim to marry more than one wife and also permits him to procreate more than two children; other religions also permit more than two offsprings; yet, neither Islam nor other religions ordain the followers to enter into more than one marriage or procreate more than one child. Permission by the religion and/or absence of prohibition do not constitute a religious tenet or a religious rule. A practice simply permitted does not by itself constitute an essential order of the religion. No doubt polygamy and multiple children are practices widely in vogue, but they can be restricted or even restrained on the grounds of public order, morality and health and for the purpose of social welfare and reform. Accordingly the limit of two offsprings is not unconstitutional. (*ii*) the verse on polygamy ordains the husband to do justice to all the wives as a precondition, otherwise 'marry only one—this is better so that you may not deviate from the right path'; (*iii*) husband's right to bigamy may be restricted by a stipulation in the *Kabinnama*; (*iv*) the first wife may also stipulate that in case of second marriage without her consent, she can exercise her right of delegated divorce; (*v*) subsequent marriage entitles the

90. AIR 1960 All 684.

91. Tahir Mahmood, *An Indian Civil Code and Islamic Law*, Tripathi, Bom (1976) at p. 84.

92. *Javed* v. *State of Haryana*, (2003) 8 SCC 369: AIR 2003 SC 3057.

first wife to live separate from the husband; (*vi*) such bigamy is a valid defence against a decree by the husband for restitution of conjugal right; she may refuse cohabitation with him; (*vii*) bigamy entitles her to maintenance allowance, and also to her children.

Some of the consequences of polygamy or bigamy under the penal law have been analysed by Tahir Mahmood thus: A woman desirous of remarriage must not have a living and legally recognised husband. There is no corresponding condition imposed on men. Her second marriage will be void (*Batil*) at Muslim Law and will attract the application of Sections 494 and 495 of the Indian Penal Code (IPC), 1860.[93] But when her first husband renounces Islam, she exercises her right to delegated divorce, or exercises her option of puberty, the courts would exempt her from the above penal consequences in case of her marrying again. The fifth marriage of a man, while the first four marriages legally persist, is irregular (*Fasid*) at Hanafi Law and void (*Batil*) at the Ithna Ashari Law. The fifth marriage of a Hanafi Muslim being merely 'irregular', is not hit by Sections 494 and 495 IPC.[94] However, the fifth marriage of a non-Hanafi Muslim man should attract the IPC, since such marriage is void under the law applicable. The concept of 'irregular' (*Fasid*) marriages is not recognised by every school of Muslim Law.[95]

Very recently, a socio-legal scientist reported that amongst the Muslim respondents to her questionnaire on Muslim Law reforms, one stated that polygamy should be put under much greater restrictions if not banned altogether. It should be permitted in very exceptional circumstances, and only with the permission of the first wife. Others either avoided answering or answered in favour of retaining its legality on the ground that polygamy was not much in vogue.[96]

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93. *Hamid* v. *Emperor*, AIR 1931 Lah 194.
94. *Shahulameedu* v. *Zubaida*, (1970) MLJ (Cri) 569.
95. Tahir Mahmood, *The Muslim Law of India* (2nd Edn., 1982 Law Book Company, Allahabad) at pp. 58-59.
96. Vasudha Dhagamwar, '*Towards Uniform Civil Code*. . .', in Madhava Menon (Ed.), *Uniform Civil Code*, BCI (New Delhi 1986) at p. 23.

IV

Dower

(Mahr)

1. Pre-Islamic background

In the regular form of marriage, as distinguished from the marriage by capture, the fixing of dower was in vogue. Sometimes the guardian of the bride used to take the dower himself; but it is not certain whether it was a mere violation of the usage that the bride should take the dower, or whether it shows that dower was originally the price paid for the bride to her parents. A device was prevalent under the name of *shighar* marriage in which a man would give his daughter or sister in marriage to another in consideration of the latter giving his daughter or sister in marriage to the former. Neither of the wives could get a dower. False charges of unchastity were frequently used to deprive the wife of her dower. The term *mahr* was originally used to signify gifts given to the parents of the wife while *Sadka* was a gift to the wife herself. The *Sadka* or dower which was paid in case of regular form of marriage was approved by Islam; the Koran says:

"And give women their dowers freely." (Koran 4 : 4)[1]

2. Definitions of 'Mahr'

Baillie: "...the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself...Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman."[2]

Abdur Rahim (*On the basis of* "It is either a sum of money or other form of property to which the wife becomes entitled by marriage... It is an

1. Abdur Rahim, at p. 8.
2. Baillie, at p. 91.

Hedaya): obligation imposed by law on the husband as a mark of respect for the wife..."[3] (This definition has been adopted by Mulla also).

TYABJI: "Mahr or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties, or by operation of law."[4]

3. The nature of dower

Mahmood, J., in *Abdul Kadir* v. *Salima*[5], gives the best description of the nature of dower. He observes:

"Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the *Hedaya*, the payment of dower is enjoined by the law merely as a *token of respect* for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although a man were to engage in the contract on the special condition that there should be no dower."[6]

"Even after the marriage *the amount of dower may be increased by the husband* during coverture[7]; and indeed in this, as in some other respects, the dower of the Muhammadan Law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English Law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan Law be regarded as the consideration for the connubial intercourse, and *if the authors of the Arabic textbooks of Muhammadan Law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy.*" (Italics are mine)

The line of reasoning based on the analogy of sale was criticised by Ameer Ali[8], and by Sir Shah Sulaiman in *Anis Begam* v. *Mohd. Istafa*[9]; and in *Wajid Ali Khan case*[10]. Sir Sulaiman observed:

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3. Abdur Rahim, at p. 334.
4. Tyabji, at p. 170.
5. ILR (1886) 8 All 149.
6. *Hamilton's Hedaya* by Grady, at p. 44.
7. *Baillie's Digest* at p. 111.
8. Ameer Ali, *Mohammadan Law*, Vol. II at pp. 459-60.
9. ILR 1933 All 743.
10. *Wajid Ali Khan* v. *Shaukat Ali Khan*, (1912) 15 Oudh Cases 127.

"It is quite obvious that the analogy of sale cannot be carried too far. The marriage cannot be regarded as purely a sale of the person by the wife in consideration for the payment of dower."[11]

It was observed in this case that the similarity of dower to sale price cannot be pushed too far, nor can the principles governing the sales of goods be applied in all their details. For example, the contract of sales of goods can be cancelled if a portion of the price has not been paid. Even if the goods have been once delivered they may in such an event be returned. But if consummation of marriage has taken place and a part of the dower remains unpaid, it would be absurd to think that marriage could be cancelled by the wife at her will. Moreover, the question—whether the dower is the consideration for the first consummation of marriage only or whether it is the consideration for the society of the wife during the married life?—could not be answered by applying the analogy of sale to dower, money and marriage.

Islam insists that dower should be paid to the wife herself. It sought to make dower into a real settlement in favour of the wife, a provision for the rainy day and socially, a check on the capricious exercise by the husband of his almost unlimited power of divorce.

A husband thinks thrice before divorcing a wife when he knows that on divorce the whole of the dower would be payable immediately.[12]

There is a classic example given by someone which must be mentioned here. A person purchases a horse. To whom he must pay the price? Not to the horse itself, certainly. But to the owner. Thus, if dower be regarded as sale-price, it must be paid to the father or the guardian of the wife. Since it is paid to the wife herself, it cannot be the price. It is a token of respect.

4. Kinds of dower

Broadly, there are two kinds of dower: (*i*) specified, and (*ii*) unspecified.

But the specified dower has been further divided into: (*a*) Prompt, and (*b*) Deferred.

(*i*) Specified dower.— An amount settled by the parties at the time of marriage or after, is called specified dower. If the bridegroom is minor, his father may settle the amount of dower. Hanafi Law says that the father is not personally liable for the dower, but according to Shia Law, he will be so liable.[13]

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11. *Anis Begam* v. *Mohd. Istafa*, ILR 1933 All 743.
12. Fyzee, at p. 133.
13. See, *Syed Sabir Husain* v. *Farzand Hasan*, (1937) 65 IA 119, where a Shia father's property was attached to pay the dower of his minor son.

The husband is bound to pay the amount of the specified dower, however excessive or beyond the reach it may be. In Oudh, however, the excessive amount may be curtailed to a reasonable amount.

Prompt and Deferred dower.—Prompt dower is payable on demand, and deferred dower is payable on the dissolution of marriage by death or divorce. The prompt portion of the dower may be realised by the wife at any time before or after consummation, but the deferred dower could not be so demanded.[14]

In the case where it is not settled how much of the dower is prompt and what part of it is deferred, the *Shia Law holds that the whole of dower is prompt*; the Sunni Law, however, holds that only a part is prompt. This part is to be fixed with reference to (*i*) custom, or (*ii*) the status of the parties, and (*iii*) the amount of settled dower.[15]

There are two aspects of the prompt dower (*Mahr-i-muajjal*)—the time factor and the quantum factor. Prompt in theory means immediately on demand or at the time of marriage, or at any time before consummation, or after consummation when demanded. In practice, however, it is seldom paid promptly at the time of marriage or even when demanded; and equally tardily demanded. The fear of annoying the husband, of his pronouncing *talak* in retaliation, of vengeful ouster by him—factors like these choke the demand. We may illustrate the point with the facts of a recent case *E.V. Kunhimariam* v. *O. Mammu*[16]. In the words of Justice Sukumaran: "This case may serve as a study in the continuing suffering of the Indian womanhood. The legal battle for getting a paltry amount of less than Rs 2000 by way of Mahr and past maintenance spanned a period of nearly a decade and spread over three courts including the High Court." The short of the long story is like this: The defendant *M* was married, had six children, and at the time of the seventh, when his wife was at her parents' house, he married a young girl, the petitioner *K* in April 1976. In July when the first wife returned, he packed off *K*, already pregnant, to her parents' home, and abandoned her and the child. *M* was a rich man. When *K* filed a maintenance petition under Section 125 CrPC, *M*, in retaliation divorced her. He sent Rs 105 as Mahr and Rs 200 towards past maintenance. *K* claimed Rs 2000 only as Mahr, but that was denied. So the legal battle ensued. Finally, the High Court decreed Rs 2000 as Mahr on the basis of the custom of the parties and Rs 60 and Rs 25 as maintenance amounts for the petitioner *K* and her child, respectively.

Under the customary law if the prompt dower is not paid on demand, the wife has a right to refuse conjugal rights. In those cases where the marriage has not been consummated, she can successfully resist the suit for restitution of

14. Mulla, at p. 311.
15. See, *Taufik-un-nissa* v. *Ghulam Kambar*, ILR (1877) 1 All 506.
16. AIR 1985 Ker 239.

conjugal rights; but where consummation has taken place, her refusal extends only to the point of payment of the prompt dower; the court will grant a decree conditional to the payment of the dower. Prompt dower in full amount can be recovered by the wife even after the death of her husband, it will be charged on his estate.

As regards the quantum of the prompt dower, it may be divided into specified and unspecified. The general custom regarding the unspecified prompt dower is to consider half of the total amount of dower settled at the time of marriage as the portion referable to prompt Mahr. Even when the *Kabinnama* is silent as regards the nature of the dower, the court has considered the half of the whole dower as prompt.[17] This presumption may however be rebutted by either party; the circumstances of the case, the status of the wife and the total amount of dower must also be taken into account. In one case the Allahabad High Court had decreed Rs 12,000 as the prompt portion out of the Rs 51,000 amount of whole dower.[18]

(ii) Unspecified dower.—In such cases where dower has not been settled at the time of the marriage or after, it is fixed with reference to the social position of the wife's family and her own personal qualifications. Help would be taken by taking into account the amounts of dower fixed in case of wife's sisters, paternal aunts, etc., and according to the *Hedaya*, the wife's age, beauty, intellect and virtue will also be considered. Such dowers are called *mahr-ul-misl*.

One aspect of dower beneficial to the Muslim woman is that even where the parties to the marriage have not stipulated any dower, the husband remains under an obligation to pay it. Only under the Ithna Ashari Law an adult wife can waive the requirement of dower. Under other schools of Muslim Law, even where the wife stipulates that she will not demand any dower, she remains entitled to it and the rule of estoppel will not apply to her. This implied dower is called proper dower, or customary dower or *mahr-i-misl* or *mahr-ul-misl*.

5. Subject-matter of dower

The fitting subject-matter of dower is not only confined to a sum of money or property; it includes personal services and other things. According to a tradition Aamir-bin-Rabia said "that a woman of the tribe of Bani Fazarah married on a settlement of a pair of shoes, and the Prophet said to her 'Are you pleased to give yourself and your property for these two shoes.' She said, 'yes'. Then the Prophet approved of the marriage".[19] The following were recognised as the subject of dower:

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17. *Nasiruddin Shah* v. *Amatul Mughni Begum*, ILR (1947) 28 Lah 565.
18. *Bibi Rehana Khatun* v. *Iqtidar Uddin Hassan*, 1943 All LJ 98.
19. Mohd. Yusuf, Vol. I at pp. 111-112.

(*i*) A handful of dates (*Abu Daud*).

(*ii*) A pair of shoes (*Tirmizi*).

(*iii*) If the husband is a slave, his services to his wife (*Mohit Sarkhsee*).

(*iv*) The services of the husband's slaves to the wife (*Fatawa-i-Alamgiri*).

(*v*) Husband's services rendered to the guardian of a minor wife (*Durrul Muktar*).

(*vi*) Teaching Koran to the wife (Tradition).

In fact, the main contention of the Muslim jurists is that anything which comes within the definition of maal can be the subject-matter of dower. Thus, apart from the personal services of the husband, any profits arising from land or business, debts due to the husband, insurance policies, choses-in-action, the sale proceeds of something, may constitute valid dower.[20]

If the subject-matter of dower be "an animal" or "cloth", then the wife is entitled to *mahr-ul-misl*, proper dower because such dowers are invalid for uncertainty. Similarly, "a house" or "the land" without specifying the exact location and description are not fit subjects of dower, and the court will have to fix proper dowers in those cases.

6. Minimum and Maximum Amounts of dower

Minimum[21].—Hanafis—10 dirhams (Rs 5-6 after devaluation). Malikis—3 dirhams (Rs 1.50-2 after devaluation).

Shafis, Shias } No minimum

Maximum.— Among Sunnis there is no maximum; any amount may be fixed. Fyzee[22] cites an example based on his personal knowledge, of a dower amount of Rs 2,20,00,000.

Among some of the sects of Shias, however, there is a tendency "not to stipulate for a sum higher than the minimum fixed by the Prophet for his favourite daughter Fatima, the wife of Ali, namely 500 *dirhams* (Rs 100 approximately)".

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20. Things which are opposed to Islam, e.g. wine, profits from prostitution, etc., cannot be the subject of dower. So also a non-existent thing, e.g. produce of some tree or crop, sheep which are yet to be born, etc. Shia Law, however, holds the dower of non-existent things as valid. *See*, Verma, *Mohammedan Law* at p. 143.

21. Fyzee, at p. 134

22. *Ibid*, at pp. 135-136.

7. Amounts of dower and conditions of payment[23]

(1) If the marriage is consummated, and is dissolved by death:

(*a*) whole of the specified dower, or (*b*) proper dower if unspecified, } in case of regular marriage.

(*c*) specified or proper dower, whichever is less, in the case of irregular marriage.

(2) If the marriage is not consummated, and is dissolved by the act of party:

(*i*) When divorced by the husband—

(*a*) half of the specified dower, or (*b*) a present of three articles, if unspecified } in case of regular marriage

(*ii*) When divorced by the wife: No dower.

(*iii*) If the marriage is irregular in the cases (*i*) and (*ii*) above. } No dower.

8. Widow's right to retain possession of her husband's estate in lieu of unpaid dower

In Hamira Bibi v. *Zubaida Bibi*[24], the Privy Council explained this special right of the widow to enforce her demand for the payment of unpaid dower. Delivering the judgment, Lord Parker observed:

> "Dower is an essential incident under the Mussulman Law to the status of marriage...the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman Law which has received recognition in the British Indian Courts and this Board."

In the same case, it was further held:

> "When a widow is allowed to take possession of her husband's estate in order to satisfy her dower debt with the income thereof, it is either on the basis of some understanding as to the conditions on which she should hold

23. *See*, Tyabji, at p. 178-180.
24. (1916) 43 IA 294.

the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband."

Their Lordships observed that the widow cannot be made to account for the profits of the estate without being allowed reasonable compensation; this compensation may be allowed in the form of interest on the dower. And 6 per cent per annum interest was fixed in this case.

The other leading case on the point is *Babee Bachun* v. *Hamid Husain*[25], where it was held that the possession of the husband's estate should have been acquired by the wife without force or fraud, that is, it should be "peaceably and lawfully acquired", as held later on in *Maina Bibi* v. *Chaudhri Vakil Ahmad*[26].

The widow's right of retention does not create any right of the widow on the property. She can simply retain the possession and appropriate the usufruct until her dower debt is satisfied. She has thus no right to alienate the property by sale, mortgage, gift or otherwise, and if she attempts to do so, she loses her right of retention.[27]

In *Kapore Chand case*[28], the Supreme Court held that the widow is not entitled to priority as against her husband's other unsecured creditors.

It is on the dissolution of marriage that the widow's right of retention comes into existence. Where widow is already in possession of the property, it is presumed that it was lawfully and peacefully obtained, unless otherwise proved. The wife cannot obtain a lien during the lifetime of the husband. This special right is a pure creature of Muslim Law which lays down as a general rule that the creditors of a deceased Muslim are entitled to appropriate usufruct of any property which they could get hold of. This general rule is now no more applicable in its totality. The widow's lien "is the only creditor's lien of the Mussulman Law which has received recognition in the British Indian Court..."[29]

The widow has no legal right to enter into possession of the property of her deceased husband. She is only entitled to retain it after once getting it.

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25. (1871) 14 MIA 377.
26. (1924) 52 IA 145.
27. Fyzee, at p. 144, *citing* Tyabji and Mulla.
28. *Kapore Chand* v. *Kader Unnissa*, 1950 SCR 747.
29. *Hamira Bibi* v. *Zubaida Bibi*, (1916) 43 IA 294.

Widow's right to retain and enjoy her husband's property in lieu of unpaid dower is not analogous to mortgage, usufructuary or other. Because, in the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. Any rights the mortgagee gets are conferred upon him by the mortgagor. But respecting widow's right of retention neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower debt is paid is conferred on her by the Muslim Law. This has been amply made clear by the Privy Council in *Maina Bibi* v. *Chaudhri Vakil Ahmad*[30].

Those being the position, the rights available to a mortgagee are not wholly available to the Muslim widow. Thus, where a Muslim widow gets into possession of her deceased husband's property which is already mortgaged with another person, and if the mortgagee brings a suit on the basis of which the property is sold, the purchaser can dispossess the widow and she cannot set up the right to retain possession until her dower debt is satisfied.[31]

There is a conflict of opinion as to whether consent of the husband or his heirs is necessary before the widow can enter into possession of the property. This conflict is the result of the following passage in Privy Council's judgment in *Hamira Bibi case*[32].

> "Her right, however, is no greater than that of any other unsecured creditor, except that she lawfully, *with the express or implied* consent of the husband or his other heirs, obtains possession of the whole or part of his estate..."

From the above, the Calcutta and Patna High Courts have held that consent is necessary.

But the Allahabad, Bombay, Oudh, Lahore, Peshawar and Madras High Courts hold that the Privy Council's observations are merely *obiter dicta* and need not be followed strictly.

It is submitted that the latter view is correct. Because, keeping in view the widow's special right, the consent of the husband or his heirs seems immaterial.

It is still not clear whether the widow's right of retention is *transferable* and *heritable* or not? There is a plethora of conflicting judicial opinions on this point.

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30. (1924) 52 IA 145.
31. *Arabi* v. *Kanhayalal*, AIR 1926 Nag 307.
32. *Hamira Bibi* v. *Zubaida Bibi*, (1916) 43 IA 294.

Some of the cases in which this right was held to be heritable are *Azizullah Khan* v. *Ahmad Ali*[33]; *Ali Bakhsh* v. *Allahdad Khan*[34]; *Amir Hasan Khan* v. *Mohd. Nazir Husain*[35]; *Mir Vaheed Ali* v. *Rashid Beg*[36].

Held, not heritable, in these cases (out of many) *Muzzaffar Ali Khan* v. *Parbati*[37]; *Hadi Ali* v. *Akbar Ali*[38].

As to the transferability of this right, Mulla observes:

> "In *Maina Bibi* v. *Chaudhri Vakil Ahmad*[39], the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Though it cannot be said with certainty whether it is also transferable, the balance of authority in India is in favour of the view that it is also transferable."[40]

Fyzee, however, holds a contrary view.[41] He says that the Mysore High Court in *Hussain case*[42], decided that the widow's right of retention is both heritable and transferable; but the Patna High Court in *Zobair Ahmad* v. *Jainandon Prasad*[43] has held that it is not transferable. So, although there is a conflict of opinion, yet in view of the Supreme Court observations in *Kapore Chand case*[44], it seems more probable that this right is not transferable. Recently, the Andhra Pradesh High Court held in *Ghouse Yar Khan* v. *Fatima Begum*[45] that in Muslim Law a widow is entitled to retain possession of property for dower debt, and right is alienable and heritable.

If the widow is dispossessed by the heirs of the husband or their transferees, the right to recover possession is available to her only under Section 9 of the Specific Relief Act, and that too within six months of dispossession, failing which the right to recover possession would be lost, and with it, of course her lien over the 'property'. In dispossession by a trespasser, she can sue within 12 years under Article 142 of the Indian Limitation Act.[46]

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33. ILR (1885) 7 All 353.
34. ILR (1910) 32 All 551.
35. ILR (1932) 54 All 49[illegible].
36. AIR 1951 Bom 22.
37. ILR (1907) 29 All 640.
38. ILR (1898) 20 All 262.
39. (1924) 52 IA 145.
40. Mulla, at pp. 321-322.
41. Fyzee, at pp. 144-145.
42. *Hussain* v. *Rahim Khan*, AIR 1954 Mys 24.
43. AIR 1960 Pat 147.
44. *Kapore Chand* v. *Kader Unnissa*, 1950 SCR 747.
45. AIR 1988 AP 354.
46. Verma, at p. 178.

Illustrations[47]

(*i*) A Muslim dies leaving a widow, a daughter, and his father. The wife is in lawful possession of her husband's property in lieu of her dower. The widow dies leaving the daughter as her only heir. The daughter is entitled to retain possession of the property. The father is not entitled to possession of his share until he pays his proportionate share of the dower debt. But if the widow herself has not obtained possession in her lifetime, the daughter as her heir is not entitled to go into possession.

(*ii*) A Muslim dies leaving a widow and a brother. The widow is in lawful possession of her husband's property in lieu of her dower. The brother is not entitled to possession of his share until he pays his proportionate share of the dower debt.

Now suppose, the dower debt remains unsatisfied, and the widow sells the whole property to satisfy the debt, and delivers possession to the purchaser. The effect of the sale is that it passes to the purchaser only the widow's share and the right to possession of that share. Consequently, the brother who was not until then entitled to possession of his share without paying his share of debt becomes entitled to immediate possession of his share without making any payment.

The widow is not entitled to have the possession restored back to her, for by giving up possession, she lost her right to hold possession. Whether she is entitled to recover the dower debt out of the other properties of her husband, is an open question.

9. Dower divorced from divorce and mated with maintenance

As we saw above the dissolution of marriage, either by divorce or death is the farthest point to which the payment of dower can be postponed and no more beyond it. In large number of cases the Muslim wife suddenly divorced by the husband finds herself at the brink of destitution and has to pull all the resources together to meet the needs of future. Dower is one such source she taps for money. Does dower then represent an amount payable by husband to the wife on divorce? For the last one decade this question has been the bone of contention at the courts, the legislature and the Muslim society. The genesis of this moot point was the scheme of the complex of the provisions in Chapter IX of the Criminal Procedure Code, 1973 designed with a social purpose. That Chapter is titled Order for Maintenance of Wives, Children and Parents. Section 125(1) therein obliges a person (irrespective of his religion) having sufficient means, to maintain his wife, inter alia, including the one divorced by him, who is unable to maintain herself. The Magistrate, who has to order such persons to fulfil his

47. Mulla 14th Edn. at p. 261.

family obligation, is further ordained by Section 127(3)(*b*) to cancel such order on proof that the divorcee has received from her husband the whole of the sum which under customary or personal law was payable on such divorce.

In *Bai Tahira* v. *Ali Hussain*[48] the Supreme Court (Justice Krishna Iyer) regarded Mahr as the sum payable under customary or personal law on divorce as referred to in Section 127(3)(*b*) CrPC. Justice Krishna Iyer said: "Payment of Mahr money as a customary discharge, is within the cognisance of that provision".

Next year the same problem propped up again in *Fuzlunbi* v. *K. Khader Vali*[49]. Fuzlunbi (*F*) and Khader (*K*) were married in 1966. They had a son from the wedlock. *K* was an Additional Accountant in the State Bank of India, receiving a salary in four figures. When he discarded *F*, she prayed for maintenance under Section 125 CrPC. The Magistrate granted Rs 250 per month for *F* and Rs 150 per month for the son as the maintenance charges on *K*. Thereupon *K* played the usual trump card: he divorced *F*, tendered Rs 500 as the total amount on account of Mahr and Rs 750 as the maintenance amount in total for the period of *iddat*. Consequently the Additional First Class Magistrate cancelled the maintenance order in terms of Section 127(3)(*b*). On appeal to the High Court, the cancellation order was upheld. Therefrom *F* came in this appeal before the Supreme Court. Is dower the sum to be paid on divorce? Although answering the question in the negative for all its worth, the Supreme Court conveyed an altogether different impression. Iyer, J. went on to say:

> "May be somehow the masculine obsession of jurisprudence linked up this promise or payment as a consolidated equivalent of maintenance after divorce. May be, some legislatures might have taken it in that light, but the law is to be as the law enacted. The language of Section 127(3)(*b*) appears to suggest that payment of the sum and the divorce should be essentially parts of the same transaction so as to make one the consideration for the other. Such customary divorce on payment of a sum of money among the so-called lower castes are not uncommon. At any rate the payment of money contemplated by Section 127(3)(*b*) should be so linked with divorce as to become payable only in the event of the divorce."[50]

Paras Diwan[51] wrote that about the concept of Mahr two misconceptions prevailed. One was that it was in consideration of marriage (Mulla) and the other was created by the statement that dower (or at least the deferred dower) was payable by the husband to the wife on divorce; in *Bai Tahira* (supra) the

48. (1979) 2 SCC 316: 1979 SCC (Cri) 473: AIR 1979 SC 362.
49. (1980) 4 SCC 125: 1980 SCC (Cri) 916: AIR 1980 SC 1730.
50. *Ibid*, at p. 1736 (AIR).
51. Paras Diwan, *Dowry and Protection to Married Women* (Deep & Deep, New Delhi 1987) at p. 135.

Supreme Court fell into the trap of regarding Mahr the sum payable on divorce as referred to in Section 127(3)(*b*).

Though the Supreme Court did connect dower with the 'sum' envisaged by Section 127(3)(*b*), the Court did not hold dower to be a compensation or a consideration for divorce. The following observations of Krishna Iyer, J. in *Fuzlunbi case*[52] should dispel doubts:

> "The quintessence of Mahr, whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money for maintenance on divorce. Indeed dower focusses on marital happiness and is an incident of conjugal joy. Divorce is farthest from the thought of the bride and the bridegroom when Mahr is promised. Dower may be prompt, which is payable during marriage and cannot therefore be a recompense for divorce... Mahr as understood in Muslim Law cannot under any circumstances be considered as consideration for divorce or a payment made for loss of connubial relationship."[52]

It was however in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[53] that the Court divorced dower from divorce. Mohd. Ahmad Khan was married to Shah Bano in 1932. He (*a*) drove the respondent (*b*) out of the matrimonial home in 1975. In 1978 *B* filed a petition in the Court of the Judicial Magistrate, Indore for maintenance at the rate of Rs 500 per month. The same year *A* divorced *B* by an irrevocable talak. *A*'s defence to the maintenance petition was now on the traditionally set line—*B* was no more his wife; he had paid Rs 200 per month for two years to *B* and deposited Rs 3000 in the court by way of dower during the period of *iddat*. The Madhya Pradesh High Court nevertheless fixed Rs 179.20 as the monthly maintenance. *A* came in appeal against this order. *A*'s second plank of argument was that *B*'s application under Section 125 CrPC was liable to be dismissed because of the provision contained in Section 127(3)(*b*) that ordained the Magistrate to cancel such order of maintenance on proof that the divorcee had received from her husband the whole of the sum which under customary or personal law was payable on such divorce. That raised the question whether under Muslim Law any sum was payable 'on divorce'. Appellant's argument was that *Mahr* was the sum payable by husband to the wife on divorce. The Court rejected this argument on the following reasoning:

> "The fact that deferred *Mahr* is payable at the time of dissolution of marriage, by death or by divorce, cannot justify the conclusion that it is payable on divorce. Divorce may be a convenient point of time for identifying the time at which it is payable. But the payment is not occasioned by the divorce which is what is meant by the words 'on divorce'

52. *Fuzlunbi* v. *K. Khader Vali*, (1980) 4 SCC 125: 1980 SCC (Cri) 916: AIR 1980 SC 1730 at p. 1736.

53. (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.

under Section 127. If Mahr is the amount which the wife is entitled to receive from the husband in consideration of 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 on 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 on 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'."[54]

The Court therefore pronounced that:

"Though *Bai Tahira*[55] is correctly decided, an error has crept into the judgment. There is a statement at p. 321 (SCC, para 11) that 'payment of Mahr money as a customary discharge, is within the cognisance of that provision'. We have taken the view that Mahr, not being payable on divorce does not fall within the meaning of that provision."[56]

Thus, the Court divorced dower from divorce in one important sense, namely, the mere fact of payment of dower on divorce could not lock out the considerations of the human aspects of the divorced woman's financial condition:

"If the first payment by way of Mahr ordained by custom has a reasonable relation to the object and is capitalised substitute for the order under Section 125 of the Code of Criminal Procedure—not mathematically but fairly, then Section 127(3)(*b*) subserves the goal and relieves the obliger, not *pro tanto* but wholly."[57]

The Court was aware that merely divorcing dower from divorce could not serve the constitutional objective of economic justice to that one individual, viz. the destitute divorcee. In fact the very objective of divorcing dower from divorce (in the sense of a *quid pro quo* for divorce) was to remove an obstacle to a maintenance claim for divorcee that would maintain her in fact. The Court commented in *Shah Bano*[58] that the provision contained in Section 127(3)(*b*) may have been introduced because of the misconception that dower is an amount

54. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945 at pp. 952-954.
55. *Supra*, n. 48.
56. *Ibid*, at p. 572 (SCC).
57. *Bai Tahira* v. *Ali Hussain*, (1979) 2 SCC 316: 1979 SCC (Cri) 473: AIR 1979 SC 362 at p. 365.
58. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.

payable 'on divorce'. But that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce. 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 Muslim Personal Law do not contenance cases in which the wife is unable to maintain herself after the divorce. Section 125 envisages such situation. If she is unable to maintain herself she is entitled to take recourse to Section 125. There is no conflict between the provisions of Section 125 and those of Muslim Personal Law on the question of Muslim husband's obligation to provide maintenance to her. There can be no greater authority on this question than the Holy Koran: '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'—Allamah Nuri, *The Running Commentary of the Holy Koran*. There is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125.[56]

The latest law on the point is the Muslim Women (Protection of Rights on Divorce) Act, 1986, a law commonly known as a sequel to the *Shah Bano*[59] decision. Section 3 of the Act strikes a consonant note with *Shah Bano* ruling that dower is not an amount payable *on* divorce, i.e., for divorce. Section 3(1)(*c*) reads as follows:

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

According to sub-clause (*a*) a divorced Muslim 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,

and if he fails, she can 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, under Clause (2). It may further, be carefully noted that Section 3 enumerates four kinds of rights besides Mahr to which she is entitled (including maintenance), and the Act nowhere absolves the husband of 'making and paying' her properties and rights on the ground of having paid her dower.

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59. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945 at p. 572.

V

Divorce

(Talak)

It is a popular fallacy that a Muslim male enjoys under the Koranic Law an unbridled authority to liquidate the marriage. The whole Koran expressly forbids a man to seek pretexts for divorcing his wife so long as she remains faithful and obedient to him. Indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce.

—Justice V.R. Krishna Iyer

1. Pre-Islamic background

Among the pre-Islamic Arabs, the power of divorce possessed by the husband was unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce, and divorce again as many times as they preferred. They could, moreover, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.[1]

According to Abdur Rahim, at least four various types of dissolution of marriage were known in pre-Islamic Arabia. These were *Talak*, *Ila*, *Zihar* and *Khula*. A woman if absolutely separated through any of these four modes was probably free to remarry, but she could not do so until sometime, called the period of *iddat*, had passed. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that the period of *iddat* in case of death of husband then was one year.

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1. *See*, Ibrahim Abdel Hamid, "Dissolution of Marriage" *Islamic Quarterly* (1956) 3 at pp. 166-75, 215-223; (1957) 4 at pp. 3-10, 57-65, 97-113.

2. After the advent of Islam

The Prophet of Islam looked on these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorced parties three distinct and separate periods within which they might try to reconcile their differences; but should all attempts at reconciliation prove unsuccessful, then in the third period the final separation became effective.[2]

The reforms of Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced "*talak* to be the most detestable before God of all permitted things" for it prevented conjugal happiness and interfered with the proper bringing up of children. Ameer Ali asserts:

> "The permission (of divorce), therefore, in the Koran though it gave a certain countenance to the old customs, has to be read in the light of the lawgiver's own enunciations. When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce."[3]

An effective check placed by Islam on frequent divorce and remarriage was that in case of irrevocable separation, it is essential for remarriage, that the wife should marry another man, and this marriage should be consummated before divorce, and the wife should observe *iddat*. This was a measure which rendered separation more rare. Certain critics accuse this procedure as "a disgusting ordeal" and "revolting", but they ignore that among a proud, jealous, and sensitive race like the Arabs, such a condition was one of the strongest antidotes for the evil. It intended to control one of the most sensitive nations of the earth, by acting on the strongest feeling of their nature, the sense of honour.[4]

Fyzee says that it is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering is engendered by the husband's withholding divorce than by his irresponsible exercise of the right.[5]

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2. Ameer Ali, *The Spirit of Islam*, London, 1965 at pp. 243-44.
3. *Ibid*, at p. 244.
4. *Ibid*, at pp. 245-46.
5. Fyzee, "The Muslim Wife's Right of Dissolving her Marriage" (1936) 38 Bom Law Reporter, LJ 113.

Tahir Mahmood points out that 'in India the courts, gradually realizing that the concept of *Talak* has been very much misunderstood in the past, have made appreciable efforts to remove the misconceptions in this respect, ... In Pakistan and Bangladesh instant *talak* is no more possible and the cases of divorce are now regulated by Section 7 of the Muslim Family Laws Ordinance, 1961 which subjects it to the true Islamic procedure for the same.[6]

3. Modes of dissolution of marriage

Among the books on Muslim Law, including that of Baillie, Wilson, Tyabji, Ameer Ali, Mulla and Saksena, the best classification of divorce has been given by Fyzee. His method of classification is more scientific and easy to grasp, and hence, it has been adopted here with little additions. The discussion which follows in the sequence, however, is not confined to Fyzee alone.

CLASSIFICATION

A. BY THE DEATH OF HUSBAND OR WIFE

B. BY THE ACT OF PARTIES

1. By the husband

(*i*) *Talak*:

(*a*) *Talak-us-Sunnat* — { *Ahsan* (*most approved*). / *Hasan* (*approved*). } Triple divorce.

(*b*) *Talak-ul-Biddat* — { Triple divorce. / One irrevocable divorce (single) (generally in writing). }

(*ii*) *Ila* (Vow of continence).

(*iii*) *Zihar* (Injurious comparison).

2. By the wife

Talak-e-Tafwid (delegated divorce).

3. By mutual consent

(*i*) *Khula* (redemption).

(*ii*) *Mubarat* (mutual freeing).

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6. *Tahir Mahmood* (Ed.), Fyzee, *Cases*... at pp. 158-59.

C. BY JUDICIAL PROCESS

1. Lian (mutual imprecation).

2. Faskh (judicial annulment).

A. By the death of husband or wife.—It is clear and natural that with the death of husband or wife the marriage tie comes to an end. When the wife dies, the husband may remarry immediately, but in case of husband's death, widow has to wait till the expiry of *iddat* (4 months and 10 days, or if pregnant, till delivery).

B. By the act of parties

1. By the Husband

(*i*) ***Talak.***—In its literal sense this Arabic word means "taking off any tie or restraint", and in law it signifies the dissolution of marriage. In Hanafi Law, no special form or phrase is necessary to pronounce *talak*. The *Ithna Ashari* Law, however, insist on strict adherence to a form, that is, it must be in the Arabic language uttered orally, in the presence and hearing of two male witnesses, who should be honest and virtuous Muslims. Even the presence of the wife is not required. The *talak* would be deemed to have taken effect on the date the wife came to know of it.[7] Communication of *talak* becomes necessary in certain cases, as when the wife has to observe *iddat* and the dower becomes payable during *iddat*. While the Sunnis permit oral and written—both types of *talak*, Shias insist on oral *talak*. Any words may be used and it may be given at any time. In fact, while facing proceedings for maintenance, as for example under Section 125 CrPC (old Section 488), it is a common practice for the husband to take the plea that he had pronounced *talak* on his wife, and the courts regard it as a conclusive fact of completed divorce.[8] The practice of *talak* almost defies any bondage. The husband holds the key, to assign no reason, to go to no court, take no consent of the wife, give no regard to her condition, follow no procedure or formality, and just pronounce *talak*. 'How he does it, when he does, or in what manner he does it, is not very material'.[9] *In Hannefa* v. *Pathummal*[10], the judicial conscience of Khalid, J. was so much perturbed that he termed the practice as a monstrocity.

That was thirty five years back. But in 2007 the same High Court let slip a chance to make even a marginal change in the position. In *Alungaprambil Abdul*

7. *Ful Chand* v. *Nazab Ali Choudhari*, ILR (1909) 36 Cal 185; *Mohd. Shamsuddin* v. *Noor Jahan*, AIR 1955 Hyd 144.
8. *Chunno Khan* v. *State*, 1967 All WR 217.
9. Paras Diwan, *Muslim Law in Modern India*, ALA (1985) at p. 76.
10. 1972 KLT 512.

Khader Suhud v. *State of Kerala*[11], the petitioner a Muslim wanted to marry under Special Marriage Act, 1954 and get his marriage solemnised and registered under the provisions of the Act. Under this Act a marriage cannot be registered if another spouse is living or a Court decree of the dissolution of existing marriage is not produced. The petitioner had given *talak* to the earlier wife but possessed no certificate required as above and insisted that as per his Muslim Personal Law he need not get a decree from a civil court for a valid divorce and what he needs is only a certificate from the concerned *Jama-Ath* to the effect that divorce has been effected in accordance with personal law. This he had filed; the State insisted on proper court decree. The Kerala High Court held that the State cannot insist on a decree of divorce and a certificate from a Muslim *Jama-Ath* must be accepted by the State.

This was a writ petition. We submit the learned Single Judge of the High Court should have taken into consideration the possibility of the alternative remedy available to the petitioner, namely, marriage under traditional personal law. In this case a secular law condition has been bent to accommodate a personal law practice, without giving any convincing reasons. Where and what would be the limit? The secular legal world should consider, in view of the latest judicial decisions and academic opinions discussed below towards the end of this chapter, whether registration of Muslim divorce, effected as much under personal law as a marriage contracted under the same personal law, should also be compulsorily required under State authority. This would indeed facilitate the judicial supervision of the adherence to the pure Koranic injunctions for a valid *talak*, as recently insisted by the Supreme Court and the various High Courts.

(*a*) ***Talak-us-Sunnat***, that is, a *talak* which carries the approval of the Prophet. It may be in the most approved form, i.e., *ahsan*; or *hasan*, i.e., simply an approved form.

Ahsan.—*Hedaya* brands it as the most laudable divorce, where the husband repudiates his wife by a single pronouncement in a period of *tuhr* (purity, i.e., when the wife is free from her menstrual courses), during which he has not had intercourse with her, and then leaves her to the observance of *iddat*. The divorce remains revocable during the *iddat*, and the parties retain the right of inheritance.[12] According to the *Hedaya*, this method of divorce is the most approved because the companions of the Prophet approved of it, and second, because it remains within the power of the husband to revoke the divorce during *iddat*, which is three months, or till delivery.[13]

In a marriage not yet consummated, *ahsan talak* may be pronounced during menstruation also. Where the wife and husband are living separate from each

11. (2007) 1 DMC 38 (Ker).
12. Fyzee, at p. 152.
13. *Hedaya*, at p. 72.

other, or where the wife is beyond the age of menstruation (i.e. in old age), the condition of *tuhr* is not applicable,[14] it is also not applicable to a written divorce. This *talak* may be revoked either by express words, or impliedly by cohabitation within the *iddat* period. On such revocation, it is not necessary for the wife to undergo intermediary marriage, the husband can simply say 'I have retained you'. After the *iddat* period lapsing without revocation, the *talak* becomes final and irrevocable.

Hasan.—In *talak hasan*, the husband successively pronounces divorce three times during consecutive periods of purity (*tuhr*). It is, therefore, "a divorce upon a divorce", where the first and second pronouncements are revoked and followed by a third, only then *talak* becomes irrevocable. It is also essential that no intercourse should have taken place during that particular period of purity in which the pronouncement has been made. This may be illustrated thus— When the wife is in *tuhr*, without having intercourse with her, the husband pronounces *talak*. Then he revokes it by words or by intercourse. Menstruation follows. Again when she is in *tuhr*, and before intercourse, the husband pronounces *talak*. Intercourse follows (i.e. repudiation). Again menstruation follows. Now during *tuhr*, without having had intercourse, he pronounces *talak*. This is final, and divorce becomes irrevocable.

Where the wife is not subject to menstrual courses, an interval of 30 days is required between each successive repudiation. *Talak hasan* tries to put an end to a barbarous pre-Islamic practice to divorce a wife and take her back several times in order to ill-treat her. Through this method of *talak*, the husband has been given two chances of divorcing and then taking the wife back, but the third time he does so, the *talak* becomes irrevocable. In this way, the process of divorcing and repudiating cannot be continued indefinitely. Thus, it is a kind of relief to the wife from the harassment and tension on account of uncertainty that the Arabs could cause her by repeated *talak* and revocations without limit. The Prophet restrained them to the limit of three repetitions. Further shackle on the overbearing males was by way of the requirements of intermediary marriage, its consummation and divorce before remarriage with such wife. Of course the aspect of her further humiliation involved in this process was overlooked.

(*b*) ***Talak-ul-Biddat.***—Here the husband does not follow the approved form of *talak* i.e., *talak-us-sunnat*, and neither pays any attention to the period of purity nor to the abstention from intercourse. This was an escape lane from the restrictions imposed by the Prophet, as we saw just above. As Ameer Ali observed, the Omayyad monarchs finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their

14. *Chand Bibi* v. *Bandesha*, AIR 1960 Bom 121.

caprice, endeavoured to find an escape from the strictness of law and found a loophole to effect their purpose.[15]

Triple divorce—Hedaya defines it as a divorce where the husband repudiates his wife by three divorces in one sentence, or where he repeats the sentence, separately, thrice within *tuhr*.[16] Such a divorce is lawful, although sinful, in Hanafi Law; but in Shia Law it is not permissible.[17] Thus, he may pronounce 'I divorce you, I divorce you, I divorce you'; this is triple divorce, or he may say 'I divorce you thrice'. Even the triple form is not an indispensable requirement. He may say 'I divorce you in *talak-ul-biddat* or *talak-ul-bain* form'. Where the intention is clear the divorce is irrevocable. None of these forms is recognised by Shias. After such divorce also, like in *hasan Talak*, intermediary marriage is necessary for reunion. This condemned form is considered heretical because of its irrevocability. *Talak-ul-biddat* is good in law though bad in theology, and is most commonly practised in India.[18] The courts have refused to derecognise it.[19]

One Irrevocable Divorce.—The husband may say that he divorces his wife a hundred times, the *talak* is complete. So also if he shows his intention in writing. For example he writes: "I, by my free will, divorce my wife by one *bain talak* (irrevocable divorce), and renounce her from the state of being my wife,"[20] an irrevocable divorce has been effected.

Talak—When becomes irrevocable.—(*i*) *Talak ahsan becomes irrevocable* on the completion of the period of *iddat*. (*ii*) *Talak hasan* comes into force on the very point when the third pronouncement is made. *Iddat* factor has no influence on it. (*iii*) *Talak-ul-Biddat* of both types—triple or single—also becomes irrevocable right on pronouncement. (*iv*) In case of unconsummated marriage *talak* becomes irrevocable right on pronouncement. (*v*) A written *talak* comes into effect from the moment of its execution, unless it is ambiguous.[21]

Effect of Compulsion, Intoxication or Jest.—[22]Hanafi jurists consider a *talak* given by a man under compulsion as valid, while Imam Shafii, Malik and Hanbal and Shia jurists consider it as invalid.

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15. Ameer Ali, Vol. II at p. 274.
16. *Hedaya*, at p. 73.
17. Fyzee, at p.154.
18. *Sarabhai* v. *Ralia Bai*, ILR (1906) 30 Bom 537.
19. *Fazlur Rahman* v. *Aisha*, ILR (1929) 8 Pat 690.
20. Mulla, at p. 330.
21. *See*, K.P. Sharma, *Muslim Vidhi* (*Hindi*) (Rajasthan Hindi Granth Academy, Jaipur 1983) at p. 168.
22. Only Hanafi jurists hold that a divorce given under compulsion, intoxication and jest will be valid. Hanafi Law is followed by a majority of Muslims in India, hence, the above types of divorce shall be perfectly effective in India. The rule, however, has been criticised by Ameer Ali, Fyzee and others.

Divorce given under the influence of intoxication is valid according to Hanafi Law, whereas Shias do not recognise it. Hanafi jurists hold that when a husband becomes intoxicated of his own free will, and repudiates his wife, the divorce is valid; but if he was intoxicated under a compulsion or from necessity, there is no divorce.[23]

Hanafi Law, as distinguished from the Shia Law, holds a divorce pronounced in jest (joke, fun, non-seriously) as valid (*Hedaya*).

Commenting on *talak-ul-biddat*, Professor Anderson recently observed:

"As the law now stands in India, a formula of divorce uttered by a Hanafi husband under compulsion, intoxication, or the influence of such rage as deprives him of self-control is regarded as valid and binding—although legislation, based on authorities in the other schools of law which are of unquestionable repute, has been introduced in one after another of the Muslim countries to ensure that this 'dominant Hanafi opinion' should no longer be followed by the courts. Reforms to ensure that formulae of repudiation pronounced merely as an oath or threat should also be regarded as of no legal effect, and that the 'triple' divorce when pronounced on one and the same occasion should be regarded as only a single (and therefore revocable) divorce, have also been widely accepted in Muslim countries. These find their juristic justification partly in the *dicta* of jurists of the past, both *Sunni* and *Shia*; partly in the statement that the triple formula when pronounced on one and the same occasion counted as a single repudiation in the time of Prophet of Islam and his first successor, and that it was only in the time of Umar that this was changed with the intention of restraining husbands from an increasingly common abuse; and partly on the broad grounds that these practices represent manifest evasions of the spirit, if not the letter of the Islamic reforms—introduced as these were to ensure that a husband would have a reasonable opportunity to think better of, and retract, a formula of divorce uttered in the heat of the moment.

Even so, these reforms do nothing whatever to restrain a husband who is determined to divorce his wife from doing so, however unjustified his action may be. More recent legislation in some Muslim countries, therefore, often introduces one or more of three further reforms. The *first* empowers a court to compel a husband who repudiates his wife without adequate reason to pay her some financial compensation in addition to such maintenance as may be due to her. The *second* insists that no formula of divorce pronounced outside a court of law, and before any attempt has been made to reconcile the parties, will be legally recognised...the *third*, which is up till now peculiar to Iran, not only prescribes that no divorce may be effected before a certificate of impossibility of reconciliation has been granted, but also enacts that such

23. Jung, at p. 50.

a certificate will in no case be issued unless the request for this certificate is based on one of a list of permissible reasons for divorce."[24]

Implied and Contingent Divorce.—The word *talak* has unequivocal meaning viz., repudiation of marriage. It is an express word. But when other words are used in its substitution, such as 'I have severed all relations with you', 'I will have no connection with you', 'you are no more my wife', etc., these words are implied forms of *talak*. These words would require construction with reference to intention to establish the factum of *talak*. In contingent *talak* the husband ties the effectiveness of *talak* to the happening of some event in future; that event not happening, the marriage is to continue. Thus when he says: 'I shall divorce you if you do such and such thing'—it is a contingent *talak*. If the eventuality is not an impossibility, on the happening of that event, *talak* is materialised. In *Hamid Ali* v. *Imtiazan*[25], the husband said to his wife 'if you go to your father's house, you are my cousin (paternal uncle's daughter). In spite of this threat, the wife went to her father's house. This was an implied divorce in terms of the indirect words, and a contingent divorce as well, the contingent event being her going to her father's house. The court held it a *talak*, overlooking the fact that 'cousin' did not fall within the prohibited degrees of relationship.[26] The Shias do not recognise implied and the contingent *talak*; the Sunnis do so. Contingent divorce is called *talak-e-taliq*.

(*ii*) ***Ila* (vow of continence).**—*Ila* is when a person swears that he will not have sexual intercourse with his wife and abstains from it for four months, the divorce is effected. The Hanafi jurists argue that since the husband acted unjustly towards his wife, it is equitable that on the expiration of four months he should be deprived of the benefit of marriage.[27] The Shafiis and Shias consider that such a vow does not amount to divorce, but only gives the wife a ground to seek judicial divorce. In Sunni Law legal proceedings are not required. The intent of the husband must be expressed clearly. In *Rahema Khatoon* v. *Iqtidar-Uddin*[28] the husband, on entering the room of the wife on the very first day of the marriage called her 'a wife in name only'. The court refused to accept it as an *Ila* in absence of a clear intention. According to Asharis this form of divorce can be given only when the marriage has been consummated. The Hanafi Law provides that *Ila* can be retracted by resumption of cohabitation or even by verbal retraction if actual cohabitation is not possible due to some reasons. Even after the expiry of 4 months the husband can cancel *Ila* with the assent of the wife. *Ila* is not in practice in India.

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24. In Tahir Mahmood (Ed.), *Islamic Law in Modern India* at pp. 39-40.
25. ILR (1878) 2 All 71.
26. Paras Diwan, *op. cit.*, at p. 78.
27. Jung, at p. 66.
28. AIR 1943 All 184.

***(iii) Zihar* (injurious comparison).**—*Zihar* signifies a husband's comparison of his wife with his mother or any female relation within the prohibited degrees. In *Zihar*, the usual phrase is "thou art to me as the back of my mother'. The uttering of *Zihar* does not by itself dissolve the marriage; its legal effects are that sexual intercourse between them becomes unlawful till he has expiated himself by performing penance, and two, the wife can claim judicial separation or even a regular divorce if he continues to behave irresponsibly in this fashion. According to Ameer Ali the intention of the husband must be to show disrespect to the wife. Shia Law requires presence of two witnesses to testify the *Zihar*. It seems *Zihar* was practised to dissolve *Muta* marriage which admits no other form of *talak*. *Zihar* is also out of vogue, 'these words do not naturally come to Muslims in India' (Tyabji).

2. By the wife.—*Talak-e-Tafwid* (delegated divorce).

Baillie defines it as follows[29]:

> "As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party"

That is, the husband may delegate the power of divorce to his wife. He may do so at the time of marriage contract or at any time when he so likes.

This doctrine is peculiar to the Muslim Law and has no parallel in other systems. Fyzee says that this form of delegated divorce is now beginning to be fairly common in India. The Indian High Courts have repeatedly held as valid the agreement by which the husband authorises the wife to divorce herself from him in the event of his marrying a second wife without her consent.[30]

There are three forms of *tafwid*.[31]

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29. Baillie, at p. 236.

30. Fyzee, at p. 159.

31. The three forms are: (*i*) *ikhtiyar* (choice); (*ii*) *amr biyad* (the affair is in your hands); and (*iii*) *mashiat* (at your pleasure). But the technical difference meant to be indicated by these expression's is not of any importance in India where the Arabic language is not used. (Fyzee, 159). Lucy Carroll and Harsh Kapoor in their "Information Kit: Talaq-i-Tafwid: The Muslim Womans Contractual Access to Divorce", (Readers and Compilations Series, Published by Women Living under Muslim Laws, 1996) have printed, 'to facilitate its more general use', a "Bombay Woman's Nikahnama" drafted by a group of progressive Muslim women in Bombay (sic). This format (of a contract) prescribes a few conditions 'binding' on both the Hanfi parties. Some of the mentioned are: amount of Mahr (on demand type as well as deferred type), ban on pressurising the wife to remit or reduce it, requirement of her consent for second marriage, recognition of wife's delegated right and power of divorce, requirement of maintenance during *iddat*, ban on *Talaq-ul-bain* by husband, fine of double *Mahr* if he violates the ban, medical examination by both in case of non-conception. . . . (at pp. 99-101).

The authors have also included in their 'Kit' Danial Latifi's *Note on Sanad-e-Nikah*. Latifi says that written marriage contracts have been in vogue among upper class Muslims since Mughal times, and although writing is not essential to a marriage contract (Nikah Namas, Kabin Namas, Sanad-e-Nikah), the Koran itself enjoins that all transactions should be reduced to writing because so to do is "juster in the sight of God, better as evidence and conducive to prevent disputes" (Koran Ch. II verse 282). But, overriding all these commendations is the

The delegation must be made in clear terms and the circumstances in which the wife (or a minor wife's guardian) is to exercise the choice must be spelt clearly. The conditions must not be opposed to public policy. Thus delegation of the right to *talak* if the husband fails to pay her maintenance may be delegated.[32] The wife must exercise her option expressly, mere happening of the stipulated event would not per se result in *talak*. The power may be delegated at the time of nuptial agreement or during the married life. The power so delegated cannot be revoked by the husband. The wife may exercise the power to counter a suit for restitution of conjugal rights instituted by the husband, and that exercise will result in *talak*.[33] Even when the wife exercises the option, it will be called a divorce of wife by husband, as she would be acting on his behalf. In spite of the delegation the husband retains the right to *talak* her according to his choice.

The Executive Committee of the All India Muslim Personal Law Board in its meeting held at Lucknow in December 2004 adopted a model marriage contract (*Nikahnama*). The Assistant Secretary-General of the Board stated that this model marriage contract contained guidelines for the Muslim couples. The *Nikahnama* forbids triple *talak* as it is condemned a sin. Arbitrary, one way decision is discouraged; in case of a dispute the eldermen of the concerned families should sit together to resolve it; if the dispute still persists, the case should be referred to a *Muslim Adalat* or a *Shariat Panchayat* or sent to a local *Ulema* and the decision of these should be accepted by both the parties. The *Nikahnama* also contains the necessity of good relationship, the details of responsibilities and duties during the married life. A wide public drive for the acceptance and practice of this *Nikahnama* is also proposed. This new scheme required the sanction of the Board at its General Body Meeting.

And the Board approved the plan of the Executive Committee at its conference held at Bhopal in April-May 2005. Releasing the model *Nikahnama* the Secretary of the Board said this model marriage contract was 'different' from the other *Nikahnamas* in vogue in the country and was a true model. The proforma contains three basic features: The first part of the *Nikahnama* contained the names of the bride and the bridegroom, their addresses, age and other personal profile. The Board insists on two witnesses; the names of these with their address and signatures would also be noted. Some tips to the couple for a happy married life have also been included, along with words of caution on do's and don'ts; like keeping the marriage ceremony as simple as possible, refraining from asking for or offering dowry, and also lavish parties, check on expenses,

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following note by Latifi at the same place: "It is well-known that Muslim marriage is a civil contract and therefore it is permissible to stipulate therein terms not inconsistent with Muslim Law. When an illegal condition is annexed to a marriage, the contract is not cancelled by it, but the condition itself is void, leaving the marriage unaffected. So says *Fatawa-i-Alamgiri Baillie's Digest of Muhammadan Law*, Vol. I (2nd Edn.) at p. 19. —Lucy Carroll, etc. at p. 22.

32. *Hamidoolla* v. *Feizunnissa*, ILR (1882) 8 Cal 327.

33. *Sainuddin* v. *Latifannessa Bibi*, ILR (1919) 46 Cal 141.

respecting each other's sentiments, overlooking each other's drawbacks and protecting mutual interests. The second part contains cautions on *Talak*. Menfolk should refrain from pronouncing *talak*, three times at one go. On uttering *talak* one time and letting the *iddat* period (three months) to complete the husband and wife get separated. But between the period of the uttering of one *talak* and the completion of *iddat* reapproachment is possible and they may then restart a joint life. Contrarily, a triple pronouncement at one sitting closes the door on such patch up. This possibility should always be kept alive, and therefore triple announcement should be shunned. If joint life is not possible, the couple should resort of *darul kaja*, and its decision should be abided by both. The third part deals with *Mahr*. The *Mahr* amount should be handed over to the female right at the time of the marriage. If this be difficult, part payment should be made and balance remitted at the earliest. There is a piece of advice here: Cash amount is exhausted soon, therefore the *mahr* amount should be paid in kind like gold, silver, immovable property, so that it appreciates with the passage of time leaving something substantial with the lady after the divorce.

The point of appropriate age at the time of marriage is left unattended by the Board's model *Nikahnama*. The Shariat regards the age of 15 years as fit for marriage. The Board rejected the demand for according equal right to the women to divorce the husband. The Board's logic is that the Islam confers the right of *Khula* to the wife. The Women's Associations contended that although the women get divorce under the *Khula* system, but they are deprived of *Mahr* and other rights. The Board counter-contended that under Islam marriage is a contract, when the man breaches this contract, he knows that he will have to fulfil his obligations towards the wife and the children. But when the demand for *talak* is initiated by the wife, he is not bound to fulfil these obligations; therefore when she is dissolving the marriage, she will not get the benefits of economic support from her husband.

3. By mutual consent.—(*i*) *Khula (redemption)*.—If the mutual relationship between the husband and wife is not good, the wife, if she so desires, may seek a *Khula* divorce, e.g. by relinquishing her claim to the dower. It, however, entirely depends upon the husband to accept the consideration of dower and to grant the divorce. A husband may similarly propose a *Khula* divorce; the wife may accept or refuse it.[34] If she accepts, it means that she has relinquished the right to get dower from her husband. *Khula* may be for any consideration—dower, money, property, etc.[35]

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34. Jung, at p. 52.

35. According to Tahir Mahmood, in Pakistan the Courts are now of the opinion that *Khula* is the right of the wife not dependent on husband's consent. 'The correct exposition of the law of *Khula* given by the Pakistan Supreme Court (in PLD 1967 SL 970) is'—

    There are no words in this verse (referring to Surah II: 229: Koran) indicating that the consent of, or *talaq* by, the husband is necessary for *Khula*. Where the husband disputes the right of the

Wife's failure to pay the consideration agreed upon in a *Khula* divorce does not invalidate the divorce, so as to enable the husband to sue for restitution of conjugal rights, but only entitles him (*a*) to claim the release of dower, or (*b*) to sue for any money or property due under the agreement.[36]

The leading case on *khula* divorce is *Moonshee Buzul-Raheem* v. *Luteefut-oon-Nissa*[37], in which it was observed that a divorce by *khula* is at once complete from the moment when the husband repudiates the wife. There is no period during which such a divorce can be repudiated.

Mulla considers *khula* as a divorce by mutual consent; but Paras Diwan differs, saying that since in *khula* the desire to separate emanates from the wife, and she has to make her husband agree to it by offering consideration, it would be proper to call it divorce at the instance of the wife.[38] Both husband and wife must be of sound mind and have attained puberty. Hanafis and Shafiis permit the guardian of the minor wife to enter into *khula* on her behalf; but not the guardian of the minor husband. Shias insist that there must be no compulsion exerted on the mind of the wife, while Sunnis would not mind *khula* obtained under compulsion. Sunnis also recognise a conditional *khula*; not so the Shias. Hanafi Law permits the wife to retain an option to revoke the *khula*. If the husband stipulates such an option, the *khula* will be deemed irrevocable and the option void. Under Shia Law, both the *khula* and the option would be void; for the *khula* must be unconditional. All schools agree, in *khula* the consent of the husband in clear words is a must. The wife may revoke the *khula* before the agreement is finalised by getting up from the meeting. Hanafi regard *khula* as a *talak-ul-bain*, an irrevocable divorce. Shia jurists differ on the point whether wife and husband can remarry immediately after *khula*. *Ithna Asharis* hold it irrevocable, but maintain that if the wife during *iddat* demand the return of the consideration, the husband may revoke the *khula*.

(*ii*) *Mubarat* (*mutual freeing*).—When the divorce is effected by mutual consent of the husband and wife, it is known as *mubarat'at* (i.e. freeing one another mutually).

It has been held in a recent Pakistani case[39], that such matters as "incompatibility of temperaments, aversion, or dislike cannot form a ground for a wife to seek dissolution of her marriage, at the hands of a *Kazi* or a Court, but they fall to be dealt with under the powers possessed by the husband and the wife

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wife to obtain separation by *Khula*, a third party must decide the matter, and it will have to be adjudicated upon by the *qazi*, and any other interpretation of the Koranic verse would deprive it of all efficacy as a charter granted to the wife.

— Tahir Mahmood (Edn.), Fyzee, *cases*... *op. cit.*, at p. 159.

36. Wilson, at p. 169.

37. (1861) 8 MIA 379.

38. Paras Diwan, *op. cit.*, at p. 85.

39. *Sayeeda Khanum* v. *Mohd. Sami*, PLD 1952 (WP) Lah 113 (FB).

under Muslim Law", that is, the capacity of making a *Khula* or *Mubarat'at* divorce. *Khula* and *Mubarat'at* are irrevocable divorce; *iddat* become necessary for wife, and she is entitled to maintenance.

The word *mubarat'at* or *mubara'at* indicates the freeing of each other (from the marriage tie) by mutual agreement. As Fyzee puts it, while in *Khula* the request proceeds from the wife to be released and the husband agrees for certain consideration, usually the *mahr*, in *mubarat'at* apparently both are happy at the prospects of being rid of each other.[40] No formal form is insisted on for *mubarat'at* by the Sunnis. The offer may come from either side. When both the parties enter into *mubarat'at* all mutual rights and obligations come to an end. Both Shia and Sunni Laws hold it an irrevocable divorce (*talak-ul-bain*). *Iddat* is compulsory after *mubarat'at* as after *Khula*. Aquil Ahmad notes the following points of difference:

Khula	*Mubarat*
1. Redemption of the contract of marriage	1. Mutual release from the marital tie
2. Offer comes from the wife, husband accepts	2. Any party may make the offer, the other side accepts
3. Consideration passes from wife to husband	3. No question of consideration
4. Aversion is on the side of the wife	4. Mutual aversion

Besides, two points of similarity are that in both *iddat* is compulsory and both are irrevocable.[41]

C. By Judicial process.—(1) *Lian* (*mutual imprecation*).—The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. At the hearing of the suit, the husband had two alternatives: (*i*) he may retract (withdraw) the charge before the end of the trial, in which case the wife could not get a divorce, or (*ii*) to persist in his attitude, whereby he will be required to accuse his wife on oath. This is followed by oaths of innocency made by the wife. After these "mutual imprecations", the court dissolves the marriage.[42] The husband and wife both must be sane adults; the charge must be false, i.e. one not proved to be true; the wife must file a regular suit for the dissolution of marriage making the false charge the ground for seeking divorce. Mere laying of charge by husband or mere application to the court complaining that the husband had falsely charged her of adultery would not by itself amount to divorce. Their marriage must be *sahih* and not *fasid*. When dissolved by the

40. Fyzee, *op.cit.*, p. 156.
41. Aquil Ahmad, *op. cit.*, p. 124.
42. Fyzee, at p. 167, *citing* Baillie, (*i*) 338.

court, it would be an irrevocable consequence. The doctrine of *lian* is still accepted by courts as a valid Muslim Law procedure. In *Nurjahan Bibi* v. *Mohd. Kazim Ali*[43] whereon husband bringing a false charge on wife (*lian*) the court granted the wife the decree for dissolution of marriage under Section 2(*ix*) of the Dissolution of Muslim Marriages Act, 1939, it was observed by Bhattacharya, J. that the doctrine of *lian* had not become obsolete. The practice is based on tradition. Husband and wife both have to take oath inviting God's curse on liar. If the husband's charge is proved, the wife loses the ground for dissolution. If he fails, she can get the divorce as well as sue the husband for defamation under the Indian Penal Code for bringing a false charge of adultery amounts to cruelty against the wife and attracts Section 2(*viii*) of the Act, and the Exception I under Section 499 of the Indian Penal Code would not apply.[44] In a *lian* suit the burden of proof lies on the wife. According to Malik this holding is against Muslim Law where it is provided that the husband must prove the charge of adultery or suffer the consequences.[45]

Retraction of Charge.— There are two conflicting stands among the courts about retraction of charge by the husband. In *Tufail Ahmad* v. *Jamila Khatun*[46] the Allahabad High Court held that retraction of charge by husband before the wife brought the suit for dissolution of marriage on the ground of false charge was sufficient to dismiss the wife's suit. The retraction must be honest and genuine, not *mala fide* to defeat the suit. He must acknowledge that he had falsely accused her, and he must be punished for this. In such a retraction though he may be held liable for slander or defamation, the marriage cannot be dissolved. The Calcutta High Court allowed retraction at any time before the close of the evidence.[47] The Bombay High Court had held on the other hand that retraction had no place in the procedure of Indian courts,[48] but later the Court had retracted from this holding.[49] In an earlier decision the Allahabad High Court had also held that after the passing of the 1939 Act, there was no place for retraction under the Act, and it amounted to cruelty by the husband.[50]

Commenting on *lian* form one scholar has observed: 'It is interesting to note the difference in approach of the modern systems and the Islamic Law. Whereas an unsubstantiated charge of adultery is of no consequence under most of the modern laws, in Islamic Law it leads to divorce. On the contrary, while proven

43. AIR 1977 Cal 90.
44. *Abdul Khadar* v. *Taib Begum*, AIR 1957 Mad 340.
45. Vijay Malik, *Muslim Law of Marriage, Divorce and Maintenance* (Eastern Book Co., Lucknow 1988) at p. 63.
46. 1962 All LJ 971.
47. *Shamsunnessa* v. *Mir*, AIR 1940 Cal 95.
48. *Ahmad* v. *Fatma*, AIR 1931 Bom 76.
49. *Maomedali* v. *Hazrabai*, AIR 1955 Bom 464.
50. *Kalloo* v. *Imaman*, AIR 1949 All 445.

adultery leads to divorce under most of the modern systems, it does not, under the Islamic Law of *lian*; however, proved adultery will lead to death of the wife under the pure Islamic criminal law. Since Islamic criminal law has no validity in India, its corresponding limb, the *lian*, may also be given up'.[51]

(2) *Faskh (judicial annulment).*—*Faskh* means annulment. It refers to the power of Kazi (in India, law court) to annul a marriage on the application of the wife. The law of *faskh* is founded upon Koran and Traditions, "If a woman be prejudiced by a marriage, let it be broken off", (*Bukhari*). In India, such judicial annulments are governed by Section 2 of the Dissolution of Muslim Marriages Act, 1939. Prior to the Act, the Muslim woman could apply for dissolution of marriage under the doctrine of *faskh* on 4 grounds: (*i*) The marriage was irregular, (*ii*) in exercise of the right of option — *Khyar-ul-Bulugh*, (*iii*) the marriage was within the prohibited degrees of relationship, (*iv*) post-marriage conversion of the parties to Islam.[52] Two more grounds could be added: Impotency of the husband and lian. In *K.C. Moyin* v. *Nafeesa*[53] the court had held that under no circumstances could a Muslim woman unilaterally repudiate a marriage by *faskh*, it had no legal sanction without seeking the intervention of the court.

Prior to this Act, the classical Hanafi Law of divorce was causing hardships as it consisted no provision whereby a Hanafi wife could seek divorce on such grounds as disappearance of the husband, his long imprisonment, his neglect of matrimonial obligations, etc. Finding no other way to get rid of undesired marital bonds, many Muslim women felt compelled by their circumstances to renounce their faith. The Statement of the Reasons and Objects of this Act indicates the circumstances in which this Act was passed:

> "There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently ill-treating her or 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 in which the application of Hanafi law causes hardship, it is permissible to apply the provision of the Maliki, Shafii or Hanbali Law. Acting on this principle the *ulema* have issued *Fatawas* to the effect that in cases enumerated in Clause 3, Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called *Heelat-un-Najeza* published by Maulana Ashraf Ali Sahib (Thanvi) who has

51. B.N. Sampath, *Uniform Civil Code: Judicial Separation and Divorce*, in Menon (Ed.), *Uniform Civil Code*, op. cit., at pp 104-05.

52. Tyabji, *Muslim Law* at p. 194.

53. AIR 1973 Ker 176.

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 *ulema* who 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 Muslim woman, legislation recognising and enforcing the abovementioned principle is called for in order to relieve the sufferings of countless Muslim women."

In view of the above reasons, the Dissolution of Muslim Marriages Act, 1939 was passed. It is applicable to all Muslims in India who may otherwise adhere to the Hanafi, Shafii, Ithna Ashari or Ismaili Law. The Act is in force throughout India except in the State of Jammu and Kashmir, where a parallel enactment by the name of Jammu and Kashmir State Dissolution of Muslim Marriages Act, 1942 is in force. The words used by Section 2 of the Act are a "woman married under Muslim law", and not a 'Muslim woman'. This protects women who have already abjured Islam in the hope of getting their marriage dissolved and are thus no longer Muslims; they also can get their marriage dissolved on any of the grounds given in the Act. The Act consolidates and clarifies the Muslim Law relating to suits for dissolution of marriage by women. It is applicable to all Muslims but the provisions of this Act have to be applied by taking recourse to ordinary process of the civil courts of the country. An appeal against order of the subordinate court is competent under Section 96 of the Code of Civil Procedure.[54]

Section 2 of the Act lays down the following grounds on which a Muslim woman can seek divorce—

Grounds for decree for dissolution of marriage.—A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(*i*) that the whereabouts of the husband have not been known for a period of four years;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(*v*) that the husband was impotent at the time of the marriage and continues to be so;

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54. For an exhaustive commentary on the provisions of the Act, *see*, Vijay Malik, *op. cit.*, at p. 7 et seq.

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(*vii*) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(*viii*) that the husband treats her with cruelty, that is to say:

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*b*) associates with women of evil repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her exercising her legal rights over it, or

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Koran;

(*ix*) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that—

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final;

(*b*) a decree passed on ground (*i*) shall not take effect for period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(*c*) before passing a decree on ground (*v*) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Some of the more important of these clauses may be briefly analysed now.

Clause (*ii*).—The word 'neglect' means a wilful neglect of duty, where the wife refuses to live with the husband and stays at her father's house, or refuses to fulfil her marital obligations, the husband cannot be said guilty of neglecting her. His second marriage would not by itself provide a ground for dissolution, unless

a differential treatment is proved, though under Section 125 CrPC this would entitle her to live separate from him.

About the words 'failed to provide for her maintenance' there is difference of opinion among the courts. The Allahabad High Court held that the Act did not require the husband to follow his wife wherever she went and force money or food or clothes upon her when she refused to accept the shelter offered by him.[55] On the other hand Krishna Iyer, J. of Kerala High Court (as he then was) held that the words of the Act were absolute and admitted of no justifications to absolve him of his obligation.[56]

Clause (*iv*).—A husband has four obligations towards his wife under Muslim Law: (*i*) to maintain her; (*ii*) to treat all his wives equally; (*iii*) to make available to her a personal apartment, and (*iv*) to allow her to visit and be visited by her parents and blood relations. The first two are covered by clauses (*ii*) and (*viii*)(*f*) of Section 2. The last two would be covered by this clause.

In *ila* the husband declares that he would have no carnal connection with his wife for four or more months, on which he is said to have given her *ila talak*. Here, under clause (*iv*), when the husband has in fact abstained from his wife's sexual company for 3 years, the wife is afforded a ground to sue for the dissolution of the marriage. And the clause goes beyond that; it covers desertion by husband which means total repudiation of the obligations of marriage. His failure must not originate from the misconduct of the wife or a cause in which she had consented, such as his visit to a foreign country for studies or business with her consent. Similarly when he is compelled by circumstances such as illness or imprisonment of three or more but less than 7 years, she will not get the remedy under this clause.

Clause (*vii*).—This clause is based on the Muslim Law custom of *Khyar-ul-bulugh*. But the clause does away with the problem of ascertaining the condition of puberty by fixing the minimum and maximum age. It also removes the difference of opinion among the Shias and Sunnis regarding the repudiation of marriage contracted by father and grandfather of minor. The conditions prescribed by this clause are—(*i*) the marriage was solemnised before the girl had attained the age of 15 years; (*ii*) by father or any guardian; (*iii*) she is repudiating the marriage; (*iv*) she is between 15 and 18 years of age, and (*v*) their marriage was never consummated. To illustrate, in *Mustafa* v. *Khursida*[57] the facts were: A muslim girl of 7 years was given in marriage by her parents; the marriage was never consummated; on attaining puberty but before reaching 18 years, the girl appealed before the Family Court at Jodhpur for dissolution of her marriage under Section 2(*vii*) of the Dissolution of Muslim Marriage Act; her

55. *Badrulnisa Bibi* v. *Mohd. Yusuf*, AIR 1944 All 23.
56. *A. Yousuf Rawther* v. *Sowramma*, AIR 1971 Ker 261.
57. 2006 AIHC 382 (Raj).

application was granted. On appeal by the husband against the decree, the High Court upheld her right of the option of *Khyar-ul-bulugh* and held she was entitled to the decree. Would she lose the right if her marriage was consummated? According to *Fatawa-i-Alamgiri* a *Sayyiba* (a girl not being virgin) has the right of option which is not rendered void except in express words, or by cohabitation or demand of *mahr* and maintenance. The Allahabad High Court had held that the consummation must be with the wife's consent, and the Lahore High Court had held that cohabitation before the age of 15 years did not fall within the meaning of the proviso.[58] In Malik's view, *Sayyiba's* right would be covered or protected by clause (*ix*) of Section 2, but not so according to Sharma, for clause (*vii*) makes no distinction between a virgin and a *Sayyiba*. There seems to be no need to carve out an exception in the express terms of clause (*vii*) on the basis of general terms in clause (*ix*).

Clause (*viii*).—Cruelty was always recognised as a ground for dissolution of marriage under the traditional Muslim Law. 'Cruelty', cannot be defined in absolute terms. The concept has to be understood in relation to the status and grooming of the pair, the social conceptions of the time, victim's capacity to endure, effect on body and mind, etc. The court does not view it in the frame of an ideal couple, but in the context of expectations from a normal couple. Beating, bodily assaults, physical violence, ill-treatment, false accusations about her character, civil or criminal suits against her to harass or coerce to part with property, neglect, cessation of marital intercourse, are some of the examples of legal cruelty. In *Begum Subanu* v. *A.M. Abdul Gafoor*[59] the Supreme Court held that sharing the matrimonial bed with the second wife of the husband constituted 'matrimonial injury' affording her a ground to live separately from the husband. As the Privy Council observed there was no material difference between Muhammadan Law and English Law on the question of the legal concept of cruelty.[60] Actual physical beating is also not necessary, conduct injurious to her health or mind was enough.[56] Malik makes a useful suggestion that looking to the ill-treatment of the wife by her in-laws while the husband connives at it, it would be proper to widen the horizons of the clause to include such ill-treatment also.[56]

Clause (*ix*).— This is a residuary provision covering other grounds such as *tafwid*, *Ila*, *Zihar*, *Lian*, *Khula* and *Mubarat'at*, as mentioned in the Shariat Act, 1937. In *Aboobacker* v. *Mamu*[61] and *A. Yousuf Rawther* v. *Sowramma*[62] Krishna

58. 1958 ALJR 91, as cited in *Ghulam Sakina* v. *Falak Sher*, AIR 1950 Lah 45, as cited in K.P. Sharma.
59. (1987) 2 SCC 285: 1987 SCC (Cri) 300: AIR 1987 SC 1103.
60. *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, 11 MIA 551: 74 IC 166, as cited in Malik, *op. cit.*, p. 52, and his suggestion at p. 53.
61. 1971 KLT 663 at p. 668.
62. 1971 Ker 261.

Iyyer, J. laid down that when there was incompatibility of minds between the spouses, the marriage must be dissolved. This is known as the breakdown theory of marriage. Earlier it was propagated by Tyabji, CJ in these words: 'There is no merit in preserving the marriage when the parties fail to live within the limits of Allah.'[63] In Koranic text the Prophet had said that when reconciliation was not possible, let there be separation. Paras Diwan commends these 'well-laid' foundations of the 'most modern theory'.[64]

In a very recent case the plea of irretrievable breakdown of marriage has been pressed by the wife. We are narrating in a little detail the facts of *A.M. Jagjakh* v. *Rajathi Ziaudeen*[65] because of the interesting arguments in sequence found in the case. *A* in this narration is the appellant husband before the Madras High Court, and *R* the Respondent wife. *A* fought legal battle in Family Court for 12 long years for dissolution of their marriage. In his written submissions he had charged her of being already secretly married to another person, was leading an un-Islamic life, and asserted that he had pronounced divorce twice in writing and communicated to her. When the Family Court granted divorce decree he took a U turn and appealed to the High Court alleging that the Family Court had not given him sufficient time for reconciliation and should have ordered restitution of conjugal relations. The High Court dismissing his contentions as frivolous held that he was interested only in dragging the case whereas their marriage had been rendered a complete dead wood and there was no useful purpose in putting the parties together. Held there was irretrievable breakdown of marriage and so the divorce decree was upheld.

4. Husband's unilateral power to divorce: A critique

In *Aziza Khan* v. *Dr. Amir Hussain*[66], the petitioner was married with the respondent in 1982 in accordance with the Muslim rites and customs and Rs 10,000 were settled as the Mahr amount in case of *Talak*. The petitioner was an advocate and the non-petitioner was a doctor. The petitioner's case was that the non-petitioner was having illicit relations with two ladies and she herself was subjected to inhuman treatment. It was alleged that the doctor was not satisfied with the dowry given by her parents and she was asked to fetch more money from her father who was a Minister at that time. The respondent denied all charges and asserted that he had given her *talak* by written *talaknama* in 1986 and addressed it to her by registered post. He refuted responsibility to pay her maintenance after passing of the Muslim Women Act, 1986.

63. *Noori Bibi* v. *Pir Bux*, AIR 1950 Sind 8.
64. Paras Diwan, at pp. 94-95.
65. (2007) 1 DMC 365 (Mad).
66. 2000 Cri LJ 2582 Raj HC.

The point of central importance for us here is the argument of the petitioner that the *talak* was not valid on account of two lacunae, one, there was no attempt for reconciliation, and two, pre-divorce conference was not held. Both these arguments were contested by the respondent pointing out that the provisions in the Koran for an attempt of settlement or pre-divorce conference were directory in nature and their non compliance did not render the *talak* invalid. The High Court held that both the grounds were not mandatory according to the Koran and there was no authority that in their absence the *talak* was rendered invalid. The claim for maintenance under Section 125 CrPC was also rejected.

In *Koushar Ali Laskar* v. *Moslema Bibi*[67], the husband petitioner could not pay his wife the maintenance. She refused to live with him because of his TB. So he pronounced *talak* in accordance with Muslim rites and custom, and filed an application under Section 127 CrPC for quashing of the maintenance order. The wife contested the factum of the proof of the divorce. The High Court found that the *talaknama* was reduced into writing by the Chief Imam of a mosque in the presence of witnesses and the same communicated to the wife after eight months. The High Court held that the *talak* was duly proved and valid.

Thus, it can be seen that in the matter of procedure of *talak*, including its testimony, timing, method, instruments, retrospective effect, etc., the courts considered the husband's authority as almost undisputable. Is this kind of arbitrariness religiously sanctioned in Muslim Law? S.A. Kader (former Judge, High Court of Madras) has this to say:

> According to Moulana Mohamed Ali the practice in those early Islamic days was for the *Kazi* to appoint two arbitrators one from the husband's family and the other from the wife's family, that those two arbitrators have to try to effect a reconciliation between the parties and if all hopes of reconciliation fail, a divorce is allowed, but the final decision for divorce rests with the *Kazi*, who is legally entitled to pronounce divorce. This is a procedure par excellence, which portrays Islam in its true glory. But later Muslim jurists of 'great antiquity and high authority' threw to the winds this salutary procedure and conceived or rather misconceived a form under which a husband can bring about dissolution of marriage by unilateral pronouncement of *talak* thrice in one sitting called *talak-ul-biddat* or *talak-i-badi* which is not recognised in the holy book.

Kader quotes Ameer Ali *citing* an incident:

> 'As a matter of fact, the capricious and irregular exercise of power of divorce which was in the beginning left to the husbands was strongly disapproved by the Prophet. It is reported that when once news was brought to him that one of his disciples had divorced his wife pronouncing the three *talaks* at one and at the same time, the Prophet

67. (2000) 2 CLJ 134 Cal HC.

stood up in anger on his carpet and declared that the man was making a plaything of the words of God and made him take back his wife.'[68]

Now the Supreme Court has derecognised the husband's dictat to divorce in any manner, from any date past or future and without any proof. The Apex Court held in *Shamim Ara* v. *State of U.P.*[69], that the condition precedent for effectiveness of divorce was the pronouncement of divorce which has to be proved on evidence. Merely taking a plea in the written statement before the trial court in reply to an application for maintenance, that the husband had divorced the applicant sometime in the past would not have the effect of effectuating a divorce. Nor could a similar statement made in an affidavit by the husband in some other case to which the wife was not even a party, be regarded as an evidence of divorce accomplished.

The appellant (*S*) and the non-appellant (one Abarar Ahmed, referred to herein as *A*, or husband) were married in 1968. *S* filed an application in 1989 under Section 125 CrPC complaining of cruelty to her and her children as well as desertion. *A* replied by claiming divorce, done in 11th July 1987, and therefore her disentitlement for maintenance. No statement of circumstances, no justification by reasons, no proof of efforts of reconciliation and no evidence of witnesses in support of the *talak* were adduced. The Family Court had accepted an affidavit by *A* in some case where *S* was not even a party as a proof of the *talak*. The High Court of Allahabad held that although the alleged divorce had not been communicated to the appellant *S*, that stood completed in 1990 when the husband filed written statement to her appeal.

In this appeal by special leave the Supreme Court observed:

"None of the ancient holy books or scriptures of Muslims mentions such a form of divorce. . . a recital in any document, whether a pleading or an affidavit incorporating a statement by the husband that he has already divorced his wife on an unspecified or specified date even if not communicated to the wife would become an effective divorce on the date on which the wife happens to learn that statement . . .

The Supreme Court noted the views of Mulla (*Mulla on Principles of Mahomedan Law*, 19th Edn., 1990) that no particular form of words, no proof of intention, no presence of wife, no communication except for the purposes of dower were required; and of Tahir Mahmood (*The Muslim Law of India*, 2nd Edn.) that the basic rule is that a Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the court. Both have cited cases supporting their views. The Supreme Court expressed disapproval and disagreement with the above views. Approving the

68. S.A. Kader, *Muslim Law of Marriage and Succession in India* (Eastern Law House, Calcutta 1998) at pp. 37-38.

69. (2002) 7 SCC 518.

decisions of Gauhati High Court in *Jiauddin Ahmed* v. *Anwara Begum*[70], and *Rukia Khatun* v. *Abdul Khalik Laskar*[71], the highest court held:

> "The correct law of *talak* as ordained by the holy Koran is that *talak* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbitrators—one from the wife's family and the other from the husband's; if the attempts fail, *talak* may be effected. . . We are also of the opinion that the *talak* to be effective has to be pronounced. We are very clear that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating *talak* on the date of delivery of the copy of the written statement to the wife. The husband ought to adduce evidence and prove the pronouncement of *talak*. . ."[72]

This judgment can be expected to restrain the Muslim husbands from playing the trump card of divorce to defeat the wife's demand for maintenance. Now he will have to prove reconciliation efforts, establish reasonable grounds, and show two witnesses, in whose presence *talak* was pronounced.[73] The wife's side being involved (in the reconciliation efforts) it is not so easy now to 'manage' all this. Further, requirements of consent by the wife and dated receipt of the *talaknama*, or, alternatively order of the Court (accepting the reasonableness of the *talak* by the husband) may prove as effective check on the misuse of the power. The further requirement of 'reasonable provision' ordered by the Supreme Court in *Danial Latifi* case (infra) makes the wife's position better guarded than before. In essence, it is a matter of attitude: attitude towards the wife, towards the relationship, towards the family.[74]

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70. (1981) 1 Gau LR 358.
71. (1981) 1 Gau LR 375.
72. *Shamim Ara* v. *State of U.P.*, (2002) 7 SCC 518.
73. Thus, in *Munear Ahmed* v. *Sufia Mateen*, (2007) 1 DMC 550, the Karnataka High Court held factum of divorce cannot be held proved merely on basis of divorce certificate at instance of husband; in *Kausarbi K. Mulla* v. *State of Maharashtra*, (2007) 1 AIR Bom R 214, the Aurangabad Bench of the HC held that merely by taking plea of Talaq in written statement it cannot be said that wife would be deemed to be divorced from date of filing it, similarly by making statement before Court that he was giving Talaq to his wife in Court it cannot be held talaq was given on that day; similarly mere plea of husband without proof was not sufficient — *Shameem Baig* v. *Najmunnisa Begum*, (2007) 4 AIR Bom R 676, and *Riaz Fatima* v. *Mohd. Sharif*, (2007) 1 DMC 26.
74. Sometimes it is difficult to even fathom the attitude. We quote here the views of two academicians — Barsha Mishra and S.J. Hussain, student and Professor, Hidayatullah National Law University, Raipur, published in Delhi Law Review, Vol. 25 (2003) at p. 180:

    ... The decision of the Supreme Court in *Shamim Ara's case* is momentous. It has shown the way that the judiciary can play an important role in liberalising and modernising the rules of Muslim Law of marriage and divorce ... Earlier the Courts in India by and large expressed reluctance to depart from the opinion of the traditional Muslim Law ... now the judiciary has taken a progressive measure in order to elevate the helpless Muslim wife ... But a caveat has to be entered here. The courts can interpret Muslim Law in progressive way so long it is in tune or conformity with *Shariah*. If the interpretation of Muslim Law by Courts is not within

It is one of those areas of Muslim Law where reform is overdue. The very idea of unilateral divorce militates against the real spirit behind Islamic Law of marriage and divorce. Divorce is permissible in Islam only in cases of extreme emergency when all efforts at reconciliation have failed. But unfortunately, "it is the Islamic Law of divorce not polygamy which is the major cause of suffering to Muslim women...the Muslim wife indeed has always lived, so far as the law is concerned, under the ever present shadow of divorce" (Anderson).

As we know, *talaks* are of two types: *Talak-us-Sunnat* and *Talak-ul-Biddat*; the former is approved while the latter is disapproved in Islam. *Talak-ul-Biddat* came into being during the second century of Islam when "the Omayyad monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found...a loophole to effect their purposes".[75]

It must be noted clearly that it was not Islam but Omayyad practices that gave validity to these *biddat* divorces. It has recently been pointed out by Justice Iyer in *A. Yousuf Rawther* v. *Sowramma*[76] where he said:

> "It is a popular fallacy that a Muslim male enjoys under the Koranic Law, unbridled authority to liquidate the marriage... the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim Law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Koran laid down and the same misconception vitiates the law dealing with the wife's right to divorce...Commentators on the Koran have rightly observed and this tallies with the law now administered in some Muslim countries like Iraq—that the husband must satisfy the court about the reasons for divorce."

Talak-ul-Biddat should, therefore, be not given effect to. Fyzee denounces such *talaks* as "absurd and unjust", and suggests that the proper remedy is to do away with them by statute. Ameer Ali suggests that Shafii Law be made applicable to Muslims in India. Abdur Rahim is more pungent when he says:

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the confines of Shariah, then we have a great controversy. The case of *Shah Bano* is in point.— 'Clipping the Wings of Talaq: A case of Judicial Reform'.

What do the learned academicians mean? The Judiciary has never claimed any power to overrule the Shariah, nor ever expressed an intention to disregard the Koranic law. Then what is 'in tune with the Shariat and what 'is not so'? Who to decide? Many 'rules' or customs have been introduced in Muslim Law since ancient times to tide over difficulties faced by the society. Some of these innovations have been misused also. The social conditions keep changing. Isn't it in tune with the Shariah to innovate by interpretation in order to meet the present changes in social conditions? Is the decision in Shah Bano controversial or contributory to the amelioration of Muslim women's hardships? Do the learned authors, therefore, contribute any positive point by their above quoted remarks?

75. Ameer Ali, Vol. II (1965 Edn.) at p. 435.

76. AIR 1971 Ker 261.

"I may remark that the interpretation of the law of divorce by the jurists specially of the Hanafi School, is one flagrant instance where because of literal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject."[77]

Far-reaching reforms relating to unilateral divorce have been introduced during the recent years, in a large number of Muslim countries.[78] According to Kader, 'in Algeria, Tunisia, Turkey, South Yemen, Malaysia and Indonesia the practice of extra-judicial unilateral divorce has been abolished. Algerian Family Code (1984) requires attempt of reconciliation and judgment of the *Qadi*. In Turkey divorce is recognised only when granted by the court. The court's decree also provides for maintenance, residence, custody of the children and compensation. Yemen *Family Law* (1974) also requires approval of the District Court after satisfactory efforts for reconciliation. Malaysian Islamic Family Law, (1984) punishes a man for divorcing his wife outside the court, and divorce is permissible only after judicial investigation into causes of the breakdown. Indonesia also adopts similar policy. In Egypt, Jordan, Morocco, Iraq, Pakistan and Bangladesh unilateral divorce is allowed, but it must be duly registered and defaulting husband is liable for punishment. It is high time that something be done in India too. It is interesting to note that under a decree of H.H. the Agha Khan, the Khojas in India have their own marriage tribunals, and neither a second marriage nor a divorce is possible without recourse to these tribunals'.

5. Effects of divorce[79]

(*i*) Cohabitation becomes illegal between the couple.

(*ii*) Dower becomes payable to the wife.[80]

(*iii*) The husband and the wife are entitled to inherit from the other, if either of them dies during *iddat* following a revocable divorce. No right of inheritance arises in irrevocable divorce.

(*iv*) The wife becomes entitled to maintenance during the period of *iddat*.[81]

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77. Cited in M.R. Zafar, "Unilateral Divorce in Muslim Personal Law", in Islamic Law in Modern India (1972) at p. 173.

78. *See generally, Family Law Reform in the Muslim World*, prepared by Tahir Mahmood (Indian Law Institute 1972).

79. Verma, at pp. 253-55.

80. But in *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945 it has been laid down that dower is not payable on divorce but is payable on marriage.

81. 'The reason for divorce has no bearing on entitlement of the divorced wife to claim amounts under S. 3 (Muslim Women ... Act, 1986) ... Her status as a divorced wife must be held to be not altered or disturbed even assuming that allegations of adulterous behaviour had led to the proved divorce. Contumacious behaviour in matrimony, which led to divorce, may at worst have a bearing while fixing the quantum of fair and reasonable provision for the divorced wife but cannot affect her status as a divorced wife or her entitlement to fair and reasonable provision.' — Kerala High Court in *Musthafa* v. *Fathimakutty*, (2006) 3 KLT 690.

(*v*) Remarriage between the couple is only possible after observing a strict procedure. Remarriage with another man can be contracted by the widow after observing *iddat* only.

6. Formalities necessary for remarriage[82]

Where the husband has divorced his wife by three pronouncements (i.e. irrevocable divorce), remarriage with her is possible only if the following formalities are observed:

(*i*) After the divorce, the wife should observe *iddat.*

(*ii*) When the period of *iddat* expires, she should marry another person.

(*iii*) This marriage should be actually consummated.

(*iv*) The second husband should voluntarily divorce the wife.

(*v*) Then the wife should observe *iddat,* after which remarriage with the first husband would be possible.

If remarriage takes place without fulfilling the above requirements, it is irregular but not void.

In the leading case of *Rashid Ahmad* v. *Anisa Khatun*[83], it was held by the Privy Council that where a husband irrevocably divorced his wife but continued to live together as husband and wife, then the children of such a union would be illegitimate; even an acknowledgment of legitimacy could not make them legitimate. It must be noted here that not only the necessary formalities were evaded in this case, but even a remarriage was not formally contracted, otherwise, such a marriage being irregular (and not void), the children would have been legitimate.

7. Apostacy and conversion as grounds of divorce

When a Muslim renounces or leaves Islam it is called apostacy; whereas when a non-Muslim embraces or accepts Islam, it is known as conversion.

Apostacy and conversion may affect the marriage tie in the following circumstances:[84]

(*i*)	Where husband renounces Islam.	Apostacy.
(*ii*)	Where wife renounces Islam.	Conversion.
(*iii*)	Where husband embraces Islam.	
(*iv*)	Where wife embraces Islam.	

82. *See,* Mulla, at pp. 353-54; Fyzee, at p. 186.
83. (1931) 59 IA 21: AIR 1932 PC 25.
84. Classification given by Fyzee, at pp. 178-185, has been adopted here.

(*i*) **Where husband renounces Islam.**—Where a Muslim husband renounces Islam, his marriage with his Muslim wife is dissolved ipso facto.

As to what constitutes an "act of apostacy", the Lahore High Court, in *Resham Bibi* v. *Khuda Bakhsh*[85], held that a formal declaration is sufficient, e.g.; 'I hereby renounce Islam'.

(*ii*) **Where wife renounces Islam.**—Section 4 of the Dissolution of Muslim Marriages Act, 1939 says that "the renunciation of Islam by a married Muslim woman...shall not by itself operate to dissolve her marriage..." The second proviso to the same section, however, provides that this rule "shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith". For example, Rita is a Christian lady who embraces Islam and marries Raza, a Muslim. Rita then re-embraces Christianity. In this case, the marriage of Rita with Raza is dissolved.[86]

(*iii*) **Where husband embraces Islam.**—According to Ameer Ali, if a Christian or Jew (or anybody else following a Divine Book) embraces Islam, his marriage with his Christian or Jewish wife is not dissolved. It will be dissolved, however, if the wife belongs to a non-scriptural religion (i.e. Hinduism, Buddhism, etc.) because of the fact that a Muslim cannot marry a non-*Kitabiya* woman. Islam has to be offered to such a wife, if she refuses to embrace it, divorce may be given. This offer shall be made by the husband and the law court has nothing to do with it.

(*iv*) **Where wife embraces Islam.**—If a non-Muslim wife, whether she is a Hindu, Christian, Jew or an Irani Zoroastrian embraces Islam, her marriage tie stands intact, irrespective of the fact that the husband is non-Muslim.

For instance, it was held by the Calcutta High Court in *Noor Jehan Begum* v. *Eugene Tiscenko*[87], that the marriage of a Russain Christian wife with her Christian husband is not dissolved merely because the wife has accepted Islam. Similar were the observations of the Bombay High Court in *Robaba Khanum* v. *Khodadad Bomanji Irani*[88], where Robaba, a Zoroastrain wife embraced Islam but her husband did not.

Comments of Ameer Ali and Fyzee on Apostacy

Ameer Ali.—The enforcement of the Muslim Law in its entirety regarding apostate has become impossible under existing conditions in most countries inhabited by Muslims. The legal position of married parties, one of whom

85. AIR 1938 Lah 482.
86. *See*, Fyzee, at pp. 179-80.
87. ILR (1942) 2 Cal 165.
88. (1946) 48 Bom LR 864.

abandons Islam, must therefore be determined on principles of the Muslim Law other than those relating to apostacy.

Fyzee.—Muslim Law relating to 'marriage' and 'apostacy' are two different branches distinct from one another. Muslim Law never intended apostacy to be used as a means of dissolving the marriage contract.

Fyzee further adds that it must be asked: who is the person that seeks relief? If the husband changes his religion, it is understandable that the wife should complain and sue for dissolution; and vice versa. But is it right and just that one spouse should declare himself or herself a convert and then ask the court to declare the marriage dissolved? The result would be that by these means, a party to a marriage would be able to evade the legal obligations of a marriage entered into at a prior time and in accordance with a different system of personal law.[89]

7-A. Use of conversion to elude criminal liability for bigamy.—We read above [in 7 (*iii*)] the views of Ameer Ali. They are his views only. In the midst of various personal laws operating in the country the evil of employing conversion to dodge the criminal liability for bigamy under Sections 494-495 of the Indian Penal Code is also in vogue in our society. Section 494 of the Indian Penal Code stipulates that if a person, during the subsistence of the first marriage contracts a second marriage which is void due to its being bigamous, he/she shall be guilty of the offence of bigamy under the section. However, bigamy is not only not an offence in Muslim Law, it is also permissible. Therefore, if a Hindu or Christian male already married, subsequently converts to Islam and again marries a Muslim woman, such a marriage shall not be void: it shall be a valid marriage.[90] Therefore, it will not be an offence under Section 494. This presumption ruled till 1995, when the Supreme Court took a bold step to check the evils of dodging the Hindu wife of first marriage through the agency of conversion, ditching the Penal Code by converting to Islam and exploiting the difference between the two personal laws for unjust advantage. The Court laid down a new principle relevant to our present chapter and topic in the case of *Sarla Mudgal* v. *Union of India*[91], The facts, in brief, are like this—A married Hindu, in order to marry his paramour converts to Islam, and without obtaining dissolution of the first marriage, marries the other woman who was originally a Hindu and now has converted to Islam with the same objective of contracting a 'valid' marriage and ditching the Penal Code. The first wife has filed this petition in the Supreme Court praying for declaration of the second marriage as void. This apparently simple issue raises some vital problems: one, the second marriage constitutes a breach of the nuptual promise held out to the first wife; two, it violates her matrimonial rights; three, her rights of inheritance have been

89. Fyzee, at p. 185.

90. *John Jiban Chandra Dutta* v. *Abinash Chandra Sen*, (1939) ILR Cal 12.

91. (1995) 3 SCC 635: AIR 1995 SC 1531.

robbed; four, the problem of subsistence stares her starkly now; five, where children were born, problem of their maintenance stalks her; six, it is circumventing the criminal law. [Under Muslim Law a non-Muslim has absolutely no *locus standi* to inherit, therefore the first Hindu wife loses now all her rights to inherit from her husband; a Muslim giving maintenance money to his non-Muslim relatives is beyond all probabilities, therefore, his Hindu wife and children from Hindu wife are destined to become destitute; he has changed his religion to dodge the criminal law rather than out of great religious devotion, thus he has cheated the State.] One may look at all these questions from two different angles: one, purely technical, and two, in the perspective of their ramifications on the various constitutents of the society. It would have been really a wonder had the pioneer of social engineering the Supreme Court neglected the second angle in the year 1995. "Kalyani", a women welfare organisation joined the case as a party to serve the cause of the deserted Hindu women by presenting their case effectively before the Court.

The Supreme Court framed three vital questions for consideration: (*i*) Can a Hindu husband who has married under the Hindu Marriage Act (HMA), embrace Islam and contract a second marriage? (*ii*) Will such a marriage, contracted without obtaining lawful dissolution of the first marriage, be a valid marriage *qua* the first wife who remains a Hindu still? (*iii*) Is the apostate husband guilty of the offence under Section 494?

Before this decision the unequal position was like this: *See* heads 7(*i*) and (*ii*) above Apostacy . . . where husband/wife renounces Islam. If a married Hindu or Christian male embraces Islam his first marriage is not automatically dissolved, nor can he successfully fire the *talak* missile on his Hindu/Christian wife from the Muslim fort. Now he has two wives. Islam has no objection to this. But when a married Hindu wife converts to Islam and marries a Muslim in accordance with Islamic system, the Muslim Law has objection. Thus, the root cause being, the prior Hindu marriage is not dissolved by the fact of conversion to Islam. Therefore, in spite of her conversion to Islam, the woman's marital status remains intact. Muslim Law does not permit a married woman to repeat performance. So, when that female married in accordance with Hindu rites again marries "according to Muslim system", that marriage is void. Thus, in terms of the Indian Penal Code she contracts a marriage that is void, and therefore she becomes guilty of the offence under Section 494, and her Muslim "husband" of one under Section 49 of adultery. The Supreme Court said this is also true of that person (who fits in question no. (*i*). Answering the first question the Court said that on his converting from Hinduism to Islam, his first marriage was not dissolved, therefore he was a married man. This legal status of married male was conferred on him by the Hindu Marriage Act, he was bound by all the conditions laid down in that Act; one of the conditions of that law was that he would not marry again during the subsistence of the first marriage, no matter whether he

converts or not. Conversion is not a ground for absolution from the Hindu Marriage Act. So when he embraces Islam and marries again, he commits the offence of bigamy under the Penal Code. The Court observed:

> Parties who have solemnised the marriage under the Hindu Marriage Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Hindu Marriage Act by which he would continue to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage *qua* his wife who married him under the Act and continues to be a Hindu . . . It is no doubt correct that the marriage solemnised by a Hindu husband after embracing Islam may not be a strictly void marriage under the HMA because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy. . . .
>
> A Hindu marriage solemnised under the HMA can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert, therefore, be in violation of the Act and as such void in terms of Section 494 of the Indian Penal Code. Any act which is in violation of mandatory provisions of law is *per se* void.
>
> The real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-bye to the substance of the matter and acting against the spirit of the Statute (HMA) if the second marriage of the convert is held to be legal.[92]

The part of the judgment most appealing to the sense of justice and precisely decisive appears to be the following:

> A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute 'where the parties are Muslims' and, therefore, the rule of decision in such a case. . . is not required to be the 'Muslim Personal Law'. In such cases the Court shall act and the judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494 of the Indian Penal Code.

92. *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635: AIR 1995 SC 1531 at pp. 1536-37.

> Looked (at) from another angle, the second marriage of an apostate husband would be in violation of rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the HMA to marry again without getting his earlier marriage under the Act dissolved. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as that would be void.[93]

Altogether, the three questions (*supra*) were answered by the Supreme Court thus: (*i*) No, (*ii*) No, and (*iii*) Yes. As Lucy Carroll says "this conclusion has the advantage of placing the married male Hindu convert to Islam in exactly the same position as the married female Hindu convert and rendering both equally liable for the fulfilment of their marriage vows".[94]

The roots of the legal facets of marriage among the Hindu, Muslim and Christian sects lie in the soil of religious concepts. We referred to these three only because the incidents of inter-sect conversions are in sizable number among these, although there is no quantitative equality, the minus debit of balance being always in the Hindu account. When one party to an inter-sect marriage converts to another sect, that very marriage raises some inter-sect problems: What will be their future? What future of their matrimonial rights? What of their property rights? What of the guardianship of their children? What will be the legal remedies for the dissolution of their marriage? And many more questions may arise. Islam is always abreast with tactiele measures in the interest of the community. The confused secular conscience of the Hindu paralyses the Hindu community in the expectation of legislative intervention.

The Law Commission of India in its recommendations (of 1961) has advocated legislation to deal with the problems arising out of conversion by married persons. Some of its recommendations are: Conversion by either husband or wife would not dissolve the marriage prior to conversion. A second marriage by a Hindu or Christian husband on embracing Islam during the lifetime of the earlier (first) wife would constitute an offence under Section 494 of the Indian Penal Code. At the same time the apostate would have a right to pray for the dissolution of the first marriage in stipulated circumstances and under specified conditions. Now also, the one such advantage conferred on such an apostate as a result of the Mudgal decision is that since he has been held to continue to be governed by the HMA, he can take steps under that law for the dissolution of his marriage. The recommendations of the commission frame limits and impose certain conditions. Further, in the case of sham conversion, that is one not inspired by religious cause, basically *mala fide* one, no application can be submitted for dissolution of marriage for a minimum period of two years. Dissolution may be granted on ground that the non-apostate party refused

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93. *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635: AIR 1995 SC 1531 at pp. 1536-37.

94. Lucy Carroll, 'Religious Conversion and Polygamus Marriage' (1997) 39 JILI 272 at p. 275.

cohabitation. The decree of dissolution of marriage will not be passed in favour of the male apostate till he does not make provisions for the maintenance of the non-apostate wife and children. The non-apostate party will have right of priority to keep in his/her custody the children of the first marriage. However the Commission has forgotten to safeguard the right of inheritance of the non-apostate spouse and children.

8. *Iddat*: Its rationale, utility and periods

Hedaya defines it as follows:

> "The term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connection." It has been further said in *Hedaya* that "the most approved definition of *iddat* is, the term by the completion of which a new marriage is rendered lawful."

Thus, *iddat* is the period for which a woman must wait before marrying again whether in the event of divorce or death. The different periods of iddat are as follows:[95]

Cause of dissolution	*Marriage whether consummated or not*	*Period of iddat*
Divorce	Consummated	3 courses or, if pregnant, till delivery.
Divorce	Not consummated	No *iddat*
Death	Doesn't matter	4 months and 10 days or, if pregnant, till delivery whichever period is longer.

In certain cases, 'valid retirement' has the same legal effect as consummation. When the husband and wife are alone together under circumstances, which present no legal, moral or physical impediment to marital intercourse, they are said to be in valid retirement.[96]

Thus, the period of *iddat* prescribed in case of consummation will apply in case of 'valid retirement' also.

The reasons for observing *iddat* in the case of divorce are:

(*i*) to ascertain whether the woman is pregnant, and

(*ii*) to provide an opportunity to the husband to take the wife back (in revocable forms of *talak*).

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95. The periods given here are the most important and common. If anyone is interested to see how the period of *iddat* changes with such factors as regular and irregular marriages, and menstruation or the absence of it, he may consult the table given in Tyabji, at p. 137; adopted by Saxena, at p. 161.

96. Fyzee, at pp. 107-108.

Illustrations

(*i*) *A* enters into an agreement before his marriage with *B* by which it is provided that *A* should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and in case of breach of any of these conditions, *B* should have the power of divorcing herself from *A*. Some time after the marriage, *B* divorces herself from *A*, alleging cruelty. *A* then sues *B* for the restitution of conjugal rights.

The divorce is valid and *A* is not entitled to the restitution of conjugal rights if the charge of cruelty is proved. Because, the conditions are all of a reasonable nature and they are not opposed to the policy of Muslim Law.

(*ii*) An agreement between husband and wife through which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid.

(*iii*) *A* enters into an agreement before his marriage with *B* that *B* would be authorized to divorce herself on *A*'s contracting a second marriage. *A*, marries a second wife but *B* does not exercise her right for 2 years, after which she divorces herself.

The divorce is valid. The wrong done to her is a continuing one, and she has a continuing right to exercise her power.

(*iv*) An agreement arrived at by the guardians of minor husband and wife, to the effect that wife would be entitled to divorce herself from him in the event of his marrying a second wife without her consent, is valid and binding on minors, even after attaining the age of majority.

11. *Talak*—Not an Arbitrary Power

Zeenat Fatema Rashid v. *Mohd. Iqbal Anwar*[101]—The petitioner Zeenat married Iqbal in 1987. They had a son in 1989. After that she was ill-treated by her husband and in-laws. She instituted a criminal case. She had to leave her husband's house. She instituted a criminal case for getting back her properties, which were recovered. She also filed a case under Section 125 CrPC against her husband claiming maintenance for herself and her minor child, Iqbal contested the case by filing written statement. His main defence is that he had divorced his wife in 1990. The Family Court held that there had been a divorce duly effected and therefore, claim for maintenance would be determined under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Interim maintenance for the child was granted pending final disposal of the case. Hence this petition.

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101. (1993) 1 DMC 49 (Gau).

The question which arises for consideration is whether there had been a divorce duly effected.

Under the Koran, the marriage state is to be maintained as far as possible and there should be conciliation before divorce (*see*, note 254 Vol. I of *Holy Koran* by A Yusuf Ali). Therefore, the Koran discourages divorce and permits it only in extreme cases after pre-divorce conference. Therefore, a Muhammadan husband cannot divorce his wife at his whim and caprice. The question then is,— whether, if divorce by *talak* is made arbitrarily, should it be treated as spiritual offence only? Under the Muhammadan Law, marriage though regarded as a civil contract between a man and a woman; they become husband and wife after solemnisation of the marriage and their respective rights and obligations are regulated by the rules under relevant law. This being the position, marriage is the basis for social organisation and foundation of legal rights and obligations. The modern concept of divorce is also that the matrimonial status should be maintained as far as possible. The Family Court aims at reconciliation and persuasion of parties to arrive at a settlement. For these reasons if a Muhammadan husband divorces his wife at his whim and caprice, it would not only be a spiritual offence but it would also affect the divorce. In the above view of the matter, a Muhammadan husband cannot divorce his wife at his whim or caprice, that is, divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement. The case is solely based on *talaknama* which has not been proved, and there was no evidence that there was a pre-divorce conference. In that view of the matter the husband has failed to prove the alleged divorce by *talak*.

The recent judicial opinion heavily condemns arbitrary *talak* and ordains strict adherence to the spirit and letter of Muslim Law governing husband's power to divorce. In *Dagdu Chotu Pathan* v. *Rahimbi Dagdu Pathan*[102] the Bombay High Court very clearly redefines the procedure for *talak*. (The facts of the case are typically prototype. The petitioner married second wife and neglected the respondent first wife with her three children from him. Now her struggle for claiming maintenance started; the petitioner has come in appeal against the magistrate's order in her favour. His plea is again the old repetition — he had divorced her earlier.) The High Court held that not merely the factum of *Talak* but conditions preceding to the stage of giving *Talak* are also required to be proved when wife disputes factum of *Talak* or effectiveness of *Talak* or legality of *Talak* before a court of law. Mere statement made in writing before the Court in any form, or oral depositions regarding *Talak* having been pronounced sometimes in the past is not sufficient to hold that husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.

102. (2003) 1 Bom CR 740.

Even in case of irrevocable *Talak* in presence of Kazi or wife's father or two witnesses the factum of this form of *Talak* is required to be proved.

The Court said in the system of Muslim marriage the process of reaching to the marital tie is certainly a civil contract but once the marriage is solemnized it becomes an institution life long for both husband and wife and they do not live together by way of a mere contract[103] but in a holy and sacred bond of love, care and mutual respect with equal status to both the partners. Muhammadan Law does recognise the husband to be on the high pedestal than the wife but that by itself does not mean that he can check out his wife at his whim and caprice and without assigning any reason. The Court said conversation, persuasion, process of reconciliation — are the stages prerequisite to separation.

Again next year the Calcutta High Court re-emphasised the need to adhere to a regulated procedure before recognising a talak in *Mohinuddin Middya* v. *State of W.B.*[104] The husband had taken a plea in a written statement of a divorce having been pronounced sometime in the past and its communication to the wife by delivering a copy of that written statement. The Calcutta High Court held such a plea by itself cannot be treated as effecting *talak* on the date of delivery of the copy of the written statement to the wife. The husband ought to adduce evidence and prove the pronouncement of *talak*, and if he fails in this, the plea has to be treated as failed. The Muslim marriage is no doubt a contract but it does not empower the Muslim husband to divorce his wife whenever he likes and the wife cannot be treated like a chattel. The correct law of *talak* as ordained by holy Koran is existence of a reasonable cause and attempt of reconciliation before two arbitrators and then *talak*.

Triple Talak

According to Asghar Ali Engineer the Islamic Shariah which was formulated more than hundred years after the death of the Prophet and had evolved under complex influences of various civilisations took away what was given to women by the Prophet and the Koran. The issue of triple divorce in one sitting illustrates this very well. It was practised during *jahilliyah* period (times of ignorance) before the advent of Islam. The usual practice then was to pronounce the word *talak* two times and withhold the third pronouncement, making the wife live thus in constant fear of the third utterance.

The triple divorce was not allowed during the Prophet's lifetime, during the first Caliph Abu Bakr's reign and also for more than two years during the second Caliph Umar's time. Later on Umar permitted it on account of a peculiar situation. When the Arabs conquered Syria, Egypt, Persia, etc., they found

103. We know, even a simple contract cannot be terminated ex parte at whim and caprice; that is called a breach of contract, not a termination, and entails civil consequences.

104. (2004) 3 CHN 417.

women there much more beautiful than their own women and hence were tempted to marry them. But those women not knowing about Islam's abolition of triple divorce in one sitting, would insist that before marrying them they should pronounce divorce thrice to their existing wives which they would readily accept to do (as they knew Islam had abolished triple divorce and that it would not be effective) and marry the Syrian or Egyptian women and would also retain their earlier wives. When the Egyptian and Syrian women discovered that they had been cheated, they complained to Umar. The Caliph then enforced triple divorce again in order to prevent its misuse by the Arabs. He had done so to meet an emergency situation and not to enforce it permanently. But later jurists also declared this form of divorce valid and gave sanction to it.

The *Hadith* literature records that when the Prophet was told that so and so had divorced his wife thrice in one sitting his face turned red with anger and he stood up and said he was ridiculing the divine law in the Prophet's own life time and required that the man took back his wife.

The Koran does not mention triple divorce in one sitting. It requires the divorce to be effective over three periods of cleanliness, giving the couple a chance to reconcile during those three months. The Koran also provides for arbitration both to men and women appointing arbiter for each and they together would attempt reconciliation failing which the decision for divorce will be recommended to *Kazi*. Thus, both the Koran and the Prophet prohibit arbitrary divorce. All precautions were taken to guard woman's interests. However the later jurists influenced by the male dominated values of the patriarchal society gave man absolute right to divorce his wife and brought back a measure which was pre-Islamic and which was strongly condemned by the Prophet.

A *Fatwa* given by a Mufti of *Ahl-e-Hadith* rejecting the validity of triple divorce brought the *talak* issue to focus again. Maulana Asad Madani, President of the powerful Jamiate-Ulema-e-Hind has strongly opposed the *Fatwa* and declared it un-Islamic and a conspiracy. The progressive Muslim intellectuals like Maulana Wahiduddin Khan and Engineer have upheld the *Fatawa*. They argue that if the *Shariah* is truly based on the Koran and *Sunnah* then there is no place for the pronouncement of triple divorce in one sitting. Imam Ibn Taimiyyah, a jurist of the 14th century and his disciple Ibn Qayyim Jawzi had also held the triple divorce in one sitting invalid. All the Ulemas also agree that this divorce is *bidah* (innovation) and hence sinful. It is also unjust to the Muslim women. Ashgar Ali Engineer feels that it is high time the Muslim Personal Law Board recommended a Bill to the Government abolishing the triple *talak* in one sitting and enforcing the Koranic form of divorce which is very fair to women.[105]

105. Asghar Ali Engineer, *Islam and Women, The Indian Express*, New Delhi, 5-8-1993.

In July 1993 a petition was filed in the Supreme Court to declare as unconstitutional the right of a Muslim husband under personal law to divorce his wife by simply saying *talak* thrice. The petition by Nafisa Hussain contends that under the Constitution no community can have a personal law which gives a man greater rights than are given to a woman. Any personal law from pre-independence days which makes women's rights lesser than those given by it to men, must be struck down as being violative of the Fundamental Rights of women to equality. Yet, this is exactly what is done by the Dissolution of Muslim Marriages Act, 1939. The far reaching petition also seeks the striking down of the right of Muslim men to have four wives on the ground that the pre-independence Muslim Personal Laws (Shariat) Application Act, 1937 which requires this personal law to be applied in the case of Muslims, is unconstitutional.

It is also pointed out in the petition that the Union Government has denied the Muslim Women their constitutional right to equality by refusing to formulate a uniform civil code in terms of the Directive Principle (Article 44) in the Constitution. According to the Constitution the Directive Principles shall be fundamental in the governance of the country. The Union Government has done this inspite of the Supreme Court having pointed out in *Shah Bano* and *Jordan Diengdeh cases* the urgent necessity for a move in this direction.[106]

We saw above, the All India Muslim Personal Law Board's Executive Committee at its Lucknow meeting approved a model *Nikahnama* and adopted resolution to banish the system of pronouncing *talak* thrice. The General Secretary of the Board also condemned triple *talak* as a sin, and advised the Muslims to shun it. Again, coming back to our refrain, the crux of the matter is how the Muslim society views its social obligation, what perspective it adopts. The Muslim male class should think that it owes an obligation towards the Muslim society that the society should not become a cluster of divorced, deserted, destitute women. The father should pray for the same fate of his daughter-in-law as he does for his daughter. But the hurdle is that the Ulema is still keeping their personal ambitions above the welfare of the society. For example, a section of the Shia Muslim leaders declared a plan to constitute a separate personal law board on the heels of the above meeting of the Muslim Personal Law Board, accusing the existing Board of neglecting the problems of the Muslims!

Jorden Diengdeh v. *S.S. Chopra*[107] case deals with a petition for judicial separation under the Indian Divorce Act, 1869. Jorden was a Christian woman married to a Sikh man under the Indian Christian Marriage Act, 1872. While explaining the various laws on divorce applicable in India, the Court also dealt

106. *The Indian Express*, New Delhi, 11-7-1993.
107. (1985) 3 SCC 62: AIR 1985 SC 935.

with Section 2 of the Dissolution of Muslim Marriages Act, 1939 and observed 'under strict *Hanafi Law* there was no provision enabling a Muslim woman to obtain a decree dissolving her marriage on the failure of the husband to maintain her, or on deserting or maltreating her; and it was the absence of such a provision entailing unspeakable misery in innumerable Muslim women, that was responsible for the passing of the Dissolution of the Muslim Marriages Act, 1939. If the legislature could so alter the Hanafi Law, it is difficult to understand the hullabaloo about the *Shah Bano* decision... It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases'.

VI

Legitimacy and Parentage

(Jayaj aur Rishta)

1. Pre-Islamic background

The legitimacy of child depended not only on marriage but also in other cases, as we have seen in Chapter III of this book, on the right of the mother of the child to affiliate it to any one with whom she had sexual connection.

Adoption existed among the pre-Islamic Arabs. Much like its origin in Hindu and Roman systems, it was having a religious bias, "having relation to the repose of the souls of the departed and the preservation of the household divinities". The odious name attached by the pagan Arabs to any person leaving no male issue behind him is sufficient evidence of the importance which the custom of adoption possessed in their eyes.[1] Under certain circumstances, however, adoption had no relationship with religious motives. Sometime an Arab would employ it to legitimate his own son by a slave girl; sometime a refugee from another tribe was adopted by a member of the tribe which received him; and sometime a youth of Arab race enslaved to another by the fortune of war, would gain his attachment to such an extent as not merely to be set free but to be treated by him as his son, which is what occurred as between the Prophet and Zaid.[2] Neither any ceremony nor any restriction as to the age of adopted child, or the absence of a natural born son to the adoptive father, was known in pre-Islamic Arabia.[3]

The Prophet appears to have recognised the custom at the time he adopted Zaid, the son of Haris. But later on, he disapproved of it by saying that adoption similar to what was practised in the "Days of Ignorance" (*Jahiliyyah*) created no such tie between the *adopted* and the *adopting* as resulted from blood relationship.[4] Hence, Muslim Law does not recognise the validity of any mode of filiation where the parentage of the person adopted is known to belong to a

1. Ameer Ali, *ii* (2nd Edn.) at p. 215.
2. Wilson (5th Edn.) at p. 158.
3. Abdur Rahim, at p. 11.
4. Ameer Ali, *ii* (2nd Edn.) at p. 215.

person other than the adopting father. And it is acknowledgment alone that Muslim Law recognises as the only form of filiation. The father alone has the right to establish the relationship to the total exclusion of the mother and other relations.[5]

Distinguishing legitimacy from legitimation, the Privy Council in *Habibur Rahman* v. *Altaf Ali*[6] observed:

> "Legitimacy is a status which results from certain facts, legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under Muhammadan Law. Examples of it may be found in other systems. The adoption of the Roman and the Hindu Law affected legitimacy. The same was done under the canon law and the Scotch law in respect of what is known as legitimation *per subsequens matrimonium*."

Islamic concept

The concept of legitimacy of children is the direct outcome of the concept of marriage. Society that recognises the institution of marriage also recognises the legitimacy of children born within lawful wedlock; and vice versa, those born outside the wedlock are illegitimate. Muslim Law is very harsh on illegitimacy, yet fairly liberal in the rules on legitimacy. It postulates very strict enforcement of sexual morality; extramarital sexual relationship of any kind is condemned as *zina* and is severely punishable. Yet the relative catholicity in according recognition to marital status mitigates the perils of illegitimate relationship, offsprings of *Muta* are legitimate. 'The parentage of child is determined on the principle that it always follows marital bed. The father of a child born in wedlock is presumed to be the husband of the woman giving it birth, and a child which is born after six months of marriage and during its continuance is said to be born in wedlock. The legal effect of marriage on fixing the paternity of a child continues, according to Hanafis, for two years, and according to the Malikis and the Shafiis for four years after the separation by divorce or death'.[7]

2. Parentage

Parentage is the relationship of parents to their child or children.[8]

Paternity is the legal relation between father and child.

Maternity is the legal relation between mother and child. Depending on paternity and maternity are such things as guardianship, maintenance and inheritance.

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5. Ameer Ali, *ii* (2nd Edn.) at p. 215.
6. (1921) 48 IA 114.
7. Abdur Rahim, as *cited* by Paras Diwan, at p. 105.
8. Mulla, at p. 355.

Maternity is commonly recognised by law as the natural relationship between the mother and the child. The woman who gives birth to the child is its mother. Sunni Law (like other legal systems) recognises this status, irrespective of the fact whether she is married or unmarried, and even if the child is the outcome of *zina*. So the child can inherit from its mother. But under the Shia Law mere birth is not enough to establish maternity. A child born of adultery, incest or fornication is an illegitimate child and is devoid of maternity in the woman who gave birth to it; so he cannot inherit from her. Thus, there is a legal status to maternity and is a legal relationship.

Paternity is the legal relationship between the child and its begotter. It is based in turn, on the legal relationship between the woman who gave him birth and the man who begot him—there must be a tie of marriage between the woman and the man; he must be the husband of the child's mother. The marriage must be valid, may be even irregular, but not void or *batil*; neither Sunni Law nor Shia Law gives any credence to paternity if the marriage was *batil*. The fact of marriage is proved by either direct proof or by presumption, the latter in three conditions—by prolonged cohabitation, by acknowledgment by father or by acknowledgment of the woman as wife.

An issue of void marriage has neither paternity nor maternity under Shia Law; a bastard is a *filius nullius*, i.e. a relation of none. Under Sunni Law an illegitimate child has only maternity and no paternity, i.e. the 'maternity' and 'paternity' of child begotten in consequence of adultery, merge together in the mother of the child.[9]

Blood test to determine paternity—Though blood test may appear to be a scientific method, it has its own limitations. It is based on the compatibility of the child's blood group with that of the parents. The test can establish either that the man cannot be the father or that he *may* be, but never that he is. Even the negative verdict is said to be 70 per cent reliable. Thus the test is not as useful as it appears at first sight. Further, blood samples be taken only with the person's consent, and since it cannot prove legitimacy the custodian may refuse to give the sample to avoid unnecessary mental disturbance.[10]

3. Legitimacy

The question of legitimacy is directly connected with paternity, because, the maternity of a child is always established in the mother, irrespective of the fact whether the child is legitimate or illegitimate. But the paternity of a child can only be established by marriage between the parents of the child. The marriage must not be void, it may be regular or irregular. When paternity is established,

9. Aquil Ahmad, at p. 138.
10. *See*, S.M. Hassan in *Islamic Law*, op. cit., at p. 195.

legitimacy is also established.[11] The main point in the case of legitimacy of a child is marriage between its parents. The Privy Council held in *Habibur Rahman Choudhary* v. *Altaf Ali Choudhary*[12]:

> "By the Muhammadan Law, a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *zina*, that is illicit connection; and cannot be legitimate... Direct proof (of marriage) may be available, but if there be no such proof, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgement of legitimacy in favour of a son."

The paternity of a child cannot be established by a Muslim if he adopts a child of whom he is not the actual father. Adoption is unknown to Muslim Law; it has been expressly disapproved by the Koran. Thus, there is no *legitimation* in Islam.

Muslim Law, however, provides that in certain circumstances where marriage between the parents of child cannot be proved, 'acknowledgment of paternity' by father is permissible.

In *Sadiq Hussain* v. *Hashim Ali*[13] it was said that no statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible.

Thus, there is no mode or method recognised by Muslim Law to legitimise an illegitimate child. Muslim Law insists that conception in order to render a child legitimate should take place after the marriage, actual or semblable. There are two methods through which legitimacy (and parentage) is established:

(*a*) by birth during a regular (also irregular but not void according to Hanafis) marriage, or

(*b*) an acknowledgment.

The above attitude of Muslim Law towards legitimacy can be appreciated better if we are clear in our minds that—

> "Under English law a sexual relationship outside marriage is not a legal offence unless it is aggravated by circumstances such as lack of consent, the young age of the girl, the blood relationship of the person concerned, or unnatural behaviour which will amount to the criminal offences of rape, unlawful carnal knowledge, incest, bestiality, or sodomy. Islamic Law, on the other hand, holds that any sexual relationship is a crime unless it is

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11. *See*, S.M. Hassan in *Islamic Law*, op. cit., at p. 195.
12. *Supra*, n. 6.
13. (1916) 43 IA 212 at p. 234.

between husband and wife or was, in the old days, between a master and his slave concubine."[14]

4. Presumptions of legitimacy

The circumstances in which legitimacy (or illegitimacy) is presumed are numerous and conflicting. Stating briefly, it will be presumed that[15]—

(*i*) A child born within 6 months of the marriage is illegitimate, unless the father acknowledges it.

(*ii*) A child born after 6 months of the marriage is legitimate, unless the father disclaims it.

(*iii*) A child born after the termination of marriage is legitimate, if born—

within 10 lunar months (Shia Law);

within 2 lunar years (Hanafi Law); and

within 4 lunar years (Shafii and Maliki Law).

(*iv*) According to Section 112, Indian Evidence Act, a child born during the continuance of a valid marriage, or within 280 days after its dissolution (during which period the widow remains unmarried), is legitimate, unless it is proved that the husband and wife had no access to each other at any time when the child could have been begotten.

Possible rationales behind above presumptions—On the authority of *Sharifiyah*, Baillie observes:

> "The shortest period of gestation in the human species is six months,... and the longest is two years, according to Abu Hanifa, who assigned this as the maximum on the authority of Ayeshah, who is reported to have said, as having received it from the Prophet himself, that the child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel."[16]

According to Jung, "the great *Imam* has (not) fixed 2 years as the longest period of gestation because this rule is to be read together with the provision that while observing the period of *iddat*, the woman must declare that she is pregnant. This fact is to be decided within the period of *iddat*. And if after declaration the woman were to continue enciente and exceed the natural maximum limit of gestation, the case would then be fully covered by the 2 years' rule of Imam Abu Hanifa."[17]

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14. Coulson, N.J., *Conflicts and Tensions in Islamic Jurisprudence*, 78 (University of Chicago, 1969), *cited* by S.M. Hasan in his paper *in Islamic Law in Modern India* at pp. 196-97.
15. Fyzee, at p. 190.
16. Wilson (5th Edn.) at p. 169.
17. M.U.S. Jung, *A Dissertation on the Muslim Law of Legitimacy and S. 112 of Evidence Act 13.*

The minimum and maximum periods of gestation fixed by Muslim Law have been criticised on the ground that they are not borne out by modern scientific knowledge of gestation and pregnancy.

The shortest period of gestation which has been accepted by English courts is 174 days. So also in Muslim Law. The six months being lunar months, the period may be less than 180 days. Medical testimony would generally approve this minimum limit of Muslim Law.

The main criticism, however, is directed against the maximum periods. The reasons for these long periods may be the imperfect knowledge of gestation and pregnancy in those days and this could have led to an attitude of caution. But those considerations also exist now and perplex the most skilful of the medical specialists. The Sunnite jurists acted with the same caution and humane sentiments in fixing the maximum limits. Although Maliki jurists had fixed four years, yet in Algeria, the *qadis* administering Maliki Law have adopted ten months.[18] As observed by Paras Diwan, it may be that the Muslim Law givers leaned so heavily in favour of legitimacy that they gave fullest allowance to any freak of nature. Whatever explanation, he considers these rules of presumption totally out of date, and would prefer their abandoning without any qualms.[19]

Presumption of legitimacy from presumption of marriage.—The Muslim Law givers, from the earliest times, leaned heavily in favour of legitimacy of children, and considered the children of void marriage alone as illegitimate. In their concern to avoid illegitimacy they accorded recognition even to temporary marriages. The fact of the matter seems to be that even when there was a semblance of marriage, the Muslim Law givers construed it to be a marriage—the underlying idea being to confer the status of legitimacy on the children of such unions.[20] The Privy Council observed: 'The legitimacy or legitimation of a child of Muhammadan parents may properly be presumed from circumstances without proof or at least any direct proof, either of a marriage between the parents or any formal act of legitimation.[21] Inference of marriage between the man and the woman would confer legitimacy on their child, unless disproved. In *Zamin Ali* v. *Azizunissa*[22] the Allahabad High Court observed that a statement of the deceased father that he was married to the mother of the child, is evidence of a valid marriage, from which legitimacy of the child may be presumed.

Whether Section 112 of Evidence Act overrides Muslim Law of legitimacy.— The question whether Section 112 supersedes the provisions of

18. S.M. Hasan, *Muslim Law of Legitimacy* and S. 112 of the Indian Evidence Act, in the *Islamic Law in Modern India* at pp. 198-99.
19. Paras Diwan, at p. 107.
20. *Ibid*, at p. 108.
21. *Mohd. Bauker* v. *Shurfoonnissa*, (1860) 8 MIA 136.
22. AIR 1933 All 329.

of the child was impossible or did not exist at the time which would make the child legitimate, the acknowledgment itself would be ineffective.

For similar reasons there is absolutely no analogy between the Roman law of adoption and the Muhammadan Law of the acknowledgment of parentage. Under the Roman system adoption of whether in the form of *arrogatio* or in the later form of *adoptio* proper, was simply one of the methods of acquiring *patria potestas*, that is, the rights to control enjoyed by the head of a Roman family over his children, and it went through various stages of modification both as to the method by which it was acquired and as to its conditions and effects on the adopted children.

It is enough to say that before the age of Islam, adoption by a *feigned parturition* (pretending a childbirth) was common and well recognised among the ancient Arabs; that the cognate and agnate rights were attributed to children so adopted; and that such adoption and its legal effects were abrogated by the express words of the Koran and have never since found a place in Muhammadan jurisprudence in connection with marriage, inheritance, or for any other legal purpose.

Thus, the doctrine of acknowledgment applies only to cases where either the fact or the exact time of the alleged marriage is a matter of *uncertainty*, that is, the marriage has neither been *proved* nor *disproved*.[32]

Acknowledgment may be (*i*) express, or (*ii*) implied. An express acknowledgment entails a formal declaration, whereas in implied, it is presumed from the fact that a person has openly and habitually treated another as his legitimate child.[33]

Thus, in *Allahdad case*[30], the facts were that the plaintiff's father a Sunni, died leaving behind two sons and three daughters. The plaintiff filed a suit against his younger brother and three sisters claiming that he was the eldest son of the deceased and as such was entitled to 2/7th share in the property. The defendent's contention was that while they were born to the deceased after the marriage between their mother and father, the plaintiff was born to their mother (common mother) before she was married to their father, and his paternity was doubtful. The plaintiff's argument was that even if he could not prove that he was the son of the deceased father, the fact remains that the deceased had on several occasions acknowledged him as his son, in support of which he produced some letters written by the deceased. The Allahabad High Court held that the case was fit one for the application of the theory of acknowledgment for following reasons— (*a*) the paternity of the plaintiff was not proved, (*b*) it was also not disproved, (*c*) it was also not proved that *P* was the offspring of

32. Mulla, at p. 353.

33. *Mohd. Azmat* v. *Lalli Begum*, (1881) 9 IA 8.

fornication (*zina*) or illicit relations or born prior to the marriage between his mother and the deceased, and (*d*) there was no legal impediment to the marriage between them. The Court upheld the plea of acknowledgment of *P* by the deceased as the latter's son and held him entitled to inherit the property. This case lays down the following principles: (*i*) the rule of acknowledgment applies in the case of uncertainty of paternity, (*ii*) the rule proceeds on the presumption of lawful union between the mother and father of the child acknowledged, (*iii*) the offspring of fornication or adultery cannot be legitimatised by acknowledgment, (*iv*) this Muslim Law rule is not a substitute for the Hindu system of adoption, as the latter is not acceptable to Koran.

6. Conditions of valid acknowledgment

There are *seven* essential conditions of a valid acknowledgment:

(*i*) **Unknown paternity.**—(*a*) *Fact or exact time of marriage is not certain.*— As marriage among Muslims may be constituted without any ceremonial, direct proof of marriage is not always possible. Where direct proof is not available, indirect proof is by way of an acknowledgment of legitimacy in favour of a child.

(*b*) *Paternity neither proved nor disproved.*—It is necessary that marriage between the parents of the acknowledged child must neither be proved nor disproved; it must be in a state of *not proved*, i.e. capable of being proved or disproved. (If already established, there will be no dispute, if already disproved legitimacy is ruled out; 'not proved' means 'yet to be proved', meaning thereby that positive and negative both results are probable, and exactly for that reason the legitimacy is in question.)

(*ii*) **Intention to confer status of legitimacy.**— In *Habibur Rahman* v. *Altaf Ali*[34], the Privy Council observed that "the acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledger meant (i.e. intended) to accept the other not only as his son, but, as his *legitimate* son". The general principle of law is that acknowledging a child as son indicates accepting him as legitimate son. As held in *Fazal-un-Bibi* v. *Umda Bibi*[35] this rule is applicable to Muslim Law also. However, a casual acknowledgment would not confer the status of legitimacy. There must be an express intention to do so.[36] (It will not suffice to say 'he is like my son', or 'I consider him as my son', or 'he has been brought up like a son'; it must be clearly stated that he is his legitimate son.)

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34. (1921) 48 IA 114.
35. (1868) 10 WR 469.
36. *Abdool Razack* v. *Aga Mohd.*, (1893) 21 IA 56: 21 Cal 666.

(*iii*) **Acknowledger must be 12½ years older than the acknowledged.**—"The limitation that the acknowledged might have been born of the acknowledger means that the age of the acknowledged should exceed the age of the acknowledged at least by twelve and half years, and this because it is the minimum period of puberty for a youth; and this limitation is necessary because if the acknowledger has not attained puberty, the acknowledgment would be falsified obviously."[37]

(*iv*) **Legal marriage must be possible between the parents of the person acknowledged.**—The parents of the acknowledged child must not be in the prohibited degree of relationships. Such absolute prohibitions are on the points of (*a*) Consanguinity, (*b*) Affinity, (*c*) Fosterage, and (*d*) Polyandry.

If the parents are within the relative degrees of prohibitions so as to make the marriage between them as irregular but not void, valid acknowledgment can be made of an issue of such a marriage.

An example of a child of void marriage can be seen in *Rashid Ahmad* v. *Anisa Khatun*[38]. The 'acknowledgment' in question was of a child born to the parents who were 'remarried' after triple divorce. The wife was given triple divorce and without undergoing a second marriage with another person, the spouses remarried with each other. Since this marriage was void, valid acknowledgment could not be given to the child.

(*v*) **Person acknowledged must not be the offspring of *zina*.**—An offspring of *zina* is one who is born either:

(*a*) without marriage, or

(*b*) of a mother who was the married wife of another, or

(*c*) of a void marriage.

Baillie says that when a man has committed *zina* with a woman, and she delivered a son whom he claims, the descent of the son from the man is not established,[39] and he cannot be acknowledged.

(*vi*) **Person acknowledged must not be known to be the child of another.**—The Muslim Law of acknowledgment relates only to cases of uncertainty and proceeds on the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union.[40] Thus, where a person is known to be the child of another, valid acknowledgment cannot be made.

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37. Birjandi, at p. 294, *cited* in *Mohd. Allahdad Khan* v. *Mohd. Ismail Khan*, ILR (1888) 10 All 289.
38. (1931) 59 IA 21: AIR 1932 PC 25.
39. Baillie, at p. 411, cited by Mahmood, J., in *Mohd. Allahdad* v. *Mohd. Ismail*, (1888) 10 All 289.
40. (1888) 10 All 289 at p. 341.

(*vii*) **Person acknowledged must not repudiate the acknowledgment.**— It is a condition that the acknowledged child should verify acknowledgment, because, if the child does not verify, an impediment is created and the child's descent is not established by the mere acknowledgment, but requires proof. However, if the child is too young, such a verification is not essential.

Rebuttal of acknowledgment.—The presumption of paternity by acknowledgment may be rebutted on the following grounds:

(*i*) *Disclaimer by acknowledged person.*—If the person acknowledged as 'son' by the 'father' subsequently refutes or disowns the acknowledgment, it becomes effectless.[41]

(*ii*) *On proof of real parentage.*—If it is proved that the child acknowledged is the son of another person, the acknowledgment is nullified.

(*iii*) *When mother not lawful wife.*—When it is proved at the time when the son was conceived the mother could not be regarded lawfully wedded to the father, the acknowledgment by the 'father' is ineffective. Thus, in *Rashid Ahmad* v. *Anisa Khatun*[42], the husband pronounced triple divorce on the wife. Subsequently, the child was begotten. Without undergoing all the formalities of intermediate marriage and divorce, they remarried. This marriage being void, the recognition of the child could not be upheld valid.

(*iv*) *Age difference less than 12½ years.*—If the difference of age between the father and acknowledged child is less than 12½ years, the acknowledgment is unacceptable.

7. Effects of acknowledgment

(*i*) Acknowledgment of child means acknowledgment of wife also.

(*ii*) It raises presumption of marriage.

(*iii*) It gives rights of inheritance to children, parents and wife.

(*iv*) Acknowledgment once made is irrevocable.

8. Position of adoption in Muslim Law

Though adoption is not recognised under Muslim Law, in the following circumstances it is applicable:

(1) *A valid custom not abrogated by the Shariat Act, 1937.*— Before the coming into force of this Act, adoption was customarily recognised in Punjab, Oudh and some other parts. If an Indian Muslim citizen capable of entering in contract under the Indian Contract Act, Section 11, declares under Section 3 of the Shariat Act that the provisions of the Muslim Personal

41. *Abdul Rajak* v. *Aga Muhammad*, (1913) IA 46.
42. (1931) 59 IA 21: AIR 1932 PC 25.

Law (Shariat) Application Act would govern him and his minor children and descendants, the custom of adoption would cease to apply to him. If a convert, like a Khoja, Bohra, Kutchi Memon does not declare so, he would be governed by the customary law.

The Himachal Pradesh High Court, in a very recent case, has reiterated that by virtue of custom Muhammadans may also have system of adoption, subject to proof. In *Zatieen Begum* v. *Secy., Forests*[43] the petitioned right was not granted on facts of the case, but the principle was re-recognised. The appellant had proved under the Workmen's Compensation Act, 1923 for compensation to the deceased on the ground that she was the adopted daughter of the deceased. The appellant however miserably failed to prove this claim of adoption on facts, and therefore her claim was rejected by the High Court. Apart from this, the Court during the course of the judgement reaffirmed that if the custom of adoption is prevalent amongst the Muslims of the area to which the claimant belongs, a Mussulman can also adopt a child. Quoting from the works of B.R. Verma, *Mohammedan Law in India and Pakistan* and Mulla, *Principles of Mohammedan Law* the Court said taking in adoption will be valid if based on special family or tribal custom. Moreover, the list in the Shariat Act [Muslim Personal Law (Shariat) Application Act, 1937] excluding the subjects from the application of customs in India does not include adoption. Therefore, if proved, the custom of adoption will override general Muslim Law. 'Three points emerge clearly: (1) in general, the Muslim Law does not recognise adoption, (2) adoption may be permitted among Muslims on the basis of custom, and (3) one who claims the basis of custom, will have to prove the existence of the custom'. The Court said the mode of proving a custom is well known. The person relying upon the custom must prove that such a custom has been in existence from time immemorial and must give specific instances of such custom.

(2) *When the right of adoption is permitted by law.*—The Oudh Estates Act, 1869, Section 29 entitles a Muslim Talukdar to adopt a son.[44]

Paras Diwan is of the view that to a very great extent the custom of adoption stands abrogated[45]. However, in addition to the view of the Himachal Pradesh High Court just quoted above, there are a number of other decisions and instances which we will examine below and which will establish that this presumption of Paras Diwan is hemmed by many exceptions, and that this custom is prevalent in the Muslim community in many parts of India. For instance — *Khair Ali Shah* v. *Imam Shah*[46] (former Punjab); *Usman* v. *Asaf*[47]

43. (2005) 3 ACC 516.
44. *See*, K.P. Sharma, *Muslim Law* at p. 227.
45. Paras Diwan, at p. 113.
46. AIR 1936 Lah 80.
47. AIR 1925 Sind 207.

(Sindh, now in Pakistan); *Abdullah Khan* v. *Sunda*[48] (Ajmer); *Mst. Khatgi* v. *Abdul Rajak*[49] and *Mohd. Akbar Bhat* v. *Mohd. Akhoon*[50] (— both Kashmir); *Ayubsha Amirshah Jamadar* v. *Babalal Mahabut Danawade*[51] (— former Bombay Province); *Abbasali Shah* v. *Mohd. Shah*[52] (—Madhya Bharat — now Madhya Pradesh); and *Abdul Hakim* v. *Gappu Khan*[53] (— Rajasthan). Indeed, amongst the Mahawatan caste of the Muslims of Rajasthan the custom of adoption tallys with that as practised by the Hindus. The Rajasthan High Court observed in *Abdul Hakim* v. *Gappu* (supra):

In addition to the above quoted decisions delivered during last 50 years, abundant oral evidence supports the claim that adoption custom is prevalent among the Mahawatan Muslims; this fact has not been rebutted also, and the instances, cited by the witnesses of the defendant party have also not been rebutted.

Again in *Nenu Khan* v. *Mst. Sugni*[54] The same High Court decided that custom based system of adoption among Muslims is recognised. Further, in *Mst. Bibi* v. *Said Ali*[55]. This High Court considered the subject in detail and propounded the following findings:

(*i*) As a rule, adoption among muslims is not an unknown fact.

(*ii*) If (among that class) this custom has been practised, the system of adoption can be prevalent.

(*iii*) The Muslim person who claims that the custom of adoption applies to him, will have to prove his claim.

Thus, many cases substantiate the point that Muslim Law accords sanction to the practice of adoption on the basis of custom.

If we examine the Shariat Act we will find that there also adoption has not been forbidden. Section 2 of the Shariat Act enlists the subjects (topics) of the Muslim family law which, notwithstanding any custom to the contrary and superseding it, shall be governed by the provisions of Shariat Act (Muslim Personal Law) only; this schedule does not include adoption, that means this custom of adoption has not been superseded, and therefore it can apply. Commenting on this provision of law the Madras High Court in *Puthiya Purahil Abdurahiman Karnavan* v. *Thayath Kaucheentavida Avoomma*[56] and *Moulvi*

48. 11 IC 670.
49. AIR 1977 J&K 44.
50. AIR 1972 J&K 105.
51. AIR 1938 Bom 111.
52. AIR 1951 MB 92.
53. S.B. C5A No. 115/1950, decided 22-12-1954.
54. 1974 WLN (HC) 8.
55. SB SA No. 132/1990, decided 12-9-1997 (unreported).
56. AIR 1956 Mad 244.

Mohammed v. *Mahboob Begum*[57] observed that the subjects not enlisted under Section 2 can be permitted rightly to be governed by custom.

The Koran has not expressly disallowed taking a child in adoption; what it ordains is only this: 'in the matter of parentage, one should not commit a mistake on account of confusion, between one's own offspring and that of other person'[58].

9. A comparison between acknowledgment and adoption

We may compare now the two systems to highlight the differences:

(*i*) While the first system is recognised by Muslim Law, the second is recognised by Hindu Law; and both the laws reject the alternatives.

(*ii*) While the basis of the former is the real paternity of the child, in the latter, *another's* child is adopted; one never adopts one's own child, just as a Muslim never acknowledges another's child as his own.

(*iii*) Similarly, while a direct descendant is acknowledged in Muslim Law, in adoption, the child is artificially made a descendant of the adopter.

(*iv*) There is no *gift* of the child in the former system, while in the latter the real father may gift the child to another.

(*v*) There is no *change* of family in acknowledgment, while such change takes place in the latter system.

(*vi*) The object of acknowledgment is to dispel doubts about the paternity. Adoption is for material, spiritual or one or both purposes.[59]

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57. AIR 1984 Mad 7. And also see, *Hajee Abdul Sattar Sait* v. *CED*, (*Mys*), (1968) 69 ITR 45 (Mys), and *C. Mohd. Yunus* v. *Syed Unnissa*, AIR 1961 SC 809.
58. *See*, A.K. Bhandari, "Adoption Amongst Mohammedans — Whether Permissible in Law" —, (2005) 47 JILI at pp. 110-114.
59. K.P. Sharma, *op. cit.*, at pp. 228-29.

VII

Guardianship

(Valaya)

Abdur Rahim defines guardianship as:

> "A right to control the movement and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs; for example, an infant, an idiot, a lunatic. It extends to the custody of the person and the power to deal with the property of the ward."[1]

1. Concept of guardianship in Islam

In pre-Islamic Arabia, the properties of minors were looked after by guardians taken from among the members of the family. In the absence of any code of conduct, misappropriation and embezzlement were rampant. This necessitated the introduction of most stringent rules for the protection of minors in the Islamic legal system.[2]

According to Ameer Ali, the Koran is full with denunciation against the gross malpractices prevalent in Arabia of those days.

> "Restore to the orphans," says the Koran, "when they come of age, their *substance* (property); do not substitute bad or good (that is, take not what ye find of value among their effects to your own use and give them worse in its place), nor devour their substance by adding it to your own, for this is an enormous crime" (Koran, Chap. IV, v. 2).

The Koran forbade the waste of the property of wards by their guardians (Koran, Chap. IV, v. 156), and directed that the guardians may take a reasonable and moderate gratuity for their labour, but not more.

"Let him who is rich abstain entirely from the orphans estate" (Koran, Chap. IV, v. 6).[3] It also lays down that "when ye deliver unto your wards their property,

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1. Abdur Rahim, at p. 344.
2. Ameer Ali, at pp. 472-73.
3. *Ibid.*

call witnesses thereof in their presence. Surely they who devour the possession of orphans unjustly shall swallow fire hereafter" (Koran, Chap. IV, v. 6).

Since the law of guardianship, as we have seen is mainly based on Koran, there is little room for differences between the Shia and Sunni Schools in this branch of Muslim jurisprudence.

'A remarkable feature of Muslim Law of guardianship and custody', according to Paras Diwan 'is that, on the one hand, detailed rules have been laid down for the guardianship of a minor's property, while on the other, there are very few rules relating to the guardianship of a minor's person. This is so because they regarded the latter as more of a matter of custody than of guardianship. The rules regarding the minor's custody have been laid down in great detail. In this lies their foresightedness that in an essentially patriarchal society, they could lay down that the custody of children of tender years belonged to the mother. Thus, a clear distinction is maintained between guardianship and custody—a distinction which could be established in English law only after a protracted struggle extending over almost two centuries, and that too, by legislation (Guardianship of Minors Act, 1971). It is unfortunate that in the early days of administration of Muslim Law during the British Raj, some textbook writers and judges could not decipher the distinction. On the one side, undue prominence was given to the paternal right, on the other, the mother was dubbed as guardian of tender age...the Koran. the ahadis and other authorities on Muslim Law emphatically speak of the guardianship of the property of the minor; the guardianship of the person is a mere inference'.[4]

2. Appointment of guardian

Under Muslim Law, no formal appointment by any authority is necessary for a competent person to act as guardian. The only consideration is, whether he is competent and entitled to be a guardian.

According to Muslim Law, a person who has attained the age of 18 years, and who is sane, can act as guardian.

A guardian may also be appointed under the Guardians and Wards Act, 1890. The application for the appointment may be made not only by a person

4. Paras Diwan, *Muslim Law in Modern India* at p. 114. The examples of the text-book writers and judges given by Diwan are as follows: In Tyabji's *Muhammedan Law*, S. 231 runs: "Guardianship of the person is referred to in Muslim Law as *Hizanat*." Raffi and Poggot, JJ. said, "The right of guardianship of female minor primarily rests with mother," *Salim-un-Nissa* v. *Saadat Husain*, ILR (1944) 36 All 446. To the same effect are the remarks of Jallal, J. in *Nur Begum* v. *Begum*, AIR 1934 Lah 274 (1), and of Davis, J. in *Isso, Re*, 1942 Sind 204. In following cases which were under S. 488 CrPC (old Code) the mother is referred to as guardian: *Zauhra Bi* v. *Mohd. Yusaf*, 1931 Cri LJ 247 (Lah); *Sarfraz Begam* v. *Miran Bakhsh*, 1928 Cri LJ 1052 (Lah); *Mohd. Jusab Nurani* v. *Adam Haji Nurani*, ILR (1911) 37 Bom 71; *Parathy Valappil Moideen, In re*, 1913 Cri LJ 597 (Mad); *Muzaffarjiruddin Begum* v. *Hazara*, 1952 Cri LJ 996 (Hyd) and *Allah Rakhi* v. *Karam Ilahi* 1934 Cri LJ 344 (Lah).

desirous of being, or claiming to be the guardian of the minor but also by any relative or friend of the minor, and in some cases by the Collector.[5] Reading in between the lines of Section 17 of the Guardians and Wards Act, 1890, it may be very well inferred that even though the Court is empowered to appoint a guardian, the application of Muslim Law of Guardianship has been by and large preserved in the Act, which provides:

> "17. (*i*) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what consistently with the *law to which the minor is subject*, appears in the circumstances to be for the welfare of the minor..."In appointing the guardian, the Court shall consider:
>
> (*i*) the welfare of the minor,
>
> (*ii*) age, sex and religion of the minor,
>
> (*iii*) character and capacity of the proposed guardian, and his nearness of kin to the minor,
>
> (*iv*) the wishes, if any, of a deceased parent,
>
> (*v*) any existing or previous relations of the proposed guardian with the minor or his property, and
>
> (*vi*) preference of the minor, if he is old enough to form an intelligent preference.

The Guardians and Wards Act, 1890 defines a guardian as 'a person having the care of the person or his property or of both his person and his property'. The individual who has by law the right and duty of giving a boy or girl in marriage may also be said to have the care of the person for that limited purpose; he is called *wali*—a species of *wilaya* (Tyabji Section 235). But there is no mention of disposal in marriage in any part of the Act, and nothing to indicate that it was intended to replace the persons who, under the traditional law have been assigned the right to give a minor in marriage (*See Jabr*—Guardianship in marriage, *supra*). Thus guardianship (*wilaya*) may be of the person, of property and in marriage. The Koran is the basis of the law relating to guardianship and therefore differences between Sunni and Shia Schools are relatively less.[6]

3. Age of majority

Muslim Law:	15 years—marriage, dower and divorce,
	18 years—guardianship and all other matters.
Indian Law:	18 years—Indian Majority Act, 1875,
	21 years—Guardians and Wards Act, 1890.

5. Mulla, at p. 294.
6. Aquil Ahmad, *Mohammedan Law* at p. 150

That is, any Muslim of 18 years of age (or above) can act as a guardian of a minor Muslim; but if formal appointment by the Court under the law (Guardians and Wards Act, 1890) is sought, then he must be of 21 years at least, for a minor cannot act as a guardian of a minor (Section 21).

4. Kinds of guardians

Guardians may be classified into three categories—natural, testamentary and court-appointed. *De facto* guardian—a *fizuli*, is out of vogue in the modern Muslim Law. Father is the natural guardian of the legitimate children, though the term natural guardian is not used in Muslim He has no right of guardianship over the illegitimate children, not even after the death of the mother, unless the court appoints him. The mother is *not* a natural guardian of her children, legitimate or illegitimate neither during the lifetime of the husband nor after his death. Thus father is the sole guardian. He controls the education, upbringing and religious inculcation of the child as a supremo. After his death, guardianship passes on to his executor under Sunni Law and to the grandfather according to the Shia Law.

A testamentary guardian is a person appointed as guardian by the natural guardian by testament or will. The father, his executor and then the grandfather, in that order have the power to appoint a testamentary guardian under the Sunni system. The Shia father cannot appoint a testamentary guardian if the grandfather is alive; the latter acquires the power only on the father's death, and the executor is out of picture. The mother is totally deprived by both schools, but she can become a testamentary guardian by appointment. For this, she must necessarily be a Muslim under the Shia Law, not so for the Sunnis. However, no non-Muslim alien person can be appointed a guardian by a testament under any system. A Muslim may appoint a testamentary guardian orally or in writing, no specific formality being required. But the testator must be a major and of sound mind at the time of making the will. The executor of the testamentary guardian is called a *wasi* (guardian), *amin* (a trustee) or a *kaim-mukam* (representative)—all allusions to his attributes. Once the obligation of testamentary guardianship is accepted, expressly or impliedly, it cannot be renounced without the permission of the court.

The court-appointed guardian takes place when no natural guardian is available and testamentary guardian has also not been designated. Previously the *Kazi* was authorised by the traditional law to appoint a guardian. But now under the Guardians and Wards Act, 1890, that power is abrogated; for all guardians for minors, irrespective of any religion, can be appointed only under this law. The District Court exercises this power. As stated earlier, Section 17 requires the court to make the appointment consistently with the law to which the minor is subject, i.e., the minor's personal law.

5. Kinds of guardianship

Muslim Law recognises three kinds of guardianship, namely:

(*a*) Guardianship of person.

(*b*) Guardianship of property.

(*c*) Guardianship in marriage.

A. GUARDIANSHIP OF PERSON

In Indian Law three periods of guardianship of minors are relevant. Under the Muslim Law a minor is a person under 15 years, while under the Indian Majority Act he is one under 18 years; and if he is under the supervision of the Court of Wards, his minority terminates at 21. Under the Muslim Law 'minors' between the ages of 15 and 18 can act independently of any guardian in marriage, dower and divorce. A Muslim wife of 16 may sue for divorce without the intervention of a guardian.[7]

Guardianship of the person of the minor belongs to the following, in the order they are mentioned below:

(1) Mother is entitled to the custody (*Hizana*) of—

(*a*) A male child till 7 years,	}	Hanafi Law
(*b*) A female child till puberty, which is either 15 or 18 years.	}	Hanafi Law
(*a*) A male child till 2 years	}	Shia Law
(*b*) A female child till 7 years.	}	Shia Law

'The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked or unworthy to be trusted.'

Here it must be clearly understood that there is a vast difference between mother's right of custody (*Hizanat*) and father's right to be the legal guardian of his minor children. Explaining this difference, it was observed by the Privy Council in *Imambandi* v. *Mutsaddi*[8] that under Muslim Law "the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But, she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law) is the legal guardian".

From the above Tyabji concludes that where the husband and wife are living together, the child must stay with them, and the husband cannot take the child

7. Fyzee, at p. 197.
8. (1918) 45 IA 73.

away with him; nor can the mother, even during the period that she is entitled to the custody of the child, take it away without the permission of the father.[9]

The father's supervision over the child continues in spite of the child being under the care of female relations, because, the burden of providing maintenance to the child rests exclusively on the father. The mother's right of custody is not lost merely by her being divorced.[10] But where she marries a second husband, the custody of children normally belongs to her former husband.[11] The fact that wife stayed separately from her husband, because of some dispute, does not destroy her entitlement to the custody of her children.[12] In this case the husband and wife were living separately in Madras itself, on account of some property dispute. They had four children of different ages ranging from 10 months to 7 years. All the four were living with the mother. The husband married a second wife, but soon divorced her by *khula*. One day the husband forcibly removed one daughter of 5 years and the son aged 10 months. The wife sued for the custody of both the children. The Madras High Court held that the wife was entitled to the custody of the children and her staying apart from the husband did not constitute any substantial disqualification.

According to Mulla mother is entitled to custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by father of the child, unless she marries a second husband, in which case the custody belongs to the father (Section 352 of Mulla's, *Principles of Mohammedan Law*). Approving this principle the High Court of Kerala held in *Yusuf* v. *Sakkeena*[13] that where the facts of the case reveal that the paramount interest of the children will be better served if they are allowed the custody of their mother, the application of the mother would be accepted. In the facts of this case the Court found that the mother was looking after the educational interests of the minor children in better way than the father. Even in such a case, the father would not be denied the right of visitation. For exercise of such right he would have to seek permission from the lower court. And the Allahabad High Court had also held that the fact that the mother was a divorcee and had no source of income would not by itself be a ground to refuse her the custody of her minor daughter.[14] In this case the mother had already applied for maintenance under Section 125 CrPC on the ground that she had no source of income. The Court said this did not mean that the Court would overlook the welfare of the children. It was convinced that the children

9. Tyabji, at p. 274.
10. *Ibid.*
11. Fyzee, at p. 190, citing *Mir Mohd. Bahauddin* v. *Mujee Bunnisa Begum*, AIR 1952 Mad 280.
12. *Zynab Bi* v. *Mohd. Ghouse*, AIR 1952 Mad 284.
13. (1998) 2 KLJ 573.
14. *Zahid Ali* v. *Keshari*, 1996 AIHC 1267.

would have better mental development in being with their mother than with the father, specially when they are young girls.[15]

According to Bombay High Court there is no absolute bar on giving custody of a child to its mother if she remarries. In *Irfan Ahmad* v. *Mumtaz*[16], the High Court held:

> ". . . it is open to the Court to appoint the mother as the guardian even if she has married a stranger if the Court considers it to be in the interest of the minor."

In this case the child had expressed to the Court more than once her unwillingness to go to the father. The Court said there is no dogmatic insistence in Muhammadan Law that the child must remain with the father even against her wishes the moment the mother gets remarried to a stranger.

As regards the mother or a female guardian, marriage to a person not related to the child within the prohibited degrees is a bar to guardianship (*hizanat*). The ground for this rule seems to be the apprehension that if she marries a stranger she would not be able to devote the same care to the child in the home of the stranger—a *gair-mahram*. The paternal uncle is a *mahram* by consanguinity, so a marriage with him would not attract the disqualification. But is this rule absolute? The courts are not unanimous about it. Paras Diwan has mentioned the cases in which Sind, Lahore and Madras High Courts have held that where the law was definite the Court could not disregard it in the interest of the child.[17] On the other hand Oudh Chief Court, Allahabad, Calcutta, Jammu and Kashmir and Andhra Pradesh High Courts have held that the prohibition was relative and could be waived in the interest of the child.[18] The Jammu and Kashmir High Court has held though a Muslim mother may lose her preferential right of *hizanat* by her marriage with a *gair-mahram*, she may still be appointed a guardian by the Court in the interest of the child, for such marriage does not disqualify her for a judicial appointment, if otherwise found suitable, the welfare of the child being of paramount importance.[19]

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15. See also, *Arif Ahmed* v. *Irshad Ahmed*, 1998 AIHC 911, where the divorcee mother was entrusted with the custody of her male child aged 7 years. And also see, *Abdulsattar* v. *Shahina*, AIR 1996 Bom 134, where the mother was held entitled to the custody of her minor son who was 5 years of age, and the father was allowed to meet the child on weekends or during vacations.
16. AIR 1999 Bom 25.
17. The cases mentioned by him at p. 128 are *Ansar Ahmed* v. *Somaidan*, 1928 Sind 220; *Mehraj Begum* v. *Yar Mohammad*, AIR 1932 Lah 493; *Mir Mohd.* v. *Bahauddin Mujee Bunnisa Begum*, AIR 1952 Mad 280.
18. The cases are—*Gunna* v. *Dargahi*, AIR 1925 Oudh 623; *Samiunnissa* v. *Saida Khatun*, AIR 1944 All 202; *Haliman* v. *Ahmedi*, 1959 All 627; *Tumina Khatun* v. *Gaharjan Bibi*, AIR 1942 Cal 281; *Abdul Mohit* v. *Zebunnessa Khatun*, AIR 1951 Cal 205; *Hassan Bhatt* v. *Ghulam Mohamad Bhat*, AIR 1961 J&K 5.
19. *Sundri* v. *Mohd. Fafoo*, AIR 1971 J&K 43.

(*xi*) full paternal aunt, h.h.s.

The inclusion of paternal grandmother (No. *iv*) and paternal aunt (No. *xi*) is doubtful according to Tyabji, because, they do not belong to the category of mother's relations.[25]

(3) Male relations.—Failing mother and female relations, the following male relations may act as guardian in the order they are mentioned below:

(*i*) Father;

(*ii*) Nearest paternal grandfather;

(*iii*) Full brother;

(*iv*) Consanguine brother; and other paternal relations within the prohibited degrees, reckoning proximity in the same order as for inheritance.

Wilson says that the reason for not carrying the series of the above relations beyond the prohibited degrees is the fear that in the case of a girl, for instance, the paternal cousin or other agnate could forcibly marry her to himself, which he could more easily do by reason of his being also guardian for marriage, and in case of a boy, he could be murdered for the sake of his inheritance.[26] Whereas a brother or uncle could not so marry, and the natural affection would restrain him from killing or harming the minor.

The custody of a boy over seven years of age, and of an unmarried girl who has attained puberty (only when she is related within prohibited degrees) belongs to[27]:

(*i*) The father;

(*ii*) The "executor" appointed by the father's will;

(*iii*) The father's father, h.h.s.;

(*iv*) The male paternal relations in the same order as for inheritance; and

(*v*) Failing all the above, it is for the Court to appoint a guardian of such minors.

Custody of minor wife and illegitimate child.—The mother is entitled to the custody of her married minor daughter as against the minor daughter's husband.

The custody of an illegitimate child belongs to mother and her relations and to no one else, as held by the Supreme Court.[28]

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25. *Ibid*, at p. 276.
26. Wilson, at p. 206.
27. *Ibid*, at pp. 207-8.
28. *Gohar Begam* v. *Suggi*, (1960) 1 SCR 597.

Disqualifications of guardianship of persons[29].—(*a*) *In the case of mother and other female relations*:

(*i*) If she married a person who is not related to the child within the prohibited degrees by consanguinity; (the right of guardianship revives on the dissolution of such a marriage);

(*ii*) if she leads an immoral life; or

(*iii*) if she resides, during the subsistence of marriage at a distance from the father's place of residence.

The *Rudd-ul-Muhtar* lays down the general rule thus: *Hazina* is not disentitled to custody in every case of misconduct, but only such conduct as is detrimental or injurious to the child.[30] Thus if she treats the child with cruelty or neglects it grossly, she would lose her *hizanat*. Poverty, as such would also not disqualify her, for the main responsibility of maintenance of the child is that of the father. If the child has property, then of course she can provide it with house and daily necessities out of the property. The true test is the welfare of the child, other considerations are subordinate; the criterion of her conduct is relative to the interest of the child and would vary from case to case.

(*iv*) If she converts to another religion. According to *Hedaya*, if a Muslim mother converts to another religion, she is deprived of her right to *hizanat*, for a non-Muslim female cannot keep in her custody a Muslim child. So is the Shia Law. Paras Diwan is of the view that after coming into force of the Caste Disabilities Removal Act, 1850, change of religion cannot strip a person of his or her rights or property. This view is held by Mulla also, though Ameer Ali advocates the opposite view. 'In several cases it has been held that the change of religion by the guardian by itself is not enough to deprive him or her of the right of guardianship or custody'.[31]

(*b*) *In the case of a male*.—If the minor is an unmarried girl and is not related to him within the prohibited degrees. If a non-agnate within the prohibited degrees, such as a maternal uncle is available, he should be preferred over an agnate not within prohibited degrees (i.e. a *gair-mahram*). The object of this Islamic rule is to avoid the custody of a male *hazin* who may marry the girl. However this rule is not recognised by the Shias. This rule, according to Paras Diwan, should not come in the way of handing over a boy to the custody of the paternal uncle's son.[32] Similarly a *hazin* who is minor, or of unsound mind or a

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29. Verma, at pp. 323-324, *citing* Baillie, at pp. 435-36, and *Hedaya*, at pp. 138-39.

30. Therefore, the remark of Fyzee that 'the ancient doctor would obviously have frowned upon a modern society mother who goes out for bridge (or social service) in the morning, has lunch with a friend and comes home late in the evening after a dance at the club'— should be taken in light spirit. (*see* Fyzee, at p. 199.)

31. Paras Diwan, *Muslim Law* at p. 130.

32. *Ibid.*

profligate, i.e. one leading an immoral life would also be debarred from *hizanat*. Since among Shias no person other than mother, father or grandfather (f.f.) can act as such guardian, it is a moot point what adverse effect profligacy would have on such father.

(*c*) *In the case of a husband.*—If the minor wife has not attained the age of puberty, or is not of such an age as to allow consummation of marriage.

Termination of guardianship of person.—In the following instances the guardian's right of *hizanat* comes to an end:

(*i*) Death of the guardian.

(*ii*) His removal (or her removal).

(*iii*) Court of Wards taking over the superintendence of the minor's person.

(*iv*) The minor attaining majority.

(*v*) The minor girl marrying a person capable to be her *hazin*.

(*vi*) The father of the male minor again qualifying to be his guardian.[33]

It was observed by the Andhra Pradesh High Court in *Khatija Begum* v. *Gulam Dastagir*[34] that merely by marrying second time the father did not disqualify to remain a guardian unless his continuation was against the interests of the child.

This view was reiterated by the Kerala High Court in *Poolakkal Ayisakkutty* v. *Parat Abdul Samad*[35]. This was an appeal against the order of the Family Court granting custody of the minor child aged 4 years to the father in preference to the maternal grandmother. The mother of the child had committed suicide and after her death the child was brought up by the maternal grandparents. The father filed an application for custody of the child which was earlier allowed by the Family Court. Against this the maternal party filed this appeal. Father had remarried and got children. The grandmother was dependent on her another daughter. Held, conduct of remarriage by the father of the child itself is not a ground to reject the prayer for custody. Welfare of the child is of paramount consideration. It is for the welfare of the child that the child be with the father.

B. GUARDIANSHIP OF PROPERTY

Three types of guardians are recognised for the purposes of guardianship of property, namely:

(*i*) Legal guardians;

(*ii*) Guardians appointed by Court; and

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33. K.P. Sharma, *Muslim Law* at pp. 237-38.
34. AIR 1976 AP 128.
35. (2005) 2 CLT 203.

(*iii*) *De facto* guardians.

(*i*) **Legal guardians.**—Under Hanafi Law, the following are the guardians of minor's property, in order of priority:

(*a*) Father;

(*b*) Executor appointed by father's will;

(*c*) Father's father;

(*d*) Executor appointed by paternal grandfather; and

(*e*) Executor of the last named executor.

Thus, the only persons who are entitled to appoint a guardian of the property of a minor by *will* are his father and father's father. The mother has no power to appoint *by will* a guardian of the property of her minor child. It must be remembered that mother, brother, uncle, etc., are not legal guardians.[36] However, there is nothing to prevent the father or father's father from appointing the mother, brother or uncle, etc. as executrix or executor, and on such appointment she or he will be as much competent as any other person to manage the property.

As Paras Diwan observes, the term 'natural guardian' is not used by the Muslim Law-givers and jurists, they use the term *wilaya*, or 'guardianship' and the term 'legal guardian' is of English usage, as also the term 'natural guardian', both being used as synonyms.

The executor of the father's will, according to Hanafi Law, has preference over the grandfather. In Shia Law, however, some hold that the father cannot appoint an executor in the presence of a grandfather, who will have preference over father's executor in superintending the property. According to another view, the nomination of an executor by the father is valid to the extent of one-third of the property and for the discharge of all rights or claims upon his estate. The power of the executor can be further limited if the executor so desires.

According to Shafii Law, the grandfather has preferential rights over the father's executor in matters of property management.

ALIENATION BY LEGAL GUARDIANS

Movable properties.—In *Imambandi* v. *Mutsaddi*[37], the Privy Council held that a legal guardian has power to sell or pledge the goods and chattels of the minor for the minor's *imperative necessities*, such as food, clothing, or nursing.

Immovable properties.—Generally, Muslim Law does not allow legal guardian to alienate immovable properties of a minor. Following exceptions to this general rule, however, are recognised[38]:

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36. Mulla, at p. 375.
37. (1918) 45 IA 73.
38. Mulla, at pp. 376-77.

(1) Where the sale may fetch double the value of the property;

(2) Where minor has no other property, and sale is necessary for minor's maintenance;

(3) Where there are no other means of paying debts of the deceased;

(4) Where there are no other means of paying legacies (under will);

(5) Where the income is less than the expenses of the property;

(6) Where the property is falling into decay;

(7) Where the property has been usurped (i.e. wrongfully seized or encroached upon), and the guardian fears that there is no chance of fair restitution.

The Guardians and Wards Act cares for the minor's property by expecting such guardian to deal with the former's property with the same prudence as an ordinary man would do in respect of his own property (Section 66). Such guardian may be restricted by any conditions stipulated in the will and he cannot transfer the property contrary to the conditions (Section 28), such alienations being made voidable by Section 30. The powers and obligations of the testamentary guardian are at par with those of the natural guardian. It may be noted that the power of alienation (mostly referred to as sale by the traditional authorities) in respect of immovable properties is more restricted than that for movable property, for the former is regarded as already in a state of conservation, while the latter may involve perishable items. It is only in extreme necessity that he can sell immovable property. Improper alienation may be voided by the minor on attaining majority. The guardian may also lease the property for his benefit till he attains majority. The guardian may also do trade or business on the minor's behalf, but the latters liability is limited to his share.[39] However, the Madras High Court has held that the guardian cannot impose any liability on the minor though the minor would be entitled to the profits of the business.[40] There is also a conflict of judicial opinion with regard to specific enforceability of a contract for a minor. In one case the Privy Council held that the guardian could not bind the minor's estate by contract for purchase of immovable property; however, in a much later case, the Hyderabad High Court, following the general observations of the Privy Council in a case under Hindu Law, held that a beneficial contract may be sought to be enforced by the minor by a suit for its specific performance.[41] In an interesting case the Gauhati High Court has held that imparting higher secondary school education to the minor was justified in the present social context and therefore included in the ward's

39. *Jaffar* v. *Standard Bank Ltd.*, 1928 PL 130.

40. *R. Soudagar Saheb* v. *Soudagar Muhammad Saheb*, (1931) 54 Mad 543.

41. *Amir Ahmmad* v. *Mir Nizam Ali Meer*, AIR 1952 Hyd 120, relying on *Kakulam Subrahmanyam* v. *Kurra Subba Rao*, AIR 1948 PC 95. *See also*, Paras Diwan, *The Law of Parental Control, Guardianship and Custody of Minor Children* (1973) at pp. 408-414.

maintenance expenses, the transfer of the minor's property for this purpose was permissible.[42]

(*ii*) **Guardians appointed by the Court.**—In the absence of legal guardians, the court is competent to appoint guardian for the protection and preservation of minor's property.[43] Section 17 of the Guardians and Wards Act, 1890 vests this power in the District Court, abrogating the customary power of the Kazi. That Act is of general amplitude, irrespective of community, but the court has to take into consideration the personal law of the minor, his or parent's wishes, besides his age, sex and welfare, the proposed guardian's competence and character. If the minor is mature enough to indicate his preference, the court will take that also in consideration. There is no compulsion on the court to prefer paternal side over the maternal side, but the proposed guardian must be willing to accept the obligation. The prime guiding factor should be the welfare of the minor.

In *Meethiyan Sidhiqu* v. *Mohd. Kunju*[44], the Supreme Court held clearly that:

"Father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence property guardian appointed by the competent Court would be competent to alienate property of the minor with the permission of the Court. When a sale is to be made on behalf of the minor the necessary ingredients are that the sale must be for the benefit of the minor and therefore the competent person entitled to alienate the minor's property would be, subject to the above condition, either natural guardian or the property guardian appointed by the Court. In this case after the demise of the father no property guardian was appointed. The mother therefore is not guardian for the alienation of the property of the minor. The sale made by the mother is therefore void."

The Gauhati High Court had also held that when a mother married another husband on the death of former husband, she was not entitled to the guardianship of either the person or property of her minor daughter.[45]

ALIENATION BY CERTIFIED GUARDIANS

Movable properties.—A guardian of the property of a minor appointed by the Court under the Guardians and Wards Act, 1890, is bound to deal with movable properties as carefully as a man of ordinary prudence would deal with his own property. That is, he may alienate only in cases of grave necessities.

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42. *Ahmadellah* v. *Mafizuddin Ahmad*, AIR 1973 Gau 56.
43. *Imambandi* v. *Mutsaddi*, (1918) 45 IA 73.
44. (1996) 7 SCC 436: AIR 1996 SC 1003.
45. *Rahima Khatoon* v. *Saburjanessa*, AIR 1996 Gau 33.

Immovable properties.—He cannot alienate immovable property of minor:

(*a*) without the permission of the Court; and

(*b*) without necessity or advantage of the minor.

With the prior permission of the Court, he may:

(*a*) mortgage, sell, gift away or exchange the property,

(*b*) lease any part of that property for a term exceeding 5 years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.[46]

Any alienation in contravention of the above provisions is voidable at the instance of minor or any person affected by such an alienation. He may not, for example, lease a house of the minor for 6 years, or when the minor is of 16 years lease it for 4 years, without the court's permission. The court gives a permission only when necessary in the interest of the minor or for the minor's advantage (Section 31). The court may from time to time redefine the guardian's powers by restricting or extending them in view of the minor's interests.

Removal of testamentary or court-appointed guardian.—The court may, on the application by any person interested or suo motu, remove a testamentary or court-appointed guardian on any of the following grounds:

(*i*) Abuse of the trust reposed in him.

(*ii*) Persistent failure to perform his duties.

(*iii*) Incapacity to execute the obligations of the trust.

(*iv*) Ill-treatment or neglect of the ward.

(*v*) Contumacious disregard of the provisions of the Guardians and Wards Act, 1890 or of the orders of the court.

(*vi*) Conviction of an offence which the court regards as a defect of character as unfits him to continue as a guardian.

(*vii*) Entertaining adverse interest conflicting with faithful performance of his duties.

(*viii*) Shifting his residence away from the jurisdiction of the court.

(*ix*) Bankruptcy or insolvency of the guardian of property.

(*x*) Ceasing of the guardianship by application of the law governing the minor.

(*iii*) **'De facto' guardians.**—As we have seen above, the *de jure* guardians are legal guardians and certified guardians. Persons not belonging to these two

46. It follows from the above that a certified guardian may lease, *without the prior permission of the Court*, immovable property for a period up to 5 years, or for a term extending up to one year beyond the date on which the ward will cease to be a minor.

categories, but who place themselves in the position of a guardian by intermeddling with the property of the minor, are called *de facto* guardians,[47] for example, mother, uncle.

ALIENATION BY 'DE FACTO' GUARDIANS

Movable properties.—*A de facto* guardian has the same power to sell and pledge the goods and chattels of the minor in his charge as a legal guardian of his property. But he cannot enter into any contract whereby the minor would be saddled with any pecuniary liability.[48]

Immovable properties.—*A de facto* guardian has no right to alienate immovable property of a minor. Such a transfer is void. Thus, a sale, mortgage, or any other transfer by mother, who is a *de facto* guardian, is absolutely void, as held in *Imambandi* v. *Mutsaddi*[49]. Even if such a sale or transfer was made to satisfy a mortgage or other debts of minor's father, it is not binding on the minor, as held by the Privy Council in *Mata Din* v. *Ahmad Ali*[50]. The minor is entitled to redeem the mortgaged property.

The question of benefit or necessity of the minor is altogether immaterial. The point hardly needs any discussion in the light of Privy Council's decisions in *Imambandi case*[51], *and Mata Din case*[52], and Supreme Court's verdict in *Mohd. Amin* v. *Vakil Ahmed*[53]. However, if the property has been sold in execution of a decree and is purchased at an auction by a *bona fide* purchaser, the sale cannot be set aside.

On the question whether the transferee who is dispossessed by a minor, is entitled to any compensation? One view held by Madras, Nagpur and Lahore High Courts is that though the alienation was void *ab initio*, yet here applies the maxim that one who seeks equity must come with clean hands. Thus, the minor cannot recover the property unless he gives compensation equal to the benefit derived by him. Under Section 41 of the Specific Relief Act also, the Court has the discretion to make it a condition that the minor should refund the amount which he has received. The other view held by the Patna High Court is that equity does not favour a person who obtains property from a person not competent to transfer it. The discretion given to the Courts by Section 41 does not cover such transferees, as they themselves are not coming with "clean hands".

47. *See*, Fyzee, at p. 203.
48. Mulla, at pp. 305-306.
49. (1918) 45 IA 73.
50. (1912) 39 IA 49.
51. (1918) 45 IA 73.
52. (1912) 39 IA 49.
53. 1952 SCR 1133.

The Kerala High Court has held that the mother of a minor being only a *de facto* guardian has no legal authority to sell minor's immovable property. Therefore, the transferee being fully aware that the property belonged to the minor, and having made no enquiry whether the *de facto* guardian the mother had legal authority to sell it was not a *bona fide* purchaser and hence could not claim the value of the substantial improvements effected by him.[54]

Purchase of immovable property.—It was held by the Privy Council in *Mir Sarwarjan* v. *Fakhurddin*[55], that the guardian of minor (whether he be legal, certified or *de facto*) has no right to make an agreement for the purchase of immovable property on behalf of the minor; such an agreement is void.[56]

In *Amir Ahmmad* v. *Meer Nizam Ali*[57], it was held, however, that, if the guardian is a *de jure* guardian (that is either legal or certified), he is competent to enter into such an agreement of purchase and thereby bind the minor. But Fyzee comments that in view of the Privy Council decision, this judgment appears to be of doubtful authority.[58]

C. GUARDIANSHIP IN MARRIAGE

See Chapter III of this book.

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54. *Salema Beevi* v. *Oushan Pillai*, 1996 AIHC 1897.
55. (1912) 39 IA 1.
56. Fyzee, at p. 197.
57. AIR 1952 Hyd 120.
58. Fyzee, at p. 198.

VIII

Maintenance

(Nafaqa)

1. Introduction

"The law of maintenance suffers in point of definiteness," says Tyabji, "as the Muslim texts had no object in keeping legal rights distinct from obligations of a moral nature. The powers of a *Kazi* are different from those of court of law in India, that rules sufficient to guide the Muslim courts can at times hardly be stated in a concrete form, without violence to some necessary but merely implied, reservation or qualification. The whole of law cannot, however, be said to be of merely imperfect obligation."[1] The present chapter states what seems legally enforceable.

The distinction between legal and moral duty to maintain has been well brought out by the Bombay High Court in *Mohd. Jusab* v. *Haji Adam*[2]:

> "It has been contended that the Muhammadan Law as to maintenance is a law of imperfect obligation imposing a moral and not a legal obligation. The distinction between the laws of perfect and imperfect obligation has been discussed in detail by Abdur Rahim at page 62 of his *Principles of Mohammadan Jurisprudence*, where he has described the laws as to domestic relations to be laws of perfect and not imperfect obligation. Later on at page 343, Abdur Rahim has referred to the maintenance of children being a right against their father. So also Wilson in Chapter VI of his Anglo-Muhammadan Law has treated the rights of maintenance as rights enforceable under Anglo-Muhammadan Law, and in para 142 has asserted the right of minor sons to maintenance from their father on the authority of page 456 of Baillie's *Digest* so that there would appear to be no reason to doubt that the rights of maintenance are enforceable under Anglo-Muhammadan Law. That being so, the right to enforce them in civil courts under Section 9 of CPC, is unaffected by the fact that there is a concurrent provision for their enforcement in criminal courts under Section 488 of the

1. Tyabji (4th Edn.) at p. 254.
2. ILR (1911) 37 Bom 71.

Criminal Procedure Code as pointed out in *Ghana Kanta Mohanta* v. *Gereli*."[3]

It must be appreciated that whereas Muslim jurists left legal and moral obligation to maintain overlapping each other, they remedied this "deficiency" by giving extended powers to the *Kazis*. However, since the present day law courts do not possess such vested powers, the difficulty remains. Thus, though it may be conceded that Muslim Law of maintenance imposes a legal obligation, "but the details in the texts about the quantum of maintenance, the rules for determining when a person must be considered necessitous, and for fixing the standard of means, the possession of which imposes the obligation to provide maintenance, are hardly applicable to our times and conditions".[4]

After accepting the view that "to maintain" is a legal duty, let us examine in which order obligations to maintain various class of persons, can be placed.

The first obligation arises on marriage. It is obligatory to maintain the wife and children.

Then come those obligations that arise out of blood relationship.

And lastly, obligations arising when a man has "means" and another is "indigent". The test appears to be: 'Are you prevented by Islamic Law from accepting alms?' If you are, you are possessed of means.[5] Let us take the case given in *Fatawa-i-Alamgiri*: the possession of a surplus of 200 dirhams (Rs 60 to 80) over and above a man's necessities was deemed sufficient to prevent him from begging and to include him in the class of 'persons of means'. To prevent him from begging is alright, but to make him liable to maintain others on the ground that he possesses rupees 60 to 80, seems a far cry. Considering the fact that the time when *Fatawa-i-Alamgiri* was compiled, the value of 200 dirhams could have been enough to make one liable to maintain. But applying this test during these hard days, seems doubtful.

2. Definitions

HEDAYA:	"All those things which are necessary to the support of life, such as food, clothes and lodging; many confine it solely to food."[6]
DURR-UL-MUKHTAR:	"*Nafaqa* literally means that which a man spends over his children; in law it means

3. ILR (1904) 32 Cal 479.
4. Tyabji, at p. 254.
5. Fyzee, at p. 202.
6. *Hedaya*, at p. 140.

feeding, clothing and lodging; in common use it signifies food."[7]

FATAWA-I-ALAMGIRI: "Maintenance comprehends food, raiment and lodging, though in common parlance it is limited to the first."[8]

The main principles of maintenance may be recounted thus: (*i*) A person is entitled to maintenance if he has no property, (*ii*) is related to the obligor in prohibited degrees, or is the wife or child, and (*iii*) the obligor is in position to support him. Though a person is under a greater liability to maintain his wife, minor sons, unmarried daughters, mother, father, father's father and father's mother, this obligation is also hedged by the factor of their economic condition.

Is the duty 'to maintain' absolute under traditional Muslim Law? The answer is by and large no. The economic factor is dominant, may be because there is no concept in it of a joint family with corporate property as a common fund for common benefit. As pointed out by Paras Diwan, 'The Muslim Law of Maintenance differs from other systems of law, since in most cases the obligation of a Muslim arises only if the claimant has no means or property to maintain himself or herself. It is true that the obligation to maintain children is a personal obligation in the sense it is under Hindu Law, but unlike Hindu Law, it is not absolute, there is no obligation if they have a source of income. The same is true respecting aged parents and other relatives. Further, the obligation is proportionate to the obligor's percentage of share in their property. It is only in the case of a wife that the obligation is absolute in the sense that a husband is required to maintain his wife irrespective of her financial position (she may be rich) even if he is not in a position to support her'.[9] Aquil Ahmad also states that 'the Muslim Law is not so catholic in spirit as the legal system of the Hindus, so there are very few provisions for the maintenance of the relatives'.[10]

Kharch-e-pandan is something different from maintenance. As Fyzee puts it 'in addition to the legal obligation to maintain there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called *kharch-e-pandan*, *guzara*, *mewa khori*, etc.[11] It is a special allowance to which the wife may be entitled in addition to maintenance allowance. Its source is an express agreement between the parties to the marriage or their parents (if they are minors) at the time of marriage. The agreement may stipulate that even if the parties lived separately at any time after their marriage the wife would be paid *kharch-e-pandan* by the

7. *Durr-ul-Mukhtar*, at p. 316.
8. *Fatawa-i-Alamgiri*, Vol. I at p. 732, cited by Baillie at p. 437.
9. Paras Diwan, at p. 133.
10. Aquil Ahmad, at p. 174.
11. Fyzee, at p. 212

husband; such an agreement would be enforceable.[12] It can be realised by the wife from her father-in-law also. In *Khawaja Mohammad Khan* v. *Nawab Hussain Begum*[13], the parents of the minors who were married had stipulated that the son's father would pay the son's wife Rs 500 per month in perpetuity as *kharcha*. Some years after the marriage the wife left her husband's house due to differences. On her filing a suit for realisation of the amount, the Court upheld her claim, even though she herself was not a party to the agreement.

3. Persons entitled to maintenance

A. Wife,

B. Descendants,

C. Ascendants, and

D. Other relations.

A. MAINTENANCE OF WIFE

It is incumbent on a husband to maintain his wife, whether she be Muslim or *Kitabiyyah*, poor or rich, enjoyed or unenjoyed, young or old. However, if the wife is too young for matrimonial intercourse, she has no right to maintenance from her husband, whether she is living in his house or with her parents.[14]

This broad and wide obligation is restricted only in cases where she is not obedient and does not allow the husband free access at all lawful times. If the husband has not paid the prompt part of dower[15] or she refuses to live with her husband because of his cruelty, the husband is bound to maintain her. It was held by the Allahabad High Court in *Badruddin* v. *Aisha Begum*[16] that where husband has married a second wife or keeps a mistress, the wife may refuse to live with the husband and still claim maintenance from him.

The question of maintenance of wife may arise in the following two cases:

During the continuance of marriage. The husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. In an interesting case[17] decided by Strachy and Badruddin Tyabji, JJ., it was held that disobedient wife need not be maintained. Strachy, J., observed:

> "...the husband's duty to maintain his wife is conditional on her obedience, and he is not bound to maintain her if she disobeys him by

12. *Mohd. Ali Akbar* v. *Fatima Begam*, ILR (1929) 11 Lah 85.
13. (1910) 37 IA 152.
14. Baillie, at p. 437.
15. See, *Amir Mohd.* v. *Bushra*, AIR 1956 Raj 102.
16. 1957 All LJ 300.
17. *A* v. *B*, ILR (1896) 21 Bom 77.

refusing to live with him or otherwise.[18] (Here in this case the wife) only paid occasional visits to his (husband's) house, staying for a night or so at a time from the 6th March to 23rd June 1895, returning on each occasion to her mother's house...I am clearly of the opinion that in such circumstances a Muhammadan husband is not bound to give his wife separate maintenance..."

To the same effect were the observations of Tyabji, J. :

"...it is impossible to hold that a Mussulman wife defying her husband, refusing to live with him, and bringing scandalous charges against him, can yet claim to be maintained separately at the expense of her husband."

However, it is interesting to point out that neither the books nor law courts indicate the *degree of disobedience* that may deprive a wife from her entitlement to maintenance. Where obedience ends and disobedience starts, may not be easy in certain cases to decide.

It is immaterial that she has the means to maintain herself while the husband has no means. The marriage must be regular; but a marriage which is irregular solely because of the absence of witnesses is deemed regular for the purposes of maintenance.

The wife is not entitled to sue her husband for *past* maintenance, unless the claim is based on a specific agreement, as held in *Abdool Futteh* v. *Zabunnessa*[19]. The Court cited with approval a passage from Baillie's *Digest* (p. 443): "When a woman sues her husband for maintenance for a time antecedent to any order of the judge or mutual agreement of the parties, the judge is not to decree maintenance for the past". And the same thing has been laid down in much the same term in *Hedaya*. Thus, the decree of the lower court, which awarded "Rs 1400 for arrears of maintenance, from March 1878 until the end of June 1880, at the rate of Rs 50 a month", was reversed.

The above case would have been decided otherwise in the presence of an agreement that past maintenance would also be payable.

To summarise, the wife loses her right to maintenance in the following circumstances:

(*i*) She is a minor, incapable of consummation.

(*ii*) Refuses free access to the husband at all reasonable times.

(*iii*) Is disobedient.

(*iv*) Never visited his house.

(*v*) Refuses to live with him in the conjugal home, without a reasonable excuse.

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18. Baillie, at p. 438.
19. (1881) 6 Cal 631.

(*vi*) Abandons conjugal home without any reasonable ground.

(*vii*) Deserts him.

(*viii*) Elopes with another person.

The exceptions to the ground of refusal to free access are his cruelty and keeping a concubine by him. Similiarly, there are exceptions to the ground of want of consummation—her pre-puberty age, her illness, old age, his inability to consummate. In these exceptions, she retains right to maintenance.

Maintenance by agreement.—The husband and wife or their guardians may enter into an agreement whereby wife is entitled to recover maintenance from her husband, on the happening of some specified event, such as ill-treatment or disagreement, or husband's second marriage, etc. But an agreement in the marriage contract that wife would not be entitled to maintenance is void. Here the key consideration is that the agreement should not be opposed to public policy and Muslim Law.

In an interesting case[20] the Allahabad High Court has amply clarified the legality or otherwise of ante-nuptial agreements between husband and wife or their guardians. The Court observed.

> "Mehdi Hasan, the husband of the plaintiff, had married twice before, and on each occasion he seems to have ill-treated his wife. The father of the plaintiff was, therefore, naturally anxious that something should be done in order to protect his daughter from similar ill-treatment and to secure for her a maintenance allowance if his daughter and Mehdi Hasan could not live happily together. The agreement in question provided that in case of dissension or disunion the prospective husband and his father should be bound to pay an allowance of Rs 15 per month, in addition to the dower debt, to the lady for her life; and certain property was hypothecated to secure the payment of that allowance ...the plaintiff was divorced by her husband on the 14th August 1917, and a formal deed of divorce was executed and registered some months later. But long before that date, differences had apparently cropped up between them. The lady had gone back to the house of her father in 1912 and a notice was sent by the husband to the father of the plaintiff on the 30th October 1912, couched in insolent terms and demanding that the plaintiff should be sent back to his house with her jewellery...On that evidence the courts below awarded to the plaintiff the allowance mentioned in the agreement from the 30th October 1912.
>
> The learned counsel for the appellants contends, on the authority of the decision in *Bai Fatma* v. *Alimahomed Aiyeb*[21] that the agreement was unenforceable; but that was a case in which a person, who had a wife living

20. *Mohd. Muin-ud-din* v. *Jamal Fatima*, ILR (1921) 43 All 650.
21. (1912) 37 Bom 280.

and wanted to marry another, had entered into an agreement with his first wife that he would pay her a certain allowance as maintenance if any disagreement took place between her and him thereafter. The agreement in that case was treated as opposed to public policy, because it encouraged a separation between the husband and his wife. The agreement in the present case was executed before marriage in order to restrain the prospective husband from ill-treating his wife or behaving improperly towards her or capriciously turning her out... In view of the circumstances established, we do not consider that the agreement in the present case offended against the provisions of Section 23 of the Indian Contract Act, 1872 or encouraged or facilitated a separation between the plaintiff and her husband...The appeal therefore fails and is dismissed with costs."

In sharp contrast to the already cited case of *Bai Fatma* v. *Alimahomed Aiyeb*[21] is the case of *Mansur* v. *Azizul*.[22] In this case, an agreement between a Muslim and his first wife, *made after his marriage with a second wife*, providing for a certain maintenance for her if she could not in future get on with the second wife, was held not void on the ground of public policy.

In all such cases, the key consideration is that the agreement should not be opposed to public policy or Muslim Law. Thus, an agreement for future separation between husband and wife and providing maintenance to wife is bad in law. Similar is the case of an agreement that the wife would not be entitled to maintenance.

Nevertheless, agreements to provide betel allowance (*kharch-e-pandan*) or allowance for dry fruits (*mewa khori*) are valid and binding. These are not opposed to public policy, and thus such agreements even entered into by the guardians of minor parties to a marriage, are valid and binding on the husband.

Maintenance by agreement is a pecuniary aspect of the wider point of conditions of marriage. In that sense, conditions which are not against (*i*) any express provision of law, or (*ii*) public policy, or (*iii*) principles of Muslim Law, are enforceable. Thus following types of conditions are valid:

(*i*) If the husband treats the wife with cruelty, she will have a right to separate residence and maintenance to meet it.

(*ii*) If he brings subsequent wife and the previous wife is unable to adjust with her, she will get maintenance allowance to live separately, or even at her father's house.[23] In *Mydeen Beevi Ammal* v. *T.N. Mydeen Rowther*[24], the husband at the time of his second marriage settled by agreement certain properties on his first wife. Later he divorced her and brought a suit for recovery of the settled property. The court

22. AIR 1928 Oudh 303: ILR (1928) 3 Luck 603.
23. *Sakina* v. *Shamshad Khan*, (1936) Pesh 195.
24. 1951 Mad 992.

rejected his suit holding that she was entitled to enjoy the income of the property, in spite of the divorce.

(*iii*) If he brings his other wife to live in the matrimonial home, she will reside at her father's home and he will give her maintenance.[25] This position has been reinforced in a recent decision by the Karnataka High Court in *Ashabi* v. *Bashasab Takke*.[26] The husband contracted second marriage. Now, the first wife refused to live with him and claimed maintenance. There was some dispute as to who deserted whom. The High Court held that this question paled into insignificance in the light of this development. The fact that the wife could not get maintenance earlier under Section 125 CrPC also cannot have any hearing in a suit for maintenance filed subsequent to second marriage. This is so, even if the personal law permitted him to contract more than one marriage. She cannot be denied maintenance on the ground of not joining her husband. She is in law entitled to seek maintenance for separate living.

(*iv*) In case of disagreement with each other, he will give her maintenance for separate residence.

(*v*) He will pay maintenance even after divorce.

Ameer Ali says a stipulation that the wife will be disentitled to maintenance in all circumstances is void.[27] But in a divorce by *Khula* or *Mubarat'at*, such stipulation can be entered. Section 23 of the Indian Contract Act also voids an agreement that in case of separation in future at the option of the wife the husband will give her maintenance allowance.[28] But in view of the recent decision of the Bombay High Court, this position needs to be restated now as limited to 'stipulation' part. According to the Nagpur Bench of the Bombay High Court the fact of divorce by *Khula* does *not* disentitle the divorced wife from her right of maintenance under the Muslim Women ... Act of 1986. In *Parzana Parveen* v. *Shakil Khan*[29] the applicant was married to the non-applicant in 1998; on the grounds of ill-treatment, demand for dowry and push out from matrimonial home, she proposed to her husband divorce by *Khula* which was executed in writing by *Khulanama* in 1999. The lower courts granted her maintenance during *iddat* period. This application was for maintenance beyond *iddat* period under Section 125; as such the High Court rejected it; but with reference to the allowance received during *iddat* the Court observed that 'the applicant is a divorced Muslim woman and after divorce she is entitled to maintenance under the provisions of the Muslim Women ... Act, 1986, which

25. *Mansur* v. *Azizul*, AIR 1928 Oudh 303: ILR (1928) 3 Luck 603.
26. (2003) 2 Kant LJ 429.
27. Ameer Ali, Vol. II at p. 319, *cited* in K.P. Sharma, *Muslim Vidhi* at p. 255.
28. *Bai Fatma* v. *Alimahomed Aiyeb*, (1912) 37 Bom 280.
29. (2006) 1 AIR Bom R 140.

was rightly granted by the lower courts during *iddat* period, and she could not claim it further under Section 125 CrPC.'

Maintenance under the Criminal Procedure Code.—The old Section 488 of the CrPC had conferred an independent right to the wife to claim maintenance allowance irrespective of the provisions of the traditional personal law. The Magistrate could compel the husband to pay an allowance not exceeding Rs 500 per month. In *Badruddin* v. *Aisha Begum*[30] and *Sarwari* v. *Shafi Mohd.*[31] the Allahabad High Court had held that the Shariat Act of 1937 did not affect the provisions of the CrPC. Since the statutory right continued only during the continuance of the marriage, the easy way out of the liability for the husband was to pronounce *talak*. Justice Yahya Ali of the Madras High Court had held *In re, Mohd. Rahimulla,* that the foundation on which the wife's right rested was the relationship of husband and wife. When that relationship was lawfully dissolved and there was no marital tie either in reason or on any canon of justice or even on the language of Sections 488 and 489, how the husband could be directed to continue to maintain his divorced wife...[32] Mulla was also of the same view: Where an order was made for the maintenance of a wife under Section 488 and she was afterwards divorced, the order ceased to operate on the expiration of the period of *iddat*.[33] But if the divorce was not communicated to her even up to the expiry of *iddat*, she could get maintenance even after the expiry of *iddat* till the divorce was communicated to her. The Shia and Shafii sects deprived her of maintenance during *iddat* also in cases where the marriage was dissolved in irrevocable form; one concession was her pregnancy at the time of the pronouncement. No maintenance was sanctioned by the old law to an apostate or a criminal wife. In case of dissolution of the marriage due to the death of the husband maintenance was ruled out even during *iddat*. And after *iddat* neither the texts nor the CrPC recognised any right to maintenance. Paras Diwan had written in the 3rd edition of his book that Muslim Law did not recognise any obligation on the part of a man to maintain a wife whom he had divorced.[34]

Thus, both the old texts and the old Code neglected the wife left to destitution by her husband. To mitigate this evil the CrPC, 1973 remoulded the old Section 488 and in the new Section 125(1) Explanation (*b*) defined the term 'wife' as to include the woman who was divorced by or who had obtained divorce from her husband and had not remarried. So now a battered wife's maintenance suit cannot be frustrated by the husband by divorcing her. It is a prophylactic provision intended to prevent vagrancy and destitution. Section 125

30. 1957 All LJ 300.
31. (1957) 1 All 255.
32. AIR 1947 Mad 461.
33. (18th Edn.) at p. 301
34. *Muslim Law* (3rd Edn., 1985) at p. 135.

applies to all communities, it has thus a characteristic of a common civil code. It also extends its protective umbrella over the legitimate or illegitimate minor children, whether married or unmarried, who are unable to maintain themselves, or even major children who, due to physical or mental abnormality or injury are unable to maintain themselves, and parents also, who are unable to maintain themselves. The relevant conditions are that the person responsible (husband/father/son) should have the means to maintain, yet, he neglects or refuses. The recipient wife should not refuse to live with the husband if he so requires, should not be living separately by mutual agreement, or should not be living in adultery. However, she can live separate or refuse to join him if he has brought another wife to live with him, or keeps a concubine or treats her with cruelty or is impotent. In these conditions the Magistrate can pass an order for maintenance granting a sum up to Rs 500 per month.

The objective of Section 125 is to ameliorate the economic condition of neglected wives and discarded divorcees. One achievement towards this welfare goal was to extend the protection to the divorcee; and second major step was taken by the judiciary by taking *mahr* to the doorsteps of maintenance. *Mahr* has assumed the negative role as a representative of the 'customary or personal law sum' mentioned in Section 127(3)(*b*). Just as the strategic divorce deprived the wife of maintenance under the old Section 488, the provision under the new Section 127(3)(*b*) was also ingeniously used by the inconsiderate husband as an escape lane. Section 127(3)(*b*) ordains that the Magistrate shall cancel his order passed under Section 125 on proof that the divorcee has received from her husband the whole of the sum which under customary or personal law was payable on such divorce, and 'the customary or personal law sum under Section 127(3)(*b*) envisaged the *mahr*', held the Supreme Court in *Bai Tahira* v. *Ali Hussain*[35]. In this case the husband had pressed that payment of Rs 5000 by him as *mahr* money (in an earlier compromise proceedings) satisfied the requirements of Section 127(3)(*b*) and absolved him of further obligation to pay maintenance to his divorced wife, the plaintiff. Justice Krishna Iyer held:

> 'Nor can Section 127 rescue the respondent from his obligation. Payment of *mahr* money, as a customary discharge, is within the cognisance of that provision. But what was the amount of *mahr*?...The point must be clearly understood that the scheme of the complex of provisions in Chapter IX has a social purpose. Ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section 127, where the husband, by customary payment at the time of divorce, has adequately provided for

35. (1979) 2 SCC 316: (1979) SCC (Cri) 473: AIR 1979 SC 362.

the divorcee, a subsequent series of recurrent doles is contraindicated and the husband liberated."[36]

Since the amount of Rs 5000 could not provide sufficient interest to keep the woman's body and soul together, the husband's defence was rejected and the Court restored the Magistrate's order of Rs 400 per month for the wife and Rs 300 per month for her child as the maintenance allowance imposed on him.

Bai Tahira incorporates *mahr* in the 'customary sum' of Section 127, but at the same time qualifies the recognition teleologically. Judicial alertness is sharply visible, and more prominently in *Fuzlunbi* v. *K. Khader Vali*[37]. *K* discarded his wife *F* and son; she prayed for maintenance under Section 125, the Magistrate granted her and the child an allowance of Rs 250 and 150 per month, respectively; *K* resorted to *talak* and tendered Rs 500 as *mahr* and Rs 750 as maintenance for *iddat*, the Magistrate vacated the earlier order, *F* lost her revision petition in the High Court of Andhra Pradesh and landed up in the Supreme Court. The Supreme Court restored the allowance earlier awarded by the Magistrate, laying down—

> "The payment of an amount, customary or other, contemplated by the measure (Section 127) must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowance the divorcee may need until death or remarriage... Section 127(3)(*b*) takes care to avoid double payment... The Code by enacting Sections 125 to 127 charges the court with humane obligation of enforcing maintenance or its just equivalent to ill-used wives and castaway ex-wives... Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127(3)(*b*)..."[38]

The Court held in clear words that the payment of liquidated sum at the time of divorce can release the husband from the continuing liability only if the sum paid is realistically sufficient to maintain the ex-wife.[36]

Thus, by mating *mahr* with maintenance the Court produced the result conceived by Section 125. Several other decisions of the High Courts had also contributed to the destitute-welfare oriented outlook.[39] Then the watershed line was authoritatively drawn by the Supreme Court in *Shah Bano*.[40] The ruling that 'payment of *mahr* money as a customary discharge is within the cognisance of

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36. *Ibid*, at p. 365, para 11.
37. (1980) 4 SCC 125: AIR 1980 SC 1730.
38. (1980) 4 SCC 125: AIR 1980 SC 1730, 1736, paras 19(2) to (4).
39. See, *Kunhi Moyin* v. *Pathumma*, 1976 KLT 87; *Muhammad* v. *Sainabi*, 1976 KLT 711; *Hajuben* v. *Ibrahim Gandabhai*, (1977) 18 Guj LR 133; Cf *Rukhsana Parvin* v. *SK. Mohd. Husein* (1977) Cri LJ 1041 (Bom); *Kamalakshi* v. *Sankaran*, AIR 1979 Ker 116. *See also* Paras Diwan, *Dowry and Protection to Married Women* (Deep and Deep 1987) at pp 234-237.
40. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.

that provision'—was overruled: "We have taken the view that *mahr*, not being payable on divorce does not fall within the meaning of that provision."[41] Why did the Court expel *mahr* from the precincts of Section 127(3)(*b*)? One reason is that, logically,

> "...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 marriage....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...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."[42]

There was also no theological evidence to establish that *mahr* was in consideration of divorce. Section 127 also does not mention that word.

The second reason that might have weighed on the mind of the Court seems to be that had *mahr* remained incorporated in that provision by judicial inference, its quantum (unspecified) had the potential to again thwart the social objective enshrined in Section 125; for, at some point, some court could hold a particular sum as sufficient to release the husband of his continuing liability to maintain, while another might differ. This uncertainty could be a gold mine for legal profession, but no hope for a destitute.

Another question to which the Supreme Court addressed itself was 'did the Muslim Personal Law (MPL) restrict the payment of maintenance to *iddat* only? In other words, did MPL prohibit payment beyond *iddat* period? Citing extracts from the works of Mulla, Tyabji and Paras Diwan to the effect that *iddat* was the limit-line for maintenance, Chandrachud, C.J. (for the Court) turned towards the claimed absoluteness of the limit-line[43] and held:

> "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*...[T]hese provisions of MPL do not countenance cases in which the wife is unable to maintain herself after the divorce... 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...[Section 125] 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

41. *Ibid*, at p. 572, para 30.

42. *Ibid*, at pp. 569-70, para 24.

43. *See*, Paras Diwan—'On the expiration of the period of *iddat*, the wife is not entitled to any maintenance under any circumstances'. Cited *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.

MPL, 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 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 Section 125 of the Code."[44]

Is the secular law requiring payment beyond *iddat* in contravention to MPL, or, does the MPL bless such secular law?[45]

"The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the MPL on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself."

By exploring this aspect the Court was contributing to the evolution of MPL:[46]

"There can be no greater authority on this question than the Holy Koran...Verses (Aiyats) 241 and 242 of the Koran show that there is an obligation on Muslim husbands to provide for their divorced wives... 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 you may understand...

* * *

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.

* * *

There shall be for divorced women provision honourable—an obligation on the godfearing.

* * *

These Aiyats leave no doubt that the Koran 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 Koran."[47]

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44. *Ibid*, at pp. 565-66.
45. *Ibid*, at p. 566, para 14.
46. *Ibid*, at pp. 566-68, paras 15-22.
47. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.

The decision in *Shah Bano* raised a considerable dust amongst the Muslim fundamentalists. If the Court erred, it was only in showing eagerness to widen the scope of the Muslim scriptural concern for the divorced wife.[48] But beyond that, there was no violation of Muslim tenets, no imposition of any obligation extraneous to Muslim fold, no general duty towards non-Muslim persons imposed. The beneficiary was to be a Muslim person only. However, extraordinary pressure was brought on the Government to change the effect of the decision by the agency of legislation. As a result the Muslim Women (Protection of Rights on Divorce) Act was passed in 1986.

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

The above genesis and the sequence of events often create an impression that the Act undoes the gains of the divorced Muslim woman. A close analysis will show that the Act does nothing like throwing out of window the *Shah Bano* verdict or the legislative progress enshrined in the provisions of the CrPC. The Act accords relief to the *divorced wife*; it does not say that *mahr* is a consideration for divorce, or is the sum referred to in Section 127(3)(*b*) CrPC; it does not lay down that no maintenance is to be paid to the divorcee after *iddat* or that she is to be abandoned for the life after *iddat*; it does not make the secular law (like CrPC) inapplicable to Muslims, it does not overrule the *Shah Bano case*. The Supreme Court said protection from vagrancy was her right, thus it became an integral part of her personal law *rights*. The Preamble to the Act says that it is 'an Act to protect the rights of Muslim women who have been divorced' and *further* to provide for matters connected and incidental thereto'. The legislative history of the Act supports this view. The Objects and Reasons Clause of the Act says: "The Supreme Court in *Shah Bano* held that if she is unable to maintain herself after the period of *iddat*, she is entitled to have recourse to

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Briefly, the facts of the case are as follows: Appellant *A* was married to respondent *B* in 1932. After 43 years of married life in 1975 *A* drove *B* out of his house. In 1978 *B* filed a petition under S. 125 in the court of the Magistrate, Indore. Thereupon *A* divorced her. He contested the petition on the grounds that he had paid her Rs 200 per month during *iddat*, and deposited Rs 3000 in the court by way of *mahr*. The Magistrate awarded a princely sum of Rs 25 per month by way of maintenance. *B* filed a revision application before the M.P. High Court. She claimed that *A*'s annual income was at least Rs 60,000 per annum. The High Court enhanced the maintenance allowance to Rs 179.20 per month. *A* appealed to the Supreme Court under Article 136 of the Constitution. The Supreme Court dismissed the appeal. *B* was allowed to make an application under S. 127(1) for increasing the maintenance amount.

48. Paras Diwan still holds the view that (*a*) a Muslim husband has no obligation to pay maintenance beyond *iddat*, and (*b*) deferred dower has been considered to be a sum payable on divorce. He poses a question: Suppose a husband pays Rs 50,000 or 80,000 right on divorce: would the Magistrate not take this amount into consideration (under S. 127) while determining the maintenance rate? In such a situation, in Diwan's opinion, no maintenance may be granted (in view of the income from the sum). He prefers Krishna Iyer, J.'s approach: 'no illusory amount would annihilate the maintenance rate; no frustration of the statutory purpose would be permitted'. Paras Diwan, *Dowry and Protection to Married Women* (Deep and Deep 1987) at pp. 241-42.

Section 125 CrPC. This decision has led to some controversy as regards the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has therefore, been taken to specify the rights which a divorced Muslim woman is entitled to at the time of divorce and to protect her interests." The Act therefore, requires an interpretation which fulfils its object rather than frustrates it. In a progressive trend setting judgment, the Kerala High Court has recently held that Section 3 of the Act does not require divorced wife must be unable to maintain herself before she can claim amounts under Section 3 of the Act. 'The legislature conscious of the rights of the wives professing other religions under Section 125 CrPC when enacted Section 3 did not choose to weave into it the requirement that the divorced wife must be unable to maintain herself. It is not necessary to advert to certain precedents by other High Courts in as much as from the language of Section 3 the position is well laid down and need not be doubted. Even a millionaire wife will be entitled to claim amounts under Section 3 from her billionaire husband and the fact that she can maintain herself is no bar against any claim under Section 3.[49]'

Section 3 of the Act entitles a divorced woman to (*i*) reasonable and fair provision, and (*ii*) maintenance to her, (*iii*) provision and maintenance to her children for two years, (*iv*) *mahr* amount and (*v*) all properties given to her before, at the time of and after her marriage.[50] Out of these, the 'provision' and the 'maintenance' are to be 'made and paid to her in the *iddat* period by her former husband'. Does it mean that the maintenance is to be paid to her only during the *iddat* period? The original controversy resurrected in *Arab A. Abdulla* v. *Arab Bail Mohmuna Saiyadbhai*.[51] Briefly, the facts of the case were as follows: The divorced wife (the respondent) had filed criminal application under Section 125 CrPC claiming maintenance allowance, and the Magistrate had granted Rs 250 per month as the allowance payable to her by her former husband. This order was confirmed by the Additional Sessions Judge. Against that order the petitioners filed this criminal application in the High Court. Held, by the Gujarat High Court that the order passed by the Magistrate under Section 125 was not nullified by the Muslim Women (Protection of Rights on Divorce) Act. The petition by the husband was dismissed, leaving the order of the Magistrate unaffected.

The petitioner's case was that in terms of Section 3(1)(*a*) of the Act, the maintenance allowance was payable within the *iddat* period, which implied that

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49. *T.K. Abdulla* v. *Subaida*, (2007) 1 DMC 464 (Ker): (2006) 3 KLT 699.

50. Jurisdiction of civil court is not ousted by provisions of Section 3 of the Act. Both remedies are available to divorced Muslim woman — she can either avail remedy under Section 3 of the Act of 1986 or file civil suit for recovery of dowry articles. (S. 9 of the Civil Procedure Code vests civil courts with jurisdiction to try all civil suits except those expressly barred.) — *Amirshah* v. *Salimabi*, (2006) 4 Mah LJ 856.

51. AIR 1988 Guj 141.

it was to be paid only during the *iddat* and not beyond. Rejecting this contention the court pointed out that the Act nowhere specified the period for which she was entitled to get maintenance, nor did the Act provide that it was for *iddat* only. The dictionary meaning of the word 'within' is 'on or before', 'not later than', 'not beyond'; therefore the word 'within' meant that he was bound to make and pay the provision and maintenance before the expiration of *iddat*. In contrast the sub-clause (*b*) of Clause (1) of Section 3 prescribes the period of 2 years for the allowance payable to her 'for the maintenance of her children'. Again, under Section 4(1) the Magistrate may specify the periods for which maintenance is to be paid. If the Act wanted to limit her right, it could have expressly done so. Further, under Clauses (2) and (3) of Section 3, when the husband has failed in his duty, the divorcee may apply to the Magistrate, and he may fix the amount 'having regard to her needs'. Now this phrase cannot smoothly be interpreted to mean 'her past needs during *iddat* period'. Since such application would come up before the Magistrate only after *iddat*, the language employed would have been different, requiring the Magistrate to approve arrears of past expenses, had Parliament intended to tag maintenance with *iddat*

Another weighty argument of the petitioner was based on Section 4 which required her relatives, and failing them the Wakf Board to pay her maintenance if she was unable to maintain herself after *iddat*, and for such period as the Magistrate may order. This arrangement, it was argued, implied that the husband's liability was limited to the *iddat* period only. Rejecting this contention, the Court interpreted this provision to make additional arrangement for her when the maintenance allowance and provision settled by the previous husband fell short of her needs on account of some unforeseen circumstances.

Section 5 of the Act gives the parties an option to declare jointly, if agreeable to both, to be governed by either the CrPC or the new Act. Did this provision mean that the Act, unlike the Code, did not contemplate the husband's obligation to pay maintenance allowance to extend beyond *iddat*? The Court held 'No', for, if it were so, the husband would never agree to abide by the Code and thus Section 5 would be rendered redundant or otiose. Such interpretation, said the Court, could not be adopted.

Did the Act repeal or supersede the Code? Section 7 of the Act provides that every application by the wife under Section 125 or 127 CrPC pending before the Magistrate on the commencement of the Act shall be disposed of in accordance with the provisions of this Act. Did this rule make the orders passed by the Magistrate under Section 125 *non est*? The Court held that the Act nowhere nullifies the orders passed under Section 125. Once that order is passed, her rights are crystallised and she gets vested right to recover maintenance allowance from her former husband. That vested right has not been taken away by Parliament.

But the Kerala High Court has expressed a different view in *Abdul Gafoor Kunju* v. *Pathumma Beevi*.[52] According to that High Court, 'Sections 125 to 128 of the Code of Criminal Procedure are not repealed but excluded or restricted. It was an appeal against the order of the Court of Session enhancing the maintenance awarded to the divorcee by the Magistrate after the Act had come into force. The question for consideration was whether she was entitled to invoke Section 127 after the Act came into force. The Sessions Judge was of the opinion that she could, as the Act contained no repeal, express or implied, of the Code. The Single Judge of the High Court held that the reason why Sections 125 to 128 were not repealed was that those sections applied to other than Muslim divorces also—wives of other religions, parents, children, etc. The well-known rule of interpretation is that a special law excludes a general law. When a special law namely the Act was passed to govern maintenance to Muslim wives, application of the general law under the Code was excluded or restricted. 'It is argued that the right' under the Code is independent of the personal law and is unaffected. If one considers the context in which the Act came into existence or its object, it is not possible to think that it was intended to provide additional rights. The decision in *Shah Bano* was considered as going against Islamic Personal Law. Otherwise put, the provisions of Sections 125 to 128 were considered to be in conflict with Islamic Personal Law and hence to "specify" the rights of a divorced Muslim wife and "to provide for matters" connected with divorce the law was enacted. It is difficult to accept the view that the Act following *Shah Bano* was intended to widen rights of divorced Muslim wives. The Objects and Reasons clause and the Preamble show that the Act was to *specify* her rights and not to add to the rights given by Sections 125 to 128. The Act enacted in post-*Shah Bano* era was intended to restrict the effect of the Code'.[53]

The view of the Gujarat High Court was not approved by the High Courts of Andhra Pradesh, Gauhati and Calcutta. In *Usman Khan Bahamani* v. *Fathimunnisa Begum*[54], the A.P. High Court dissented from the Gujarat High Court decision. The majority (2 : 1) in the A.P. High Court was of the view that 'the use of the word "within" in Section 3(1)(*a*) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the Act) does not permit an interpretation to be put to the section that the liability of the husband to make a reasonable and fair provision and maintenance to his divorced wife extends beyond the period of *iddat*. A contrary view would result in complete negation of the principles envisaged in that section and would defeat the very purpose of the Act. Section 4 clearly shows that the husband is not liable to pay maintenance beyond the period of *iddat*. Section 3 starts with a non-obstante clause. Section 4 casts the burden on the relatives and the *Wakf* Board.

52. (1989) 1 KLT 337.
53. *Ibid*, at pp. 339-40.
54. 1990 Cri LJ 1364 (AP).

Section 5 provides for an option between the Act and the Code (CrPC). It is too much to say that inspite of the condition in Section 5, the claim of the divorced Muslim wife would still be governed by Section 125 of the Code. Section 7 of the Act makes it still clear, as all pending applications under Section 125 are to be disposed of in accordance with the provisions of the Act. Even in *Shah Bano case*, it is recognised that a Muslim wife is entitled to maintenance under Muslim Law only during the period of *iddat*, and maintenance beyond *iddat* is envisaged only under Section 125 of the Code. A combined and harmonious reading of the provisions of Sections 3 to 7 of the Act clearly demonstrates that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim Law.

Further, the Court held that the words 'provision' and 'maintenance' in Section 3(1)(*a*) convey the same meaning, and not two different things. Even in *Shah Bano* the Supreme Court had recognised this. A different meaning would amount to negation of the very object of the Act.'

On this point the dissenting Judge opined that the words 'within the *iddat* period' in Section 3(1)(*a*) refer to maintenance. Interpreting the distinct liability of making a reasonable and fair provision as having been confined to the period of *iddat* would render the very section otiose and also defeat the specific purpose of casting that liability on the former husband by Section 3(1)(*a*) in contradistinction from Section 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. The period of this liability to make provision on the husband may surely be much more beyond the period of *iddat* and for future of the divorced wife. The amount would depend on facts and circumstances of each case and there cannot be a general ruling on these aspects.

The majority also dissented from the decision of the Kerala High Court in *Ali* v. *Sufaira*[55] where in it was held that under Section 3(1)(*a*) a divorced woman was not only entitled to maintenance for the period of *iddat* but also to a reasonable and fair provision for her future.

The Calcutta High Court, also dissenting from the Gujarat High Court decision held in *Abdul Rashid* v. *Sultana Begum*[56] that the liability of the former husband to provide maintenance was limited for the period of *iddat* and therefore, if she was unable to maintain herself she had to make an application under Section 4 of the Act. 'In view of the scheme of the Act, the provision could not be fairly interpreted to mean that it was open to the divorced wife to claim maintenance under Section 4 of the Act in addition to what she might have received under Section 3 of the Act.'

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55. (1988) 3 Crimes 147.
56. 1992 Cri LJ 76.

Yet in *Shakila Parveen* v. *Haider Ali*,[57] the High Court took a different, liberal view. The petitioner (wife) had filed an application under Section 125 CrPC claiming maintenance from her husband. The Judicial Magistrate, Sealdah granted her maintenance (of Rs 800 per month) for the *iddat* period (two months) over and above the Den Mehr amount of Rs 2,500. The petitioner aggrieved by that order had filed the revision petition. Meanwhile the Act of 1986 was passed. The Calcutta High Court extensively quoted the judgment of the Gujarat High Court and approved both the principles established therein, namely, the word "within" in Section 3 does not mean "for or during", it means "on or before", and the Parliament has nowhere provided that the reasonable and fair provision and maintenance are limited only for the *iddat* period. Accordingly, the expression "during *iddat* period" should be extended till a Muhammadan divorced female enters remarriage, and the Magistrate's order was modified to the effect that the petitioner was entitled to get the maintenance allowance from the date of application till she remarries.

This (relatively less known) verdict was soon reinforced in July 2000 by the decision of the Bombay High Court, rekindling the light of hope for the indigent deserted Muslim woman. Advocating the path of judicial activism for the establishment of social justice the Mumbai High Court observed that "while interpreting a beneficial legislation we should lean in favour of the beneficiaries to help them get the maximum which the legislature purports to give them. We would be wary of overriding the personal law of Muslims, but we shall within its framework reconcile it with the provisions of the Code. Our Constitution strives to preserve and enhance the dignity of women, and laws should be interpreted with that end in view."

The Single Bench of the Bombay High Court had considered it just and equitable that the husband should pay the divorced wife maintenance allowance even after the *iddat* period, but thought it necessary in the interest of justice that this matter should be referred to the Full Bench for its decision; therefore this revision application of *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh*[58] came up before the Full Bench comprising Shah, J., Smt Ranjana Desai, J. and Patil, J. The four prime questions for consideration before the Court, along with their answers, were as follows:

> (*i*) "Whether the Muslim husband's liability under Section 3(*a*) of the MW Act to make a reasonable and fair provision and pay maintenance is restricted to only the *iddat* period or whether it extends beyond the *iddat* period"?

In answer, the Court said that in its opinion, a reasonable and fair provision has got to be distinct from maintenance. The word "provision" has a future

57. (2000) 1 CLJ 608.
58. (2000) 3 Mh LJ 555.

content. It is an amount kept aside to meet a known liability. In the context of Section 3(1)(*a*) it would mean an amount as would be necessary for the divorced Muslim woman to look after herself after the *iddat* period. This may involve amount for her residence, food, clothing, medicine and like expenses. It is precisely for this reason that like Section 125 of the Code no maximum amount is fixed here, but the quantum has got to be substantial having regard to the future needs of the woman. On the first question (*supra*) therefore, the Court concluded:

> "the husband's liability to pay maintenance to a wife ceases the moment the *iddat* period gets over. He has to pay to her within the *iddat* period for *iddat* period. But he has to make reasonable and fair provision for her within *iddat* period, which should take care of her for the rest of her life or till she incurs any disability under the MW Act. While deciding this amount, regard will be had to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. If the husband is unable to arrange for such a lump sum payment he can ask for instalments and the Court shall consider granting him instalments. Further till the husband makes the provision the magistrate may direct monthly payment to her even beyond *iddat*, till the amount is fixed."

(*ii*) On the second question namely, whether the Act has the effect of invalidating the orders/judgments passed under Section 125 of the Code prior to its coming into force, that is, whether the Act divests parties of vested rights/ benefits by acting retrospectively, the Court held:

> "The orders passed under Section 125 of the Code prior to the commencement of the MW Act are not nullified by reason of its coming into force. Such orders are binding on both sides and can be executed under Section 128 of the Code. The Act does not divest the divorced woman of the right to get maintenance under Section 125 of the Code vested in her by reason of orders of a competent Court passed prior to its coming into force."

(*iii*) After the commencement of the MW Act can a divorced Muslim wife apply for maintenance by invoking the provisions of Chapter IX of the Code of Criminal Procedure? Addressing to this question, the Court ruled:

> "After the commencement of the MW Act a divorced Muslim Woman cannot apply for maintenance by invoking the provisions of Chapter IX of the Code. According to Sections 5 and 7 a divorcee and her husband can by agreement subject themselves to the jurisdiction of the Magistrate under Sections 125 and 127 of the Code and agree to be governed by the said provisions (but not without such agreement)."

(*iv*) The last question considered by the Court was whether the Family Court has jurisdiction to try applications of the Muslim divorced women for

maintenance after the coming into operation of the MW Act? On this, the Court held:

> "If the jurisdiction of the Family Court was sought to be protected, there would have been an express provision making it clear that the Family Court has jurisdiction. By virtue of Sections 3 and 4 the application under Section 5 and 7 of the Act have to be filed before the Magistrate only. We therefore hold that after coming into force of the MW Act, a Muslim woman can apply under Sections 3 and 4 only to the First Class Magistrate having jurisdiction under the Code. The Family Court cannot deal with such applications".

But this decision, being of a High Court, could not provide relief to the Muslim divorcee women in other States. For example the Madhya Pradesh High Court held in *Rafiq* v. *Farida Bi*[59], that if a divorced wife wanted maintenance beyond the *iddat* period, she had to make her relatives/*Wakf* Board as parties to the suit under Section 4 of the Act, for the husband could not be made a party. Again the M.P. High Court asserted in *Julekha* v. *M. Fazal*[60], that the Muslim Law makes the husband liable for the maintenance of his divorced wife during the *iddat* only. And though the decision of the Kerala High Court in *Khyrunneesa* v. *Alair*[61], concentrates mainly on the quantum of maintenance and provision for the divorcee, it does advance the cause of the deserted wife in so far as it combines "maintenance" with the requirement of "reasonable provision" for the post-*iddat* period. In the words of the Court:

> "While enacting Section 3(1)(*a*) of the Act, the Parliament has accepted the traditional view that right to maintenance ceases after the expiry of the *iddat* following *talak* after declaring and protecting the right of divorced women to get a fair and reasonable provision being made for her livelihood during the post-*iddat* period also from her husband within the *iddat* period."

Some of the other pre-*Danial Latifi case* decisions favouring an interpretation more beneficial to the claiming wife are: *Haroon Rashid* v. *Raqueeba Khatoon*[62]—The Patna High Court held: She is entitled to reasonable maintenance for the *iddat* period and fair and reasonable provision for the rest of her life or till she remarries. *Majitha Beevi* v. *Yakoob*[63]—The Kerala High Court, after laying great emphasis on the need to make provision for her remaining life, held that if the former husband has given sufficient property to the divorced wife during the subsistence of the marriage satisfying the requirements of Section 3(1)(*a*) of the Act, the divorced woman is not entitled to claim anything more,

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59. (2000) 2 MPWN 77 MP.
60. (2000) 1 Vidhi Bhaswar 123 MP.
61. (2001) 1 KLJ 46. See, *infra*, further under the head "Amount of Maintenance".
62. (1997) 1 BLJR 93.
63. (1999) 1 KLT 796.

over and above the properties already given. In an interesting case *Nizar* v. *Hyrunneessa*[64]—the Kerala High Court held: The period up to which the needs of the woman should be considered is not mentioned anywhere in Section 3 of the Act. The remarriage of the divorced woman is no criterion while determining the reasonable and fair provisions to be paid by former husband to his divorced wife. Therefore, the fact that the divorced woman had remarried during the pendency of the petition is not a factor which determines the date to which she is entitled to fair and reasonable provision . . . Of course, if the wife gets remarried during the pendency of the petition that fact is a factor to be considered by the Magistrate keeping in view the object and reasons in enacting the Act.[65]

In *Hasenura Begum* v. *Fazar Ali*[66], the Gauhati High Court was called to decide whether the words "provisions" and "maintenance" (in Section 3) convey the same meaning, as decided by the Andhra Pradesh High Court in *Usman Khan Bahamani* v. *Fathimunnisa Begum*,[67] by majority. The Gauhati High Court held that a combined reading of Sections 3 and 4 of the Act would show that the word "provision" has been used only in Section 3 and is absent in Section 4. The Preamble of the Act takes care of the rights of the divorced Muslim wife and "to provide for matters connected therewith or incidental thereto." While the liability to pay maintenance shifts under Section 4 to classified relatives and the *Wakf* Board, the word provision is deliberately omitted in that section. This should lead any prudent person to form an opinion that so far as making provision is concerned the liability remains with the former husband by the implicit significance of deliberate mentioning in Section 3 while consciously omitting in Section 4 and this cannot be for any limited period. The needs of a divorced muslim wife are not confined to maintenance and maintenance alone. Apart from the requirement of fooding, clothing, medicine, the divorced wife may require the minimum residential accommodation and least arrangement for proper utilisation of leisure and recess and proportionate fund for discharging religious and social obligations, etc. even after *iddat* period.

Held, the former Muslim husband is under legal obligation to 'make provision' for his divorced wife for her whole life or till her remarriage and should be made within *iddat* period having regard to the status and financial

64. (1999) 1 KLT 709.

65. We think the two sentence are contradictory; the second neutralises the first. In view of the Supreme Court decision in *Danial Latifi* making her remarriage a terminating point for her entitlement to provision and maintenance, this point of the High Court decision must be taken to have become inoperative. Furthermore, the Supreme Court having made destitution as the *raison de etre* for departure from the traditional time limit of *iddat*, the condition of remarriage operates to negate her claim. *See below*, the discussion on *Latifi*.

66. (2001) 3 Gau LR 576.

67. 1990 Cri LJ 1364 (AP).

condition of both, and so far as the liability to pay maintenance is concerned, it is confined for the *iddat* period, though must be paid within *iddat* period.

Thus, the legal status of the right of the divorced wife continued to be fluid, variable according to the views of the different High Courts. The Act is yet another example of the legislators' preference for legalistic semantics over bold and straightforward expression of will. The quantum of maintenance allowance, whether the fair and reasonable provision was in addition to the maintenance allowance or included in it, and duration of time for which the husband's liability extended — still remained contentious issues. No doubt, the divorced wife's fate was on progressive path: In the first stage the husband could rid himself of all the liability by simply divorcing her. The second stage was the 1973 amendment in the CrPC — he was made liable to maintain her even after the *talak*; this was her first stage of acquirement. But the husband found out an escape valve-payment of *Mahr*. In the third stage the Judiciary insisted on making this *Mahr* reasonable. The fourth stage came when the Court insisted on her maintenance, *Mahr* or no *Mahr*. The fifth stage was marked by the Act of 1986.

The objective of the Gujarat High Court in according benevolent interpretation to the Act was to afford a concrete relief to the destitute divorcee, so that the goal set by the Supreme Court in *Shah Bano case* may be rendered easily approachable. But this path was undulated, as the various decisions analysed so far would show. The success of the objective of the judiciary rests on certain perceptions, not expressly manifested by the Act. Surely, the Act nowhere says that the maintenance is limited to the *iddat* period, but the Act also misses the golden opportunity to declare that the maintenance is for her life; or conversely, to say that "till *iddat* period only, and no more". Fairly enough, the language of Section 4 of the Act gives a powerful impression that the maintenance referred to in Section 3 is limited to *iddat* period; this line of argument cannot be dismissed offhand in view of the words used in the Statement of Objects and Reasons; it did require the authority of the Supreme Court to decide which side was right. The legislators had played their ball. There is one more snag in the language of the Act. If the entire amount of provision and maintenance is to be made and paid to her "within", that is, "on or before", "not beyond" the period of *iddat*, that is in 3 months, then the number of divorcing husbands who could arrange the whole amount in that short period would be really negligible. What can be done 'within' that period is to assess and fix the sum and commence the payment. Those payment then shall have to go beyond that period, till either the sum fixed is exhausted, according to one view or till her lifetime, according to the liberal view. Seen from the angle of this economic reality, even the liberal view would create difficulty if it were insisted that the husband must clear himself of all his liabilities in three months; any such insistence could result only in sending him a distress warrant, but that would no way solve her financial problem. In this context also "within" should not mean

"not beyond, before the end of"; so it has to imply "from, since the beginning of". One ray of hope in the Act is the removal of the maximum limit of the amount of maintenance allowance that the Magistrate may determine, the code had fixed the ceiling of Rs 500 per month. Now the Magistrate will assess the span of life of the divorcee, and on the basis of this and other prescribed norms, determine the sum.

These uncertainties had to be settled. The verdict in *Danial Latifi* v. *Union of India*[68], deciding some of the unsolved questions did not come a day sooner. This was a writ petition under Article 32, challenging the constitutional validity of the Act, the target being in fact the restrictive interpretation of Section 3 of the Act.[69] The petitioner's contention was that the Act, by making Section 125 of the Code of Criminal Procedure inapplicable to the Muslim women, discriminates against them. The argument was that Section 125 CrPC gave protection to all women irrespective of their religion. The *Shah Bano* decision made this protection available to the destitute Muslim woman for her entire life. Then came the Act with the "inevitable effect to nullify the law declared by the Supreme Court in *Shah Bano*". Now, by the application of the Act only the Muslim wives are singled out for the adverse discrimination. The Act thus violates Articles 14, 15 and 21, and is also un-Islamic, and violates the basic secular character of the Constitution.

On behalf of the Union of India, it was contended that when it was provided by Section 3 that the "provision and maintenance" was for the *iddat* period, it would make it clear that it could not be for life but would be only for the *iddat* period and "when that fact has been clearly stated in the provision the question of interpretation as to whether it is for life or for the period of *iddat* would not arise".

On behalf of the Indian Muslim Personal Law Board, the submission was that the main object of the Act was to undo *Shah Bano case*, the task of interpreting the unfamiliar language of the Koran was hazardous, the interpretation placed on the Arabic word "Mata" in *Shah Bano case* was incorrect, "provision and maintenance" were clearly the same thing, such provision was to be made for the divorcee for the period of *iddat* only, this was the tenetary law and the Court should interpret the Act according to the Muslim Personal Law and Muslim social ethos only. The Islamic Shariat Board also pleaded that the obligation for "Mata" was a one-time transaction and the different view by some authors on Muslim Law was not authentic and reliable.

On the other hand, the National Commission for Women submitted that if the protection of Section 125 CrPC is withdrawn and Section 3 of the Act is

68. (2001) 7 SCC 740.

69. There are no other reported facts in the case related to any events or transactions.

interpreted to abandon the divorced Muslim woman to the caprice and whim of her husband, it would amount to depriving her of her constitutional rights to equality, non-discrimination and life, which included right of livelihood.

The Supreme Court ruled, first of all, that the decision of the Constitution Bench in *Shah Bano case* was not open to re-examination. The law applicable to a divorced Muslim woman on the date the 1986 Act came into force was as declared by the Supreme Court in *Shah Bano*. Therefore, in the present case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be *Shah Bano case*, and not the original texts or any other material. That (*Shah Bano*) declaration was made after considering the holy Koran, and other commentaries or other texts. In that case, the Supreme Court said that although Muslim Personal Law limits the husband's liability to the period of *iddat*, it does not contemplate a situation in which she is unable to maintain herself after *iddat*, and Section 125 CrPC envisages that situation. Precisely, the point that arose for consideration in *Shah Bano case* was that the husband had not made a "reasonable and fair provision" for his divorced wife, even if he had paid *Mahr* and provided *iddat* maintenance. Therefore, he was ordered to pay a specified sum monthly to her under Section 125. This position was available to the Parliament on the date it enacted the law but even so the words used in the Act are "a reasonable and fair provision and maintenance to be made and paid", and there is no reason why this provision could not take the form of the regular payment of alimony to the divorced woman, "though it may look ironical that the enactment intended to reverse the decision in *Shah Bano case*, actually codifies the very rationale contained therein". And "if the language of the Act is as we have stated, the mere fact that the legislature took note of certain facts in enacting the law will not be of much materiality."

As we observed while analysing the various decisions of the High Courts, the Act could be interpreted in both ways: restrictively and liberally. Restrictive interpretation would make the Act foul of the constitutional principles of equality and right to livelihood. The Supreme Court held that a construction that results in making an Act ultra vires has to be discarded and one that upholds the validity of the Act preferred.

Having established these foundational postulates, the Supreme Court held that nowhere had Parliament provided that reasonable and fair provision and maintenance were limited to the *iddat* period and not beyond. It would extend to the whole life unless she got married for the second time. At the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance. The word "within" means "on or before", "not beyond". The emphasis of this Section (3) is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment should be concluded namely, within the *iddat* period. If he has made such arrangement and discharged his liability, he would be exempted for the

post-*iddat* period liabilities.[70] Section 4 of the Act contains no reference to "provision". Obviously this right is enforced only against her former husband, in addition to maintenance.[71]

The reasonable and fair provision and maintenance that the Magistrate can order her former husband to be made and paid to her has to be worked out with reference to her needs, standard of life enjoyed by her during her marriage and means of her former husband. It may include provision for her residence, food, clothes and other articles.[72] The wordings of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his wife, and (2) to provide maintenance for her. To say that the Act deprives her of the protection extended previously by Section 125 CrPC and now expect her to run after the *iddat* period from pillar to post in search of her relatives and ultimately to knock at the doors of the *Wakf* Board — does not appear to be reasonable and fair substitute of Section 125 CrPC. No reasonable, fair and just law would do so. Otherwise it would amount to discrimination and violation of Articles 14 and 21.[73]

In conclusion it was held:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well, extending beyond the *iddat* period; and must be made by him within the *iddat* period, in terms of Section 3(1)(a) of the Act.

(2) His liability under Section 3, to pay maintenance is not confined to *iddat* period.

(3) A divorced Muslim woman, not remarried and unable to maintain herself after *iddat* period can proceed, under Section 4 against her relatives who are liable to maintain her in proportion to the properties which they would inherit from her. If none of them is able to maintain her, the Magistrate may direct the State *Wakf* Board to pay.

(4) Provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution.[74]

'Future'? — Further development

We have used two terms above — 'future' and 'not remarried'. In a recent landmark decision the Kerala High Court has thrown light on the futuristic extensions of these terms. Indeed the facts of the case offered an opportunity to

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70. (2001) 7 SCC 740 at pp. 760-61.
71. *Ibid*, at p. 761.
72. *Ibid*, at p. 760.
73. *Ibid*, at p. 763.
74. *Ibid*, at pp 765-66.

the Court, and creditably the Court ceased it. Is the amount due to her under Section 3(1)(*a*) for her entire life till end? Does the discharge of his obligation by the husband under this provision absolve the next husband from his similar duty if and when he divorces her? Does the Section mean one time payment? These were the questions raised in *V. Bapputty* v. *Shahida*.[75] This is a case of third divorce. Her testing HIV positive is the root cause. Her first husband paid her certain amount in discharge of his duty under this section; she did not claim anything from the second one on divorce, but claimed from the third one when he divorced. This third one objects claiming that 'conceptually the amount payable under the Section is the maintenance amount which is due to her till the end of her life or till her remarriage. So, she is not entitled to claim it now. (Otherwise also he was wrong, for she had not 'remarried'.) The High Court held: 'The obligation rests on the shoulders of every husband who divorces his wife. Such liability of his does not vanish or is not obliterated by the mere fact that the previous husband had discharged his duty. Every husband at the time of divorce must independently make reasonable and fair provision. It is not the law that the woman should be unable to maintain herself to claim the fair and reasonable provision under the Section (*see*, footnote reference 46-A *supra*). Hence the fact that provision has been made at the time of the previous divorce would become irrelevant. In every case where the woman actually remarries the amount paid by the former husband under section must be held to be sufficient provision till remarriage only and not till the end of her life; it does not absolve the subsequent husband when he divorces.

Does the MW Act 1986 substitute Section 125 CrPC so far as the Muslim Women are concerned?

Section 5 of the MW Act gives the divorced Muslim woman and her former husband an option to declare that they jointly or separately would prefer to be governed by the provisions of Sections 125-128 CrPC, the Magistrate shall dispose of the maintenance accordingly (i.e., according to Section 125 etc. CrPC). The Andhra Pradesh High Court in *Usman Khan Bahamani* v. *Fathimunnisa Begum*,[76] had held that after passing of the Act a divorced wife cannot claim maintenance under Section 125; these (125-128) sections are not applicable after coming into force of the Act. The same was the view of the Madhya Pradesh High Court,[77] and Patna High Court.[78] The Punjab and Haryana High Court had also denied her a recourse to the CrPC after the Act, but held that the Act did not divest the party vested with determined rights and benefits

75. (2007) 1 KLT 422.
76. 1990 Cri LJ 1364 (AP).
77. *Sakinabai* v. *Fakruddin*, (1999) 2 DMC 576.
78. *Mohd. Yunus* v. *Bibi Phenkani*, (1987) 2 Crimes 241 and *Bibi Shahnaz* v. *State of Bihar*, (1999) 2 DMC 589.

under Section 125.[79] The Gujarat High Court in *Arab A. Abdulla* v. *Arab Bail Mohmuna Saiyadbhai*[80], had held that the Act did not take away a divorced Muslim woman's rights under personal law or under general law, i.e. Section 125, etc. The Court also ruled that orders passed by the Magistrate under Section 125 are not nullified on coming into force of the Act. In *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh*[81], the 2nd and 3rd questions formulated by the Bombay High Court related to the issue under our discussion, viz.: (*a*) whether the Act has the effect of invalidating the orders/judgments passed under Section 125, i.e. whether the Act operates retrospectively so as to divest parties of their vested rights, and (*b*) whether, after the commencement of the Act, a Muslim divorced wife can apply for maintenance under the provisions of the CrPC? The Bombay High Court ruled, on question (*a*) that provisions of statutes which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Therefore, the orders passed under Section 125 are not nullified; they are binding and the wife is not divested of her vested rights. As to question (*b*) the Court held that in view of the provisions of Sections 5 and 7 of the Act, a divorced Muslim woman cannot apply for maintenance by invoking the provisions of the Code. It is only by mutual agreement that they can decide to be governed by the Code.[82] Both these questions again appeared before the Calcutta High Court in *Abdul Latif Mondal* v. *Anuwara Khatun*[83]. But before attending them, we may note the observations of the High Court regarding the misuse of the divorce power by the husband. The brief facts of the case were: the opposite party, i.e. the wife alleged that within few days after her marriage with the petitioner, the latter and his family members started torturing her for money and gifts; after four years she and her child were driven out of the matrimonial home; she applied for maintenance for herself and the child under Section 125; the husband countered on the ground that he had divorced her two years back, but the Magistrate granted the maintenance allowance; hence this petition by the husband. Commenting on the misuse of the divorce card by the husband, the High Court observed:

> "It is true that Section 5 of the Act gives an option to be governed by Sections 125-128 of the CrPC. But, this looks like very hard to come by. Despite the new Act many women approach the Court under Section 125. One reason for this is that significant number of women are not divorced at the time of approaching the Court for maintenance. These women are divorced after filing for maintenance as a retaliatory measure. The usual tendency of a husband who is called upon by the Courts to defend himself

79. *Kaka* v. *Hassan Bano*, (1998) 2 DMC 85.
80. AIR 1988 Guj 141.
81. (2000) 3 Mh LJ 555.
82. *Ibid*, at pp. 578-79.
83. (2002) 1 CLJ 186.

against the claim of maintenance, irrespective of religious affiliations is to exploit any legal loophole which will enable him to escape from his financial obligation towards his wife and children. The wife having been driven away and divorced by the husband, in distress and in desperate need of money and material to sustain herself and for that reason, requiring the speedy remedy of Section 125, is not likely to get her embittered ex-husband easily to join hands for an affidavit or declaration that they prefer to be governed by the provision of Sections 125-128, especially a husband who by all means is bent upon evading the financial obligation."[84]

On these facts the High Court framed three issues: (*a*) Whether the Act renders the Judicial Magistrate's maintenance order, passed in 2001, under Section 125 a nullity. (*b*) Whether the claim of maintenance is limited only up to the period of *iddat*. And (*c*), whether a divorced Muslim wife can still claim maintenance under Section 125 after the coming into force of the Act. On the first issue the High Court ruled that on the basis of the latest judgment of the Supreme Court in *Danial Latifi* "we possibly have enough reason to maintain that the position of Section 125 has not been materially changed". There is no section in the Act which nullifies the orders passed by the Magistrate under Section 125. Once the order is passed, her rights are crystalised 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 provisions in the Act and there was no inconsistency between the Act and the CrPC. As to (*b*), the Court ruled that the object of Section 125 is to prevent vagrancy and destitution. The Constitutional Bench in *Shah Bano case* has given a woman in destitution a constitutional right to protection and the Act has nowhere taken away that right, nor can it do so. On the third point (*c*) the Court held:

"The provisions of the Act as made available to the divorced Muslim women are in addition of the claims available to them under Section 125 CrPC. Moreover, it might be borne in mind that Section 125 provides for speedy and summary remedy to the indigent wife and her children driven to destitution, the prevention of which is the whole purpose of the welfare legislation. In a given situation, desperate that it is, if the destitute woman in dire straits instead of taking the long winding and difficult path in pursuit of justice under the Act, goes straightaway by Section 125 which promises speedy and summary remedy and can thereby secure for her the basic right to life and a life with dignity, then I believe there is no stopping her — morally as well as legally."[85]

84. (2002) 1 CLJ 186 at pp. 195-96.
85. *Ibid*, at pp. 202-03.

Bound by the Full Bench decision in *Karim Abdul* (supra) the Single Judge Bench in *Sk. Mohamed* v. *Naseembegum*[86], *Sajanbee* v. *Khajamiya*[87] and *Syed Younus* v. *Jabeen.*[88] has reiterated the position laid down in *Karim Abdul* (supra). The Gauhati High Court is also of the same opinion.[89] In our opinion the judgment of the Calcutta High Court appeals more to logic and results in practical justice. Still, Supreme Court verdict is needed to crystallise the position.

Position of Pre-Act divorcees

Can a Muslim woman, divorced before the coming into force of the Act, claim maintenance under the Act? 'Yes'—according to the Kerala High Court. In *Hyderkhan* v. *Meharunnissa*[90] the Court held that the Act was a declaratory statute. The presumption against retrospective operation will not apply to a declaratory statute. From the Preamble it is very clear that the Act applies to Muslim women who have been divorced or have obtained divorce from their husbands. Section 2(*a*) defines a divorced woman without prescribing any date. There is no logic in holding that the Act for the first time introduced a burden on the Muslim husband to provide for reasonable and fair provision and maintenance to the divorced wife.

The respondent was divorced in 1980 (within 8 months of marriage). The award of Rs 24,000 as maintenance by the Chief Judicial Magistrate was therefore upheld by the High Court.

Now, of course the decision of the Supreme Court in *Danial Latifi* settles the law in favour of the divorced Muslim wife and vests her with a "constitutional right" to livelihood through maintenance in the situation discussed in detail above. All the decisions of various High Courts going contrary to *Danial Latifi* law, therefore, stand overruled. It may be noted that the definition of the "divorced woman" given in Section 2(*a*) of the Act does not require that the divorce must have taken place before the commencement of the Act, it covers all divorcees under the Muslim Law.[91]

Maintenance by Children, Relatives, Parents and *Wakf* Board

Section 4 of the Act provides that if a divorced woman has not remarried and is unable to maintain herself *after the iddat period*, the Magistrate will order the following "persons", and in that order, to maintain her:

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86. (2007) 1 DMC 226 (Bom).
87. (2007) 1 DMC 537.
88. (2008) 5 AIR Bom R 700.
89. (2007) 2 Gau LR 657 in *Md. Siddique Ali* v. *Mustt Fatema Rashid.*
90. 1993 Cri LJ 236 (Ker).
91. For procedural details, *see generally*, M.A. Qureshi, *Muslim Law of Marriage, Divorce and Maintenance* (Deep and Deep, New Delhi 1992).

(*i*) *Children.*—In a queer style of legislative drafting, the section first mentions in detail the liability of the relatives, and then by use of the proviso super-posts the children at the first place. So proviso to sub-section (1) of Section 4 casts the liability to maintain her on her children: "The Magistrate shall order only such children to pay maintenance to her." Since the term "children" has not been defined, "children" will include male and female, married or unmarried, legitimate or illegitimate. The question of major or minor has also been left open, and perhaps their capacity will guide the Magistrate.

In *Makiur Rahman Kha* v. *Mahila Bibi*[92], the respondent mother who was a divorced Muslim woman had filed an application under Section 125 CrPC claiming maintenance from her two sons. Various objections were raised by the petitioners but the Magistrate had allowed the application and granted maintenance at the rate of Rs 250 each per month. The sons had claimed their income was very low. They also stated that the mother had failed to discharge her duties by showing love and affection to them, and left them when they were merely 3/4 years old. One important objection was that while her maintenance case against her husband under Sections 3 and 4 of the Act was pending, parallel proceeding under Section 125 CrPC against her sons was not maintainable.

The Calcutta High Court rejected this contention and held that Section 4(1) of the Act does not debar the divorced Muslim woman from invoking the provision of Section 125 against her children. Even under Section 5 the condition is with regard to the former husband, but it is conspicuously silent as regards others. The framework of the Act itself and the ratio of Danial Latifi will show that the Act itself is not a substituted measure of Section 125 CrPC but in addition thereto.

The High Court also upheld that Magistrate's order regarding the amount of maintenance.

(*ii*) *Parents.*—"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". The term includes father and/or mother.

(*iii*) *Relatives and* (*iv*) *Other Relatives.*—On proof of the inability of the parents being furnished to the Magistrate, he will order that such relatives as would be entitled to inherit her property on her death will pay such reasonable and fair maintenance as may be ordered by the Magistrate. Further, if her needs still remain unattended, the Magistrate may order that the share of such relatives in the maintenance ordered by him may be paid by such of the *other relatives* as may appear to him to have the means of paying the same. In the case of "relatives" the Magistrate will take into consideration their means, her needs and their proportionate share in the prospective inheritance of her property. In the

92. (2002) 1 CLJ 291.

case of "other relatives" their proportion will be such as he may think fit to order. That is, whereas in the case of prospective inheritors, their share in the maintenance is matched with their share in the property, in case of "other relatives", their share is left to the discretion of the Magistrate.

It is notable that Section 4 makes no reference at all to her former husband. But the specified condition that "she is unable to maintain herself" may be taken as to provide one clue. The other clue is provided by the non obstante clause with which Section 4 opens: "Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force"; which means even if the husband is paying maintenance after *iddat* period, due to his poverty and her needs, the amount is so small or insufficient that she is not able to maintain herself. In that case, she can appeal to the Magistrate to use his powers under this section. And, at the end of this line of waiting burden-bearers comes the *Wakf* Board.

(v) *Wakf Board.*—Sub-section (2) of Section 4 says that where a divorced woman is unable to maintain herself and the relatives and other relatives also have no means to support her, the Magistrate may order the local *Wakf* Board (i.e. of the area in which she resides) to pay her entire maintenance allowance as per his orders or share the relatives in the discharge of their obligations. The period is also left to the discretion of the Magistrate.[93]

Maintenance by Wakf Board—Constitutional Validity of Section 4(2)

In *Syed Fazl Pookoya Thangal* v. *Union of India*[94] the facts were as follows—One Jameela was divorced by her husband; under Section 3 of the Act she was granted Rs 15,400 towards her maintenance. Towards this amount only Rs 6000 could be realised by attachment and sale of husband's property, and the husband was jailed for the non-payment of the balance amount. Jameela had no property or source of income to maintain herself or the child. Her near relations (and legal heirs) were her parents who were unable to maintain her because of their impecuniosity.

Therefore, Jameela claimed maintenance from the Kerala *Wakf* Board at the rate of Rs 350 per month invoking Section 4(2) of the Act. The Judicial Magistrate First Class ordered the *Wakf* Board to pay her Rs 250 per month towards her maintenance. The *Wakf* Board challenged the constitutional validity of Section 4(2) of the Act on the ground that the *Wakf* Board was a religious body created for the purpose of performing pious activities like offering prayers to God and functions beneficial to the spiritual well being of the Muslim

93. *Wakf* Board can be directed to pay maintenance amount. Opportunity of hearing to Board before passing order is not contemplated under Section 4(2); on Board's failure to implement distress warrant will be issued—*Tripura Board of Wakf* v. *Ayasha Bibi*, AIR 2008 Gau 10.

94. AIR 1993 Ker 308.

faithfuls. Once the property is dedicated to the *Wakf* Board, it vests in God and no one is competent thereafter to muddle with it or divert its income to a purpose not authorised by the *Wakf* deed. The casting of obligation on the *Wakfs* to pay maintenance to divorced Muslim wives and the diversion of their funds for that purpose were sacrilegious, violative of the guaranteed freedoms under Articles 25 and 26 of the Constitution, the *Wakf* Board contended.

The Kerala High Court held that to claim the rights under Article 26, the petitioner must be a religious denomination. The *Wakf* Board is not a conglomeration of individuals. It is not even akin to a company where many individuals join together to constitute it. It is a statutory body, pure and simple. It is not a representative body of Muslim community. It has no soul and no faith, except the faith of dutiful performance of its functions and duties under the Act (i.e. the *Wakf* Act of 1954). It is an instrumentality of the State. The *Wakf* Board is a creature of the *Wakf* Act. It is not a denomination and hence it has no rights under Article 26. (Article 25 was not pleaded before the Court after initial mention.)

Nature of the Wakf Board's obligation

Secy., Tamil Nadu Wakf Board v. *Syed Fatima Nachi*,[95] The respondent, Fatima, was married to Syed Ahmad Moulana in 1980. She had twin daughters from him. The husband, (one of the appellants) divorced her in 1986. She was not remarried. She claimed she was not able to maintain herself and the children and hence, prayed the Judicial Magistrate, Tiruchendur for granting the maintenance allowance. The Supreme Court held that the host of her relatives as given in the Act 1986, and Muhammadan Law are responsible to provide her maintenance, and if they are unable, the claim of maintenance must be met by the *Wakf* Board. Her prospective heirs and parents are unable to maintain her. Thus, there was a bounden duty on *Wakf* Board to maintain her. The *Wakf* Board contended that Section 4 of the Act would require her to file proceedings against all the relatives mentioned in that section one by one, and finally when all fail to maintain her, then a proceeding can be filed against the *Wakf* Board, because it is at the bottom of the list in Section 4. *Held*: She is entitled to plead and prove relevant facts in one proceeding as to inability of her relations mentioned in Section 4(1) to maintain her by directing her claim against State *Wakf* Board in first instance. She is not required to proceed against her relatives mentioned in Section (4)(1) in the order they are mentioned and then to touch the *Wakf* Board. The provision is one integrated whole. It is, however, open to the *Wakf* Board to controvert to the effect that the relations mentioned in the provision have means to pay maintenance to her. The Magistrate would then add them as parties.

95. (1996) 4 SCC 616: AIR 1996 SC 2423.

In *Tripura Board of Wakf* v. *Tahera Khatoon*[96], the respondent was a divorced Muslim woman. Originally, she had filed application before the Magistrate impleading the *Wakf* Board and others for payment of maintenance allowance to her. The Magistrate had partially granted her prayer and the *Wakf* Board had filed this review application before the High Court of Gauhati. The main contention of the *Wakf* Board was that the Magistrate had not recorded any finding that the relatives of the respondent were not in position to maintain her, as required by Section 4(2). In fact, the *Wakf* Board had also not established on proof that any other relatives were able to maintain her. However, held the High Court, even where no such plea was taken by the *Wakf* Board before the Magistrate, some finding had to be recorded by the latter as required by sub-section (2) of Section 4. This is so because:

> "The resources available with the State *Wakf* Board are not unlimited but limited and as the language of sub-section (2) of Section 4 makes it clear that such limited resources available with the *Wakf* Board are meant for divorced Muslim women who are unable to maintain themselves or who have no relatives having enough means to pay maintenance to her. . . Further the order passed by the Magistrate must also indicate the maintenance (amount) determined by him which is to be paid by the *Wakf* Board."[97]

(The case was redirected to the Magistrate for appropriate proceedings.)

A Critique—Summing up, the Act thus codifies the liabilities of a Muslim husband towards his former wife and children. But the contents of the Act are such that the best tribute that can be paid to it is that it has given an opportunity to the judiciary to not only provide some relief to the deserted Muslim wives but also spur a countrywide debate on the need to look after them and not abandon them to destitution. Beyond the vicarious kudos, the Act invites more criticism than praise. As to the contents of Section 3, we have time to time noted our observation during the case law discussion and subject analysis above. Now something about Section 4. This section casts the first liability on the children. Now, in most of the cases of divorce or desertion, the children are toddlers and the families are poor. The incidence of divorce and desertion is much more among the working class. If the children are grown up and living under the protection of their mother, they normally assist the mother in the bread earning work; but again, under Muhammadan Law, the father is the natural guardian of the children, of their person also. So he takes them away to his family, leaving the deserted woman helpless. Under Muhammadan Law, the father-in-law is under no obligation at all to maintain the daughter-in-law. The doors of the in-laws are closed for her. Her parents in such cases, are also of the low income group; and they have other sons and daughters to look after. But they are only

96. AIR 2001 Gau 103.
97. *Ibid*, at p. 107.

hope, unless they be very old, infirm, themselves in destitution. The relatives would be smartly avoiding the responsibility. To tell them that they would inherit her property would invite the retort that if she has any property, she is not a destitute and she can manage on the basis of that property. The last in the list, the *Wakf* Board has naturally no sentimental attachment to her. The Board is a conglomeration of government servants and "influential" personalities of the society. It has so many priorities to look after, and limited funds. For a destitute to extract help from the *Wakf* Board by legal action is not an easy proposal.

Fortunately, the judiciary has shown awareness towards these problems. Barring few decisions, the Court verdicts have not only provided her the much needed relief, but also expanded the horizons of the egalitarian motive of the Act. The Danial Latifi decision and the Gauhati High Court decision (*supra*) should lead the other courts to new paths of woman emancipation. Finally, it is a matter of the attitude of the society. If the Muslim society continues to view the well-being of the divorced or deserted woman a liability, the hurdle race will continue. If the Muslim society adopts the approach of respect for womanhood, her status will rise better and faster than by dry legal battles.

B. MAINTENANCE OF CHILDREN

Legitimate children.—The maintenance of infant child rests upon the father. In *Hedaya*, the following verse of the Koran, namely—

> "The maintenance of the woman who suckles an infant rests on him to whom the infant is born,"

is mentioned and from which it has been inferred that "the maintenance of an infant child also rests upon the father, because, as maintenance is decreed to the nurse on account of her sustaining the child with her milk, it follows that the same is due to the child himself *a fortiori*".[98]

Thus, a father is bound to maintain his sons until they attain puberty, and his daughters until they are married. He is also responsible for the upkeep of his widowed or divorced daughter, or a child in the custody of the mother. The father is not bound to provide separate maintenance for a minor son or unmarried daughter who refuses to live with him without reasonable cause. An adult son need not be maintained unless he is infirm.[99] The father is not bound to maintain a child who is capable of being maintained out of his or her own property.[100]

If the father is poor or infirm, the mother is bound to maintain the children. And, failing her, it is the duty of the paternal grandfather.[101] A father-in-law is under no obligation to maintain his widowed daughter-in-law.

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98. *Hedaya*, at p. 146.
99. Fyzee, at p. 214.
100. Mulla, at p. 383.
101. Fyzee, at p. 214; Mulla, at p. 383.

Illegitimate children.—In Muslim Law, the father of an illegitimate child is not bound to maintain it. Section 488 of the Criminal Procedure Code, 1908 (as amended up to 1955), however, did bind such a father to pay up to Rs 500 per month by way of maintenance. The father would be liable to pay this amount even if the mother refuses to surrender the illegitimate child to him.

In a case[102], it was held:

> "An agreement to maintain an illegitimate child, for which the Muhammadan Law as such makes no provision, will in my opinion not have the effect of defeating the provisions of any law. As a matter of fact, maintenance of illegitimate children has been statutorily recognised under Section 488 of CrPC in our country and it is in consonance with this wholesome policy that the offsprings born under such circumstances are to be provided for and should not be left to the misfortunes of vagrancy and its attendant social consequences."

It is, however, not open to a Court to award maintenance under Section 488 unless expressly asked for.[103]

Right to maintenance ceases.—(*i*) At puberty or 15 years, according to Muslim Law; and

(*ii*) at 18 years, according to the Indian Majority Act, 1875.

There is a difference of opinion as to whether majority for purposes of maintenance is attained on puberty or at the age of 18 years. The former view has been recommended by a majority of writers and hence should be accepted as correct.

Children's Right of Maintenance: CrPC & 1986 Act— Run Parallel

In *Sk. Abubakkar* v. *Ohidunnessa Bibi*[104] the Calcutta High Court has held that the right of the child to claim maintenance under Section 125 of the Code of Criminal Procedure either by itself or through its mother acting on its behalf remains intact in spite of the right of the mother under Section 3 of the Act of 1986 to claim maintenance for the child for a period of two years from her former husband where she herself maintains the child. While the right of the divorced Muslim woman is limited to 2 years under Section 3 of the Act, the Act virtually does not deal with the right of maintenance of a child from its father and therefore in case of a child the provisions of Section 125 will be clearly applicable. Under Section 125 it is his own right, while under Section 3 of the Act it is a part of the right of the divorced woman. Under Section 125 the child can claim maintenance from its father irrespective of the question as to who

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102. *Sukha* v. *Ninni*, AIR 1966 Raj 163.
103. *Pavitri* v. *Katheesumma*, AIR 1959 Ker 319.
104. 1992 Cri LJ 2826 (Cal).

maintains the child. Under Section 3 of the Act it is limited to the period of 2 years from birth, while under Section 125 of the Code of Criminal Procedure it is logged with the attaining of majority, i.e. 18 years.

In *Haji Farzand Ali* v. *Noorjahan*[105] the petitioner contended that the right of children to maintenance was ancillary to mother's right and the mother had no right to move the court under Section 125 due to the provisions of Sections 4 and 7 of the Act. Rejecting this argument the Rajasthan High Court held that the above contention was absolutely unfounded. Section 125(1)(*b*) and (*c*) CrPC give independent right to the child to move an application claiming maintenance. The right of such child is independent to the right of its mother. All the sub-clauses (*b*), (*c*) and (*d*) of Clause (1) of Section 125 have used the conjunction 'or' making the child a recipient independently of the 'mother' or the 'wife' of the obligor.

In *Rupsan Begum* v. *Mohd. Abdus Sattar*[106] the Gauhati High Court has held that the provision of Section 3(1)(*b*) of the Act providing for a 'reasonable and fair provision and maintenance of minor child to be made and paid to the divorced Muslim woman by former husband for 2 years is a right of Muslim divorced woman and is incidental to the divorce, and the said provision in no way comes in conflict with the provision of Section 125 CrPC providing for maintenance to the child. As such, an order can be passed against a Muslim father after he has divorced his wife if she is unable to maintain the child or children above 2 years who may be living with her.

And after divorce if divorced wife maintains children, then and then alone, she will be entitled to payment under Section 3(1)(*b*) of the Act, fact that she maintained children in pre-divorce period, cannot entitle her to any amount under that provision[107].

Sub-clause (*d*) requires the father to maintain even the married minor female child if her husband is not possessed of sufficient means.

In an article in 1993 AIR Journal Section, 'Shariat Provides Maintenance to unmarried Daughter', the view has been reiterated that whether the daughter is minor or major the obligation to maintain her until her marriage rests with the parents. Maintenance under "Shariat" is enforceable under the Muslim Personal Law (Shariat) Application Act, 1937. Therefore, unmarried daughter can claim maintenance until she is married.[108]

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105. (1988) 1 RLW 179.
106. 1990 Cri LJ 2391 (Gau).
107. *T.K. Abdulla* v. *Subaida*, (2007) 1 DMC 464 (Ker): (2006) 3 KLT 699.
108. *S.A. Karim*, AIR 1993 Journal 44.

A daughter of 10 years of age can also claim maintenance under Section 125 CrPC. In *Naseem* v. *State of U.P.*[109], the facts were like these: The husband had divorced his wife. On application by her for maintenance allowance for herself and to her daughter aged 10 years, the Magistrate had rejected the claim of the wife but accepted the claim for her daughter under Section 125. The present applicant's claim before the Allahabad High Court was that in terms of Section 3 of the Act, a child was entitled to maintenance up to 2 years of age only and not beyond. The Allahabad High Court held that this interpretation of Section 3 goes against any norm of civilised society and cannot be accepted. Section 3 does not exclude the application of general and secular law of maintenance as enunciated in Section 125 CrPC. The latter provides for maintenance to minor children. Section 3 of the Act cannot stand on the way of claim by a child when the latter is more than 2 years.

Now, the Supreme Court has confirmed that children, if unable to maintain themselves, can claim maintenance from their father under Section 125 CrPC independently of their mother's right under Section 3(1)(*b*) of the Act. In *Noor Saba Khatoon* v. *Mohd. Khatoon*,[110] the Supreme Court held that the children's right under Section 3(1)(*b*) can run parallel with Section 125 CrPC. The question was whether the Muslim children were entitled to maintenance under Section 125 up to majority or ability to maintain themselves, or for daughters till their marriage, or their right was restricted to 2 years as per Section 3(1)(*b*) of the Act, notwithstanding Section 125. The facts in brief were: The appellant was married to the respondent and had 3 children from him. The husband turned her and her children out of the home. When, on her application the trial court granted maintenance allowance to her and the children, the husband divorced her and claimed exemption with regard to the wife as the *iddat* period was over. The case went upto the High Court where also it was held that the Act limited maintenance allowance for divorcee up to *iddat*, and for children up to the age of 2 years for each child, notwithstanding Section 125. The Supreme Court held that the right under the Act is that of the mother on behalf of her children and it has nothing to do with the independent right of the minor child under Section 125.

> "A careful reading of the provisions of Section 125 CrPC and Section 3(1)(*b*) of the Act makes it clear that the two provisions apply and cover different situations and there is no conflict and much less a real one, between the two. Whereas the 1986 Act deals with the obligation of a Muslim husband *vis-à-vis* his divorced wife including the payment of maintenance to her for a period of 2 years of fosterage for meeting the infants where they are in the custody of the mother, the obligation of a Muslim father to maintain

109. 1998 All LJ 2270. Reaffirmed in *Muffees*, infra.

110. (1997) 6 SCC 233: AIR 1997 SC 3280: (1998) 1 Bom CR 340. Followed in *Mufees* v. *State of U.P.*, (2007) 1 DMC 22 (All).

the minor children is governed by Section 125 CrPC and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In female children this obligation extends till their marriage. Apart from the statutory provisions referred to above, even under Muslim Personal law, the right of minor child to receive maintenance from their father, till they are able to maintain themselves, is absolute."[111]

C. MAINTENANCE OF PARENTS

According to *Hedaya*:"It is incumbent on a man to provide maintenance for his father, mother, grandfathers, and grandmothers if they should happen to be in necessitous circumstances."[112]

This obligation to maintain does not end by the mere fact that the parents are able to earn something for themselves. If a son is earning something, he is bound to support his poor father who is earning nothing.[113] Or even if the father is capable of earning something, but with much labour and pain. It is positively so stated in *Hedaya*: "If they (the parents) were to labour for subsistence, it would subject them to pain and fatigue, from which it is the express duty of their child to relieve them. It is because of this reason that maintenance of parents is incumbent on the child, although they should be able to subsist by their own industry." According to *Fatwa-i-Alamgiri*, however, the matter is disputed.[114]

The children's obligation to maintain their poor parents is irrespective of sex and wealth. Any son or daughter in easy circumstance may be forced to pay the whole amount of maintenance that may be required, and having done so, may call upon others to contribute equally. It is because the maintenance of parents is an urgent matter, and may even be a matter of life and death. Hence the summary procedure for the purpose, leaving the defaulter to be proceeded against by the aggrieved party in a regular suit.[115] The point may be illustrated with the following example:

A, who has no income-producing property, has a son *B*, with property worth Rs 100,000, and a daughter *C*, with property worth Rs 50,000. It appears to the judge that a monthly allowance of Rs 100 is required for *A*'s maintenance. He should order *B* and *C* to pay Rs 50 each per month; and on either of them making default, he should order the deficiency to be levied out of the property of the other leaving the latter to recover it from the defaulter by separate suit.[116]

111. *Ibid*, at p. 345 (BCR).
112. *Hedaya*, at p. 147.
113. Mulla, at p. 385
114. *See*, Wilson, at p. 205, n. 1.
115. *Ibid*, at pp. 205-206.
116. *Ibid*, at p. 205.

D. MAINTENANCE OF OTHER RELATIONS

All persons who are in 'easy circumstances' are bound to maintain their poor relations who are within the prohibited degrees by consanguinity in proportion to the shares which they would inherit at the time of the death of such poor relations.

Illustrations

(*i*) *A*, who has no income-producing property, has a son, *B*, with property worth Rs 100,000 and a daughter, *C* with property worth Rs 50,000. In suit of maintenance, if it appears to the Court that monthly allowance of Rs 200 is required for *A*'s maintenance, it may order *B* and *C* to pay Rs 100 each per month. In default, this amount may be recovered from the children's properties.[117]

(*ii*) *Liability proportional to rights of inheritance.*—(*a*) A poor person has a father's father and a son's son, both in easy circumstances. The father's father must contribute 1/6th, the son's son 5/6th, of the amount required for his maintenance.

(*b*) A poor person has many relatives, but the only relatives in easy circumstances are a maternal uncle and a paternal first cousin. Here, the maternal uncle must bear the whole charge of maintenance, because he is within the prohibited degrees.

(*c*) A poor person has a paternal uncle and a paternal aunt: the uncle is solely liable to pay maintenance, because he would be the sole heir to the exclusion of the aunt.[118]

E. AMOUNT OF MAINTENANCE AND WHEN IT BECOMES PAYABLE

Amount

Under Hanafi Law.—By reference equally to the social position of husband and wife.

Under Shafii Law.—The position of the husband is alone considered.

Under Shia Law.—By the wife's requirements in respect of food, clothing, residence, service, etc. Regard would also be made to the custom of her equals, among her own people in the same city.[119]

Since both the *Hedaya* and *Fatwa-i-Alamgiri* support the view that maintenance should be fixed with due regard to the condition of both the

117. *Ibid*, at p. 231.
118. Wilson, at pp. 232-33.
119. Tyabji, at p. 319.

husband and wife, hence this view "would no doubt find favour with the Courts in India".[120]

When payable.—Maintenance becomes due from month to month unless otherwise directed by the Court. According to Shia Law, however, the maintenance amount becomes due from day to day.

Devolution of liability where the person primarily liable to pay maintenance is poor.—*A* is a poor person having a son *B*, also poor, a full brother *C*, consanguine brother *D*, and a uterine brother *E*.

Here, if *A* dies first, *B* would be his sole heir, and therefore *B*, if rich, would be solely chargeable with *A*'s maintenance. But since *B* is poor, he is supposed to be non-existent so far as duty of maintenance is concerned. The duty of maintaining *A* devolves upon those who would on that supposition have been *A*'s heirs, namely, *C* and *E*, in the proportion of 5/6th and 1/6th. *D*, the consanguine brother, would have been excluded from the inheritance by *C*, the full brother, and will, therefore, be exempted from the burden of *A*'s maintenance.[121]

According to Shia and Shafii Law, however, there is no legal obligation to maintain any relations other than descendants and ascendants. Thus, brother, sister, uncle and aunt, etc., for example, need not be maintained.

According to Muslim Law, the right to maintenance is lost on apostacy. The Caste Disabilities Removal Act, 1850 provides, however, that a Muslim is bound to maintain relations even after they apostatise. But whether the apostate himself would be bound to maintain his Muslim relations is a point which is still not clear.

F. LIABILITY UNDER THE ENACTED LAWS

Besides the above personal law position, the Criminal Procedure Code, 1973, and the Muslim Women (Protection of Rights on Divorce) Act, 1986 also deal with the subject. Section 125 CrPC requires a person having sufficient means, to maintain, besides his wife, (*a*) a minor child, legitimate or illegitimate who is unable to maintain itself, including a minor married daughter whose husband has no sufficient means to maintain her; (*b*) a major child who is so disabled as to be unable to maintain itself; (*c*) his parents unable to maintain themselves. The maximum burden with respect to any person can be Rs 500 per month. The First Class Magistrate of the area has been empowered to order the payment of the maintenance, and can imprison the defaulter up to one month for each month of default. This section applies to all persons irrespective of their religion. The object of the section is to avoid vagrancy. It is a summary

120. *Ibid*, at p. 320.
121. Wilson, at p. 233.

procedure for speedy remedy. It leaves unaffected the question of personal law rights for which the civil courts have jurisdiction. On a decision by a competent civil court calling for cancellation of his order, the Magistrate will do so under Section 127. He may also vary his original order on proof of a change in the circumstances. The civil court at the time of making a decree, will also take into account the amount received as a result of the Magistrate's order [Section 127(4)].

The Muslim Women (Protection of Rights on Divorce) Act, 1986 states in Section 3(1) that 'Notwithstanding anything contained in any law for the time being in force, a divorced woman shall be entitled to—(*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.' The Act makes the child only a medium entitling her to the particular right. The child is only indirectly a beneficiary through her. It is she who will receive that amount as her maintenance allowance. The section speaks nothing about spending that amount on the child.

Whether the Family Courts have jurisdiction.—In 1996 the Allahabad High Court had held that the Family Court had jurisdiction in respect of application for maintenance etc. under Section 3 of the Act.[122] In 2000 the Andhra Pradesh High Court has held that in such matters the Family Court had no jurisdiction. only the Magistrate can adjudicate them.[123] This view seems to be more in consonance with the wordings of the Act and its Rules.

Law Relating to Maintenance in Several Muslim Countries

Almost all muslim countries today have modernised their laws relating to maintenance of women, children, old parents and deprived relations, and have switched over to Shariat based yet progressive philosophy oriented legislation. To begin with, Pakistan and Bangladesh have established 'Arbitration Councils' for the neglected wife; she can appeal there against her husband to seek an order by the court to provide her maintenance for her livelihood. In Brunei and Malaysia the Shariat Courts have been armed with sufficient powers to reach relief to such wives. The religious councils, state customs and 'Kathi's Courts Enactment, 1955 have been empowered to apply the classical Islamic Law based on Shariat principles to such effect that the neglected married woman can obtain an order from the Court of 'Kathi' (as called there) compelling the husband to make payment of maintenance from time to time. The wilful failure of husband to comply with such order can put him behind bars for a small period.

In Iraq, this jurisdiction is vested in *Kazi*. There, the wife's right to receive maintenance is not adversely affected by her richness, illness or by the fact of

122. *Mohd. Sayeed* v. *Rehana Begum*, 1996 All LJ 1382.
123. *Patnam* v. *P. Ashia*, (2000) 3 ALT 571.

belonging to another religion. She can validly refuse to live with him if he withholds her *mahr* or neglects to maintain her; in such conditions she can live with her parents and still claim the maintenance allowance. Obedient wife's maintenance is a debt on the husband. Membership of another religion is no bar in Jorden also. In Egypt, Iraq, Morocco and Yemen maintenance includes food, clothing, residence, medical treatment and some other expenses recognised by laws. If the wife was Muslim and converts to another religion after marriage, she loses her right to maintenance. Right to accommodation includes separate accommodation if the husband brings a co-wife without her consent. Even if the accommodation provided by him is not suitable to her standard or is situated too far from her place of work to enable her to simultaneously look after her household duties and official duties, she can refuse to accept it, it will not amount to disobedience. But the criterion of obedience is not left to unilateral decision; the court is precluded from passing an order of 'disobedience' as long as the wife justifies her disobedience. Similarly, no obedience against the rules of Shariat can be demanded. In such cases maintenance will be intact. The Iraqi statute also provides that where the husband leaves his wife without support and hides himself or disappears, or has gone missing, the quadi can order maintenance for her from his property. Under Tunisian statute the husband who absconds leaving his wife unattended is ordered by the court to return within one month, failing which, the wife is given option to dissolve the marriage.

In Yemen and Somalia both the husband and wife are obligated to bear the expenses of marital household; however where either is not in a position to do so, the other must pull the cart alone. The expenses are to be shared in proportion to income.

The liability of maintenance of the wife after dissolution of marriage is interlinked with *iddat* period in almost all muslim countries. In Algeria the period of iddat is three months. On failure, the claim must be presented within one year. In Egypt, where the marriage has been consummated, the divorcing husband shall have to pay her the maintenance allowance for the *iddat* period plus *Mata* — which is an amount equal to two years' maintenance allowance. He can make this payment in instalments if he so opts. In Labanon, the period of *iddat* for a separated wife after retirement (*khilwat*) is three menstrual courses, if she is not pregnant and has not attained the 'age of despair'. In pregnancy this period extends to delivery. But where the husband dies, the widow has been left unattended by the law, even when the pregnancy is in progress. The statute of South Yemen declares that if a discordant husband divorces a wife who was at no fault he will pay maintenance for one year. That is a 'compensation' to be obtained by her through the court. The Syrian Code declares that maintenance during *iddat* is like maintenance during marriage which can be extended to a maximum period of nine months. Brunei Darussalam and Tunisia also make provisions for maintenance during *iddat*, and/or pregnancy, as the case may be.

Divorced woman with children

The Islamic countries provide for some additional benefits to the divorced wife having small children. Mother's right to the custody of children is normally not affected by divorce. The classical principle is that when deprived of matrimonial home, she should be provided with shelter for her and her children. In Algeria if the *Qadi* is of the opinion that the husband has misused the power of Talak, he can order payment of compensation to the wife. She can demand accommodation from the husband for herself and her children. In Malaysia this right to residence can extend to expiry of *iddat* period, or children's guardianship period, or her entering in another marital relationship. Egyptian law also requires the husband to provide independent accommodation to the minor children and the divorced wife both, otherwise she can retain possession of the matrimonial home till they remain under her guardianship. Indeed in Iraq, there is special law, entitled the Law of Divorced Wife's Right to Residence, 1983'. During the hearing of the matter for the dissolution of their marriage, the Court can pass an order for her independent residence and in execution order eviction of the husband to make it available to her. (The Qadi in Egypt can also offer her an option for rental from her husband for a suitable residence at other than the matrimonial home.) The Iraqi law however does not allow her these facilities if she independently owns a house or a flat. The Tunisian Code of Personal Status goes one step further: first of all, the Court must be satisfied that reconciliation is no more possible, then only the divorce decree can be passed; and while passing the decree the court, even at its own provide for all important matters relating to the residence of the divorcee, her maintenance, custody of the children and schedule for meeting them. Of course, any of the parties are free to forgo any of these rights. The husband is also bound to pay her remuneration for suckling and keeping custody.

Remuneration for Suckling.— is provided to the divorced Muslim wife in many Islamic countries. When she is with her husband and during *iddat* period following revocable divorce the wife is *not* entitled to such right. But following an irrevocable divorce, during *iddat* and afterwards also the wife owns the right to remuneration for suckling. In the personal laws of Jordan, North Yemen, Somalia, Syria, Tunisia such statutory provisions are incorporated. In North Yemen this type of payment is to be made 'for reasonable period, not exceeding two years'. The Iraqi Code describes 'the cost of child's fosterage to be like that for food'.

Maintenance of Children.— This is the responsibility of the father in generally all the Islamic countries. No doubt it extends to that period also during which the child is in the custody of mother. This period ranges from 7 to 12 years, in some countries (Somalia, South Yemen) 15 years, in Algeria and Morocco till puberty or marriage of the female child. During this period the divorced mother can demand *recompensation* for the amount spent on the child.

In a divorce by mutual agreement the *talaknama* may mention the amount agreed by both for spending on the child. In Algeria the maintenance of the daughter is father's liability till she joins her husband after marriage; in the case of son it extends to his age of majority (Algerian Family Code, 1984). Physically or mentally handicapped children and the school going ones are to be supported further till they recover or finish their education and start earning on their own. In Iraq if the boy is unable to earn, the father's liability continues further. In Jorden the expenses on son and daughter's education is to be wholly born by father. In Egypt also the son can demand expenses from father for his education upto the level of his other peers. According to the Moroccan Code the father's liability to maintain his son runs up to the completion of the latter's education or attaining 21 years of age. This liability does shift from father to mother if the former is indigent; and an affluent son has to fend for himself. In South Yemen both have to share in proportion to their capacity.

Maintenance of Parents and Relatives

Classical Muslim Law requires the children to maintain their parents and needy relatives. This principle is accorded recognition in modern times in the enactments of many Muslim countries. Though wife can demand an 'independent matrimonial home', yet the husband can give shelter to his parents in the same house. Thus the 'Codes of Personal Status' — i.e. family laws of Iraq and Jordan require son and daughter to maintain needy parents; provided the latter are incapable to earn. Deliberate idleness may deprive the parents of this facility. In North Yemen this right is extended to grand parents and other relatives also, in order of priority, i.e. mother first, then father, grand parents and relatives, in that order. In Iraq this liability is linked to inheritance from the receiver of help in proportion. In Syria and Tunisia the liability of the supporter is in proportion to his or her financial condition[124].

More Recent Developments.—The 'double protection' under Section 125 CrPC and Section 3 of the Act (1986) has sometimes caused a needy Muslim woman costly entanglement in procedural wrangle about whether the case should have been heard under CrPC or the Act. This could delay the relief or even frustrate it. Now the Supreme Court has held that Proceedings under Section 125 CrPC are civil in nature. Even if the Court (i.e. trial court) notices there was divorced woman in the case in question, it was open to him (sic) to treat it as petition under the Act considering beneficial nature of the legislation. Proceedings under Section 125 CrPC and claims made under the Act are tried by

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124. 'Maintenance of Woman and Children under Muslim Law: Legislative Trends in Muslim Countries', M. Afjal Wani, (2003) 45 JILI 409 — Author is indebted to this Article for the topic. The Family Law Special Issue of this number of the JILI is highly useful to the LLM students.

Note:—The above narration is in a summary version of the referred Statutes. Consulting original enactment is always advisable for authenticity.

the same Court. In this case it took the deserted woman 16 long years to get the final relief, and they were married some 47 years back and in one of the several arguments of the husband he had stated that he had *talaked* her 30 years back (without proof).[125] This was a judgment by Justice Dr. Arijit Pasayat. Six months later in *Chaurbhuj* v. *Sita Bai*,[126] in which a petition was filed by one Chaturbhuj against the decision of Madhya Pradesh High Court upholding the order of the lower court under Section 125 CrPC granting maintenance allowance to his *deserted* wife Sitabai, Justice Pasayat held that even a *deserted* wife was entitled to maintenance allowance. The learned Judge said that ordering a husband to pay maintenance allowance to his *deserted* (not 'divorced') wife did not amount to awarding him punishment; it was reminding him of his social obligation towards his wife and compelling him to fulfil it.

Is consummation (of marriage) a pre-requisite for entitlement to the benefits of Section 3 on divorce? This question arose in *T.K. Moidu Haji* v. *Konnapalarkandy Mariyam*.[127] The husband objected to the order of the Sessions Court awarding the divorced wife certain sums for maintenance during *iddat* period and fair provision for subsequent life, on the ground that the person he married at the age of 73 and lived with for 4 years was found by him to be dispossessed of the attributes of womanhood and therefore their marriage was never consummated and hence she was disqualified to be called a divorced wife, resulting in her disqualification to claim the benefits of Section 3 of the Act. Rejecting the plea about absence of physical attributes for want of proof, the Kerala High Court held that consummation of marriage can be presumed in this case by applying the Muhammadan Law principle of 'valid retirement' (*Khilwat-us-Sahiha*), as they lived together for at least 3 years. According to Mulla valid retirement is equal to consummation. Moreover, the Court said, Section 3 of the Act does not prescribe consummation as a *sine qua non* for entitlement.

Second question raised by the petitioner was 'is the court debarred from entertaining an application under Section 3 before the expiry of the *iddat* period'? The High Court said that on the contrary the concern shown by Section 3 for the plight of the women on divorce establishes that the Act intents that relief must be available to her immediately on divorce; in fact within one month of the receipt of the application.

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125. *Iqbal Bano* v. *State of U.P.*, (2007) 6 SCC 785: (2007) 3 SCC (Cri) 258: (2007) 2 DMC 1 (SC), decided June 2007: (2007) 6 SCC 785: (2007) 3 SCC (Cri) 258.
126. (2008) 2 SCC 316: (2008) 1 SCC (Cri) 356.
127. (2007) 1 KLJ 314.