The Supreme Court Speaks: Judgments on Muslim Law & Women's Rights

Saumya Uma
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Women’s Research & Action Group
Mumbai
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Dedicated to

All those courageous and determined women who knocked at the doors of the Supreme Court and provided it an opportunity to give positive judgments on Muslim law & women’s rights . . .

and many more such women who were unable to do so.
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### ABBREVIATIONS

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<td>A.I.R.</td>
<td>All India Reporter</td>
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<td>All.</td>
<td>Allahabad</td>
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<td>A.P.</td>
<td>Andhra Pradesh</td>
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<tr>
<td>CEDAW</td>
<td>The Convention on the Elimination of All Forms of Discrimination against Women, 1979</td>
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<td>DMC</td>
<td>Divorce and Maintenance Cases</td>
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<td>Cr L J</td>
<td>Criminal Law Journal</td>
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<td>IA</td>
<td>Indian Appeals</td>
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<td>J.T.</td>
<td>Judgment Today</td>
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<tr>
<td>K.L.J.</td>
<td>Kerala Law Journal</td>
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<tr>
<td>MANU</td>
<td><a href="http://www.manupatra.com">www.manupatra.com</a></td>
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<tr>
<td>Mh L J</td>
<td>Maharashtra Law Journal</td>
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<tr>
<td>Pat.</td>
<td>Patna</td>
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<td>PC</td>
<td>Privy Council</td>
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<td>SC</td>
<td>Supreme Court</td>
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<tr>
<td>SCC</td>
<td>Supreme Court Cases</td>
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<td>SCR</td>
<td>Supreme Court Reporter</td>
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<td>SCW</td>
<td>Supreme Court Weekly</td>
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<tr>
<td><strong>GLOSSARY</strong></td>
<td><strong>Definition</strong></td>
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<tr>
<td>1. Amicus curiae</td>
<td>A person who is not directly involved in a litigation but is appointed as a friend of the court, to advise it on a matter of law directly affecting the litigation</td>
</tr>
<tr>
<td>2. Fatwa</td>
<td>Advisory opinion concerning religious laws / religious edict</td>
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<td>3. Habeas corpus</td>
<td>Is a legal remedy available from High Courts and the Supreme Court, asking that a person who has been illegally detained be produced in court</td>
</tr>
<tr>
<td>4. Halala</td>
<td>A practice by which a divorced woman is required to marry another man, consummate the marriage and obtain a valid divorce from him if she wishes to re-marrying her first husband after divorce</td>
</tr>
<tr>
<td>5. Iddat</td>
<td>A waiting period to be observed by the woman after death of her husband or divorce, before she remarries</td>
</tr>
<tr>
<td>6. Ijtehaad</td>
<td>Is a source of Muslim law; it refers to determining or arriving at a decision about an issue on which the Shariat is silent. The decision is taken in the light of one’s own understanding of the situation as well as that of the spirit of the directives of the Quran</td>
</tr>
<tr>
<td>7. Kabinnama</td>
<td>Marriage certificate / contract of marriage</td>
</tr>
<tr>
<td>8. Mahila adalat</td>
<td>Similar to mahila panchayat</td>
</tr>
<tr>
<td>9. Mahila mandal</td>
<td>Community-based women’s organizations</td>
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<tr>
<td>10. Mahila panchayat</td>
<td>A redress forum for women living in communities, where informal settlement of disputes is undertaken</td>
</tr>
<tr>
<td>11. Maulvi</td>
<td>Religious leader</td>
</tr>
<tr>
<td>12. Mehr</td>
<td>An economic right of woman, to be paid by her husband, the amount of which is stipulated in the contract of marriage as a mark of respect to the woman</td>
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<tr>
<td>13. Nikah</td>
<td>Marriage</td>
</tr>
<tr>
<td>14. Nikahnama</td>
<td>Contract of marriage</td>
</tr>
<tr>
<td>15. Qaza</td>
<td>Judgment by a judge based on the Shariat</td>
</tr>
<tr>
<td>16. Qazi</td>
<td>Judge who arrives at a judgment based on the religious tenets of Islam</td>
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<tr>
<td>17. Quran</td>
<td>The central religious text of Islam</td>
</tr>
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<td>18. Shariat</td>
<td>Islamic legal code based on the Quran and other sources of Islamic law</td>
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<tr>
<td>19. Tafweez-e-talaq</td>
<td>A form of divorce in which husband delegates his power of divorce to his wife</td>
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<tr>
<td>20. Talaq</td>
<td>Divorce</td>
</tr>
<tr>
<td>21. Triple talaq</td>
<td>A method of divorce practiced in India by which husband unilaterally divorces wife by pronouncing the word talaq thrice</td>
</tr>
<tr>
<td>22. Ulema</td>
<td>A body of Muslim legal scholars and functionaries who are arbiters of the Shariat</td>
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ABOUT THE AUTHOR

Saumya Uma is a lawyer and a women's rights activist. She graduated from National Law School of India, Bangalore, in 1994. Soon afterwards, she began working with Majlis, a Mumbai-based legal and cultural centre for women, where she represented women in cases of domestic violence in the Bombay High Court and Family Court. She obtained an LL.M. in Human Rights and Family Law from Bombay University in 1997 and an LL.M. in International Human Rights from University of Nottingham, U.K. in 1999. Subsequently, she worked for a year with India Centre for Human Rights and Law (ICHRL), Mumbai, in the capacity of Assistant Director. In the year 2000, she initiated ICC-India: the Indian campaign on the International Criminal Court, which she continues to coordinate. Since 2001, she has been working with Women's Research & Action Group (WRAG) – a non-profit organization working on women's rights - as Co-Director. In 2002, she initiated the ‘Justice and Accountability Matters’ programme in WRAG which she also continues to coordinate.

As part of her work, she conducts programmes on legal literacy and human rights awareness with varied groups, including underprivileged women living in communities, adolescent girls, college students, police, seminarians, social activists and representatives of non-governmental organizations. Her endeavour has been to make law accessible to the lay woman, particularly women belonging to minority and underprivileged communities. She has authored two books on International Criminal Court and India. Since the year 2005, she became actively engaged with the campaign on Communal Violence Bill, advocating for an incorporation of international standards, a gender perspective and a meaningful consultation with survivors on the same. She has also been campaigning for the implementation of Justice Srikrishna Commission report that enquired into communal violence in Mumbai in 1992-93. Her field of specialization is women’s rights, human rights and the law.
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<td>to wife</td>
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<td>India</td>
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India's constitution was a milestone for women’s advancement; the right of non-discrimination on the basis of sex is guaranteed in the list of justiciable Fundamental Rights, as also equal protection under the law and equal opportunity in public employment. Yet, judging from the status of women in India, this has not always been the case. These guarantees did little to bring about social and material change in the lives of most women. Vast numbers of women lack essential support for fundamental functions of a human life. This is frequently caused by their being women. The constitution protects sex equality, non-discrimination, and free choice of religion, but it also retains plural systems of religious personal law. With the exception of commercial law which was codified on a nationwide basis by the British and has remained so, civil law remains the province of various personal systems of law. Personal laws cover rights within marriage, divorce, maintenance and inheritance, and all of them discriminate against women. The system of personal laws creates difficulties not only for gender equality and for non-discrimination on the basis of religion. Secularism notwithstanding, the state has been unwilling to radically interfere in matters of the family, marriage and personal law which are widely seen as the domain of religious and traditional authorities and where religious and customary precepts (the latter often giving women even fewer rights than the former) continue to hold sway.

Among a population of over a billion Muslims spread across the world, India has one of the largest concentrations of Muslim population. The Muslim community in India is not homogenous. It is divided into sects (Shias and Sunnis) and sub-sects (Hanafis, Shafis, Mallikis, Hanbalis, Bohras, Khojas, Innaasharis etc). Each religious community in India, including the Muslim community, is governed by a different set of family laws (popularly known as ‘personal laws) that governs issues arising out of matrimonial relations, such as marriage, divorce, maintenance and alimony, inheritance and succession. India’s Muslim community is governed by a complex set of laws, consisting of uncodified, statutory (codified), customary laws and practices. Uncodified laws derive their basis from interpretations of Quranic verses, ranging from the most orthodox to most liberal interpretations. Uncodified laws and customary laws and practices differ with each sect and sub-sect of the Muslim community in India, while statutory laws and judicial interpretations are by and large applicable to the entire Muslim community.

There has been a history of law reforms in Muslim family law in India dating back to the British period. The British government enacted the Shariat Application Act, 1937 which was an attempt at codification of Muslim family law. Dissolution of the Muslim Marriages Act was enacted in 1939, providing, for the first time, a statutory right for a woman to obtain a divorce from her husband in a court of law. Thereafter, for several decades, no further reforms were made in Muslim family law. In 1986, after the Supreme Court pronounced its judgment in Shah Bano's case, where it upheld Muslim women's right to post-divorce maintenance, Muslim family law and women's rights within the same came to be discussed with renewed vigour. With a view to neutralize the consequences of the judgment, the controversial Muslim Women (Protection of Rights on Divorce) Act was passed. Since then there has been little visible effort by the state or the Muslim community to revive the process of gender-just reforms in Muslim family law. Repeated communal violence that targeted the minority community during these decades has created a sense of insecurity and alienation within the Muslim community. In this context, when the community is enmeshed with issues related to its identity, survival, physical and economic security, the right of Muslim women to a dignified life has taken a backseat in public consciousness.

Judgments on Muslim Law & Women’s Rights
There has been inadequate progress towards the secularization of personal laws. The process of bringing about gender-just reforms in family laws needs to be preceded by a dialogue among various actors involved in order to build a consensus on the reforms required. Overall, the process of legal reform is protracted and is unlikely to be resolved any time soon. This process could take several years, as indicated by the experience of the Parsi and Christian communities in India in bringing about reforms in their family law in the past two decades.

Simultaneous with the discussion and debate on reforms within Muslim family law that would benefit women, a significant parallel process has been in progress which has slowly but surely helped in consolidating the rights of Muslim women. Muslim women have knocked at the doors of the courts of law to assert their individual rights within family law. Many courts of law across the country, including Family courts, High Courts and the Supreme Court, have responded to these petitions and pronounced judgments on issues pertaining to women's rights within Muslim family law. Since the Supreme Court's judgments are binding upon all courts across the country, such judgments on women's rights within Muslim family law bear a special significance. While there is no conclusive study on the percentage of Muslim women who access courts of law as compared to women of other religious communities, Muslim women do approach courts of law but the socio-economic and cultural status of Muslim women has created serious obstacles in their access to justice through courts of law. This is partly because of the availability for Muslims of extra-judicial divorce and the ineligibility of Muslim women from the maintenance provisions of Section 125 of the Cr.P.C.

In this context, the present publication is timely and useful for the collective and individual struggles of women for a dignified life, both within courts of law as well as through informal forums of dispute resolution. The publication, aimed at popularizing Supreme Court judgments on Muslim family law that are beneficial to women, forms one of the many strategies that are urgently required to ensure that anti-women and anti-Islamic practices and beliefs that violate a Muslim woman's dignity are countered.

This volume is a pioneering and commendable effort by a women's rights advocate and activist who has worked closely with underprivileged women from the Muslim community, in bridging the gap between judicial pronouncements and practices at the grassroots on aspects of Muslim family law in India. This publication, with its compilation of landmark judgments that are explained in a simple manner in order to reach out to lay women, would definitely help conscious women's rights activists and organizations to arm themselves in the struggle for dignity of women within marriage and after divorce – a struggle that is bound to be intense and protracted.

This publication is essentially a compilation of case law. Yet, various chapters with the incorporation of a background note, an in depth analysis of the implications of the judgment as well as a discussion of other related judgments, makes it a valuable book not only for activists but also lawyers and judges who deal with issues pertaining to Muslim family law. The concluding chapter is useful in raising many issues and dilemmas that would necessarily have to be addressed in future through the collective efforts of the legal, academic and activist communities.

– Dr. Zoya Hasan
Professor at the Jawaharlal Nehru University and
Member, National Commission for Minorities,
Government of India
INTRODUCTION

Supreme Court is the highest judicial institution under the Indian Constitution. By pronouncing judgments, it not only resolves disputes but also states the law and decides the rights of parties. It also interprets laws and legal provisions when their meaning is ambiguous or when they seem to contradict one another, and sets precedents for itself and other courts to follow.

Muslim law in India is partly codified and mostly uncodified. The law is uncertain and ambiguous on many issues. The Muslim community in India interprets the law differently depending on the sect and sub-sector that one belongs to. Many of the verses of the Holy Quran have been interpreted by religious and patriarchal forces in a manner detrimental to the interests of women. Seen in this light, Supreme Court judgments on Muslim family law bear a special relevance and significance to Muslim women’s individual and collective struggles to lead a life with dignity.

Few women have approached the Supreme Court for asserting their rights related to Muslim family law. Hence, opportunities for courts to give judgments protecting Muslim women’s rights have been limited. Fewer women have obtained judgments in their favour, which also lay down a law or interpret legal provisions. Some of these judgments have sparked protests from patriarchal forces within the community. Though these judgments are well-known, women find it difficult to counter the resistance from the community and seek recourse to law. Other judgments remain dormant in law reports, only to be accessed by lawyers, judges, law students and researchers from time to time. They are not known to most lay persons, particularly women. Hence, practices that adversely affect women’s rights continue to exist and remain mostly unchallenged in courts of law.

A primary objective of this work is to contribute to bridging the existing gap between the law and practice, by disseminating information on landmark judgments of the Supreme Court on Muslim law and women’s rights. Such judgments have the potential to strengthen individual and collective struggles of Muslim women for equality and justice in the family sphere, within and outside the courts. Needless to say, all Supreme Court judgments are not infallible. Many contain communal and patriarchal biases. However, this compilation culls out, highlights and explains only the judgments beneficial to women.

It is pertinent to note that there is no record at all of the number of Muslim women approaching district courts for matrimonial reliefs, as judgments of such courts are not reported. One cannot even begin to guess if women obtain justice from such courts. Due to a lack of access to quality legal aid, Muslim women’s access to justice from High Courts is poor, and from the Supreme Court even more remote. There are many lawyers practising in the district and High courts, fighting their small battles in representing Muslim women in family law cases and trying to obtain judgments in their favour. This compilation is intended to be a resource material to all such lawyers.

Mahila mandals, mahila panchayats, mahila adalats, women’s cells and such other informal / semi-formal dispute resolution mechanisms intervene on behalf of women. They play a significant role in negotiating and settling matrimonial disputes amicably.

Judgments on Muslim Law & Women’s Rights
outside the formal judicial structure. This book is also aimed at disseminating information to members of such forums so that the Supreme Court judgments favourable to women maybe used while negotiating for the rights of Muslim women. It is also hoped that this book will contribute to and strengthen the national campaign on reform of Muslim law in a small way.

As far as practicable, recent judgments have been included in this compilation, except where no recent judgments were available on an important principle. Judgments chosen for this book are those that have laid down an important principle in Muslim law, and which continue to remain law of the land. They also include observations made by the Supreme Court on aspects of Muslim law. Care has been taken to include issues such as custody and compulsory registration of marriages, which apply to all religious communities, only because they are relevant issues for the Muslim community. A consistent demand has come from over 25 communities that Women’s Research & Action Group works with, for information related to property rights of Muslim women. In response to the demand, judgments on property rights of women have been included in this compilation.

This book summarizes landmark judgments of the Supreme Court on Muslim family law and women’s rights, and does not reproduce the judgments. However, copies of the judgments in English are available with the publisher upon request. While summarizing, legal language and jargon, reference to laws, sections, sub-sections and prior judgments have been kept to a minimum, but could not be omitted in their entirety. Some judgments deal with multiple issues. However, in order not to confuse the reader, only the issues relevant to the topic at hand are highlighted and discussed. Some judgments included in this compilation have political and / or communal overtones and implications. While endorsing the law that is laid down by the Supreme Court, there is a need to work on countering the communal prejudices with which the findings have been arrived at and the law has been laid down. The write-up on the respective judgments carry a note of the concerns to the communal implications.
SOME QUOTABLE QUOTES

Reproduced below are some positive comments and observations made by the Supreme Court pertaining to Muslim law and women’s rights. This would help us understand how the apex court approaches these issues. The negative observations and comments anyway gain publicity through other sources!

ON ISLAM & MUSLIM LAW

The word “Islam” means “peace and submission.” In its religious connotation it is understood as “submission to the Will of god.”...Muslim Law is admittedly to be based upon a well recognized system of jurisprudence providing many rational and revolutionary concepts, which could not be conceived by the other systems of Law in force at the time of its inception... The small beginnings from which it grew and the comparatively short space of time within which it attained its wonderful development marked its position as one of the most important judicial system of the civilized world. (Justice R.P. Sethi in Lily Thomas vs Union of India AIR 2000 SC 1650 at para 61, page 1666)

ON MARRIAGE UNDER MUSLIM LAW

(Under Muslim law) ... marriage is a sacrosanct contract and not a purely religious ceremony as in the case of Hindu law. (Justice Fazal Ali in Sirajmohmedkhan Jannohamadkhan vs Hafizunnisa Yasinkhan & another AIR 1981 SC 1972 at para 6, pages 1974)

ON SEX WITHIN MARRIAGE

Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a woman’s mind and body. The result being that if she does not get proper sexual satisfaction, it will lead to depression and frustration. (quoted with approval by Justice Fazal Ali in Sirajmohmedkhan Jannohamadkhan vs Hafizunnisa Yasinkhan & another AIR 1981 SC 1972 at para 22, pages 1977-78)

ON MAINTENANCE TO WOMEN UNDER CRIMINAL PROCEDURE CODE

After the International Year of Women when all the important countries of the world are trying to give the fair sex their rightful place in society and are working for the complete emancipation of women by breaking the old shackles and bondage in which they were involved, it is difficult to accept a contention that the salutary provisions of the Code are merely meant to provide a wife merely with food, clothing and lodging as if she is only a chattel and has to depend on the sweet will and mercy of the husband. (Justice Fazal Ali in Sirajmohmedkhan Jannohamadkhan vs Hafizunnisa Yasinkhan & another AIR 1981 SC 1972 at para 14, page 1976)

ON HUSBAND’S DUTY TO PAY MAINTENANCE TO DIVORCED WIFE

A woman on her marriage ... shares with her husband, her emotions, sentiments, mind and body, and her investment in her marriage is her entire life ... When a relationship of this
nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognized ... it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. (Justice S. Rajendra Babu in *Danial Latifi vs Union of India* AIR 2001 SC 3958 at para 20, p. 3967)

**ON POLYGAMY**

It may be permissible for Muslims to enter into four marriages with four women ... but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy ... What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one ... is a practice followed by any community ... the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform ...(emphasis is the author’s) (Javed vs State of Haryana AIR 2003 SC 3057 at para 60, page 3073)

Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though capacity to do justice between the co-wives in law is condition precedent... Under the Muslim law plurality of marriage is not unconditionally conferred upon the husband. (*Lily Thomas vs Union of India* AIR 2000 SC 1650 at para 61, page 1666)

**ON INTERPRETING MATRIMONIAL LAWS**

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male-dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. (Justice S. Rajendra Babu in *Danial Latifi vs Union of India* AIR 2001 SC 3958 at para 20, p. 3967)

**ON LAW REFORM**

The directive principles of the Constitution themselves visualize diversity and attempted to foster uniformity among people of different faiths. A uniform law, though is highly desirable, enactments thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. (*Pannalal Bansilal vs State of A.P* 1996 AIR SCW 507 at p. 515)
MARRIAGE
1. PRESUMPTION OF MARRIAGE

If a man and a woman had cohabited continuously and for a prolonged period, a presumption of lawful marriage would arise.

(Mohammed Amin vs Vakil Ahmed AIR 1952 SC 358 decided by Justices Mahajan, Chandrasekhara Aiyar and Bhagwati)

Law referred to: S. 114 of Indian Evidence Act, 1872

BACKGROUND

Whenever a Muslim woman approaches the court for matrimonial reliefs, or for rights flowing from marriage or divorce, the legal validity of the marriage requires to be proved in court. This can be established by direct or indirect evidence. Where direct evidence, such as a nikahnama / kabinnama, is not available, the court would resort to determining the legality of marriage through indirect means. Indirect means would involve presumption of marriage drawn from certain facts. Section 114 of the Indian Evidence Act permits a presumption of marriage on the basis of continuous and prolonged cohabitation of a man and woman. This is because law leans in favour of legitimacy of marriage. This section is applicable to Muslim marriages as well.

FACTS OF THE CASE

Haji, a Sunni Muslim, died in 1940, leaving behind many properties. The case involves a property dispute among the family members (his sons, daughter and wife on one side, and his sister, his daughter by a predeceased wife, his nephews and grand nephew on the other side). In this case, for Haji’s sons, daughter and wife, Rahima to claim a share of the property, it was necessary to prove that Haji’s marriage with Rahima was legally valid. No document was available as evidence indicating that marriage between Haji and Rahima actually took place. Both sides brought many witnesses to the court, who gave oral evidence on whether or not the marriage took place. However, the oral evidence was not conclusive. Haji and Rahima had lived together for 23-24 years and 4 children were born out of their relationship.

ISSUE FOR DETERMINATION

In the absence of direct evidence, would a presumption of marriage arise on the basis of prolonged and continued cohabitation between the couple?
JUDGMENT

Based on the facts of the case - Haji and Rahima had lived together continuously for 24 years openly and to the knowledge of all their relatives and friends, the children born through the relationship stayed with Haji and Rahima, Haji had purchased a house in the name of his children and had described them as his sons in the sale deed – the court raised the presumption of lawful marriage.

The court stated a presumption in favour of a lawful marriage arose in the absence of direct proof, based on a prolonged and continuous cohabitation as husband and wife. This presumption in favour of a lawful marriage arose where there was “no insurmountable obstacle to such a marriage” – such as prohibited relationship between the parties, the woman being an undivorced wife of a husband who was alive, if the conduct of the couple was incompatible with the existence of the relationship of husband and wife or if the woman was admittedly a prostitute before she was brought to the man’s house. In all other cases, a presumption of lawful marriage would arise and such a presumption would be sufficient to establish that there was a lawful marriage between the couple.

IMPLICATIONS OF THE JUDGMENT

The woman’s failure to produce or prove the marriage contract in court does not imply that her marriage is invalid, or that she is not entitled to matrimonial rights. She can gather and produce evidence indicating prolonged and continuous cohabitation with her husband. If the husband or any other party denies the marriage in court, it would be the responsibility of such a person to prove that the marriage is not lawful.

NOTES

- The Supreme Court relied upon earlier judgments in Abdul Rasak vs Aga Mahomed Jaffer 31 Ind App. 56 (P.C.) and Ghasanfar Ali Khan vs Kaniz Fatima 87 Ind. App. 105 (P.C.) which were also Muslim marriages in which the issue of presumption of a lawful marriage arose.
- Presumption of a lawful marriage is a general principle of law that is applicable to marriages of all communities.
- The court, by excluding situations where the woman was a prostitute, from the legal presumption, missed an opportunity to be reformist and condemned all prostitutes to be irredeemable.
- The Supreme Court has reiterated this position in other judgments, including Gokal Chand vs Parveen Kumari AIR 1952 SC 231 and Badri Prasad vs Deputy Director of Consolidation AIR 1978 SC 1557.
2. VALIDITY OF MARRIAGE WITH PREGNANT WOMAN

Marriage valid if pregnancy was known to husband.

(Amina vs Hasan Koya 2003 Cri.L.J. 2540 (SC), decided by Justices M.B.Shah & Arun Kumar)


FACTS OF THE CASE

Amina and Hasan married each other in 1972 according to Muslim law. A girl child, Soudha, was born to them four months later. Hasan divorced Amina in May 1977. Amina then filed a petition in the magistrate’s court for maintenance seeking Rs. 150 per month for herself and Rs. 125 per month for Soudha. In reply to the petition, Hasan stated that Amina was already pregnant at the time of marriage and that she had concealed the same from him. He therefore argued that their marriage was invalid in law and that he was not liable to pay her any maintenance. He further said that Soudha was not his child and hence he had no obligation to pay maintenance to the child.

The magistrate’s court held that the marriage was valid and awarded maintenance to Amina. No maintenance was awarded to Soudha as the court concluded that Hasan was not the father of the child. On appeal, the higher court came to the conclusion that the marriage was invalid, and refused to grant any maintenance to Amina or Soudha. The Kerala High Court confirmed that the marriage was invalid. Amina appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the marriage between the parties was valid in law

JUDGMENT

The Supreme Court found the judgment of lower courts “wholly unwarranted, incorrect and unacceptable.” The Supreme Court concluded that Hasan was fully aware of Amina’s pregnancy at the time of marriage and that the marriage was valid. It further decided that therefore, Hasan could not avoid liability to pay maintenance to Amina or Soudha. Its conclusion was based on the following considerations:

- Amina was five months’ pregnant at the time of marriage. It would be impossible to conceal the pregnancy from Hasan either at the time of or subsequent to the marriage
- Birth certificate of Soudha showed Hasan as the father and Amina as the mother
Evidence of the doctor who performed the delivery indicated that Hasan had attended on Amina in hospital after the delivery

The conduct of the husband after the marriage – he did not raise any objection after marriage, was present at the time of delivery and lived with Amina and the child for four and a half years thereafter

**Implications of the Judgment**

In situations where the husband disputes the paternity of the child and/or the validity of marriage, the court will examine all facts and evidence in relation to the case, including the behaviour of the parties. Mere denial of validity of marriage or paternity of the child by the husband will not be accepted implicitly by the court.
3. COMPULSORY REGISTRATION OF MARRIAGE

Marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable. Non-registration of marriage affects women to a great measure.

(Smt. Seema vs Ashwani Kumar, (2006) 2 SCC 578, decided by Justices Arijit Pasayat & S.H.Kapadia)

LAWS REFERRED TO:

Assam Moslem Marriages and Divorce Registration Act, 1935
Orissa Muhammadan Marriages and Divorce Registration Act, 1949
Bengal Muhammadan Marriages and Divorce Registration Act, 1876
Bombay Registration of Marriages Act, 1953 (applicable to Maharashtra & Gujarat)
The Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976
The Himachal Pradesh Registration of Marriages Act, 1996
Special Marriage Act, 1954
Hindu Marriage Act, 1955
Indian Christian Marriage Act, 1872
Parsi Marriage & Divorce Act, 1936
The Law of Marriages (applicable to Goa, Daman & Diu)
Portuguese Civil Code (applicable to Goa)
Code of Civil Registration (applicable to Goa)
Foreign Marriage Act, 1969
Jammu & Kashmir Hindu Marriage Act, 1980
Jammu & Kashmir Muslim Marriages Registration Act, 1981
Jammu & Kashmir Christian Marriage and Divorce Act, 1957
U.P. Hindu Marriage Registration Rules, 1973
Pondicherry Hindu Marriage (Registration) Rules, 1969
The Haryana Hindu Marriage Registration Rules, 2001
West Bengal Hindu Marriage Registration Rules, 1958
BACKGROUND

In India, registration of marriage is not compulsory for all religious communities, including Muslims. While some states have enacted a law for compulsory registration, other states have legal provisions for voluntary registration and some others have no law on the subject at all. In 1993, India ratified the U.N. Convention on Elimination of Discrimination Against Women (CEDAW) 1980. This Convention provides for compulsory registration of marriage. The Government of India made a reservation to the provision, saying that though it agreed in principle that compulsory registration of marriages was highly desirable, this was not practical in a vast country like India with its variety of customs, religions and level of literacy.

In recent years, there has been a move towards making registration of marriages compulsory. However, women’s organizations and activists, including WRAG, have been concerned that making registration of marriages compulsory could lead to considering marriages invalid in law if they are not registered. Devious husbands could take advantage of such a position by intentionally not registering their marriages, thereby disadvantaging a vast majority of women who were illiterate and not aware of the requirement of registration. Hence, groups including WRAG have sought for encouraging registration of marriage as a viable option, until such time that every woman knows that registration of marriage is required, and has the means to register her marriage.

The present case was a transfer petition (for transfer of petition from one court to another). While hearing the petition, the Supreme Court dealt with the issue of registration of marriages for all religious communities. Since the judgment applies to and has repercussions on women entering into Muslim marriages, the judgment has been included in the present compilation.

PROCEEDINGS BEFORE AND OBSERVATIONS OF THE COURT

The Court observed the present legal position in India on the issue of registration of marriages. There were four legislations extending to Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh, that provided for compulsory registration of marriages, it said. In Assam, Bihar, West Bengal, Orissa and Meghalaya, provisions have
been made 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 Indian citizens irrespective of religion each marriage is registered by the Marriage Officer specially appointed for the purpose. The registration of marriage is compulsory under matrimonial law applicable to Christians and Parsis. The court further detailed the legal provisions under Hindu law and other relevant state and central laws. It highlighted that in Jammu and Kashmir, a law had been enacted making registration within 30 days of the *nikah* ceremony for all Muslim marriages. However, the law was not being enforced.

National Commission for Women filed an affidavit in the Supreme Court opining that non-registration of marriages affects women the most and hence has, since its inception, supported the proposal for legislation on compulsory registration of marriages. It stated that 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 married women to claim their right to live in the matrimonial house, maintenance, etc.

(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.

(f) Deterring men from deserting women after marriage.

(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.”

The Court noted with concern that in large number of cases, some unscrupulous persons are denying the existence of marriage taking advantage of the situation that in most of the states there is no official record of the marriage. It observed that if the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons can be avoided.

The court observed as follows: *As rightly contended by the National Commission, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place.* It noted that although the registration itself cannot be proof of validity of a marriage, registration had a great evidentiary value in matters of custody of children, rights of children from parents whose marriage is registered and the age of parties to the marriage.
Judgment

Based on these observations, the court concluded that it would be in the interest of the society if registration of marriages is made compulsory. It stated that it was 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 solemnized.

It directed the Central and state governments to take the following steps:

(i) The procedure for registration should be notified by respective States within three months from today. This can be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.

(ii) The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated. The consequence of non-registration of marriages or for filing false declaration shall also be provided for in the said Rules. Needless to add that the object of the said Rules shall be to carry out the directions of this Court.

(iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.

Implications of the Judgment

Registering all marriages, including Muslim marriages, is now compulsory. The judgment does not clearly state whether non-registration of marriage would attract any punishment / fine, or affect the validity of marriage itself. The rules to be enacted by the states may provide for the same. However, the judgment is quite clear that as a natural consequence, the effect of non-registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered. Hence it would be beneficial to register the marriage under existing / new law to be enacted for the purpose in each state.

Registration does not necessarily mean registration under Special Marriage Act; it would be under a state law providing for the same. A careful reading of the judgment shows that the Supreme Court’s direction towards compulsory registration of marriages of all communities is not intended at making inroads into Muslim law, but to facilitate prevention of child marriages and to help women to obtain their matrimonial rights. This is evident from the following observation of the Supreme Court: “Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of
custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable.”

Registration of marriages, as directed by this judgment, is not the first attempt to prevent child marriages. The Child Marriage Restraint Act 1929 remains in force and is applicable to all marriages performed in India, including Muslim marriages. The latest amendment - the Prohibition of Child Marriage Act 2006 - prohibits solemnization of a child marriage (marriage of a girl below 18 years of age and boy below 21 years of age), and provides an option to the contracting party who is a child to petition for annulling the marriage for up to two years after attaining majority.

There has also been an attempt by the National Commission for Women to bring about a law on compulsory registration of marriages, through “Compulsory Registration of Marriage Bill 2005”. This has not been enacted as a law as yet, as on 2 November 2007 at the time of the final draft of this book. For details of the Bill, please see www.ncw.nic.in under “New Bills / Laws Proposed”. 

The Supreme Court Speaks
MATRIMONIAL RELIEFS
4. MAINTENANCE TO CHILD

The father is duty-bound to maintain his children until they are able to maintain themselves or till they marry.

(Noor Saba Khatoon vs Mohammed Qasim AIR 1997 SC 3280, decided by Justices A.S.Anand & K.Venkataswami)

Laws referred to: S. 125 of Criminal Procedure Code, 1974; S. 3(1)(b) of Muslim Women (Protection of Rights on Divorce) Act, 1986

BACKGROUND

S. 125 of Criminal Procedure Code 1974 states that children are entitled to maintenance until the time they attain majority or are able to maintain themselves, whichever date is earlier, or, in the case of female children, till they get married. This is a secular law and was applicable to all religious communities. However, in 1986, after the controversy over the Shah Bano judgment that gave Muslim women a right to life-long maintenance after divorce under this law, the Parliament created a new law – Muslim Women (Protection of Rights on Divorce) Act. This law sought to nullify the effect of the Supreme Court judgment in Shah Bano’s judgment. The question of maintenance to children was not considered in Shah Bano’s judgment. However, this 1986 Act also contains a provision in S. 3(1)(b) stating that the woman was entitled to an additional maintenance for taking care of her children a period of two years from their date of birth, over and above the maintenance she claims for herself. In the present case, the Supreme Court rules on whether children will be entitled to maintenance beyond the age of two.

FACTS

Noor Saba Khatoon and Mohammed Qasim married each other in 1980. Subsequently, three children were born to them – two daughters and a son. Some years later, they had a dispute, based on which Mohammed Qasim turned Noor Khatoon out of their matrimonial home with their three children. He also refused and neglected to maintain her and the children afterwards. He then married another woman, Shahnawaz Begum. Noor Khatoon approached the local court and claimed maintenance for herself and the three children. The court found that Mohammed Qasim had agricultural land and was carrying on a business in electrical appliances, and had sufficient means to maintain his wife and children, but had neglected to maintain them. In 1993, the court ordered Mohammed Qasim to pay Noor Khatoon a maintenance of Rs. 200 a month and each of the children Rs. 150 per month.

Mohammed Qasim then divorced Noor Khatoon and filed an application before the same court, asking for a modification of its order. He pleaded in court that since he had divorced Noor Khatoon, Muslim Women (Protection of Rights on Divorce) Act 1986 would apply,
and under that law, he was duty-bound to maintain his children only for two years after their birth. The court refused his plea and said that the children’s maintenance would not be affected by the divorce. The husband approached the higher court for modification of the order, where again, his plea was refused. He then challenged the correctness of the order in the High Court, where his plea was partly allowed. He then appealed to the Supreme Court, pleading that he was not duty-bound to maintain his children until they attained majority or were able to maintain themselves.

**Issue for Determination**

Whether the children of Muslim parents are entitled to a grant of maintenance under Section 125, Cr. P. C. for the period till they attain majority or are able to maintain themselves, whichever date is earlier or in the case of female children till they get married, or is their right restricted to the grant of maintenance only for a period of two years after birth as prescribed under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986?

**Judgment**

The court said:

...the children of Muslim parents are entitled to claim maintenance under Section 125 Cr. P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females, till they get married, and this right is not restricted, affected or controlled by divorcee wife’s right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. (para 11, page 3285)

It reasoned that the divorced woman is entitled to a maximum of two years’ maintenance under the 1986 Act on her own behalf for children living with her. This was a “separate, distinct right” independent of the right of the mother to claim maintenance. This is aimed at providing some extra amount to the mother for her nourishment for nursing or taking care of the infant/infants up to a period of two years. It has nothing to do with the right of the child/children to claim maintenance under Section 125 Cr. P.C.

**Implications of the Judgment**

A Muslim father’s duty to maintain his children extends till they become majors or are able to maintain themselves or, in the case of female children, till they get married. So long as the children are unable to maintain themselves and other conditions are met, it remains his absolute obligation to provide for them.
5. CUSTODY OF CHILD

Welfare of child is of paramount consideration to the Court.

(Syed Saleemuddin vs Dr. Rukhsana & others AIR 2001 SC 2172, decided by D.P.Mohapatra J & Brijesh Kumar J)

Law referred to: Art. 226 of Constitution of India, Muslim law (uncodified)

FACTS OF THE CASE

Syed Saleemuddin and Dr. Rukhsana married each other in 1993 and have two children—one daughter aged 6 years and a son aged 5 years. The husband is a businessman and the wife is an Ayurvedic doctor in Hyderabad. In March 2000, Rukhsana sustained burn injuries when she was in her house. She was admitted to a hospital, from where she made a statement to the police. In her statement, she alleged that her husband harassed her for dowry and attempted to kill her by setting her on fire after pouring petrol. Her statement was registered by the local police station. Some weeks later, while she was still in hospital, she filed a habeus corpus petition in court through her brother, Irfanullah, asking for the children to be produced and for transfer of custody of her children from her husband to her. The Hyderabad High Court ordered the husband to produce the children, and on the basis of statement made by the wife, it directed that the custody of children be granted to Rukhsana, and temporarily to Irfanullah till Rukhsana recovered from her burn injuries. It also directed the husband to deposit Rs. 1 lakh with the court towards the medical expenses of Rukhsana, and directed the police with regard to investigation based on the criminal complaint lodged by her. The husband appealed against this judgment in the Supreme Court.

JUDGMENT

In the Supreme Court, the husband stated that he had no objections if Rukhsana had custody of the children till the Family Court looked into and decided his petition for permanent custody of the children. Based on this, the issue of custody was amicably settled.

The court explained that the habeus corpus petition dealt with the machinery of justice, and was aimed at securing release of a person who was illegally restrained of his / her liberty. It referred to previous judgments of the Supreme Court, and stated that in an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. It reiterated a well-settled principle that in a matter of custody of a child, the welfare of the child is of paramount consideration of the Court.
**IMPlications of the Judgment**

In determining the custody of child, courts would look at serving the best interests of the child, over and above legal rights of parties. Under Sunni and Shia law, a Muslim woman is entitled to have custody of her son and daughter only up to a prescribed age. However, the courts have adopted a progressive attitude, disregarding the orthodox principle of supremacy of the father’s right. The judgment in *Syed Saleemuddin*, read in consonance with other Supreme Court judgments on the issue of custody, makes it clear that the courts give primary importance to welfare of the children, and not the legal rights of parents, while deciding the issue of custody for all communities, including the Muslim community. Other landmark Supreme Court judgments include *Chandrakala Menon vs Vipin Menon*, (1993) 2 SCC 6 and *Rosy Jacob vs Jacob A. Chakranakkal* AIR 1973 SC 2090.

**Note**

Some High courts, such as the Allahabad High Court, have specifically stated that the personal law governing the parties cannot come in the way so as to deviate from the basic requirement of welfare of the child. (*Mohammad Khalid vs Zeenat Parveen & others* AIR 1988 All 252)
6. CUSTODY OF CHILD OF UNWED MOTHER

Unwed mother is entitled to custody of her daughter, no matter who the father is. The mother can be expected to take better care of the child.

(Gohar Begum vs Suggi AIR 1960 SC 93, decided by Justices S. Jafer Imam, A.K. Sarkar and K.N. Wanchoo)

Law referred to: Arts. 136 & 226 of Constitution of India, S. 491 of Code of Criminal Procedure, Guardians and Wards Act, Muslim law (uncodified)

FACTS OF THE CASE

Gohar Begum was an unmarried Sunni Muslim woman, and a singer by profession. In 1951, she met a man called Trivedi and since then, she lived continuously with him exclusively in various places in Mumbai. Three children were born out of their relationship – daughter named Anjum, and sons named Yusuf and Unus. Suggi - Gohar Begum’s mother’s sister - who had brought her up, made a trip to Pakistan on a temporary visa and she took the infant Anjum with her, with the consent of Gohar. Upon their return to India, Suggi prevented Gohar’s access to the child Anjum. Gohar petitioned the Bombay High Court against Suggi, stating that she feared her aunt would forcibly take the child Anjum to Pakistan any day as a valid visa for the child existed.

Suggi denied that Trivedi was the child’s father, and named another man. She stated that she had hoped Gohar would marry and “live a clean and respectable life” but other influences operated on her and she went to live with Trivedi as his mistress. She stated that she was treating Anjum as her own child, looking after the child with great care, had admitted her in a good school, appointed a special maid to take care of the child and that she had sufficient means to look after the child well. She stated that it was not in the interests of the child to live with Gohar as Gohar was living with a man who might turn her out and she would then have to seek the protection of another man. Trivedi made an affidavit acknowledging the paternity of the child and undertaking to bring her up properly as his own child. He was a man of sufficient means and Gohar had been living with him for a considerable period of time.

The High Court was of the opinion that the child was not illegally and improperly detained by Suggi and others, and dismissed Gohar’s petition. In fact, the parties arrived at a settlement during the High Court proceedings, saying that Gohar would have custody and Suggi would have access to the child. However, the High Court was not willing to make an order in terms of the settlement because it considered that such a settlement would not be in the best interests of the child. Gohar appealed to the Supreme Court.
ISSUES FOR DETERMINATION

- Was the child illegally detained?
- Who was entitled to custody of the child?

JUDGMENT

The court granted custody of the child to Gohar. It said that Gohar was entitled to the custody of the Anjum, *no matter who her father was*. Suggi has no legal right whatsoever to the custody of the child. Her refusal to hand over the child to Gohar therefore resulted in an illegal detention of the child. The High Court was wrong in their view that the child was not illegally or improperly detained. The court reiterated that before making the order, the court was called upon to consider the welfare of the infant concerned, and that there was no reason to think that the child’s interests would be better served by keeping her custody with the aunt. It observed that the High Court had given no reasons as to why it thought that the best interests of the child would not be served by giving the custody to Gohar, when both Gohar and Suggi were singing women and the atmosphere at both their homes was the same. “…as the mother can be expected to take better care of the child” While awarding custody of the child to Gohar, the court also took into consideration the fact that Trivedi had acknowledged paternity of the child and so, in law, the child could claim maintenance from him while the child would have no such right against Suggi.

IMPLICATIONS OF THE JUDGMENT

Custody of child would be granted to an unwed mother provided it serves the best interests of the child.
7. PRESUMPTION OF CHILD’S LEGITIMACY

Child born within a valid marriage or within 280 days after its dissolution presumed to be legitimate in law. Law leans in favour of legitimacy of child.

(Dukhtar Jahan vs Mohammed Farooq AIR 1987 SC 1049, decided by Justices A.P.Sen and S.Natarajan)

Law referred to: S. 125 of Criminal Procedure Code, 1974; S. 112 of Indian Evidence Act, 1872

BACKGROUND

Legitimacy of a child is a patriarchal concept, as it is determined by who the father of the child is, and dependent on a valid marriage between the mother and father of the child. While women’s groups including WRAG believe that all children are the legitimate children of the mother, the regressive concepts of ‘bastardy’, and ‘illegitimacy’ of children have permeated all institutions, including that of law.

Just as the Indian Evidence Act contains a provision for presuming a lawful marriage (for details, see Chapter 1), Section 112 of the Act states that if a child is born during the continuance of a valid marriage between the mother and any man or within 280 days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that the child is the legitimate child of that man. The rationale for this provision is that the law favours legitimacy and is against bastardy. The implication of this presumption in law is that if anyone objects to the legitimacy of the child, it is the person’s responsibility to prove so.

FACTS OF THE CASE

Dukhtar and Farooq were close relatives. Seven months after they married each other, a girl child – Tarana - was born to them. The birth of Tarana took place in Farooq’s house. Ten months after the birth of Tarana, Farooq divorced Dukhtar. Dukhtar filed a petition for maintenance for Tarana. Farooq stated that he was not liable to provide maintenance to the child as he was not the father of Tarana and that the child had been conceived even before marriage. Dukhtar gave evidence in court that Tarana was not born prematurely.

ISSUES FOR DETERMINATION

- Whether presumption of legitimacy of Tarana would arise
- Liability of Farooq for paying maintenance to Tarana
The court stated that on the sole ground that Tarana had been born in about 7 months’ time after the marriage, it could not be concluded that the child should have been conceived even before the marriage. This was because giving birth to a viable child after 28 weeks of pregnancy was not biologically improbable or impossible.

The court explained the philosophy behind the rule in Section 112 of Indian Evidence Act providing for presumption of legitimacy of the child. It said that based on this rule, courts were always inclined towards upholding the legitimacy of the child unless the facts are so compulsive and clinching that the child could not have been legitimately born at all. It observed:

*Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.* (para 12, page 1052)

The court also based its conclusion on the conduct of the husband. It observed that Dukhtar could not have hid the pregnancy from Farooq for long. After marriage, once he came to know about her pregnancy, if he had doubted the paternity of the child, he would have protested about the pregnancy, reported the matter to the elders of the village and stopped living with Dukhtar. Instead, he continued living with her, the delivery of the child took place in his house and after the child was born, he continued living with Dukhtar and Tarana for ten months. Moreover, the court opined that even if the child was born after a full-term pregnancy, the possibility of Dukhtar and Farooq having access to each other prior to their marriage cannot be ruled out, since they were close relatives. The court further observed that Dukhtar was an illiterate woman and her evidence in court that the child was not born prematurely could suffer from error of judgment. Taking these factors into consideration, the court rejected Farooq’s plea that he was not the father of the minor child. He was made liable to pay maintenance to Tarana.

**Implications of the Judgment**

In cases of maintenance for child, it is very easy for a father to dispute the paternity of a child. However, the strong presumption in law in favour of legitimacy implies that the burden is not upon the woman to prove the paternity of her child.
8. TRIPLE TALAQ

Unilateral triple *talaq* must be preceded by attempts at settlement and be for a reasonable cause.


*Laws referred to:* Art. 15(3) of Indian Constitution; S. 125 of Criminal Procedure Code, 1972; Muslim law (uncodified)

**Facts of the Case**

Shamim Ara & Abrar Ahmed married in 1968 according to Shariat law. Four sons were born to them. In 1979, Shamim approached the Family Court at Allahabad for maintenance for herself and her two minor sons, and said that her husband had treated her with cruelty and deserted her and her children. While the proceedings were pending in court, Abrar stated in court that he had divorced Shamim orally by triple *talaq* in July 1987, and that therefore she was not entitled to any maintenance. He said the divorce had been pronounced in the presence of 4-5 persons in their neighbourhood.

The Family Court accepted his story based on Abrar’s statement in court and his affidavit filed in some other litigation in which Shamim was not a party, and refused to award maintenance to Shamim. Shamim approached the High Court. The High Court did not believe Abrar’s statement that he divorced Shamim in 1987, since the *talaq* was neither pronounced in the presence of Shamim nor communicated to her subsequently. However the High Court said that Abrar communicated the divorce to Shamim through court documents in 1990, and that the divorce became effective then. Shamim appealed to the Supreme Court.

**Issue for Determination**

Is the alleged divorce valid in law?

**Judgment**

The Supreme Court decided that no legally valid divorce had taken place, either in 1987 or 1990. No valid reasons for the divorce had been stated by Abrar; no proof of attempts at reconciliation had been presented before the court; there was no proof that Abrar had pronounced *talaq* in 1987 as the particulars of the alleged *talaq* were not stated, and the witnesses before whom the *talaq* was allegedly pronounced did not testify in court. The Supreme Court also stated that making a reference to *talaq* in court documents is not a valid form of divorce recognized under Muslim law. Hence the court directed Abrar to
continue paying maintenance to Shamim until the obligation comes to an end in accordance with law.

Before arriving at the judgment, the court referred to several commentaries on Islamic law by eminent scholars, including Dr. Tahir Mahmood’s ‘The Muslim Law of India’ 2nd edition and Mulla’s ‘Principles of Mohamedan Law’ 19th edition, as well as previous judgments of the courts on the issue. Based on these, the Supreme Court stated the following principles in relation to unilateral, oral *talaq* by the Muslim husband:

- An oral *talaq*, to be effective, has to be pronounced / uttered; if the wife contests the divorce in court subsequently, the fact that it was pronounced will have to be proved.
- A written statement / affidavit by the husband filed in court in response to the wife’s petition for any legal remedies against her husband, saying that he pronounced triple *talaq* some time in the past cannot, by itself, constitute a pronouncement of *talaq*.
- A mere statement in writing or in oral disposition before the court regarding the *talaq* having been effected in the past is not sufficient to prove the fact of divorce. Such a form of divorce is not recognized in ancient holy books or scriptures of Muslims.
- *Talaq*, to be legally valid, must be for a reasonable cause
- *Talaq* must be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife’s family and the other from the husband’s; if the attempts fail, *talaq* may be effected.

**Implications of the Judgment**

A unilateral divorce pronounced by the husband without a reasonable cause and without any attempts at reconciliation by two arbiters prior to the divorce is not a legally valid divorce. If the wife disputes the fact of divorce before a court of law, all the stages of conveying the reasons for divorce, appointment of arbitrators, conciliation proceedings for reconciliation between the parties by the arbitrators and failure of such proceedings are required to be proved in court by the husband. A wife who has had a unilateral oral *talaq* pronounced on her that does not satisfy the conditions stated above, would continue to be entitled to matrimonial reliefs such as maintenance, since it is not a legally valid form of divorce.

**Note**

A Full Bench judgment of Bombay High Court, delivered prior to the Supreme Court judgment discussed above, stated that mere pronouncement of *talaq* by the husband or merely declaring his intentions or his acts of having pronounced the *talaq* is not sufficient and does not meet the requirements of law; in every such exercise of right to *talaq* the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for *talaq*. It further held that if the husband has not been able to prove his statement regarding
divorce given earlier to making such a statement before the Court, there does not exist a *talaq* in the eyes of law and such a statement cannot be taken as a fresh declaration of divorce, as a mere declaration of divorce is not sufficient, by itself, for a valid divorce (*Dagdu Pathan vs Rahimbi*, Full Bench of Bombay High Court, 2002 (3) Mh.L.J. 602). Principles laid down in Dagdu Pathan’s case are wider than in Shamim Ara, but apply only to Maharashtra.

In an interesting case before a Division Bench of the Madras High Court, the petitioner, Parveen Akhtar, argued that the Muslim Personal Law (Shariat) Application Act, 1937, by providing for the application of Muslim Personal Law in matters relating to marriage where the parties are Muslims, conveyed a wrong impression that the law sanctions this sinful form of *talaq* which form, according to the petitioner is grossly injurious to the human rights of the married Muslim women and offends Articles 14, 15 and 21 of the Constitution. She submitted that the assumptions and beliefs upon which such a form of divorce is recognised are factually false, scientifically untenable and contrary to the spirit and provisions of the Constitution. The Court relied upon the Supreme Court judgment in Shamim Ara (discussed above) and reiterated that *talaq, in whatever form, must be for a reasonable cause, and must be preceded by attempts for reconciliation by arbiters chosen from the families of each of the spouses. The petitioner’s apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of *talaq* is valid, is based on a misunderstanding of the law. (*A.S. Parveen Akhtar vs Union of India*, MANU/TN/2472/2002, decided on 27 December 2002 by R. Jayasimha Babu & E. Padmanabhan, J.J.)

The Delhi High Court, in a recent judgment delivered by Justice Bader Durrez Ahmed, relied upon the principles laid down by the Supreme Court in Shamim Ara’s case and emphasized the importance of reconciliation, and then went on to state that in cases of revocable *talaq*, the attempts at reconciliation can take place even after the pronouncement. The Delhi High Court, at para 26 of the judgment, further observed that the triple *talaq* “is an innovation which may have served a purpose at a particular point in time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.” (*Masroor Ahmed vs State (NCT) of Delhi & Another*, judgment delivered in Delhi High Court on 3 October 2007 by Justice Badar Durrez Ahmed)

Many women have reported in recent times that the passport authorities are unwilling to accept an oral divorce as a valid form of divorce, and insist on a written document, preferably issued by the courts, as a proof of divorce.
9. DISSOLUTION OF MARRIAGE THROUGH COURT

A marriage dissolved by court at the instance of wife is a legal divorce under Muslim Law

(Zohara Khatoon vs Mohammed Ibrahim AIR 1981 SC 1249, decided by Justices S. Murtaza Fazal Ali, A.D.Koshal and A.Varadarajan)

Laws referred to: S. 125 & 127 of Criminal Procedure Code, 1974; Dissolution of Muslim Marriages Act, 1939; Muslim law (uncodified), Hindu Marriage Act, Parsi Marriage and Divorce Act, 1936

FACTS OF THE CASE

Zohara Khatoon and Mohammed Ibrahim married each other. They had a minor son. Some years later, Mohammed Ibrahim started willfully neglecting Zohara Khatoon. Khatoon approached the civil court for divorce on the ground of cruelty and willful neglect. She obtained a divorce in 1973 under Dissolution of Muslim Marriages Act, 1939 (DMMA). In 1974, she then petitioned the magistrate’s court for maintenance for self and for her minor son under Section 125 of Criminal Procedure Code. The magistrate’s court fixed a maintenance of Rs. 100/- per month for Khatoon and her son, and stated that she had been neglected by the husband without reasonable or probable cause. The husband petitioned the High Court for quashing (canceling) the magistrate court’s order, stating that he was not duty-bound to pay Khatoon maintenance since she had obtained a divorce from the court in 1973, and therefore she ceased to be his wife.

In the High Court, Khatoon argued that though she had obtained a divorce through her own initiative, under a statutory law, the divorce was on par with other recognized forms of divorce under Muslim law, and hence she should be brought within the purview of explanation to Section 125 (1) of Criminal Procedure Code, which states that “wife includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried,”. The High Court ruled in husband’s favour and denied Khatoon any maintenance, stating that wife obtaining a divorce under DMMA stood on a different footing from husband divorcing the wife unilaterally.

ISSUES FOR DETERMINATION

- What is the result of a marriage that is dissolved by the court at the instance of the wife?
- Is a divorce under The Dissolution of Muslim Marriages Act, 1939 a legally valid divorce under Muslim law?
- Would the clause “a woman who has obtained a divorce from her husband” include a wife who has been granted divorce by the court under the 1939 Act?
The Court stated as follows:

*Before the enactment of the Act of 1939 a woman under pure Mohamedan law had no right to get a decree for divorce from the husband if he refused to divorce her... After the Act of 1939, a wife thus had a statutory right to obtain divorce from the husband through the Court ... The Act provided for the wife an independent remedy which could be resorted to by her without being subjected to a pronouncement of divorce by the husband.* (para 19, page 1248)

The Court noted that there were three modes of divorce under Muslim law: (1) husband unilaterally giving a divorce according to the forms approved by Muslim law; (2) by an agreement between the husband and wife either at the instance of the wife or through mutual separation, through *khula* or *mubarat*; (3) by obtaining a decree from a civil court for dissolution of marriage under the 1939 Act. It noted that the High Court had failed to consider the legal consequences flowing from the decree passed by the court dissolving the marriage – a legal divorce under Muslim law.

It further stated as follows:

*Under the 1939 Act when the marriage is dissolved by the Court at the instance of the wife, the only result that follows is that the wife stands divorced from the husband by operation of law and no other relief can be granted by the Court under the 1939 Act after a decree of dissolution is passed. It follows, therefore, that the divorce resulting from the aforesaid dissolution of marriage is also a legal divorce under the Mahomedan law by virtue of the statute (1939 Act).* (para 17, page 1248)

**Implications of the Judgment**

As an option to other forms of divorce, the woman has a right to approach the court for divorce under the 1939 Act. Divorce obtained by court would stand on the same footing as those forms of divorce without proceedings in court.

**Notes**

- Although the Act does not specify, it is a fact that the 1939 Act was passed after a debate and discussion within the Muslim community on the need for such a law and therefore the Act is considered a valid source of Muslim law – *ijtehaad*.

- There is no provision in the Hanafi law for a Muslim woman to obtain a divorce from the Court. 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 provisions of the Maliki, Shafi'i or Hanbali law. Acting on this principle the *ulema* (religious scholars and functionaries) issued *fatwas* (opinions concerning the religious law) to...
the effect that in cases enumerated in S. 2 of the Act, a married woman may obtain a decree dissolving her marriage. The Act was made uniformly applicable to the entire Muslim community by borrowing provisions from a particular school of Muslim law.

- Under Dissolution of Muslim Marriages Act 1939, a wife is entitled to petition the court for divorce on grounds including the husband’s neglect or failure to pay maintenance for two years, unreasonable failure to perform marital obligations for three years and cruel treatment. Cruel treatment includes husband having more than one wife and failure to treat them equitably.

- Post-divorce maintenance of Muslim women is now governed by Muslim Women (Protection of Rights On Divorce) Act, 1986, and not under Section 125, Criminal Procedure Code.

- DMMA has no provisions for interim maintenance or custody, making it difficult for a woman wishing to seek such reliefs in addition to a divorce. The omission of such reliefs from the Act leads to a situation where she may have to initiate multiple sets of litigation, some of which may be in different courts. This is an issue on which law reform is urgently required.
10. LEGAL VALIDITY OF FATWA

(Nazma Bibi & another vs State of Orissa & Others, order dated 21 April 2006 in Special Leave Petition (Civil) 837 of 2006, delivered by Justices Ruma Pal, C K Thakker and Markandey Katju)

FACTS OF THE CASE

Nazma Bibi is a Muslim woman from Bhadrak, Orissa. On July 3, 2003, under the influence of alcohol and as several members of the community looked on, Nazma’s husband, Mohammed Seru, beat her and divorced her by unilateral oral *talaq*. However, soon after his drunken declaration of triple *talaq*, Seru repented, and the couple wanted to re-unite and live together. The couple then approached a *maulvi* (religious leader) to obtain his opinion. After hearing the couple, the *maulvi* decreed that the *talaq* was invalid since the husband had uttered the word ‘*talaq*’ thrice in a drunken state. However, the community refused to accept the *maulvi*’s judgment. Mohammed Seru’s family then approached another *maulvi* for further consultation and advice. He said that the *talaq* was valid and if at all Nazma wanted to stay with Seru, she had to first go through *halala* (i.e. marry another man, consummate that marriage and then go through a divorce) before returning to her first husband. However, Nazma rejected the idea of *halala* and was forced to abandon her home, taking shelter at a short stay home, Ashiyana, in the town itself. Nazma’s husband then petitioned the family court at Cuttack for restoration of his conjugal rights. On 13 December 2003, the family court dismissed the *talaq* as illegal and ordered for restoration of the marriage as well as Nazma and Seru’s conjugal life as a couple.

However, under the leadership of Abdul Bari, president of Bhadrak Muslim Jamait, the local Muslim community to which Nazma belonged refused to accept the court order and opposed the couple’s re-union. The couple then cut all ties with immediate relatives and found a place outside the community where they stayed together for three months. Three months later, some persons from the Muslim community physically assaulted Seru. Despite the intervention of State Human Rights Commission, National Commission for Women, and sincere efforts of the local police and administration, the community remained rigid in its stance and opposed the couple living together. Nazma faced social boycott by being deprived of water and fire for her everyday use. Her father, a rickshaw puller, was prevented from going to work and her children were prevented from going to school. At the instance of women’s groups, Nazma received financial support of Rs. 20,000 from the Orissa government.

A public interest litigation filed in Orissa High Court in this context, seeking to evolve a separate mechanism for protecting the rights of Muslim women, was not entertained by the High Court. Subsequently Nazma approached the Supreme Court in this regard.
The Supreme Court issued an order directing the Orissa government to provide security to the couple who wanted to stay together. The Supreme Court observed: “No one can force them to live separately. This is a secular country. All communities — Hindus or Muslims should behave in a civilised manner.” The petition is pending in the Supreme Court.

By giving a direction to the Orissa government to provide protection to the couple who disregarded the fatwa (religious edict), the Supreme Court, by implication, has not recognized the legality of the fatwa. It is important to note that the Supreme Court has not specifically pronounced that all fatwas are invalid in the eyes of law. Yet, its order could have far-reaching consequences on the impact of fatwa on the life, liberty and security of Muslim women in India placed in similar situations as Nazma.

Taking strong exception to the Supreme Court order directing Orissa government to provide security to a Muslim couple who wanted to stay together after talaq, Orissa unit of Jamiat-ul-Ulama threatened to ostracise the couple if they abided by the decision of the apex court. “Supreme Court has no power to intervene in religious matter. The apex court should have confined itself to other litigations. It should have consulted religious institutions and clerics before taking such decision,” Aameere Shariat (president) of Jamiat-ul-Ulama Maulana S S Sajideen Quasmi told PTI from Cuttack. “We will certainly drive the couple out of Muslim society if they stay together defying clerics decisions and abide by the Supreme Court verdict,” Sajideen said.

In 1988, Kerala High Court stated that the fatwa had no legal sanctity. It stated so in a case in which a man had been ex-communicated from the Islamic religion and declared a non-Muslim through a fatwa. (Sona Ullah Ganai vs Moulvi Akbar 1988 K.L.J. 201) A recent judgment of the Delhi High Court highlights the distinction between fatwa (an advisory opinion) and qaza (a judgment by the qazi or judge based on the Shariat when an issue is carried to the point of litigation and cannot be settled privately by the parties. (Masroor Ahmed vs State (NCT) of Delhi & Another, judgment delivered in Delhi High Court on 3 October 2007 by Justice Badar Durrez Ahmed) However, the Supreme Court is yet to give such a categoric pronouncement. In January 2001, a High Court in Bangladesh declared as illegal all fatwas not issued by courts and suggests that the government enact rules to this effect. The declaration was made in a case of a woman who had been divorced.
by her husband and forced by a fatwa to marry her cousin. It further held that giving a fatwa by unauthorised person or persons must be made a punishable offence by the Parliament immediately, even if it was not executed. (The Daily Star, 2 January 2001)

The intervention of the Supreme Court in this case has to be seen against the backdrop of a spate of fatwas passed by religious authorities in recent years including in

- Imrana’s case - where Imrana was raped by her father-in-law and the community panchayat issued a fatwa ordering Imrana to live with her father-in-law and become mother to her own husband (2005)
- Gudia’s case – where, in accordance with a fatwa, Gudia was “handed” over to her lost and returned first husband despite the fact that she was married and pregnant through her second husband (2005)
- A fatwa about India tennis star Sania Mirza’s dress code saying that Islam does not permit a woman to wear skirts, shorts and sleeveless tops; (8 September 2005, The Hindustan Times)
- A fatwa from Darul Uloom Deoband that women could contest elections only if they wore a veil, (18 August 2005, The Hindu)
- A ban against issuing fatwas in political matters (August 2005)
- Arrest of a mufti in Indore for giving a fatwa against a divorce decree by a court, on the ground that the judge was a non-Muslim and hence the judgment was not acceptable under the Islamic Shariat. (18 November 2005, The Pioneer)
- A statement of Union Law Minister H.R.Bharadwaj in Rajya Sabha that fatwas issued by Islamic institutions are not valid in the eye of the law. (August 2005)
- A fatwa issued by Darool Uloom of Deoband stating that life insurance was illegal under the Shariat (30 August 2006, The Indian Express)
- “Cash for fatwas” scandal (September 2006)
- The government informed the Supreme Court that fatwas issued by Muslim clerics are opinions and cannot be imposed or enforced on anyone. The government said the Dar-ul-Qaza and Nizam-ul-Qaza are a form of alternative dispute redressal fora that perform a conciliatory role without any power of enforcement. In an affidavit submitted to the top court, the Centre said, “The mufti has no authority or powers to impose his opinion and enforce his fatwas on anyone, either by imposing any penalty or a fine or send him to jail. Even the seeker of opinion is not bound to follow the opinion.” (3 November 2006, Asian Age)
- A fatwa imposing the separation of the sexes in schools and universities (July 2007)
- A fatwa banning photography as illegal (September 2007)
PROPERTY / ECONOMIC RIGHTS OF WOMEN
11. MEHR

*Mehr* as a debt has priority over other heirs’ claim to have the estate distributed among themselves.

A claim for unpaid *mehr* constitutes a debt payment on par with the demands of other creditors.

*(Kapore Chand vs Kidar Nissa Begum and others AIR 1953 SC 413, decided by Justices Mahajan, Naik and Khaliluzzaman Siddiqui)*

**Law referred to:** Muslim Law (uncodified)

**BACKGROUND**

Stipulation of *mehr* at the time of marriage is an important aspect of a Muslim marriage. Traditionally, *mehr* is intended as a mark of respect to the woman and is an economic right of women that is unique to Muslim law. Feminist lawyers say that the concept of *mehr* is superior to the concept of maintenance that exists under other matrimonial laws, as maintenance presumes a state of eternal dependency and is linked to the woman’s chastity. *(Flavia Agnes, p. 39)* Since the 1800s, Indian courts (High Courts and the Supreme Court) have dealt with the issue of *mehr* and have laid down the following principles:

- *Mehr* is an essential incident under Muslim law to the status of marriage; to such an extent that when it is unspecified at the time of the marriage, the law declares that it must be adjudged on definite principles *(Hamira Bibi vs Zubaida (1961) IA 249)*

- Among the Shias, if the bridegroom has no means to pay the *mehr*, his father is liable *(Sabir Hussain vs Farsand AIR 1938 PC 80)*

- Under all schools of Muslim law, the husband has the power, at any time during the subsistence of marriage, to increase the amount of *mehr* *(Amina Bibi vs Mohamed Ibrahim AIR 1929 Oudh 579)*

- A husband is free to fix any amount of *mehr*, even much beyond his means or ability to pay or earn *(Haliman vs Mohamed Manir AIR 1971 Pat. 385)*

- In order to prevent the husband from exercising his unilateral power of divorce, a wife stipulates deliberately a very high amount of *mehr*, and if the husband agrees to it, he is bound by the terms of the agreement *(Mohamed Shahabuddin vs Ummatur Rasul AIR 1960 Pat 511)*

- A woman whose marriage is dissolved by divorce or death of her husband, and who has been in possession of her husband’s estate, can continue to retain that possession till her *mehr*-debt is recovered out of the estate or payment of *mehr* is made to her. *(Maina Bibi vs Vakil Ahmed (1924) 52 IA 145)*
In the following judgment, the court lays down and explains the widow’s right to recover the *mehr* debt.

**FACTS OF THE CASE**

Hamid Ali Khan had undertaken to pay a substantial amount of *mehr* to his wife Kaderunnissa Begum. He died without paying the amount, leaving the house in dispute and leaving outstanding a number of debts. Kaderunnissa was in possession of their house at the time of his death. After his death, debtors to whom Hamid Ali owed money sought to attach the house to recover their dues. Kaderunnissa raised an objection to the attachment, saying that she was in possession of the house in lieu of her outstanding *mehr* and could not be dispossessed till her claim was satisfied. The lower court in Hyderabad ordered the house to be sold and the proceeds be used to pay Kaderunnissa’s claim, and if there was any surplus, the same could be paid to the other creditors. However, there was not much possibility of the house fetching more than the amount due on account of *mehr*. The other creditors appealed against the judgment to higher courts, until the matter reached the Supreme Court.

**ISSUE FOR DETERMINATION**

What is the nature of a widow’s right to claim *mehr* out of her deceased husband’s property, in relation to other heirs as well as creditors?

**JUDGMENT**

The court referred to interpretations of Quranic verses, texts of renowned authorities on Muslim law and Islamic scholars such as Tyabji’s Mohammedan Law (1940), Hamilton Hedaya (1870), Fatwa-e-Alamgiri and Ameer Ali’s Muhammadan Law. It also examined decided cases on the subject.

The court arrived at a finding that *mehr* as a debt has priority over other heirs’ claim to have the estate distributed among themselves. It also has a priority over bequests and inheritance, irrespective of whether or not the widow is in possession of the estate. The court observed that the advocates had made references to verses in Sur-ai-Nissa which enjoins a husband to pay the claim of his wife and says that widows and minors should be given favourable treatment.

However, the widow is entitled, *along with the other creditors* of her deceased husband, to have it satisfied out of his estate. She would have no priority over other creditors, unless the husband, by his own act, placed the widow in a better position than his other creditors by creating a charge in favour of his wife in lieu of her claim for *mehr*.

The court arrived at this conclusion by balancing between the widow’s right to a claim of
mehr as well as a Muslim man’s duty to observe his engagements and to keep his contracts faithfully and to discharge his liabilities in an honest manner. It said:

“The Quranic text in Surae-nissa Ruku 4 enjoins the payment of dower in preference to bequests and inheritance but it is silent on the question of priority of dower debt in relation to other creditors.” (para 3, page 414)

**IMPLICATIONS OF THE JUDGMENT**

Mehr as a right is enforceable in a court of law, not only during the husband’s life but after his death as well. The widow can claim the mehr amount after her husband’s death, from his property, before the property is distributed among his legal heirs. During the lifetime of the husband, if he, by his own initiative or on the wife’s suggestion, places the mehr debt on a higher footing than that of debts owed to other unsecured creditors, the courts will respect and enforce the same.

**NOTE**

Unsecured creditors are those persons from whom a debt has been incurred, without depositing any securities. Although the widow’s claim for priority over other unsecured creditors was rejected by the Supreme Court, this judgment is important as it is a recent reiteration by the Supreme Court of the principle that mehr as a debt has priority over other heirs’ claims.
12. MAINTENANCE TO WIFE AFTER DIVORCE

Post-divorce maintenance to wife should include maintenance for the woman’s future extending beyond the *iddat* period.


**Laws referred to:** Art. 14,15 & 21 of Indian Constitution; S. 125 & 127 of Criminal Procedure Code, 1974; Muslim Women (Protection of Rights on Divorce) Act 1986; Special Marriage Act 1954; Muslim law (uncodified)

**BACKGROUND**

In 1985, in Shahbano’s judgment (*Mohammed Ahmed Khan vs Shah Bano Begum* AIR 1985 SC 945: 1985 Cr L J 875), the Supreme Court had stated that Muslim women could claim life-long post-divorce maintenance under a secular law – S. 125, Criminal Procedure Code. Soon after that, to neutralize the effects of the judgment, The Muslim Women (Protection of Rights on Divorce) Act was enacted by the Rajiv Gandhi government in 1986. Section 3 (1) of the 1986 Act provides that a divorced woman shall be entitled to have from her husband, “a reasonable and fair provision and maintenance” which is to be made and paid to her within the *iddat* period.

An issue that has come up before the courts time and again is the interpretation of the term “reasonable and fair provision”. Various High Courts interpreted the term in various ways – some in a restrictive manner, and some in a manner beneficial to women. The issue came for determination before the Supreme Court. In this case, the legal validity of the 1986 Act also came up for determination.

In Supreme Court, All India Muslim Personal Law Board was heard, which argued that the husband should not be held liable to pay maintenance beyond the *iddat* period. It argued that “the social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband.” Islamic Shariat Board also made similar arguments in court.

**JUDGMENT**

The Supreme Court, in this case, heard the viewpoints of many advocates including those representing the Union of India, the All India Muslim Personal Law Board, the Islamic Shariat Board and the National Commission for Women. It rejected the arguments of Personal Law Board and Islamic Shariat Board.

The Supreme Court highlighted the economic disparity between a man and a woman in every community – majority or minority, and the fact that even highly-educated women
often give up their jobs after marriage and devote their full time to their matrimonial life. Hence when the marriage breaks up, it is difficult to compensate the woman for the emotional breakdown and loss of investment. The principles laid down in this judgment include:

- The provision of paying a “reasonable and fair provision and maintenance” applies only to a Muslim woman whose marriage and divorce took place in accordance with Muslim law; it does not apply to women who are deserted and separated Muslim wives (who are not divorced); it does not apply to women who have married or been divorced under other laws of India;
- At the time of the divorce, the Muslim husband is required to contemplate the future needs for the entire life of the divorced wife and make preparatory arrangements in advance for meeting those needs;
- Reasonable and fair provision may include provision for the divorced woman’s residence, food, clothes and other articles;
- As per the provisions of the 1986 Act, the Muslim husband is obliged to pay the maintenance within the *iddat* period;
- If he fails to do so, the wife is entitled to recover the maintenance by filing an application before the magistrate, in accordance with provisions of the 1986 Act.

**Implications of the Judgment**

A divorced Muslim woman is legally entitled to receive life-long post-divorce maintenance within the *iddat* period (i.e. three months from the date of divorce).

**Note:**

- This judgment has reiterated the fact that the 1986 Act would be applicable only to women who have married under Muslim law. A civil marriage under the Special Marriage Act, 1954 is a viable option for those women who do not wish to be governed by provisions of Muslim law. The provisions of *mehr*, divorce without the intervention of the court and polygamy would not be available to Muslims marrying or subsequently registering their marriages under the Special Marriage Act.
- This judgment also held the 1986 Act to be legally valid.
13. HUSBAND’S IMPOTENCY & MAINTENANCE TO WIFE

Impotency of husband amounts to cruelty; Wife entitled to maintenance if she lives separately.

(Sirajmohmedkhan Janmohamadkhan vs Hafizunnisa Yasinkhan & another AIR 1981 SC 1972, decided by Justices Murtaza Fazal Ali and A.P. Sen)

Laws referred to: S. 125 of Criminal Procedure Code, 1974; Ss. 10 & 13 of Hindu Marriage Act 1955; Ss. 23 & 27 of Special Marriage Act, 1954; Muslim law (uncodified)

BACKGROUND

Section 125 of Criminal Procedure Code that provides for maintenance to wife has a sub-section: If the husband offers to maintain his wife on the condition of her living with him, and if the wife refuses to do so, the magistrate may consider any grounds of refusal stated by her and may grant maintenance if there is a just ground for her refusal. The case in the present chapter as well as in the next two, deal with the issue of what amounts to just and reasonable ground for wife’s refusal to live with the husband.

FACTS OF THE CASE

Hafizunnisa and Siraj married each other in 1978 according to Sunni Muslim rites. After marriage, Hafizunnisa lived with Siraj for about three months. During that time, she found that her husband was unable to have a sexual relationship with her and he frankly told her that he was impotent. The same month, she was ill-treated and driven out of the house by Siraj. Some months later, Hafizunnisa filed a petition for maintenance before the appropriate magistrate’s court in Gujarat, stating that Siraj was guilty of willful neglect and was unable to fulfil his primary responsibility of discharging his marital obligations. Soon afterwards, Siraj sent her a registered notice, informing her that he had no physical disability and was prepared to keep Hafizunnisa with him and discharge his marital obligations.

The magistrate’s court and Gujarat High Court found that Siraj was impotent, though the judgment does not state clearly how the courts arrived at this finding. However, the magistrate’s court arrived at a conclusion that the “mere ground” that the husband was impotent was not a just cause for the refusal of the wife to live with her husband. On the basis of this reasoning, it dismissed Hafizunnisa’s petition for maintenance. Hafizunnisa appealed to the High Court. The High Court decided in her favour and awarded her maintenance of Rs. 150 per month. Siraj appealed to the Supreme Court against this judgment.
**Issues for Determination**

- Whether husband’s impotency amounted to legal and mental cruelty against wife?
- If so, was the wife entitled to live separately for this reason and be entitled to maintenance?

**Judgment**

The court concluded that impotency of husband resulted in his inability to discharge his marital obligations, and that this would amount to both legal and mental cruelty. The court said that under Muslim law, marriage is a sacrosanct contract and not purely a religious ceremony as in the case of Hindu law. An impotent husband would be unable to fulfil the main object of marriage, it observed. It said that this would be a very just and reasonable ground on the part of the wife for refusing to live with her husband, under Muslim law, Hindu law and other laws.

The court said: *The matter deserves serious attention from the point of view of the wife. Here is a wife who is forced or compelled to live a life of celibacy while staying with her husband who is unable to have sexual relationship with her. Such a life is one of perpetual torture which is not only mentally or psychologically injurious but even from the medical point of view is detrimental to the health of the woman. Surely, the concept of mental cruelty cannot be different in a civil case and in a criminal case when the attributes of such a cruelty are the same.* (para 21, page 1977)

**Implications of the Judgment**

The apex court recognizes the sexual rights of women within marriage. By equating sexual non-performance on the part of the husband as mental cruelty and considering it a valid reason against co-habitation, it accords women’s sexual satisfaction a high value in determining the success or failure of a marriage.
14. HUSBAND’S UNREASONABLE THREAT & MAINTENANCE TO WIFE

Threat to wife to return home or be divorced – wife entitled to live separately and claim maintenance.

(Khatoon vs Mohammed Yamin AIR1982 SC 853, decided by Justices S. Murtaza Fazal Ali, D.A. Desai and A. Varadarajan)

Law referred to: S. 125 of Code of Criminal Procedure, 1974

FACTS OF THE CASE

Some years after Khatoon and Yamin were married, when Khatoon was away from her matrimonial home, Yamin sent her a letter asking her to return home and otherwise the letter would be treated as a divorce. Khatoon refused to live with Yamin, on the ground that he had threatened her through the letter. She filed a petition for maintenance under Criminal Procedure Code in the magistrate’s court. The court rejected her claim on the ground that the wife had refused to live with the husband without sufficient reason. She appealed to a higher court, which concluded in her favour. It said that the letter contained a clear threat to the wife and that such an unreasonable threat would constitute sufficient reason for Khatoon to refuse to live with Yamin. Yamin appealed to High Court, which decided in his favour. Khatoon appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Did Yamin’s letter constitute an unreasonable threat, so as to entitle Khatoon to live separately for this reason and be entitled to maintenance?

JUDGMENT

The court found that the letter was couched in most discourteous terms and amounted to a clear threat to divorce the wife and sought to obtain her consent to live with him under duress. (para 1, page 854) In the court’s opinion, this was sufficient reason for the wife to refuse to live with her husband. Hence she was entitled to maintenance.

IMPLICATIONS OF THE JUDGMENT

Unreasonable threats by the husband can entitle the wife to live separately and claim maintenance.

Judgments on Muslim Law & Women’s Rights
15. POLYGAMY & MAINTENANCE TO FIRST WIFE

Husband’s second marriage confers right on first wife to live separately and claim maintenance.

(Begum Subanu alias Saira Banu and another vs A.M. Abdul Gafoor AIR 1987 SC 1103, decided by Justices A.P. Sen and S. Natarajan)

FACTS OF THE CASE

Saira Banu married Gafoor in 1980, and had a girl child in 1981. Saira Banu filed a petition for maintenance in the magistrate’s court under Criminal Procedure Code, seeking Rs. 500 a month for herself and Rs. 300 for her child, on the ground of Gafoor’s neglect and failure to provide maintenance. The magistrate’s court dismissed the petition, stating that Saira Banu had failed to establish an adequate justification for living separately. Saira Banu approached the sessions court. Meanwhile Gafoor married again. Saira Banu then argued in court that the second marriage itself was a ground for her to live separately and be granted maintenance. The sessions court refused to grant her maintenance, saying Gafoor had offered to take her back even after his second marriage and hence her living separately was not justified. She approached the High Court, which also did not hold in her favour. Saira Banu then approached the Supreme Court for redressal of her grievance.

ISSUES FOR DETERMINATION

- Does the second marriage of the husband confer a right upon the first wife to live separately and claim maintenance?
- Is such a right curtailed in any manner since Muslim law permits polygamy for the man?

JUDGMENT

The court came to a conclusion that the second marriage of the husband does confer a right upon the first wife to live separately and claim maintenance. She cannot be reasonably expected to live in the same house. It said:

“...a husband who marries again cannot compel the first wife to share the conjugal home with the co-wife and as such, unless he offers to set up a separate residence for the first wife, any offer to take her back cannot be considered a bona fide offer. It is therefore obvious that the offer was only a make-believe one and not a genuine and sincere offer.” (para 13)
It further said that this was the case, irrespective of the fact that Muslim law permitted polygamy for the man. It said:

The legal status of the woman to whom a husband has transferred his affection cannot lessen her distress or her feelings of neglect. 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. (para 11)

**Note:**

Although Muslim law permits polygamy upto four wives, there are conditions that regulate this aspect. Separate residences for each of the wives is recognized as a right of all the four wives and therefore this judgment is also consistent with Muslim law.
16. WAKF BOARD & MAINTENANCE TO WOMEN

Woman can initiate a single litigation against her relatives and the Wakf Board for maintenance.

(Secretary, Tamil Nadu Wakf Board and another vs Syed Fatima Nachi AIR 1996 SC 2423, decided by Justices M.M.Punchhi and Sujata V. Manohar)

Law referred to: S. 4 of Muslim Women (Protection of Rights on Divorce) Act 1986

BACKGROUND

The Muslim Women (Protection of Rights on Divorce) Act was enacted in 1986. (For a background to the Act, see Chapter 12 under ‘Background’.) The Act has a provision stating that in situations where a divorced woman has not re-married and is not able to maintain herself after the iddat period, the magistrate may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay her a reasonable and fair maintenance. If they are unable to do so, her children and then her parents are responsible; where she has no such relatives who can pay her maintenance, the State Wakf Board established and functioning in the area where the woman resides is duty-bound to pay her maintenance.

FACTS OF THE CASE

Fatima is a divorced Muslim wife. She was married to Syed Ahmed Moulana in 1980 in accordance with Muslim law and had female twins in 1981. Her husband divorced her in 1986 and since then, she did not remarry. She had no income to maintain herself and her twin children, and they did not own any property. She claimed that she had been leading a good life as a married woman but after divorce, was in dire straits and in suffering. She said that none of her prospective heirs or her parents were in a position to provide maintenance to her. On these grounds, she filed a petition against Tamil Nadu Wakf Board in the magistrate’s court for a monthly maintenance of Rs. 750 for herself and for each of her children.

The State Wakf Board, instead of paying the amount as maintenance, petitioned the High Court of Madras for quashing (cancelling) the proceedings. It argued that the woman would have to initiate proceedings against her relatives in the first instance. Only if the magistrate passed an order stating that the woman’s prospective heirs, her children and parents cannot pay her maintenance, could the State Wakf Board be petitioned against, it stated. The High Court declined to pass an order in favour of the Board. The Board then approached the Supreme Court for the same purpose. Since Fatima could not afford litigation expenses at the Supreme Court, she requested the Supreme Court to appoint a lawyer to represent her in the case.

The Supreme Court Speaks
ISSUE FOR DETERMINATION

Could the divorced Muslim woman proceed against her relatives, parents, children and the State Wakf Board in a single litigation for maintenance under the 1986 Act? Or is she required to initiate separate litigations in succession against them?

JUDGMENT

The court stated that the woman would be entitled to plead and prove all relevant facts in one proceeding - the inability of her relations to maintain her as well as her claim against the State Wakf Board in the first instance. It said that in one and the same proceeding, one or more orders can be passed in favour of the divorced woman, subject to her not remarrying and remaining unable to maintain herself. It reasoned as follows:

It is futile for a divorced woman seeking succour to run after relatives, be it her children, parents, relatives or other relatives, who are not possessed of means to offer her maintenance and in fighting litigations in succession against them, dragging them to courts of law in order to obtain negative orders justificatory to the last resort of moving against the State Wakf Board. (para 9, page 2425)

The Supreme Court directed the State Wakf Board to deposit Rs. 10,000/- in court, out of which Rs. 3000/- was paid to a lawyer appointed by the court as amicus curae (friend of the court) on Fatima’s behalf, and Rs. 7000/- was paid to Fatima to help her overcome her financial difficulties. The Supreme Court further directed that this amount was not to be taken into account in determining her claim for maintenance. The proceedings in magistrate’s court would continue to determine whether, and to what extent, the State Wakf Board was liable to pay Fatima maintenance.

IMPLICATIONS OF THE JUDGMENT

A divorced Muslim woman in dire need of maintenance need not run pillar to post, to each relative / child, parent and State Wakf Board for maintenance. She can claim maintenance against all persons duty-bound to maintain her in a single litigation in the relevant magistrate’s court.
17. ORAL GIFT TO MARRIED WOMAN

Oral gift of property by father-in-law to daughter-in-law is valid.

(Ram Niwas Todi and another vs Bibi Jabrunnissa and others (1996) 6 SCC 444, decided by Justices M.M.Punchhi and K.Venkatamaswami)

Laws referred to: Land Acquisition Act 1894; Bihar Tenancy Act, 1885; Bihar Land Reforms (Fixing of Ceiling Area and Acquisition of Surplus Land) Act; Muslim law (uncodified)

BACKGROUND

A gift is a transfer of property or right by one person to another. It is a donation conferring right of property without exchange. Under Muslim law, to be a valid gift, three essential requirements exist: a) declaration of gift by donor; b) acceptance of gift, express or implied, by or on behalf of the donee; and c) delivery of possession of the subject of the gift. The object behind complying with these three requirements is to avoid any future dispute in respect of the property that is gifted. The Supreme Court has stated that if there is no compliance with any of these essential conditions, the gift would be invalid. (Gulam Hussain Kutubuddin Maner vs Abdulrashid Abdulrajak Maner J.T. 2000 (10) SC 425: 2000 (8) SCC 587)

FACTS OF THE CASE

A man made an oral gift of house property including open spaces of land to his daughter-in-law, Bibi Jabrunnissa. He also documented the gift in a written form, but did not register the document. Subsequently, he delivered the possession of the property to Jabrunnissa. After his death, Ram Niwas Todi and another person tried to claim the property under tenancy and land ceiling laws, alleging that the gifted property was agricultural land. They argued in court that the gift made to Jabrunnissa was invalid. The trial court stated that the gift was complete and valid. The High Court came to the conclusion that the oral gift would prevail. Ram Niwas Todi and another, aggrieved by the judgment of the High Court, appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the gift made to Jabrunnissa was valid.
JUDGMENT

The court held that since the donor and donee were Muslims, an oral gift by a father-in-law to his daughter-in-law was permissible. In this case, the gift was written but not registered. Hence it could not, in any event, be said that there was no oral gift. Since the gift was followed by possession, making the gift complete, the gift was valid. The Supreme Court further stated that since the property in dispute was house property, tenancy and land ceiling laws would not be applicable. The apex court delivered the judgment in favour of Jabrunnissa.

NOTE

- In an earlier case, *Ilahi Shamsuddin Naday vs Jaitunbi Makbul Naday* (1994) 5 SCC 476, the Supreme Court stated that a gift whose declaration and acceptance was oral would be valid irrespective of the nature of the property. In another case, gift of immovable property by the husband to a minor wife, where it was made through a registered deed and the possession of property was given to the wife’s mother, was held to be a valid gift. (*Valie Peedikkandi Katheessa Umma vs Pathakkalan Narayanath Kumhamu* AIR 1964 SC 275) These two judgments, read together, consolidate the right of a Muslim woman to property gifted to her in accordance with Muslim law.

- Although oral gift is valid, in order to better protect her rights and by way of proof, it would be desirable to register the gift through a deed.
18. RIGHT TO MATRIMONIAL PROPERTY

Family court can adjudicate on matrimonial properties of divorced parties.

Fact that wife was awarded certain amount as maintenance has no effect on the litigation; The two are separate and distinct proceedings.

(\textit{K. A. Abdul Jaleel v T. A. Shahida} AIR 2003 SC 2525, decided by Chief Justice V. N. Khare, Justices S. B. Sinha and Dr. A. R. Lakshmanan)

\textit{Laws referred to: S. 7 of Family Courts Act, 1984; S. 125 of Code of Criminal Procedure, 1974; Muslim Women (Protection of Rights on Divorce) Act, 1986}

\textbf{FACTS OF THE CASE}

Abdul Jaleel and Shahida married each other in 1988. After the birth of their second child, the relationship between them became strained. Shahida said that at the time of marriage, a large amount in cash and gold ornaments were given. From the cash amount, Abdul Jaleel purchased a property (Property A) and kept the balance amount to himself. Shahida said that her husband sold her gold ornaments and out of the sale proceeds, he purchased another property (Property B). Thereafter, the parties entered into an agreement stating that the purchased properties will be transferred in the name of Shahida by Abdul Jaleel.

Subsequently, the relationship between the husband and wife became further strained, leading to a divorce. Shahida filed a petition under Muslim Women (Protection of Rights on Divorce) Act, 1986, for post-divorce maintenance. She was awarded Rs. 1,33,200/- in that petition. She also filed a petition in Family Court in Kerala for properties A & B, on the basis of the agreement entered into between her and Abdul Jaleel. Abdul Jaleel argued in court that the agreement was signed by him under threat and coercion. The Family Court arrived at a finding in favour of Shahida, stating that she was the absolute owner of Property A and of 23/100 shares in Property B. Dissatisfied with the judgment, Abdul Jaleel approached the High Court, where his appeal was dismissed. He then approached the Supreme Court, where he argued that the Family Court had no power to decide a dispute with regard to properties claimed by a divorced wife. He further argued that since he had already paid Shahida post-divorce maintenance, the property-related litigation should not be sustained.

\textbf{ISSUE FOR DETERMINATION}

Can the Family Court hear and decide on disputes related to matrimonial properties between divorced parties? Or are the court’s powers limited to disputes between parties whose marriage is subsisting?
**JUDGMENT**

The court stated that the Family Court was set up for settlement of family disputes, and to deal with disputes concerning the family by adopting an approach radically different from that adopted in other proceedings. The power of a specially-created court to hear and decide on issues should be construed liberally. Hence, property-related disputes between divorced parties can be entertained by the Family Court.

The court further clarified that post-divorce maintenance awarded to a woman under the 1986 Act has no effect on litigation related to matrimonial property, as “the two proceedings are absolutely separate and distinct.” (para 18, page 2528)

**IMPLICATIONS OF THE JUDGMENT**

Divorced women can approach the Family Court for resolving disputes over matrimonial property. Such disputes will not be affected by any grant of post-divorce maintenance to the woman by court.
C. CONCLUSION

The summary of judgments covered in this publication is only a part of the entire gamut of issues on Muslim law and women’s rights.

Apart from the issues dealt with in this compilation, there are other legal issues on which the law is settled, but on which no recent Supreme Court judgment could be identified. These include

- nikahnama / kabinnama as a civil contract into which valid conditions can be included to protect women’s rights;
- tafweez-e-talaq (delegated right of divorce) and the consequent right of the woman to pronounce a divorce;
- the legal consequences of Muslims registering their marriage under Special Marriage Act - including a curb on polygamy, unilateral divorce by the man and application of an egalitarian law on inheritance;
- non-payment of maintenance amounting to cruelty as a ground for divorce for the woman; and
- option of puberty and the right of a minor girl to repudiate her marriage on attaining majority without showing any cause.

Several provisions in Muslim law have been interpreted by various High Courts in a manner that blatantly discriminates against women. These include judgments stating that father is the natural guardian of a child, a mother cannot be the guardian of her child’s property and women heirs’ entitlement to half the share of their male counterparts in the matter of inheritance. To my best efforts, no Supreme Court judgments that invalidate such discriminatory provisions / interpretations in Muslim law could be found.

A third set of issues which this publication has not dealt with include petitions pending in the Supreme Court, challenging aspects of Muslim law from a gender perspective. These include challenging the practice of polygamy as violative of the fundamental right to equality under the Indian Constitution, challenging the legal validity of various aspects of uncodified Muslim law that discriminate against women, and the role of Islamic and Shariat courts in a constitutional set-up.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (adopted by the United Nations General Assembly in 1979 and entered into force in 1981) contains some of the most comprehensive international standards pertaining to women’s human rights. The Indian government ratified CEDAW in 1993, thereby committing itself to be bound by its provisions. However, it made a declaration that would abide by Article 16(i) in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent. (emphasis is the author’s). This provision mandates states parties to eliminate discrimination against women in all matters relating to marriage and family relations. Concluding comments of the Committee on the Elimination of Discrimination Against Women on India, in its 37th session from 15 January to 2 February 2007, has specifically spelt out an obligation of the Indian government as follows: The Committee urges the state party … to proactively initiate
and encourage debate within the relevant communities on gender equality and human rights of women, and in particular, work with and support women’s groups as members of these communities so as to … review and reform personal laws of different ethnic and religious groups to ensure de jure gender equality… (para 11). While reforms in Hindu, Parsi and Christian matrimonial laws have been brought about in the post-independence era, using the pretence of sensitivity to sentiments of religious minorities, state apathy to gender-just reforms in Muslim family law has served the cause of political expediency at the cost of women’s rights.

In addition to the executive, the judiciary, particularly the Supreme Court, has been particularly reluctant at making interventions to reform aspects of Muslim law to bring them in line with the Indian Constitution, passing the buck to the legislature instead. Its judgment in Ahmedabad Women Action Group vs Union of India AIR 1997 SC 3614, is a case in point, where it was held that personal laws are matters of state policies to which the court would not have any concern. The judgment in Daniel Latifi gives a ray of hope that in future, atleast some provisions of codified law may continue to be tested against the Constitutional provisions, particularly fundamental rights to life, equality and non-discrimination. In this context, “reforms from within” has become imperative. However, this places a huge burden on women of the community to contend with orthodox leadership within the community, communal forces as well as state apathy and to have their voices heard on the issue of gender-just law reforms. The formation of Bharatiya Muslim Mahila Andolan in January 2007, with a membership of over 1500 women, most of whom live in communities, is a significant development in the collective struggle for gender-just reforms in Muslim family law.

Strategies for bringing about gender-just reforms in Muslim family law are many, some of which have been explored more than others. These include

- promoting a progressive *nikahnama* that protects and promotes women’s rights both within marriage and upon divorce;
- disseminating information on the Special Marriage Act;
- challenging the legal validity of aspects of the law vis-à-vis constitutional guarantees in courts of law;
- law reform in a piecemeal manner, of issues common to women of all communities – such as on domestic violence and right to residence in matrimonial home;
- creating an awareness on pro-women judgments of the Supreme Court and promoting their use in judicial, quazi-judicial and informal forums;
- providing legal aid and improving Muslim women’s access to courts to litigate on aspects of Muslim family law;
- codification of Muslim family law to make it gender-just, with an active participation of women’s groups;
- advocacy with the CEDAW committee through incorporation of Muslim women’s experiences and demands in shadow reports;
● organizing women and articulating their demands through a collective struggle; and
● dialoguing with religious leaders, parliamentarians and policy makers

The judgments discussed in this compilation give rise to other larger issues whose
discussion is outside the parameters of this publication, but which, nevertheless, require
to be highlighted:

1. Is the interpretation of religious texts and verses the prerogative of the religious
leaders of the community alone? Are courts entitled to do so?

2. Does the court have a duty to interpret religious texts and spell out rights of women
from the same? Or should they base their judgments only on secular laws and the
Constitution?

3. Would pronouncing judgments on aspects of Muslim law, especially pertaining to
rights of Muslim women, amount to interference with Muslim law as often stated by
All India Muslim Personal Law Board, Islamic Shariat Board and other such
organizations?

4. Are the courts bound to give their opinion on all personal laws (codified and
uncodified), even if that meant commenting on state policy?

5. Should the law reform process come from within the community, through Supreme
Court judgments, though an enactment of gender-just secular family laws or a
combination of these and other strategies?

6. Would codification of Muslim law with a substantial integration of a gender
perspective, provide an alternative answer to the question of reform?

7. Is codification necessary and achievable, given the present communal climate within
the country?

8. What short-term strategies could be used to ensure protection of women’s rights within
Muslim law in the present context? The consequences of strategies including
popularizing the use of Special Marriage Act and wide dissemination of Supreme
Court judgments beneficial to women require to be discussed.

9. What is the role of Islamic / Shariat courts and law, in the context of human rights of
women as well as the fundamental right to religious freedom in a secular country?

Issues and dilemmas are many. And there are no easy answers. However, it would be
important for any campaign on Muslim law reform to contend with these issues and
formulate a multi-pronged strategy to address the issue of women’s rights.

Supreme Court judgments are not the be-all and end-all to Muslim women’s rights. They
are however an important source of law, the knowledge of which may encourage more
women to approach the courts, while not guaranteeing their rights if and when they do so.
If and when a woman does approach a court - magistrate’s court, family court, high court –
the courts are bound to follow the dictates of the Supreme Court. It is at this juncture
that the woman, through her advocate, can highlight the Supreme Court judgments beneficial
to women. There are many obstacles to justice for women from the courts. Access to
justice from the apex court is extremely limited to underprivileged women, with a ray of

The Supreme Court Speaks
hope being the lawyers providing free / subsidized legal aid. However, these judgments are yet another way to equip the woman and increase her bargaining power – in and out of courts, in her community and her home. Ultimately, the empowerment of women through a spread of information about law and rights would remain an incomplete project without larger social and institutional structures that have to become operational for women, particularly those who are marginalized and underprivileged.
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