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MUSLIM LAW

Danial Latifi

The contribution of the Supreme Court to the development of Muslim Law over the five decades of its existence has not been negligible. This contribution might have been even greater had there been a more sensitive relationship between the judges of the court (and the counsel advising it) and significant sections of Islamic scholars and progressive thinkers, as well as with Parliament. The unnatural ascendancy of arch-conservative diehards among the Muslim politicians has created problems for everybody.[1] This ascendancy came to a head during the protest over *Shah Bano*,[2] which will be dealt with presently.

Over-enthusiasm among some lawyers and judges, for early implementation of the constitutional directive for a common civil code, has also sometimes complicated the issue. There has been engendered, perhaps undeservedly, the feeling among certain *ulema* and their supporters, that their cherished institutions have not been adequately appreciated by the legal fraternity at large. This has obstructed the mental process of such elements and

[1]See the speech in Parliament made on December 1985 by a senior Minister, Ziaur Rehman Ansari, which sparked off a nationwide agitation by chauvinists against the Supreme Court judgement in *Shah Bano*.

[2]*Mohd. Ahmad Khan v Shah Bano Begum* AIR 1985 SC 945.

warped their appreciation of the wise, and sometimes admirable, pronouncements of certain judges and lawyers.

It is a paradox that while the Muslim world as a whole has been moving forward to a far-reaching reformation,[3] such reformation has barely touched the fringes of Muslim Law in India. Partly, this is on account of ill-educated ***moulvis*** and, partly, insensitivity and ignorance among the bulk of the lawyers and judges regarding the real needs and aspirations of the Muslim people.

Nevertheless, important issues have been settled by the courts and significant progress has been made. This is evident from the law reports. On the whole, it may be said that the courts, and in particular the Supreme Court, have succeeded in maintaining the traditional view of Muslim Personal Law, occasionally (too rarely) ventilating its ancient and hallowed archives with much-needed currents of fresh air from contemporary life. This author wrote elsewhere regarding Muslim Law that 'the Tomes of the Law are Grey but the Tree of Life is Green'.[4]

Development of closer rapport between the judges and lawyers serving the highest court in the land and enlightened elements among a sensitive minority like the Indian Muslims, conformably to the Indian concept of secularism, requires the greatest clarity of mind, erudition and goodwill on both sides. There must be the fullest trust engendered in the minority group that the court has no desire to ride roughshod over its cherished institutions.

Unfortunately, this has not always been the perception conveyed to the Muslims. No doubt the courts must strive to update those institutions, to meet the needs of modern life within the parameters available wherever they are susceptible of such updating. In a recent case, Venkatachaliah, CJ, laid down the ***grundnorm*** on this topic. Presiding over a constitution bench in *Ismail Faruqui* he said:

> The concept of secularism is one facet of the right to equality woven as the Central Golden Thread into the fabric of our Constitution.... The purpose of law in a plural society is not the progressive

[3]See for example, the contemporary best-selling work in the Arabic language, by Muhammad Husayn Haykal, *The Life of Muhammad* [English trans., Delhi 1998]

[4]D. Latifi, 'Rationalism and Muslim Law', 4 *Islam and Modern Age* 97 (November 1973).

> assimilation of the minorities in the majoritarian milieu.... In a pluralist secular society law is the great integrating force. Secularism is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. What is material is that it is a constitutional goal and a Basic Feature of the Constitution.[5]

The significance of this pronouncement is that it rejects the concept of 'progressive assimilation of the minorities in the majoritarian milieu', which has caused such havoc in our country but, alas, remains the favourite of some enthusiasts. This concept, admirably formulated and set in modern constitutional prose by Venkatachaliah, CJ, has a respectable pedigree in ancient Indian tradition.[6]

This concept of pluralism rejects the Nazi concept of *Gleichshaltung* that wrought such havoc in the land of its birth. Harmonized by enlightened constitutional jurisprudence, this concept is especially applicable in the field of religion, culture and language. It is sometimes referred to as Indian secularism, and is vital for preserving the unity and integrity of India.

Some Leading Cases

A reference may be made to some landmark judgements rendered by the Supreme Court. In *Mohd. Yunus v Syed Unnissa*,[7] Shah, J (as he then was), laid down an important rule regarding the construction of section 2 of the Muslim Personal Law (*Shariat*) Application Act, 1937.[8] The section provided that

> Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land), regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including ***talaq, ila, zihar, khula***, and ***mubarraat***, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the

[5]***Mohammed Ismail Faruqui and Others v Union of India and Others*** AIR 1995 SC 605 at 630.

[6]That dates back to Emperor Ashoka and even earlier to the great Buddha, see Ashoka's XII Rock Edict.

[7]AIR 1961 SC 808.

[8]Act No. 26 of 1937.

rule of decision in cases where the parties are Muslims shall be the Muslim Personal, Law (*Shariat*).

In the graphic phrase used by Shah, J, this enactment was a mandate to the court, in the matters enumerated. He held that the Act must be given a liberal construction and applied to all suits and proceedings pending even in appeals on the date when the Act became law.

Another decision of the constitution bench which needs mention is *Sardar Syedna Tahir Saifuddin v State of Bombay*.[9] It considered the constitutionality of social reform legislation known as the Bombay Prevention of Excommunication Act,[10] introduced by Morarji Desai in the early years of the Republic. This Act sought to prohibit the practice existing in some religious communities of allowing untrammelled powers of excommunication of their members to the arbitrary discretion of the religious head. The Bombay High Court[11] upheld this statute, particularly taking note of local conditions. It seemed to be a necessary and valid piece of social reform legislation. J.C. Shah, J, later an eminent Chief Justice of India, M.C. Chagla CJ, and Bhagwati, J, who considered the matter, were familiar with the prevalent ignorance and superstitious bent of the people at large, particularly the trading community, and their submissiveness to oppression engendered by a long period of feudal autocracy and colonial rule. Unfortunately, the Supreme Court, by a majority decision, overruled the Bombay High Court ruling, and held that under article 25(2) read with article 25(b) the Act was *ultra vires*. This was a disappointment to progressive elements among the Daudi Bohras, a small group mainly settled on the west coast of India.

Fundamental Islamic belief holds that ultimately every human being is answerable on the day of judgement to God, and to God alone. General Islamic norms do not bestow papal authority on any head priest to excommunicate. The Quran ordains that 'there shall be no compulsion in religion'.[12] Though certain sects with a limited (but sometimes affluent and influential) following admitted this practice, it is in bad odour among the public at

[9]AIR 1962 SC 853.
[10]Act 42 of 1949.
[11]*Tahir Saifuddin v Tayabji Moosaji* AIR 1953 Bom 183.
[12]Quran II: 276.

large. The case before the court related to a group which allegedly allowed this authority to their head priest, known as *Dai-ul Multaq,* who claims what may be loosely described as papal powers.

In *Katheesa Umma v Narayana Kathamma*,[13] the Supreme Court, speaking through Hidayatullah, J (as he then was), made a valuable contribution, by way of an accurate, erudite and elaborate summary of the law relating to the important topic of *Hiba* (gift) among family members. The three necessary elements—declaration by donor, acceptance by donee and delivery of possession—are admirably and lucidly explained in the judgement of Hidayatullah, J, running into several pages, with which Sarkar, CJ, and Shah, J, concurred.

Another important decision of the court was given in *Board of Muslim Waqfs, Rajasthan v Radha Kishen*,[14] decided by Jaswant Singh, Pathak and Sen, JJ. The question before the court was interpretation of the expression, 'any person interested therein' occurring in section 6(1) of the Waqf Act, 1954. This barred challenge to the findings of the Waqf Commissioner by certain persons regarding land comprised in Waqf properties. The court held that the respondents (non-Muslims) were not barred from filing a civil suit to establish their rights and title, if any, to the disputed properties. As this writer commented at that time, this judgement must be commended as a good and practical solution of reconciling conflicting claims and social needs. It upheld the jurisdiction of the Waqf Commissioner and the Waqf Board to make and publish a survey of Waqfs and Waqf properties, while limiting the finality and conclusiveness of their findings differentially respectively to the persons interested in the Waqf (Muslims) and to outsiders. It has given the Waqf Act a reasonable scope of operation and usefulness without making it oppressive to non-Muslims.

In *Sarla Mudgal v Union of India*,[15] Kuldip Singh, J, sitting with Sahai, J, made a constructive and valuable contribution to a problem that has long vexed Indian society. That problem is the

[13]AIR 1964 SC 276.

[14]AIR 1979 SC 289; see also Danial Latifi 'Muslim Law', 15 *ASIL* 143 (1979).

[15]AIR 1995 SC 1352.

path of escape from matrimonial obligations chosen by certain men married under the Hindu Law by 'conversion' to another religion, usually Islam, which seemingly offers them such indulgence. This happens in cases where marriages have broken down irretrievably or where, under some influence, there is an urge to change partner.

Relying on *Ram Kumari*,[16] *Budama v Fatima*,[17] and *Nandini v Crown*,[18] Kuldip Singh, J, drew a valuable conclusion. These were all cases where the woman had converted. It had been held that such conversion did not dissolve the marriage tie.[19] Kuldip Singh, J, held that the same rule would apply to a case of conversion by a Hindu man to another religion. What is sauce for the goose is sauce for the gander. That, as Kuldip Singh, J, rightly held, is the traditional position that has not been changed by legislation. Thus when two persons are married under the Hindu Law, the apostasy from Hinduism of one spouse or his or her conversion to any other religion does not dissolve the marriage. The judge, in effect, further held that the continued subsistence of the earlier Hindu marriage occupies the jural space that would be required to accommodate a second marriage by the same person under any other system.

The view of Kuldip Singh, J, so understood, does not in any way conflict with or detract from the freedom of religion, a fundamental right of every citizen under article 25 of the Constitution. No doubt it is the fundamental right of every Hindu to convert to Islam if he so desires. But such conversion cannot displace existing jural obligations. A man can give up his rights but not his obligations. The finding of Kuldip Singh, J, does not conflict in any way with Islamic law and harmonizes therewith.

[16]*In re Ramkumari* (1891) ILR 8 Cal 266.
[17]AIR 1914 Mad 192.
[18]AIR 1920 Lah 379.
[19]By virtue of section 4 of the Dissolution of Muslim Marriages Act, 1939 (still in force in India, Pakistan and Bangladesh), 'The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage.... Provided that the provision shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith'.

Under Islamic law, conversion to Islam must be for the sake of Islam, not for the sake of a woman, as the Prophet himself laid down in a famous and undisputed *Hadith*.[20]

The ruling and declaration of the law by Kuldip Singh, J, is by virtue of article 141 of the Constitution, binding on all the courts in the territory of India. Henceforth no such marriage solemnized by a Hindu who, for this purpose, has become a Muslim, shall be held legally valid. Parties indulging in such practice shall be liable to prosecution under the Indian Penal Code, section 494. This decision has met a long-standing demand of Hindu women. It should be welcomed by all sections of Muslims as it conforms to the dictum of the Prophet. This ruling will be conducive to communal harmony and prevent misuse of Islam.

It is unfortunate that, Kuldip Singh, J, has encumbered his otherwise admirable judgement with observations irrelevant to the matter before him, regarding the desirability of a uniform civil code. This was, perhaps, playing to the gallery, overlooking the impact of these remarks on a concerned section of the people. The task of regulating the pace of statutory reform of our laws has, wisely, been committed, by the framers of our Constitution to our sovereign Parliament and the state legislatures. In this sensitive field, it would have been in conformity with judicial wisdom for the court to abstain from advising the legislators about any law reform they may, in their wisdom, in future undertake.

Arrested Step Towards Islamic Reformation

Shah Bano[21] has excited much public attention. Many are surprised why so seemingly small an issue as a maintenance order of a few hundred rupees monthly in favour of an elderly divorcee should arouse such extreme passions in such diverse quarters. Some future legal historians may consider this case to be the greatest contribution made by the Supreme Court to the development of Muslim law. Others may differ.

[20]Mohd. Ismail, I *Sahiah al-Bukhari* Eng. trans. by Dr Muhsin Khan 1 (1980).

[21]*Supra*, note 2.

The contentions advanced on behalf of the divorcee (wife) in the Supreme Court[22] were modest, based on section 127 of the Code of Criminal Procedure, buttressed by the Quranic verse,[23] as interpreted by the ruling of the canonized jurist, Imam Shafe'i.[24] The latter had held that this Quranic verse imported a legally binding obligation upon the divorcing husband to make a reasonable provision for his divorcee wife. This reference to Islamic law was necessary because the Muslim Personal Law Board, which had intervened in the case, had challenged the constitutionality of section 127, on the ground of its alleged repugnance to the fundamental right of a Muslim under article 25 of the Constitution to practise his religion. The omission in the judgement of the Supreme Court of any reference to Imam Shafei may or may not have been accidental but it led many to believe (what may actually be the result) that the Supreme Court was overturning the age-old rule applied to Islamic law that only the rulings of particular canonized jurists could be looked at by the courts and that the Quran could not be directly looked at or interpreted. This understanding, or misunderstanding, was the nub of the issue that aroused so much heat among the orthodox throughout India.

A combination of politicians, pontiffs, and conservatives rushed through Parliament the so-called Muslim Women (Protection of Rights on Divorce) Act, 1986, that took away from unfortunate Muslim divorcees their right to relief under section 125 of the Code of Criminal Procedure, while professing to give them other rights whose value is still uncertain. That Act is not the subject-matter of the present discussion.

Reverting to *Shah Bano*,[25] it is best to state the decision of the Supreme Court in the words of the learned judges themselves. After setting out *Ayats*[26] (verses) of the Holy Quran, the court said:

> These *Ayats* (verses) leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to

[22]By this writer, as her counsel.
[23]Quran II: 241.
[24]See Annexure.
[25]*Supra*, note 2.
[26]Quran II: 240–1, trans. By Abdullah Yusuf Ali.

> provide maintenance to his divorced wife. The contrary argument does less than justice to the teachings of the Quran. As observed by Mr. M Hidayatullah, in his introduction to Mulla's *Mahomedan Law*, the Quran is *Al Furqan*, that is, one showing truth from falsehood and right from wrong.[27]

The judgement of the constitution bench seemed a direct challenge to an old standing rule of interpretation of the Islamic Law *(Shariat)*. The old rule had held the field for over a thousand years. This rule was evolved in the Abbasid period when the early Islamic Caliphate had yielded its republican form to a dynastic monarchy and empire. The purpose of this rule was to minimize the apprehended mischiefs that an autocrat or his appointed judges could do to the law and Islamic society, and to ensure that any such damage would be limited within narrow bounds. It also insulated the autocrats against radical and republican jurists, of whom there was no dearth. It was then laid down, allegedly by consensus, that the judges and the legislative authority of the caliph could only operate within the parameters of the rulings of the canonized masters of the law who had each, in one way or another, passed the test of their integrity to the satisfaction of the public and the ruler. Their rulings were acceptable to the autocrats and the public. This rule was accepted and recognized by the Privy Council in *Aga Mohammed*:

> They do not care to speculate on the mode in which the text quoted of the Koran, which is to be found in Sura II, vv 241–2, is to be reconciled with the law as laid down in the *Hedaya* and by the author of the passage quoted from Baillie's *Imameea*. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.[28]

By their deft juristic reasoning the Privy Council pleased the conservative elements. This rule had however, outlived its usefulness. South Asia's Islamic Erasmus, Sir Syed Ahmad Khan, strongly disapproved the continuance of this old rule, sometimes called *taqlid* (imitation). According to him, it had long outlived its usefulness. The real reason for the decline of the Muslims, according to Sir Syed Ahmad Khan, was that they have not yet

[27]*Supra*, note 2 at 952.
[28]*Aga Mahomed Jafer v Koolsom Beebee* (1897) 24 IA 196 at 203–4.

realized that the present age demands a totally new legal system which should deal with social, political and administrative affairs. He held that the unwarranted seal of infallibility put upon the compilations of the ancient jurists had led to dire consequences. According to Sir Syed Ahmad:

1. The people were led wrongly to believe that the religion of Islam is directly related to all worldly matters and that, therefore, nothing can be done without obtaining a religious sanction.
2. If the laws and regulations, which the jurists had formulated in the context of the material and social conditions obtaining in those days, were accepted as the private judgements of certain learned personages, there would have been no harm. But unfortunately they came to be identified with Islam itself. Hence any attempt to modify or replace them by better laws came to be looked upon as heresy.
3. Due to these reasons, the books of the jurists were regarded as incorporating infallible truth and so sufficient for the guidance of our affairs. Civil and criminal, commercial and revenue codes were thought unnecessary and redundant.[29]

Sir Syed, therefore, called upon the Muslims 'to formulate a new legal code suited to present needs. In this work of Reconstruction, we cannot neglect or ignore the stupendous work done by the early jurists but we cannot be bound by it. We must go back to the original sources, the Quran and the *Sunna*'.[30]

Dr Sir Mohammed Iqbal also took the same view. He observed:

> I know the *ulema* of Islam claim finality for the popular schools of Mahomedan Law, though they never found it possible to deny the theoretical possibility of a complete *ijtihad* (reinterpretation).... Since things have changed and the world of Islam is confronted by new force... I see no reason why this attitude should be maintained any longer. Did the founders of our Schools ever claim finality for their reasoning and interpretations? Never. The claim of the present generation of Muslim liberals to re-interpret the foundations of legal principles, in the light of their own experience and the altered

[29]Bashir Ahmad Dar, *Religious Thoughts of Sir Syed Ahmad Khan* 135 (1975).
[30]Ibid.

> conditions of modern life, is in my opinion, perfectly-justified. The teaching of the Quran that life is as a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.[31]

This old rule of Islamic jurisprudence was outdated. Whatever may have been the merits of this old rule when it was evolved in the Islamic world, and in the turbulent period following, when the Muslim masses and intelligentsia were kept out of power and had little say in the decisions of autocrats and imperialists there is no doubt that this rule placed Islamic juristic and political thinking in a straitjacket very far from what the Prophet had envisaged.

Despite the wide consensus among the intelligentsia that this old rule must go, such was its entrenched strength that for the first six decades of the twentieth century only halting and cautious moves were made to soften it. In 1936–9 the efforts and inspiration of the late Maulana Ashraf Ali Thanvi led to a consensus of the *ulema* that may be considered a halfway house. At the time of enactment of the Dissolution of Muslim Marriages Act, 1939 the ulema agreed that, '[i]n cases in which the application of the Hanafi law causes hardship, it is permissible to apply the provisions of the Maliki, Shafei or Hanbali Law.'[32]

This new consensus or *Ijma* was applied by the (British) Indian Central Legislature in 1939 while enacting the Dissolution of Muslim Marriages Act, 1939. This statute, in substance, extended the principles of the Maliki law to all Muslims in India (as it then was). This principle is known as *Takhayyur* (eclectic choice), which was also applied by the Abdur Rashid Commission appointed by the Government of Pakistan in 1950 for the reform of Muslim Family Law. The recommendations of this commission resulted in the famous Muslim Family Laws Ordinance, 1965. It is still the law in Pakistan and Bangladesh under different names. It may well be adopted as the basis of reform in India.

[31]Mohd. Iqbal, *Reconstruction of Religious Thoughts in Islam* 168 (1994).

[32]Gazette of India 1936, Pt. 5, at 154. For detail see Furqan Ahmad, 'Maulana Ashra Ali Thanavi: Juristic Thoughts and Contribution to the Development of Islamic Law in the Indian Sub-continent', VI *Islamic and Comparative Law Quarterly* 71 (1986).

Steps Taken in Pakistan Towards Law Reform *vis-à-vis* Supreme Court of India

As a matter of comparative jurisprudence, the resolute struggle of the women of Pakistan, that took place under the banner of their various organizations, merits notice. These movements had an impact on the thinking of the legal profession and the people, particularly in Pakistan and Bangladesh. To some extent they muted the stridency of the ulema. They brought about a change in public mood, affecting the development of the law and having an impact on the judges and lawyers. This change is reflected in important court decisions in Pakistan and in Bangladesh. Since the language of the Supreme Courts of India, Pakistan and Bangladesh remains English, and these tribunals cite each other's judgements in many matters, particularly in the field of Muslim Law, these may be referred to here.

The first of these decisions, given by the Supreme Court of Pakistan, is *Khurshid Bibi*.[33] The judgement of S.A. Rahman, J, reads in part:

> The question arises whether the wife is entitled as of right, to claim ***khula*** (dissolution) despite the unwillingness of the husband to release her from the matrimonial tie, if she satisfies the Court that there is no possibility of their living together, consistently with their conjugal duties and obligations....
>
> [T]he fundamental laws of Islam are contained in the Quran and this is, by common consent, the primary source of law for Muslims. Hanafi Muslim jurisprudence also recognizes ***hadith***, ***ijtehad***, and ***ijma*** as the three secondary sources of law.[34]

After a discussion of the original sources, the learned judge concludes, 'the view taken by Kaikhus, J, in ***Bilquis Fatima***,[35] that the relevant verses of the Quran give a right of ***khula*** (wife's right to divorce) to the wife subject to the limitations mentioned therein is correct....'[36] This view was unanimously supported by Hamdur Rahman, Yaqub Ali, Fazle Akbar, A.A. Masood, JJ. Masood, J, in his concurring judgement emphasized:

[33]***Khurshid Bibi v Mohd. Amin*** PLD 1967 SC 97.
[34]Ibid.
[35]***Bilquis Fatima v Najmul Ikram Qureshi*** PLD 1959 (WP) Lah 566.
[36]***Supra***, note 33.

> The opinions of jurists and commentators stand on no higher footing than that of the reasoning of men, falling in the category of secondary sources of Muslim law, and cannot therefore compare in weight or authority with, nor alter, the Quranic law or the *Hadith*. If the opinions of the jurists conflict with the Quran and the *Sunnah*, they are not binding on courts and it is our duty, as true Muslims to obey the law of God and the Holy Prophet....[37]

A close reading of the concurring judgements reveals the epoch-making force of this decision. The specific point of matrimonial law decided in this case, namely, the establishment (or re-establishment) of the right of a married Muslim woman to obtain a dissolution of her marriage from her husband, without any allegation of fault on his part, was revolutionary. It was not only this result but the manner of reaching it, namely the primary reliance on the Quran and the Hadith, that was revolutionary. This far exceeded the bounds of matrimonial law. This broke the tradition of *taqlid*, established at the time of autocratic monarchs and emperors in the Middle Ages,[38] and continued as a matter of imperial policy by the colonial regime in India.[39]

The unanimous declaration by all the judges of the Supreme Court of Pakistan constitutes the biggest change in the approach to Islamic Law ever since the doctrine of *taqlid* (precedent) was established over a thousand years ago in the period of the autocratic caliphs at Baghdad. This is identical with the view taken by the Supreme Court of India in *Shah Bano*, when the court unanimously declared, 'There can be no greater authority on this question than the Holy Quran.'[40] This new approach is bound, by its very nature, to spread throughout the Islamic world.

Thus, in Pakistan, *Aga Mohd*, earlier referred to, is no longer good law. The decision in *Khurshid Bibi* evoked criticism from a writer defending the old view of the Privy Council. Dr Doreen Hinchcliff of the London School of Oriental Studies assailed the

[37]Ibid.

[38]*Supra*, note 3.

[39]*Supra*, note 28.

[40]*Supra*, note 2 at 945. It may be noted that the Supreme Court of India in *Shah Bano* declined to accept the views taken by the Privy Council on the issue of maintenance. Therefore, the judgement was severely criticized by conservative Indian Muslims.

judgement on familiar lines.[41] But, as another British scholar, Hodkins, sees it, *Khurshid Bibi* 'is now soundly established and unlikely to be challenged'.[42]

Unfortunately, the text of the judgement in *Khurshid Bibi* was not widely available in India in 1985 at the time of *Shah Bano* nor was its full implication then appreciated. For some years, its significance outside the field of Family Law was not understood even by writers who had the text.[43] This judgement subjected the ulema in Pakistan to the discipline of Islam—alas seemingly for some years only—and of democracy, hopefully. This enabled Pakistan to avoid the kind of traumatic events that have occurred in some other (primarily Hanafi) Muslim countries like Turkey. These countries, which faced difficulty in adjusting some of the demands of the mullas, who often muster public support, with the urgings of the pragmatic modernists who control the State and army, perhaps, may profit from a study of Pakistan's experience in this regard. It is a ding-dong battle.[44]

Reflection of the Indian Supreme Court on Bangladesh

Perhaps much of the unseemly fanaticism exhibited by mullas at the time of *Shah Bano,* at the behest, it is said, of some politicians, would have been tempered if our intelligentsia, at least, had the opportunity to study these judgements, including one from the highest court in a neighbouring country which happens to be Muslim.

Bilquis Fatima and *Khurshid Bibi*, cited above, fostered a similar development in Bangladesh. In the Supreme Court (High Court

[41]Keith Hodkinson, *Muslim Family Law* 230 (1984).

[42]Ibid.

[43]Ibid. at 229.

[44]In a perceptive dispatch from Bahrain in *The Hindu* dated 27 June 1999, Kesava Menon views the situation in Iran, Algeria, Egypt, Turkey, finding that, 'In country after country in West Asia, religious forces that initially sought to mobilize people through violence (and bigotry) have learnt that they can progress only if they... delve deeper into the meaning of the Koran, try to understand its precepts in a broader philosophical framework and seek to match centuries old precepts with modern needs.'

Division) at Dhaka,[45] on 9 January 1995, Mohd. Ghulam Rabbani and Syed Amirul Islam, JJ, delivered an admirably short but path-breaking judgement relating to the same verse II: 241 of the Holy Quran that had figured in *Shah Bano* before the Supreme Court of India in 1985. The learned judges pointed out that 'the literal study of the Quran is discouraged by a section of Muslims. They insist that the readers should follow any one of the interpretations given by the early scholars. They go further saying that the door of interpreting the Quran is now closed.' Referring to the dictum of the Privy Council in *Agha Mohd*, the court noted:

> This dictum of the Privy Council pronounced about one hundred years ago in 1897 AD cannot be followed on three grounds—
>
> Firstly the learned judges in the Privy Council were non-Muslims and they were anxious to decide such issues in accordance with the laws as propounded by the Muslim jurists, rather than independently disregarding the Muslim jurists.
>
> Secondly Article 9 (1A) of the Constitution of Bangladesh ... states that 'Absolute trust and faith in Almighty Allah shall be the basis of all actions'. This indicates that Quranic injunctions have to be followed strictly without any deviance.
>
> Thirdly the Quran urges, 'Those to whom we have sent the Book should study it as it should be studied' [Q II:121].[46]

The learned Judges then cited the judgement of the Lahore High Court in *Mst. Rashida Begum v Shahdin*:

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

[45] *Hafizur-Rahman v Shumsum Neher Begum* 47 *Dhaka Law Reports* 54–7.

[46] Ibid.

> commentators who lived thirteen or twelve hundred years ago is considered the last word on the subject then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the times. It will cease to be a universal religion and will remain a religion confined to the time and place where it was revealed.[47]

The learned judges concluded:

> A civil court has jurisdiction to follow the law as laid down in the Quran disregarding any other law on the subject, if contrary thereto, even though laid down by earlier jurists or commentators of great antiquity and high authority and though followed for a considerable time. Under the Hindu law clear proof of usage can outweigh the written text of the law. But it is not so in the case of Islamic law. For it is an article of faith of a Muslim that he should follow without questioning what has been revealed in the Quran and disobedience thereof is a sin.[48]

Then followed a discussion and interpretation of the verse in Quran II. 241, where the court reaches the same conclusion as did the Supreme Court of India in *Shah Bano* as earlier set out, and ruled:

> We hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period, that is, till she loses the status of divorcee by marrying another person.[49]

This valuable judgement of the High Court Division has unfortunately been overruled by the Appellate Division on the technical ground that the appellant therein did not receive adequate notice.[50] The learned judges of the Bangladesh Supreme Court have at the same time recorded their *obiter dicta* criticizing the judgement on merits which, with due respect to them, may not be the last word on the subject.[51] The Chief Justice delivering

[47]PLD 1960 Lah 1142.

[48]*Supra*, note 45.

[49]Ibid.

[50]See Judgement of the Appellate Division (Civil), 3 December 1998, *Hafizur Raman v Shamsum Nahar Begum* 3 MLR (AD) 1999 at 41–88.

[51]This writer is confident that the trend of international opinion in the Islamic world is rapidly moving in the direction of rational and humanistic interpretation of the law. See for example Syed Shahbuddin, 200 *Muslim India* 365 (August 1999).

the decision of the Appellate Bench, however, appeared to favour 'a fair, just and reasonable legislation to remove the extreme hardship of divorced women in our society. Such statutory recognition of benefits and privileges for a divorced woman will not conflict with Muslim law.'[52]

Referring to the *Shah Bano* judgement, A.T.M. Afzal, CJ, said:

> It is to be observed that in the [Shah Bano] case the Indian Supreme Court was considering an application for maintenance of a divorced Muslim woman filed under section 125 of the Code of Criminal Procedure 1973 and particularly the provision in the said section which read: 125(1)(a) If any person neglects or refuses to maintain... his wife ***unable to maintain herself*** [emphasis added by his Lordship].
>
> In considering the defence taken by the husband and the interveners (including the All India Muslim Personal Law Board) on the basis of the aforesaid Personal Law of the Muslims the Court observed, 'We are of the opinion that the application of these statements of the law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife in all circumstances and in all events. That is not the subject matter of section 125.'
>
> The Indian Supreme Court then considered the aforesaid Ayats 241 and 242 of the Sura Baqara and observed, 'These Ayats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the Quran'.
>
> The Shah Bano decision was thus a limited one given in the context of Section 125 of the CrPC.[53]

It is unfortunate that such advice was not given to the Indian ulema, in 1985–6. Resistance by section of the Indian ulema to the idea of a reasonable provision for divorced Muslim women is now much weakened. This is partly due to the impact of international Muslim opinion.[54]

[52]*Supra*, note 50 at 88.

[53]Ibid. paras 18–21.

[54]See edit page article in the *Pakistan Times*, Lahore, dated 9 January 1986, by Maulana Rafiuddin Shahab, where the stand of the Indian ulema has been assailed. The Maulana wrote,

> The Association of Indian Lawyers and Judges have condemned the attitude of the Muslims [for agitation against *Shah Bano*]. They have treated the agitation of the Muslim masses as a challenge to the courts. This situation has provided

Conclusion

Women's organizations, including those of Muslim women, are demanding immediate relief for Muslim divorcees, enabling resort to section 125 of the Code of Criminal Procedure, notwithstanding the Muslim Women's Act of 1986. The intelligentsia and the women's movement, particularly Muslims, should complete the task of demolition of the old and injurious ideas that Sir Syed Ahmad Khan and Dr Sir Mohd Iqbal denounced.

We must notice a recent judgement of the Mumbai High Court,[55] interpreting section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that this section conferred a right on a divorced woman to claim a reasonable provision. The court held that this provision must take into account the needs for her future beyond the iddat period.

This is consistent with the view taken by the author of the celebrated Arabic Lexicon, *Lissanul Arab,* written seven hundred years ago, which said that 'mataa has no time limit because Allah has not fixed a time limit for the same. He has only enjoined the payment.[56] The unrealistic view of certain ulema, that because Islam provides remarriage as a remedy for the divorcees, maintenance is unnecessary, must be rejected. In Indian conditions where such remarriages are infrequent, and polygamy is frowned upon, the divorcee's plight is pitiable. It is notable that in Egypt, which is perhaps the leading country governed by the Hanafi doctrine, the law provides:

> A wife who after consummation of her valid marriage is divorced by the husband without her consent and without any fault on her part, shall be entitled, in addition to maintenance of *iddat,* to *mata'* equivalent to at least two years' maintenance, subject to consideration

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an opportunity for the opponents of Islam to pass derogatory remarks about the faith. Shah Bano was divorced after spending a major part of her life with her husband. The [opponents of Islam] maintain that a religion which opposes the provision of maintenance allowance to an old helpless divorced woman cannot be a true religion.

[55]*Smt. Jaitunbi Mubarak Ali v Mubarak Fakruddin Shaikh* Cr. W.P. No. 1299 of 1999, decided on 4 May 1999.

[56]Cited in the Memorandum dated 1 February 1986 submitted to the Prime Minister by the Islamic Shariat Board, Kozhikode, Kerala; see also Danial Latifi, 'Muslim Law', 21 *ASIL* 398 (1985).

> for the financial status of the husband, the circumstances of the divorcee and the duration of the marriage between the parties, The husband shall be entitled to pay such *mata'* by instalments.[57]

Many, even among the most conservative ulema, hold that although provision for the divorced wife under Quran II: 241 is not *ipso facto, by the force of that text alone,* legally enforceable, such provision if provided for by positive legislation is not inconsistent with Islam and indeed promotes Islamic norms of justice.[58]

This question will be a challenge for the Supreme Court of India. Its outcome will be one that all women, including conscious Muslim women, and many men, will anxiously await.

The Supreme Court of India, speaking through Chandrachud, CJ, in *Shah Bano,* and earlier through Krishna Iyer, J,[59] roused the conscience of the world public to the plight of divorced Muslim women. Since the wrong is long standing, in some Hanafi jurisdictions only, its remedy, whether by legislation or judicial decision, may take time, but will assuredly be achieved.

[57]Article 18A, Egyptian Law on Personal Status, 1929 as amanded by Law 100 of 1985. This law has ben approved by the Grand Shaikh of Al-Azhar (the Athenaeum of the Sunni Muslim world) and has successfully withstood challenge in the Supreme Constitutional Court of Egypt.

[58] See even Bangladesh judgement, *supra*, note 49.

[59]See *Bai Tahira v Husain* AIR 1979 SC 362; *Zohra Khatun v Mohd. Ibrahim* AIR 1981 SC 1242.

Annexure

Imam Shafei's Ruling on AlQuran II.241

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

wa qaola huv	Regarding the Ayat
'WA LIL MUTALLAQAATI	'AND FOR DIVORCEES
MATAAUN BIL MAROOFE	REASONABLE PROVISION
HAQQAN ALAL	IS DUE FROM
MUTTAQEEN'	THE RIGHTEOUS'
qaala 'Abdur Rahman	Said Abdur Ratunan
bin Zaid bin Aslam	bin Zaid bin Aslam
lamma nazala	'When God revealed
qaola huu Ta'alaa	the Ayat
'MATAAUN BIL MAROOFE	'REASONABLE PROVISION
HAQQAN ALAL	IS DUE FROM
MOHSINEEN' (II.236)	THE KINDLY" (II.236)
qaala rajulun	someone said
'in sheto ahsanto	'If I wish to be kind
fafa 'alato wa	I may pay and
in sheto lam af'al'	otherwise not.'
Then God revealed	fa anzala Allaaho
this Ayat:	haaza hil aayaha
'WA LIL MUTALLAQAATI	'AND FOR DIVORCEES
MATAAUN BIL MAAROOFE	REASONABLE PROVISION
HAQQAN ALAL	IS DUE FROM
MUTTAQEEN' (II.241)	THE RIGHTEOUS"'(II.241)
wa qad istadalla	And because
ba haaza hil ayaha	of this Ayat
man zahabe min al ulamaae,	a group of scholars
ila wujuub il mata'ata	hold MATAA obligatory
likulle mutallaqaatin	in all cases
sawaan	whether
kaanat mufawwazatan	of divorce by delegation

aw mafruzan laha	or of Mahr paid
aw mutallaqatan	or of those divorced
qabl al masiis	before consummation
aw madkhoolan bihaa	or those after consummation
wa hua qaolun	so held
'an Al SHAFEI	IMAM AL SHAFEI
razi Ullaah alaeh.	God bless him and his!