ROLE OF JUDICIARY AND MUSLIM PERSONAL LAW

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INTRODUCTION

The basic premise of law and legal institutions is to ensure justice. A narrative on rights cannot escape the purview of law and concomitantly of justice. Basic rights, according to Juger Habermas have become 'architectonic principles' of legal order, transforming content of individual liberties into fundamental norms that shape 'objective' law[2]. This work is an attempt to study the rights of Muslim Women in the context of Muslim Personal Law, in the backdrop of the ongoing debate on *triple talaq*, Muslim Personal Law and imposition of uniform civil code. The overarching rubric is to analyze the place of gender-based identity in legal discourse. This paper uses the case law methodology to, weed out the intricacies in the Muslim Personal Law and study ways in which Courts have interpreted this law. The paper analyses ways in which courts have adjudicated on issues related to customary observances such as triple *talaq*, *halala*, or *iddat* period, and tried to negotiate between individual rights on the one hand and idea/ideals of a secular democracy on the other. The paper attempts to trace the enactment of The Muslim Women (Protection of Rights on Divorce) Act 1986 and analyzes the opinion of the courts with regard to 'reasonable and fair', 'provision and maintenance' and 'within *iddat* period'. Subsequently, the paper attempts to emboss the principles on which the courts have adjudicated and argue that the principles are inadequate in changing the dynamics of gender-based identity within the personal law system. This paper borrows the idea of 'principles' from Ronald Dworkin's treatise *Taking Rights Seriously*. The work concludes by highlighting the importance of Article 44 of the Constitution of India and argues that in order to create a rights based society, it is imperative to look beyond the personal law system and maneuver on the path towards a uniform civil code.

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[2] Juger Habermas in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* in chapter 6: *Judiciary and Legislature*, says that 'the fundamental norms and principles that now penetrate all areas of law demand that individual case be interpreted constructively. Although basic rights originally consists negative rights that granted liberties within the bounds of law, they have now become architectonic principles of the legal order.'

India's recognition as a 'sovereign, socialist, democratic republic' is intricately interwoven around caste, class and gendered identities. It is not difficult to discern the role of law in dispensing justice and in upholding ideas/ ideals enshrined in the constitution. Law is inevitably, essentially and centrally implicated in determining rights and entitlement. This law, crucial and indispensable for the survival of a civilized nation thrives on socially determinant factors. On one hand, it becomes instrumental in addressing questions on rights and justice in the society and on the other, it metamorphoses along with socially determined factors. The question is whether the legal system - deemed the epitome of and last resort to justice, a perfectly neutral system.[3] When we say that law is socially and historically determined, how impervious is law to socially constructed hegemonic ideas that are entrenched in our collective consciousness?

This work attempts to pursue the dynamics of the rights of women and legal discourse, within the context of the Muslim Personal Law. Through a series of cases, the paper analyzes how the courts have adjudicated upon the rights of Muslim women. It is pivotal to understand the role of Judiciary in this ongoing debate on the personal laws of Muslims, because, though so much of the Islamic Law remains uncodified, the Supreme Court and the high courts have advanced the 'official law' through judicial interpretations on a case-to-case basis.[4] The legal discourse determines ways in which the constitutional values that exist in abstract form animate in contemporary society. While on the one hand the judgments become ways of interpreting the constitutional provisions, on the other it reveals the place of gender based identity in a particular society.[5] This work intends to emboss how the court (s), that is the Judiciary, has dealt with indeterminacy in the Muslim Personal Law.

The case law methodology serves the purpose of this paper as it, highlights the myriad issues that a Muslim woman faces within the community with marriage, maintenance and divorce. In each

[3] Agnes, F (2004) *Family Law* (Volume I, Oxford University Press) xxiii

[4] Agnes, F (2011) *Family Law*, (Volume I, Oxford University Press)

[5] In '***Between Facts and Norms'***, Juger Habermas reflects on the role of adjudication in cases arising out of Indeterminacy of law and the Rationality of Adjudication. According to Habermas in order to fulfill the socially integrative function of the legal order and the legitimacy claim of law, judicial decision-making must simultaneously guarantee certainty and legitimacy or rational acceptability. According to Habermas the two set of, consistent decision-making and rational acceptability do not easily fit in together and therefore must be reconciled in adjudication. This essentially embosses the rationality of adjudication. According to Habermas, as in the case with laws, court decisions too are creatures of history and morality. What an individual in a civil society is entitled to have depends on both the practice and the justice of its political institutions. For Habermas a legal order's consistency and rational acceptability comes when a judge made decision has *internal consistency* and *rational external justification*, which becomes problematic in the application of contingently emergent law.

of these aspects, we get an overview of the role of a Muslim woman within the personal law system, the leeway she has to voice her opinion, the behavior meted out to her by the men in the community and her condition, which is on tenterhooks once she is out of the conjugal relationship. Each of the aspects that the paper enlists has a bearing in adjudication. In the domain of Muslim Personal Law especially where marriage is tantamount to a contract, the role of the woman, her negotiating space and the implications of an elaborate mode of breaking away from the marriage, serve as important markers, which the judiciary has to take into consideration in establishing the 'truth'.[6]

Gendered identities have been a dominant and recurrent theme in almost all personal laws. Then the question is why Muslim Personal Law? We concede that laws are under constant negotiation and that; historically determined factors have considerable influence over laws and their functioning. In our country, the Muslims find themselves embedded in a certain historical and social milieu. The fact that Muslims are a minority, deemed to be in conditions worse than the Dalits according to Justice Rajendra Sachar has implications in determining the rights of 'minority within a minority'.[7]

This leads us to the ***Shah Bano*** judgment, which was one epoch making judgment in the history of India with implications on the social, political and personal space of Muslim women. The Supreme Court opined that there is no conflict between the provision of Section 125 of the Code of Criminal Procedure and of the Muslim Personal Law on the question of the husband's obligation to provide maintenance for a divorced wife. The judgment upheld that a Muslim woman is entitled to claim maintenance under Section 125 of the Code of Criminal Procedure, in case she is not in a position to support her. The judgment garnered opposition from the fundamental Islamic organizations like the All India Muslim Personal Law Board and Jamaat-i-

[6] Agnes, F (2004) Family Law Volume I mentions that the procedural and methodological aspects of law are important in civil cases while adjudicating on issues such as validity of marriage, sexual conduct of women, maintenance etc as these affect the rights of women and are dependent on what is legally valid and what are the popular notions of legality.

[7] This idea is borrowed from Zakia Pathak and Rajeshwari Sundarajan's work *Shah Bano.* The authors talk about the historical backdrop of the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and explain that the demand of Hindus for reform or outright removal of Muslim Personal Law was a ploy of a majority community to repress the religious freedom of a minority community, by professing to safeguard their women. The enactment of The Muslim Women Act, after the ***Shah Bano*** case was a move of the Congress government keeping in mind the party's political future. The authors are of the opinion that by adopting a perception theory, the Government was able to present the situation as a conflict between two minority interest, that is Muslim versus women.

Islami, which questioned the judgment and its validity in accordance with the Muslim Personal Law, as in accordance with The Muslim Personal Law a woman is entitled to maintenance from husband only till the *iddat* period. The Congress after ***Shah Bano*** judgment passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. This move of the Congress called upon criticism from feminist groups and even some Muslim groups who viewed the move by the Rajiv Gandhi government a political subterfuge.

The debate between the retention of the personal laws and the uniform civil code received a newfound importance after the ***Shah Bano*** case. In the words of Zakia Pathak and Rajeswari Sunderajan, this case is the displacement of religious identity of Muslim Women by highlighting their gendered identity.[8] Despite the fact that ***Shah Bano*** case was able to break the silence over the prevailing injustice and impropriety within the personal law, a space, a leeway to allow the women folk of the community to negotiate her rights continue to remain bleak even today.

The ***Shah Bano*** case serves as an exposition in analyzing the role of the judiciary in upholding the rights of women, ''without dismantling the personal law system''. The *Shah Bano* judgment as Seobhar Mullally in '*Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*' opined is the beginning of a dialogue to accommodate differences.[9] The subsequent judgments on Muslim Personal Law, too, embody this negotiation, between principles endeared by a secular state and those by a welfare state. This admixture of history, constitutional rights and precedent finds place in Ronald Dworkin's treatise *Taking Rights Seriously* where his

[8] Authors Zakia Pathak and Rajeswari Sunderajan in *Shah Bano* talk about the formation of discontinuous female subjectivity owing to the displacement of the Muslim woman, onto several discourses. The assumption, of an ideology of 'protection' marks and unifies these several discourses. The subaltern consciousness operates as operative will and functions as resistance, dismantling the family's idea of 'protection' and further allowing the woman to speak from the space thus created. The paper embosses the role played by Shah Bano 'the woman' who dared to break out from the confines of the private space where her religion and her family dominated. To quote 'the subaltern consciousness assumes an operative will that function as resistance, it destabilized the family's ideology of protection and the law's ideology of evolution. Thus creating a space from which the woman can speak.'

[9] Siobhan Mullally; Feminism and Multicultural Dilemmas in India: Revisiting the *Shah Bano* Case. *Oxf J Leg Stud* 2004; 24 (4): 671-692. Doi: 10.1093/ojls/24.4.671 (671-692). Mullally is of the opinion that in the Shah Bano judgment, the court perhaps recognizing the heightened nature of communal tensions in India, sought to root its findings in Islam itself. While in the Danial Latiffi case, the court remained within the constraints of the 1986 Act and avoided finding of unconstitutionality while continuing to assert the primacy of the constitutional guarantee of equality. This intervention of the judiciary, as propunded in this paper, is striving towards deliberative democracy, which is an overarching imperative to uphold the doctrine of secularism as well as uphold the personal law system and to build the edifice of a successful multicultural country.

principal judge 'Hercules' is one who has an all-encompassing idea of the 'seamless' web of varying arguments across common law precedents, constitutional and statutory provisions.

Ronald Dworkin in his treatise *Taking Rights Seriouly* highlights the importance of principle in hard cases, and argues that 'principles should focus on the rights of the community'.[10] According to Dworkin in order to achieve legal certainty and rational acceptability, it is important to pay attention to the principle[11] on which the court is adjudicating. For Dworkin, these principles are equal concern and respect for each person. Different transitive orders can be set up between the same principles without affecting the validity of the principles.[12]

According to Dworkin, this practical methodology of adjudication based on principles that enjoy validity and rational acceptability is 'constructive interpretation'.

The courts in India too have adjudicated based on 'beneficial rule of construction'. But in the tug-of- war, in the constant negotiation between the personal laws and the language of rights, the basic premise of 'equal concern and respect' for each citizen has been on tenterhooks. The absence of a precedent coupled with adjudication on a case-by-case basis has left the domain of Muslim Personal Law confusing and ambiguous. 'Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.'[13]

The paper attempts to look at the way the judiciary has tried to resolve cases related to marriage and maintenance, and on the principles on which it has premised its arguments. An analysis 'triple talaq', '*iddat*', 'halala', will show how the courts have tried to negotiate customary practices and the gender question but has failed to convince, that the personal laws can be

[10] Ronald Dworkin in *Taking Rights Seriously* brings out the difference in principles and policies while deciding on hard cases. According to Dworkin, in hard cases it is not for the principle to be decided in accordance to the policies that were legislated. The gravitational force of a precedent is defined by the arguments of the principle that support the precedent. The argument of fairness offers the only adequate account of the full practice of the precedent. The most important of these is that, the ideal judge, whom Dworkin refers as Hercules must limit the gravitational force of his earlier decision to the extension of the arguments of principle necessary to justify those decisions. If an earlier decision were taken to be entirely justified by some argument of policy, it would have no gravitational force.

[11] Dworkin in an effort to refute the proclamation of legal positivists substantially arrives at a process of adjudication in hard cases, where principles attain supremacy over rules and mentions that a legal system that consists of rules and principle, secures via adjudication the integrity of relations of mutual recognition which guarantee equal concern and respect to each citizen.

[12] Habermas, J (1996) Between Facts and Norms, 209

[13] In her volume on Family Laws, Agnes mentions that the rulings in these court cases were shaped by the need of the hour, political exigency and social concerns of the individual judge.

negotiated with to accommodate in a just and fair manner the rights of Muslim women. The paper finally concludes by making a case for an uniform civil code that will serve as an ideal ground for the courts to adjudicate on issues of marriage, maintenance, divorce in ways that best embody principles of 'equal concern and respect for each person'.

CASES RELATED TO MARRIAGE AND DIVORCE

In Islam, marriage is a civil contract subject to dissolution. Asaf A AFyzee in ***Outlines of Muhammadan Law*** mentions that in Islamic marriages there are kinds of dissolution by act of parties or by the operation of law[14]. Women and men have the liberty to settle the marriage on their own terms[15]. In case the woman is aware of the existence of the law, she not only has enough discretion in deciding upon the terms of the marriage but also has ample provisions enabling her to dissolve the marriage, in accordance with The Dissolution of Muslim Marriage Act, 1939.

The tensions that highlighted the case of ***Shah Bano*** made it clear that customary practices observed during marriage have adverse impact on women. Even when courts adjudicate in their favour, it is not acceptable by the entire community who are of the opinion that the courts do not have the right to interfere in the personal laws, even if these laws are hostile and degrading.

This case highlighted the most contentious practice of verbal triple talaq. It is preposterous to consider *triple talaq* pronounced by men verbally a valid form of divorce, resulting in the dissolution of marriage. ***The Quran allows talaq only on the ground, that the talaq is for a reasonable cause and there have been attempts for reconciliation between the wife and the husband and two elders from the family, one from the side of the wife and the other from the side of the husband.***

In a series of cases, after the wife claimed for maintenance, the husband made a plea in writing that, on an earlier date the marriage stood dissolved in *talaq* form. ***Smt. Jaitunbi Mubarak***

[14] Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 2008), 69

[15] Women have the right to stipulate the terms of the marriage, which is termed as *aqd-e-nikah*. The Holy Quran bestows this right upon women.

Shaikh vs. Mubarak Fakruddin Shaikh and Anr[16] came to the Court after the enactment of Muslim Women (Protection on Rights of Divorce) Act 1986. In this case, the High Court of Bombay upheld that plea in written statement by the husband is valid and consistent with the views of ancient Muhammedan Text on Marriages.[17] The divorce, in this case, had to be a valid one in order to allow the petitioner maintenance under Section 125 Code of Criminal Procedure, (hereinafter referred to as 'the Code'). The court citing a series of cases opined that 'based on the authority of ancient texts' there is no doubt that the pronouncement by a husband in written statement that he had divorced his wife earlier ***despite not being proven on evidence would be validated as divorce in the talak form*** from the date of filing the written statement.

With ***Shamim Ara vs, State of UP***[18] the issue of arbitrary *talaq* and plea of divorce in the written statement came under a new light. In the above judgment, the Supreme Court opined that the husband could not treat a plea of previous divorce taken in written statement as valid pronouncement of *talaq*[19].

The case of ***Dagdu S/o Chotu Pathan Latur vs Rahimbi Dagdu Pathan*** [20] dealt with plea of divorce in written form in details. The judgment traced from the Quran and All India Muslim Personal Law Board's Compendium of Islamic law, forms and conditions on which one can file a divorce. The Court after considering all forms of *talaq* from the two sources concluded that ***in order to validate a divorce the judges are required to appoint two arbitrators one belonging to the wife's family and other to the husband's family*.** The two parties must first make efforts for reconciliation before the ultimate decision of divorce entrusted to the judge. The court was of the opinion that *talaq* must be for a reasonable cause and must be preceded by an attempt at reconciliation between the husband and wife and by two arbitrators, one chosen by the husband and one by the wife and this is imperative for talaq in any form.[21]

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[16] 1999 CriLJ 3846

[17] Smt Jaitunbi Mubarak Shaikh vs Mubarak Fakruddin Shaikh and Anr 1999 CriLJ 3846 [37(1)]

[18] (2002) 7 SCC 518

[19] 'No holy book or scripture has been brought to notice which provides that a recital in any document whether a pleading or an affidavit, incorporating a statement by the husband that he has already divorced his wife even if not communicated to the wife would become an effective divorce from the date the wife learns of such a divorce'

[20] 2003 BomCR (Cri) 251

[21] Talaq-e-AhsanTalak "Ahsan" consists of a single pronouncement of divorce (Talak) made during a tuhr, period between two menstrual course, followed by abstinence from sexual intercourse for the period of Iddat.
Talaq-e- HasanTalak "Hasan" consists of three pronouncements made during successive tuhrs without sexual intercourse during any of the three tuhrs. The Talak becomes irrevocable on pronouncement of divorce during all

One cannot deem a divorce valid by a mere declaration of divorce by the husband, in oral or written form or even if a Talaqnama supports the statement. Despite the fact, that Islam customary practice allows talaq in various forms; the overarching imperative is all encompassing, that is, without the involvement of the wife in decision-making, one cannot hold a divorce to be valid.

The practice of *halala* too has garnered censure and derision. In ***Mrs. Sami Khan vs Adnan Sami Khan***[22], the court adjudicated on the issue of Halala[23]. In the case of ***Mrs. Sami Khan vs Adnan Sami Khan*** the appellant sought to dissolve her second marriage but the respondent challenged the validity of the second marriage on the ground that the wife did not perform halala before contracting the second marriage with the respondent husband. The ratio of the case was, 'halala requires to be complied with only where the husband has repudiated his wife by three pronouncements.' The court mentioned that there is a difference between 'Triple Talaq' that is talaq by three pronouncements and talaq by a single pronouncement. In this case, to examine whether the wife has to perform halala or not before contracting the second marriage, it was imperative to understand the mode of divorce. The court opined that the mode of divorce was divorce in the Ahsan mode that is divorce through a single pronouncement and therefore it was not mandatory on the part of the wife to observe halala.

The judgement of the court was in favour of the woman, but in any case, if we look into the personal law system, notwithstanding the decision of the court, the practice in itself is malignant

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the three tuhrs. In Talaq-e-Biddat divorce in any form becomes irrevocable.There are two forms of divorce: Talaq by Khula and Talaq by Mubara'at. A divorce by Khula is a divorce by consent initiated by the wife and the wife demands for a separation. Talaq by Mubara'at the divorce is a mutual one initiated by both the husband and the wife. In Mrs. Sabah Adnan Sami Khan vs Adnan Sami Khan 2011(1) BomCR 788 the court opined that Khula and Mubara'at operates as a single irrevocable divorce and therefore mere reconciliation would not resume marital life and a formal marriage is necessary.

[22] 2011(1) BomCR 788

[23] To understand the practice of Halala it is important that we know the grounds on which a Muslim marriage can be dissolved. A Muslim marriage is deemed to be dissolved after a period of three months which is called iddat period, from the day a man divorces his wife. This period is for attempts to reconciliation. After three months the marriage is deemed to have been dissolved. However the marriage can be renewed and the couple can be reunited but this process can take place just thrice, this was done to prevent men from dissolving and renewing the marriage by the husband at their own whims and not allowing the wife to remarry. Once the marriage is broken three times, the divorce becomes irrevocable. If after the third divorce, or a thrice divorced wife gets married to another man and that marriage also fails due to divorce of death of the husband and the wife wants to resume the previous marriage in that case the women has to observe halala.

and is a violation of provisions of the Constitution. The derogatory implication of this practice is an outright violation of Article 51A (e) of the Constitution[24].

There is not an iota of doubt that in adjudicating each of the cases, the courts have relied on certain principles. Quite like Dworkin's principle of equal concern and respect for each person, 'beneficial rule of construction' has been a recurrent principle in these judgments, yet, in the case of marriage, the concern that looms large is the hesitant approach of the courts, to rescind, amend or modify customary practices that scrap women's rights and dignity.

Decisions of the courts, which act as negotiations between the rights of women and Quranic injunction, have made it difficult to avert practices that prima facie are antithetical to the dignity of women. To uphold the placard of multicultural democracy the intervention made by the judiciary as we have seen and shall see in the subsequent cases is a negotiation of competing claims with the society and the community. It is the women- who in this negotiation of religion, politics and law are, either absent or fragmented, develop into a discourse which is about her and embody this negotiation best.[25] The casual acceptance of the observance of practices, such as, halala deepens and paves way for gender polarization within the personal law system. The courts have acknowledged the Quranic injunctions through varied interpretation but have never been dismissive of practices that are ostensibly oppressive. Cases of ***Daniel Latifi*** and ***Shamin Ara***, have garnered attention due to their support for women's rights and an outright condemnation[26] of the provisions of personal law, but what sort of a space that has provided women with the opportunity to negotiate their position is highly dubious.

[24] 51A. Fundamental duties- It shall be the duty of every citizen of India
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women

[25] Zakia Pathak and Rajeswari Sunder Rajan talk about the formation of discontinuous female subjectivity in displacement of Muslim women onto several discourses. In the context they say that to be framed by a certain discourse is to be objectified as the other, whose identity becomes transient 'fragmented' in the social context?

[26] The Court was of the opinion that confining the liability of the husband to the period of iddat and then (alluding to section 4 of MWA Act) making the women run every nook and cranny seeking maintenance from people who are not only strangers but sometimes people who are responsible for the divorce is objectionable. The Court along the same lines was of the opinion that the even the State Wakf Board does not have sufficient funds to pay for the maintenance of the women. Section 5 of the Act could not escape the scrutiny of the Supreme Court and was considered by the court as 'whimsical' and 'capricious'

ADJUDICATION IN CASES RELATED TO MAINTENANCE

The parliament passed the Muslim Women (Protection of Rights on Divorce) Act in 1986. The enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as The Act) removed the concept of maintenance of Muslim women from the purview of the criminal and civil code and brought it under the ambit of personal law. That is to say, the general code of criminal procedure no longer would determine the rights and entitlements of a Muslim woman after her divorce.

Maintenance of Muslim after divorce women before the enactment of the Muslim Women Act, 1986 was under the purview of the Muslim Personal Law (Shariat) Application Act, 1937. According to the Muslim Personal (Shariat) Law, a husband is liable to pay maintenance to his wife only until the *iddat* period. The Muslim Women Act retained this position making Section 3(1) (a) the most controversial provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986. According to Section 3(1) (a), a divorced Muslim woman is entitled to a 'reasonable and fair provision and maintenance to be made and paid to her by her former husband within the *iddat* period.' Under section 125 of the Code of Criminal Procedure if a man with sufficient means, neglects or refuses to maintain his wife then he is under the obligation to make a monthly allowance for maintenance of his wife. This is contradictory to The Muslim Personal law where the husband is liable to pay maintenance for his wife just for a limited period of three months that is the period of *iddat*. Under Section 125 of the Code, a wife who is unable to maintain herself is entitled to a monthly allowance for as long as she is not in a position to support her. The case of *Shah Bano* also invoked Section 127 of the Code of Criminal Procedure.

Section 127 of the Code of Criminal Procedure confers statutory recognition to the amount that is payable within the personal law system. It stipulates that if the magistrate has issued an order under Section 125 of the Code in favor of a woman who has been divorced and if she is satisfied that woman has received before or after the marriage, a whole sum of money under any customary or personal law then the magistrate can cancel the order for maintenance. This brings us to the issue around the amount of 'mehr', that is whether *Mehr* amount comes under the ambit of Section 127 of the Code. Mehr in Muslim marriages is an economic safeguard and is a Qur'anic right given to the woman at the time of marriage. This amount, which is stipulated in

the nikahnama (contract of marriage) or kabin-nama (agreement of marriage), is an economic safeguard against unilateral divorce in Muslim marriages.

In ***Mohd Ahmad Khan v Shah Bano***, Justice Chandrachud was of the opinion that *Mehr* is not an amount payable on divorce. The argument put forth was, if *Mehr* is an obligation imposed upon the husband as a mark of respect for the wife, then it is 'detrimental' on the part of the wife if it becomes an amount payable on divorce.[27] The court argued that the fact thatis payable at the future date would not mean that the payment of the deferred amount is occasioned by the events of the given case. It is here that in the case the court invoked section 127 (3) (b) and opined that mehr cannot be considered an amount that has to be paid on divorce and therefore the order for maintenance under section 125 Crpc will persist.

In ***Bai Tahira vs Ali Hussain Fissalli Chothia***[28], the court opined that, a husband will not be exempted from his obligation under section 125 of the Code to pay maintenance to his wife, except on sufficient proof of the payment, made under the stipulated customary or personal law and that the amount paid is sufficient for her. '*The payment of illusory amounts by way of customary or personal law requirement will be considered in reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute*'.[29]

Though the courts have invoked the statement of object and reason of the Muslim Women Act, 1986 and argued that the very enactment of the legislature was to eliminate the difficulties that arose with regard to decision on the liability of the husband, the judgments echo the complexity and complication that are inherent in the Muslim Women Act, 1986. The Act is rife with, what the paper calls 'ambiguous quantifiers'. These ambiguous quantifiers- 'provision and maintenance', 'reasonable and fair', are the sources of the determination of entitlements of a Muslim woman and therefore become pivotal.

In this part, the paper intends to classify the issues inherent in the provision of the act that have been open to varied interpretations. The aim here is look at the ways in which the judiciary has

[27] (1985) 2 SCC 556 [24]
[28] (1979) 2 SCC 316
[29] Bai Tahira vs Ali Hussain Fissalli Chothia (1979) 2 SCC 316[15]

resolved the indeterminacy arising out of these ambiguous quantifiers and adjudicated upon them.

LIABILITY OF THE HUSBAND

One of the most contentious provisions of the Muslim Personal (Shariat) Act is, the liability of the husband to pay for maintenance only until the period of *iddat*. In the *Shah Bano* case, the husband paid a meager amount after divorce on the ground that he is entitled to pay maintenance only within the period of *iddat*.

When the court overturned this decision it upset the Muslim community leading to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which retained this provision under section 3 (1) (a). Courts after the enactment of the Muslim Women Act have tried to arrive at a consensus regarding the liability of the husband with regard to section 3 (1) (a) that is whether a husband is liable to pay maintenance beyond *iddat*.

In ***Usman Khan Bahamani vs Fathimunnisa Begum and Others***[30], the High Court of Andhra Pradesh ruled that according to the Muslim Women Act, 1986 the husband is liable to pay maintenance only till the period of *iddat* and if the woman is not in a position to maintain herself then she can take recourse to Section 4 of the Act. Section 4 of the Act provides her with the alternative to turn towards her children and relatives for maintenance. The idea behind confining the liability of the husband to the period of *iddat* is that Muslim women after the divorce have the option to remarry, in which case the ex-husband is not under an obligation to continue paying for her maintenance.

The Full Bench ruled that section 3 and 4 of The Act read together gives the woman ample leeway to claim for maintenance. The court interpreted section 3 (1) (a) as reasonable and fair provision and maintenance to be made in 'lump sum' within the *iddat* period. The judgment acknowledged that this interpretation entails the problem of uncertainty, which would mean that the husband has to anticipate the future of his wife before making such provision. '*How can an*

[30] 1990 CriLJ 1364

assessment be made that a provision is reasonable and fair provision payable within the period of iddat forecasting the future needs that may arise fifty to sixty years hence?'. On the other hand, if the wife remarries then what will happen to the amount of maintenance if the payment of the maintenance amount not confined to the period of *iddat*?[31] Keeping all competing claims in view, the three-bench judge was of the opinion that the amount of provision and maintenance that the husband has to pay is confined until the period of *iddat*.

In ***Smt. Jaitunbi Mubarak Shaikh vs Mubarak Fakruddin Shaikh,*** the High Court of Bombay after much speculation arrived at a decision that a Muslim husband is liable to make a reasonable and fair provision for the future of the divorced wife, which would inevitably construe maintenance for her future as well. The Court opined that the husband must make the provision within the *iddat* period. Taken section 3 and section 4 together the husband clearly is liable to pay for maintenance only until the *iddat* period. The court interpreted the 'term' provision as long-term provisions different from maintenance and in consonance with the idea of 'within' *iddat* period; it meant that a lumpsum amount has to be paid within the *iddat* period.

In ***Iqbal Bano vs State of UP***[32]the Supreme Court elaborated on the scope on section 3(1) (a) and mentioned that ' a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period' does not mean that the husband is liable to pay for maintenance only for the *iddat* period. The section directs for two separate obligations by the husband, first - reasonable and fair provision and second- maintenance. The court mentioned in the judgement that ironically the legislative enactment which was meant to reverse the provisions made in the case of Shah Bano was actually codified and by virtue of section 3 (1)(a) of Muslim Women (Protection of Rights on Divorce) Act, 1986, and now divorced woman is entitled to regular payment of alimony.

ON MAINTENANCE BEYOND *IDDAT* PERIOD

In ***Usman Khan Bahamani vs Fathimunnisa Begum and Ors*** , the court pointed out that section 3 of the Act mentions 'reasonable and fair provision and maintenance' and section 4

[31] Usman Khan Bahamani vs Fathimunnisa Begum and others 1990 CriLJ 1364 [24]

[32] (2007) 6 SCC 785

mentions 'reasonable and fair provision'. This clearly would oblige the husband to pay the additional 'maintenance' and the difference in phraseology would mean to confer different benefits.

The case of ***Arab Ahmadhia Abdulla and etc vs Arab Bail Mohmuna Saiyadbhai and Ors***[33]**,** the court pointed out that this phraseology itself resolves the issue. The husband's liability is confined to the period of *iddat*. Thereafter, in case the woman is not in a position to maintain her she can file an application for maintenance under section 4 of the Act.[34] The liability of the husband therefore is confined to the period of *iddat* and beyond *iddat* the relatives and if, the relatives are not in a position to pay then the State Wakf Board is liable to pay for her maintenance.

In the case of ***Daniel Latifi v Union of India***[35], the court opined that under Muslim Women Act, 1986, the woman is 'compelled' to seek refuge with her relatives who might be complete strangers to her or the State Wakf Board, the financial capacity of which is dubious.[36]

In ***Tamil Nadu Wakf Board and another vs Syed Fatima Nachi***,[37] the aggrieved party claimed maintenance from the State Wakf Board under Section4 of the Muslim Women Act. The State Wakf Board on receiving the application from the women appealed for the quashing of proceedings. The court maintained that the women could not claim that her relatives, or children or parents or other relatives will not be able to pay for maintenance due to their financial disability. *She has to sufficiently prove it with the proceedings against each party separately starting her children, parents, relatives, other relatives and then approach the State Wakf Board*. Though the court later directed the woman to plead and prove relevant facts in one such proceeding where she is able to prove that her entire lineage as directed under the Muslim Women (Protection of Rights of Divorce) Act, 1986 section 4 will not be able to pay for her

[33] (1988) 1 GLR 452

[34]Arab Ahmadhia Abdulla and etc vs Arab Bail Mohmuna Saiyadbhai and Ors (1988) 1 GLR 452 [29]

[35] (2001) 7 SCC 740

[36]Danial Latifi and anr. vs. Union of India (2001) 7 SCC 740 [34]

[37] (1996) 4 SCC 616

maintenance. It is, however, open for the State Wakf Board to controvert that the relations mentioned in the provision, or some of them, have the means to pay maintenance to her.[38]

ON THE QUANTUM OF MAINTENANCE

The inadequacy of the phrase 'reasonable and fair provision and maintenance' has been embossed in most of the cases. Section 3 (3) (a) stipulates that if the magistrate is satisfied that the husband having sufficient means has failed or neglected to make or pay within the *iddat* period a reasonable and fair amount; he may- make an order, directing the husband to pay such reasonable and fair provision and as he may determine as fit and proper. This is to be done having regard to the needs of the divorced woman, the standard of life enjoyed by her during marriage and the means of her former husband.

In ***Arab Ahmadhia Abdulla and etc vs Arab Bail Mohmuna Saiyadbhai and Ors*** the court laid down that "This objective criteria laid down by the Parliament i.e. the Magistrate should take into consideration the needs of the divorced woman would undoubtedly indicate that the future needs of the divorced woman are required to be taken into consideration. The future needs would by no stretch of imagination mean her past needs during the *iddat* period." In this case, the Court interpreted 'provision' as property to buy articles for livelihood or even residential accommodation until the woman remarries.[39]

The case of ***Mohd.Khan and Shah Bano*** too had invoked the issue of maintenace. The judgement passed referred to the financial ability/ diability of a woman and concluded that if a woman is unable to maintain herself beyond *iddat*, she can take recourse to section 125 CrPC. It is difficult to quantify the parameters on which the act obligates the husband, the relatives or the State Wakf Board to provide for maintenance. In ***Usman Khan Bahamani vs Fathimunnisa Begum and Others,*** the Full Bench agreed that 'provision' and 'maintenance' have separate connotations. Provisions would involve multiple factors such as the state of condition as to the health or education of the divorced wife. The divorced wife may be a student or a patient

[38] Tamil Nadu Wakf Board and another vs Syed Fatima Nachi (1996) 4 SCC 616 [9]

[39] *Supra* [16]

suffering from some chronic disease. In accordance with the situation of the women, the provision might differ. [40]

In the below mentioned cases the courts have gone beyond to interpret the phrase 'reasonable maintenance' not exempting the husband under any circumstance to escape the demands of the law. In ***M.C Haseena vs Mundakkaparamban Abdul Jaleel***[41], the High Court of Kerala upheld the appeal by Haseena; the husband should pay a large amount for the completion of her education. The court considered this high quantum bearing in mind that before marriage Haseena was receiving proper education, which stopped after the marriage. The High Court of Kerala maintained that funding her education or providing a large amount, for the purpose can be claimed under the 'provision to be made' to the divorced wife. The Court also persisted that a desire to continue her education after the divorce is a relevant factor when deciding upon the amount compatible with 'reasonable and fair provision and maintenance'.

The Supreme Court of India in ***ShamimaFarooqui vs Shahid Khan***[42] overturned the judgment of the High Court and restored the Family Court judgment. The Court opined that it is the duty of the husband to maintain the wife and no relief shall be granted to the husband cannot in terms of reduction in maintenance amount because of any reason. The High Court reduced the maintenance amount considering the fact that the husband was retired and was not in a position to pay the amount order by the Family court for the maintenance of his wife. The Supreme Court dismissed this appeal as 'only bald excuses having no acceptability in law'.

IN MATTERS RELATED TO CONSENT

In ***Mohd Ahmed Khan v Shah Bano***, the court ruled that if a woman is unable to maintain herself beyond *iddat*, she could take recourse to section 125 CrPC. This was before the enactment of Muslim Women Act, 1986. After the enactment of the Act a divorced woman cannot invoke the provisions of section 125 Code of Criminal Procedure, against her former husband unless after making an application under section 3(2) of the act either parties

[40] *Supra* [57]
[41] 2007 CriLJ 1554

[42] (2015) 5 SCC 705

unanimously decide to be governed by section 125 of the Code. Therefore, a divorced woman, seeking maintenance can invoke section 125 of the Code only after exercising her option section 5 of Muslim Women Act, 1986. Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that if the husband and the wife conjointly decide that they would like to settle the disputes of maintenance under **section 125 -128 Code of Criminal Procedure** , then their case will be disposed of accordingly. In ***Smt.Jaitunbi Mubarak Shaikh vs Mubarak Fakruddin Shaikh and Anr***, it was pointed out that no husband will be ready to resolve issues of maintenance under section 125 -128 of Code as it will make them liable to pay maintenance beyond the *iddat* period.[43]Therefore, in some ways this section, invoked in many other cases, remains a façade.

The attempt in this part is to examine the principles on which the courts adjudicated upon the issue of maintenance. Feminist organizations opposed that the provision of maintenance was under the purview of personal law were of the opinion that communitarian demands foreshadowed the individual rights of the women.

The maintenance question in the personal law system is of utmost importance as it involves economic transactions. The cases have revealed how the courts have dealt with inadequacies and vagueness in phrases that are rife in the Muslim Women (Protection of Rights on Divorce) Act. An in-depth analysis of the decisions will reveal that in trying to discern the meaning and implication of each of the phrases- 'provision and maintenance', 'reasonable and fair', the courts have invested time, logic and principles. For instance, a thorough perusal through the judgment in the case of ***Daniel Latifi*** would reveal the beleaguered reluctance of the court to admit that the provisions of section 3 of Muslim Women Act ineherently defies section 125 of CrPC, which decides the fate of women belonging to every other religion but Muslim women. A close reading of the section would reveal that section 5 is solely dependent on the choice that the husband makes, because it is questionable as to how many husbands would agree to be under the purview of section 125 Code will might increase the liability on the part of the husband.

The Court was of the opinion that a 'rule of construction' approach of the statue would render it unconstitutional and a practical approach to section 3 and 4 would be in defiance to Article 14, 15 and 21 of the Constitution. The Court entrusting the legislature with the responsibility of

[43] *Supra* [28]

protecting the rights of Muslim Women after divorce opined that the Legislature does not intend to enact unconstitutional laws and therefore the Muslim Women Act is constitutional and valid statute.

The cases enlisted above makes the complexity of the Personal Law apparent. Complexity and confusion continue to mire the rights of Muslim women. If one were to scrutinize the cases, little or almost no space for the women to negotiate. For instance, ***Tamil Nadu Wakf Board and another vs Syed Fatima Nachi,*** revealed the plight of a woman after her divorce and how she was expected to toss from one person to the other looking for means of survival. Yet there has been no attempt on the part of the judiciary to eliminate these complex procedures and bring about structural reforms or a precedent that would address the issue.

CONCLUSION

The decisions of the courts are of immense importance in adjudication of cases. Granville Austin in *Religion, Personal Law and Identity in India* argues that under the stimulus of rising Hindu nationalism, Muslim identification of themselves with Islam and the personal law accompanying it has been greatly intensified. At this hour, sandwiched between ideological differences the debate is no more about mitigating chances of violence against women. It is about politically motivated results. With this tension, it is difficult to accommodate all competing claims. In a democracy while it is imperative to uphold constitutional provisions, it is difficult for the government to insulate itself from popular will. In the case of Muslims a minority community, the personal laws are seen as indispensable tool for asserting one's identity without which they feel their ideological demands and rights pushed to the side and postponed. The Christians and Parsees personal law mirror this idea as well. Democracy is a political system that bestows power based on what people want.

During the constituent Assembly debates, some nationalists vehemently demanded that personal laws should receive a backseat, as it had created a schism along religious lines, a mission accomplished by the colonial masters. There were counter debates over its existence stressing upon the fact that it was necessary to keep the personal laws in order to reflect concern over the interest of minorities and respect for their personal, religious and cultural practices.

During the era of partition and constitution making it were the lower and the backward sections who demanded for reservations. The act of uniformity in the personal law brought various fragmented section of the Hindus and the Muslims under their codified personal laws. In '*Living with Difference in India*' Sussane Rudolf and Lloyd Rudolf, make an argument that might provide a useful lens to describe the multicultural Indian society- that Indian law and politics have vacillated between two positions of legal pluralism and legal universalism. [44]

This dichotomy of legal pluralism and legal universalism has much contemporary relevance. The ensuing and increasingly charged debate post the *Shah Bano* case, which is recurrent throughout this paper, put the judiciary and the policy makers in a democracy in an uncomfortable position of having to prioritize some values or principles professed in a democracy over others. These are- protection of the rights of the minorities by codifying their personal laws and the protection of rights of the women in a country that constitutionally mandates equality, liberty and prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.[45] The decisions of the Courts too emboss this negotiation. Courts have invariably interpreted the law, to protect and safeguard the rights of women while keeping the personal law intact through the judgments and maintained a cautious stand lest they trample over the power of the legislature. Quite like Dworkin's idea of principle in hard cases, that is principles which 'secures via discursive adjudication the integrity of relations of mutual recognition that guarantee equal concern and respect to each citizen' Courts have adjudicated based on principle of 'beneficial rule of construction'. Despite that how much of space women are getting to negotiate for their rights is questionable. As we see the judiciary has dealt with the issue arising out of legal indeterminacy or vague language on a case-to-case basis depending upon contingent factors or in the words of Flavia Agnes, these court cases were shaped by the need of the hour, political exigency and social concerns of the individual judge. In this erratic adjudication mode, undoubtedly confusion prevails over the negotiating space of women.

The only way to fill this yawning gap is through the imposition of a rule, which will have universal appeal and will pave way for women to negotiate for their rights. Article 44 provides

[44] Rudolf and Rudolf define legal pluralism as a way to give expression to India's continuously and variously constructed multicultural society and legal universalism as equal and uniform citizenship.

[45] Article 14- Equality before Law; Article 15-Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth; Article 21- Right to Life and personal liberty

for a Uniform Civil Code to bring people from all religion, background and culture under one banner. After witnessing and thoroughly analyzing the complex problems in the Muslim Personal Law, it undoubtedly seems a laudable option on the part of the legislature to manoeuvre on a path towards a Uniform Civil Code.