Part-II

EMPOWERMENT OF WOMEN THROUGH DIFFERENT RELIGIOUS SYSTEM
Chapter-1: Marriage
Chapter-1

MARRIAGE

1.1 INTRODUCTORY REMARKS

India is only country in the world which permits persons belonging to different religious to follow their own personal laws based on religion. Thus in respect of personal matters like marriage, divorce, succession and maintenance, different personal laws are followed, depending on the religion of the person. This gave rise to different marriage laws, succession laws and divorce laws, applicable to different religions like Hinduism, Islam, Christianity and Parsis.

Marriage is the very foundation of human civilization and civil society. The institution of marriage has been made sanctified and sacrosanct so much so under most of the systems that prevailed sometime or other in the world that it began to be adored and worshipped by their adherents who pushed its objective to the background in course of time. As a result, society in general and women in particular were hard hit. In the late eighteenth century, the French Revolution, the democratic ideas and industrialism came to drive the blow on the base of the very fetish character of this institution. Hereafter people began to raise doubt on the relevance and utility of marriage as an institution. Some sociologists attempted an empirical study to see if an alternative to marriage is at all possible. In this part of the Indian sub-continent four major communities, Hindus, Muslims, Christians and Parsis hold their respective system of marriage. In India, laws on marriage and divorce from part of the personal laws. In respect of these subjects each
community is governed by its own personal laws deriving sanctity from religion. In addition there exists a secular law providing for a civil form of marriage. It is the Special Marriage Act, 1954. This can be availed by the persons domiciled in India regardless of their faith. Besides, any existing religious marriage can be registered under the Special Marriage Act, 1954.

In India, different set of laws and rules are applied in respect of marriage depending on the religion followed and practiced by the individuals. Thus the Hindus are governed by the Hindu Marriage Act, 1955, the Muslims are governed by the tenets of Holy Quran and the Christians are governed by the Christian Marriage Act, 1872 and other laws.

Marriage is one of the most important of all Samaskaras under the Gṛhya Sutras. According to Apastamba, “Marriage was meant for doing good deed and for attainment of Moksha”. Among the Hindu the marriage was considered as a sacrament. It was obligatory for every Hindu through which his well conducted life progresses to its appointed end. The rationale behind such sacramental character was to make the spouse physically, psychically and spiritually united. Thus marriage is an association for life here and hereafter, productive of full partnership with temporal and divine rights and duties. In Tikait v. Basanti\(^1\) it was held that marriage under Hindu law was a sacrament, an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world. Wife is ardhangini, half of her husband.\(^2\) It was held that the marriage was the last of ten sacraments enjoined by the

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1. ILR 28 Cal. 758
2. Satpātha Brahmana v. 16. 10.
Hindu religion purifying the body from inherited taint. Thus marriage is a religious necessity rather than mere physical luxury. A Hindu has to marry for a son who alone can save him from narak (hell) after death. It was also observed by the court that marriage was binding for life because a marriage performed by saptapadi before consecrated fire was a religious tie which could never be united.\textsuperscript{3}

Now a relevant question arises whether Hindu marriage continues to be a sacrament even after the Hindu Marriage Act, 1955. Some of the judges are inferring that in the light of the changes effected by the Hindu Marriage Act, 1951 Hindu marriage is no longer a sacrament. For instance, Justice Saharya of the Delhi High Court quotes with approval in Dhanjit Vadra v. Beena Vadra\textsuperscript{4} the observations of a division bench of the Andhra Pradesh High Court:

"Section 13-B radically altered the legal basis of a Hindu marriage by treating it as an ordinary form of contract which competent parties can enter into and put an end to like any other contract by mutual consent."\textsuperscript{5}

In view of the above shastric texts and judicial decisions, we can say that the sacramental marriage among Hindus has three main characteristics. First, it is a permanent union. That means, it cannot be dissolved on any ground whatsoever. Secondly, it is an eternal union (Janma-janmantar bondhari), extending to series of births. Its implication has been that widows' remarriages, as a rule, were not recognized in Hindu law.\textsuperscript{6} Thirdly, it was a holy or sacrosanct union. This implies that such a marriage cannot take place without the

\textsuperscript{3} Shivonandh v. Bhagawanthumma, AIR (1962) Mad. 400.
\textsuperscript{4} AIR 1990 Del. 146 at 151.
\textsuperscript{5} K. Omprakash V.K. Nalini, AIR 1986 AP 167 at 169.
\textsuperscript{6} Paras Dewan, Modern Hindu Law (sixth ed.)
performance of sacred rites and ceremony.

It is now clear that the first characteristic of sacramental marriage has been affected by Hindu Marriage Act, 1955, for Hindu marriage can be dissolved on certain grounds specified under Section 13 of the Act. The second characteristic was wiped out with statutory recognition of widow marriage in 1856. 'Probably to some extent the third characteristic' is still retained'. In most of the Hindu marriages, a religious ceremony is still sine qua non. Viewed from this side, one may conclude that Hindu marriage has not remained purely a sacrament and at the same time it has become completely a contract. As Paras Diwan has observed:

"It has semblance of both. It has a semblance of a contract as consent is of some importance; it has semblance of a sacrament as in most of marriages a sacramental ceremony is still necessary."

1.2 HINDU WOMEN AND MARRIAGE

The law relating to Hindu women and marriage can be better understood, if the position before the codification of Hindu laws is made clear.

(a) Position before the Hindu Marriage Act, 1955

Prior to 1955, that is before the enactment of the Hindu Marriage Act, 1955, the Hindu Marriage was considered purely to be a sacrament, by all the schools. There were eight forms of marriage among Hindus, out of which four were approved forms and the rest unapproved. The

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8 Paras Dewan, Supra note 6.
approved forms of marriage were Brahma, Daiva, Arsha and Prajapathy. The unapproved marriages were Asura, Gandharva, Rakshasa and Paisacha. In due course of time only two forms remained in practice viz 'Brahma' in the approved form and 'Asura' in the unapproved form. In the former type, the women were given as a gift by her father to his son-in-law i.e. the husband of the women. In the latter type, it was considered as a sale by the father to the son-in-law, "Kanya Sulkam" was the consideration for such sale. Another difference was that in a Brahma form of marriage, when the woman died, her property devolved upon the legal heirs of the husband, in the absence of the husband and children. In 'Asura' form of marriage, on the death of the wife, in the absence of her husband & Children, her property devolved upon her parental side. Polygamy was an accepted practice and there was no limit on the number of women, a Hindu man could marry. Widow remarriage was prohibited till the reformers like Raja Rammohan Rai and Kandukuri Veereshalingam made some bold attempts to introduce them. Child marriages were rampant, inspite of sustained efforts by certain reformers.

(b) **Position after the Hindu Marriage Act, 1955**

The Hindu Marriage Act, 1955 was the first of the codified Hindu laws. The Act does not specifically provide for any form of marriage. It made the marriage more consensual and secular than religious. It no more considers the marriage as a 'Samskara' as considered by Dharma Sastras. The marriage is solemnized as per the customary ceremonies prevalent in the community to which the bride and bride groom belong:

The Hindu Marriage Act has made elaborate provisions as to the conditions for a Hindu marriage, ceremonies, registration, legitimacy of children, nullity of marriage and divorce etc. Even though almost all the provisions are equally applicable to the Hindu husband and wife, a few provisions may be discussed to understand the changed position of the Hindu woman after the Act came into force.

Section 5 of the Act lays down the conditions for a Valid Hindu Marriage. They are: i) Monogamy, ii) Sound mind, iii) a minimum age of 18 years for the girl (bride) and 21 years for the boy (bridegroom), iv) The parties are not within prohibited degrees of relationship, and v) The parties are not Sapindas to each other.

The last two conditions may be waived if there is a custom or usage governing each of the parties to the marriage permitting the same.

The Hindu Marriage Act, 1955 introduced radical changes in the marriage laws of Hindus. Section 5 has the effect of abolishing the prohibition on widow remarriage, child marriage and polygamy in one stroke. The woman stands on the same footing as the man in all these matters.

Before 1978, Section 6 of the Act provided that the consent of
Guardian was necessary for a bride, if she was below the age of 18 years i.e. minor. However the Child Marriage Restraint (Amendment) Act of 1978 deleted this section in view of the fact that the age of the bride should be at least 18 years at the time of marriage. Therefore when the bride has already completed 18 years of age, the question of consent of guardian would not arise as she would be a major.

A package of mutual rights and responsibilities emanates from marriage. Consortium is one of such important rights. In case one of the parties to marriage refuses to discharge his or her marital duties, the prejudiced has the right to get them enforced by resorting to the court of law.

Section 9 of the Hindu Marriage Act, 1955.

When either the husband or the wife has, without reasonable excuse, withdrawn from society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation- where a question arises whether there has been reasonable excuse for withdrawal from the society the burden of proving reasonable excuses shall be on the person who has withdrawn from the society.

The remedy for restitution of conjugal rights has been incorporated under Section 9 of the Hindu Marriage Act, 1955. Accordingly either spouse under the Act can claim the remedy by way of a petition to the
court. The aggrieved spouse has to prove that the other spouse has without reasonable cause withdrawn from the society of the petitioner. If the court is satisfied to the effect that the statements averred in the petition are true and no other legal ground exists to ignore the petitioner, it may pass the decree for restitution in favour of the petitioning spouse. This apart, under Section 9(2), the proper defences to assail the petition are laid down.\(^9\)

Restitution of Conjugal Right is a right available to both the spouses i.e. wife and Husband equally. This provision has been challenged as unconstitutional and as violative of Article 14 and 21 of the Constitution in Sarita v. Venkatasubbaiah.\(^{10}\) Justice P.A. Chowdhary of the A.P. High Court expressed the view that Section 9 of the Act offends Articles 14 and 21. The learned judge held that the effect of decree of restitution of conjugal rights is to coerce the unwilling party to have sex against that person's consent and free will thus allowing one's body to be used as a vehicle for another human being's creation. Section 9 was held to violate the right to privacy of the individual also.

However the Supreme Court overruled the above decision of the A.P. High Court recently in the case of Saroj Rani v. Sudarshan by holding that in the privacy of home and married life, neither Article 21 nor Article 14 has any place. It may be mentioned in this context that this remedy has been abolished in England by Section 20 of the Matrimonial Proceedings Act, 1970. However in India Section 9 affords a remedy to the aggrieved wife against the husband deserting her without any reasonable cause. If the court passes a decree in her

\(^9\) For details, Section 9(2), Hindu Marriage Act, 1955
\(^{10}\) AIR 1983 A.P. 356.
favour it can be executed as per the procedure contained in Civil Procedure Code.

Section 10 of the Hindu Marriage Act, 1955 declares the right of either spouse to a marriage for obtaining Judicial separation. This provision is a statutory recognition of the right to Judicial separation among Hindu spouses.

Section 10 of the Hindu Marriage Act, 1955 which contains the provisions runs as follows:

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petitions rescind the decree if it considers it just and reasonable to do so.

Section 10 of the Hindu Marriage Act, 1955 incorporates various grounds on which the remedy can be availed by the Hindu wives. It mentions the outcome of the decree and that such a decree can be rescinded by the court at the instance of either to the decree, if the
court feels satisfied to do so.

Under the new Hindu Marriage Act, judicial separation has been given a retrospective effect and the remedy was made available to either spouse. A petition for judicial separation by wife can succeed on any of the grounds mentioned in sub-section (1) and (2) of Section 13, while the husband can avail only those grounds incorporated in sub-section (1).

Besides Section 10 of the Hindu Marriage Act, 1955 Section 18 of the Hindu Adoptions and Maintenance Act, 1956 also entitles the Hindu wife to separate maintenance The grounds for maintenance under Section 18 of the Hindu Adoption and Maintenance Act are the same as have now been made available by the amendment of 1976 for judicial separation such as existence of another wife, his keeping a concubine, his conversion to another religion and any other cause which may justify his separate living.

While the scope for judicial separation under Hindu Marriage Act, 1955 has been kept limited, that of Section 18 of the Hindu Adoption and Maintenance Act has been a little too much. The latter extends to the Hindu wife the right to live separately on any justifiable ground. It has been observed that impact of this Act on the earlier enactment has been profound. It was held by the Punjab High Court that the measures taken by the legislature had laid down a new foundation of equality of husband and wife.\textsuperscript{11} However, inspite of the Hindu Marriage Act, the Hindu married women's position could not be emancipated. Therefore, the Indian Parliament has passed the Hindu Marriage Amendment Act,

\textsuperscript{11} Ram Prakash v. Savitri Devi, AIR 1958, Punjab 87 (FB).
1976, by virtue of which the provisions of divorce has been liberalized. Now we have to wait and see how far these changes will help the Hindu women. ... Merely introducing changes by way of legislation will not improve the status of Hindu women. If we want to change the condition of woman there must be social change to improve their status.\^{12}

A few relevant judicial pronouncements are referred below in order to assess the recent trends:

**Ishwar Kanta v. Om Parkash:\^{13}**

The appellant, Smt. Ishwar Kanta, was married to the respondent on April 13, 1976. A son was born to the couple on September 9, 1977. On September 29, 1981, the respondent husband filed a petition under Section 13 of the Hindu Marriage Act, 1955, alleging that the wife was guilty of cruelty and desertion for a period of more than two years immediately prior to the filing of the petition. He further alleged that she was suffering from schizophrenia of such a kind that it was not safe for him to stay with her. The learned trial court judge found that the present appellant was guilty of cruelty and desertion. Accordingly, on July 21, 1982 the learned trial court judge passed a decree for judicial separation. The appellant approached the High Court in an appeal which has been dismissed by the learned Single Judge. Aggrieved, the appellant has filed the present Letters Patent Appeal.

Another fact which deserves mention is that on March 13, 1982 the appellant filed a petition under Section 9 of the Act for restitution of

\^{12} M.A. Qureshi, *marriage and Matrimonial Remedies*, (1978)
\^{13} I(1994) DMC 39 (DB) P&H High Court.
conjugal rights. This petition was not contested by the respondent-husband. As a result an *ex parte* decree for restitution of conjugal rights was passed against him on May 28, 1982.

Upon this, the court held that it was the admitted position that the parties have not stayed altogether since July 7, 1979. Furthermore, it is also apparent that in spite of having obtained an *ex parte* decree for restitution of conjugal rights, the appellant had refused to stay with her husband. As such, it is clear that the marriage has irretrievably broken. Accordingly, the appeal was dismissed.

*Souruia Sanjey Karkhanis v. Sanjay Surendra Karkhatis* 14

"It will be necessary to state at the outset that both the parties are well educated and employed. The husband first filed the petition seeking decree of divorce alleging cruelty on the part of the wife. He sought decree under Section 13(1) (ia) of the Hindu Marriage Act. The said petition was bearing No. 371 of 1989 and was filed on 1-2-1988. The husband filed another petition for decree of divorce on the ground of desertion i.e. Section 13 (1) (ib) of the Hindu Marriage Act. The said petition bearing no. 1185 of 1989 was filed on 21.8.89. In the said petition, the husband alleged, that the wife has left the matrimonial house without his consent on 2.5.87 and she does not intend and was not prepared to come back to the matrimonial house as she was interested only in service. Two years have passed prior to the filing of the petition she was staying separately and therefore he was entitled to get the said decree."

The petition filed by the husband seeking divorce on the ground of cruelty came to be dismissed in which it was held that the husband had failed to establish those allegations. Thus petition seeking decree of divorce on the ground of desertion came to be allowed partly and
instead of decree of divorce, the learned Judge granted the decree for judicial separation by exercising under Section 13-A of the Hindu Marriage Act.

_Sudeskna Kar v. Dr. Abhijit Kar_15

"In this case the wife was living separately and there was no genuine attempt on the part of the husband to bring back his wife to matrimonial home. It was held that the wife having good reason for leaving her matrimonial home specially in view of the fact that her fine sentiments and susceptibilities as educated and cultured lady was mortally wounded by the acts of her husband's parents and specially the mother-in-law and in the absence of accompanying intention to bring cohabitation permanently to an end the cruelty, as alleged, cannot be said to have been proved. There is no sufficient material on record to hold that the wife misbehaved or quarreled with her husband or member of his family. Those allegations have not also been proved".

The court in this case was hesitant to grant a decree for divorce on the ground of irretrievably break down of marriage as the party seeking divorce failed to prove those grounds strictly. The court instead granted judicial separation.

On the question of custody of the minor child the court held at the same time that for the proper welfare and the education of the child, the child should be allowed to stay with her mother. The husband holds a transferable job and as such it will not be beneficial for the child to stay with his father, that is, petitioner.

_Hilda Basant Lal v. Lt. Col. Basant Lal_16

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15 [1(1995) DMC 401 (DB) Calcutta High Court]
16 [1(1994) DMC 185 Delhi High Court]
In the petition under Sections 22 and 23 of the Indian Divorce Act, the petitioner (wife) has prayed for judicial separation and also for grant of permanent alimony under Section 37 of the Act to the extent of Rs.60 lakhs which would be about half of the respondent's income. Along with the petition under Sections 22 and 23 of the said Act, the petitioner has also filed the present application under Sections 27 and 28 of the Act seeking restraint order against the respondent husband from selling, renting out or alienating in matter of the property No. X-37, Green Park, New Delhi. On 01-10-1992 when the matrimonial reference and the present application came up for preliminary hearing, this court passed the following order:

"In the meanwhile, the respondent is restrained from alienating or transferring in any manner property bearing No. X-37 Green Park, New Delhi. The respondent will also not interfere in the use and occupation of the said property by the petitioner".

*Smt. K. Vinayamani v. K. Subramanyam*¹⁷

"This is an appeal filed by the wife challenging the order of the second Additional Judge, City Civil Court, Hyderabad dissolving the marriage between the parties by granting a decree of divorce. The husband filed an application under Section 13(1-A) (i) of the Hindu Marriage Act, 1955 seeking dissolution of marriage between the parties by a decree of divorce. He stated in his application that marriage between the parties was solemnized according to the Hindu Custom on 09-08-1974 and the same was consummated immediately. Later on a son was born during the wedlock on 22-7-1975 who was aged 7 years by the time of

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¹⁷ II (1995) DMC 320 (DB) A.P. High Court
the filing of application. The husband alleged that the wife deserted and living away from him in her parents' house. According to him ever since 1977 she never returned to the house. The wife herself filed O.P. 25/86 on the file of the said court seeking judicial separation on the ground of desertion by the husband. In the said proceeding the husband remained ex parte and did not contest it with a view that better sense would prevail on her and on her parents and also for facilitating reconciliation between the parties. In the said O.P. 25/86 a decree for judicial separation was passed in favour of the wife on 25-4-1986. Alleging that there was no resumption of cohabitation or reconciliation after the passing of the decree for judicial separation on 25-4-1986 the said application has been filed. The husband also referred to the fact that far from any reconciliation between the parties, the wife filed suit O.S. No. 1177 of 1986 on the file of the Second Additional Judge, City Civil Court, Hyderabad, against him for her maintenance and maintenance of her minor son. The filing of the suit indicates that there was no possibility of the parties coming together and leading a marital life and, therefore, the application was filed stating that the statutorily required period has elapsed and that he is entitled to a decree for divorce.

Held: When once a decree for judicial separation was passed under Section 10 either party to a marriage can present a petition for dissolution of marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation. Therefore, a plain reading on the section indicates that either party to the marriage, irrespective of the fact as to
who is the successful party in the earlier application for judicial separation, can approach the court under Section 13(1-A) for a decree of divorce on the ground that there was no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of the decree for judicial separation. The section does not say that a successful party in the earlier proceeding for judicial separation alone is entitled to file the application under Section 13(1-A). This is clear indication of legislative intendment even though a person suffers a decree for judicial separation, yet that party also can approach the court under Section 13(1-A) seeking a decree for divorce. It is also well settled that a decree passed for judicial separation or for restitution of conjugal rights etc. against a party cannot be treated as "wrong" or "disability" within the meaning of Section 23 (1)(a) of the Act as against the said party. It is also well-settled that Section 13(1-A) is subject to Section 23(1)(a) of the Act.

And, therefore, the appeal was dismissed:

The case study in the preceding pages shows that the courts are gradually freeing themselves from the snare of male obsession. The interests of wife and welfare of children are receiving ardent attention of the courts. This is surely a firm and positive step towards achievement of woman's higher status in the society where gender justice was a dream and women were used to receiving the bottom rock priority down the ages.

The Supreme Court has explained the consequences of Judicial separation in *Jeet Singh v. State of UP.*\(^{18}\) The Judicial sanction of

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\(^{18}\) *Jeet Singh v. State of UP* (1993) 1 SCC 325
separation creates many rights and obligations. A decree or an order for Judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage, It affords an opportunity for reconciliation and adjustment. Though Judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live separately keeping their status of wife and husband till their lifetime.

The grounds for Judicial separation for both the husband and wife are the same as the grounds for divorce contained in Section 13 (1) of the Act. They are Adultery, cruelty, desertion, conversion, unsound mind, venereal diseases, incurable leprosy, renunciation of the world, presumption of death and failure to comply with a decree of restitution of conjugal rights etc. All these grounds are available equally to the husband and wife.

Apart from the grounds aforementioned, a Hindu wife may invoke any of the following grounds exclusively available to her. viz.,

(a) Remarriage by Husband
(b) Husband found guilty of rape sodomy or bestiality
(c) Non-resumption of co-habitation inspite of a decree for maintenance of wife and
(d) option of puberty i.e. at the option of the wife if her marriage was performed before her 15 years of age and she repudiates the
marriage after attaining the age of 15 years but before the reaches 18 years of age.

These special grounds have been provided for Hindu wife exclusively by the Marriage Laws (Amendment) Act, 1976 which amended Section 10 and 13 of the Act. The object of this provision is mainly to give time to the spouses for rapprochement and reconciliation. Thus a wife can proceed against the husband on more special grounds than mat are available to both the spouses. This provision no doubt places the Hindu wife on a better pedestal compared to the Muslim and Christian wives.

The belief of the ancient Hindu clergymen in an absolute indissolubility of marital role of ṭyāga, might have been based on a misreading of the holy Dharma shastras. For this reason and for adapting the law to the demands of time, it could have been inevitable for the reformers of Hindu law to open up the doors of divorce. So the divorce was first legalized by customs here and there and then locally by regional laws19 and or the whole country by parliamentary legislation.20 Thus the Hindu Marriage Act, 1955 was the first central enactment which revolutionized the matrimonial reliefs under various circumstances. Divorce, therefore, could be obtained by either party on grounds of adulterous life, conversion, incurable unsoundness of mind, virulent and incurable leprosy, communicable venereal disease and renunciation of the world by entering any religious order, of the other party A petition for divorce could also be made if the respondent had not been heard of as being alive for a period of seven years or more by

19 In Bombay, Madras, Saurashtra, UP, Baroda and Mysore.
20 Tahir Mahmood, Personal Law in Crisis, New Delhi (1986).
those persons who would naturally have heard of it had he or she been alive. Besides these, non-resumption of cohabitation after a decree of judicial separation and failure to comply with a decree of restitution of conjugal rights, for a period of two years (which has been reduced to one year by the amendment of 1976) or upwards also gave a right to the decree holder to apply for a divorce. Apart from these grounds, which were available both to the husband as well as to the wife, the wife was given additional grounds to present a petition for the dissolution of her marriage. These grounds were: pre-Act bigamous marriage of the husband (provided the other wife was alive at the time of the petition) and acts of sodomy, rape or bestiality on the part of the husband. [The Marriage Laws (Amendment) Act, 1976 has added two more grounds to this.] Thus, we see that the grounds available for divorce were predominantly based on fault of the other party whether it was voluntary, accidental or natural. The presence of break down grounds, however, could not be wholly denied. For instance, divorce on the ground that the other party had not been heard of as being alive for seven years or more showed an element of break down rather than fault of any party. Moreover, within a decade of passing of the Hindu marriage Act, 1955, amendments started trickling in thereby making divorce more easy and liberal. Mention may be made of an Amendment made in 1964 to section 13(1) of the Act.

Thus the result was that whereas before 1964 only the decree holder could apply for a divorce on the ground of non-resumption of cohabitation for a period of two years or more after obtaining a decree of judicial separation or restitution of conjugal rights, after the Amendment of 1964 even the party against whom the decree was made
could apply for divorce. The idea behind this amendment was to end stalemate, *since, quite, often* a party might simply keep quiet after obtaining a decree. He or she might choose to neither comply with the decree nor obtain a divorce. Thus, the other spouse was faced with a difficult situation, he had no *locus standi* to apply for divorce and obtain freedom.

A perusal of the statement of objects and reasons\(^2\) would show that a deliberate beginning, though in a limited way, was made in 1964 towards the introduction of break down theory of divorce. The basis of such ground, however, still rested on faults.

A further step towards the recognition of the principle of break down as a ground for divorce and further liberalization of the divorce law was taken up in 1976 when divorce by mutual consent was inserted into the Hindu Marriage Act.

It cannot be ruled out that a system which permits divorce on the fault of the other party has a number of flaws. Under the fault system of divorce, parties whose marriage has obviously broken down are impelled to live together in law. In absence of a technical fault viz., the fault grounds enumerated in the divorce section, no divorce can be granted. Similarly when both parties are at fault- the "clean hands theory" of equity makes matters difficult for the spouses.

The Law Commission at last in its seventy-first Report has recommended the introduction of matrimonial break down as a ground for divorce. Accordingly it has suggested that a separation of three years with no hopes of reconciliation should be as a proof of the break

\(^2\) *Gazette of India Extraordinary part-II: 2 p. 86 July, 1963.*
down and hence a decree of divorce should be available on this
ground.\textsuperscript{22}

The Commission recommends some safeguards regarding the welfare
of children, wherein it suggests that unless the court is satisfied that
adequate provision for maintenance of children has been made which
is consistent with financial capacity of the parties, it should not give a
decree of divorce.

Yet another recommendation by the Commission is that where the wife
is the respondent and there is an irretrievable break down of the
marriage, the court should still have the discretion to refuse a decree if
they feel that it will cause grave financial hardship to the respondent,
and that in all the circumstances it would be wrong to dissolve the
marriage.

It is submitted that social justice and public interest demand that
irretrievable break down of marriage be a ground for divorce.

Section 13 of the Act provides several grounds for obtaining divorce
by either party to the marriage whether solemnised before or after the
commencement of the Act. Unless there is a custom in vogue, no
divorce can be obtained by a Hindu couple without approaching a
court of law.

The grounds common to both the Husband and wife are mentioned in
Section 13 (1). They are

(a) other spouse living in adultery

\textsuperscript{22} Kusum, 'Irretrievable break down of Marriage: Ground of Divorce', JILI Vol. 20: 2, pp. 288-299
(1978).
(b) cruelty of the other spouse
(c) desertion by the other spouse
(d) conversion by the other spouse to other religion
(e) unsound mind of the other spouse
(f) virulent and incurable from leprosy to other spouse
(g) other spouse suffering from venereal diseases
(h) renunciation of the world by the other spouse and
(i) presumption of death of the other spouse.

To these grounds, two more grounds common to both the husband and wife were added by an amendment made in 1964, in the form of Section 13 (1-A). They are:

(i) non-resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation and

(ii) no restitution of conjugal rights as between the parties for a period of one year upwards, after passing of decree for restitution of conjugal rights. These grounds could be invoked by either the Husband or the wife for the purpose of obtaining divorce.

There are four grounds mentioned in Section 13 (2) which are available only to a wife, for the purpose of obtaining divorce. These last two grounds were added by the Marriage Laws (Amendment) Act, 1976 (68 of 1976). Even though these grounds were added in 1976, they can be availed by a wife whether her marriage was solemnized

23 Inserted by Act 44 of 1964, Section 2.
before or after 1976. These grounds are.

In the case of any marriage solemnized before the commencement of the Act, if the husband had married again before such commencement or if such other wife was alive at the time of marriage of the petitioner, it would be an exclusive ground for the petition of such divorce. Obviously the right to apply for divorce is available only to the first wife.

Thus, in the case of a petition for divorce by the first wife on the ground that her husband had married a second wife, the fact that the husband divorced his second wife after filing the petition, is no ground to disentitle the first wife for the relief.24

This provision enables the wife to obtain divorce where the husband has since the solemnization of the marriage been guilty of rape, sodomy or bestiality as understood under Section 375 and 377 of the Indian Penal Code, 1860.

Where a wife obtains a decree or order for maintenance either under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of Cr. P.C., 1973 and if cohabitation between the parties had not been resumed for one year or upwards after the decree, she can invoke that non-resumption of cohabitation as a ground for obtaining divorce.

Where a Hindu girl's marriage was solemnized before she attains the age of 15 years and she repudiates the marriage after 15 years but before attaining 18 years, she can apply for divorce whether the

marriage is consummated or not. In this context, the repudiation must be a valid repudiation. However certain authors are doubtful whether any repudiation of marriage done by a wife below the age of 18 years is valid because it amounts to repudiation by minor.\textsuperscript{25}

It may be seen that similar right is given to a Muslim wife married during her minority in the form of "Khyar-ul-Bulugh" (option of Puberty).

Section 13-B of the Act, added by Act 78 of 1976 provides for divorce by mutual consent. Thus when there total break-down of the matrimonial relationship and the spouses are living separately for a period of one, year or more on the mutual agreement between the parties, divorce can be obtained from a court of law.

This provision is a progressive law as it treats the Hindu wife or equal footing with the Hindu husband.

The Act makes no provision that bars the remarriage by a divorced wife or husband, provided the divorce becomes final (Section 15). It does not attach any stigma to a Hindu woman divorcee and she is free to contract a fresh marriage.

According to Section 23-A of the Act,\textsuperscript{26} any proceeding for divorce or judicial separation or restitution of conjugal rights may not only oppose the relief sought by the petitioner but the respondent may also make a counter claim on the grounds of petitioner's adultery, cruelty or desertion. This provision appears to be an effort to avoid filing of two petitions by the two spouses.

\textsuperscript{25} See Mayne's Hindu Law and Usage (13th Ed.) p. 255.
\textsuperscript{26} Added by Section 17 of the Marriage Laws (Amendment) Act, 1976.
In any proceedings under the Act like the petition for restitution of conjugal rights, judicial separation or divorce where the respondent spouse has no independent income, sufficient for self support and also for paying the necessary expenses, the other spouse may be directed by the court to provide maintenance and legal expenses. The quantum of maintenance depends on the petitioner's own income and that of the respondent. This provision helps the spouse in financial distress to face the legal proceedings initiated by the other spouse. This provision is, only temporary and lasts till the disposal of the legal proceedings. However the maintenance awarded to a wife under Section 24 of the Act is independent and different from the proceedings under Section 125 Cr. P.C. which is a secular and social welfare provision applicable to all the religions.

The Indian Divorce Act 1869, The Parsi Marriage and Divorce Act 1936 and the Special Marriage Act 1954, provide for permanent alimony and maintenance in favour of the spouses. Section 25 of the Act makes a similar provision. Under this provision the court is empowered to grant permanent maintenance to either spouse, at the time of passing the decree or any time thereafter at the instance of a spouse who is not able to maintain himself or herself.

However, if the petition of the husband filed under the provisions of Section 9 to 14 of the Hindu Marriage Act, for a decree of restitution of conjugal rights, judicial separation for divorce is dismissed, no alimony can be granted to the wife under Section 25 of the Hindu Marriage Act. However maintenance can be claimed by her under Section 18(1) of the Hindu Adoptions and Maintenance Act or under
Section 125 Cr.PC.\textsuperscript{27}

The award and quantum of maintenance depends on the conduct and status of the party seeking such relief. This provision is a boost to the Hindu wife who is in financial distress and not able to maintain herself during the legal proceedings.

A Hindu wife whether living with the husband or not, whether divorced or not is equally entitled to the custody of her minor children, of course subject to the satisfaction of the court by virtue of Section 26 of the Act. Even though there are no certain guidelines as to the right to custody of the minor children, the courts held that the custody of a child below 5 years of age shall be with the mother unless special circumstances injurious to the child's interest are shown.\textsuperscript{28} Similarly the court may not be influenced by the fact of re-marriage of the mother.\textsuperscript{29}

Thus it could be seen that in relation to the marriage and other related aspects, the Hindu Marriage Act, 1955 has introduced radical and progressive changes which go a long way in rendering gender justice. They also provide certain special rights and privileges to the Hindu woman apart from conferring equal rights on par with the Hindu men.

Apart from trying to abolish certain unequal and evil practices like polygamy, child marriage, sati and restriction on widow remarriage etc., the Modern Hindu Law has also not barred any inter-caste marriages. Thus as long as both the parties are Hindus they can get married under the provisions of the Act of 1955 irrespective of their

\textsuperscript{27} Chand Dhawan v. Jawaharlal Dhawan, (1993) 3 SCC 406

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1.3 MUSLIM WOMEN AND MARRIAGE

Islam does not distinguish between the two halves of the sphere of humanity. In order to affect perfect male-female equilibrium in the human society, the Quran speaks in numerous verses of women especially. It even promulgates a special chapter under the title "The Woman" (Surah-al-Nisa), major parts of Surah-al-Nisa deal with women and the family. Scattered over many chapters of the Quran also are special exhortations, precepts and commands concerning all stages of female life - childhood, marital life and old age.

In *Abdul Qadir v. Salima*\(^{30}\) the court had to make a number of observations of which the nature of Muslim marriage received pre-eminence. Mr. Justice Mahmood, referring to *Munshi Buzlur Kuheem v. Shamsoonnisa*\(^{31}\) (1867) decided by Privy Council, drawing inspiration from the Tagore Law Lecture\(^{32}\) by Sarkar, and basing his support from Hamilton's Translation of Hedaya observed that 'Marriage among Muhammadans is not a sacrament, but purely a civil contract,\(^{33}\) ...', with *ejab-o-kabool* as 'declaration and consent, both expressed in *preterit*,\(^{34}\) and dower partaking of consideration for the connubial intercourse\(^{35}\) in gross disregard of the religious aspect of marriage, although its social aspect has not been lost sight of by him when he mentions that 'it was also instituted for the solace of life, one

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\(^{30}\) (1886) 8 All 149
\(^{31}\) (1867) 11 MIA 551, 615.
\(^{33}\) *Baillie*
\(^{34}\) Hamilton, *Hedaya*
\(^{35}\) *Abdul Qadir v. Salima* (1867) 11 MIA 551, 615
of the prime or original necessities of man.\textsuperscript{36} Mahmood, J., also set up an analogy of sale of goods with wife married to her Muslim husband in a limited sense.\textsuperscript{37}

Subsequently, the 'purely civil contract' doctrine of Justice Mahmood came under fire in the writings of Ameer Ali, J., Abdur Rahim, J., and particularly in the judgment of Sir Sulaiman, J., of the same Allahabad High Court in context of \textit{Ants Begum v. Tefa}. In his poignant observation, the Justice criticized the doctrine in the following terms:

"The line of reasoning based on the analogy of sale has naturally been very severely criticized at pages 148 and 149 in Wajid Ali Khan's case by the Oudh Bench, and so also by Mr. Ameer Ali in his Mohmandan Law, vol. II, pages 459 and 460. No doubt, the Muslim commentators have, by way of illustration, applied certain principles governing a contract of sale of goods to contract of marriage, but that was by way of analogy only. The similarity cannot be pushed too far, nor can be principles governing the sale of goods applied in all their details. Indeed, if one were to pursue the analogy far enough there would be a reductive ad absurdum. The contract of the sale of goods can be cancelled if a portion of the price has not been paid. Even if the goods have been once delivered they may in such event be returned. But if the consummation of marriage has taken place and the part of the dower remains unpaid, it would be absurd to suppose that the marriage could be cancelled by the wife at her will."

He went on observing that:

"It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that marriage is not regarded as a mere civil contract, but as a religious sacrament,"\textsuperscript{38}

\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid
\textsuperscript{38} \textit{Ants Begum v. Muhammad Isafa} (1933) 55 All 743, 756.
The deprecation by Chief Justice Sulaiman for equating marriage with mercantile transaction and his protestation in strongest terms despite, the courts in India have till date been possessed with the 'Civil Contract' doctrine formulated by Justice Mahmood. In effect, it changed the very basis of determining legal principles in the whole gamut of Islamic matrimonial relation,\(^{39}\) erroneously justifying the application of the Transfer of Property Act, Indian Contract Act, Sale of Goods. Act, the Registration Act, Specific Relief Act, so on and so forth, supplanting the relevant Islamic legal principles in its place.\(^{40}\) To illustrate the point, a decision relating to dower by Mr. Justice Mitra of Calcutta High Court may be drawn to attention. On the face of the argument that dower being incidental to marriage under Muslim law and hence, calling for treatment of Muslim personal law he was of the view that:

"The marriage under Mohammadan Law is a Civil Contract of sale. Sale is a transfer of property for a price in contract of marriage; the wife is the property and dower is price."\(^{41}\)

Hereupon, he upheld the application of the British law palpably in defiance of objective assessment of the problem.

Marriage under Islamic law is neither a 'Samaskara' (purificatory ceremony) as in the classical Hindu law, nor a sacrament in its pristine form as among Roman Catholics.\(^{42}\) It is far from the modern notion of 'non-marital cohabitation' and 'one-parent family' of the West.\(^{43}\)

\(^{39}\) Dr. M. Shabbir, Muslim Personal Law and Judiciary (1988) 14.

\(^{40}\) Ibid.


\(^{43}\) Tahir Mahmood, Personal Law in Islamic Countries (1987) 268.
Islamic law, marriage is an over-emphasized and strongly enjoined Sunnah of the Holy Prophet to be whole-heartedly and universally exercisable by the generality of his following. The Qur'anic projection of matrimonial concept is a sacred covenant, a solemn pact, *Mithaq-i-ghalid*\(^44\) with a pious purpose of raising a blissful family life, and having off springs in their trail. Looked at superficially, it seemingly assumes the form of ordinary contract. But an in-depth and penetrating probe bursts forth its true nature in the reflection of a highly imaginative researcher:

"However it is palpably wrong to say that in Islam marriage is nothing but a civil contract. In fact marriage in Islam is contractual only at the formative stage. Once a marriage is solemnized, it is much more than, and much different from a civil contract. Islam does not require a ceremonial solemnization of marriage. An intended marriage is to be proposed by or on behalf of one of the parties. This is ijab—the proposal. It is then to be accepted by or on behalf of the other party. This is qubul—acceptance. Ijab and qubul, when made in the legally prescribed manner, results into a binding marriage—a relationship of sacred partnership between the husband and wife, which the Qur'an calls a sacred covenant and a "protective fortress."\(^45\) To the strict legal requirements of ijab and qubul and some procedural requirements, e.g., presence of witnesses, the Muslim society has added the extra-legal practice of recitation of the khutba-e-nikah (marriage sermon) and the finale of du'a-e-khayr (praying for the couple). These are superfluous so far as the legal theory is concerned, but have great social significance and add an aroma of solemnity to the occasion and to the newly created relationship between the two individuals and their families."

\(^{44}\) The Holy Qur'an IV: 21

\(^{45}\) AA Mandudi, Huquq Al-Zawjayn (6th ed. 1968, Delhi)
Most certainly, thus, marriage in Islam is much more than a "contract for production of children". The contractual element in marriage is, in fact, introduced by Islam exclusively for the benefit of the parties so that they may enter into a life-partnership, as far as permissible by Shanat on their own mutually agreed terms and conditions. This element is aimed at giving greater freedom to the parties in respect of the style of their life and thus strengthens the marriage bond in its own way. In no way does it detract from the sanctity of the marriage. If properly used, it is in fact a great boon for the parties to an intended marriage.\(^{46}\)

As quality of civilization and cultural consciousness of men enhances, man's relationship with outside world registers a movement from status to contract.\(^{47}\) Muslim law relating to marriage testifies this development with transition of the world from Ahme-jahilia (the Dark Age) to the age of enlightenment. (Early Seventh century A.D. which almost provides a water-shed in the World History coincides with revelation of the Holy Qur'an). On objective analysis, it is not strictly a contract in the commercial sense of the term. It carries with it the major essentials and appellation of a contract. On intensive appreciation, it brings out itself to be a covenant. Offer, acceptance, mahr, consent of the parties, presence of witnesses, reasonable interference of the guardian, legal consequences etc.— all by way of formation of a contract—present the best form and modalities of marriage solemnization that a civilized society can contemplate of. Needless to say the Arabian society with advent of Prophet displayed all principal characteristics and vital potentialities of a great civilized\(^{48}\)

\(^{47}\) Anson's, Law of Contract.
\(^{48}\) For details, P.K. Hitti, History of Arabs; MN Roy, Historical role of Islam; Mohammad Qutb, Islam the Misunderstood Religion.
society, particularly considered from the contributions made and the basic socio-economic infrastructural network it laid for the emancipation of slave and women who constitute a major segment of the population. The form of marriage incidentally touches certain element of contract of commercial nature. However, the analogy, as we have seen, is by no means conclusive. Justice Mahmood with all respects to his eminent person, did not apply his mind independently while pointing out its nature. He heavily banked on the observation made in the illustrious Tagore law Lecture (1873). However to substantiate his point Justice Mahmood desperately fell back upon Hamilton's Translation of the Hedaya to project 'ejab-o-kabul' as a qualifying element for marriage solemnization to reach out for the level of contract. Sarkar, the author of the Lecture, whose mind was consciously or unconsciously directed to the pre-Islamic Arab women on the pages of history, was allured to develop the idea as Women in that era were often subject to sale during their conjugal alliance.  

From Mahmood J., the doctrine found its way into the later judicial decisions by the Indian courts that were ceaselessly haunted by the ghost let loose by the former. The triumph continued despite cautions pronounced by Amer All, Abdur Rahim, Sir Sulaiman JJ. and the like whose pre-eminence in Indian Judiciary was no less than Justice Mahmood's. Thus basic tenets of Islamic matrimonial jurisprudence were pushed to the background giving rise to a distorted concept in man-woman equation in matrimony. It left a disastrous impact on Muslim wives who came to be meted out a bottom-rock priority in the scheme of distribution of Justice in course of their continued degenerating process. Thus it is submitted with due respect that the

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Indian Judiciary cannot disown the share of responsibility in the downward trends of women's status in this part of the hemisphere. The relegation of matrimonial concept from the altruistic 'Sacred Covenant' to a temporal 'civil contract' has undone a lot so far as spiritual and social values are concerned. Sociological experience has revealed that irregular and random secularization within a religion-oriented society promotes process of dehumanization. Such attitude has evermore encouraged the whimsical Muslim husband to abruptly dismiss his wife without any rhyme and reason or on any pretext. It is unfortunate that multitude of Qur'anic verses seeking elevation of woman's status escaped the notice of the judicial intelligentsia. Instead, woman, to their estimation, has grotesquely emerged as an object of sale.\textsuperscript{50} And, therefore, it will not be surprising, if, to the unscrupulous Muslim husband, the reminder served by the Prophet in his Farewell Address goes unheeded:

\textit{'People! your wives have certain rights over you and you have certain rights over them. ... Do treat your women well and be kind to them, for they are your partners and committed helpers. Remember that you have taken them as your wives and enjoyed their flesh only under God's trust and with his permission.'}\textsuperscript{51}

Therefore, it may be observed that marriage (nikah) among the Muslims is a "solemn pact" (..................) between man and a woman, soliciting each other's life-companionship, which in law takes the form of a contract (aqd).

\textsuperscript{50} Regulation IV of 1793 saved the application of the Muslim Personal Law. However a purely civil contract' doctrine in \textit{Abdul Qadir v. Salima} brought about a sweeping change in the dispensation of legal culture of India. Regulation IV of IV of 1793 read, \textit{Inter alia}, as follows:

In suits regarding succession, inheritance, marriage, caste and all religious institutions, the Mohammadan law with respect to Mohammadans — as the general rules by which die judges are to form their decisions" (Sec. 15).

\textsuperscript{51} Haykal, \textit{The Life of Muhammad}, 486-87 (1976)
There is a popular misconception that no religious significance or social solemnity is attached to a Muslim marriage which is a "mere civil contract". However, on examination, it reveals that although it is not a sacrament in the sense that the Hindus take their marriage, Muslim marriage (nikah) is strictly a sunnah of the highest order enjoined by the Prophet himself. Even the Qur'an does not deem the marriage as an ordinary contract. In fact, it is only the form of Muslim marriage that is contractual and non-ceremonial; marriage, as a concept, is not merely a contract. Rather it is ebadat (service to God) and muamlat (social dealings).\textsuperscript{52}

Muslim marriage is regarded as a contract between a Muslim man and woman which has for its object procreation and legitimization of children.\textsuperscript{53} Once a marriage comes into existence, it is treated with all the essential attributes of a sacred covenant (mithag-i-ghalid). The contractual element attaches to it only at the formative stage; and there it is§ meant for the mutual benefit Office parties. A man and woman intending to become life partners can, at the very inception mutually, settle down their own terms for the entire duration of the intended partnership and in respect of all its aspects and phases. Perhaps the confusion about the Muslim marriage is compounded by the absence of a codified law in that regard and the varying practices followed by various schools.

Marriage of every Muslim, whether male or female, is permissible in law provided the following conditions are satisfied.

\textsuperscript{52} Tahir Mahmood, Muslim Law of India (1980), also Abdur Rahim, The Principles of Muhammadan Jurisprudence, Lahore (1958).

\textsuperscript{53} D.R. Mulla, Principles of Mohammedan Law, Section 20 (Bombay, 18" Ed. 1977).
(a)  Sound mind and
(b)  Puberty (bulugh).

As regards puberty, it is to be understood as a physical phenomenon to be ascertained by evidence and in the absence of evidence to the contrary, it is generally presumed that a person who has completed the fifteenth year of age, has attained puberty. 54 Text book writers maintain that the earliest age of puberty for a boy is, generally twelve years and for a girl it is nine years. Thus even a minor Muslim girl also can marry if the consent of a "marriage-guardian" is obtained for that purpose.

As regards those persons (both male and female) who are neither minors nor insane, the rules of Muslim law are as follows.

(i)  under all schools of Muslim law, such a boy can freely marry, personally and without any body else.

(ii) under the hanafi and Ithna Ashari Laws (but not under shafei and Ismaili school), such a girl can freely marry personally and without the consent of any one else.

As regards those people's male and female who are incompetent to contract their own marriage due to insanity or minority, the Muslim law lays down as under.

(i)  under none of the schools of Muslim law, can an insane person (male or female) or a minor contract a marriage without the consent and intervention of his or her "marriage-guardian".

(ii) under Shafei law a girl, though not a minor or insane, cannot contract her first marriage without the consent of her marriage-guardian; but where she is marrying for the first time, this rule does not apply. The same principle applies to Ismaili Law.

Thus it could be seen that there is no uniform practice as to the marriage of a Muslim either male or female even though he or she is a major and of sound mind. It depends on the school to which the person belongs to.

The authority of a person to contract the marriage of another who is incompetent to contract his or her own marriage is called "marriage-guardianship" (Witlyat-e-nikah). The person having such authority is called marriage-guardian (Wali-e-nikah). Only those persons who can contract their own marriage can act as marriage guardian for another person.

There is no uniformity as to the persons who can act as marriage-guardians. Different Schools of Muslim law follow different practices in this regard. Eg: In Hanafi law, there are 18 relatives of the bride/bride groom who can act as "marriage-guardians" they include father, father's father, father's father's father, brother (first full, then consanguineous) etc., one after the other. At the shafei, Ithna Ashari, and Ismaili laws, the entitlement to marriage-guardianship is extremely restricted. Only the father, or the father's father of a minor can act as the marriage guardian.

However, there is no "Kanyadan" or the "ceremonial giving" of the bride in marriage, as the guardian in marriage acts only as a mediator.
(iii) The Indian Majority Act, 1875 does not affect the roles of Muslim law relating, to minor's marriage.\footnote{See Section 2(a) of the Act, 1875, which specifically states that the Act shall not affect the marriage, dower, divorce or adoption of any person governed by personal laws.}

However, the rules of Muslim law relating to minor's marriage do conflict with the provisions of the Child Marriage Restraint Act, 1929 (Popularly known as Sarada Act) which is applicable equally to all Indians including Muslims. Under the provisions of this Act, every man below the age of 21 years, as also every girl below the age of 18 years is a "Child", every person under the age of 18 years is a "minor" and every marriage either party to which is a child is a "child marriage". As Muslims do not enjoy an exemption from any of the aforesaid provisions of the Act of 1929, when a Muslim marriage is a "child marriage" under the Act takes place, various persons responsible for it including the bride groom not being a "child", the "marriage-guardian", if any may be prosecuted. However there is nothing in the Art which suggests that a marriage in violation of its provisions will be invalid.

(iv) As a Muslim marriage partakes the character of 'Civil Contract', there is always a proposal (\textit{Ljub}) by either party or acceptance (\textit{Qubul}) by the other party. If the parties to the intending marriage are not competent to contract their own marriage then the proposal and acceptance can be made by their respective marriage guardians. The proposal and acceptance can be made either personally, or through a representative. Most of the Muslim schools like Hanafi and Shafei insist on the presence of witnesses (Gawah) when the contract takes place.

(v) In Pre-Islamic Arabia, unlimited polygamy was prevailing. After
the advent of Islam, the prophet introduced limited polygamy which fixed the limit of four wives. A Mohammedan male may have four wives at the same time. However it may be remembered that it is only a permission given by the Holy Quran to contract a polygamous marriage and it is not a compulsion. A Muslim male can marry more than one woman subject to a maximum of four, only when he can deal with them justly and equitably.

Though limited polygamy has been recognized by Islam, it is -tolerated only under certain, circumstances. In the case of Moonshee Byzloor Raheem v. Shamsonnisa Begum, the Privy Council observed:

"Mohammedan law enforced in India has considered polygamy as an institution to be tolerated but not encouraged and has not enforced upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances"

Now after passing of the Dissolution of Muslim Marriage Act, 1939, a Mohammedan wife can file a suit for divorce against the husband, on the ground that her husband, having more than one wife, is not treating her equitably.57

If a Muslim male contracts a fifth marriage when his first four marriages are intact, such marriage is void (Batil) as per Shia law but is only irregular (Fasid) as per the Sunni law.

(vi) A Muslim woman is not allowed to have at a time more than one husband. If she marries again during the life-time of her husband, she will be guilty of committing the offence of Bigamy under Section 494 of Indian Penal Code. The children born to bigamous

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56 11 MIA 551.
marriages are illegitimate.

(vii) There are three kinds of prohibitions of impediments to a Muslim marriage.

(1) A marriage between two Muslims is absolutely prohibited.

(i) on the ground of polyandry of the woman.

(ii) the ground of consanguinity (blood relationship)

(iii) on the ground of affinity (through earlier marriage) and

(iv) on the ground of fosterage. . .

A marriage performed or contracted disregarding these impediments are void (Batil) and it does not give rise to any marital rights or obligations.

(2) A marriage between two Muslims is not absolutely prohibited:

(i) on the ground of unlawful conjunction

(ii) on the ground of polygamy

(iii) on the ground Iddat period

(iv) on the ground Difference of Religion

(v) on the ground absence of witnesses and

(vi) on the ground of Divorce (where the divorced female is sought to be remarried by the husband).

Thus in the case of unlawful conjunction i.e. where a Mohammedan male of Sunni is prohibited to marry at the same time two wives who are so related each other by blood relationship, affinity or fosterage
that if one of them were a male they could have been lawfully married if the husband divorces one, the marriage with the other is valid.

Similarly a Mohammedan male is prohibited to marry a woman who is undergoing "Iddat" period after the dissolution of her first/earlier marriage. Here the "iddat period" varies depending on the cause of dissolution viz. death of husband or divorce etc. A Mohammedan female is prohibited to marry a non-Mohammedan. These impediments are only temporary and can be removed by a subsequent supervening development like divorcing one of the wives, expiry of iddat period and conversion to Islam etc. Any Muslim marriage contracted ignoring these impediments are irregular (Fasid) which can be regularized by certain actions or developments.

(viii) A Muslim wife is also entitled to dower (mahr) from her husband. Dower or mahr is a sum of money or other property which the wife is entitled to receive from the husband in "consideration of marriage".\textsuperscript{58} It is inherent in the concept of marriage under Mohammedan law. It is a sort of deterrented to the husband's absolute power of pronouncing divorce on his wife, so the main object of dower is to offer protection to wife against such arbitrary power.\textsuperscript{59} However some of the Mohammedan Law commentators do not agree with the idea of identifying mahr as consideration for marriage, but they consider it as an obligation imposed upon a husband as mark of respect for the wife.\textsuperscript{60}

\textsuperscript{58} Mulla, Principles of Mohammedan Law, 17\textsuperscript{th} Ed. p. 277
\textsuperscript{59} Abdur Kadir v. Salima ILR 8 All. 149.
\textsuperscript{60} Abdur Rahim, "Mohammedan Jurisprudence" p. 334.
The Dower may be Prompt Dower which is payable at the time of marriage or Deferred Dower which may be paid at the time of death of the husband or on the dissolution of marriage. The Quantum of dower depends on the status of the husband and wife.

(ix) In Muslim Law, the Shia law recognizes 'mutha' marriages but according to Sunni law, such marriages are void. Among the Shias also the "Ithna ashari School" only permits such marriages.

The literal meaning of the word 'mutha' is enjoyment, use. Thus a mutha marriage is a contract marriage for a certain period of time as agreed by the parties.

A Mohammedan male of Ithna Ashari sect of the Shias may contract any number of mutha marriages, with a female belonging to Islam, Christianity, or Jewish religion. However a female of Ithna Ashari sect of the Shias has capacity to contract a valid mutha marriage only with a Mohammedan and nobody else of other religion. A major Shia female of Ithna ashari School has capacity to contract a valid mutha marriage without the consent of her guardian but if she is a minor, she can do so only with the consent of her guardian. The violation of this condition by a minor girl will render the marriage unlawful.

In a Muta Marriage, the period of cohabitation and the amount of dower must be specified. The condition of proposal and acceptance should be fulfilled along with the use of the word 'tazwīg' or 'nikah' or 'mutha'.

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61 Baillie, I, 18; The Hedaya, 33.
(x) The following are the consequences of a valid muta marriage.

(1) The parties to a muta marriage will be called the muta husband and the muta wife.

(2) A muta marriage does not give rise to mutual rights of inheritance between the rights to inheritance between the muta husband and the muta wife. However this practice can be overridden by an agreement to the contrary.

(3) A muta wife is not entitled to any maintenance from the husband.

(4) In a muta marriage, the children born out of this union are legitimate and capable of inheriting from both the parents in the same manner as the offspring of a permanent marriage.

(5) If the muta marriage is dissolved by the death of the husband, the muta widow must observe the period of iddat for 4 months and 10 days or till the delivery in the case of pregnancy and.

(6) Dower or mahr must, be specified in a muta marriage.

Thus the status of a muta wife is very low and insecure, as compared to that of a Muslim wife in a permanent marriage.

On the basis of above discussion amply makes it clear that in a Muslim marriage, the female plays an important and almost an equal role as compared to the males. However she enjoys a very fragile marital life as the Muslim husband is vested with an almost absolute right to divorce the wife at any time by resorting to Triple Talaq' method. It is not to say that every Muslim husband is invoking his
right to divorce his wife indiscriminately but only to point out the possibility of its misuse. The law relating to Divorce among Muslims and the position of the Muslim wife papoose to it, has been discussed in detail elsewhere in this work.

1.4 CHRISTIAN WOMEN AND MARRIAGE

English Law from the very beginning subscribed to the notion of spousal consent to the marriage. The ecclesiastical was of the view that though in its formation marriage was a contract, it was a sacrament in its consequence. With the advent of Reformation, the Protestant World came out with the notion that marriage was a civil contract and matrimonial matters were subject to the jurisdiction of civil courts, ecclesiastical court having no jurisdiction over them. The marriage thereafter also came to be regarded as a dissoluble union. Thus the Reformation caused a fundamental change of attitude towards marriage among the Protestants, The Catholics continued to uphold and follow the ecclesiastical doctrinaire view of sacra-mentality and indissolubility of marriage, while the Protestants became liberated and propounded the concept of contractually and dissolubility of marriage. They regarded marriage as essentially man-made in sharp contrast to the Catholic view that marriage was made in heaven.  

Still, the Protestant though regarded their marriage as contract, regarded it as a special contract. It was not equated with commercial contract. They asserted that marriage being a social institution, there was social interest in its preservation and protection.

62 Friedman, *Law in a Changing Society* (1970), 174; also A.A. Maududi (Supra note, 24) who has attributed this changed view of the protestant to the interaction of Christianity with the Islamic East on the Reformation eve.
Among the Indian Christians, marriage is regarded as a civil contract, though it is usually solemnized by a Minister of religion licensed under the Christian Marriage Act, 1872. It can also be solemnized by Registrar of Marriages.\(^{63}\)

Every marriage between Indian Christians may be solemnized provided the bride is 18 years of age and the bride groom 21 years. Polygamy is prohibited among the Christians. For the contract of marriage among Christians, the free and intelligent consent of the parties is indispensable. As the Christian do not have a personal law, the law of marriage with special exceptions is codified in the Indian Christian Marriage Act, and Indian Divorce Act.

There are number of enactments in India that deal with the Christian marriages and matrimonial causes. They are the Indian Christian Marriage Act, 1872, the Marriage's Validation Act, 1892, The Cochin Christian Civil Marriage Act, 1905, The Indian Matrimonial causes (War Marriages) Act,\(^{64}\) 1948. The convert's Marriage Dissolution Act, 1866 and The Indian Divorce Act, 1869 etc. However many lawyers and jurists are of the opinion that the law relating to Christian marriage is deficient and that it lacks coherency.

The Indian Christian Marriage Act, 1872 deals with a Christian marriage in India. This Act lays down various provisions dealing with the marriage registrar, time and place of marriage registration of marriages and the grant of marriage certificates etc. A perusal of various legislations on the topic makes it amply clear that a Christian marriage has the right to maintenances during marriage to restitution

\(^{63}\) Section 4 of the Christian Marriage Act, 1872.
of conjugal rights, to judicial separation and divorce. Every Christian marriage may be solemnized by complying with certain preliminary procedural formalities like notices of the intended marriage, publication of such notice and declaration by one of the parties. Registration such marriage is compulsory. A marriage between the Indian Christians may be solemnized without the preliminary procedural formalities of notice etc. by any person licensed to solemnize such marriages.

The Christian women enjoy equal rights in her marital life along with her husband. There is no polygamy permitted among the Christians similarly to Christians cannot marry each other, if they are within the prohibited degrees of relationships. The Child Marriage Restraint Act, 1929 is applicable to the Christian also. It is clear that a Christian wife enjoys co-equal rights with Hindu and Muslim wife even though her status and rights are not governed by a single law.

1.5 PARSI WOMEN AND MARRIAGE

Among the Parsis, marriage, as it stands now, is regarded as a contract. In Parsi marriage though a religious ceremony called ashirbad\(^4\) is mandatory for its validity, it is essentially regarded as contract. Consent is essential in marriage. A Parsi priest solemnizes the marriage amid ceremony of ashirbad in the presence of two witnesses. Ashirbad is a prayer or exhortation to the parties for observance of their marital obligations.\(^5\)

It is notable, therefore, that a Hindu husband takes wife in the presence


\(^5\) Section 3(b) of the Parsi Marriage and Divorce Act, 1936
of consecrated fire, a Muslim husband takes her under God's trust and with His permission, a Christian husband unites with his wife with all holiness of the Church and a Parsi husband takes wife in the presence of a priest under a solemn vow. While under Hindu and Christian system of marriage, the bond between husband and wife are sought to be strengthened through a concept of sacrament, under Islamic marriage the same object is sought to be achieved by declaring marriage as *Sunnah* of highest order ordained by the Prophet and as *ibadat* i.e. service to God and devotional act.

A marriage under the Parsi Marriage and Divorce Act, 1936 is nullity, if (1) the parties are within the prohibited degrees of consanguinity or affinity (Section 3), (2) necessary formalities of marriage are not performed (Section 3), (3) party/parties to marriage is/are less than 21 years and the marriage solemnized without guardian's consent (Section 30), and (4) either party was impotent (Section 30).

Section 34 of the Parsi Marriage and Divorce Act, 1936 which contains the provision runs as follows:

*Any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce, or on the ground that the defendant has been guilty of such cruelty to him or her or their children, or has used such personal violence, or has behaved in such a way as to render it in the judgment of the court improper to compel him or her to live with defendant.*

It may be observed that the provisions of the Hindu Marriage Act and the Special Marriage Act are more or less comprehensive; the provisions under the Indian Divorce Act are most inadequate. The grounds provided under the Parsi law leave room for rationalization as
the Act has incorporated certain grounds which should normally have been grounds for nullity. In addition to those nine grounds, Hindu Marriage Act, 1955 incorporates a few more additional grounds for wife alone.66

Section 36 of the Parsi Marriage and Divorce Act, 1936 also delineates the circumstances in which a suit for conjugal rights can be lodged. Section 38 of the Act says that no suit is to be filed to enforce marriage or contract arising thereof in those cases where the husband is below sixteen years or the wife below fourteen. According to Section 15 of the Act, the provision of the Code of Civil Procedure, 1908 shall so far as the same may be applicable, apply to proceedings in suits instituted under this Act including proceedings in execution and orders subsequent to a decree.

Section 36 of the Act says where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

The words of this Section are same as used in Section 32 of the Indian Divorce Act with this difference that the expression used there is "without reasonable cause" whereas it is "ceasing to cohabit without lawful or just cause". The two expressions, says histice S.C.

Manchanda, mean the same thing.\textsuperscript{67} Therefore, for the correct interpretation of these words reference may be made to the Section 32 of the Indian Divorce Act. The question as to what would be a lawful or just cause, among the Parsis, for a refusal to cohabit, is one of fact to be decided by the delegates. In \textit{Hirabai v. Dhanjibai}\textsuperscript{68} it was held that the grounds for refusal to cohabit must be grave and weighty so as to make the due performance of the marital obligation a moral impossibility.

A defence to restitution petition under Parsi law is the same as under Section 33 of the Indian Divorce Act. It was held in \textit{Kawasji v. Sirinbai}\textsuperscript{69} that an agreement to live separate is as good a defence to a suit for restitution among the Parsis as it is under the Indian Divorce Act.

It is observed that Act of 1936 deletes the penal clause which existed in Section 36 of the Act of 1865. Under the Act, 1865 a failure to obey a decree for restitution rendered the defaulting party liable to imprisonment for a term which right extend to one month or with fine or with both.\textsuperscript{70} But under the Act, 1936 a decree for restitution is enforceable only in the manner provided for in the Code of Civil Procedure. Apart from this remedy, the plaintiff has been conferred a statutory right to apply for a divorce on the ground of refusal to comply with a decree for a year.

The object of the Section 37 is to avoid multiplicity of suit between the same parties. This Section provides that the respondent need not file a

\textsuperscript{67} SC Manchanda, \textit{The Law and Practice of Divorce} (4\textsuperscript{th} ed.) 1973
\textsuperscript{68} (1900) 2 Bom. LR 845
\textsuperscript{69} 23 Bom. 279.
separate suit in order to obtain relief. It is enough for him or her to
counter-charge in his or her answer to the petition and the court will
then grant him such relief to which he is entitled as if he or she had
presented a cross-petition. In this respect it differs essentially from
Section 15 of the Indian Divorce Act which provides relief to the
respondent in case of opposition on certain specific ground only. This
Section therefore has the merit of completely avoiding multiplicity of
suits and the defendant need never file a separate petition for any relief
under the Act that he may desire to obtain.

It may be submitted that the restitution of conjugal rights as a
matrimonial remedy under Section 36 of the Parsi Marriage and
Divorce Act, 1936 has never been tested on the constitutional touch-
stone of the judiciary as was done with respect to the remedy under
Section 9 of the Hindu Marriage Act, 1955.71 And issues involving the
restitution of conjugal rights incorporated under Parsi law does not
materially differ from those under Hindu law which was framed in the
backdrop of similar social facts so far as women's interests are
concerned. As already stated Parsi community like Christians forms an
infinitesimal fraction of our populace.

Chapter-2:
Dissolution of Marriage
Chapter-2

DISSOLUTION OF MARRIAGE

2.1 INTRODUCTORY REMARKS

The Union of marriage is never meant to be broken under any personal law. Firm union of the husband and wife is a necessary condition for a happy family-life. Islam therefore, insists upon the subsistence of marriage and prescribes that breach of the marriage-contract should be avoided. Initially no marriage is contracted to be dissolved in future, but in unfortunate cases the dissolution takes place and the matrimonial contract is broken. A marriage may be dissolved:

(1) by act of God i.e. due to death of the husband or wife, or
(2) by act of the parties i.e. divorce

Death of the husband or wife during subsistence of marriage dissolves the marriage immediately under all the personal law systems. The very fact of the death of any party to the marriage is sufficient to terminate the marriage. Where a Marriage is terminated by act of the parties, the dissolution is called divorce. Under Muslim law the divorce may take place by the act of parties themselves or through a decree of the court of law. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst.¹ Divorce being an evil, it must be avoided as far as possible. But sometimes this evil becomes a necessity. When it is impossible for the parties to carry on their union

¹ See Tyabji; Muslim Law; Fourth Edn. p. 143.
with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings. The basis of the Islamic law of divorce is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. It may be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce.

The Indian Divorce Act, 1869 regulates the law relating to the divorce of persons professing the Christian religion and also the other matrimonial clauses. This act has application if one of the parties to the proceedings is a Christian. The Act is modeled on the English law of divorce (Section 7) Section 10 of the act provides the grounds on which a husband or a wife may petition for dissolution of marriage. It has prescribed a solitary ground for dissolution of marriage on a petition by a husband that is adultery of the wife. It is not necessary that there should be direct evidence of adultery before marriage can be dissolved, for direct evidence is rarely available. Association coupled with opportunity and evidence of illicit affection or familiarity may be sufficient for the court.

2.2 MUSLIM WOMEN- DISSOLUTION OF MARRIAGE

(a) Divorce by husband

Among the pre-Islamic Arab, the power of divorce possessed by the husband was unlimited. They could divorce their wife at any time, for any reason or without reason. They could also revoke their divorce, and divorce again as many times as they preferred. They could, if they were so inclined, swear that they would have no intercourse with their
wives, though still living with them. They could arbitrarily accuse their
wives of adultery, dismiss them, and leave them with such notoriety as
would deter other suitors; while they themselves would go exempt
from any formal responsibility of maintenance or legal punishment.²

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

The Prophet of Islam looked upon these customs of divorce with
extreme disapproval, and regarded their practice as calculated to
undermine the foundation of society. It was impossible, however,
under the existing conditions of society to abolish the custom entirely.
The Prophet had to mould the mind of an uncultured and semi-
barbarous community to a higher development. Accordingly, he
allowed the exercise of the power of divorce to husbands under certain
conditions. He permitted to divorced parties three distinct and separate
periods within which they might endeavour to become reconciled, but
should all attempts of reconciliation prove unsuccessful then in the
third period the final separation became effective.³

² Ibrahim Abdul Hamid, "Dissolution of Marriage" in Islamic Quarterly, 3(1956) 166-75, 215-
223; 4 (1957) 3-10, 57-65, 97-113.
The reforms of the Holy Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband, and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced "talaq to be the most detestable before God of all permitted things"⁴ for it prevented conjugal happiness and interfered with the proper upbringing of children.

Ameer Ali asserts:

"The permission (of divorce), therefore, in the Koran though it gave a certain countenance to the old customs, had to be read in the light of the Law giver's own enunciation? When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce⁵.

The effective check placed by Islam on frequent divorce and remarriage was that incase of irrevocable separation, it is essential for remarriage, that the wife should marry another man, and this marriage be consummated before divorce, and the wife should observe iddat. This was a measure which rendered separation more rare. Certain critics accuse this procedure as "a disgusting ordeal" and "revolting", but they ignore that among a proud, jealous, and sensitive race like the Arabs, such a condition was one of the strongest antidotes for the evil. It intended to control one of the most sensitive nations of the earth, by acting on the strongest feeling of their nature, the sense of honour.⁶

It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without

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⁴ Abu Daud, Sunan, xiii 3.
⁵ Supra note, 17.
cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering is engendered by the husband's withholding divorce than by this irresponsible exercise of the right.\textsuperscript{7}

It is true that the divorce does him at the root of many sufferings, but it is to be borne in mind that the husband's right to divorce is in fact circumscribed in various ways. The amount of dower itself serves as "a check on the capricious exercise of his unlimited power of divorce".\textsuperscript{8} The higher the amount of dower, the more difficult is the pronouncement of talaq. Then talaq tafweed (divorce by delegation) is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court".\textsuperscript{9} The wife may at the time of entering into a marriage contract to secure the right of divorce from the husband.

"One cannot deny that many Muslim men abuse the matrimonial laws of Islam and treat their women shabbily. But it certainly does not mean that Muslim women live inconstant dread of the blighted word - talaq, talaq, talaq as some self-appointed experts on Shariat... would have us believe", observes Parwez Hafeez. According to him, Muslim men despise divorce as much as Muslim women. Divorce is considered a dirty word and is strongly disapproved of even in Muslim society. Because of the social stigma attached to it, the overwhelming majority of Muslim men never dream of uttering the word. The rate of divorce among Indian Muslim is more or less the same as among other communities. In the Western society, where divorce is a time-

\textsuperscript{6} Id. at pp. 245 & 46
\textsuperscript{7} Id. at pp. 245 & 46
\textsuperscript{8} Fyzee, "The Muslim Wife's Right of dissolving her Marriage". (1936) 38 Bom. Law Reporter, LJ 113.
\textsuperscript{9} Id. at 159.
consuming, expensive and torturous process, the divorce rate in some countries is as high as 45 percent. Bertrand Russel, much-married and much-divorced, observes the author, acknowledged that where family feeling is strong, the rate of divorce is low even if it is legally easy and conversely where family feeling is weak, rate of divorce is high even if it is legally difficult. It need not be mentioned that family ties are extraordinarily strong in Muslim society. The "rational, realistic and modern law of Islamic divorce" appears repugnant to many because of their mind-set that divorce is something inherently immoral. But social scientists and marriage counsellor agree that it is a better and healthier for a constantly squabbling couple to part than to persist with a marriage that becomes a mere sham. When a matrimonial alliance turns into a prison sentence, making life an unending nightmare for both or either of the spouses, divorce is the only escape-route to relief, liberty and sanity. Other societies realized this reality only in the current century while law-givers of Islam realized it fourteen centuries ago.\(^\text{10}\)

The legal systems of various countries have grudgingly accepted the truth that if the marriage has broken down irretrievably let there be a divorce. Called the "breakdown theory", this law was incorporated by British in 1969 and recommended by the Indian Law Commission in its report in 1978.

Besides these precautionary devices, Islamic law has given rights to the wife to get rid of an unpleasant husband and has the marriage dissolved through the prescribed procedure on certain grounds.\(^\text{11}\) The

\(^{10}\) Parvez Hafeez, "Talaq is as dirty a word for Muslim men as it is for women". The Asian Age, 23 August, 1995.

\(^{11}\) Fyzee, Outlines of Muhammedan Laws (4th ed.) p. 33
law also protects the wife against the malicious intent of the husband in pronouncing *talaq*. This situation is well-explained by Mulla who says that the rights of mutual inheritance cease immediately when the *talaq* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry *iddat*. To this there is an exception in favour of the wife. It *is* this that if the repudiation was made during the husband's death- "illness (marz-al-maul), and he dies, before the expiry of the *iddat* the wife is entitled to inherit from him, the reason being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance.\(^{12}\)

Lastly, the inequality of sexes is explained by Abdur Rahim in these words:

"The relations between two members of the opposite sexes which marriage legalizes are, however, so subtle and delicate and require such constant adjustment, involving the fate and well-being of the future generations, that in their regulation, the law considers it expedient to allow the voice of one partner more or less predominant over that of the other."\(^{13}\)

The structure of the Islamic law of divorce is, as already stated, based on the so-called "breakdown theory", now being adopted by modern laws on matrimonial disputes. Without prescribing any specific "grounds" for divorce, it allows dissolution of marriages at the instance of husband (*by talaq*) or the wife (*by Khul*) and by mutual consent (*by mubara'at*) subject in each case, to such ifs and buts that in modern legal terminology can be best translated into nothing but "irretrievable break down".\(^{14}\)


\(^{14}\) Tahir Mahmood, "Halala: A misunderstood concept of Muslim Law". 11 NO. 4 Islamic &
The Prophet who set the examples by never divorcing any of his wives despite occasional provocation inspired religious awe against divorce by declaring that "among legally permitted things most detestable in God's sight is divorce". The Qur'an prescribed bilateral reconciliatory measures to precede essentially every case of divorce. Only where marital relationship was ruptured past all repairs, room was kept for a respectable parting of ways. Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but is a necessary evil. It is better to wreck the unity of the family than to wreck the future happiness of the parties by binding them to a companionship that has become odious.

Thus it may be submitted that Islam discourages divorce in principle and permits it only when it becomes absolutely impossible for the parties to live in peace and harmony. The Prophet has expressed his abhorrence of it on various occasions. Unequivocally declaring divorce to be abghad al-mubahat (i.e. most detestable of all legally permissible things) the Prophet issued a stern warning:

"Enter into marriage and do not dissolve it. God hates those men and women who change their bed-partners for sake of pleasure".

Another tradition says: "Marry but do not divorce, because God does not like men and women who relish variety of sexual pleasure." He also warned, 'Do not make nikah and talaq a play thing'. Elsewhere he said, 'Marry not for the sake of divorce'. In case of differences and

15 Qu’nn, IV: 35.
17 Mohammad Ali, Manual Hadith, 284.
18 Abu Da’ud, Mishkat (Kitab al talaq) as cited in the Jami Saghir (Egyptian ed.)
family jars which may lead to divorce, Qur'an enjoins four steps to be in that order: (1) perhaps verbal advice or admonition may be sufficient; (2) if not, sex relations may be suspended; (3) if this is not sufficient, some light physical correction may be administered; but Imam Shaft considers this inadvisable, though permissible and all authorities are unanimous in deprecating any sort of cruelty, even of the nagging kind; (4) if all this fails, a family council is recommended:

As to those women On whose part ye fear Disloyalty and ill-conduct, Admonish them (first). (Next), refuse to share their bed (And last) beat them (lightly); But if they return to obedience. Seek not against them.

Means (of annoyance): For God is Most High, Great (above you all).

35. If ye fear a breach Between them twain, appoint (two) arbiters. One from his family and the other from hers; If they wish for peace.

God will cause their reconciliation: For God hath full knowledge. And is acquainted with all things.\(^{19}\)

It may be submitted that this is an excellent plan for settling family disputes without too much publicity or mud-throwing or resort to the chicaneries of the law. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties and would be able, with God's help to effect a real reconciliation.\(^{20}\)

It has also been observed that these three measures are not to be applied to simultaneously or equally in every case. The punishment shall correspond to the fault and the status of the wife. Where a light

\(^{19}\) The Holy Qur'an. IV: 34-35.
admonishment proves effective, sterner measures shall not be resorted to, as for the third harsher alternative in case of an incorrigible wife. The Prophet directs men not to hit across the face, nor to beat severely nor use anything that might leave marks on the body (Ibn Majah). And the Prophet elaborates in the most unambiguous terms that husbands who resort to such measures are not among the best. Again it must be borne in mind that this permission to rectify an errant wife is just symbolic and by way of a warning.  

The Qur'anic injunction apart, there is also a tradition of the Prophet suggesting reconciliation:

"... Let the case be referred to two Muslim arbitrators, free and just, one chosen from the family of each of the parties; and they shall see, whether in that particular case reconciliation or separation is desirable; and their decision shall be binding upon them both." 

Though Islam recognizes the necessity for divorce in cases when marital relations have been poisoned to a degree which makes a peaceful home life impossible, it does not believe in unlimited opportunities for divorce on frivolous and unimportant grounds, because any undue increase in the facilities of divorce would destroy the stability of family life. Therefore, while allowing divorce on genuine grounds, Islam has taken great care to introduce checks and balances designed to limit the use of available facilities. Let us see in more detail the Islamic law on this point.

So far as men are concerned, they have been given liberty of divorce on certain conditions. First, as regards the dower they bestowed on

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their wives, they are not permitted to withhold it or take back anything from it, if they decide upon divorce. Secondly, a divorce pronounced at a single sitting does not have the effect of final separation. It is laid down as a condition that a divorce, to take legal effect, must be pronounced three times at an interval of one month each. There is some difference of opinion as to whether three pronouncements at a single sitting can have the effect of final separation. Most jurists hold that for a divorce to take effect, it is pronounced three times even at a single sitting. But Imam Ahmad ibn Hanbal and Ibn Taymiyyah reject this opinion and regard three declarations of divorce delivered at a single sitting as one pronouncement, so that separation does not come at the end of three such declarations, but only when such declarations are separately made at an interval of one month. There are strong grounds for supporting the stand taken by Imam Ahmad and Imam Ibn Taymiyyah. In the first place it is obvious that the intention of the law in prescribing three pronouncements of divorce separated by fixed intervals of time precedent to final separation was to leave open the opportunity of reconciliation. This intension is defeated by recognition of three pronouncements delivered at a single sitting with the effect of final separation. Secondly, there is evidence to show that the companions of the Prophet regarded this form of divorce as being morally reprehensible and involving the person responsible in a great religious sin. It is recorded that 'Umar, the second caliph, used to punish such persons who pronounced three divorces at a single sitting. Ibn Abbas, another companion of the Prophet was asked about a person who divorced his wife in a single sitting. He said: 'Man was

guilty of disobedience to divine commands'. 'Ali is reported to have said: 'If the people faithfully observed the conditions of divorce, no one would feel sorry for the separation of his wife'. In the face of this strong evidence, it is strange that the majority of the jurists recognized the legal validity of an act which has been universally condemned as being highly sinful and which obviously defeat the law giver's intention.

During the period of the first two pronouncements of divorce, the husband and the wife are required to live together as formerly, so that if the husband has acted hurriedly or in a fit of passion, he may revoke his pronouncement and normal relations may be restored. Again if the husband has sexual intercourse with his wife or indulges in the preliminaries of co-habitation, the pronouncement of divorce lapses automatically without express declaration on his part. If, however, no such thing has happened and two intervals of one month each has elapsed, and the husband makes the third and final pronouncement after this period, marital relations are completely dissolved and the divorce is complete. If the husband reports after this and wishes to have his wife again, he cannot do so, except after his wife has been married to someone else and divorced by him too. This provision has been considered necessary in order that it may act as a deterrent for husbands who are prone to act rashly without considering the consequences of their action.\textsuperscript{24} According to one submission 'this was deterrent law meant to prevent the husband from divorcing his wife for a third time, whenever it be in his life,… . It was a pro-woman law of a permissive nature.\textsuperscript{25}

\textsuperscript{24} MM Siddiqui, \textit{Women in Islam} (1980), 64.
\textsuperscript{25} Tahir Mohmood, \textit{II Islamic & Comparative Law quarterly}, p. 301.
Talaqul biddat triple declaration or a single declaration, observes Mulla,\textsuperscript{26} "is good in law, though bad in theology". Tyabji points out it has become most common, for men have always moulded the law of marriage so as to be the most agreeable to themselves.\textsuperscript{27} Though it is common use, it may be submitted, the present trend of opinion all over the Islamic world is against it. Pakistan has abolished it.\textsuperscript{28} There it has been given in writing with a prior notice of three months. Talaq is effective only with the permission of the union council constituted by the government. Similarly in Sudan, Jordan, Syria and Morocco, it is provided that the triple divorce when pronounced in a single formula or on one and the same occasion, would count as a single and revocable divorce.

Similarly, in divorcing one's wife regard is shown for the better considered judgment. One might ask: why should the talaq be effective even if it is pronounced under compulsion or in a state of voluntary intoxication,\textsuperscript{29} in jest or in anger? Talaq under intoxication is peculiar to Hanafi law alone, and has been criticized as absurd and hence unjust and should be abolished by statute.\textsuperscript{30} Ameer Ali and Abdur Rahim suggest that in such cases where the parties happen to be Hanafi, the court should on grounds of equity, apply the Shafei law. The Ottoman law of Family Rights also provides that talaq uttered under the influence of intoxication or intimidation would no longer be given effect to. The legislations introduced in Jordan and Syria provide that the formula of talaq uttered as an oath or threat would be carried into effect only if the husband really so intended. It may be observed

\textsuperscript{26} Mulla S. 311.
\textsuperscript{27} Tyabjee, Muhammadan Law (3rd ed) 221.
\textsuperscript{28} Section 66, government of Pakistan, Ministry of Law, Ordinance no. viii of 1961.
\textsuperscript{29} A.A.A. Fyzees, Outlines of Muhammedan Law (4th ed.) p. 156.
in this connection that *Talaq-ul-biddat* came into being during the second century of Islam when the Umayyid monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found a loophole to effect their purpose.\(^3\)

Thus it is abundantly clear that it was not Islam but Omayyid practices that gave validity to these *biddat* divorces. It has recently been pointed out by Justice Iyer in *Yusuf v. Sowramma*\(^2\) where he said:

"It is a popular fallacy that a Muslim male enjoys under the Qur'anic law, unbridled authority to liquidate the marriage... the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim Law, as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy Qur'an laid down and the same misconception vitiates the law dealing with the wife's rights to divorce.... Commentators on the Qur'an have rightly observed and these tallies with the law now administered in some Muslim countries like Iraq that the husband must satisfy the court about the reasons for divorce".

*Talaq-ul-biddat* should, therefore, be not given effect to Abdur Rahim\(^3\) is more poignant when he says:

"I may remark that the interpretation of the law of divorce by the jurists specially of the Hanafi School, is one flagrant instance where because of liberal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct

\(^{30}\) Ibid (4\(^{th}\) ed.) p. 156.
\(^{32}\) AIR 1971 Ker. 261
\(^{33}\) M.R. Zafer, "Unilateral Divorce In Muslim Personal Law", in *Islamic Law in Modern India* (1972) p. 173
antagonism to the admitted policy of the law on the subject".

Far-reaching reforms relating to unilateral divorce have been introduced during the recent years, in a large number of Muslim countries.\textsuperscript{34} It is high time that some thing be done in India too. It is interesting to note that under a decree of H.H. the Aga Khan, the Khojas in India have their own marriage tribunals and neither a second marriage nor a divorce is possible without recourse to these tribunals.\textsuperscript{35}

Another condition laid down for husbands intending to divorce their wives is that they should not pronounce the divorce during the period of their wives ‘menstruation’. This condition has been deemed necessary because a woman is liable to become ill-tempered and easily irascible during the period of menstruation. This physical disability leads her sometimes to act and behave in a manner which she disapproves herself on becoming clean. Vermilow in his \textit{Biological Tragedy of Woman} makes some observation which is pertinent in this case:

"Women's mental equilibrium is upset during the period of menstruation... A woman street-car conductor pulls out the wrong tickets and is muddled in counting the change. A menstruating motor-woman drives the street-car slowly and with hesitancy, becoming confused at crossings. The lady typist's fingers strike the wrong keys, The woman dentist cannot find the proper instrument. An actress is not in the right mood and makes wrong gestures".\textsuperscript{36}

Havelock Ellis observes:

\textsuperscript{34} Tahir Mehmood, \textit{Family Law Reforms in the Muslim World}, (Indian Law Institute, 1972).
\textsuperscript{35} Khalid Rashid, \textit{Supra} note 44, p. 97
\textsuperscript{36} Vermilow, \textit{Biological Tragedy of Women}, quoted by M.M. Siddique in Woman in Islam, p. 65.
"There is in this period greater impression-ability, greater suggestion and more or less diminished self-control. It is at this time that sudden caprices, fits of ill-temper, moods of depression, impulses of jealousy, outbursts of self-confession are chiefly liable to occur."\textsuperscript{37}

Another reason for this stipulation is that normal sexual relations between husband and wife are suspended for the time she undergoes her monthly course, and sexual relations are commonly the basis of love and amity between husband and wife. It is possible that, a couple may resume their normal attitude to each other and forget their quarrels when their sexual relations are restored after the period of menstruation. There is a tradition that ‘Abdullah b. Umar divorced his wife when she was having her monthly period. His father reported the matter to the Prophet who became very angry and ordered that Abdullah should revoke his divorce and wait until his wife is clean, after which he is free to do as he liked. Another tradition states that the Prophet told Ibn Umar to observe the following procedure in divorcing his wife:

\"Ibn Umar", said the Prophet, \"you adopted a wrong method The right one is that you should wait for tuhr (period of cleanliness), then pronounce a divorce during tuhr and another during the second. During the third tuhr you should decide finally either to retain your wife or to divorce her\".

It is respectfully submitted that in talaq-ul biddat the form of talaq widely and indiscriminately practiced in India, the process prescribed by the Holy Prophet is hardly observed.

\textsuperscript{37} Havelock Ellis, Man and Woman, quoted ibid.
(b) Wife's right to divorce

The general survey in the foregoing pages reveals the right of divorce sanctioned in favour of the husband. In the following pages right to divorce sanctioned in favour of Muslim wife will be examined. There are two ways in which a woman is allowed to seek separation from her husband; first, through mutual agreement between the husband and the wife which is called *Khula*, secondly, through a judicial decree by filing a suit against the husband in a law court called *fask*. It will be seen that the wife is not at liberty like husband, to get herself released by an outright declaration of divorce. If her husband refuses to release her from the marriage bond, she has to go to a court of law and obtain a decree in her favour. This may seem to place her at a disadvantage in comparison with her husband and it may be asserted that this implies inequality of rights, as between husband and wife. Actually, the intervention of the state in this matter is a device for the fuller protection of her rights. Conditions all over the world, including even Western countries, are such that a woman is not altogether free to exercise the legal rights. The husband can, if he so desires, place many impediments in her way. If the state does not come to her help in order to safeguard her rights, the woman may find herself handicapped in many ways, despite all talks and preaching of sex equality. It is, therefore, in her own interest to seek the support of authority in defending and exercising her rights. This was all the more necessary in the past when woman's social position exposed her to greater difficulties.

As in the case of divorce by the husband, the legal permission given to
woman to seek and obtain separation through mutual agreement or through the intervention of the court does not imply moral approval of the act. Islam has unreservedly condemned men and women who use their legal rights of divorce except on legitimate grounds and in absolutely unbearable condition. Thus a tradition of the Prophet states: 'God does not like men and women who seek variety of sexual experience'. Another tradition says, 'God has showered curses on those men and women who make frequent use of divorce for the sake of sexual enjoyment' Again, the Prophet of God said; 'A woman who seeks divorce from her husband without any excess on his part will be cursed by God and His angels' Yet another Hadith says: 'Women who make a play thing of their divorce rights are hypocrites'. According to Ahmed and Tirmizi, the Holy Prophet of Allah said, 'Whichever woman asks her husband for divorce without fault, the fragrance of paradise is unlawful for her'. These warnings and moral exhortations are intended to discourage men and women from disturbing the stability of family life and resorting to separation except in cases of unavoidable necessity. Moral dissuasion apart, there is no dispute about a woman's legal right to seek separation from her husband. Thus she may do either by giving up a part or the whole of the dower given to her by the husband or by offering an arranged sum of money to her husband in return for his consent to release her from the marriage bond. Thus both men and women are required to undergo monetary sacrifice for securing their separation. This is likely to act as a deterrent in both cases. Should the husband refuse to part with his wife on any of these terms, it is open to the latter to the protection of law by filing a suit against him and obtaining a legal decree of separation.
Actual legal decisions by the Prophet of Islam show the spirit and principles which the law courts should apply to cases brought by women against their husband.

The most famous among the cases is that of Thabit b. Qais whose two wives sought divorce from him. One of them Jamila bint Abi Salul, disliked his features. She came to the Prophet of God and complained against him, saying: 'O Prophet, nothing can bring him together with me. I lifted my face covering to see him coming along with a few other men and I noticed that he is the blackest, the most short-statures and the ugliest of them.' Another report says: 'she said, by God, I do not dislike his morals or behaviour, but I cannot stand his ugliness. According to Ibn Majah, she is reported to have said, ‘By God, if fear of God did not stand in my way, I would have spit him on his face’. According to the author of Fath-al-Bari, Jamila said 'You see, O Prophet, how beautiful I am, but Thabit is an ugly person'. Bukhari reports that she said to the Prophet: 'I do not blame him for his morals or religion, but I am afraid Islam will lose its hold upon me if I am compelled to live with him'. After hearing her complaint, the Prophet said to her, 'Will you give him back the orchard he gave you?' She replied, 'yes and also more, if he wants'. The Prophet asked her not to give more and ordered Thabit to accept the orchard and divorce her.

It will, thus, appear that distaste for the husband's appearance was considered a sufficient ground by the Prophet for the dissolution of marriage. It is significant that the Prophet did not endeavour to expound to Jamila the Philosophy about facial appearance agreeable or otherwise. What is important to note is that once the Prophet was satisfied that there existed a deep-seated distaste in the heart of the
wife for her husband, the marriage was ordered by him to be dissolved. The Prophet had, presumably, so ordered in view of the moral consequence. The repercussions thereof could have been harmful for character, religion and morality. These considerations must out-weigh the harmful ramifications of dissolution of marriage.\textsuperscript{38}

Another wife of Thabit b Qais, Habibah bint Sahil, according to a report from Imam Malik and Abu Dawud, came to the Prophet early one morning. When the Prophet came out, he saw her standing before the door. On the Prophet's enquiry how she happened to be there, she replied: 'I and Thabit cannot pull together.' When Thabit came, the Prophet said to him: 'This is what your wife says about you, so leave her'. According to Ibn Majah, Habibah complained to the Prophet that Thabit had beaten her so badly as to break her bone. In any case, the Prophet, on hearing both sides of the matter, ordered dissolution of the marriage.

During the time of 'Umar, the second Caliph, a suit of divorce was brought to him. He advised the wife not to leave her husband and try to pull on with him. The woman refused to do so 'Umar put her in a dirty room for three days. On the fourth day he asked her how she had fared. She said that she had real peace of mind only for those three days, whereupon 'Umar ordered dissolution of her marriage'.

These three cases show that the mere fact of a woman having disgusted with her husband is sufficient ground for legal separation between them. In the case of Thabit b. Qais, the Prophet showed by his action that a woman's disapproval of her husband on physical grounds

\textsuperscript{38} SAM Khurso, 'A Muslim Wife's right to divorce: A note on the proper perspective', II No. 41 Is. & CLQ 2 December, 1982, p. 299.
is a legitimate ground for a decree of separation in her favour. It is
enough for the court to satisfy itself that one of the partners had
developed sufficient antipathy against the other to make reconciliation
impossible. The court need not inquire into the detailed reasons of this
antipathy, because a woman may dislike her husband on many
grounds, some of which she may not like to state openly There may
also be reasons for disgust which may not seem valid to the court or
any other arbiter, but which may be sufficient to spoil the marital
relations of husband and wife The court has no right to give its verdict
on the point whether the reasons for dissatisfaction as expressed by the
wife are valid. All it can do is to satisfy itself on the point whether the
dissatisfaction is genuine or feigned, whether it arises from causes
which are temporary and may disappear or it is so deep-rooted as to
preclude the possibility of happier relations being restored.

It is inadvisable for the court to inquire whether a wife seeking divorce
is doing so because she is sexually erotic and desires a variety of
sexual pleasure or her aversion to her husband springs from genuine
causes The right of a man to divorce is not limited by conditions that
he should not use it for satisfying his anarchic sexual desire, the mere
fact being unable to obtain a divorce from a law court will not prevent
her from forming illicit unions, and in such a case the court, by
refusing a decree of separation, will be supplying an incentive to
illegitimate sexual activity which is morally and socially more
reprehensible than frequency of divorces. The effect of a court decree
in favour of separation is the same as that of the final divorce
pronounced by the husband, which dissolves the marriage finally and
irrevocably. The couple cannot be remarried unless the woman marries-
another husband and gets a divorce.

As regards monetary sacrifices involved when a woman seeks divorce from her husband, it has already been stated that the husband cannot claim more than what he has already given to his wife as dower. If the separation comes as a result of mutual agreement without the intervention of the court, the amount has to be settled between the two partners. But if the dispute is brought to the court the latter can decide what portion of the dower should be returned by the wife, whether the full amount or half of it or one-fourth etc. Many jurists agree that if separation takes place as a result of the ill-treatment of the husband or his excesses, and such charges are proved during the process of legal inquiry, the court can totally exempt the wife from repayment of the dower, or it can decide in favour of an amount less than that of the dower, according to the circumstances involved. Some jurists are also of the opinion that if the court is satisfied that the wife has no legitimate grounds for seeking separation and is merely the victim of anarchic sexual impulses, it can order her to pay more than her dower.

Thus, it is established that under classical matrimonial laws, wife's right to divorce has been admitted. In India, the Dissolution of Muslim Marriages Act, 1939 was enacted in the light of the sanction delineated above.

(c) Indian scenario

(i) Divorce on wife's own initiative

Divorce on wife's own initiative as already stated assumes the form of a *talaq-i-tafwid* or a *Khula*. A Muslim wife can at the time of marriage
reserve in the *kabinnama* (marriage-deed) a right for herself to
dissolve the marriage under certain specified conditions. This is styled
as *tafvid-e-talaq* (delegation of divorce). A stipulation that, under
certain specified conditions, the wife can pronounce divorce upon
herself has been held to be valid, provided first, that the option is not
absolute and unconditional secondly, that the conditions are reasonable
and not opposed to public policy.\(^{39}\) Stipulations such as wife's power to
exercise divorce on the failure of payment of maintenance, contracting
second marriage by husband, shifting of matrimonial home, interference with wife's movement consequent upon economic and
social needs, wife's insistence not to live with her in-laws have been
adjudged as valid and not in variance with the spirit of Islamic law.
The wife exercising her powers under the agreement must establish
that the conditions entitling her to exercise the power have been
fulfilled.\(^{40}\) It has been observed that *talaq-i-tafvid* is perhaps the most
potent weapon in the hands of a Muslim wife to obtain her freedom
without the intervention of any court and has become rife in India
since thirties.\(^{41}\)

Regardless of incorporation of such a clause in the *Kabinnama* as in
the process of delegated divorce every Muslim wife is facilitated by
the right to *Khula*. 'Wife’s right to *Khula* is parallel to the men’s right
of *talaq* like the latter the former, too is unconditional".\(^{42}\) 'In the matter
of *Khula* if it is taken to the court, it is not for the court to enquire if
she wants dissolution on a genuine ground or just for the sake of

\(^{40}\) Mirjan Ali v. (Mst.) Matmuna Bibi AIR (1950) Cal. 304
\(^{41}\) Asaf A.A. FYZE, 'The Muslim Wife’s Right of Dissolving her Marriage’ (1936) 38 Bom. Law
marrying another man'. If a wife thinks that it is no more possible for her to live with her husband, she would simply tell him that she needs a divorce. Where the husband is reluctant, the wife may straightaway proceed to the court for a decree of Khula. Here the husband may demand of the wife to relinquish her claim to dower.

Khula is extremely liberal and pro-woman law. It is extremely liberal and pro-woman law. Although the institution of Khula has been grossly misunderstood by the Indian courts since the Privy Council's pronouncement in the Moonshee Buzloor Raheem, its true spirit has been duly recognized by the courts of Pakistan and now of Bangladesh following the celebrated judgment by Pakistan Supreme Court in Khurshid Bibi v. Mohammad Amin. It would be therefore, in the fitness of things that the court in India pass decrees of Khula under the residuary clause of section 2(ix) of the Dissolution of Muslim Marriages Act, 1939 enabling a Muslim wife to dissolve a marriage on "any other ground which is recognized as valid for the dissolution of marriages in Muslim law".

Table-i-tawwid and khula apart, accessible to a Muslim wife is the judicial divorce, styled as fask In India it may be granted on any of the grounds specified under the Dissolution of Muslim Marriages Act, 1939 Section 2 of the Act lays down that even a single ground incorporated therein is enough for a Muslim wife to secure a dissolution of her marriage. Among these grounds are missing of a husband, failure on the part of a husband to maintain his wife, imprisonment of husband, failure to perform marital obligations, impotency, insanity, leprosy, venereal disease option of puberty and

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44 (1861) 8 MIA 379.
45 PLD 1967 SC 97
cruelty. Unfortunately, however, the courts in India are reluctant to grant a divorce to a wife on the grounds in the Act. In *K.C. Moyin v. Nafeesa*,

Justice Khalid observed that under lib circumstances can a Muslim marriage be repudiated by the wife and he further said (hat a unilateral repudiation of marriage by way of *fask* by wife has no legal sanction.

(ii) **Divorce by mutual agreement**

In Islamic law dissolution of marriage by mutual consent is known as *mubara'at*. It is a process in which a couple can jointly dissolve their marriage extra-judicially on the terms that may be mutually agreed upon. The word *mubara'at* denotes the act of freeing one another mutually. In case of *Khula* literally meaning 'to take off clothes', the wife to be released and the husband agrees for a certain consideration, which usually form a apart of the whole of the *mah*, while in *mubara* at apparently both are happy and may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution- any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman:

"or has been guilty of incestuous adultery,

or of bigamy with adultery,

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or of marriage with another woman with adultery,
or of rape, sodomy or bestiality,
or of adultery coupled with such cruelty as without adultery
would have entitled her to a divorce à mensa et toro,
or of adultery coupled with desertion without
reasonable excuse for two years or upwards".

While commenting on the Jordan case Lucy Carroll observed:

"Talk of family law reform or a uniform civil code
frequently focuses on the major minority community, the
Muslims. This is unfortunate because reform is needed
elsewhere as urgently. Jordan Diengdeh v. S. S.
Chopra\(^{47}\) highlights the archaic divorce law that
continues to govern Christians in India. Based on
English matrimonial law of the mid-nineteenth century,
the Divorce Act of 1869 has remained unchanged for
nearly a century and quarter while the parent statute in
England has undergone revolutionary change.
Ironically, the Dissolution of Muslim Marriages Act
1939 would offer greater succor to the unhappy wife in
the present case than the laws of her own community
afford".\(^{48}\)

Earlier as back as 1960 Law Commission took up the matter for
consideration However, the reform could not be carried out because of
a section of the Christian community. In Law Commission's own
words

"Coming next to divorce, the Roman Catholics have
strongly pressed on us that divorce should not be
recognized, as it is opposed to their faith, or, in the
alternative, that they should be exempted from the
provisions of this Act in so far as they relate to divorce.
They say, basing themselves on the passage in the Bible,
"What therefore God has joined together let not man
put asunder", that, it is a fundamental article of the

\(^{48}\) Lucy Carroll, “Family Law Reform and the Christian Community, A Comment on the Jordan

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Christian faith that marriage is indissoluble; that the canonical law therefore does not recognize divorce; that the grant of divorce would be repugnant to it; and that therefore the provisions relating to divorce should not apply to them."

Regarding grounds of divorce under section 10 of Indian Divorce Act, 1869, the Commission appreciated the well-founded criticism that it makes a distinction between the husband and the wife in the matter of grounds on which they could obtain divorce and that there is no justification for maintaining this distinction between them. It also entertained the view that this law has now become very much out of date, and that it is necessary to allow divorce on several other grounds, 'as has been done in all modern legislation'.

Part of observation made by the Law Commission of India, however, evoked severe criticism from the National Specialized Agencies and Women's Equality which records its findings in the following terms:

"Regarding the grounds for divorce the Commission departs from its usual practice of clearly enunciating a proposal or turning down one by giving detailed reasoning. The provision in the Divorce Act provides for only one ground viz., adultery and even in this clearly differentiates between a husband and a wife. Adultery simpliciter is sufficient for a husband to proceed for divorce In the case of the wife, adultery is not sufficient, she has to prove aggravated adultery like incestuous adultery or adultery with cruelty. The Commission recommends mildly a change by opining that there is criticism against this distinction and 'we agree with it' Headed by a retired Supreme Court Judge, there is no mention of the fact in 1960, many years after our constitution, this is violative of the fundamental rights prohibiting discrimination on the ground of sex. This point was forcibly argued when the Commission took up the case of the Christian

50 Ibid.
matrimonial law for the third time in 1973 and the Commission headed by an eminent retired Chief Justice warned the Government that if they did not remove this provision, the courts would do so and that would result in a lacuna in the law, till the legislature moved and remedied the situation.\textsuperscript{51}

The Commission recommended sweeping change of the much criticized section 10 of the Act containing grounds of Christian divorce. Appreciating the drive, the Agency noted that "while suggesting additional grounds for divorce 'as has been done in all modern legislation', the Report is clear and forthright".\textsuperscript{52}

These all despite, the law on divorce was left stranded. No reform could be introduced till date. Again the problem of the Indian Divorce Act, 1869 was highlighted in one of the cases reported as recently as 1995. \textit{Mary Sonia Zachariah v. Union of India}\textsuperscript{53} is a case in point. In this case the grounds for dissolution of marriage by the Christian wife under section 10 of the Indian Divorce Act, 1869 was challenged as violative of Fundamental Rights guaranteed under Articles 14,15,19 and 21 of the Constitution. Indian women of all religions other than Christianity are entitled to get divorce\textsuperscript{011} ground of cruelty and / or desertion without reasonable excuse for two years or more \textsuperscript{^dependent} grounds are available under the respective enactments. For Christians governed by Indian Divorce Act, besides cruelty and desertion, adultery should also be proved while seeking divorce. Direct proof of adultery by wife is well-nigh impossible. Provision for divorce is infructuous inasmuch as while husband is entitled to get divorce on the

\textsuperscript{51} National Specialized Agencies and Women's Equality, Law Commission of India, prepared by Latika Sarkar, Centre for Women’s Development Studies, New Delhi, pp. 88-89.

\textsuperscript{52} Ibid.

proof of adultery simplicitor, wife is obliged to prove either cruelty or
desertion along with incestuous adultery. It is a sex-based
discrimination and so this provision is constitutionally bad.... The
antiquated and anomalous nature of the Act was noted by the Supreme
Court and the other courts ....

The court found that the life of the Christian wife who is compelled to
live against her will as wife of a man who hates her, treats her with
cruelty, deserts her, will be a inhuman life imposed by tyrannical
law— violative of Article 21. If such relationship is not allowed to put
an end, it will lead to continued bickering, quarrels and litigation.

It was also observed by the court that there is a "real need of
comprehensive reform" and "this judgment will have a compelling
effect on the Central Government in finalizing its proposal for
introducing comprehensive reform in the law governing marriages and
divorce among Christians in India." 54

It may be submitted that the inadequacy of the provision of the Indian
Divorce Act B conspicuous. It has severely marred the interest of the
parties, particularly, the wives. In D'Souza's case a Full Bench of the
court had stated:

"The inadequacy of the provisions of (the Indian
Divorce) Act is patent. Perhaps when this Act was
passed by the Legislature in 1869 it was a progressive
law. To-day one can almost say that it is an archaic law
requiring serious reconsideration by Parliament to
bring it in line with other laws governing marriage". 55

32:1.
54 Id. p. 58.
55 AIR 1980 Del. 275.
The reform was demanded from all sections of the intelligentsia. Kusum, while surveying the family laws observed that 'the need for reform in the Act is overdue.\textsuperscript{56} Over the past few years there have been many cases which show that the Act is too harsh on the parties and hence needs to be amended and brought at par with other divorce laws in the country. A case decided by the Andhra Pradesh High Court reinforces this fact.\textsuperscript{57}

(d) Delegated Divorce

A Muslim husband has unrestricted right to divorce his wife whenever he likes. This right is so absolute that he may exercise it either himself or may delegate his right to another person. In other words, instead of pronouncing the \textit{Talaq} himself he may give his right of divorce to any one else, including his own wife. Even the presence of wife at the time of pronouncement of \textit{Talaq} is not necessary. A \textit{Talaq} pronounced in the absence of wife is lawful and effective. Divorce by such other person, who acts as agent of the husband under his authority, is called \textit{Talaq-e-Tafweez} or delegated divorce. In the delegated divorce the \textit{Talaq} pronounced by that other person is as effective as if it was made by the husband himself.

The husband may delegate his right of divorce to his own wife and authorize her to pronounce \textit{Talaq}. According to \textit{Fyzee},\textsuperscript{58} this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India. The authority

\textsuperscript{56} Kusum, \textit{Annual Survey of Indian Law} (1990)
\textsuperscript{57} Amarataha Hemalatha v. Desari Bahu Rajendra Varprasad, AIR, 1990 AP 220.
\textsuperscript{58} Outlines of Mohammedan Law, Fourth Edn.p. 159
it’s given to the wife under an agreement at the time of the marriage or any time after it. The delegation of the power of divorce to the wife may either by permanent or temporary i.e. only for a specified duration. A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband.\footnote{D.F. Mulla; Principles of Mohammedan Law; 18th Edn. p. 332}

The delegation may be unconditional or subject to certain condition or contingency. Where the delegation is conditional, the authority of giving *Talaq* cannot be exercised until that condition is fulfilled. The general practice is to delegate the power of divorce to the wife upon the husband’s failure to fulfill certain conditions or upon the happening of an event. But the conditions must be of reasonable nature and must not be against the principles of Islam.

(e) **Judicial Divorce**

Judicial divorce means a divorce by the order of a court of law, granted on a number of grounds.

Before 1939, a Muslim wife could seek her divorce by a judicial decree only on the ground of (1) false charge of adultery by the husband against her (Lian), or (2) impotency of the husband, and on no other grounds. There were conflicting provisions in the various schools of Muslim law in respect of divorce by a wife through judicial intervention. It was felt by the right thinking persons of the Muslim society and also by the Government, that great injustice was being done to a Muslim society and also by the Government, -at injustice was being done to a Muslim wife in the matter of matrimonial relief. Accordingly, the Dissolution of Muslim Marriages Act, 1939 was
enacted by the Central Legislature. Under this Act, a wife married under Muslim law, may seek divorce by a judicial decree on any of the grounds enumerated therein. The Act is applicable to all the wives married under Muslim law irrespective of their schools or sub-schools.

The Dissolution of Muslim Marriages Act, 1939 may be considered as a landmark in respect of matrimonial relief to a Muslim wife. The wife's right of divorce, which was denied to her, was restored to her under the Act. Salient features of the Dissolution of Muslim Marriages Act, 1939, may be summarized as under:

(a) Section 2 of the Act contains certain grounds on the basis of any one of which a wife married under Muslim law, may file a petition for divorce. There are nine grounds in Section 2 out of which seven grounds are matrimonial guilt’s (or faults) of the husband which entitle a wife to get her marriage dissolved by a court of law. Clause (vii) entitles the wife to exercise the right of option of puberty through a judicial decree. The ninth ground in Section 2 Clause (ix) is a residuary clause. Under this clause a wife may seek divorce on any other ground recognized under Muslim law which could not be included in the first eight grounds. For example, under this clause, a wife may seek her divorce by judicial decree on the ground of false charge of adultery against her (Lian). Thus, while giving some additional grounds of divorce to a Muslim wife, the Act has not affected her right of divorce on the ground already available under pure Muslim law.

(b) The grounds for matrimonial relief in Section 2 of the Act are
available exclusively to the wife. It is because Muslim law has already given an absolute right to the husband to divorce his wife without judicial intervention and without any reason.

Section 2 of the Dissolution of Muslim Marriage Act, 1939, provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds enumerated therein. The benefits of this Section may be availed by a wife whether her marriage was solemnized before or after the commencement of the Act. The provisions of Section 2 may be given retrospective effect. The specified grounds are as under:

(i)  The Husband is missing for Four Years
(ii) Husband's failure to maintain the wife for Two Years
(iii) Imprisonment of the husband for Seven Years:
(iv) Husband's failure to perform marital obligations for Three Years
(v)  Husband's Impotency
(vi) Husband's insanity, leprosy or venereal disease
(vii) Option of Puberty by wife.
(viii) Cruelty by the husband.

2.3 CHRISTIAN WOMEN AND DIVORCE

Section 10 of the Indian Divorce Act, 1869 sets forth the grounds on which a Christian marriage may be dissolved. A wife may present a petition for dissolution of the marriage to the District Court or to the High Court on any one of the following grounds:

(i)  If the husband has exchanged his profession of Christianity for some other religion, after the solemnization of marriage and he
has gone through a form of marriage with another women the wife is entitled to get her marriage dissolved.

(ii) It means adultery committed by a man with a woman who he could not lawfully marry by reason of her being within the prohibited degrees of relationship even if his wife were dead. If a husband is guilty of such incestuous adultery, the wife can claim divorce on that ground.

(iii) If the offences of bigamy and adultery are committed by the husband during the subsistence of first marriage the wife can claim divorce if they are proved separately.

(iv) Wife is entitled to divorce on this ground after his marriage if he left his wife and subsequently married another woman.

(v) If the husband is found guilty of rape, sodomy or bestiality the wife may claim divorce on that ground. These offences are define a under Sections 375 and 377 of the Indian Penal Code.

(vi) Adultery with cruelty has not defined in the Act. It is "generally described as conduct of such a character as to have caused danger to limb or health (bodily or mental) or as to give rise to reasonable apprehension of such danger".

(vii) Desertion alone is not a ground for dissolution of marriage. It can be invoked as a ground only when the adultery is coupled with desertion without reasonable excuse for two years or upwards. The desertion can be actual or constructive.

A man and woman married under the Christian Marriage Act are not entitled to a degree of divorce by mutual consented. The grounds set
forth in Section 10 of the act are only grounds on which a Christian marriage can be dissolved. Therefore additional grounds can not be included by the judicial construction of some other Section unless that Section plainly intends so.

Thus it could be seen that a Christian wife can invoke seven grounds for dissolving the marriage. However the existing law appears to be deficient as it is very narrow in substance and application. It is suggested that the Act may be amended to make the law broader in sweep and effective in application.

Apart from the divorce, Christian women can seek judicial separation on the ground of adultery, cruelty and desertion without reasonable excuse for two years or upwards (Section 22). Similarly she can also claim restitution of conjugal rights under Section 32. She is also entitled to alimony *pendente lite* from the husband and also to permanent alimony (Section 36 & 37).

The Indian Divorce Act, 1969, requires a Christian Husband only to prove adultery simpliciter whereas requiring the Christian wife to prove adultery with one or other aggravating circumstances like desertion and cruelty. This discrimination has been taken note of by a few High courts in India. In *Pragati Varghese v. Syryl George Varghese*, a full Bench of the Bombay High Court held that the different treatment which is accorded to Christian women under Section 10 is based nearly on the grounds of sex. Similarly if one compares the provision of the other enactments on the subject of Divorce, it would be clear that the Christian wives are discriminated and have been treated differently as compared to wives who are

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60 AIR 1997 Bom. 349.
governed by other enactments. The discrimination therefore is based on the ground of religion also. This discrimination is violative of Article 14 and 15 of the Constitution of India. Similarly if one has regard to the dealings with protection of life and personal liberty it would be clear that the position of Christian women has been rendered most demeaning as compared to Christian husbands as also wives governed by other enactments. In the light of this discrimination, the Bombay High Court held that the discrimination part of Section 10 of Indian Divorce Act, 1869 is violative of Article 21 of Constitution of India also.\(^{61}\)

In *Jorden Deigndeh v. Chopra*,\(^{62}\) suggested complete reform of law of marriage and introduction of mutual consent and irretrievable breakdown of marriage as grounds for divorce. The court berated for not introducing the changes into the Indian Divorce Act to bring it in tune with modern conditions.

In view of the clear discrimination against the Christian wives on the ground of religion and sex and also in view of the fact that the High Courts of A. P. Bombay and Kerala have already struck down the discriminatory provision it is suggested that the Indian Divorce Act must be amended without delay and to remove the bias and also to render gender justice.


\(^{62}\) *AIR* 1985 SC 935
Chapter-3:
Succession
Chapter-3
SUCCESSION

3.1 INTRODUCTORY REMARKS

The rights of women to succeed to any property vary from one religion to other depending on the personal laws followed by them. The religion played a very important role in the devolution of property on the woman in the earlier days. Initially the entire law of succession was uncodified but with the advent of modern governments and legislatures, most of the succession laws have been codified and consolidated. However there is no uniformity in the succession law relating to women following different religions. Even in England, the English women did not enjoy equal rights in the property and succession until the Equity courts started applying the principles of equity.

In India, the women enjoyed a secondary status with regard to the succession. This unequal status was sought to be removed by certain legislations governing different religions like The Hindu Women's Rights to Property Act, 1937, The Hindu Disposition of Property Act, 1916, The Hindu Inheritance (Removal of Disabilities) Act, 1928, The Indian Succession Act, 1925, and The Cochin Christian Succession Act, 1902.

The law relating to testamentary succession among Hindus, Christians and parsis etc., is contained in the Indian Succession Act, 1925. It does not make any distinction between the rights of women and men under a will.
3.2 HINDU WOMEN AND SUCCESSION

The Hindu law of intestate Succession has been codified in the form of The Hindu Succession Act, 1956, which bases its rule of succession on the basic mitakshara principle of propinquity, i.e., preference of heirs on the basis of proximity of relationship. Prior to 1956, there used to be two major schools of Hindu law viz. mitakshara and Dayabhaga which laid down different principles of succession. There was no uniformity in the rights of the Hindus following different schools to succeed to the property of a Hindu who died intestate i.e., without leaving a will behind him.

Before 1956, the property of a Hindu woman was divided into two heads viz. (a) Stridhan (b) Woman's Estate. Stridhan literally means woman's property. The Hindu law interpreted Stridhan as the properties received by a woman by way of gift from relations. It included movable as well as immovable properties. The texts relating to Stridhana except in the matter of succession are fairly adequate and clear. Manu defined Stridhana as that what was given before the nuptial fire, what was given at the bridal procession, what was given in token of love and what was received from a brother, a mother, or a father. The property inherited by a woman from a male or female was not considered as Stridhana and it was not her absolute property for the purpose of inheritance. However Bombay school considered the property inherited by a woman from a male other than a widow, and mother etc. as Stridhana. Under all schools of Hindu law, the property obtained by a woman in lien of maintenance by adverse

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1 See Mayne's Hindu Law and Usage, 13th Ed. 1995 at p. 875.
possession and property purchased with Stridhan was considered as Stridhan.

- The Hindu woman had full rights of alienating the "stridhan", being its absolute owner. She could sell, gift, mortgage, lease or exchange the same in any manner she liked.

- On her death, all types of Stridhan passed to her own heirs and not to the heirs of her husband. Thus a Hindu woman had unlimited rights of enjoyment, alienation and possession in respect of "stridhan" as its absolute owner.

The Supreme Court has explained the meaning and nature of "Stridhana" in a recent judgment. The properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof.

The other type of property that could be devolved upon the Hindu woman was called 'woman's Estate'. It was also called widow's estate. A Hindu woman could be the owner of woman's Estate in the same way as any individual subject to two basic limitations.

(a) She could not alienate the property (Corpus) and

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3 Rashmi Kumar v. Mahesh Kumar Bhada (1997) 2 SCC 397
(b) on her death, it devolved upon the next heir of the last full owner.

In other words, she had only 'limited estate' in respect of this kind of property. She had full powers of possession, management and enjoyment of such property but she had virtually no power of alienation or transfer. However she could alienate the property in certain exceptional cases like (a) legal necessity i.e. for her own needs and for the need of the dependants of the last full owner, (b) for the benefit of estate and (c) for the discharge of indispensable religious duties such as marriage of daughters, funeral rites of husband, his 'Shraddha' and alms to poor for the salvation of his soul. In other words she could alienate the property for the spiritual benefit of the last full owner but not for her own spiritual benefit. So the rule in Hanooman Prasad v. Babooee Mumraj\(^4\) applied to alienation of woman's estate also. The women's estate was normally taken by the woman either by way of property obtained by inheritance or as share obtained on partition.

The foregoing brief discussion makes it amply clear that the position of Hindu woman in relation to property and succession was not satisfactory and uniform. The rights varied depending on the school to which she belonged and the nature of property that devolved upon her. The Hindu Women's Right to Property Act, 1937 made some changes in succession in respect of separate property of a mitakshara Hindu and in respect of all properties of a Dayabhaga Hindu. It provided for right of survivorship and right of partition to a Hindu widow of mitakshara school in coparcenary property. However she was not accorded the

\(^4\) (1856) 6 MIA, 393. Also see Harisatya v. Mahadev, AIR 1983 Cal. 76.
status of a coparcener. This uncertainty was put to rest by codifying the entire Hindu law of succession in 1956.

The Parliament has enacted the Hindu Succession Act, 1956 to amend and codify the law relating to intestate succession among Hindus. This Act is applicable to all the Hindus, Buddhists, Janis and Sikhs by religion. Section 14 of the Act made radical changes in the rights of a Hindu woman to succeed to a property. "Property" in this context includes both movable and immovable property acquired by a female Hindu by inheritance or device or at a partition or in lieu of maintenance or by gift from any person, before or after her marriage.\textsuperscript{5} It is a comprehensive definition which covers all kinds of property and also covers the erstwhile women's estate.

Section 14 has been specifically made applicable to the pre-Act women's estate also and it has been given retrospective effect. Thus the rule of full ownership is applicable to all kinds of properties vested in and held by a woman when the Act came into force.

The Act abolished the limited ownership of a Hindu woman in respect of the property held by her as woman's estate, by converting it into full ownership. Limited owner commonly means a person with restricted rights as opposed to full, owner with absolute rights. In relation to property absolute, complete or full ownership comprises various constituents such as the right to possess, actual or constructive, power to enjoy i.e. determining the manner of use extending even to destroying, right to alienate, transfer or dispose off, etc. Any restriction or limitation on exercise of these rights may result in limited or

\textsuperscript{5} See Explanation to Section 14 of the Act.
qualified ownership. Now, after 1956, no distinction could be made between the stridhana and women's estate, as the erstwhile women's estate is converted into 'stridhana' by Section 14 of the Act.

Where any property is given to a female Hindu in lieu of her maintenance before the commencement of the Hindu Succession Act, such property becomes the absolute property of such female Hindu on the commencement of the Act provided the said property was possessed by her, by virtue of Section 14 (1) of the Act. This is not withstanding the limitations, or restrictions contained in the instrument, grant or award where under the property are given to her.

The Mitakshara bias of preference of males over females and of agnates over cognates has been considerably whittled down by the Act. An analysis of the various provisions of the Act makes it clear that the position of women has improved considerably, as compared to the pre-Act position in the matter of succession. In the matter of succession to the property of a Hindu male dying intestates. Section 8 lays down that it shall devolve firstly upon the heirs specified in Class-I of the Schedule to the Act, secondly, in the absence of any Class-I heirs on the Class-II heirs; Thirdly in the absence of Class I and II heirs upon the agnates of the deceased and lastly if there are no agnates, thereupon the cognates of the deceased.

It is worthwhile to note that there are as many as 8 females in Class-I heirs. They are (1) daughter (2) mother (3) widow, (4) daughter of a

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6 Kalavati Bai Sourya Bai (1991) 3 SCC 410 at 424.
8 'Agnate' is defined by Section 3(a) of the Hindu Succession Act, 1956.
9 Cognate is defined by Section 3(a) of the Hindu Succession Act, 1956.
predeceased son (5) daughter of a pre-deceased daughter, (6) widow of the pre-deceased son (7) daughter of a pre-deceased son of a pre-deceased son and (8) the widow of a pre-deceased son of a pre-deceased son. All these female Class-I heirs take their shares on par with their male counter parts as per the scheme of distribution contained in Section 10 of the Act. Similarly, there are number of females among the Class-II heirs. With regard to the remote heirs, the rule of agnatic preference over cognatic heirs reasserts itself, which is an indication that there is still some degree of discrimination against females.

The Hindu Succession Act has abolished the practice of reversion. It may be recalled that one of the characteristic features of the women's estate was that the female owner had no independent stock of descent in respect of it. On her death, the estate reverted to the heirs of the last full owner as if the latter died when the limited estate ceased. Such heirs could be male or female. They were known as reversioners who had only a speck succession during the life time of the owner of the women's estate or till termination of such estate by other means like surrender, her remarriage etc.

Even though the Act has abolished this discriminatory practice, still it makes a distinction between the various properties inherited by the female from different sources, thus the concept of reversionary inheritance still lurks in the back ground. It could be clearly seen by the impact of Section 12 which regulates the order of succession among agnates and cognates of the deceased - male dying intestate and more particularly Section 15 (2).

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10 *Moni Ram v. Kerry*, (1880) 7IA 115.
Section 15 deals with succession to a Hindu Female's property of a female Hindu. This is the first statutory provision dealing with succession to the property of female Hindu. The previous enactments like the Hindu Law of inheritance (Am) Act, 1929 and the Hindu woman's Rights to Property Act, 1937, dealt with succession to the property of a male. For the purpose of succession, a female Hindu's property is divided into three categories; (1) property inherited by a female from her father or mother; (2) property inherited from her husband or father-in-law and (3) Property which she herself required any other manner from any other source as her absolute property. The property mentioned in the first two categories devolves upon her death intestate upon the heirs of her father in the absence of any son or daughter of the deceased and upon the heirs of the husband respectively. Her absolute property mentioned in the third category above devolves upon any of the five classes of the heirs described in Section 15 (1) subject to the rules set out in Section 16: Her sons, daughters who include children of pre-deceased son or daughter and husband take precedence over the heirs of the husband.

Section 23 makes special provision respecting dwelling houses. The object of the section seems to be to prevent fragmentation or disintegration of a family dwelling house at the instance of a female heir to the prejudice of the male heirs\(^{11}\) if a female Hindu inherits a dwelling house along with male heirs she has no right to claim partition of such house until the male heirs divide their respective shares. However a female heir, not being an unmarried daughter is entitled to reside in the dwelling house. A" deserted wife or a female

separated form her husband or a widow is entitled to a right of residence in the dwelling house. A share in a dwelling house cannot be claimed by married daughters.\textsuperscript{12}

The expression 'dwelling house' though not defined by the Act, is referable to the dwelling house in which the intestate Hindu was living at the time of his/her death; he/she intended his/her children who continued to normally occupy and enjoy it. He/She regarded it as his/her permanent abode.\textsuperscript{13} Under Section 23 a female heir's to claim partition of the dwelling house of a Hindu dying intestate is to be deferred or kept in abeyance during the life time of even of a sole surviving male heir of the deceased until he chooses to separate his share or ceases to occupy it or lets it out.

Section 24 lays down a disqualification for succession against (i) the widow of a pre-deceased son (ii) the widow of a predeceased son of a pre-deceased son (iii) the widow of a brother of a Hindu intestate if such widow has remarried on the date when the succession opens. The remarriage, if takes place after the opening of the succession does not divest such females of the property.\textsuperscript{14} The disqualification is confined to only three classes of widows mentioned supra and not to the other widows. In other words, once the succession is opened, a widow can not be executed from succession even if she marries again. In Velamuri Venkata Siva Prasad v. Kothuri Venkateshwarlu,\textsuperscript{15} the Supreme Court held that Section 2 of the Hindu Widow's Remarriage Act, 1856 for cesser of widows rights in deceased husband's property, remained

\textsuperscript{12} Dharam Singh v. Aso and another, 1990 (Supp) SCC 684
\textsuperscript{13} Narsimham Murthy v. Sheetala Bai (1996) 3 SCC 644.
\textsuperscript{14} Chanda v. Khubala, AIR 1983 Pat. 33.
\textsuperscript{15} (2000) 2 SCC 139.
effective and would be applicable even in case of a void marriage. The court further held that the same remained effective even after the enactment of the Hindu Succession Act, 1956 and was repealed only by Act 24 of 1983 and not by the 1956 Act.

Coparcenary means that part of a Joint Hindu family which consists of persons who by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce its partition.\(^{16}\) A female Hindu was not considered as a coparcener.\(^ {17}\) Thus she could not enjoy the right of survivorship. She had only certain inferior rights such as that of maintenance since she was not a coparcener, she was not entitled to act as the manager or karta of a Joint Hindu Family. The Hindu women's Rights to property Act, 1937, makes a serious in road upon the rule of survivorship, by making the wives of coparceners entitled to the interests of male coparceners in a Mitakshara family on their death. However under the provisions of this Act, the male issue of the deceased coparcener remained coparceners along with the other surviving coparceners. The Hindu Succession Act, 1956 did not disturb this principle and still retained the same concept of Mitakshara coparcenary.

Certain States in India like Andhra Pradesh, Tamil Nadu and Maharashtra have realized the difficulty that arises by excluding the daughter's right to claim partition in coparcenary property. In order to confer equal rights on Hindu women along with the male members in the coparcenary under the Hindu mitakshara law, these State

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\(^{17}\) *CED v. Harish Chandra*, (1987) 167 ITR 230 (All.)

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legislatures have amended the Hindu Succession Act, 1956 to achieve the Constitutional mandate of equality.

- A clear perusal of the Andhra Pradesh Amendment inserted by Andhra Pradesh Amendment Act 13 of 1986 shows that, in the State of Andhra Pradesh.

- The daughter of a coparcener shall become a coparcener by birth in her own right and her status is equal to that of a son. She enjoys the same rights in the coparcenary property as a son. She is entitled to all the rights of coparceners including the right of survivorship. She will be subject to the same habitats and disabilities in respect of coparcenary property as the son (S. 29-A).

- She becomes the absolute owner of the property inherited by her as a coparcener (S. 29-A).

- When a female Hindu dies after coming into force of this amendment (i.e. after 5-9-1985), having at that time interest in Mitakshara coparcency, her interest will be devolved by survivorship upon the other coparceners. But if the deceased dies leaving behind any children or children of pre-deceased child at the time of death, the devolution will be in accordance with the provisions of the Hindu Succession Act and not by survivorship. (S. 29-B)

Similar amendments are made in Tamil Nadu by the Hindu Succession (Tamil Nadu Amendment) Act, 1990 (1 of 1990) w.e.f. 25-3-1989, and in Maharashtra by the Hindu Succession (Maharashtra Amendment)
Act, 1994 (46 of 1994 w.e.f. 22-6-1994). These legislations are beneficial to the women who form part of vulnerable sections of the society and it is necessary to give a liberal effect to them.\textsuperscript{18}

3.3 MUSLIM WOMAN AND SUCCESSION

The Muslim Law of Succession is basically different from the other indigenous systems of India. The distinction between the self acquired and ancestral properties, concepts of right by birth coparcenary property, survivorship and partition etc. are not known to Islamic law of succession which is based on the tenets of the holy Qur’an. No woman is excluded from inheritance only on the basis of sex. Women have, like men, right to inherit property independently, not merely to receive maintenance or hold property in lieu of maintenance.\textsuperscript{19} Every woman who inherits some property is its absolute owner like a man. There is no concept of either stridhan or women’s limited estate. Consequently there is no scope of any reversion upon the death of a Muslim woman because it devolves upon her own shares and not on those of her husband.

The Muslim law of succession which is uncodified, makes no distinction between a property of deceased male or female. Some authors on Muslim law feel that the Muslim law of property and succession in India has been considerably influenced by the local concepts and institutions.\textsuperscript{20} Inheritance at Muslim law— position of woman:

Position of women in Pre-Islamic Law: the principles of the Pre-

\textsuperscript{19} Dr. Tahir Mahmood: The Muslim Law in India, (1980) at p. 243
\textsuperscript{20} Ibid.
Islamic customary law may be summarized as under:

- The nearest male agnate(s) succeeded
- Females and cognates were excluded,
- Descendants were preferred to ascendants and ascendants to collaterals
- Where the agnates were equally distant, the estate was per capita.

It is clear that the females were discriminated against, as they were virtually excluded from the inheritance.

Position of women in Islamic Law: The main reforms by Islam may be stated briefly as under.\(^2\)

- The husband/wife were made an heir
- Females and cognates were made competent to inherit
- Parents and ascendants were given the right to inherit even when there were male descendants
- As a general rule, a female was given one half the share male.

The newly created heirs were mostly females, but where a female was equal to the customary heir in proximity to the deceased, the Islamic law gave her half the share of the male. For example, if a daughter co-existed with the son, or a sister with a brother, the female obtained one share and the male two shares.

At present, males and females have no equal rights over property. This is manifest when there are two heirs of opposite sex in the same
degree. Then the male heir takes two shares and the female heir takes only one share. Thus, a daughter does not, however, by reason of her sex, suffer from any disability to deal with her share of the property. She is the absolute owner/master of her inheritance. The same rule applies to a widow or a mother. There is no such thing as a widow's estate, as in Hindu law, or the disabilities of a wife, as under the older English common law.

Hanafi Law of Inheritance: Under the Hanafi law, the heirs of a deceased, male or female, fall under the following classes:

I  The sharers,
II  The Residuaries,
III  The Distant Kindred and
IV  The State by escheat

There are twelve sharers in number who are given specific shares. However their shares are not permanently fixed as each heir may be affected by the presence of other sharers. Sometimes, a sharer may be totally excluded from inheritance. The sharers include Father, True Grandfather, Husband, wife, mother, True Grandmother, Daughter, Son's Daughter how so ever, uterine Brother, Uterine Sister, Full Sister, Consanguine-Sister. There are as many as 8 female sharers who could inherit the property of a deceased Muslim.

They are certain shares who are excluded from taking their specified sharer, if a residuary of equal rank co-exists. In such a case they become residuaries. They are also called chronic residuaries. They are entitled to inherit, if there are no sharers, if there are sharers, but there

is a residue left after satisfying their claims. In the presence of such circumstances either the whole inheritance or the residue as the case may be devolves upon residuaries in the order prescribed by the Koranic Text.\textsuperscript{22} These residuaries include:

I. Descendants viz (1) Son (2) Son's Son how so ever

II. Ascenda viz (3) Father (4) True Grandfather how high so ever


In all, only four females are included among the residuaries in the form of Full sister, consanguine sister, the daughter and the son's daughter how low so ever: No other female can inherit as a residuary. All the four females inherit as residuaries with corresponding males of a parallel grade. Of the five heirs that are always entitled to some share of the inheritance and who are not liable to exclusion in any case viz (1) the child i.e., son or daughter (2) father (3) mother (4) husband (5)

\textsuperscript{22} Mulla: Principles of Mohemmedan Law Ed. by M.Hidayatullah, 19th Ed. 1990 pp. 56, 55.
wife, there could be three females in the form of mother, daughter and wife.

In the absence of sharers and residuaries, the inheritance is divided among 'distant kindred' which consists of four classes viz the Descendants of the deceased, ascendants of the deceased descendants of parents and descendants of immediate grand parents. There are number of females in all these four classes, who are remotely related to the deceased. The first of the class exclude the second and the second excludes the third, so on.

The Shias divide heirs into two groups, (i) heirs by consanguinity i.e. blood relations and (ii) heirs by marriage i.e. husband and wife. Among the blood relations mother, daughter, sister, grandmother, maternal aunt, and maternal aunt are the females who are entitled to inherit the property of the deceased. They are called sharers. They take different shares depending on certain conditions like existence of other sharers and relatives. However it may be noted that wife takes normally $\frac{1}{8}$ share in the property of the husband but the husband takes $\frac{1}{4}$ share in the property of the wife i.e. double the share of the wife in similar circumstances. Among the Shias, there is no separate class of heirs corresponding to the distant kindred of Sunni law.

Even though the protagonists of the Muslim law claim that there is absolute equality among the women and men in the matter of succession, there are certain provisions which are loaded in favour of the male inheritors as they take more shares, compared to their female counter parts. For example, among the Shias, a childless widow takes no share in her husband's land but she is entitled to her one-fourth
share in the value of trees and buildings standing thereon, as well as in his movable property.\textsuperscript{23}

3.4 **CHRISTIAN WOMEN AND SUCCESSION**

The entire Christian law of succession is codified and governed by the Indian Succession Act 1925. The Act regulates the intestate as well as testamentary succession among the Christians and also others.

Part V of the Act, and Sections 29-56 deal with the intestate succession. This part is not applicable to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina. In other words this part is applicable to the property of the Christians and Parsis only. Chapter-II of Part V of the Act deals with the Rules in cases of Intestate other than parsis. According to Section 32, the property of an intestate devolves upon the wife or husband on upon those who are the kindred of the deceased.

According to Section 33, where the intestate has left a widow and also any lineal descendants, one third of his property shall belong to his widow and the remaining two thirds shall go to his lineal descendants. But if there are only distant kindred left along with the widow but no lineal descendants, one half of his property shall belong to his widow. If he has not left behind any lineal descendants or distant kindred but only the widow, she takes the entire property. Therefore the share of the wife is not fixed and is variable depending on certain circumstances.

Thus the widow is made to share the property along with the other

\textsuperscript{23} Mulla: Principles of Mohammedan Law, 1990 at para 113, p. 98
relatives of the husband in certain cases. On the whole the position of
the Christian women is unhappy as was the case of the Hindu women
prior to the Act of 1956. The lineal descendants and the kindred also
consist of many female heirs who take their shares in the property of
the intestate as per the Rules of distribution contained Sections 36 to
49 of the Indian Succession Act, 1925.
Chapter-4:
Maintenance
4.1 INTRODUCTORY REMARKS

The chapter of maintenance has been discussed under the following headings and sub-headings: Maintenance of Wife under Hindu, Muslims, Christian and Parsi Laws- (a) Analysis of the legislative provisions (b) Evaluation of the judicial pronouncements (c) Identification of pitfalls (d) Advocacy of reforms and improvements.

*Maintenance of wife under Hindu Law* deals with the relevant provisions of Modern Hindu Law regarding the Maintenance of wife. It is a noteworthy fact that the maintenance of wife under the Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956. The 'evaluation of the judicial pronouncements' in which the judicial pronouncements of the various High Courts and Hon'ble Supreme Court regarding the maintenance of wife under the Hindu Laws have been evaluated. In the process of the evaluation of the judicial pronouncements the issue involved in the case, the contention of the petitioner and the respondent, the order or the judgments of the respective High Courts or the Hon'ble Supreme Court and the merits or the demerits of the judgments has been humbly tried to put forth. Further, 'the identification of pitfalls' deals with the areas which has been in the serious requirement to be noticed and calls for some responsible steps for the reformation by the appropriate authority. The area of the pitfalls has been found during the process of the analysis of the legislative provisions and the evaluation of the judicial
pronouncements. Lastly, the advocacy for reforms and improvements which deals with the suggestions and the progressive ideas for coping up with these areas of pitfalls.

*Maintenance of wife under Muslim Law* deals with the responsibility of the Muslim husband to maintain his wife in the form of *Kharch-i-pandan*. After this the controversy between the Criminal Procedure Code, 1973 and Muslim Personal Law regarding the maintenance of Muslim divorcee has been discussed. The agitation of the Muslim community due to the controversial judgment of the *Shah Bano's* case which paved the way to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has also been analyzed under this heading. The 'Evaluation of the judicial pronouncements' deals with the evaluation of the decisions of the various High Courts and Hon'ble Supreme Court regarding the maintenance of Muslim divorcee. The evaluation of the cases and judicial pronouncements describe the judicial scenario before and after the *Shah Bano's* judgment. This heading also deals with the cause of the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, and the role of judiciary towards the application of the provisions of this enactment. The reasons have also been mentioned as to why the judiciary is sometimes blamed for promoting the application of the provisions of Cr.P.C., rather the provisions of this enactment regarding the maintenance if Muslim divorcee through the sufficient case laws. Further, this part in the identification of pitfalls shows some loopholes in the hurry and rash drafting of the Muslim Women (Protection of Rights on Divorce) Act, 1986. These loopholes may be blamed to allow the judiciary to distort some intactable rules of Muslim Law.
regarding the maintenance of Muslim divorcee in the guise of the judicial activism which can't be said a proper way for the intrusion in the personal law of any community. Lastly, this part which is the 'advocacy of reforms and improvements', covers some humble suggestions regarding the reformation of some provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, as this Act has the heavy responsibility to represent manifestly the Islamic Community to the whole world.

*Maintenance of wife under Christian Law* deals with the analysis of the relevant provisions of the Indian Divorce Act, 1869, regarding the maintenance of wife under the Christian Law. Further it deals with the evaluation of the judicial pronouncements.

*Maintenance of the wife under Parsi Law* deals with the relevant provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife. After the analysis of the legislative provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife, the rest of the headings, i.e., evaluation of the judicial pronouncements, identification of pitfalls, advocacy of reforms and improvements have been discussed.

### 4.2 MAINTENANCE OF WIFE UNDER HINDU LAW

(a) **Analysis of Legislative Provisions**

The relevant legislations which govern the maintenance of wife under Hindu law are: The Hindu Marriage Act, 1955, and the Hindu Adoption and Maintenance Act, 1956. Provisions contained therein would be discussed to know the legislative position of wife under Hindu law. The relevant provisions are: Section 24, and Section 25 of
the Hindu Marriage Act, 1955, and Section 18 of the Hindu Adoption and Maintenance Act, 1956. Section 24 of the Hindu Marriage Act, 1955, deals with the alimony pendente lite and the expenses of the proceedings. This Section empowers the court to order the respondent to pay the petitioner the expenses of the proceedings, if it appears that either wife or the husband has not independent income for his or her support and to meet out the necessary expenses of the proceedings. It is to be noted that the court while making order under this Section, pays due regard to the petitioner's own income and the income of the respondent.

The Marriage Laws (Amendment) Act, 2001 was introduced. This amendment inserted the proviso in Section 24 of the Hindu Marriage Act, 1955, which aimed to fix the duration of six months in the disposal of the application of the payment of the expenses of the proceeding and monthly sum during proceeding within the sixty days from the date of the service of notice on the wife or husband, as the case may be. Section 25 of the Hindu Marriage Act, 1955 deals with the permanent alimony and maintenance. It comprises three Subsections. Subsection 1 of this Section deals with the condition where any husband or wife may for the permanent alimony or maintenance at the time of passing any decree or at any time subsequent thereto. This Subsection empowers the court to order the respondent to pay the maintenance and support the gross sum or the monthly or periodical sum for a term not exceeding the life of applicant. According to this Subsection the responsibility of the paying spouse ends on the marriage of the other spouse. The court fixes the amount of permanent alimony and maintenance, keeping in view the
respondent's own income and other property and the income and other property of the applicant. The court may, if necessary, also secure the payment of permanent alimony by a charge on the immovable property of the husband. Subsection 2 of this Section says that after the passing of the order of the payment of permanent alimony under this Section, in case the court is satisfied that there is a change in the circumstances of either party. In this condition, the court may, at the instances of either party, vary, modify or rescind any such order in such manner as court deems just. Subsection 3 of this Section empowers the court to rescind the order of the payment of permanent alimony, if it is satisfied that the party in whose favour an order has been passed under this Section has been remarried or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he had sexual intercourse with any woman outside the wedlock.

Section 18 of the Hindu Adoption and Maintenance Act, 1956, deals with the married women's right to reside separate and claim maintenance. This Section comprises three Subsections. Subsection 1 of this Section entitles the Hindu wife to get the maintenance from her husband during her lifetime. The right to be maintained is irrespective of the fact that whether she was married before or after the commencement of the Act. Subsection 2 of this Section provides justifiable grounds to the Hindu wife under clause (a) to clause (g) which entitle the Hindu wife to live separately from her husband without forfeiting her claim to maintenance. The grounds are desertion, cruelty leprosy, having another wife by the husband, keeping a concubine by the husband, conversion from Hinduism to another religion by the husband or any other justifiable cause.
Sub-Section 3 of this Section disentitles the Hindu wife to separate residence and claim of maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

The rule laid down in Section 18 of the Hindu Adoption and maintenance Act, 1956 must also be read with Section 23 of this Act which lays down that it shall be the discretion of the court to determine whether any, and if so what maintenance shall be awarded under the provisions of this Act.\(^1\) Here in this Section, the right of the Hindu wife whether married before or after the commencement of this Act, to be maintained by her husband during her life time has been, reiterated substantially in Subsection (1). However, this Subsection (1) must be read with Subsection (2) and Subsection (3). Subsection (3) is an exception to Subsection (1) which lays down that the Hindu wife can not claim separate residence and maintenance, if she is unchaste or ceases to be a Hindu by conversion to another religion. Subsection (2) shows the justifiable ground upon which a Hindu wife lives separately from her husband without forfeiting her claim to maintenance.

Clause (a) of Subsection 2 of the Hindu Adoption and Maintenance Act, 1956 deals with the "Desertion of wife by husband". This clause aims at giving the meaning of desertion as abandonment of the wife by the husband without reasonable cause without her consent or against her will or willful neglect of the wife by the husband. It accords with the meaning given to the expression as used in Section 13(1) of the Hindu Marriage Act 1955. The only distinction between Section 18(2) (a), and explanation to Section 13(1), the Hindu Marriage Act, 1955 is that under the latter the petitioner should show the respondent had

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\(^{1}\) Mulla, Principles of Hindu Law (ed. 10\(^{th}\), 2006, New Delhi), p. 565
deserted him or her for a period of 2 years prior to the presentation of the while under Section 18(2)(a) of the Hindu Adoption and maintenance Act, 1956, desertion might be any duration. A full bench of the Kerala High Court has held that if a husband had deserted the wife, the wife need not give the proof of animus.

Clause (b) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the "cruelty" by the husband to wife. For succeeding the claim of cruelty, the wife must prove two distinct element, first, ill treatment complained of, and secondly, the result and danger of apprehension thereof. Any conduct of husband which causes disgrace of wife or subject to a course of annoyance and indignity amounts to legal cruelty. The harm apprehended by the wife may be a mental suffering as distinct from bodily harm, because the pain of the mind may be even more severe than bodily pain.

In Swajyam Prabha v. A.S. Chandra Shekhar, it was held that "the baseless allegations about the adultery would constitute mental cruelty to the wife, so that cruelty is a solid ground for claiming maintenance and separate residence". It is well settled principle of law that leveling allegations of adultery without proper foundation and basis would tantamount to perpetrating mental cruelty on the other spouse. In Ram Devi v. Raja Ram, the husband by his conduct made it evidently clear that she was not wanted in the house and her presence was resented by him, it was held that this amounted to cruelty and justified wife's living

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3 Raghavan v. Satyabhama Jaya Kumari AIR 1985 Kerala 193 (FB)
4 Supra note: 2, p. 136
5 AIR 1982 Kant. 295.
7 1963 All. 564.
separately.

Clause (c) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956, deals with the "Leprosy" of the husband. A Hindu wife is also entitled to live separately from her husband and has a right to claims maintenance from him on the ground that he is suffering from a virulent form of leprosy. It may be noted that no period is prescribed, but it must be existing at the time when the claim for maintenance is made.\(^8\) It does not make any effect whether the disease started before or after the coming into force of the Act.\(^9\) A mild type of leprosy which is capable of treatment can not be called virulent leprosy which is malignant and contiguous and in which prognosis is usually grave.\(^10\)

Clause (d) of Section (18)2 of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is "the husband having another wife. A Hindu husband can not marry another wife after the commencement of the Hindu marriage Act, 1955. Act lays down monogamy as a rule of law. This gives the right to a wife to claim maintenance, while living separately without forfeiting her claim to maintenance on the ground that his husband has another wife living with him. The interpretation of this Subsection has resulted into conflicting judicial pronouncements by the entitlement of the second wife to claim maintenance from the husband after the commencement of the Hindu Marriage Act, 1955.\(^11\) In Annamalai v. Perumayee Ammamal,\(^12\) the High Court of Madras has held that clause (d) of sec-18(2), would apply only in case of marriage solemnized before this

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\(^8\) Supra Note: 4, p. 137
\(^9\) Supra Note: 1 p. 569
\(^11\) Supra Note: 1 p. 570.
\(^12\) AIR 1965 Mad 139, 141
Act came into operation. The Andhra Pradesh High Court had earlier taken the view that the second wife would be entitled to claim maintenance under this provision. The High Court of Calcutta has taken the view that second wife would not be so entitled. The Madhya Pradesh High Court as well as the Bombay High Court had in the context of Sections 24-25 of the Hindu Marriage Act, 1955 and also taking into consideration of present Section had expressed the view that the expression 'wife' and 'husband' used in the Act can not be given a strict literal meaning so as to convey only a legally married husband and wife. It was also held that the word used in Section would refer to parties who have gone through the ceremonies of marriage, and the court can make order of maintenance at the instance of the second wife. The Andhra Pradesh High Court in a recent full bench decision over ruled the earlier decision while holding that second wife is not entitled to maintenance under this Section, since after coming into force of the Hindu Marriage Act, 1955, bigamous marriage is prohibited. The second Marriage being void, the second wife cannot claim maintenance under this Section since the parties to the marriage will not have the status of legally married husband and wife. The decision of the High Court of the Bombay in Kirshnakant's Case was overruled by the decision of the Full Bench.

In Bhau Saheb v. Lilabai which took the view that petition challenging the nullity of marriage by Virtue of Section 5(1) of the Hindu Marriage Act, 1955, is petition seeking declaration of the nullity

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13 C. Obula Konda Reddy V.C. Pedda Venkata AIR 1976 AP
17 JT 2004 (10) SC 366
of the marriage and is not a petition affecting marital status and thus, would not entitle the wife if such is void marriage to the relief of maintenance. The Court held that the words 'any decree' in Section 25 of the Hindu Marriage Act can't be construed to mean 'every decree' so as to entitle such spouse to maintenance. The Supreme Court has in the context of entitlement to a spouse of void marriage, now held that once there is a decree of nullity in respect of void marriage such spouse would be entitled to maintenance. The Court taking note of its earlier decision in the Chand Dhawan v. Jawahar Lai Dhawan\(^ {18} \) held that decision clearly stipulated that once there is decree bringing about disruption of marital tie, including a decree nullifying a void marriage, the spouse was entitled to maintenance.

Section 25 of the Hindu marriage Act, 1955 applies on the disruption of the marriage tie, as explained and interpreted by Supreme Court in above decisions, whereas Section 18 of the Hindu Adoptions and Maintenance Act. 1956 applies in cases where the marriage Subsists and confers upon the wife the right to claim maintenance without seeking disruption and the marriage tie.\(^ {19} \)

In fact Supreme Court while analyzing the provisions of the Hindu Marriage Act, 1955 in Ramesh Chandra Daga v. Rameshwari Daga\(^ {20} \) stated where the marriage is not dissolved by any decree of the court, resort to Section 25 of the Hindu Marriage Act, 1955 is not allowed as any of the spouse whose marriage continues can resort to any other provision like Section 125 of Criminal Procedure Code, 1973 or Section 18 of the Hindu Adoptions and Maintenance Act, 1956.

\(^ {18} \) JT 2004 (10) SC 366

\(^ {19} \) Supra Note: 1 p. 571

\(^ {20} \) JT 2004 (10) SC 366
It appears that though the Hindu Marriage Act, 1955, the second marriage during the life time of first wife, the present Sections does not clearly states that it is only the legally married wife who can claim maintenance in the above circumstance. If it had been the language of the Section the claim of the second wife would necessary fail.\textsuperscript{21}

The Hindu Marriage Act, 1955, which prohibited bigamy, was enacted before the Hindu Adoption and Maintenance Act, 1956. The legislature therefore conscious of the fact that the Hindu marriage Act, 1955, prohibited of bigamous marriage, and yet the present Section, as it stands today had been enacted. It is submitted that if the legislative intent in the context of this Section were to grant the right of maintenance only to a legally married wife, it would have clearly stated so. It is worth while to note that maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956 has been construed the beneficial piece of legislation. It also appears that the word 'husband' and wife in the context of this Section cannot be read to convey only a legally needed but be read as conveying the meaning of person who has undergone the ceremonies of marriage. The provision as it stands today is widely worded so as to sustain the claim of maintenance by second wife. The claim is maintainable irrespective of the fact that the other marriage had taken place after or before the marriage of applicant wife, provided the other wife is living.\textsuperscript{22} The word any other wife living, in this clause are of sufficiently wide connection to include any wife other them the wife claiming maintenance under this Section. The meaning is not confined to a wife

\textsuperscript{21} Supra Note: 1 p. 571-572.
\textsuperscript{22} Ibid p. 572
who is junior to the wife who is claimant,\textsuperscript{23} nor is it necessary that the husband and other wife should be living together. The word living here means alive and not living with the husband,\textsuperscript{24} a Second wife who had abandoned her husband for no justifiable reasons and not for immoral purpose would be entitled to live separately from the husband by virtue of present clause, and claim maintenance under present Section.\textsuperscript{25}

Clause (e) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with a ground which is "husband keeping a Concubine". A Hindu wife is also entitled to live separately from her husband and claim maintenance from him and the ground that he keeps a concubine in the same house in which she is living or habitually resides with a concubine elsewhere. In the second part of this clause, the emphasis is the 'habitually' and not so much on residence.\textsuperscript{26} It is not necessary that the husband should have actually shifted his residence to the place where concubine lives.

Clause (f) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is "husband ceased to be a Hindu by conversion".

A Hindu wife is entitled to live separately from her husband if he has ceased to be a Hindu. However, the terms Hindu in this clause must be understood in the wide sense given to it in Section 2 as will be seen from Subsection 3 of that Section. So husband continues to be a Hindu even though he may have been converted to any other of four religions:

\textsuperscript{23} Jagamma v. Satyanarayana Murti AIR 1958 All 582.
\textsuperscript{24} Kalawati v. Ratan Chand AIR 1960 All 601
\textsuperscript{25} Ram Prakash v. Savitri Devi AIR 1958 Punj. 87
\textsuperscript{26} Kesar Bai v. Hari Bhan AIR 1975 Bom. 115
Hinduism, Buddhism, Jainism, Sikhism. Conversion in the present context implies that the husband has voluntarily relinquished his religion and adopted another religion after a formal ceremonial conversion; A Hindu does not cease to be a Hindu merely because he professes an ardent admirer and advocate of such religion and its practices. However if he abdicate his religion by a clear act of renunciation and adopts the other religion, he would cease to be Hindu within the meaning of that clause.

Clause (g) of this Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is 'any other justifiable cause'. It is a residue clause; it runs, "if there is any other cause justifying her living separately". For seeking in the remedy under this clause the conduct of the husband should be such that, in the opinion of the court, the wife has 'grave and weighty' or grave and convincing reason for withdrawing from the society of the husband and it would amount to a justifiable cause. It is submitted that all those cases where the court may refer husband's petition for the restitution of conjugal right will be covered under this clause entitling a wife to claim separate residence & maintenance under this clause. In *Sitthegowda v. Hoonamma*, wife claimed maintenance on the ground that husband treated her with cruelty and that he remarried and was living with second wife. The charge of cruelty was not established, but it was found by the court that husband was living with woman, having illicit relation with her and from which a child was born. Since marriage with this wife was not established, the case was not covered.

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27 Supra Note: 1 p. 574.
28 Kesar Bai v. Haribhan AIR 1974 Bom 115
29 AIR 1984 Kant. 41
by clause (d) of Section 18(2). The court held that this was nonetheless a just cause for her to live separate and she was entitled to claim maintenance. The court took recourse to clause (g).

But according to Subsection (3) of Section 18, a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion.

(b) Evaluation of judicial pronouncements

Now, some landmark judicial decisions would be discussed here to clarify the application of these Sections in the matrimonial cases. First of all, we would like to discuss the application of Section 24 and Section 25 of the Hindu Marriage Act, 1955, then some cases would be discussed regarding the application of Section-18 of the Hindu Adoption and Maintenance Act, 1956. In Hani v. Parkash, the question before the High Court was that in case of non compliance an order under Section 24 of the Hindu marriage Act, 1955, can be the defence of the defaulter. Husband obtained a decree of divorce against the wife on the ground of cruelty. She filed an appeal against it. During pendency of appeal, she sought maintenance and litigation expenses under Section 24 of the Hindu Marriage Act, 1955. The court decreed Rs. 500 per month as maintenance pendente lite and Rs.2, 200 as litigation expenses. The husband failed to comply with this order despite several notices over a period of two years. The court observed: "Law is not that powerless as not to bring the husband to book. If the husband has failed to make the payment of maintenance and litigation expenses to wife, his defence be struck out." The verdict of the High

\[AIR\ 1964\ P & H\ 175.\]
Court in this case shows that the purpose behind this is to ensure that a husband provides for the wife and children while the litigation is on. If he fails to do so, his defence will be struck out and the case will proceed.

In *Sushila Viresh Chhawda v. Viresh Nagsi Chhawda*, the issue involved in this case was whether the litigation expenses and interim maintenance under Section 24 can be claimed, even when the main petition is for nullity of the marriage. Husband filed a suit for nullity of marriage under the Hindu Marriage Act on the ground of fraud. His allegation was that the wife suffering from a big ovarian tumour which had to be surgically removed along with an ovary just eight days after the marriage and this fact that the tumour was concealed at the time of marriage. The wife filed an application for interim maintenance under Section 24 of Hindu marriage Act. This was opposed by the husband on the ground that the marriage was void and the view of the fraud committed by her, she was not entitled to interim maintenance. The family court rejected the wife's application without even going into merits. Hence her special leave petition under Article 227 of the constitution. The High Court set aside the order of the family court. It was held that the wording of Section 24 the Hindu Marriage Act, 1955 is very clear that an application for maintenance can be filed in any proceeding under the Act, "When a fact of marriage is acknowledged and a proved, alimony follows subject, of course, to the discretion of the court in matter having regard to the means of the parties and it would be no answer to the claim. That the marriage was void ipso jure or was voidable." The court further remarked; "The direction of interim

31 AIR 1996 Bom. 94.
alimony and expenses of litigation under Section 24 is one of urgency and it must be decided as soon as it is raised and the law take care that nobody is disabled from prosecuting or defending the matrimonial case by starvation or lack of funds". The purpose of Section 24 is to provide sustenance and financial assistance for pursuing the litigation. The provision is available in case of any proceeding under the Act and not confined to any particular proceeding.

In *Lataben Y. Goswami v. Yogendra Kumar S. Goswami*, the issue before the Gujrat High Court was whether the husband can be absolved of the liability to pay arrears of interim maintenance to the wife, after allowing dismissal of this main petition under the Act? In the instant case, husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955, whereupon the wife applied for maintenance under Section 24, Hindu marriage Act, 1955. The court allowed Rs. 200 per month as interim maintenance and Rs. 300/- towards litigation expenses. The husband challenged this but his application was rejected. He was given sufficient time for making the payment which he failed to do. He made no appearance on subsequent dates either in person or through counsel; hence the same was dismissed for non-prosecution. The wife filed an application for recovery of arrears of maintenance amount w.e.f., April 1, 1988 to August 5, 1993. The same was turned down as being not maintainable in view of the dismissal of the main petition of the husband. Hence, the wife's revision, it was argued on behalf of the wife that under the provision of Section 28(a) of the Hindu Marriage Act, all decree and orders made by it in any proceeding under the Act are enforceable in

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32 AIR 1996 Guj. 103.
the same manner as decrees and orders of the made in the exercise of
its original civil jurisdiction. And further, it was contended that an
order for alimony *pendente lite* remains in force during pendency of
proceedings and in this case the proceedings under Section 9 for the
restitution of conjugal rights remained pending till the application was
dismissed on August 5, 1993 and so the wife was entitled to the
arrears. After going through the contentions of both the parties, the
wife's revision was allowed. The court observed 'That the finding of
the learned trial court that the interim order passed in any proceedings
would itself get extinguished or lost the sanctity with the ultimate fate
of the main proceedings is perverse in the face of it. In case such
interpretation is given, then the whole purpose enacting the aforesaid
Section of the Act will be frustrated. Not only this, but it will be easy
for a spouse who does not want to pay the amount of the maintenance
or the cost of litigation despite the order of the Court to deny the same
by allowing the dismissal of the petition for non-prosecution. Section
28A was substituted in the Act of 1955 to mitigate the hardships". Here
it can be said that the decision is praiseworthy as the husband cannot
be allowed to defeat the claim of the wife to the arrears of maintenance
by simply dropping or not proceeding with the main petition. This
would not only be unfair but also the defiance of court order.

In *Ghari Lai v. Surjit Kaur*,\(^33\) the issue before the High Court of
Jammu and Kashmir was under Section 5 of the Limitation Act, 1963
for condonation of delay be termed as proceedings for purposes of
Section 24 of the Hindu Marriage Act, 1955. In that case the husband
obtained an ex-parte restitution decree against the wife. The wife filed

\(^{33}\) *AIR 1997 J & K 72.*
an application for setting aside the same after the period of limitation had expired. She also filed an application under Section 5 of the Limitation Act for condonation of delay. Pending this application, she filed an application under Section 30 of the J & K Hindu Marriage Act (4 of 1980) for maintenance. This Section of the J&K Act in pari materia with Section 24 of the Hindu Marriage Act, 1955) The husband objected to her application on the ground that proceeding under Section 5 of the Limitation Act could not be considered as proceeding for purpose of grant of maintenance. His plea was, however, rejected. Hence, he appealed. The husband's appeal was admitted. The High Court reiterated the decision on Puran Chand v. Kamla Devi\(^{34}\) where it was held that maintenance is awardable on monthly basis "during the proceeding which connotes that maintenance is admissible from the time of commencement of the proceedings till their termination. According to the court proceeding in trial court would naturally commence from the date on which issues are framed and since there can be no stage of framing of issues in an application seeking condonation of delay in proceedings under Section 5 of the Limitation Act, Section 30 of the J&K Hindu marriage Act cannot apply. Accordingly, the court held that application for condonation of delay was not a proceeding within the meaning of Section 30 of the J&K Hindu marriage Act (or Section 24 of the Hindu Marriage Act). While conceding that this provision seeks to help a litigating spouse who does not have sufficient means to maintain himself/herself, the court observed that provision cannot be used in such a way that it acts as a weapon of sword for harassment of the other party.

\(^{34}\) AIR 1981 J&K 5.
Virtually the strict interpretation of the provision can work hardship on the party sometimes. Supposedly wife obtains an ex-parte order and the husband files an application for setting aside and condonation of delay for seeking restoration of the order only to harass the wife, would the court deny her expenses to fight out the application? Each case needs to be decided on its own facts and circumstances.

In *Amit Kumar Sharma v, Vlth Addl. District and Session Judge, Bijnor*\textsuperscript{35} the issue before the Allahabad High Court was whether a husband's mother's needs be taken care of in a wife application for maintenance when the mother is staying with her? In that case the husband filed a petition for divorce. Thereupon, the wife filed application for maintenance under Section 24 and 25 of the Hindu Marriage Act, 1955, claiming maintenance for herself, two minor children and ailing mother of the husband who too was staying with her. The same was allowed by the trial court and affirmed by the additional district judge in appeal. The husband filed an appeal against the order. The court held that Section 24 contemplates maintenance either to wife or husband and the mother is in no way connected with us relating to marriage between the husband and wife. The court observed that the Indian social fabric involves maintenance of parents with religious scruples and devotion but the court is called upon to interpret the law and not religious or social duties. Section 125 of the Cr. P.C. and Section 20 of the Hindu Adoptions and Maintenance Act are there to take care of the Parents maintenance rights according to the court. The court further held that where there is specific provision of law on the basis of religious scruples or social system, it could not be

\textsuperscript{35} AIR 1999 All 4.
permissible to stretch Section 20 of the Hindu Adoption and Maintenance Act, 1956, nor it can overlap the said Sections. Section 24 of the Hindu Marriage Act, 1955, does not postulate the scope of granting maintenance to the mother of the husband even when she is ailing and lives with the applicant. Maintenance award in favour of the mother was accordingly set aside by the High Court.

On evaluation of this decision of High Court it may be pointed out that here the court has taken a very rigid and technical view. Further, while awarding maintenance in an application the court considers, *inter alia*, the needs of the applicant. Besides, under Section 25 "any other circumstances of the case" is a relevant consideration. When the husband's mother, whom in any case he is liable to maintain, is staying with his estranged wife, who is taking care of her needs, including medical treatment, the court should have given due consideration to these needs rather than driving her (the mother) to file separate suits for maintenance under the provision of the Cr. P.C. or Hindu Adoption and maintenance Act, 1956.

In *Meshchandra Rampratapji Daga v. Rameskwari Rameschandra Daga*,

36 the Bombay High Court has held that the wife is not entitled to maintenance if the marriage is void. The observations of the court in *Krishnakant v. Reena*,

37 were referred to "that the Hindu Marriage Act, 1955, is a piece of social welfare legislation regulating the marital relations of Hindus consistently with their customary law, i.e. Hindu law. The object behind Section 24 of the Act providing for maintenance *pendente lite* to a party in matrimonial proceeding is

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36 (2001) 1 Feni-Juris CC 60 (Bom).
obviously to financial assistance to the indigent spouse to maintain herself during the pendency of the proceedings and also have sufficient funds to carry on the litigations so that the spouse does not unduly suffer in the conduct of the case for want of funds. The words 'wife' or 'Husband' used in Section 24 of the Act include a man and a woman who have gone through the ceremony of Hindu marriage which would have been valid but for the provisions of Section 11 read with clause (i) of Section 5 of the Hindu Marriage Act, 1955. These words have been used as convenient terms to refer to the parties who have gone through a ceremony of marriage whether or not that marriage is valid or subsisting, just as word marriage has been used in the Act to include a purported marriage which is void ab initio”.

In *Padmavathi v. C. Lakshminarayana*, the question before the Karnataka High Court was whether the mere fact that the wife being educated is capable of earning, defeat her claim for maintenance under Section 24 of the Hindu Marriage Act, 1955. It was held by the High Court that the only condition for granting maintenance under Section 24 is that the applicant has no independent income sufficient for support. The court observed that the object of Section 24 would be defeated if the interim maintenance is denied during the matrimonial proceedings on the ground that the wife is capable of earning her living because of her qualification. It further remarked by the Court that the reasoning of the family court judge was "not only contrary to settled legal position but the spirit and purpose of Section 24 of the Act". The decision seems to be correct that the mere fact that the wife is capable of earning, without any contention or proof that she is in fact earning,

58 AIR 2002 Kant 424
does not disentitle the wife to claim maintenance under Section 24 of the Hindu Marriage Act, 1955.

In *R. Suresh v. Chandra,\textsuperscript{39}* the court has elucidated the concept and meaning of term support in Section 24 of the Hindu Marriage Act, 1955, and held that the expense incurred on medical treatment would also be covered in the word 'support.' It was held that since the word "support" in Section 24 of the Hindu Marriage Act, 1955, was not defined, it should be given dictionary meaning or as understood in general parlance. Further, the court can draw inspiration from the word "maintenance" as defined in Section 3(b) (i) of the Hindu Adoption and Maintenance Act, 1956, which includes provision for food, clothing, residence, education, medical attendance and treatment. Though this definition too is not exhaustive but only inclusive, medical attendance and treatment have been specifically mentioned. Referring to *Pradeep kumar Kapoor v. Shailja Kapoor,\textsuperscript{40}* it was held that the word "support" and "maintenance" are synonymous and the definition of "maintenance" as given in the Hindu Adoptions and Maintenance Act, 1956, equally applies to the word "support" in Section 24 of the Hindu Marriage Act, 1955. As far as the point reimbursement from office was concerned, the court held that the issue is not of *his* reimbursement from office but the wife's claim for reimbursement from him. The wife was, accordingly, held to be entitled for reimbursement of her medical expenses from the husband under Section 24 of the Hindu Marriage Act, 1955.

In *Ramesh Babu v. Usha,\textsuperscript{41}* the issue before the Court was that whether

\textsuperscript{39} AIR 2003 Kant 183
\textsuperscript{40} AIR 1989 DEL. 70
\textsuperscript{41} AIR 2003 Mad. 281.
the applicant who is entitled to free legal aid, can seek litigation expenses under Section 24 of the Hindu Marriage Act, 1955. In the instant case, a husband filed a petition for annulment of marriage. The wife claimed interim maintenance and litigation expenses under Section 24 of the Hindu Marriage Act, 1955. The family court ordered Rs. 2,500/- towards litigation expenses and Rs. 1,250 per month as interim maintenance. Both were dissatisfied and filed appeal against the maintainability of the litigation expenses and the wife against inadequacy of the amount of interim maintenance. The husband's argument was that the wife was entitled to free legal aid and, therefore, he was not liable to pay her litigation expenses. The court, however, did not accept this argument and held. Though free legal aid is available however, I am of the view that on this ground the claim of the deserving person cannot be rejected. The amount of interim maintenance was also raised from Rs. 1,250/- to Rs. 3,000/- per month as the wife had no independent source of income and the carry home salary of the husband was assessed at around Rs. 9,000 per month. To deny litigation expenses under Section 24, only on the ground that legal aid available to the applicant is not justified, as was done by the Gujarat High Court in *K.K. Desai v. A.K. Bhai Desai*. In this case the court rejected a wife's claim for litigation expenses on the ground that she can avail free legal aid which is provided by the state. According to the court, in that case, the burden cannot be put on the husband merely because the wife was ignorant of her right to avail legal aid. The view adopted by the court in *Ramesh Babu* is more realistic and logical.

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42 AIR 2000 Guj 232.
In *S.S. Bindra v. Tarvinder kaur*, the court had to determine that in a claim for maintenance *pendente lite* what is the crucial time for assessing the income of the non-claimant - time of petition of claimant or time of order. Here the Court held that in awarding interim maintenance, one of the considerations is that the wife and children shall enjoy the same standard of living as the husband, but emphasized that "the intention was not to peg it or freeze it to the date of separation". If in term, orders are to be pegged to a particular point in time then if income of the earning of the spouse were to suffer a drastic reduction for any reason including deterioration in his/her health, the court would be precluded from making any adjustment because of these factors. According to my perception a very logical interpretation indeed. If the income of the husband increases manifold between the time of the application and order of the judge should not be precluded to fix the amount in that basis; and so also if it decreases. It should not be left to the claimant or non-complainant to file fresh application for reassessment.

In *Chandra Guha Roy v. Gantam Guha Roy*, the issue that whether an educated young lady should be expected to be capable of maintaining her own self or not. In that case, a husband filed a petition for divorce and the wife applied maintenance under the Section 24 of the Hindu marriage Act, 1955 and also under the Section 125 of Cr. P.C. thereafter, the husband also filed an application under Section 24 of the Hindu Marriage Act, 1955. The applications of both the parties were dismissed by the trial court. Against the wife's application, it was held that the husband was no longer in service as, consequent to his arrest

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43 AIR 2004 DEL 242.
44 AIR 2004 Jhar 36
after wife's criminal complaints against him, his services were terminated. The court further observed that it was a settled principle of law that an educated lady can not be encouraged to sit idle expecting any allowance from the husband. The wife filed an appeal against the order. It was held that the ground for rejection of the wife's application was not proper. The income of the husband must be his special knowledge; he did not make any attempt to prove either his actual income or his dismissal from job, besides, when his application for maintenance was rejected he did not challenge the same and this implied that he was not prejudicially affected by the order. Above all, according to the court, the husband had filed the divorce suit which also incurred expenditure which goes to show that he did have some income. In view of all these facts, the matter was remanded for fresh trial. According to my point of view in our times of equality, a wife is as much liable to maintain her husband as the husband is to maintain his wife—depending on the circumstances of the case. However, the trial court's observation in this case that an educated young lady cannot be expected to sit idle expecting allowance from the husband, did not find favour with the High Court. There can, however, be no hard and fast rule in this respect and each case would have to be decided on its own fact and situations.

Now, some cases with regard to the permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955 would be analyzed. In *Chand Dhawan v. Jawaharlal Dhawan*,\(^{45}\) the issue before the court was: Do the term "any decree" in Section 25 of the Hindu Marriage Act include an order of dismissal of the petition? The

\(^{45}\) (1993) 3 SCC 406
parties were married in 1972 and had three children. In 1985, a petition for divorce by mutual consent was filed in the purported to have been filed jointly by the consent of both the spouse as per the requirement of Section 13(b) of the Act. The petition was kept pending for six months. On coming to know of the petition, the wife filed objections. According to her she never consented to the divorce and the husband had duped her into signing some blank paper on a false pretext, which he used in the petition. However, some understanding was arrived at, under which the wife agreed to join the husband. Both the parties gave a joint statement and the divorce petition was got dismissed. Barely three months later, the husband filed a divorce petition on several ground. Wife's is application under Section 24 for litigation expenses and maintenance *pendente lite*, which was granted. Since the husband did not make the payments, the divorce proceeding was initiated by him were stayed under order of the High Court of Allahabad. The wife filed a petition under Section 25 for grant of permanent alimony on the ground that she was facing starvation whereas the husband was a multimillionaire. She also filed a petition under Section 24 for maintenance *pendente lite* and litigation expenses. The Additional District Judge allowed her petition and granted a sum of Rs. 6,000 as litigation expenses and Rs 2,000/- per month as alimony *pendente lite* from the date of application. The husband *filed a revision petition against it in the High Court; the wife also* approached the court seeking enhancement of the amount. Both the revision petitions were referred to a larger Bench. The husband's objection was that the wife's application was not maintainable since there was no decree under the Act, and in the absence of "any decree" no order under Section 24 or 25 of the Act could be passed. This objection was sustained whereupon
wife filed an appeal in the Supreme Court. The issue was whether the words any Section 25 includes an order of dismissal of petition. Reference was made to several cases. Some courts held that permanent alimony can be granted only when any decree and the relief sought is given, if the relief is not granted then it means that there is no decree and in such situation maintenance cannot be awarded. On the other hand, there were cases supporting the argument that the words "passing any decree" imply both the allowing and dismissal of the main petition. After an analysis of the case law, the Supreme Court came to the conclusion that the wife's application for maintenance was not maintainable as the wife had withdrawn her consent to the divorce petition and the same was dismissed. An order of dismissal of a petition does not disturb the marriage not confers or takes away any legal character or status.

According to the court that without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act, 1955, the claim of permanent alimony was not valid as ancillary or incident to such affection or disruption. The wife's claim for maintenance under the Hindu Marriage Act, 1955 was dismissed. The court held that the wife's claim in such a situation can be agitated under the Hindu adoption and maintenance Act, 1956 since Section 18(1) if this Act entitles a wife to maintenance even with any disruption in her marital status. It observed that like a surgeon, the matrimonial court, if operating assumes the obligation of the post operatives and when not leaves the patient to the physician. This judgment is bound to create problems for wives whose husband want to get rid of them and file petition which for whatever reasons get dismissed. The dismissal of the
petition only goes to show that the case of the husband against the wife is unfounded. What is the fault of the wife in such case? Secondly while Hindu Adoption and Maintenance Act where a wife can seek maintenance even without any disruption of her marital status what about woman from other communities. They have to bank upon the provision of the Cr.PC.

In Ashabi B. Takke v. Bashasab Takke,\(^46\) the issue before the Karnataka High Court was that whether a wife's refusal to join her husband who has remarried sufficient justification for her withdrawal from him and claiming maintenance. The High Court held question of the wife deserting the husband or the husband deserting the wife pales into insignificance in the light of this development. The fact that the wife could not get maintenance earlier under Section 125 of Cr. PC proceeding also cannot have any hearing in a suit for maintenance file subsequent to the defendant husband having contracted a second marriage. This is so even if the personal law of the defendant permits him to contract more than one marriage. The second marriage of the husband per se is sufficient justification for a wife to leave him and claim maintenance. When that is proved, nothing else needs to be established.

In Bhaub Saheb v. Leelabai,\(^47\) there were two main issues which had to be settled by the court: (i) Whether an order dismissing a wife's petition seeking declaration that her marriage was valid can come under the term "any decree" so as to entitle her to claim maintenance under Section 25 of the Hindu Marriage Act, 1955. (ii) Whether a wife whose

\(^{46}\) AIR 2003 Kant 172

\(^{47}\) AIR 2004 Bom. 283 (FB)
marriage is void, is entitled to maintenance. The facts of the case was that shortly after marriage, the wife filed criminal case under Sections 498A, 323, and 506 of the penal Code against the husband. She also filed case for maintenance under Section 125 of the Cr. P.C. this was dismissed by the family court on the ground that she was not the legally wedded wife of the opposite party. Meanwhile she filed an application before the family court seeking declaration that the marriage was valid and the child is legitimate. Along with that she sought maintenance for the daughter. Her petition seeking declaration regarding validity of the marriage was dismissed by observing that she was not legally wedded wife since her husband was an already married man. Maintenance, however, was granted in favour of the child. In the backdrop of this legal battle she filed a petition under Section 25 of the Hindu Marriage Act, 1955 for permanent alimony which was allowed by the family court and the husband was ordered to pay Rs. 1,000 per month to the wife w.e.f. the date of application. The family court drew support for its order from several judgments. The husband appealed against the family court order. He denied solemnization of marriage and in the alternative claimed that he was already married on the alleged date of marriage with the petitioner and so the marriage if any, was void in view of Section 5(i) read with Section II of the Hindu Marriage Act, 1955, and so the "wife" was not entitled to any maintenance. The court pointed out that conduct of the parties and also other circumstances of the case are important consideration and they cannot control the discretion conferred upon the court by the expression "court may", If there can be cases of denial of maintenance to even legally wedded wife the liberal construction of Section 25 so as to entitle an illegitimate wife to maintenance would not be proper.
According to the court, it is a fundamental principle of law that in order to claim a relief from the court of law, there must be a legal right based on a legal status. When status of a woman as wife is not recognized by the provisions of the Act which confers the right of permanent alimony, she cannot be entertained for grant of relief in the absence of recognition of her status by the Act. If the construction of the word "wife" is not accepted uniformly for the same remedy provided in special legislation *i.e.*, Section 125 of Cr, P.C. and personal law, anomalous position may occur, in personal law. The court observed: "Even while considering Section 25 to be a "welfare legislation", it cannot be ignored that a liberal construction although may benefit the second wives who are drawn into the form of marriage by keeping them ignorant about illegitimacy of the same, may encourage bigamous marriage with preventing bigamous marriage". Further the court made a distinction between a marriage which is void and one which is voidable. The court may consider granting of maintenance while declaring the nullity of a voidable marriage as the relationship would be legal in law until annulled, but not in case of nullity of marriage which is void *ipso jure*. The wife lost her case. The court held that any decree would not mean every decree so as to entitle a wife to claim maintenance; and further that wife of a void marriage is not entitled to maintenance. That absolving a husband of the liability to maintain his second wife who was kept in the dark about the fact of his first marriage would encourage, rather than discourage a man to enter into such bigamous marriage. A wife would rarely enter into a marriage with an already married man with full knowledge of this fact simply because she would not be denied maintenance.
In *Geeta Satish Gokarna v. Satish Gokarna*, the issue before the Court was: Can a wife under a consent decree agree to give up to her claim for any maintenance in future and would this debar her from claiming any maintenance from her husband thereafter? In the instant case, a marriage was dissolved by mutual consent of the parties and as one of the terms of the consent decree, the wife agreed not to claim any maintenance/alimony from the husband. However, after two years of the decree, she filed an application under Section 25 of the Hindu Marriage Act, 1955 for permanent alimony at the rate of Rs. 25,000/- per month from the date of application. The trial court held that the wife's application of maintenance despite the consent clause where under it was agreed that "the petitioner [wife] will not claim any maintenance or alimony in future from the respondent [husband]". Accordingly, it ordered the husband to pay Rs. 2,000 per month as maintenance to the wife. Both the parties appealed - the wife against the quantum and the husband against the very maintainability of the wife's claim. The appeals were dismissed. The High Court found no material on record which could justify enhancement of the amount in favour of the wife, and as to the husband's objection, it held that the power to grant maintenance has been conferred on the court by parliament under the Act and the parties cannot, by agreement, oust the court's jurisdiction. The court further stated that permanent alimony and maintenance are a larger part of the right to life. These provisions according to the court are included "to enable a person unable to maintain her/him to be protected. Therefore, any clause in a contract or consent terms providing to the contrary would be against public policy". The principle is that where on grounds of public policy, wife

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48 AIR 2004 Bom. 345
cannot enter into such contract then the contract is void and the court will take no notice of that and ignore that part of the order though it was made by consent because as remarked by Lord Atkin 'the wife right to future maintenance is matter of public concern which she; cannot barter away.' An agreement in a consent decree not to claim maintenance cannot close the doors for a wife's claim of maintenance thereafter. Maintenance has been construed as an integral part of right to life. The decision is good as it cannot be denied that maintenance is an integral part of right to life; one really wonders whether it is fair to allow a consenting party to retract. The view taken by the court has the potential of discouraging mutual settlement of issues and consent divorce since consent agreements are package where parties agree to barter certain rights and claim to buy peace. If term and conditions of the consent agreement are fair and reasonable the courts should honour such agreement and discourage retraction.

In Surendra Kumar Bhansali v. Judge, Family Court, the issue was whether an application under Section 25 of the Hindu Marriage Act, 1955, maintainable while an appeal against divorce is pending. High Court held that an application, under Section 25 can be made of passing of the decree or at any time subsequent thereto. In this case, since the divorce petition by the husband was decreed and the marriage dissolved, the wife's application was held to be tenable. According to the court, the relief could have been refused if the main petition had been dismissed as per the decision of the Supreme Court in Chand Dhawan v. Jawaharlal Dhawan, but not simply because an appeal against the divorce decree was pending. The decision is right which

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49 AIR 2004 Raj 257
50 1993 3 SCC 406
declares that an appeal against a decree of divorce does not disentitle a party from filing an application for maintenance under Section 25 of the Hindu Marriage Act, 1955. Such application, in terms of the provision of Section 25, can be filed at the time of the passing of the decree or at any time subsequent thereto. An appeal against the decree does not take away this right.

In *Sudha Suhas Nandanvankar v. Suhas Ramrao Nandanvankar*,\(^5\) the issue was: Can a wife whose conduct demonstration that she is trying to take advantage of her own wrong or fraud to harass the husband. The parties were married in 1995 according to Hindu rites. The marriage was annulled by a decree of nullity in 1996 on the ground that the wife was suffering from epilepsy at the time of marriage which fact was not disclosed to the husband and hence a fraud was committed on him [prior to the Marriage Laws (Amendment) Act, 1999 epilepsy was a ground on which a marriage could be avoided and decree obtained under Section 11, coupled with Section 5(ii) (c) of the Hindu Marriage Act, 1955. The word epilepsy in Section (c) of Section (5(ii) has now been deleted.] Even though the decree was *ex parte*, it was not challenged by the wife. However, after the decree the wife first claimed return of articles which were presented to her by her parents at the time of marriage. Further, she claimed expenses incurred at the marriage. During pendency of this application she again submitted application for articles and jewelry presented to her by her in-laws at the time of marriage. She further claimed permanent alimony. The wife's application was partly allowed by the family court. Hence, she files an appeal in respect of part rejection of her application. The main

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\(^5\) AIR 2005 Bom 62.
issue for consideration was in respect of alimony claimed by her. The court of nullity conceded that a wife is entitled to claim alimony even though a decree of nullity is passed at the instance of the applicant. This, however, according to the court is not an absolute right. If a wife's conduct is such that the court feels that she should not be granted maintenance, the court may refuse her application. In this case, according to the court the nondisclosure by the parents of the appellant and the appellant's accepting the decree as it is, without making any grudge in respect of the ground that the appellant was suffering from epilepsy prior to the marriage reflects upon the conduct of the applicant, and if we take into consideration this aspect what we find is that the appellant is trying to take advantage of her wrong or fraud and is trying to harass the respondent by claiming the amount of alimony". And further, the court held "What we find is that after a decree of annulment, the respondent has married and he is having a child. Now this appears to be an attempt on the part of the appellant and her parents to disturb the marital life of the respondent which he has tried to settle after annulment of the marriage. This is an attempt to shift the liability of maintenance by the appellant wife on a husband who was not fault and who has not consummated the marriage. Even though the law permits the right of alimony in favour of the appellant, however, the conduct and circumstances involved in the present case does not permit us to pass an order of permanent nature in favour of the appellant". The wife's appeal was, thus, dismissed.

Now some cases relating to the Section 18 of the Hindu Adoption and maintenance Act, 1956, will be discussed. In Ranjit Kumar
Bhattacharya v. Sabita Bhattacharya, the issue before the Court was: Is a married woman who lived with a married man as his wife, entitled to damages because she, not being a legal wife is not entitled to maintenance? Facts of the cases were that a married man lived with a woman for several years including her to believe that she was his wife, and also had children from her. Later they fell apart. The woman filed a suit for maintenance under the Hindu Adoption and Maintenance Act, 1956, and also under Section 125 of Criminal Procedure Code, 1973. The man denied marriage and his liability to maintain her. The additional District and session judge held that in view of long and continuous co-habitation between the parties, there was a strong presumption of marriage and that mere absence of proof regarding marriage rites could not dislodge the presumption unless there was proof of in surmountable obstacles to a valid marriage. A decree of maintenance for Rs. 500/- per month was passed. Hence, husband appeal. It was argued that Section 18 of the Hindu Adoptions and Maintenance Act, 1956, makes no provision for maintenance from a 'husband' with whom a woman has entered into a void marriage. The Contention was accepted by the court and it was held that the woman was not entitled to maintenance. The Court, however, ordered the man to pay damages. According to the court, it is obvious that the man must have induced her to believe that she is his wife: for such immoral activities, the applicant should not be spared altogether, though the damage that had been caused, both physically and mentally, could not be compensated in any way," the court remarked. He was, accordingly, directed to pay Rs.30000/- by way of damages. This case is yet another example of how a woman can be defrauded and entrapped into a

52 AIR 1996 Cal. 301
relationship and the man can just get away because under the law they are not husband and wife. There is a need for a law which should impose liability on such erring males who defraud women into a legally void marriage only to abandon them later and then take advantage of their own illegal/immoral act. As rightly remarked by the court on this case, no amount of damage can compensate the damage caused to the woman.

In Boummma v. Siddappa Jeevappa Patarad,53 the main issue was whether "an arrangement to live separately" be treated as a "divorce deed". The facts of the case were that a wife filed an application for maintenance under Section 18 of the Hindu Adoption and Maintenance Act1956. The parties were married in 1966 and the claim was made by the wife in 1995. She claimed past maintenance also. She pleaded desertion and alleged that the husband had another wife and they both ill treated her and threw her out of the house. The husband resisted the application on the ground that their marriage had been dissolved by consent as per "an arrangement to live separately", and in terms of the provision of Section 18 of the Hindu Adoptions and Maintenance Act, 1956, a claim for maintenance can be made only when their is subsisting marriage. The trial court held that there was no maintenance under the provisions of the Hindu Adoptions and Maintenance Act. Hence the wife appeals, it was held by the court that the second marriage by itself is desertion of the wife and that fact having been proved; no further proof of desertion was required. Besides, "an arrangement to live separately", even assuming that it is proved, could not have the effect of bringing the marriage to an end. Such agreement

53 AIR 2003 Kant 342
was, allegedly, entered into long after the enactment of the Hindu Marriage Act, 1955. According to the court "a marriage in law can be dissolved only by a, method recognized in law and not otherwise". The so-called arrangement sought to be passed off as a divorce-deed" could not, firstly, be treated as a divorce, and secondly, after the coming into force of the Hindu Marriage Act, 1955, a marriage could be dissolved only under the provisions of the Act, of exceptionally, under custom permitting divorce. In this case there was no assertion by the husband that there was a divorce under a customs prevalent in the community to which they belonged. The marriage was thus held to be subsisting and the wife's claim tenable and bona fide. She was, however, not entitled to past maintenance but only to maintenance with effect the cast of her application. In Sheela Rani v. Jagdish Chander Sharma.\(^{54}\) It was held that the right of residence as part of maintenance is a personal right of the wife.

(c) Identification of Pitfalls

The Hindu marriage Act, 1955 is social welfare legislation. It was with this end certain rights were conferred on Hindu women by the Act, Therefore, such a piece of legislation should be constructed by adopting progressive and liberal approach and not a narrow and pedantic approach. However, there is some judicial pronouncement which shows the strict behaviour of Judiciary toward the aggrieved spouse. In the matter of implementing the provisions of Act, the technicalities of the provision must be left to some extent. This view was adopted by the High Court of Calcutta in Sisir Kumar v. Sabita

\(^{54}\) AIR 2004 Del 158
“The word 'Wife' or 'Husband' in Section 25, has been used as convenient terms to refer to the parties to a marriage whether or not the marriage was valid or subsisting. Marriage had been used to include a purported marriage which was void ab initio”.

Here it is also a noteworthy fact which was discussed in Amit Kumar Sharma v. VIth Add. District Session Judge Bijnor, that whether a wife can also seek maintenance for husband's mother who need to be taken care of under the same application for maintenance under Section-25 when mother is staying with her? Here court has taken a very rigid and technical view and ordered the old mother to file separate claim under Criminal Procedure Code, 1973 or under Section 20 of the Hindu Adoption and Maintenance Act, 1956. While awarding the maintenance in an application the court must consider, inter alia, the needs of the applicant. When the husband's mother is staying with the estranged wife, the court should have given consideration to those needs rather than driving her (the mother) to file separate suits for maintenance under Cr. P.C or the Hindu Adoption and Maintenance Act, 1955.

The another pitfall which may be noticed is that in some cases the husband has tried to be absolved of the liability to pay the arrears of interim maintenance to the wife after allowing dismissal of the main petition under the Act, e.g. in Lataben Y, Goswami v. S. Goswami, that has been discussed earlier in this project. Here the court noticed

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55 AIR 1972 Cal.
56 AIR 1999 All
57 AIR 1999 Guj.
the husband's trick and wife was found entitled to the arrears. The husband was not allowed to defeat the claim of wife to the arrears of maintenance by simply or not proceeding with the main petition.

Another point of discussion regarding the identification as pitfalls in the application of the provisions of Hindu law is in *Ramesh Babu v. Usha*. In the instant case, the husband denied the maintenance of wife on the ground that the wife is entitled to free legal aid The Court refused the argument of husband and awarded maintenance to wife. The court caught the trick of husband and gave relief to wife.

In some cases the husband contended against the maintainability of wife's claim of maintenance under the Hindu Marriage Act, 1955 on the ground that wife gave up her claim under consent decree for maintenance in future, e.g. in *Geeta Satish Gokarna v. Satish Gokarna*. This case came before Bombay High Court, the court, however, refused to accept the husband's argument and held that "An agreement in consent decree not to claim maintenance cannot close the doors for a wife to maintenance thereafter".

The other loophole in the Act is that there is no legislative provision regarding maintenances to the place of filing of petition or jurisdiction of court. In the absence of the specific provision regarding this matter the provisions of CPC is applied, In *Sucha Dilip Ghat v. Dilip Shanta Ram Ghate*, the issue was: can a maintenance petition by wife under the Hindu Adoption and Maintenance Act, 1956 be filed at a place where wife resides. Here Section 20 (c) of CPC was applied and was

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58 AIR 2003 Mad.
59 AIR 2004 Bom. 345
60 AIR 2003 Bom. 390
held where petitioner resides.

In *Popri Bai v. Teerath Singh*\(^6\) this case was explicit example of how unscrupulous husbands try to harass their wives and use the process of court for achieving this. The court noting the tricks of the husband with regard to the alimony *pendente lite* under Section-18 of Hindu Adoption and Maintenance Act, 1956, ordered the maintenance from the date of application and not from the date of the order. Thus, there is some pitfalls in the Hindu Law regarding the maintenance of wife which have already been pointed out. As the maintenance of the women is a very sensitive issue, so, it must be handled in a careful manner, it must be paid sharing the due regard to the intention of the legislature.

(d) **Advocacy for Reforms and Improvements**

It is a well known fact that Hindu Marriage Act, 1955 is social welfare legislation. The judiciary must always while interpreting its provision, keep in consideration its social welfare nature. A liberal approach must be adopted in the interpretation of its provisions.

It is also necessary that the tricks of the spouses, for avoiding the charge to maintenance must be noticed timely so as to implement the Act sharing the true intention of legislature for its enactment.

Right of a wife to maintenance where a marriage is void had always been controversial. An amendment in law is in offing where the simple fact of the parties having gone through a ceremony of marriage would be enough to entitle the wife to maintenance.

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\(^6\) AIR 2004 Raj. 128
It is also a remarkable point that a subjective approach in order to avoid the grant of relief must not be allowed by a court.\textsuperscript{62} The denial of maintenance under Section-25 of Hindu Marriage Act, 1955, was due to the concealment of her epilepsy by the wife before marriage on the already obtained annulment. Here I am not justifying "wrong", "misconduct" or "fraud" on the part of any spouse but only indicating how subjective approach can lead to varying interpretations in order to deny or granting a relief. \textit{Bakul Bai v. Ganga Ram}\textsuperscript{63} case the fraud is serious but the victim is the wife only. Thus the court, while deciding this type of matrimonial case, must always take into consideration that the aim of the enactment should not be frustrated. To avoid the confusion regarding the maintenance as has been discussed in \textit{Geeta Satish Gokarna v. Satish Gokarna},\textsuperscript{64} there must be insertion of the provision by the legislature regarding the nullification of consent agreement not to claim maintenance in future as the maintenance has been construed as an integral part of right to life.

The Hindu Law is social welfare legislation and beneficial in nature, it has been enacted in comprehensive manner so, it would be unfair not to have the specific provision regarding the place of filling of petition or jurisdiction of the court. There must be some specific provision regarding that to face the problem raised in \textit{Sucheta Dilip Ghate v. Dilip Shanta Ram Ghate}.\textsuperscript{65} The insertion of the specific provision regarding the place of filing suit will cause the great help in avoiding confusion and will reduce the delay in deciding cases.

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\footnote{63} 1988 I Scale 188.
\footnote{64} AIR 2004 Bom. 345
\footnote{65} AIR 2003 Bom. 390
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4.3 MAINTENANCE OF WIFE UNDER MUSLIM LAW

(a) Analysis of Legislative Provision

The rules regarding the maintenance of Muslim wife has been given in Sharia. According to the ordinary sequence of natural events, the wife comes first. Her right of maintenance is absolute. Her right remains unprejudiced even if she has property or income of her own and the husband is poor. A husband is bound to maintain his wife, irrespective of being a Muslim, non-Muslim, poor or rich, young or old if not young to be unfit for matrimonial intercourse. In addition to the legal obligation to maintain, there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called kharch-i-pandan, guzara, mewa-khori, etc. The husband is bound to maintain if she fulfils the following conditions: (i) She has attained puberty, i.e., an age at which she can render to the husband for his conjugal rights; (ii) She places and offers to place herself in his power so as to allow free access to herself at all lawful times and obeys all his lawful commands. It is to be noted that a Muslim wife is not entitled to maintenance in certain conditions. These conditions are: (i) If she abandons the conjugal domicile without any valid cause; (ii) If she refuses access to her husband without and valid cause; (iii) If she disobedient to his reasonable commands; (iv) If she refuse to live with her husband without any lawful excuse; (v) If she has been imprisoned; (vi) If she has eloped with somebody; (vii) If she is a minor on which account marriage cannot be consummated. (viii) If she deserts her husband voluntarily and does not perform her marital duties, and (ix) If she makes an agreement of desertion on the second
marriage of her husband.

The wife's right to maintenance ceases on the death of her husband, as in this condition her right of inheritance supervenes. The widow is, therefore, not entitled to maintenance during the Iddat of death. But under Muslim Law, a divorce wife is entitled to be maintained by her former husband during the period of Iddat.

Now after discussing the maintenance of Muslim wife during the subsistence of marriage, it is planned to discuss the maintenance of Muslim divorcee and controversy between the provisions of Criminal Procedure Code and the Muslim Personal Law on the point of maintenance of Muslim divorcee. It is pertinent to note that under classical Islamic law, a divorcee is entitled to get the maintenance provision but the same will continue till the expiry of the period of iddat. There is controversy between the classical rules of Islamic Law and provisions of Criminal Procedure Code regarding maintenance. The controversy arose when British India took a legislative step to regulate the institution of maintenance of wife, under Section 488 of the old Criminal Procedure Code, 1898, the husband might be compelled to make a monthly allowance not exceeding Rs. 500 per month as maintenance to his wife. But the wife's right to maintenance under this Section could be defeat by the husband by obtaining the divorce under the personal law. The provision under Section 488 of the old Criminal Procedure Code, 1898 was very much in the line with the sprit of Islamic law, where it furnished a speedy remedy for securing maintenance to all Indian wives neglected by their husband on certain grounds including bigamy. In several cases the separate maintenance orders were granted in favour of the wives, but in many cases where a
maintenance order under Section 488 of Criminal Procedure Code, 1898 were granted to Muslim wife, her husband subsequently divorced her by Talaq, consequently the maintenance order so granted ceased to be effective after the expiry of iddat period as per the rules of Muslim law. This situation caused hardship and opened the gate for a long battled between the Sharia on one side, Criminal Procedure and the Indian courts on the other. To remove conflict, the joint committee recommended that the benefit of the provisions should be extended to a woman who has been divorced by her husband and it should continue so long as she has not been remarried after the divorce. Accordingly, the uniform law of maintenance was introduced to all citizens of India through the amendment in criminal procedure code in 1973. Accordingly, clause (b) of explanation to Section 125(1) was enacted, which laid down that for the purpose of maintenance "wife" includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried, however, Section 127 (3)(b) was added to provide protection to Muslims and Muslim Personal laws. This code under chapter IX, provides a uniform law of maintenance through the amendment in Criminal Procedure Code in 1973 the uniform law of maintenance was introduced to all citizens of India. The definition of wife as given in explanation of Section 125 of the Criminal Procedure Code, 1973 is noteworthy for the purpose of analysis: "Wife includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried". This definition of the wife was objectionable to the scholars to the Islamic matrimonial jurisprudence as the same was foreign to the Islamic concept of wife and Indian Muslim resented and thus their resentment was duly recognized. This definition of wife laid down by the legal fiction on the basis of which
the two strangers being of opposite sex (after the divorce on the expiry of *iddat* period) are treated to be the husband and wife under Section 125 of the Cr. P.C. for the purposes of maintenance even after divorce. When the bill to this effect was in process it was subjected to tooth and nail opposition by Muslim members in the legislative house *viz*, Ibrahim Sulaiman Seth, G.M. Banatwala, and others. They objected the explanatory clause defining the term 'wife' and they advanced potent advocacy that the Muslim must be exempted from the ambit of the definition of wife, but the strong defense of the then law minister and minority of opposition including Muslim members came in the way and resultantly could not achieve the desired goal. The law minister painted out that the explanation in Section 125, of the Cr.P.C. did not affect the civil status of husband and wife and manner and besides this, made the following observation: "we have received a lot of representations which show that after divorce, woman are generally in very bad plight and it is a very difficult social and humanitarian problem, I do not think that Muslim Personal Law comes into the problem". However, the advocacy of law minister and other supporter's plea could not satisfy, and a proposed modification was vehemently opposed by the numerous Section of Muslims.

The definition of the wife was objected by the scholars Islamic matrimonial jurisprudence as the same is foreign to Islamic concept of wife and Indian Muslim resented and thus their resentment was duly recognized, Resultantly, Section 127 (3)(b) was added to satisfy the Muslim community's resentment and the same was desired to work as exception, this empowers the Magistrate to cancel the order to maintenance passed under Section 125 of the code. If the divorce
women has received whether before or after the date of the said order, the whole or the sum which was payable under customary or personal law applicable to parties.\textsuperscript{66} The Provision for maintenance of wives, whether married or divorced, who are unable to maintain themselves is a social welfare measure applicable to all people irrespective of caste, creed, community or nationality.\textsuperscript{67}

In \textit{Bai Tahira's} case, the supreme Court did not turn to the \textit{Holy Quran} but confined itself to Section 125 considering it as a secular provision and came to the conclusion that the claim of maintenance by the divorcee was indefeasible be the husband Hindu, Muslim or others, so long as the spouse had not remarried and had no means to maintain herself. The very next year the court reinforced it's earlier decision in \textit{Fuzlunbi}’s\textsuperscript{68} case in the following words:

"Whatever be the facts of a particular case, the Criminal Procedure Code by enacting Section 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill used wives and the castaway ex-wives, only if the woman has not receive voluntarily a sum at the time of divorce, sufficient to keep her going according to the circumstances of the parties".

Section 127 (3) (b) of Criminal Procedure Code lays down that "Where any order has been made under Section 125 in favour of a woman who has been divorced by or has obtained a divorce from her husband, the Magistrate shall cancel such order of maintenance if he is satisfied that the divorced woman has received the whole of the sum

\textsuperscript{66} Mohammad Shabbir, Muslim Pesonal Law and Judiciary (Ed., 1\textsuperscript{st}, 1988, Allahabad)
\textsuperscript{67} Bai Tahira v. Ali Husain, AIR 1979, SC 362.
\textsuperscript{68} Fuzlunbi v. Kader Vali, AIR 1980, SC 1730.
whether before or after the date of such order under the personal law applicable to the parties.

The position as finally enacted laid down that through court could grant maintenance to a divorced wife, at the time of so doing, they should give due consideration as to whether she had already realized from her husband in full, her post divorce entitlement under any customary or the personal law of the parties.

The perusal of the legislative history of Section-127 (3) (b) made it clear that this provision was brought to provide to safeguard to Muslims and their persons law. It empowers the magistrate to cancel the order Section 125 of Criminal Procedure Code, 1973 if the divorced women who has received whether before or after the date of said order the whole of sum which was payable under any customary or personal law applicable to those parties. Mr. Justice Krishna Iyer further states: "Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127 (3) (b) as much as it does Section!25. So a farthing is not substitute for a fortune nor naive consent equivalent to intelligent acceptance". Thus the impact of Sections 125-127 of the Criminal Procedure Code, 1973, on the maintenance rights of Muslim ex-wives has been the subject of interpretation through Indian judiciary. The ruling laid down in Bai Tahira's case and Fuzlunbi's case, and their objection ability to Muslims are well known and to get the desired result in 1981. The Supreme Court was asked to reconsider these ruling in Mohd Ahamd Khan v. Shah Bano Begum.69 However it added fuel to the fire by

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69 AIR 1985, SC 945.
laying down: "Although the limits of the Muslim Husband's liability to prove for maintenance of the divorced wife is up to the period of Iddat it does not contemplate or countenance the situation envisaged by Section 125 of the code, it would be incorrect and unjust to extent the above principle of Muslim law cases in which the divorced wife is able to maintain herself. The husband liability ceases with the expiration of period of Iddat. But if she is unable to maintain herself after the period of Iddat she is entitled to have recourse to Section 125 of the Code".

But chief Justice of Supreme Court Mr. Justice Y.V. Chandrachud going for beyond Mr. Justice Iyer's thinking intruded into Muslim Personal Law saying the said special provision of the code totally ineffective. Two points mainly alarmed the Muslim of such judgment for the Alleged attempt of the judge to "reinterpret" certain Qur'anic verses and Second admonition to the state in respect of the uniform civil code.

As a result religious sentiments of Muslim were not only injured by the wording and purport of the Shah Bano's judgment, but also much more by its projection on an anti - Islamic law ruling of the highest court of justice in the country. There upon Muslim organizations and individuals under the leadership of the All India Muslim Personal law Board started a country wide agitation and caused the majority of Muslim citizen in India to demand statutory protection of their personal law.

Some relevant provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 regarding Maintenance of Muslim Divorce are in need of separate treatment. Section 3(l)(a) of Muslim Women
(Protection of Rights on Divorce) Act, 1986 lays down that a divorced Muslim wife shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. Section 3(1) (b) of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down the condition where divorced Muslim wife herself maintains the children born to her before or after her divorce, In this condition she will be entitled to a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children. Section 3(l)(c) of Muslim Women (Protection of Rights on Divorce) Act, 1986 lays down that a Muslim divorced wife shall be entitled to an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law. Section 3(l)(d) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 lays down a Muslim divorcee will be entitled to all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends. Section 3(2) of this act lays down that where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been or made or paid or the properties referred to in clause (d) of sub-Section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

Section 4 of Muslim Women (Protection of Rights on Divorce) Act,
1986, deals with the rules as to order for payment of maintenance. Subsection (1) of this Section lays down that notwithstanding anything contained in the forgoing provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay reasonable and fair maintenance to her as he determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at period as he may specify in his order. There is a proviso in this Section which provides that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and the event of any such children being unable to pay such maintenance; the magistrate shall order the parents of such divorced woman to pay maintenance to her. The second proviso of this Section provides further that if any of the parents is unable to pay his or share of the maintenance ordered by the Magistrate on the ground of his or not having the means to pay the same the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance order by him be paid by such of the order relatives as may appear to the Magistrate to have the means of paying the same in such proportion as the Magistrate may think fit to order. Sub-section 2 of this Section lays down that where divorced woman is unable to maintain herself and she has no relatives as mentioned Sub-section (1)
or such relatives or any one of them have not enough means to pay the maintenance ordered by the magistrate or the other relatives have not the means to pay shares of those relatives whose shares have been ordered by the magistrate to be paid by such other relatives under the proviso to sub-Section (1), the Magistrate may, by order direct the State Wakf Board established under Section 9 of the Wakf Act (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by the under sub-Section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, gives the option to divorced Muslim wife to be governed by the provisions of Section 125 to Section 128 of Criminal Procedure Code, 1973, but the condition is that there must be an agreement between the husband and wife by an affidavit, that they would prefer to be governed by the provisions of Section 125 to Section-128 of Criminal Procedure Code, 1973. It is also necessary that the declare must be made on the date of the first hearing. The explanation of this Section says that for the purpose of this Section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

Section 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, is the transitional position which lays down that every application by a divorced woman under Section 125 or under Section 127 of the Criminal Procedure Code, 1973 (2 of 1974), pending before a Magistrate or the commencement of this Act, shall,
notwithstanding anything contained in that code and subject to the provisions of Section 5 of this Act, be disposed of by such magistrate in accordance with the provisions of this Act.

(b) Evaluation of judicial pronouncements

The judicial attitude towards the application of maintenance provisions to Muslim wives and divorcee has created a crisis. The interpretation of Section 125 and 12 (3) (b) of the code as applicable to Muslim has been considered by the Supreme Court and High Courts but the decision are some how opposed to the Spirit of Islamic Law. The courts have dealt with the following issues from time to time.

1. Whether Section 125 of the code is violative of Articles 14 and 19, offends the fundamental rights under Articles 25 and 26 of the Constitution?

2. Whether the definition of the wife envisaged in explanation (b) of Section 125 (1) of the code is in conflict with the personal law of Muslims of India?

3. Whether a Muslim divorce can seek the benefit of Section 125 of the code?

4. Whether the payment of mahr by a Muslim satisfied the requirements of Section 127 (3) (b) and obliged the Magistrate to cancel a maintenance order made in favour of a Muslim divorcee? The Criminal Procedure Code, 1973 provides a uniforms law of maintenance. The new provisions enjoin payment of maintenance to divorce till their remarriage of death. It imports to create an artificial relation of husband and wife
only for the purpose of maintenance after divorce.\textsuperscript{70} Section 125 of the Criminal Procedure Code, 1973 by means of an explanation sought to extend the magisterial power to provide for maintenance of an ex-wife also.

However, an exception in the form of Section 127 (3) (b), this empowers a magistrate to cancel the order of maintenance made under Section 125 of the code, if the divorced women has received, whether before or after the date of the said order, the whole of the sum which under any customary of personal law applicable to the parties was payable.\textsuperscript{71}

Where any order has been made under Section 125 of Cr. P.C. in favour of a women who has been divorced by or has obtained a divorce from or her husband, the magistrate shall if he is satisfied that the women has been divorced by her husband and that she has received, whether before or after the date of order, the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce.

Under the new code the questions arise:

1. Whether a Muslim divorce can seek to the benefits of Section 125?

2. What is the 'sum due' from the husband to the wife on divorce under the Muslim law?

3. If the husband paid the whole of sum is there any justification in

\textsuperscript{70} See Chapter 9 of the new code- 1973.
\textsuperscript{71} See 127 93(b) of the Cr. PC.
refusing the benefits conferred by Section 127 (3) (b)?

In 1976, the Division Bench of Kerala High Court in *Kunhi Moyln Case*\(^{72}\) held that under the new code the Muslim divorced wife is entitled for maintenance under Section 125 of the new code after the *Iddat* period. In *U.A. Khan*\(^{73}\) the Karnataka High Court observed that the maintenance for some additional period beyond the period of *Iddat* becomes available to divorced Muslim women under Section 125 of the code. This additional benefit does not at all in the conflict with the right she has under the Mohammadan Law.

For the first time in *Kunhi Moyin's* case, the division of bench of Kerala High Court has held that the payment of maintenance during *'Iddat'* or the payment of *Mahr* will not exonerate the Muslim Husband from the liability towards the divorced wife under Section 125. Justice Khalid speaking on behalf of division Bench gave the social purpose of legislation and observed:

"The new definition (of wife) does not violate the fundamental rights guaranteed under article 25 (1) of the constitution. The definition of Section 125 (1) comes with the expression "providing for social welfare and reform", legislation contained in Art 25 (2) of the constitutions, and hence the challenge of Articles 25 is not available for the petitioner. The Criminal Procedure Code, 1973 transcends the personal law of the parties".

The Constitution is openly and determinedly secular. Religious discrimination on the part of the state is forbidden.\(^{74}\)

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\(^{74}\) Article 15, 16, 29(2), 30(2) of the Indian Constitution
Religion is guaranteed. Dr. Ambedkar in the constituent Assembly had expressed his awareness of the situation that would crop out in the field of social welfare legislation and social welfare programs of a government.

In *Iqbal Ahmad Khan* Case, the Allahabad High Court held that Section 125 of the code is not repugnant to Article 25 of the constitution. The court further observed that the history of applicability of Muslim law shows that the payment or non-payment of maintenance to one's wife could never be regarded as a matter of personal law.

In *Isac Chandra Palker* Case, the division bench of the Bombay High Court held that the maintenance right conferred upon the divorcee even after the *Iddat* period, under Section 125, is additional and independent right. The provisions of the *Shariai* Application Act, 1937 and Section 125 of the Cr.P.C. can stand together as there is no inconsistency between them.

Justice R.K. Shukla of Allahabad High Court in *Mohd Yameen* Case, observed that Section 125 is applicable and enforceable whatever may be the personal law of parties. Thus Kerala, Bombay, Calcutta and Karnataka High Court have taken the view that the Muslim Divorcees are entitled to the maintenance under Section 125 of the code even after the *Iddat* period. However, later Bombay, Andhra Pradesh and Full bench of Kerala High Court have taken a contrary view holding that if the husband satisfied the magistrate in proceedings under Section 125 of the code, that he has complied with requirements of

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75 Article 25, 26, 28m 29 and 30(1) of the Indian Constitution
77 Isac Chandra Palker v. Nayamst Bi (1980) Cr. LJ. 1180
Section 127 (3) (b), the divorced wife does not have any subsisting right of maintenance.

The Supreme Court of India in case of Bai-Tahira v. Ali Hussain\(^79\) found itself in dilemma at the time of interpreting Sections of Criminal Procedure Code, 1973. The facts of the case are enumerated as follows:

The respondent Ali Hussain (Husband) married the appellant Tahira (Wife) as a second wife, way back in 1956, and after few years had a son by her.

The initial warmth vanished and jealous is of triangular situation erupted marrying mutual affection. The respondent divorced the appellant around July 1962.

A suit relating to a flat in which the husband had housed the wife resulted in a consent decree, which also settled the marital dispute. For instance is recited that the respondent had transferred the suit premises, namely a flat in Bombay to the appellant and also the shares of the cooperatives housing society, which built that flat. The amount of Mahr (money Rs. 5000/-) and maintenance of Iddat period was also paid to the appellant.

The plaintiff declares that she has no claim or rights what so ever against the defendant or against states or properties of the defendant.\(^80\)

After the enforcement of code\(^81\) wife made a claim for maintenance from her husband under the Section.

\(^79\) AIR 1979 SC 362
\(^80\) 127 (3) (b) of Cr. PC
\(^81\) See Section 125 of Cr. PC.
In the instant case, supreme court surprisingly ignored the express legislative intention and connected the amount of dower payable at the time of divorce under the personal law with the amount of maintenance which accordingly to the court must sufficient to maintain the divorced women.

The Apex Court Bench, consisting of Justice Tulza Pulkar and Justice Pathak honoured the appeal of Bai Tahira 's maintenance and on behalf of the court justice Krishna Iyer observed the following.

He further says: The payment of illusory amount by way of customary or personal laws requirement will be considered in the reduction of maintenance state but can not annihilate unless it is reasonable substitution. The observation of the Supreme Court has amended some words in Section 127(3)(b) giving meaning it that the magistrate is empowered to cancel such order on the satisfaction that such whole of the sum is sufficient to do the duty of the wife and if it is not. It shall any be adjusted to be claim. Now in effect 'magistrate shall cancel' has turned to be 'magistrate may cancel' and after the words 'whole of the sum' the words 'sufficient to do the duty of maintenance' are inserted by construction.

In Fazlun Bi v. Khader & others\textsuperscript{82}, the Apex court again followed the ruling in Bai Tahira's case. Where the husband had divorced his wife & paid Rs. 500/- as a Mehr and Rs. 750/- as a maintenance for the Iddat period. The Andhra Pradesh High Court made a clear distinction from the issue raised in Bai Tahira's case. In the instant case the husband did not raised any plea based on Section 127 (3) (b) of Cr.

\textsuperscript{82} (1980) Cr. LJ 1249.
P.C. But the Supreme Court reiterating its previous ruling observed that whether or not the plea was explicitly answered in that case, the wife was given right to demand maintenance from her husband. The facts of the case are enumerated in the following manner:

*Fazlun Bi,* the appellant married *Khader Wall*, the respondent in 1966 and during their conjugal relationship a son was born to them. Due to some misunderstanding and strain relationship between the couple, the appellant left the house of her husband and went to her father's house. She prayed for maintenance, which was granted by lower court and upheld by the High Court. After this the respondent divorced his wife unilaterally and paid her amount of *'Mahr'* which was Rs. 500/- and the maintenance for the period *Iddat* which Rs. 750/- on the basis of divorce. The appellant Fazlun Bi was ordered not entitled for maintenance as her *'Mahr'* money and maintenance for 3 months was already paid. The session judge and High court also upheld the order of the magistrate. The appellant landed in Supreme Court against this judgment. The judgment was delivered by justice Krishna Iyer on behalf of Justice Chennappa Reddy & Justice A.P. Singh. The Honorable justice Krishna Iyer again expressed. That the payment of personal law amount as envisaged by Cr.PC\(^3\) should be reasonable and not illusory. According to justice Krishna Iyer: "even by harmonizing payments under personal and customary laws with the obligation under Section 125 to 127 of the liquidated and not a illusory amount will released the former husband from the continuing liability only if the sum paid is sufficient to maintain the former wife and salvage from the destitution. The payment of amount, customary or

\(^3\) Section 127(3)(b)
others, contemplated by the measure must inset the intent of preventing destitution and providing a sum which in more or Jess the present worth of the monthly maintenance allowances the divorces may need until death or remarriage overtake her. The policy of the law about neglected wives and destitute divorcees and Section 127 (3) (b) takes care to avoid double one under custom at the time of divorce and another under Section 125, A farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance",

*Mahr* as defined by Muslim law is a token of respect for a Muslim women and payment of the *Mahr* would be payable by the husband in the loss of connubial relationship. The principle laid down in *Fazlun Bi* and *Bai Tahira's* case violate the substantive Islamic law of maintenance. The approach of SC reflects the judicial legislation and not judicial interpretation. It is well established fact that constitution of India is the supreme law of the land. Therefore, the courts are in duty to follow the constitution rather then to deviate from the very spir of the Constitution. Constitution is the source from which every institution derives authority admits the theory of separation of power. Therefore, constitutionally the approach of the Apex court in the instant case is not legitimate. There is an experiment to give the harmonious construction to the Section 125 and 127(3)(b) or Cr. P.C. so as to achieve the true intention of the legislation. Section 127(3)(b) was mean to provide protection to Muslim Women and dilute the evil effect of the definition of the 'wife' given under Section 125 of Cr.P.C. But it is very unfortunate that judiciary could not take the cognizance in number of cases of conflict between Muslim personal law and

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84 Fazlun Bi v. Khader and another (1980) Cr. LJ 1249
Section 125 of Cr.P.C. There is a clear cut conflict between Section 125 of Criminal Procedure Code, 1973, and Muslim law. The court has restricted itself to only one aspect of the problem, that is right of a women saying that it is right of the women conferring an additional right is not in conflict with Muslim law, But the court failed to consider this important aspect, the duty of husband under Islamic law under Islam he is under obligation to pay maintenance till Iddat period and not after that period and divorce. Where as Section 125 required conversely.

Moreover the provision of the Cr.P.C. are applicable to all Indians irrespective of their cast, creed and religion. In order to prevent any grievance to any portion of state population by any state law or action special enactment are made to harnessed any excessive effect on their faith and sentiments. Thus in case of any inconstancy with Section 125 of Cr.P.C. and the Shariyat Application Act, 1937, latter should prevail. The definition of wife leads to the fact that a divorced Muslim woman irrespective of more resolution of marriage is entitled to maintenance up to the marriage or death.

Therefore, the correct construction of Section 127(3)(b) which impliedly protects the Muslim personal law, is that it is applicable to all the modes of the Muslim divorce determining the period of maintenance of divorced women. Further, Section 127(3)(b) does not deal with the case in which divorce has been obtained through the process of law.
Position after *Shah Bano’s Judgment*

The unanimous decision of a five judge’s constitution Bench of the Supreme Court in *Mohd Ahmad Khan v. Shah Bano* has evoked strong reaction among the Muslim and has also created the crisis. The facts of the case are as follows:

Mohd Ahamd Khan an advocate of Indore married Shah Bano in the year 1932. In the course of matrimonial wedlock three sons and two daughters were born to Shah Bano, lived as husband and wife for more than four decades. But then Mohammad Ahmad Khan drove Shah Bano of the matrimonial home. In the year 1975, in April 1978, after Shah Bano filed a petition under Section 125 of the code in the court of Judicial Magistrate, Indore asking for maintenance allowing from her husband of Rs, 500/- per month. Six months later filing of petition by Shah Bano her husband on November 6, 1978 divorced her by an irrevocable Talaq then Mohd Ahamd Khan himself, opposed the petition on the ground that he had already divorced her and paid her a sum of Rs. 3000/- on account of *Mahr* and maintenance for the period of *Iddat*. In August, 1979 after hearing both the sides the magistrate overruled the defence of Mohammad Ahmad Khan and passed an order granting Shah Bano a sum of Rs. 25/- per month by way of maintenance. She was not happy about the magistrate order as the income of the husband was around 60,000/- per year. Therefore, she filed an application in M.P. High Court to enhance this amount. The High Court enhanced the maintenance allowance to 179, 00 per month. Aggrieved by this order of the High Court, Mohammad Ahmad Khan filed on appeal in the Supreme Court which was heard by a Bench
consisting of Justice Murtaza Fazal Ali and Justice A. Varadh Rajan observed that Bai Tahira\textsuperscript{86} and Fazlun Bi,\textsuperscript{87} cases where were not rightly decided, therefore, they referred this appeal to a larger Bench by an order.

In this case Mohammad Ahmad Khan sought to defend his case in the following enumerated grounds:

1. Under Muslim law a divorced women is entitled to maintenance during the period of \textit{Iddat} only and not there after.

2. Since, Mohd. Ahmad Khan has already paid her the dower money which was according to him sum payable on divorce within the meaning of Section\textsuperscript{88} of Cr. P.C. and maintenance order could be passed against him or maintained any longer the Five Judges Constitutional Bench of the Supreme Court, after wide ranging discussion based arrangement by the courts as well as by several intervenes including the All India Muslim Personal Law Board, animously upheld a single judgment delivered by the chief justice Chandrachud.

3. A divorced wife is entitled to apply for maintenance under Section 125 of the code. A \textit{Mahr} is not a sum which under Muslim law is payable on divorce. So \textit{Mahr} does not fall in the ambit of Section 127 (3) (b) of the code. If there is only conflict between the Section 125 of the code and Muslim Personal Law, Section 125 overrides the personal laws. The government

\textsuperscript{85} AIR 1985 SC 945
\textsuperscript{86} Bai Tahira v. Ali Husain
\textsuperscript{87} Fazlun Bi v. Khader AIR 1980 SC 1730
\textsuperscript{88} Section 127 (3) (b)
should implement Article 44 of the Constitution of India the written arguments of the appellant are raised as follows.\textsuperscript{89}

It has been contended on behalf of the intravenous supporting the respondents by Sri Danial Latiti, Senior Advocate that under the Muslim Personal Law there is liability on the part on the former husband to his divorced wife. He relied on verse 241 of chapter II of the holy Quran. Which says; "For divorced women maintenance should be provided on a reasonable scale this is a duty of righteous'. All that has been stated in the various verses of the Qur'an does not contain the percepts of the law. Is the Prophet (S.A.W.) ordained, should be followed by the Muslim as regard instances in point what Shafi which founder of Shafi School said can be pursued? He is of the view that no maintenance is due to a woman repudiated by irrevocable divorce unless she is pregnant. It is clear that prophet (S.A.W.) himself made if clear that in case of irrevocable divorce no maintenance will be payable to divorce.

Second caliph has recorded, a percept of the Prophet (S.A.W.) to the effect that maintenance is due to a women divorced thrice during her Iddat. The Hedaya\textsuperscript{90} says, there are also a variety of traditions of same purpose.

The Holy Quran\textsuperscript{91} says, divorced women shall wait concerning them selves three monthly periods. Baillie has also state that a divorced women is entitled to maintenance during the period of Iddat. Further, so many event of authors have stated that divorced women is entitled


\textsuperscript{90} Chapter XV p. 145.

\textsuperscript{91} Verse 228.
to maintenance only during the period of *Iddat*.

The question of *Mata* in the *Quran*[^2] the nearest English equivalent is the word, 'Provision', the essence lies in that 'mata' has no connotation of recurrence as maintenance in Islam lays down that on divorce, women should be treated with due respect and apart from the husband, the later is exerted to make suitable gift at the time of separation. It is significant to point out the word 'mata' as temporary conventions in sura 40 verse 39. The verse says, "O my people: thus life of the present is nothing but (temporary) convenience".

The period of three months after divorce for women without menstruation. (*Surah-talaq: Aiyat-4*) of the *Holy Quran* which prescribed.

"Such of you women as have passed the age of monthly course for them the prescribed period, if he has any doubt is three months, and for those who have no course (it is the same).[^3]

The period till delivery for those pregnant above *Aiyat* further prescribed:

"*for those who carry, (life within their wombs), there period is until they deliver their burden's and for those who fear God, he will make their path easy*"[^4]

The fact is that only Islamic *Sharia* does not leave any women married, divorced women, widow without adequate protection even for a day. The rules relating for maintenance under Islam are based on definite and firm ground. The close relative of a divorced women in necessities

[^2]: Surah 2 Ayar 241.
[^3]: Surah Talaq Verse 4.
are obliged to maintain her and this obligation calculated as per the schemes of inheritance. Thus the judgment in Bai Tahira's and Fazlum Bi's case went against the Islamic law on divorce and maintenance which has been expressly protected by the Shariat Act, 1937.

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

In 1986, it was the after a month of Shah Bano's judgment when the parliament had to mend not only to renovate the maintenance provisions but to pass a full fledged Act, relating to the maintenance for Muslim divorcee in accordance with Shariat When the Shah Bano's case was decided by the Apex judiciary a great controversy in Muslim circle denoted and the Muslims depreciated and deprecated to accept the judgment thereof and further demonstrated that the line of reasoning adopted by the judiciary was wholly unjustifiable and contrary to the Shariat. Under the banner of All India Muslim Personal Law Board, a countrywide, agitation and protest was started and same germinant the consensus of the majority of Muslim of India in favour of the move to demand statutory protection of their personal law relating to maintenance.

The Muslim women (Protection of Rights on Divorce) Act, 1986 inspite of some shortcomings is by and large in consonance with Muslim law of maintenance and secures maintenance rights of Muslim married women to a great extent. The Apex court in such cases not merely ignored legislature history and the intention of the legislation but also violated the well established rules of harmonious construction.

91 Ibid.
In the name of women emancipation the Supreme Court at so many occasions tried to violate the personal laws of Muslim and encroached the universally accepted principles of Quran and Hadith.

Judicial Scenario after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Now some cases would be discussed to show the judicial scenario after enactment of Muslim Woman Act, 1986.

Md. Yunus v. Bibi Phenkani Alias Nisa,\(^5\) the court was required to decide whether the right under Section 125 of the Cr. P.C. to claim maintenance subsists even after the Act of 1986. It was held by the court that Section 3 (1) (a) of the Act 1986 curtailed the right of a divorced Muslim women to get maintenance for the period of iddat only. It was further said that the right to get maintenance from her husband given to a wife under Section 125 of the court until she remarried has been impliedly repealed in case of a divorced Muslim wife governed by the provision of Section 3 (1) (a) of the Act of 1986.

In Haji Farzand Ali v. Noor Jahan,\(^6\) a women filed an application for the maintenance of herself and her 3 children. The magistrate granted rupees 300/- for children. The husband filed and appeal against the order arguing that the right of he children ancillary of 1986 Act, the children right to maintenance under Section 125 also was not maintainable. Negating the contention the court held that the children's right was independent of mother. All the clauses (a) (b) (c) and (d) of Section 125 have used the conjunction 'or' which is significant and

\(^{5\text{ (1987)) 2 Crimes 241.}}\)

\(^{6\text{ (1988) Cr. P.C. L.J. 1421 (Raj)}}\)
shall each claimant's right is independent.

In *A.A. Abdullah v. A.B. Mehmoona Saiyad,*97 it was held that a divorced Muslim woman is entitled to maintenance after contemplation of her need and the maintenance is not limited only up to *Iddat* period. The phrase used in Section 3 (1) (a) of the Act of 1986 is "Reasonable and fair provision and maintenance to be made and paid to her" indicates that the parliament intended to see that the divorced women gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the street without a roof over her head and without any means of sustaining herself and her children. It was also held that the word 'within' under Section 3 (1) (a) could not be read as for or during therefore the husband was held to be liable for making reasonable and fair provision and maintenance to the wife even after the period of *Iddat.*

*In AbidAli v. Mst Raisa Begum,*98 the division bench of Rajasthan High Court has given the following view. In this case the question before the court was the effect of the provision of Act 1986 on an order passed under Section 125 of Cr.P.C. The division bench held that the Act of 1986 does not contain any saving clause for the right created by an order passed in favour of divorced Muslim women. The Act has completely obliterated the right of such women to get maintenance. The appeal without saving such right and that right now can not be enforced under Section 125 clause (3) of the code. A brief reference may also be made to the decision in *Abduallah Gafoor v. A.U. Pathumma Bibi,*99 it was held by the court that divorced Muslim

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97 AIR 1988 (Guj.) 141.
98 (1988) L. Raj. L.R. 104
99 (1989) Cr. L.J. 1224 Karnataka
women is not entitled to invoked Section 127 of the Criminal Procedure code for seeking enhancement of maintenance after 19 May, 1986, the date on which the Act of 1986 came in to force. The court further held that even though Section 125-127 of the code have not been repealed by the Act of 1986, it can be said that the Act of 1986 supplemented, widen, or enshrined the contents of the rights ensuring to the wife under the code.

In *Ali v. Sufaira*,¹⁰⁰ it was held that under Section 3 (1) (a) of the Act of 1986, a divorced Muslim woman is not only entitled to maintenance for the period of *Iddat* from her former husband but also to a reasonable and fair provision for her future. In this case the distinction was made between what is reasonable what is reasonable and fair provision and maintenance which is payable to the divorced women. The learned judge concluded that: "It is clear that the Muslim who believes in god must give a reasonable amount by way of gift or maintenance to the divorced lady. The gift or maintenance which is payable to the divorced women." The learned judge concluded that: "It is clear that Muslim who believes in God must give a reasonable amount by way of gift or maintenance is not limited to the period of *Iddat* it is for her future livelihood because God wishes to see all well".

The court, therefore held that under Section 3 (1) (a) a divorced Muslim not only entitled to the maintenance for the period of *Iddat* from her former husband but also to a reasonable and fair provision for her future and directed the Magistrate to pass orders giving effect to this intention of the legislature.

¹⁰⁰ (1988) 3 crimes 147.
Judiciary on the Application of the Muslim Women
(Protection of Rights on Divorce) Act, 1986

An impression is there that the Act undoes the gains of divorced Muslim Woman. It is not correct as a close analysis shows that the Act does nothing like throwing out of window the *Shah Bano*’s verdict or the legislative progress enshrined in the provisions of Criminal Procedure Code, 1973. The main features of this enactment may be summed up as the Act accords relief the divorcee. It does not say that *Mahr* is a consideration for divorce for is the sum referred to in Section 127(3)(b) Cr. P.C. It does not lay down that no maintenance is to be paid to the divorcee after *iddat* or that she is to be abandoned for the life after *iddat*.

The preamble of Act says that it is 'an Act to protect the rights of Muslim Women who have been divorced and further to provide for matters, connected and incidental thereto. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, entitles a divorced woman to (i) reasonable and fair provision, and (ii) maintenance to her, (iii) provision and maintenance to her children for two years, (iv) *Mahr* amount and (v) All properties given to her before, at the time and after her marriage. Out of these, the 'provision' and 'maintenance' are to be made and paid to her within the *Iddat* period by her former husband.

Does it mean that the maintenance is to be paid to her only during the *Iddat* period? The original controversy resurrected in *Arab A. Abdullah v. Arab Arab Bail Mohmuna Saiyad Bhai*. In the instant case, the

101 AIR 1988 Guj 141
matter takes into consideration was the validity of an order passed under Section 125 of Cr P.C. in view of Muslim Women (Protection of Rights on Divorce) Act, 1986. The main questions arose in the instant case for the determinations are: (i) Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by the Judicial Magistrate of First Class, under Cr, P.C. ordering the husband to pay the maintenance to the wife are nullified? (ii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, takes away the rights which are conferred upon the Muslim divorced wife under the personal law or under general law. (iii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that a divorced Woman is entitled to have maintenance during the iddat Period only. The divorced wife (the respondent) has filed criminal application under Sec. 125 of Cr. P.C. claiming maintenance allowance, the magistrate granted Rs. 250 per month. Additional Session Judge confirmed the order. Against that order, the petitioner husband filed the criminal application in the High Court. The petitioner husband contended that so far as the first issue was concerned they alleged that in view of the provision of Muslim Women (Protection of Rights on Divorce) Act 1986, the orders passed by the magistrate under Section 125 of Criminal Procedure Code is non-est. They relied on Section 7 of the Muslim Women (Protection of Rights on Divorce) Act 1986 to support their argument. In regard to the second issue they contended according to the Muslim Personal Law, the husband's liability to provide of his divorced wife is limited to iddat period, despite the fact that she is unable to maintain herself. The reason behind that is that the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986 is to nullify the interpretation given by
the Supreme Court in Shah Bano's Case. He contended that a divorced woman is entitled to get maintenance from her former husband within the *iddat* period only and that word within should be read as "during" or "for". It was further admitted that if the parliament wanted to provide for future maintenance to the divorced women, then the parliament would not have provided that the said amount should be paid within the *iddat* period but instead of that the parliament has specified the time. Contentions of the respondent wife were that with regard to the first issue they submitted that Section 7 of Muslim Woman (Protection of Rights on Divorce) Act 1986 clearly indicates that there is no inconsistency between the Muslim Women (Protection of Rights on Divorce) Act 1986 and the provisions of Cr. P.C. 125 to 128. The provisions of Muslim Women (Protection of Rights on Divorce) Act 1986 grant more relief to the divorced women depending upon the financial position of her former husband. So far as the second point is concerned the and alleged that there is a presumption against an implied repeal because there is a presumption that the legislature enacts the laws with complete knowledge of existing laws obtaining on the same subject and to failure to add a repealing clause indicates that the intention of the legislature was not to repeal the existing laws. As to the third question they submitted that parliament has provided for making fair and reasonable provision and the payment of fair and reasonable provision and the payment of fair and reasonable maintenance to the divorced women after visualizing and contemplating her future need and the same has to be made within the *iddat* period by her former husband. The Hon'ble Gujrat High Court speaking through M.B. Shah J. reasoned and held as under:
(i) As regards the nullify of an order passed under Section 125 of Cr. P.C. after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the Court reasoned that there is no Section in the Act which nullifies the order passed by the magistrate under Section 125 of Cr. P.C. Further once the order under Section 125 of Cr P.C. has been passed granting maintenance to the divorced wife then her rights are crystallized. There is no inconsistency between the provisions of the Act and provisions of Section 125-128 of Cr. P.C. On the contrary Act grants more relief to divorced Muslim Women depending upon the financial position of her husband.

(ii) As to the second issue the court relied on the statement of object and reasons as well as preamble of the Act. The Court held that on the plain reading of the Act, it cannot be said that Muslim Women (Protection of Rights on Divorce) Act 1986 in any way adversely affects the personal right of a Muslim divorced woman. Nowhere, it is provided that the rights which are conferred upon a Muslim divorced wife under personal law are abrogated or repealed. It does not provide that it was enacted for taking away same rights which Muslim woman seeking either under the personal law or general law under Section 125 of Criminal Procedure Code.

(iii) For the third issue, the court held that the Act nowhere specified the period for which she was entitled to get maintenance, nor did the Act provide that it was for iddat only.

The dictionary meaning of the word 'within' is 'on or before' and 'not later than', 'not beyond' therefore the word 'within' meant that he was
bound to make and pay the provision and maintenance before the expiration of *iddat* period. It seems that the Judgment is not upto the mark as it could not decide successfully the matter whether maintenance of Muslim Women is only for *iddat* period or beyond *Iddat* Period.

But the Kerala High Court has expressed a different view in *Abdul Gafoor Kunju v. Patumma Beevi*,\(^\text{102}\) The question before the Kerala High Court was whether the Muslim Women was entitled to invoke the Section 127 after the Muslim Women (Protection of Rights on Divorce) Act. 1986 came into force. The Session Judge was of the opinion that she could invoke the Section 127 of Muslim Women (Protection of Rights on Divorce) Act, 1986 as the Act contained no repeal, express or implied of the Code. Hon'ble High Court held that the Section 125 to 128 of the Cr. P.C. are not repealed but excluded or restricted. The well known rule of interpretation is that a special law excludes a general law when a special law namely the Muslim women (Protection of Rights on Divorce) Act, 1986 was passed to govern maintenance to Muslim wives, application to general law i.e. under code was excluded or restricted. On giving the answer to the argument that the right under the code is independent of personal law and unaffected, it was the opinion of Kerala High Court that if one considers the context in which the Act came into existence or its object, it is not possible to think that it was intended to provide additional right. It seems that the Judgment tried to give some clear cut picture regarding the (i)Application of Muslim Woman (Protection of Rights on Divorce) Act, 1986, (ii) Exclusion or restriction of the

\(^{102}\) (1989) 1 KLJ 337
application of Section 125 to 128 of Cr. P.C. by a well known rule of interpretation that special law exclude the general law; (iii) it tried to reduce the effect of judgment in A. A. Abdullah's case which says that the Act gives the additional arrangement for the maintenance of women when maintenance by previous husband fell short of her needs. This judgment clarified that the provisions of the Act is not to provide additional right. The view of Gujrat High Court in A.A. Abdullah Case was also not approved by the High Courts of Andhra Pradesh, Guwahati and Calcutta.

In Usma Khan Bahmani v. Fathimunnissa Begum,\(^{103}\) the issues of the case were: (i) Whether a divorced Muslim woman can claim maintenance under Section 125 of Criminal Procedure Code, 1973 from her former husband even after the passing of the Act of 1986? (ii) Whether the maintenance contemplated under Section 3(1) (a) of the Act of 1986 is restricted only for the period of Iddat? Or (iii) whether a fair and reasonable provision has to be made for future also with in the period of Iddat. Here the ratio of Majority judgment was 2:1. The Court held on issue No.1 that Section 3 of the Act of 1986 starts with a non obstante clause as it provides that "not with standing anything contained in any other law for the time being in force......."

Under Section 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of Iddat, is devolved upon the relatives and if the relatives are not available on the Waqf Board.

The very concept of the liability of the husband is limited for and

\(^{103}\) 1990 Cr. L.J. 1364 APHC
during the period of *Iddat*, under Section 5, it is provided that the husband and wife would be governed Section 125 to 128 of the Cr. P.C if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provision of Sections 125 to 125 of the Cr.P.C.

Further, under Section 7 of the Act, the intention of the legislature is clear when it provided that every application by a divorced woman under Section 125 or 127 of the Cr.P.C., pending before the court or magistrate in the commencement of the Act of 1986, shall note with standing contained in that code and subject to the provision of in accordance with the provisions Section 5 of this Act be disposed of in accordance with the provision of the Act of 1986.

A combined and harmonious reading of the provisions of Section 3 to 7 of the Act of 1986 clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. On the Issue No.2, the court held that the liability of the Muslim husband to pay reasonable and fair provision and maintenance is confined only for and during the period *oitddat*. The concept of reasonable and fair provision and maintenance cannot be read as meaning two different things. The word "**Mafa**" used in *Ayat 241* in chapter II of the Holy Quran indicates that the word "provision" and "maintenance" convey the same meaning. Even in Shah Bano case, it is recognized that the word "provision" and "maintenance" convey the same meaning. In such circumstances to say that a fair and reasonable provision shall be made by her husband forecasting her future needs, would amount to the negation of the very object of the Act for which Act of 1986 has been promulgated. It
would give rise to a new concept of liability on the part of the husband which would be difficult to be translated in concrete term as it would be almost impossible to visualize the future needs of the divorced Muslim woman which would be depending upon the several factor like remarriage, change in the circumstances, or in the life style etc.

Therefore, in regard to the second question the judge held that the liability of Muslim husband to pay the fair and reasonable provision and maintenance contemplated under Section 3(1 )(a), of the Act is confined only upto the period of Iddat. On the Issue No.3 the Court held that under Section 7 of the Act of 1986, it is specifically stated that every application by a divorced women under Section 125 or 127 of the code pending before a Magistrate on the commencement of the Act, shall be disposed of by the Magistrate in accordance with the provision of the Act of 1986, having due regard to Section 5 of the Act and the rules framed there under with regard to the option to be exercised by the parties. Any order of maintenance which is not warranted by the provision of the Act can not be executed against the husband. Therefore the Judge held that the Section 125 to 128 of Cr. P.C is not applicable after coming into force Act 1986, save in so far as the parties exercise their option under Section 5 of the Act, to be governed by the provision of Section 125 to 128 of Cr.P.C. It seems that judgment is good keeping in view of the actual position under the Muslim personal Law and historical background of the Act of 1986. It has very rightly decided the issues involved in the present case and has clarified the legal position on those issues. It has rightly remarked that divorced woman can not claim maintenance under Section 125 of Cr. P.C., after passing of the Act of 1986, except under some
special circumstances. It has held that if it has been recognized that the liability of the husband to pay maintenance is limited to the period of *Iddat*, then there is no justification to hold that the liability of making a reasonable future provision extend beyond the period of *Iddat* under Section 3(1)(a) of the Act. It has remarked correctly that the combined and harmonious reading of the Section 3 to Section 7 the Act of 1986, clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. In this case the majority dissented from the decision of Gujrat high Court in *A.A. Abdullah's* case, and decision of the Kerela High Court in *Ali v. Sufaira*,\(^{104}\) wherein it was held that under Section 3(1)(a) a divorced woman was not only entitled to maintenance up to the period of *Iddat* but also to a reasonable and fair provision for her future.

The Calcutta High court, also dissented from the decision of the Gujrat High Court in *Abdul Rashid v. Sultana Begum*,\(^{105}\) in the instant case, the main issues were: (i) Whether the Muslim husband has to provide maintenance to his divorced wife up to the period of *Iddat* or beyond the *Iddat* period? (ii) Can the Section 4 be interpreted to mean that it was open to divorced wife to claim maintenance under Section 4 of the Act in addition to Section 3 of Act. The Hon'ble High Court held on issue 1 that the liability of the husband to provide maintenance was limited for the period of *Iddat* and therefore, she was unable to maintain herself. She had to make an application under Section 4 of the Act. In view of the Act the court held on issue 2, that the provision could not be fairly interpreted to mean that it was open to divorced wife

\(^{104}\) (1999) 3 Crimes 147.
\(^{105}\) (1992) Cri. LJ 76
to claim maintenance under Section 4 of Act in addition to what she might have received under Section 3 of Act. This judgment seems to be good one keeping in view of the legislative background of Act of 1986 and actual position of Muslim personal law. This judgment was akin to the principles laid down in *Usman Khan Bahmani*’s case. It opposes the decision of *A.A. Abdullah*’s Case decided by the Gujrat High Court. It rejected the interpretation of the Gujrat High Court which laid down that the provisions of the Act is to make an additional arrangements for her when maintenance allowance and provision settled by the previous husband fell short of her needs on account of some unforeseen circumstances.

Yet the Calcutta High Court took a different liberal view in *Shakeela Parveen Ali*, the main Issues were: (i) Whether the term ‘with in' used in 1 i (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 be interpreted only as 'for or during' or a future provision may be made within *Iddat* period or for beyond *Iddat* period, (ii) What procedure is to be followed when the petition regarding maintenance under Section 125 of Cr P.C. is pending before the passing of Act? The Calcutta High Court extensively quoted the judgment of Gujrat High Court and approved both the principles therein. The order passed by the Magistrate under Section 125 of Cr. P.C. was not by nullified the Muslim Women (Protection of Rights on Divorce) Act, 1986. The word 'within' in Section 3 does not mean 'for or during', it means 'on or before', and the parliament has nowhere provided that the reasonable and fair provision and maintenance are limited only for the *Iddat* period. Therefore the word 'within' meant the he was bound to make

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*106 2001 (1) CLJ 608*
and to pay the provision and maintenance before expiration of *Iddat*. Accordingly it was held that the expression during *Iddat* period should be extended till a Mohammedan divorced female enters remarriage. The magistrate's order was modified to the effect that the petitioner was entitled to get maintenance allowance from the date of application till she remarries. This judgment can't be said upto the mark as it did not pay regard to the historical background of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986. The High Court under the guise of so called judicial activism tried to extend the meaning of word 'within' unnecessarily. The additional benefit of maintenance to the divorced Muslim women till she remarries was an open encroachment of Muslim Personal Law. The meaning of word 'within' under Section 3(1)(a) of the Act can't be extended 'upto the remarriage of divorcee, while taking regard to the purpose, object & preamble of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Here it would be worth mentioning the case of *Idris Ali v. Ramesha Khatoon*,\(^\text{107}\) the question before the court was whether the provision of Muslim Women (Protection of Rights on Divorce) Act, 1986, shall have the application when a divorced woman approaches the court of a magistrate for the execution of final order already *passed in her* favour under Section 125 of Cr.P.C. Petitioner contended that as soon as the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. Sections 125, 127, 128 of Cr.P.C, so far as *divorced Muslim women are* concerned became inapplicable on Muslim women by virtue of Section 7 of Muslim Women (Protection of Rights on

\(^{107}\) AIR 1989 Gauhati 24
Divorce) Act, 1986. It was also pointed out that such aforesaid order maintenance would become nugatory and non-est in the eye of Law as the right of the parties have to be decided according to the provision of Section 3 and Section 4 of this new Act by virtue of Section-7 of the Muslim Women Protection of Rights on Divorce) Act, 1986. Respondent contended that action 7 has settled all controversy at rest. It was pointed out that Section 7 in terms mentioned that if an application filed by a divorced woman under Section125 or 127 of Cr. P.C., is pending before a magistrate on the commencement of the Act of 1986 then only it has to be disposed of according to the provisions of new Act of 1986. His submission was that condition precedent for the application of new Act was the pendency of the proceedings, under Section 125 and 127 of Cr P.C., on the date of the commencement a new Act of 1986 and once the proceeding is disposed of under Section 125 or 127 of Cr.P.C., by the magistrate then there is no pendency. After analyzing the fact end the law on the point the Hon'ble High Court held that if a divorced Muslim woman approaches the court of a magistrate for the execution of a final order already passed under Section 125, 127 of Cr.P.C., earlier to the new act of 1986, then she will have the right to get the order executed under Section!28 of Cr.P.C., which Section has been excluded from Section 7 of Act of 1986, and Section 7 of new Act of 1986 would not take away the right. It may be said, that this judgment shows the tendency of the judiciary to the application of the provisions of Criminal Procedure Code inspite of the coming into force of Muslim Women (Protection of Rights on Divorce) Act, 1986, which has made the sufficient provisions for providing the right to the maintenance of Muslim divorcees.
The single bench of the Bombay High Court had considered it just and equitable that the husband should pay the divorced wife the maintenance allowance even after the *Iddat* period, but thought it is necessary that this matter, in the interest of justice, should be re-accessed to full bench for its decision, therefore this revision application of *Karim Abdul Rehman Seikh v. Shehnaiz Karim Seikh*,\(^{108}\) came up before the full bench comprising Shah J., Smt. Ranjana Desai J., and Fatil J. The four prime questions before the court were:

1. Whether the Muslim husband's liability under Section 3(a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 to make a fair and reasonable provision and to pay maintenance is restricted only upto the *Iddat* period or whether it extends beyond *Iddat* period.

2. Whether the Act has the effect of invalidating the orders Judgments passed under Section 125 of the Code prior to the coming into force of Act, that is, whether the Act divests parties of vested rights or benefits by acting retrospectively,

3. After the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 whether the divorced Muslim wife apply for maintenance by invoking the provision of Chapter IX of Criminal Procedure Code, 1973.

4. Whether the family court has the jurisdiction to try applications of Muslim divorced woman for maintenance after coming into operation of Muslim woman Act 1986.

\(^{108}\) 2000 (3) Mh. LJ 555.
The High Court held for issue No. 1, that a reasonable and fair provision has got to be distinct from maintenance. The word provision has a future content. In the context be of Section 3(1) (a) of this Act, it would mean an amount as would be necessary for the divorced woman to look after herself after the Iddat period. This may involve amount for her residence, food, clothing, medicine and the like expenses. So, like Section 125 of the code no maximum amount is fixed here, but the quantum, has got to be substantial having regard to the future needs of the woman. The court concluded that the husband has to pay her within the Iddat period but he has to make the reasonable and fait provision for her within the Iddat period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women (Protection of Rights on Divorce) Act, 1986 while deciding this amount regard will be had to the needs of the divorced woman, the standards of the life enjoyed by her during her marriage and the means of her former husband. If the husband is unable to arrange for such a lump sum payment he can ask for the installment. Further, till the husband makes the provision the magistrate may direct monthly payment to her even beyond Iddat, till amount is fixed. On the second Issue, the court held that "The Section of 125 Cr P.C., prior to the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 are not nullified by reason of its coming into force. The Act does not direct the divorced woman's right to get maintenance under Section 125 of the vested in her by reason of the order of he competent court passed prior to its coming into force".

For the issue No.3, the court ruled that "After the commencement of the Act a divorced wife cannot apply for maintenance by invoking the
provisions of Chapter IXth of the code. According to Section 5 a divorced wife and her husband can by an agreement subject themselves to the jurisdiction of magistrate under Section 125 and 127 of the code and agree to be governed by the said provisions (but not without such agreement).

On the 4th issue, the Court held "by virtue of Section 3 and Section 4 of the said Act the application under Section 5 and Section 7 of the Act have to be filed before the Magistrate only. We therefore hold that after coming into force of the Act of 1986 the Muslim women can apply under Section 3 and Section 4 of Act only before the first class Magistrate having jurisdiction under the code. The Family court can not deal with such application".

These case prior to Denial Latifi case can be quoted in brief such as in Rafiq v. Farida Bi,109 Madhya Pradesh High Court held that if a divorced Muslim wife wanted maintenance beyond the Iddat period, she had to make her relatives/Waqf Board as parties to suit under Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986, as the husband could not be made a party. Virtually this judgment is in the consonance of the intention of the legislature in enactment of Muslim woman Act, 1986. This judgment support the traditional view of Muslim Personal Law that the view of Muslim Personal law that the husband could not be made a party if the divorced Muslim woman wanted maintenance beyond the Iddat period.

In Julekha v. M. Fazal,110 again the M.P. High Court held that the

109 2000 (2) MPWM 77 MP
110 2000 (1) Vidhi Baswar 123 MP
Muslim law makes the husband liable for the maintenance of his divorced wife during *Iddat* only. It seems that this judgment of Court also supported the traditional view of Muslim Personal Law that the liability of the Muslim husband to maintain his divorced wife is only for the duration of *Iddat*. Thus the legal status if the right of the divorced wife continued to be fluid variable according to the views of different High Courts. The main contentious issues were:

I. Whether the fair and reasonable provision was in additions to the maintenance allowance or included in it, i.e. quantum of maintenance.

II. The duration of time for which the husband liability extends whether within *Iddat* or beyond *Iddat* period.

No doubt, the Muslim divorcee's fate was a progressive path:

- In the first stage the husband could get rid of himself of all liability by simply divorcing her.

- The second stage was the 1973 amendment in the Criminal Procedure Code which laid down that husband was liable to maintain her even after Talaq; this was her first stage of acquirement. But the husband found an escape value which was the payment of *Mahr*.

- In the third stage, the Judiciary insisted on making this *Mahr* reasonable.

- The forth stage came when the court insisted on her maintenance, whether *Mahr*. Is given or not.

- The fifth stage was marked by Act of 1986.
The uncertainties, which were led by the different decisions of the various High Courts had to be settled. The verdict of Supreme Court in *Danial Latifi v. Union of India,*\(^{III}\) deciding some of the unsolved questions. Issue before the Hon'ble Supreme Court was whether Muslim Women (Protection of Rights on Divorce) Act, 1986 is an unconstitutional on the ground that it infringed Articles 14, 15 and 21 of the Constitution? Contentions of Petitioner were the following:

(i) Section 125 Cr. P.C. is a provision made in respect of woman belonging to all religions and the exclusion of Muslim woman from its benefit would be discrimination between woman and woman.

(ii) Apart from the gender justice caused in the country this discrimination further leads to a monstrous proposition of nullifying a law declared by this court in Shah Bano's case. Thus there is the violation of equality before law but also the equal protection of law and inherent infringement of article 21 of the Constitution as well as basic human values.

(iii) If the object of Section of 125 Criminal Procedure Code, 1973 is to avoid vagrancy, the remedy there under can not be denied to Muslim woman.

(iv) The Act is un-Islamic, un-Constitutional and it has the potential of suffocating the Muslim woman and under mines the secular, character which is the basic feature of the Constitution.

(v) There is no reason to deprive the Muslim women from the

\(^{III}\) (2001) 7 SCC 740; 11 (2001) DMC 714
applicability of the provision of Section 125 Cr.P.C., and consequently, the present Act must be held to be discriminatory and violative of Article 14 of Constitution.

(vi) The conferment of the power on magistrate under Section 3 (2) and Section 4 of the Act is different from the right of a Muslim woman like any other woman in the country, to avail of the remedies under Section 125 of Cr.P.C. and such deprivation would make the act unconstitutional as there is no nexus to deprive a Muslim woman from availing remedies under Section 125 of Cr.P.C., not with standing the fact that the conditions precedent for availing of the said remedies are satisfied.

The Contention of respondent in the support of the impugned act, were the following:

(i) Where a question of maintenance which forms parts of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision to be made and paid by her former husband within the period of Iddat and when the fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of Iddat would not arise.

(ii) The personal law of any community is a legitimate basis for discrimination, if at all and therefore does not offend Article 14 & 21 of the Constitution.

(iii) The parliament enacted the impugned Article respecting the
personal law of the Muslims and that itself is a legitimate basis for making a differentiation; that a separate law for community on the basis of personal law applicable to such community can not be held to be discriminatory.

(iv) The Act resolved all issues, bearing in mind the personal law of the Muslim community and the fact that the benefit of Section 125 of Cr.P.C have not been extended to a Muslim woman would not necessarily lead to a conclusion that there is no provision on the Act to protect the Muslim woman from vagrancy and from being a destitute.

The Hon'ble Supreme Court by analyzing these points held that Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down two separate and distinct obligations on the part of the husband, viz,

(i) To make reasonable and fair provision for his divorced wife,
(ii) To provide maintenance for her

The emphasis is not on the nature of duration of any such provision or maintenance, but on the time by which an arrangement for the payment of provisions and maintenance should be concluded namely, 'within the Iddat period'.

The Court upheld the validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 and observed in para 31 as under:

"Para 31 - Even under the Act, the parties agreed that the provisions of Section 125 of Cr.P.C. would still be attracted and even otherwise, the Magistrate has been conferred the power to make appropriate
provision. Therefore, what could be earlier granted by Magistrate under Section 125 of Cr.P.C. would now be granted by the magistrate under the very Act itself.

The Court finally concluded in para 36, while upholding the validity of the Act. We may sum up our conclusions:

(i) A Muslim husband is liable to make a reasonable and fair provision for the future of divorced wife which includes her maintenance as well. Such provisions extending beyond the *Iddat* period must be made by the terms of Section 3(1) (a) of the Act.

(ii) Liability of the husband of maintains his wife under Section 3(1) (a) of the Act is not confined to *Iddat* period.

(iii) A divorced Muslim woman, who has not remarried and who is not able to maintain herself after the *Iddat* period can proceed under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, from such divorced woman including her children and her parents. In case of any of the relative being unable to pay maintenance, Magistrate may direct the State Waqf Board, established under the Act to pay maintenance.

(iv) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution.

This judgment can be said the commendable and praiseworthy step of the Supreme Court to upheld the Constitutional validity of the Muslim
Women (Protection of Rights on Divorce) Act, 1986 and paid due regard to the feelings of the minority community, i.e., the Muslim Community. As the right of the preservation of personal law is the fundamental right of any community, on that ground the Muslim Women (Protection of Rights on Divorce) Act, 1986 can not be called to run counter to the constitutional mandate. But besides it, it can also be said that in the guise of Judicial activism the court has given the liberal meaning to term within under Section - 3(1) (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 by making the husband liable to make fair and reasonable provision within the Iddat period, for beyond the Iddat period. It must be noted that the making of the future provision beyond the Iddat period for the maintenance of the divorced Muslim wife is foreign to Muslim Personal Law. Indian Muslims have their deep feelings and emotional attachment to their personal law, so it can also be said here that the sorry position is that even the Apex court was no more hesitant to venture in the areas well understood and free from legislative activity. It is to be noteworthy that as the court refers the question of Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for upholding the constitutional validity of the same, is appreciable. This step of the court tried to avoid the jurisdiction of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

After the judgment of Denial Latif's case a very interesting question came before the Bombay High Court in Sayeed Khan Faujdar Khan v. Zaheba Begum, the question was that, can a divorced Muslim wife who withdraw an earlier application under Section 125 of Cr.P.C., on

\[112\] AIR 2006 Bom. 39.
the basis of settlement, subsequently claim maintenances under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that earlier settlement made by the parities was binding on the parties. The wife's application under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 is nothing but an abuse of the process of the court. A consent order or settlement arrived between the parties in proceeding under Section 125 of Cr.P.C., operates as estoppels and no party can be allowed to Muslim or abuse the process of court by filing subsequent application under a different act for the same relief, on the same set of facts or circumstances.

Recently in 2007 a very interesting question came before Bombay High Court that whether a divorced Muslim wife alone can apply for the maintenance from her husband under Section-125 of chapter IX th of Criminal Procedure Code, 1973 in Seikh Mohammad V. Naseem Begum, the Hon'ble High Court held that Muslim divorced wife alone cannot apply for the maintenance under chapter IX th of Cr.P.C., she can only apply under this chapter IX, Section 125 of Cr.P.C., when there is an agreement between her and her husband under Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been designed to mean that no proceeding can be initiated on the application of Section 125 of Criminal Procedure Code, 1973 by divorced Muslim wife unless there is an agreement between her and her husband to be governed under Section 125 of Criminal Procedure Code, 1973. Application of the Section 125 of Criminal Procedure Code, 1973 is maintainable subject to the

113 (2007) DMC 226 Bombay High Court.
mandate of Section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Virtually the judgment of the court is good as it held that the purpose of the enactment of Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 must be fulfilled. The contrary view of the court would have under that Section otiose. Here the High Court relied on the Judgment of Supreme Court in Denial Latifi v. Union of India,\textsuperscript{114} in which court upheld the validity of Muslim woman Act, 1986.

In \textit{Riaj Fitima and Another (Petitioner) v. Mohd. Sharif}\textsuperscript{115} [Respondent], the issues before the Hon'ble High Court of Delhi were:

(i) Whether the statement of divorce taken by the husband in the written statement sufficient to constitute divorce?

(ii) Whether in the absence of direct and insufficient evidence to prove divorce, the bar of the Act of 1986, be made applicable in entertaining application of maintenance under Section 125 of Cr. P.C.?

The petitioner alleged that she was still the wife of the respondent and she was turned out of the matrimonial home for the want of dowry.

Respondent husband contended that he had obtained divorce from his wife by the Mufti. He also alleged that in view of the divorce the petition was debarrered from claiming maintenance under Section 125 Cr. P.C. Instead of the remedy of the petitioner was to take recourse to

\textsuperscript{114} II (2001) DMC 174
\textsuperscript{115} (2007) DMC 26 Delhi High Court
the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 as under:

So far as the first issue was concerned it was laid down that mere statement of the husband taken in a written statement that he had divorced his wife on a particular date would not suffice. If this accepted it would be prone to misuse. The court laid down the following perquisites for proving that divorce had taken place:-

- Divorce must be for the reasonable cause.
- There must be a proclamation of Talaq thrice in the presence of witnesses.
- There must the proof of the payment of *Mahr*.
- The husband must prove that there was attempt for conciliation prior to divorce,

As far as the second contention is concerned the court relied upon on *Salim Basha v. Mumtaz Begum*,

\[116\] where Madras High Court opines that Talaq was not valid if there was no valid evidence of pre-divorce conference for the settlement by two mediators from both sides. The Court held that respondent could not proved that he had divorced his wife and, thus the bar of the Act of 1986 was not applicable in entertaining the application of the petition under Section 125 of Cr. P.C.

This judgment is based on the Judgment of the Supreme Court in *Shamim Ara v. State of U.P.*,\[117\] wherein the court held that 'Talaq' to be

\[116\] 1991 (Criminal)
\[117\] J.T. 2002 (7) SC 570
effective has to be explicitly proclaimed. Thus in the present social welfare context the judgment is praiseworthy as it lays down that for a valid *Talaq* the prerequisites of the valid *Talaq* must be fulfilled. It will be helpful in the future to reduce the abuse of the authority of the Muslim man of giving his wife divorce arbitrary and in rash manner. Here it was clearly settled that mere the written statement of the husband that he had divorced his wife on a particular day will not be sufficient to prove divorce.

In *Tripura Board of Waqf (petitioner) v. Ayesha Bibi*\(^{118}\) [Respondent], the issue before the Gauhati High Court was that whether the Waqf board can be directed to pay maintenance amount without offering an opportunity of hearing before passing the order? The petitioner contended that there is no provision in the Act of 1986 to pay a maintenance allowance to a divorced Muslim woman by the Waqf Board, unless there is a specific order of competent court of law. He has submitted that before passing the initial order, the Waqf board ought to have been heard by the learned CJM.

Countering the contentions of the petitioner, the learned council for respondent submitted that the whole exercise on the part of the Waqf Board is to frustrate the claim of the respondent wife for the maintenance. As regard the notice to the Board, he has submitted that such notice is not contemplated in Section 4(2) of the Act nor in any provision of the Act. In this contention he has placed his reliance on the two decision of the Apex cast in *Syed Fatima Machrs* and *Denial Latifl’s* case. The learned Judge held that the plea of the petitioner board that before passing the order, they ought to have been heard, it

\(^{118}\) AIR 2008 Gauhati 10
will be suffice to say that no such provision is discernible in the Act. Section 4(2) of the Act provides that where a divorced woman is unable to maintain herself and she has no relative in Subsection 4(1) or such relatives have not enough means to pay the maintenance ordered by the magistrate or other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the magistrate to be paid by such other relatives under the second proviso to Subsection (1), the magistrate may by order direct the State Waqf Board to pay such maintenance as determined by him.

It seems that in the present case the petitioner board instead of acting towards implementation of the object and reasons for which the aforesaid Act of 1986 was made, resisted the same making all efforts. Therefore, the court should resort to prompt implementation of the order.

**Judicial Activism and its limits**

The concept of judicial activism which is another name of innovative interpretation was not of the recent past. The twin concept of judicial review and judicial activism were said to be born simultaneously. The judicial creativity may yield good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences generating conflicts which may lead to the agitation to a particular community or group.

The common criticism we hear about the judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges
metamorphose into legal principles and constitutional values. On the other facet of this line of criticism is that in the name of judicial activism, the theory of separation of powers, is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them. Judicial activism can be compared with legislative activism. The latter is of two types: (i) activist law making; (ii) dynamic law making. Activist law making implies the legislature taking the existing ideas from the consensus prevailing in the society. Dynamic law making surfaces when legislature creates an idea outside the consensus and before it is formulated, propagates it. Dynamic law making always, ordinarily carries with it legitimacy because it is the creation of the legislatures who have the popular mandate. Judges cannot play such a dynamic role; no idea alien to the constitutional objectives can be metamorphosed by judicial interpretation into a binding constitutional principle.

Thus from the above discussion on the case laws regarding the maintenance of the divorced Muslim wife, I feel that judiciary has taken the double standard in the interpretations of the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

On one side the decisions of various High Courts and Apex Court upheld the constitutional validity of Muslim Women (Protection of Rights on Divorce) Act, 1986, but on the other side I, may feel sorry to say that by unnecessarily interpreting the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, the judiciary has tried to venture in the areas well understood and free from legislative activity.
During the process of the analysis of the background history and spirit of the Muslim Women (Protection of Rights on Divorce) Act, 1986, I felt that Indian Muslims have deep emotional feelings regarding their personal law. Their personal law is constitutionally recognized and judicially enforced. So that the judiciary while interpreting the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, should pay due regard to the sentiment and emotion of the Muslim community, as "religion, ethics and law are therefore, so intermixed in Islam ...." 119

(c) Identification of Pitfalls

The above analysis of the case shows that the role of judiciary is under the sphere of doubt regarding the implementation of Islamic personal law with respect to maintenance, divorce intestate succession despite the fact that these matters have been specifically included in Section 2 of Shari'ah Application Act, 1937.

Specially in the matter of maintenance and divorce the steps of judiciary has been very harsh and has been touching the line of judicial distortion rather than judicial Activism.

The tendency of the Judiciary to the implementation of the Section 125 of Cr. P.C. regarding the maintenance of the divorce wife is frustrating the people of Islamic community. This step is being taken inspite of the fact that the Muslim divorced spouse can be governed by Section 125 of Cr, P.C. only when there is an agreement between them under Section 5 of Muslim Women (Protection of Rights on Divorce)Act, 1986.or the application of the secular provisions to the divorced

Muslim Spouse the judiciary has taken the innovative steps of not accepting the validity of talaq which has been given under the rules of Islamic Shariah. As soon as there is not the sufficient proof of talaq. The spouse comes outside the preview of Muslim Women (Protection of Rights on Divorce) Act, 1986, and the maintenance provision under secular law under Section 125 of Cr. P.C. is applied.

These cases have been recently shown in.

➢ *Iqbal Bano v. State of U.P.*\(^{120}\)

➢ *Shameen Beig v. Najmunnisa Begum*\(^{121}\)

The burning question is that the judiciary's steps to decided the validity of talaq is correct of which the sole authority of taking decision is with the Muslim community. It comes under the sphere of personal law which has been constitutionally recognized. The right of the application of the personal law in these matters has been specifically provided under the Section 2 of Shariat Application Act, 1937 by the Indian Legislature. The main pitfalls in the interpretation of Muslim Women (Protection of Rights on Divorce) Act, 1986 is, that is felt by me as a Student of personal law, the interpretation of Section 3 of this Act in such manner so as to stretch the maintenance provision beyond the *Iddat* period in the guise of future maintenance. Moreover it has been done by the Apex Judiciary through the *Denial Latifi's* case. Now the various decisions of High Courts is recognizing the existence and validity of provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

But they are very much hesitant to cross the limits set by the apex

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\(^{120}\) DMC 2007

\(^{121}\) DMC 2007 Bom. H.C. 738.
judiciary. The recent case\textsuperscript{122} of Bombay High Court is the clear example of the hesitant tendency of the High Court to cross the limits set by Apex judiciary.

The pitfalls may be summed up briefly in the following manners:

- The wrong implementation of the Cr.P.C. 127(3)(b) by not taking into consideration the legislative history and intention of legislature of inserting it. The judiciary forgot that this Section was inserted to save the Muslim Personal Law.

- The solution made by the judiciary regarding the controversy of maintenance of divorced Muslim wife within \textit{Iddat} period went against the Islamic Personal Law,

- The loopholes in the drafting of Muslim Women (Protection of Rights on Divorce) Act, 1986, which provides the chance to judiciary to interpret the provisions of the Act against the Islamic Personal Law.

The indifferent behaviours of judiciary toward the Islamic Personal Law, despite knowing the fact that this community has deep feeling and emotion regarding their religion.

(d) \textbf{Advocacy for reforms and improvements}

There are some loopholes which are being felt by the scholars of the Islamic Matrimony regarding the drafting of Muslim women (Protection of Rights on Divorce) Act, 1986.

As it is very contentious issue so I want to put forth some humble

\textsuperscript{122} Sheikh Mohd v. Naseem Gegum I (2007) DMC 226 Bombay High Court
point regarding the reforms in the drafting of Muslim Women (Protection of Rights on Divorce) Act, 1986:

➢ The expression "who has been divorce by or has obtained divorce from her husband" used in the act includes.

(a) Unilateral Talaq by Husband

(b) Khula demanded by and effected at the wife's instances whether in or outside the court

(c) Divorce by mutual consent (mubarat)

(d) Dissolution of Marriage under the provisions of the Dissolution of Muslim marriage 1939

(e) Annulment of void or irregular marriage.

These kinds do not have similar consequences for maintenance in different school. But Act deals with all forms of divorce without attaching importance of differences.

➢ The definition of term *Iddat* in Section 2(b) does not expressly state as to upon whom observing of *Iddat* is mandatory and on whose part it is not obligatory.

For example a woman divorced before consummation of marriage, is not required to observe *Iddat*, hence the clumsy definition in Section 2(a) by not excluding such woman is objectionable under Islamic rules.

➢ Despite the clear cut humane rule of Muslim law that Muslim law cares the maintenance of divorce who is breast feeding and child maintenance is the absolute duty of father, the Section 3(i)
(b) is the victim of confused drafting and bound to be interpreted by court in various ways.

➢ Section 3(i) (c) of the Act states that a divorced woman is entitled to "an amount equal to sum of Mahr or Dower is payable because in Islamic law there are many situations in which payment varies. The ambiguous language of said Section makes Mahr payable in every case of divorce.

Thus by analyzing the aforesaid loopholes of the Act which is now representing manifestly the Islamic Community to whole world, must be removed and be tried to be reformed in the line of true Islamic principles.

As the Constitution of India regards the personal laws of every community the judiciary must not assume the role of legislature and Mujtahid and does not try to venture into areas of personal laws which are well understood and free from legislative activity.

It is also to be noted that the trend which has been set by the Judiciary to maintain Muslim divorce beyond the Iddat period must be reviewed according to line of Islamic Sharia. As this concept is foreign to the spirit of Islamic law. The reason is that there is no any interfamiliar transfer of girl on marriage unlike Hindu family.

4.4 MAINTENANCE OF WIFE UNDER CHRISTIAN LAW

(a) Analysis of legislative provisions

Maintenance of wife under Christian Law is dealt with the Section-36, Section-37 and Section-38 of the Indian Divorce Act, 1869. Section 36 of Indian divorce Act, 1869, deals with the petition for the expenses of
the proceedings and alimony pending the suit. According to this Section, in any suit under this act whether it be instituted by a husband or a wife and whether or not she has obtained an order of protection, the wife may present a petition for the expenses of the proceedings and alimony pending the suit.¹²³ Such a petition shall be served on the husband and the court on being satisfied by the truth of the statement contained therein, may make such order on the husband for the expenses of proceedings and alimony pending the suit as it may seem just.¹²⁴ There is a proviso in this Section which says that the petition for the expenses of the proceeding and alimony pending the suit shall as far as possible, be disposed of with in the sixty days from the date of the service of notice on the respondent.¹²⁵

The object of this Section is to provide the wife with a source of maintenance, whilst a matrimonial suit is pending. She is entitled to present a petition of alimony pendente lite. Alimony pendente lite is an ad interim arrangement and its payment is enforced on the ground of necessity and only when the wife has no other means of subsistence. Where pending her application for alimony the wife gets advances from a third party to meet her necessaries the third party is in equity entitled to recover the sums advanced by him from the husband. The alimony may be claimed by the wife in suits for (i) Nullity (ii) Dissolution (iii) Judicial Separation (iv) Restitution conjugal rights of marriage.¹²⁶

A husband should file an oath to a petition for alimony by the wife. He

¹²³ Substituted for the word “for the alimony pending suit by Indian Divorce (Amendment) Act, 2001
¹²⁴ By Amending Act of 2001
¹²⁶ Weingarten v. Engel 1947, All ER 425
must state his gross income. He must specify deductions of any that he claims and it is not sufficient for him merely to state his net annual income.\textsuperscript{127} A husband who does not file an answer to the petition can not be allowed to cross examine witnesses produced by the wife in support of her alimony petition nor can he give any rebutting evidence. Husband may plead that his wife has income and property. It is to open to the husband to plead that the wife is being supported by the correspondent and is not entitled to alimony \textit{pendente lite}. He may also plead that the wife has been living separate for many years before the institution of suit and she has supported herself during the separation and is still able to do so. The husband is not allowed to put any question direct or indirect with regard to her adultery. The averment of adulatory in answer to a petition for alimony is irrelevant and the court is bound to presume that the wife is innocent till she is proved guilty. An alimony petition should be made at the earliest opportunity, as delay may go to show that the wife has a means of subsistence and is not in any need of alimony.

The Indian law is quite clear that in case of a suit for divorce or for nullity of marriage, the order for alimony remains operative only till the decree is made absolute or is confirmed. In case of a suit for the restitution of conjugal rights the order for alimony \textit{pendente lite} extends upto the time allowed to the husband for complying with the decree or till such times she refuse to comply with it. The quantum of alimony that should be awarded to a wife will depend on the facts and circumstances of each case. The parties may mutually agree to the amount. The Indian law with regard to the quantum of alimony

\textsuperscript{127} Nankis v. Nankis 33 L.J. p. 24
pendente litem that the alimony pendente litem should in no case exceed 1/5th of the husband's average net income for the past three years. The general rule regarding the commencement of payment of alimony is that it commences from the date of the service of the petition on the husband and not the date of the return of the citation. The Indian law is quite clear that alimony shall continue till such time as the decree is not made absolute or is confirmed by High Court. The Act contemplates the payment of alimony to the wife so long as she continues in law to be a wife.\textsuperscript{128}

The Indian Divorce Act, 1869 is silent as to the mode of the enforcement of decrees and an order for the payment of alimony pendente litem must be made according to the provisions of Civil Procedure Code, 1908 for the execution of decrees.

An order for alimony pendente litem does not create a legal debt, but a liability to pay and is only a personal allowance and so long as the order subsist the right to alimony can not be alienated or released. When a marriage has been validity terminated under the law of the parties domicile, any maintenance order made by the court other than the court of parties domicile, must also comes to an end.\textsuperscript{129}

Section 37 of the Indian Divorce Act 1869, deals with the petition of permanent alimony. This Section empowers the High Court and District judge to order that the husband shall secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune. This order may be made by the High Court or District Judge, if it thinks fit, on

\textsuperscript{128} Manchanda, The law and Practice of Divorce (ed. 2\textsuperscript{nd}, 1958, Allahabad), pp. 303-304

\textsuperscript{129} Id. pp. 305, 306.
any decree absolutely declaring a marriage to be dissolved, or any
decree of judicial separation obtained by wife. In every such case the
court may make an order on the husband for payment to the wife of
such monthly or weekly sum for her maintenance and support as the
court may think reasonable. There is also a proviso in this Section
which provides that if the husband afterwards from any cause becomes
unable to make such payment, it shall be lawful for the court to
discharge or modify the order or temporarily to suspend the same as to
whole or any part of the money so ordered to be paid, and again to
revive the same order wholly or in part, as to the court seems fit. This
Section empowers the court to order for the permanent alimony or
permanent maintenance after a final decree for judicial separation or
dissolution of marriage has been granted. The District Judge is also
given the same power after the decree passed by him has been
confirmed by the High Court.

The court may order the payment of such permanent alimony or
maintenance in three ways:

1) It may secure a gross sum of money

2) It may provide an annuity for wife life

3) It may order the husband for the payment of monthly or weekly
   sum for her maintenance.

The proviso to the Section gives the court a power to vary, discharge,
modify or temporarily suspend the payment order, if the husband
subsequently becoming unable to make such payment.
There is no hard and fast rule as to the quantum of alimony that should be given to an innocent wife. The law has laid down no exact proportion. The allocation of alimony is a matter for the discretion of the court to be exercised upon a consideration of all the circumstances of the case.\(^{130}\) As a general rule permanent alimony may be more than alimony *pendente lite*. There are some factors of which Section 37 of the Indian Divorce Act, 1869 enjoins the court. The factors are:

(i) The conduct of the parties before and after marriage.

(ii) The nature and source of husband

(iii) Fortune of the wife, if any, and other circumstances of the case.

The usual rate of permanent alimony is one third of joint net income. The court in this matter is guided by the practice of the ecclesiastical courts. However, the court has the discretion and may award less than one third of the joint net income, if the circumstances so warrant. But the court will not grant more than one third unless exceptional circumstances exist.

The permanent alimony may be increased or decreased by the court according or the changing circumstance and the fortune of the parties.

Permanent maintenance may be claimed by an application filed at any time after the decree nisi. In any event no order for permanent maintenance can take effect prior to the passing of the decree absolute. An application after final decree may be made within the two months of the final decree; but it may be filed even subsequently with the leave

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\(^{130}\) Id. p. 310
of the court. The petition for the permanent maintenance must be served on the opposite party.

Section 38 of the Indian Divorce Act, 1869, deals with the rules regarding the payment of alimony. According to this Section, in all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf. The Court may impose any terms or restrictions which to the Court seems expedient. Thus this Section lays down the mode of payment of alimony. The court is given power on making an order for alimony, be it alimony pendente lite or permanent alimony. Alimony may be paid wither direct to the wife herself or to her trustee. Such trustee, must however be approved by the court. The court is given power to impose any term or restrictions on the payment of alimony and may appoint new trustee from time to time. The whole object of this Section is to ensure that the wife receives the allotted alimony.

(b) Evaluation of Judicial Pronouncements

As it has been mentioned earlier that only landmark and trendsetter judicial decisions in the Indian context are being shown and discussed here. Since the Christians are not the majority in India population is less and the number of litigation and reported cases are almost negligible. There are not any recent cases regarding the maintenance of wife which can be termed as landmark and trendsetter. This community is also peace loving and satisfied like the Parsi community. Thus, though having the many loopholes in the drafting of the Christian laws regarding the matrimonial causes and maintenance, there is not any huge controversy like other communities.
(c) Identification of Pitfalls

The need for reforms in the Indian Divorce Act enacted as early as 1869 has long been felt and advocated by the public, jurist, the law commission and the judiciary, including Supreme Court.

It is note worthy that the ground for divorce under the Act were too limited and harsh too before the insertion of Section 10 A as amended in 2001.

Even as between husband and wife there is discrimination as under Section 10, the husband has simply to prove adultery where as the wife has to prove another matrimonial offence along with adultery, for granting relief.

There was another lacuna which is not suitable as per the present conditions of the society that a dissolution decree passed by the District Court needs to be confirmed by the High Court. It makes the procedure of divorce complicated and time killing. [Requirement of confirmation by the High Court has now, been dropped the Divorce Act, 2001].

Besides these shortcomings there are also some shortcomings in the drafting of the Indian Divorce Act, 1869 which is shown by the fact that the Act considers the wife as a property of the husband. Who under Section 34 of the Act, is entitled to claim damages from the wife's adulterer.\textsuperscript{131}

The Act was also discriminatory on the basis of religion. While under all other personal laws cruelty and desertion, inter alia are the grounds

\textsuperscript{131} Kusum, Marriage & Divorce Law Manual (ed. 2000, Delhi) p. 28
for divorce but under this Act, there are only ground for judicial separation. Thus a Christian married wife under the Act was expected to endure all sort of cruelties without any right to seek divorce where as "wife married under the Hindu or the Parsi Marriage Law, is entitled to divorce, may be even in less unbearable situations.132

As early as Section 10, was challenged as illegal discrimination on the ground of gender in Dwarja Bai v. Ninan,133 the court however dismissed the plea and observed (obiter).

"................. I consider that Section 10 as it stands is not prima facie repugnant to Articles 13 and 15 of the constitution. It appears to be based on a sensible classification and after taking the abilities of the man and woman and the result of their Acts, and not merely based on sex, when alone it will be repugnant to the constitution...

(d) Advocacy for Reforms and Improvements

The issue relating to the changes in the Indian Divorce act, 1869 has been hanging for more than forty years. Various law commissions in their reports stating with the 15th report as well as various High Courts, such as the High Courts of Mumbai, Chennai, Andhra Pradesh, Kolkata and Kerala has emphasized the need for bringing about gender equality in the matter on grounds of divorce as available to the Christian spouse. It was also pointed out that there was no need for a provision which required confirmation of decree for dissolution of marriage by the High Courts. In the Indian Divorce (Amendment) Bill 2001, the Government had sought to bring about gender equality by amending Section 10, Section 17and Section, 20 to do away with the

confirmation by the High Court of decree of divorce or nullity of marriage.

Other provisions of the Indian Divorce Act, 1869, were also sought to be amended to make certain consequential changes. The Governments approach in the matter was to bring about minimal changes in consonance with ruling of the courts and uniformity of law among Christians.

A provision has been made for the dissolution of marriage by mutual consent. This is on the lines of Section 13(b) of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954

Section 7 of the Indian Divorce Act, 1869 which provides that the High Courts and the District court shall act and give relief on the principles applied by the English Courts has been deleted since after attaining independence, this provision seems to have become redundant. Section 34 of this Act which provided that the husband may claim damages for adultery in a petition limited to that object, and the ground of his wife having committed adultery has been deleted.

Section 35 of this Act provided that where in a petition by the husband, the alleged adulterer was made a co-respondent and the adultery is established, the court may order the respondent (adulterer) to pay the cost of the proceedings. This provision has also which provides that the alimony pendente lite shall not exceed one fifth of the husband's average net income for the 3 years, the next proceeding date of the order has also been deleted.

\[133\] AIR 1953 Mad. 792 at 800.
Section 10 for which there were objections by the jurists that it wee against the gender equality. It has now been modified after the Personal Laws Amendment, 2001, both husband and wife can seek a divorce on the grounds of-

(i) Adultery
(ii) Cruelty
(iii) Insanity for more than 2 years
(iv) Incurable leprosy for more than 2 years
(v) Conversion to another religion
(vi) Willful refusal to consummate marriage
(vii) Not being heard of for 7 years
(viii) Venereal disease in communicable stage from for 2 years
(ix) Failure to obey the order for the restitution of conjugal rights.

However the wife has been permitted to sue for divorce of additional grounds if the husband is guilty of:

(i) Rape
(ii) Sodomy
(iii) Bestiality

All these years, Christian Spouses were compelled to mudslinging each other even if they desired to for in for divorce due to the non establishment of grounds. Now Section 10-A is added under which mutual consent has also been made a ground for divorce.

Thus it can be said that after the Indian Divorce (Amendment) Act, 2001, is a great step for the improvement of the lacunas in the drafting of old Act.

It has adopted the good features of Hindu Marriage Act, 1955 and
Special Marriage Act, 1954. The present situation of the Christian law thus can be said to be satisfactory.

4.5 MAINTENANCE OF WIFE UNDER PARSI LAW

(a) Analysis of the Legislative provisions

Maintenance of wife under Parsi Law is dealt with the Parsi Marriage and Divorce Act, 1988. The relevant provisions of this Act regarding the maintenance of wife are: Section 39, Section 40, Section 41 and Section 42. Section 39 of the Parsi Marriage and Divorce Act, 1988, deals with the alimony *pendente lite*. This Section empowers the court to order the defendant to pay to the plaintiff, the expenses of the suit, and weekly or monthly sum during the suit, if it appears to the Court that either the wife or the husband has no independent income sufficient for her or his support and the necessary expenses of the suit. The Court, while ordering under this Section pay regard to the plaintiffs owns income and the income of the defendant. There is a proviso in this Section which provides that the application for the payment of expenses of suit shall be disposed of within 60 days from date of service of notice on the wife or the husband as the case may be.\(^{134}\) Alimony *pendente lite* as a temporary provision for the wife or the husband awarded by the court, ordering the husband or wife, as the case may be to pay alimony *pendente lite*. In order to obtain alimony *pendente lite* and expenses of proceeding, the wife or the husband has to prove following conditions that:

1) She or he has no independent income.

2) Her or his income is not sufficient for her or his support and the

\(^{134}\) Subs by the Marriage laws Amendment Act, 2001 [Act No. 49 of 2001].
necessary expenses of the suit.

Where neither party (husband or wife) has mean to meet the expenses of other party, no order may be made.\textsuperscript{135} In granting relief under Section of Act, the court shall take into consideration:-

1) The defendants income and;

2) The plaintiff own income

Relief under Section 39 can be sought either by wife or the husband who initiated the substantive proceedings. The question as to who is the husband or wife has been interpreted by Deshpande J. of Bombay high Court while interpreting the said term with reference to Sections 24 & 25 of the Hindu Marriage Act, 1955 which are \textit{pari materia} to instant provision. His lordship has taken the view that the expression wife as used in Section 24 and Section 25 of the Hindu Marriage Act, 1955, doesn't presupposes an existing jural relationship of husband and wife, but it merely descriptive of the person who may claim to any other relief which can be granted under Hindu Marriage Act, 1955.\textsuperscript{136} Alimony \textit{pendente lite} under Section 39 can be sought during the pendency of any suit arising under the Act. When proceedings are over in their entirely, there is no question of the application of Section 39.\textsuperscript{137} Under Section 39 of Parsi Marriage and Divorce Act, 1988, no fixation of the quantum by the legislature is made for the purpose of alimony pendent elite. It is left to the court to determine the same having regard to the income of plaintiff and defendant. Ordinary, the Court grant maintenance under Section-39 from the date of the application. The

\textsuperscript{135} Preeti v. Ravind Kumar AIR 1979 All 29.  
\textsuperscript{136} Hemraj Shamrao Umedkar v. Smt. Leela, AIR 1989 Bom. 146 (SC)  
\textsuperscript{137} Nirmala v. Ramdas AIR 1973 P&H 48
court should grant alimony *pendente lite* since the date of demand.\textsuperscript{138} The judiciary is of the view that the court may grant alimony *pendente lite* from the date of the service of the notice or petition on the defendant.\textsuperscript{139} Section 40 of the Parsi Marriage and Divorce Act, 1988, deals with the permanent alimony and maintenance, Section 40(1) of the Parsi Marriage and Divorce Act, 1988, empowers any court to order the defendant to pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding the life of a plaintiff as having regard to the defendant's own income and other property, at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose by either spouse. *Any such payment may be secured if* necessary by a charge on the movable or immovable property of the defendant, if it may seems to the court to be just. According to Section-40(2) of the Parsi Marriage and Divorce Act, 1988, if the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Subsection (1), it may, at the instance of either party, vary, modify, or rescind any such order in such manner as the court may deem just. According to Section-40(3) of the Parsi Marriage and Divorce Act, 1988, if the Court is satisfied that the party in whose favour an order has been made under this Section has remarried or if party is husband, had sexual intercourse with any woman outside wedlock, it may at the instance of other party vary modify or rescind any such order in such manner as the court may deem just. This Section aims at providing for permanent alimony and maintenance to the husband or wife, whoever is in need of the same.

\textsuperscript{138} Pratima v. Kamal (1964) 68 CWM 316.
\textsuperscript{139} Sudharshan Kumar v. Chhagar Singh (1978) Kash. L.J.
This relief would be available only when a decree for judicial separation or restitution of conjugal rights or divorce or nullity of marriage has been passed by any court exercising jurisdiction under this Act. An order under Section 40 can be passed: (a) either at the time of passing any decree, or (b) at any time subsequent thereto. No order can be passed under Section 40 if the substantive petition is whether dismissed by the court, or withdrawn by the petitioner. While passing under Section 40 (1) of the Act, it is obligatory upon the court to have regard to the conduct of the parties of the case. The conduct of the parties does not mean merely the conduct of the party who is applicant for maintenance, but also of the other spouse in relation to their life together as husband and wife. Permanent alimony can be granted even to an erring spouse and the fact that the wife did not comply with the restitution of conjugal right can not by itself disentitle her to claim permanent alimony.

Doubtless, the conduct of the parties any be factor in deciding claim or permanent alimony, but each case has to be decided on its own merits, it is not correct to say that grant of judicial separation on the ground of cruelty of the wife, is a bar to her getting permanent alimony.

Section 40 of the Parsi Marriage and Divorce Act, 1988, Act puts stress on the conduct of the parties during the matrimonial life and the court pays due regard to that factor. Section 40 (1) and (3) place considerable emphasis on wife being chaste not during matrimonial tie but also after the decree to retain her eligibility for the purpose of

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140 Mazumdeet v. Mazumdar, AIR Cal 428.
141 Shanta Ram v. Hirabai, AIR 1962 Bom. 27.
143 Premji v. Rai Sarkar Kanji AIR 1968
maintenance. Now in view of the Phrase -"the conduct of the parties and other circumstance of the case," under Section 40 (1) of the Act, the courts are duty bound to take into consideration the health of applicant and source of income and if court satisfied that she is in poor health and has no sources of income and there is no one to look after her, maintenance should be granted though she had been guilty of adultery and divorce was granted on that ground.\textsuperscript{145} The Madhya Pradesh High Court opined that where the conduct of wife is unchaste; the question of alimony or maintenance does not arise.\textsuperscript{146} It is clear from the above discussion that regarding the relevancy of the conduct of the parties in deciding claim of permanent alimony, each case should be decided on its own merits. In fixing the amount of maintenance under Section 40 of the Act the court is required to consider the following matter:

(a) Income and property of the party who is required to pay.

(b) Income and property of the non claimant

(c) Conduct of the parties

(d) Circumstances of the case.

Under Section 40 of the Parsi Marriage and Divorce Act, 1988, the court can order one party to pay the other for the maintenance and support:

(a) A gross sum

(b) A sum to be paid monthly

(c) A sum to be paid periodically.

The status of the husband and wife must be taken into account and not the status of father or any other relations.

\textsuperscript{145} Jain, SC. The law relating to Marriage and Divorce, (ed. IIEd, 1980, Delhi) p. 195.

\textsuperscript{146} Lila Devi v. Manohar Lal AIR 1959 MP 349.
According to the practice of English courts, which generally influences our judicial activity, the monthly allowance that the defendant may be ordered to is one third of his or her income. In some case Indian Judiciary has followed this English Rule. The one third rules is merely a guideline and there is no rigidity about it.\textsuperscript{147}

The court is competent to fix more than one third or less than one third in a given case depending the circumstance of the case. The court under Section 40 (2) and (3) is empowered to vary, modify or rescind its order passed under Section 40 (1) of the Parsi Marriage and Divorce Act, 1988, Act in any of following circumstances:

\begin{itemize}
  \item If the court is satisfied that the party in whose favour an order has been passed, has remarried; or
  \item If such party is wife, that she has not remain chaste; or
  \item If such party is the husband, that he had sexual intercourse with any woman outside wedlock.
\end{itemize}

Thus, in view of the change in circumstances of either party at any time after it has made an order under Section 40 (1), the court may vary, modify, or rescind at the instance of either party in such manner as the court deem just,

\textbf{(b) Evaluation of the Judicial Pronouncements}

As it has been mentioned earlier that in this dissertation only landmark and trend setter judicial decision has been put forth. Since the Parsi community is a self satisfied community with the position of their

\textsuperscript{147} Supra Note 144, p. 114.
existing laws, the number of litigation cases is almost negligible regarding the maintenance of wife which can be said a trend setter and landmark. This community is peace loving and has been free from the controversies we see and had been watching in the other communities. There is no denying the fact that the modern and forward looking approach of the Indian Parses is praiseworthy. The self contentment of the Indian Parses is undoubtedly a challenge to the other communities.

(c) **Identification of Pitfalls**

It is a well known fact that the Parsi community is a self satisfied community towards their laws. It is a very progress looking community and deals mostly matters according to their customs. The Parsi Law regarding the Marriage, divorce or the matrimonial relief has been amended in 1936 and 1988. The original Act\textsuperscript{148} was passed at the express representation of the Parsi community. The Parsi Marriage and Divorce Act, 1936, has amended the original Act, i.e., 'the Parsi Marriage and Divorce Act, 1865'. The original Act was based on the recommendation of the marriage committee of the Parsi Law Association. The provisions of the Act were essentially based on the Matrimonial Causes Act, 1858. As a general rule there is a presumption that the Parsi is governed by English common law.\textsuperscript{149} The Parsi Marriage and Divorce Act, 1936 was also amended in 1988 and the same is known as the Parsi Marriage and Divorce (Amendment) Act, 1988.

Some pitfalls in the original Act i.e., the Parsi Marriage and Divorce Act, 1865, were found by the Parsi community whose sentiments and

\textsuperscript{148} See Ardasar v. Arabai 9 Bom. 290.
\textsuperscript{149} Naroji v. Roges 4 Bom. HCRJ; Bai Manek Bai v. Bai Meerbai 6 Bom. 363.
values was for the time being governed by the Act of 1865. They desired a variation in their legal resolve. The Act of 1865 had been obtained after sincere endeavour of the community, yet the legislation which followed the model of the British Matrimonial Causes Act, 1857, had featured that had became repugnant to the conscience of the community, e.g., adultery or adultery coupled with some other matrimonial offence were the extreme circumstances entitling the aggrieved party to a divorce, the remedy of judicial separation was available only to the wife etc.

It was the background that the Act of 1936 sought. The model of the Act of 1936 largely follows that of its predecessor. It provides for matrimonial remedies of divorce, dissolution and annulment of marriage. Contemporary views of the community called for updating the law. As a result the Parsi Marriage and Divorce (Amendment) Act, 1988, was enacted. This incorporates the advantageous aspect of the Hindu Marriage Act, 1955, the Indian Divorce Act 1869; the Special Marriage Act 1954 the Matrimonial causes act, 1965 and the Dissolution of Muslim Marriage Act 1939.

(d) **Advocacy of Reforms and Improvements**

We have analyzed that the contemporary view of the Parsi Community called for updating the law. The result is the Parsi Marriage and Divorce (Amendment) Act, 1988. This incorporates the advantageous aspects of the Hindu Marriage Act, 1955, the Indian Divorce Act, 1869, the Special Marriage Act, 1954, the Matrimonial Cause Act 1965 and the Dissolution of Muslim Marriage Act, 1939.

The remedy of divorce by mutual consent has been extended in favour
of Parsi Spouses. The relief of alimony *pendente lite* and permanent alimony technically known as ancillary relief is available to both spouses without any discrimination on the basis of sex.

It shows that the Indian Parsi have shown the forward looking and Modern approach towards their personal law. They have shown their willingness to adopt the good and beneficial provisions from many sister communities. There is no hesitation in the Parsi community to adopt the beneficial provisions from any sister community.

It is to be a noteworthy fact that the population of the Parsi community is very much lesser than the other communities in India. They are peace loving people and satisfied with their existing laws. Due to these reasons the number of the litigation cases in India is very much negligible.

From the above discussion it can be concluded that the modern and forward looking approach of the Indian Parsis are praiseworthy. The self-contentment of the Indian Parsis is a challenge to the other Indian minorities as their successful survival need the desirability of the rational rethinking regarding the fate of their personal laws particularly against the complexities of contemporary era. The discussion is clear from the fact that at one hand there is a plethora of cases in Hindu and Muslim community regarding the matrimonial causes which exert a lot of pressure of the judiciary, on the other hand the cases of Parsi community is almost negligible.

Therefore it seems to be correct to conclude that the present law system of the Parsi community is satisfactory and not many instant reforms are needed regarding the maintenance of wife.