CHAPTER VIII

ABOLITION OF POLYGAMY

(a) Problems to Reform Muslim Law.
(b) Reforms in the Law relating to Polygamy.
CHAPTER VIII

ABOLITION OF POLYGAMY

India is a multi-religious nation. Prominent religious communities in the country are the Hindus, the Muslims, the Christians, the Parsees and the Jews. During the Muslim rule in India all these communities were governed in matters relating to family law by their respective traditional laws and customs. The British, while establishing their political authority in India, also adopted almost a similar policy.

Coming down to the time of the Mohammadan Supremacy in India, we find that as the Mughal Emperors were Hanafis the Kazis appointed by them administered the Hanafi law. Hanafi law was, in the Mughal times, the law of the land. This continued till the British rule, when the influence of English common law and the principles of equity became more and more apparent.

2. M.I. Jain, 'Outlines of Indian Legal History', Chapters XXIII and XXV.
The Mohammadan Law was applied as a branch of personal law to those who belonged to the Muslim persuasion in accordance with the principles of their own school or sub-Schools.

In the early days of British rule the administration of justice, civil and criminal remained as it had been under the Muslim rule. The Law officers, were mostly Muslims; the criminal law was Muslim; in civil matters, the Islamic law was applied to Muslims and the Hindu Law to Hindus in accordance with the opinions of Moulies and Pandits attached to the Courts. The regulation of 1772 have provision that "in all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the Koran with respect to Mohammans, and those of the Shaster with respect to the Gentoos (Hindus), shall be invariably adhered to; where the personal laws of the parties differed, the law of the defendants was applicable.


Islamic Criminal law remained in force, although succession modifications were made in it till 1862. When the Indian Penal Code and the Code of Criminal Procedure came into force, Muslim Law relating to evidence was entirely abolished, when the Evidence Act, 1872 was passed.

The personal law of the various communities has been applied, until, with different social conditions, the need for a change is apparent. On the one hand certain portions of the law were abolished such as slavery and forfeiture of rights on apostasy and at the same time, newer ideas have been developed. In certain cases, for example the Wakf Act of 1913, where the courts had departed from the ancient rules regarding wakfs or religious endowments to lineal descendants, the legislation intervened and passed an act by which the original rules of Islamic law were made applicable.

As regards custom, the Shariat Act 1937, has had the effect of abrogating it and restoring to Muslims and their own personal law in almost all cases.
From the general history of legislation of these matters, two conflicting sets of principles arise. First, as far as possible, government does not wish to interfere with the personal law of the various communities, as it would tend to create great dissatisfaction, and Secondly, changing social conditions, the effect of European education, the contact in commercial and other centres with Europeans and their legal notions—increasingly modern civilization—produce a desire in the minds of some to see that reforms are carried out.

Speaking broadly, that every policy continues to govern us even after independence, however, with a few significant developments made by the Hindu Marriage Act, 1955; The Hindu Succession Act, 1956, the Hindu minority and Guardianship Act, 1956, the Hindu adoptions and maintenance Act, 1956. These Acts provide uniform law to a certain extent. Their influence is limited to the Hindu community itself. This is achieved by widening the definition of the
term Hindus. Now Hindus as defined in all these above mentioned Acts also includes Buddhist, Jains Sikhs by religion. Also there are certain other enactments and some provisions of some enactments applicable to all communities. All these enactments are important advancement towards a constitutionally proclaimed goal of uniform civil code. Uniform civil code enunciated in Article 44 of the constitution.

Article 44 of the constitution contains a mandate that the "State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". By civil code is meant in this Article a code of law regulating civil matters including marriage, divorce, inheritance and those other subjects which are at present governed by different personal laws. The mandate is addressed

5. The Caste Disabilities Removal Act, 1850
The Child Marriage Restraint Act, 1929
The Special Marriage Act, 1954
The Bowry Prohibition Act, 1961
Majority Act, 1875
Guardian and Wards Act, 1890
(kelating to the guardianship of minor) Sections 107, 108 and 112 of the Indian Evidence Act, 1872;
Transfer of property Act, 1882(with the exception of chapters II and VII); Order XXXIII of the Civil Procedure Code 1908 and modified and order XXXII A inserted in the code by the Civil Procedure Code (Amendment) Act, 1936; Section 125-128 of the Criminal Procedure Code, 1973; Section 107-108
to the 'State' and the term 'State' as applicable to this Article includes the government and the parliament of India and the legislature of each of the states and all local or other authorities within the territory of India or under the control of Government of India. Tahir Mahmood has rightly said "Mandate is that State shall endeavour to secure a Uniform civil code, not that it shall enact it straight away.... The fathers of the constitution, it is evident, were quite alive to the Himalayan difficulties, likely to be faced on the way to the enactment of a uniform civil code. They therefore, directed the State to endeavour to secure it. They wanted both the legislature and the executive to lead the nation to the era of uniformity in civil laws. In other words they wanted the code to be enacted and enforced at the end of an evolutionary process during which the people would be prepared to accept and actually practise the same in their day-to-day domestic life".

6. Article 12 read with Article 36 of Indian Constitution.

The unsatisfactory state of affairs due to the lack of a uniform civil code is exposed by the fact, in the case of Ms. Jorden Diengdeh v. S.S. Chopra. In this case a wife, who belongs to the 'Khasi Tribe' of Meghalaya and was born and brought up as a Presbyterian Christian at Shillong, was married to a Sikh on October 14, 1975. Under the Indian Christian Marriage Act, 1872. In 1980 she filed a petition for declaration of nullity of marriage or judicial separation under Section 13, 19 and 22 of the Indian Divorce Act, 1869. The prayer for declaration of nullity of marriage was rejected by a learned single judge of the High Court, but a decree for judicial separation was granted on the ground of cruelty on appeal, a Division Bench of the High Court affirmed the judgement of the learned Single Judge. The wife then filed petition before the Supreme Court for Special leave to appeal against the judgement of the High Court. She appealed for the declaration of nullity of marriage on the ground of impotency of

the husband. In this case the Supreme Court found
that question for consideration is not how far
"The wife has been able to establish her case". Supreme Court said the "real problem is that the marriage appears to have broken down irretrievably. Yet if the findings of the High Court stand, there is no way out for the couple, they will continue to be tied to each other since neither mutual consent nor irretrievable breakdown of marriage is a ground for divorce, under the Indian Divorce Act". 

After making a comparison between the law relating to divorce applicable to the various communities in India, Supreme Court felt that "(t)he law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion

9. Id. at 936.
10. Ibid.
or caste". It was on the other day, the most articulate criticism against the state in delaying the fulfilment of the constitutional ideal has come from the Constitution Bench of the Supreme Court inMohd. Ahmed Khan v. Shah Bano Begum. In this case Y.V. Chandrachud, C.J., expressed strong need for uniform civil code when he said: "It is a matter of regret that Article 44 of our constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslims community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the state which is charged with the duty of securing

a uniform civil code for the citizens of the country and unquestionably, it has the legislative competence to do. (A counsel in the case whispered somewhat audibly, that legislative competence is one thing the political courage use that competence is quite another.) We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the constitution is to have any meaning. Inevitably the role of the reformer has the endurance of sensitive minds to allow injustice to suffered when it is so palpable.

But piecemeal attempts of Courts to bridge the gap between personal laws cannot take the place of a common civil code. Justice to all is for more satisfactory way of dispensing justice than 12 justice from case to case".

12. Id.
The purpose of this extensive quotation is to show that the objective enshrined in Art. 44, in Court's view, does not brook any delay. But the aftermath of this decision have indicated something on the contrary. The religious susceptibilities of the Muslim population seem to indicate that they are not yet ready to receive the far reaching changes in their personal law through the enactment of a uniform civil code. As a perceptive judge in Krishna Iyer says: "Equally important are the means as the end. We must seek to convince the conscience and convert the sense of the Indian commonwealth of communities, by sure educative and legislative steps, to accept for the secular life of the people a single family code. This is the modus operandi for delicate law making in a democratic polity affecting the sensitive social underside of minority groups".

13. Weekly Young Table, New Delhi II
Objection to uniform civil code can be traced from the history of the draft Article 35. Among those who sought amendment to Article 35 so as to exclude personal laws from the purview of the Civil Code were Mohammad Ismail stressed in his speech the following points:

a) The right of every community to follow its personal law is 'a part of the fundamental right to religious freedom.

b) Retention of personal law is guaranteed by treaties of statutes in many countries, e.g. Yugoslavia, and

c) for securing 'harmony through unity; it is not necessary to 'regiment' the civil law of the people.

Naziruddin Ahmed wanted a guarantee that the personal law of any community would not be changed without the "previous approval of that community".

14. The present Article 44.
15. VII Constituent Assembly Debates, III 1949, P.540-541
He pointed out that:

a) The provision of Article 35 clashed with the fundamental right to religious freedom, a provision regarding which had already been adopted by the Assembly, it would encourage the state to break that guarantee.

b) While regulating secular activities with religious practices in exercise of the right given to it by the provision guaranteeing religious freedom, the state could enact laws like the transfer of property Act and the Sharda Act, it could make registration of all Marriages compulsory; but, it should not enact any law, say, relating to the validity of marriages and divorces. Since they were regulated by religion; and

c) time was ripe for effecting uniformity in civil laws, the power given to the state to make the Civil code uniform was in advance of time? The goal should be towards a uniform Civil Code, but it should be gradual and with
he concluded his speech saying:

What the British in 175 years failed to do or were afraid to do; what the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do all at once".

Coming to the question of saving personal law Dr. Ambedkar has rightly said: "The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to stand still. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating

16. VII Constituent Assembly Debate III, at 541-543.
to succession, should be governed by religion. In Europe there is Christianity, but Christianity does not mean that the Christian all over the world or in any part of Europe where they live, shall have a uniform system of law of inheritance. I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life to prevent the legislature from encroaching upon that field. After all what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights”.

(a) PROBLEMS TO REFORM MUSLIM LAW

In these days on the question of reform of Muslim personal law, Muslim community falls into two groups. One group who are conservative, consider the personal law to be an essential part

of their religion and stand therefore for status quo. According to them any change by outsiders in Muslim personal law would amount to repealing the Shariat. Therefore any attempt to reform it or to introduce uniform civil code through an act of Parliament is against their religious freedom.

We would like to advise the conservatives, no society remains unchanged through time, and it is bound to go through a series of metamorphosis which naturally involve and bring about modifications in value judgements.

No doubt the Quran is the main source of Muslim law but there are three other sources of Muslim law. Certain rules and provisions set by sources other than the Quran are general principles of justice and equity, considerable majority of them are regulations necessitated by the social nature and structure of the Arab Community. Thus apart

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18. Timur: The place of Islamic law in Turkish law Reform: Cited by B. Sivaramayya: Islamic law in Modern India (Edited by Tahir Mahmood) p.77.
from Quran these sources were essentially created to meet the need of the community existing during 19 and after Mohammad’s era.

It is submitted that had the Muslim law been based wholly on Quran, it would have been same in the whole Islamic community. Islamic personal law, as applicable presently in a large number of countries is not uniform. In the recent past legislative changes have been introduced into Islamic law in several parts of the world.

Legislation dealing with Muslim legal affairs has already been undertaken in respect of Wakfs and some aspects of the law of marriage and divorce.

To quote Asaf, A.A. Fyzee:

"Mohammedan Law as it exists today is the result of a continuous process of development

19. Ibid.

20. There are several central and state enactments dealing with the administration of either Wakf properties in general or particular shrines, e.g. the Central Wakf Act, 1954, the Mussulman Wakf validating Act of 1913 and 1930; the Bengal Wakfs Act, 1934; the Bihar Wakfs Act, 1947; The Uttar Pradesh Muslim Wakfs Act, 1960; the Madras Wakfs (Supplementary) Act, 1961; the Dargah Khwaja Saheb Act, 1955, etc. Cited by Tahir Mahmood; Family Law Reform in the Muslim World, p.171 (Ed. 1972).

during the fourteen centuries of the existence of Islam. According to the Classical theory, it consists of the express injunctions of the Koran; of the legislation introduced by the 'practice' (Sunna) of the Prophet; and the opinions of lawyers. In certain cases the opinion of jurists may coincide on a point, and this is known as *ijma*; in others, it may not - this is called *qiyaṣ* or analogical deduction. Islamic law is not a systematic code but a living and growing organism, nevertheless there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economical and cultural reasons.  

It indicates that reform can be made in those fields of Muslim personal law which do not come in the strata of religion, for example polygamy coupled with unilateral divorce etc., for social reform and welfare. In respect of some aspects of family law, all citizens of India, including Muslims, are governed by certain common enactments. Those principles of the various personal laws, including Islamic law, which conflict with the provisions of these enactments are, therefore, no more enforceable by the courts.

Second group who are progressive supports the reform. Moderates feel that until the Muslim Public opinion is fully educated and an urge for change is created among the community itself it would not be advisable for the government to interfere in the matter. No doubt the power is given to the Parliament to legislate. But we should not forget the warning given by Dr. Ambedkar:

"... (S)overeignty is always limited, ....

23. See supra note - 47r
sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No Government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad Government if it did so.

Historical experience indicate that unless the Ulama give the green signal the Muslim cannot be persuaded to take any step. Let us take the illustration of the Muslim personal law (Shariat) Application Act 1937 and the Dissolution of Muslim Marriage Act, 1939.

Reason for the passage of Muslim personal law (Shariat) Application Act, 1937 was that the Muslim community realized that the principle that local custom prevailed over text law, was in conflict with Islamic jurisprudence which did not recognise custom and usage as having the force of law. The statement of objects issued with the Act explained


25. Tahir Mahmood: "Custom as a Source of law in India; J.i.l. (1965), 102.
its purpose as follows:

For several years past it has been the cherished desire of the Muslims of India that customary law should in no case take the place of the Muslim personal law. The matter has been repeatedly agitated in the press as well as on the platform. Jamiat-al-Ulama the greatest Muslim religious body, has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary law is a misnomer in as much as it has not any sound basis to stand upon and is liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called customary law is simply disgraceful. The Muslim women organizations have condemned customary law as it adversely affects their rights and have demanded that the Muslim
personal law (Shariat) should be made applicable to them. The introduction of Muslim personal law will automatically raise their position to which they are naturally entitled. In addition to this, the present bill if enacted would have a salutary effect on the society because it would ensure certainty and definiteness in mutual rights and obligations of the public. Muslim personal law (Shariat) exists in the form of veritable code and is too well known to admit any doubt or entail any labour in the shape of research which is the chief feature of customary law. It shows that Muslims themselves demanded law to control the effect of customary law under which the women's status was disgraceful.

Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 provides that the law of the Shariat, and not any custom or usage, will apply to all Muslims in India in the following matters:

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a) Marriage, various forms of its dissolution, dowry, maintenance, guardianship.

b) Intestate succession (except the questions relating to agricultural lands), and

c) Gifts, trusts and wakfs (with the exception of charities and endowments).

Adoption has no recognition in Islamic law. If a person adopts a son or a daughter the law of Islam will not confer on the adopted person the status or rights of a natural son or daughter. The provision of the Quran is quite clear on the subject of adoption. It says, in effect that one who is not another person's son does not become his natural son merely by virtue of a declaration.

In India, however, the custom of adoption prevails in some Muslim tribes of the Punjab and some adjoining places. Under the Muslim personal law (Shariat) Application Act, 1937, so long as a Muslim who establishes the custom of adoption does

not make a declaration as mentioned in section 3 he will be governed by the said customary law of adoption.

Regarding adoption and wills, the Act empowers every Muslim, who is competent to contract under the provisions of the Indian Contract Act, 1872, to adopt the law of the Shariat for himself and also for his or her minor children and their descendants. Unlike customs relating to the latter, those regarding adoption, will and legacies have not been wholly abrogated by its provisions. In respect of these matters, the Act only gives an option to the Muslims to adopt Islamic personal law if they so desire.

Section 4 of the Act gives powers to the State Governments to frame rules for the filing of such a declaration and for other details attached therewith.

It means the Muslim personal law (Shariat) Act, 1937, restored the application of Shariat law and checks the enforcement of custom and usage.
But it also provides exception to cover the development made in the society by giving an option to decide whether he should be governed by the law of Shariat or by custom regarding adoption.

The same is the position of testamentary succession under the provisions of the Act of 1937.

The Khoja and Cutchi Memon communities among Indian Muslims had, under custom, unrestricted testamentary power. The Act of 1937 did not make an outright abolition of this power. It gave to Muslims including those belonging to the said communities, an option either to continue to be governed by the customary law or to adopt the Muslim law of wills. The Khojas continue to have this option. But the Cutchi Memon community has been deprived


29. Cutchi Memons Act, 1938 provided that all persons belonging to this community would be compulsorily governed by Islamic law in all matters of succession and inheritance.
of the right to retain the customary law of will.

The principles of Muslim law relating to married women's right to dissolution of marriage by the court were reformed in India in 1939. Before the enactment of the Dissolution of Muslim Marriage Act, 1939 overwhelming majority of Indian Muslims followed the Hanafi School of Muslim law, which is too restrictive with regard to married women's right to seek dissolution of marriage by a court. It created hardships for numerous Muslim women who desired dissolution of their marriage on various genuine grounds. On the other hand, if a Muslim wife renounced Islam the renunciation effected an immediate dissolution of her marriage with the Muslim husband. Finding no other way to get rid of undesired marital bounds, many Muslim women felt compelled by their circumstances to renounce their faith. A

30. The Mappilla Succession Act 1918 and the Mapilla wills Act, 1928 provided that in all matters of intestate and testamentary succession, the Mapillas would be governed by Islamic law. Only the customary institution of travad (which is akin to the Hindu Institution of coparcenary was exempted from the application of Islamic law. Cited by Tahir Mahmood, Family Law Reform In The Muslim World, p. 170. Cutchi Memon and Mapillas are convert Muslims.
reputed theologian of that time, Ashraf Ali Thanvai rose to the situation and advocated introduction of certain Maliki principles empowering married women to get their marriage dissolved by a court. In a Monograph published in 1936, he made detailed proposals on the subject and got them approved by the leading 'Ulema in India and abroad. On the basis of the aforesaid, proposals, the Dissolution of Muslim Marriage Act was enacted in 1939.

Confirming the Maliki basis of the Act, the Statement of objects and reasons issued with the Act said:

There is no provision in the Hanafi code of Muslim law enabling a married Muslim women to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently

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32. Id. at 172.
maltreating her. ... in certain other circumstances.
The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurist have, however, clearly laid down that in cases in which the application of the Hanafi law causes hardship, it is permissible to apply the provisions of the Maliki, Shafai or Hanbali law. As the courts are sure to hesitate to apply the maliki law to the case of a Muslim Woman, legislation recognising and enforcing the above mentioned principle is called for in order to relieve the sufferings of countless Muslim Women.

Reason for the enactment of this Act also shows that it was passed to control the conversion of Muslim Women to other religions only for the purpose of divorce. This act also covers law to cope up with the need of new society and provide relief to the women and controlled unlawful

conversion which were made by Muslim Women only to get divorce.

The dissolution of Muslim Marriage Act of 1939, was supported by Ulama in its initial stage. But when it was passed, they boycotted it on the ground that the government did not fulfil the main condition which the Ulama had attached, namely, that such cases should be heard by a Muslim judge. The government, however, did not agree to the condition and the bill was passed allowing every judge, regardless of his religious affiliation to decide the cases under the Dissolution of Muslim Marriage Act of 1939. Following the decision of the government nothing spectacular happened, except that the 'Ulama' declared through their religio-political organization.

The Jamiyat-i-Ulama-i-Hind would like to make it clear that a marriage dissolved by non-Muslim Judge is not a void marriage in the eyes of the Shariah. If a woman after obtaining a divorce decree from a non-Muslim judge, marries

some one else she will be committing adultry. Although the court might have dissolved the marriage, she would still remain the wife of her first husband. But this statement now has no effect on the Act.

We can conclude that Modernist should direct his reformist thought to the Ulema rather than to the State. If the approval of Ulema is obtained on such an important issue it would certainly strengthen the hands of the State. But at the same time it must be acknowledged that consensus on all areas of reform is not possible at the moment. It may be possible on some matters.

As a concession to the sentiment of a vast majority of Muslims, no concrete step for the reform of any aspect of Islamic personal law has been taken in the past independence period in India. In 1963 a move was made in the Parliament to consider the reform of Islamic personal Law, but

35. Ibid.
on account of great resentment by the Muslim community, conveyed to the parliament by the then Vice-President Zakir Hussain, it was not pursued.

In 1966, the all India Muslim Majlis-e-Mushwarat (consultative council) brought out its nine point manifesto giving an important place to the pledge regarding efforts for the preservation of Muslim personal law in its traditional form.

In December 1970, the All India Muslim political convention held at New Delhi resolved, inter alia:

The convention urges that a clear announcement should be made at an early date by the central government that no attempt would be made to change the personal law of any community and specially that of Muslims. Our recent experience of passage of the Muslim Women (Protection of Rights on Divorce) Act, 1986, affirmed this conviction.

(Protection Of Right On Divorce) Act, 1986:

Reasons for the passage of this Act are after the decision of Hon'ble Court in Moh. 37 Ahmen Khan v. Shah Bano Begum the question of relationship between S.125 of criminal procedure 38 code of 1973 and personal law of Muslims evoked much Public interest. Though this question has been answered in the same way in various earlier 39 decisions.

In this case the question before the Hon'ble Court was whether a divorced Muslim wife can claim maintenance from her husband under S.125(1)(a) of Cr.P.C. or is there any conflict between the provisions of S.125 of Cr.P.C. and personal law of Muslims?

While granting maintenance to Muslim divorced wife, the Supreme Court held that there is no

38. Hereinafter referred to as Cr.P.C.
conflict between the provisions of S.125 and those of the Muslim personal law on the question to the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

"The whole discussion as to whether right conferred by section 125 prevails over the personal law of the parties, Supreme Court said, has proceeded on the assumption that there is a conflict between the provisions of that Section 125 and those of the Muslim law, on the liability of the Muslim husband to provide for the maintenance of his divorced wife". Supreme Court discussed that question in detail and reached at conclusion that taking the language of the statute as one finds it, there is no escape from the conclusion that a divorced wife is entitled to apply for maintenance under section 125 and that mahr is not a sum which, under the Muslim personal law is payable on divorce.

40. Supra note 37 at p. 949, para 11-12.
41. Id. at p. 950, 951, 952.
42. Id. at p. 953.
Supreme Court clearly mentioned in Shah Bano's case that:

"Under Section 125(1)(a), a person who having sufficient means, neglect or refuses to maintain his wife who is unable to maintain herself, can be asked by the Court to pay a monthly maintenance to her at a rate not exceeding five hundred rupees. By clause (b) of the explanation to Section 125(1), 'wife' includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions, whether the spouses are Hindus or Muslims, Christians or Parsees, Pagans or Heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that Section 125 is a part of the Code of Criminal Procedure not of the Civil
Laws which define and govern the rights and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat or the Farsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parents. Neglect by a person of sufficient means to maintain these and the inability of these persons to themselves are the objective criteria which determines the applicability of Section 125. Such provisions which are essentially of a prophylactic nature cut across the barriers of religion.\footnote{Supra Note 37 at page 948, para 7.}
law of the parties but, equally, the religion preferred by the parties or the state of the personal law by which they are governed, cannot have any repercussions on the applicability of such laws unless, within the framework of the Constitution, their applications are restricted to a defined category of religious groups or classes."

Clause (b) of the explanations to section 125(1) which defines 'wife' as including a divorced wife, contain no words of limitation to justify the exclusion of Muslim women from its scope.

"Under Section 488 of the code of 1899, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that right could be defeated by the husband by divorcing her unilaterally as under the Muslim personal law, or by obtaining a decree of divorce, against her under the other systems of law. It was in order to remove this hardship that the joint committee

44. Ibid.
recommended that the benefit of the provisions regarding maintenance should be extended to divorced woman, so long as she has not remarried after the divorce.  

"The conclusion that the right conferred by Section 125 can be exercised irrespective of the personal law of the parties is fortified especially in regard to Muslims, by the provision contained in the Explanation to the second provision to section 125(3) of the code."

"The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages."

"It shows, unmistakably, that section 125 overrides the personal law 'if' there is any conflict between the two."

45. Id. page 949, para 9.
46. Id. Para 10.
47. Ibid.
48. Ibid.
Mind it, Supreme Court has used word 'if' there is any conflict...." and also tried to make it clear that there is no conflict between the two.

The contention of those, say; that there is conflict between the two, is that "under the Muslim personal law, the liability of the husband to maintain a divorced wife is limited to the period of iddat".

But the Supreme Court held that "this contention is inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. The Court further said that:

"There can be no better authority on this question than the Holy Quran....(The Quran,.... interpreted by Arthur J.Arberry verses (Aiyats) 241 and 242 of the Quran show that there is an obligation, on Muslim husband to provide for their divorced wives".


"Supreme Court made it clear that Mahr cannot be said an amount which is payable on divorce. Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression "on divorce" which occurs in section 127(3)(b) of the code. In spite of detailed clarification by the Supreme Court this case was assumed as an interference in Muslim personal law, and there was great hue and cry against, as well as in favour of this case. To curtail the effect of this judgement on Muslim personal law the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed.

Now by this Act Muslim husband is exempted from this liability to maintain his divorced wife, and the liability is put on her relatives and in the absence of relatives on the Wakf Board.

51. Id. at p. 952 para 24.
Under Section 5 of the Act option is given to divorced women and her former husband, if they would prefer to be governed by the provisions of section 125 to 128 Cr.P.C. Commenting upon this provision justice Krishana Iyer says, "If the rat is forced to seek justice from the cat with the latter's consent it sounds better sense than the current provision whereby the disowned wife is conferred the extraordinary privilege of proceeding against the man who talaqued her after getting his consent to be sued".

Though there was no conflict between Section 125 and Muslim law as rightly pointed out by Supreme Court in Shah Bano's case. But there is a clear conflict between the provision of Muslim personal laws and the Muslim Women (Protection of Rights on Divorce Act, 1986) as Justice Krishana Iyer has rightly pointed out, "A series of spurious alternative remedies for the divorced woman to maintain herself

52. V.K. Krishana Iyer: The Muslim Woman (Protection of Right on Divorce) Act, Ed. 1987 at p. 17.
after the Iddat period are written into the Act (Sec. 4) never found in any "family law pharmacopoeia"

in the world".

"The worst is yet to be, Section 4(2) provides that where a divorced woman has no relatives to sustain her, the magistrate may direct the state Wakf Board to pay such maintenance as may be determined by it. Wakf Boards are statutory organs to supervise the administration of wakfs which are essentially religious and charitable. A Wakf is a dedication of property in the way of God as it were, tying up the Wakf as God's property. Mostly, the purpose to be fulfilled is of a religious nature and the Wakf decides on the objects of the Wakf. The motive of the Wakf is most important. Once these principles are understood, it passes one's comprehension how the income from the wakfs can be diverted for a purpose never in the contemplation of the Wakf. Supposing a wakf is created for the maintenance of a mosque, or

53. Id. at p.141.
for financing the Haj pilgrimage of the poor can such resources be hijacked by parliamentary perversion into paying maintenance for a woman rendered destitute by some wicked husband's talaq,

54 talaq: "(l)t is an ultravires to the law of wakfs because wakfs are not trusts to look after privatised wrongs inflicted by irresponsible talaqs.

In latest case of Begum Subanu alias Saira Banu A.M. Abdul Gafoor. Supreme Court granted maintenance under S. 125, to Muslim woman whose husband has contracted another marriage.

In this case the question before the Supreme Court was whether a Muslim wife whose husband has married again can live separately and claim maintenance under Section 125(3) of Cr. P.C., whether her rights stand curtailed in any manner because of the personal law governing the parties permitting a husband to marry more than one wife.

54. Id. at p.16.

The Supreme Court held that irrespective of the husband's right under his personal law to take more than one wife, his first wife would be entitled to claim maintenance and separate residence if he takes a second wife.

Focussing attention on the explanation, the court has held that "the explanation is of common application to all wives whose husbands have contracted another marriage during the subsistence of the earlier marriage. Explanation contemplates two kinds of injuries to a wife viz. by the husband either marrying again or taking mistress. The explanation places a second wife a mistress on the same footing and does not make any differentiation between them on the basis of their status under matrimonial law. The purpose of the explanation is not to effect the rights of Muslim husband to take more than one wife, or to denigrate in any manner the legal and social status of second wife to which
she is entitled to as a legally married wife, but to place on an equal footing the matrimonial injury suffered by the first wife on account of the husband marrying again or taking a mistress during the subsistence of the marriage with her. From the point of view of the neglected wife, for whose benefit the explanation has been provided, it will make no difference whether the woman intruding into her matrimonial bed is another wife permitted under law to be married and not a mistress. The legal status of the women to a husband has transferred his affections cannot lessen her distress or her feelings of neglect. The explanation has to be construed from the point of view of the injury to the matrimonial rights of the wife and not with reference to the husband's right to marry again. The explanation has, therefore, to be seen in its full perspective and not disjunctively. Otherwise it will lead to discriminatory treatment between wives whose husbands have lawfully married again and wives whose husbands
have taken mistresses. Approaching the matter from this angle we need not resort to a comparison of Muslim wives with Hindu wives or Christian wives but can restrict the comparison to Muslim wives themselves who stand affected under one or the other of the two contingencies envisaged in the explanation and notice the discrimination. It is this aspect of the matter which we feel has not been noticed hitherto.  

"In fact from one point of view the taking of another wife pretend (Sic.) a more permanent destruction of her matrimonial life than the taking of a mistress by a husband".  

If the explanation is viewed in the larger context of the provisions of S. 125. It is clear that S. 125, its fore runner being S. 438, has been enacted with the avowed object of preventing vagrancy and destitution. The section is intended to ensure the means of subsistence for three categories of

56. Id. at p. 1107-1108, para 11.
57. Ibid.
dependents viz., children, wives and parents who are unable to maintain themselves. The three essential requisites to be satisfied before an order of maintenance can be passed are that (1) the person liable to provide maintenance has sufficient means; (2) that he has neglected or refused to maintain and (3) the dependent/dependents is/are unable to maintain himself/ herself/themselves as the case may be.

So in the considered view of the Supreme Court her right does not curtailed in any manner because of the personal law governing the parties permitting a husband to marry more than one wife.

This judgement also created apprehension of conflict between Muslim law and section 125 Cr.P.C. (Especially the explanation to Sec. 125(3) of Cr.P.C.

As Prof. Virendra Kumar while commenting on this decision he raised various objections. He says "The Court has delinked the wife's right to maintenance from the husband's right to remarry".

It is respectfully admitted that no doubt Supreme Court has delinked the husband's right to marry from the wife's right to live separate and claim maintenance in the sense that her right does not stand curtailed in any manner because of the personal law governing the parties permitting a husband to marry more than one wife. Otherwise, it is closely linked with husband's right to marry more than one wife, if he can marry second time.

He further says, "In view of the categorical stand of the Supreme Court in Shah Bano's case the explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows unmistakably that section 125 over-rides the personal law, if there is any conflict between the two."

In view of this he asked, "Is it not possible to reconcile and harmonise the two conflicting

interests except by making the one override the other? I would like to submit in this respect that this explanation appended to sub-section (3) of section 2125 of the present code of 1973 is in fact there on the statute book since the year 1949 - prior to 1973 as a part of its predecessor section 488 of the code of 1898.

It means this explanation was introduced when personal laws of both, Hindus and Muslims were polygamous. Was there such conflict between Hindu law and the Section 488 of the Cr.I.C. 1898? Because this explanation is appended since 1949.

However since 1955, with the enactment of the Hindu Marriage Act, the principle of monogamy came to be introduced amongst the Hindus. In consequence, if a Hindu solemnised a second marriage during the subsistence of the first, the second marriage was void ab initio. But no such corresponding change has been effected in the personal laws of the Muslims in India. The end

60. Supra note 37 at page 269.
result is that a Muslim husband can legally take second wife while the first marriage is still subsisting.

But to my mind there is no conflict between the two, this right is relevant only if there is polygamy. Had the Muslim law been also made monogamous like Hindu law, there would have been no need for this part of explanation relating to polygamy. Because if the second marriage is not possible, what is the need for such a provision.

In fact this explanation has some meaning if personal law permit polygamy, otherwise what was the need to mention "If a husband has contracted marriage with another woman".

Now for Hindus it is relevant marriages solemnised before 1955, and will remain relevant for Muslim till it permits polygamy. If there is conflict between Muslim husband's right to polygamy and wife's right to live separate and claim maintenance under s. 125(3) of the Code, I want to
ask, was there such conflict under Hindu law prior to 1955? This explanation is appended since 1949.

Secondly, Prof. Virendra Kumar questioned the Supreme Court's contention, which laid down that, "The explanation has to be construed from the point of view of the injury to the matrimonial right of the wife and not with reference to the husband's right to marry again", by stating that the clear object of section 125 of the code (which includes the explanation appended to the second proviso of sub-section (3)) is not to recompense for the injury to the matrimonial right of the wife. Unarguably, its limited objective is to make a provision of maintenance in favour of a neglected and needy wife who is unable to maintain herself from her own resources. If she has the resources, it needs to be stressed, she is outside the pale of section 125 regardless of the injury to the matrimonial rights caused by her heedless husband".

It is respectfully submitted that, it means

61. Supra note 37 at p. 269.
explanation should neither be construed from the point of view of injury to the matrimonial right of the wife nor with reference to the husband's right to marry again, but with reference to make provision of maintenance in favour of neglected wife.

So the whole problem of seemingly conflicting right under Muslim personal law and S. 125 Cr.P.C. comes to an end.

Another objection raised by him is that "while recognising the first wife's right to separate residence under the explanation, should the court be oblivious of the needs of the second legally wedded wife? While attempting to safeguard the lot of one woman (the first wife) is it prudent or even equitable to lose sight of the interest of another person of the same species (the second wife) and that to for no fault of hers?"

62. Supra note 37 at p.270.
interest of *all* persons of the same species (the second wife), Word "has contracted" is used in the explanation of proviso to sub-section 3 of section 125 of the Cr.P.C. which mean both the wives first or second or even third or fourth are equally entitled to claim maintenance on this ground.

If by the interest of first wife he means that it would effect economic condition of her husband and in this way second wife's interest shall be adversely affected, I would like to ask what would happen to the interest of second wife if husband marry third time, then what would happen to the interest of third wife if he marry fourth time, and even fifth time (fifth marriage under Muslim law is irregular not void).

Again he gives warning by saying that (And, mind you) it is just possible a Muslim husband if pushed to the limit, could thwart the court maintenance order by divorcing the claimant wife through talaq. In that eventuality the first wife would be obliged to seek the so-called protection
under the Muslim Women (Protection of Right on Divorce) Act 1986.

Not only this he will thwart the interest of second wife by contracting third marriage, and so on, and can thwart the order of maintenance again by divorcing first, second, third wife, and so on by talaq.

So court was not wrong when it held that divorced Muslim wife is entitled to claim maintenance from her husband in Shah Bano's case, which was made ineffective by the Muslim Women's (Protection of Rights on Divorce) Act, 1986.

We should say Supreme Court has rightly held that "irrespective of the husband's right under his personal law to take more than one wife, his first wife could be entitled to live separate and claim maintenance if he takes a second wife", in Begum Sabanu's case.

Thus the reform in relation to provision of Muslim personal laws reflects the complexity

63. Supra note - 55
of the situation, which had evoked strong sentiments earlier. For instance justice Khalid observed in Haneefa v. Fathummal Beevi, "should Muslim wives suffer this tyranny for all time? Should their personal law remain so cruel toward these unfortunate wives? Can it not be amended suitably to alleviate their suffering? May judicial conscious is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed".

The opinion of scholars, practical conditions, the experience of progressive countries and the ideals laid down in the constitution of India lead to he conclusion the reform in Muslim law in general, and equality of women in particular could only be achieved if we endeavour to locate in the first instance only those grounds which infringe upon the religious susceptibility of the Muslim least. But the attainment of this ideal presents formidable

problems in view of the general illiteracy of the people, the age-old traditions and the political consideration in a democratic system.

(b) **Reforms In Law Relating To Polygamy:**

I submit that the problem of polygamy coupled with absolute freedom of unilateral divorce is the one which can be considered on priority basis. The resolution of this single problem in my view will go a long way in reforming the Muslim law from within. Thus though no hard and fast answers can be given to this problem. Partial codification as in Egypt, and the Dissolution of Muslim Marriage Act, 1939, in India as one kind of remedy.

Next question is how to introduce reform in this respect in Muslim law?

Let us see how it is done in other Muslim countries.

Even in other Muslim countries except Turkey which in fact did not reform the Shariat but altogether repealed it, there is hardly any modern Muslim country which has so far denied the authority
of the sources of Shariat. All of them accept the Quran and the traditions of prophet Muhammad as the main sources of Muslim personal and family law, but claim that like the early Muslim jurists a modern Muslim society has the right to reinterpret these laws so as to meet the requirements of the present age.

As pointed out by Tahir Mahmood, only in Turkey and Tunisia polygamy has been prohibited absolutely, but no other Muslim country has gone so far.

In Turkey, the Civil Code of 1920 has expressly forbidden bigamous marriages. It is provided that the Court can declare such a marriage if contracted, except when the first marriage has been lawfully dissolved subsequent to the solemnization of the second one. Under the Turkish Family (Marriage and Divorce) law, 1951 of Cyprus, the Court can declare a bigamous marriage as invalid in all cases.

66. Article 93.
67. Id. Article 112.
68. Id. Article 114.
without any exception. Similarly, in Tunisia under the provisions of the Code of Personal Status, 1956, a bigamous marriage is expressly forbidden, and if contracted, shall be invalid.

A person contracting a bigamous marriage in Tunisia would incur the penalty imposed by the Code of Personal Status, 1956.

In Iran and Iraq, a bigamous marriage contracted in violation of the statutory requirements as to the courts prior approval, although not invalid per se, would make the husband liable to the penalties specified by the local laws.

In other countries some restrictions are imposed on polygamous marriages.

Prior permission of the Court is required for a bigamous marriage desired by a husband in Syria.

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69. Section 8 and 19 (a).
70. Article 18.
72. Law of Personal Status, 1953, Article 17.
Iran, Iraq, Singapore, and the Sarawak State of Malaysia.

Financial capacity of the husband to maintain more than one wife is a common condition for the grant of such permission by the Courts specifically mentioned by the laws in all these countries except Singapore, in which country the relevant law provides in general terms that the Chief Kathi solemnizing a bigamous marriage must satisfy himself that there is no legal obstacle to the desired second marriage under the law of Islam. In Iran and Iraq, an additional condition for the grant of permission for bigamy by the Court,

74. Law of Personal Status, 1959, Article 3(iv)
75. Muslims Ordinance, 1957, Section 7A.
76. Undung-Undang, Mahkama Melaya, Section 37.
77. Muslim Ordinance, Section 7A.
78. Muslim Ordinance, Section 7A (3).
specifically stated by law, is that the husband must be capable of doing equal justice, between the co-wives. In Iraq, there is yet a third condition, unique in the state, that some 'lawful' benefit must be included in the proposed bigamous marriage.

The law in Indonesia, Ceylon and Pakistan impose various kinds of social control on polygamy. The Family Law Regulations of 1947 in Indonesia require the Marriage officials working, in the country to explain and clarify to the husband desiring a bigamous marriage the true position of polygamy under Islamic law and the conditions and obligations attached therewith.

In Ceylon, the Muslim Marriage and Divorce Act, 1951 provides that a husband desiring to have a second wife must give, thirty days in advance, three notices of his intention one each to the quazis of the areas in which he, his first wife and the intended second wife reside.

80. Law of Personal Status, 1959, Article 3(iv)(b).
81. Section 24 (1).
In providing for the exhibition of such notices by all the three Quazis, in the local mosques holding congregational prayers (on Fridays) and at the residences of the three parties involved, the Ceylonese law sections to impose some social control on the husband, in case he is contracting a bigamous marriage in unreasonable condition. A bigamous marriage contracted in violation of the aforementioned requirement, although not invalid per-se, shall not be registered under the Act.

In Pakistan, under the Provisions of the Muslim Family Laws Ordinance, 1961, prior permission of an Arbitration Council, constituted ad hoc, is required for a bigamous marriage. Such permission might be given by the Council, subject to any suitable conditions, if it appears that the proposed second marriage is necessary and just. Violation of this provision would subject the husband to the liability of paying forthwith the entire amount of dowry to

82. Id. Section 24 (3).
83. Id. Section 24 (4).
84. This Council is to be formed by representatives of the spouses and a Muslim Civil official as Chairman, See, Section 2(a) and (b) of the cited Ibid.
85. Id. Section 6.
the wife, and to the said wife it would furnish a 
86 
ground for divorce by the Court.

The Ottoman Law of Family Rights, 1917 provides
that if a wife stipulates, in her marriage contract,
that in the event of her husband's second marriage
she or the second wife would stand automatically
divorced, the stipulation shall be judicially
enforceable. The same rule finds place in the
88 
Jordianian law of Family Rights, 1951, and also
89 
The latter law further provides that even in the
absence of any such stipulation in the marriage-
contract, the court may inquire if the second
90 
m华侨has caused any injury to the first wife.

86. Id. Section 5 (vi).
87. Section 2 (i) as Dissolution of Muslim Marriage
Act, 1939.
88. Article 38.
89. Article 21.
90. Article 31.
No reform have been introduced in countries like Egypt but there are very low incidence of polygamy. According to 1960 census in Egypt only one per cent of the married Egyptian men had two wives. Only four out of one thousand had three and number of men with four wives defied any ratio. That is true also of other Muslim countries.

Though no reforms have been made in India either to restrict or abolish polygamy among Muslims, the courts have made a contribution towards controlling this practice. The two ways by which the courts have done so are:

first by recognizing the right of delegated divorce in favour of the wife in the event of the husband marrying or taking another wife; and second, by refusing restitution of conjugal rights to a bigamous husband.

Treating Muslim marriage as a contract, the courts have held that any agreement entered into by

91. Quoted by Kamla Tyalji, Islamic Law in Modern India, edited by Tahir Mahmood, p.154.
the parties, if not opposed to public policy or the spirit of Muslim law, would be enforceable. Thus, both pre-nuptial and post-nuptial agreements which gave a right to the wife to get a divorce if the husband took a second wife, were held to be valid.

The Assam High Court in Saifuddin Sekh v. Soneka Libi, went a step further. In this case the Kahinnama contained a stipulation that if the husband brought his formerly married wife to stay with him without the consent of the second wife, the latter would have to option to take a divorce. Not only was such a stipulation considered valid, but such power of choice given to the wife was held to be irrevocable.

93. See saiduddin v. Latifunnisa (1913), 46 I.L.K. Cal., 141; Sadiqa v. Ataullah, AIK 1933, Lah., 685, Sai Juddin v. Soheka, AIK 1955, Assam 153. It is notable that such a stipulation is not valid under the Shia law, see 11 Waillie, Digest, of Mohammedans Law, 76 (1869).
94. 1913, 46 I.L.K. Cal., 141.
95. 1909, 36 I.L.K. Cal., 23.
In Ayatunnesa Beebee v. Karan Ali, the court held that the right to delegated divorce could be exercised at any time as the wrong done to her was a continuing one. Of course, the wife must actually exercise the power so delegated to her.

In Itwari v. Asghari husband sued for restitution of conjugal rights against the first wife, after contracting a bigamous marriage. The court refused relief to the husband. It was pointed out that polygamy was never encouraged in Islam, it was merely tolerated. Bhawan J. observed:

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

98. ibid.
He further said that the fact that a husband who has married a second wife, in the absence of some "weighty and convincing" explanation, raises a presumption of cruelty to the first wife, and will justify the court in refusing a decree of restitution of conjugal rights.

Our existing law enables any wife including a Muslim wife to refuse to live with her husband and claim separate maintenance if her husband has contracted marriage with any other women or keep mistress.

Section (488 cf Cr.I.C. 1898) and at present Section 125 of Cr.I.C. 1973 enables any wife including a Muslim Wife to refuse to live with her husband and claim maintenance if he has contracted marriage with any other women or keep mistress. In number of cases Court has granted maintenance to Muslim wives who has refused to live with a husband who has married second wife.

99. Ibid.
To a latest judgement given by in Subhnumu alias Saira Banu v. A.M. Abdul Gafoor Suprem Court granted maintenance under Section 125 (3) of Cr. P.C. to a Muslim Woman whose husband has contracted another Marriage. In this case the Court discussed in detail the question that whether her right stand curtailed in any manner because of the personal law governing the parties permits husband to marry more than one wife.

Focussing attention on the Explanation(attached to Section 125(3) of Cr.P.C. the Court have (rightly) held that the explanation is of common application to all wives, whose husbands have contracted another marriage irrespective of the fact the Personal law governing the parties permits another marriage during the subsistence of the earlier marriage. Explanation contemplated two kinds of injuries to a wife viz. by the husband either marrying again or taking mistress. The explanation places a second wife and a mistress on the same footing and does not make any differentiation.

101. [Note: The text seems to be missing at this point, possibly due to a page break or a typo.]

between them on the basis of their status under matrimonial law. The purpose of the explanation is not to effect the rights of Muslim husband to take more than one wife, or denigrate in any manner the legal and social status of second wife to which she entitled to as a legally married wife, but to place on an equal footing the matrimonial injury suffered by the first wife on account of the husband marrying again or taking a mistress during the subsistence of the marriage with her.

"... Section 125 its forerunner being Section 428, has been enacted with the avowed object of preventing vagrancy and destitution. The section is intended to ensure the means of subsistence for three categories of dependents viz. children, wives and parents who are unable to maintain themselves. The three essential requisites to be satisfied before an order of maintenance can be passed are that (1) the person liable to provide maintenance has sufficient means, (2) that he has neglected or refused to maintain and (3) the dependent/dependents is/are

102. Ibid.
unable to maintain himself/herself/themselves as
the case may be". So in the view of the Supreme
Court her right does not curtailed in any manner
because of the personal law governing the parties
permits a husband to marry more than one wife.

Other restricting provisions are:-

1. In India and Pakistan, under the
Dissolution of Muslim Marriages Act, 1939, failure
of a husband to treat his co-wives equitably in
accordance with the Quranic injunction would amount
to matrimonial cruelty constituting a ground for
dissolution of the Marriage by the Court, which
any of the co-wives can avail.

Other restricting provisions are:-

2. Under the All India Services (Conduct)
Rules and the Central Civil Services (Conduct) Rules
no government employee may contract a second marriage
while his first is still in existence. Without
prior permissions of the government, nor may any

103. Id. at 1107-1108, para 11.
104. Id. at 1103, para 12.
105. Section 2 (iii)(f).
female marry any person who already has a wife without first obtaining the permission of the Government.

A Muslim who so desires can today contract a marriage, or register a marriage already contracted, under the special Marriage Act, 1954; he can ensure that the "Civil" law of the Act, and not his personal law, will prohibit a bigamous marriages and will govern any question of the dissolution of his marriage, and will also cover all questions of testate and intestate question.

But the experiment of the special marriage Act 1954 shows that a reform in this regard whose application rests on individual option is not very useful.

The most obvious method, however, is legislation on the model of the dissolution of Muslim Marriage Act, 1939.

106. Rule 18, in both cases.
108. Id. at 48.
Polygamy among Muslims is not in practice "a very pressing problem in India". So if such law will be passed it would not affect the existing social condition but merely amount to a declaration.

For our country no exact figures are available, but according to a reliable study based on all India survey, less than one percent of Muslims in Urban areas have more than one wife.

The low incidence of polygamy amongst Muslims in India, coupled with the fact that there are powerful economic, social and psychological forces operating against this institution causing a continuous decline, renders unnecessary the heat generated by the hue and cry raised on this issue by a section of the elite in this country.

Though it is noted that polygamy is reducing and is practiced only by few people or by one per cent. But that one per cent is also a considerable number. It means by many Muslims polygamy is still is practiced.

109. The study made by Dr. Kantilal Irakrais of the Indian Statistical Institute, Calcutta, says, "nearly nine out of every 1000 married Muslims in urban areas in the country are polygamous" Hindustan Times, Dec. 12, 1969.
It causes hardships, leads to social inequalities, and results into instability of family life, over and above that the personal law of Indian Muslims is lagging behind the progress made by Islamic personal law in the major part of the Muslim world outside India.

According to most observers, the largest number of bigamous marriages found among Indian Muslims today are not cases where the husband lives with and supports two wives, which few can afford to do. In most cases of bigamy, the husband abandons his first wife (and frequently children as well) and goes off to marry another woman. Most of these people cannot be bothered with a divorce, and think nothing of leaving their wife legally bound to them. Frequently, also, the second wife knows nothing about the earlier marriage, nor of the children.

Second group of cases is where the wife, finding the marriage unbearable, has left her husband
and returned to her parents' home. The husband, in order to avoid paying the deferred mahr, or perhaps just out of spite, refuses to divorce her, but at the same time contracts another marriage.

The third group consists of wives who do put up with a husband acquiring a second wife and continue to stay with him. The reason for this is nothing but economic subservience. They do so because they can visualise no possible source of livelihood, for themselves and for their children, should they leave their unfortunate home. It would indeed be unreasonable to assert that the husband can be equitable and just in such a case.

A fourth group, is where a person of another religious persuasion deliberately adopts Islam so as to contract a marriage which would not be permitted under his own system of law.

Moreover there is nothing whatever to prevent a husband who has no means to maintain two wives equitably from contracting a second bigamous marriage.
So such polygamy not permitted by Quran (Muslim Personal Law). No doubt that the Quranic injunction permit Muslim male to marry more than one wife but not more than four at a time, if he can treat all the wives equally. He does not treat all of them equally, he is not permitted by Muslim law.

The Holy Quran in Chapter IV, verse 3 - frequently relied upon as supporting polygamy - Says:

"And if you fear that you cannot do justice to orphans, marry such women as seem good to you, two or three, or four; but if you fear that you will not do justice, then (marry) only one or that which your right hand possess. This is more proper that you may not do justice". "It is admitted on all hands that this chapter was revealed to guide the Muslims under the conditions which followed the battle of Uhud........" The Holy Quran by Maulana Muhammad Ali).

In another passage the Quran says:

"Ye are more able
To be just and fair
As between women,
You ardent desire".

110. Chapter 14, verse 129.
It follows from these passages that the Quranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognised the difficulty of treating two or more wives with equal justice and, in such a situation, directed that an individual should have only one wife. In short, the Quran enjoined monogamy upon Muslims and depature there from as an exception. That is why in the true spirit of the Quran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted. Syria, Tunisia, Morocco, Pakistan, Iran, The Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context.

The conditions under which it was permitted are so difficult to compliance that they amount to a virtual prohibition and that the circumstances which rendered it permissible in primitive times having either passed away or not existing in modern times, the practice of

polygamy is in contravention of the law.

A. Yusuf Ali in his commentary on the Holy Quran has pointed out with reference to the original text, in its proper context, that the prophet first strictly limited the unrestricted number of wives of the Times of Ignorance, to a maximum of four, provided you could treat them with perfect equality in material things as well as in affection and immaterial things. As this condition is most difficult to fulfil, the recommendation was understood to be towards the practice of monogamy.

Any dynamic Indian Judge, Jurist, or Legislature could have reasonably spelt out monogamy from the original text read in modern Indian Circumstances.

The words of the Quran say that if a man cannot treat his two wives with perfect equality, he is enjoined to marry only one wife. It is obvious that in modern Indian conditions, however, financially

112. Purushottam Bhattacharya, Law of Marriage and Divorce (Jodhpur University).

psychically, sexually potent a husband may be, it is beyond him to show equal justice in every respect to a plurality of wives.

Moreover polygamy is not one of the basic tenet of Islamic religion. "The basic tenet of Islam are (as the principle of the unity of God, i.e., God is one, and (as Mohammed is the prophet of God".

"Polygamy may be allowed by the Muslims personal Law but a belief in polygamy is not a belief or faith in Islam". The U.S. Supreme Court in several decisions held that polygamy was not a tenent of religion at all.

The prohibition of polygamy which would be ensured by such interpretation of statutes is based on Art. 25(2) of the constitution which excludes from the freedom of religion guaranted in Art. 25(1), a secular activity even if it may be associated with

114. V.K. Krishna Iyer, Islamic Law in Modern India (Edited by Tahir Mahmood, ed. 1972), p.17 at p.23.
115. Paras Diwan, Muslim Law in Modern India, p.2(Ed.1977).
116. V.S. Deshpande; Mehar Chand Mahajan Memorial Lectures (1982-83) Punjab University, Chandigarh.
a religious practice. That is why Muslim Marriage and Dissolution Act, 1939 could be enacted without touching Islam as a religion. For the same reason the ban on polygamy was upheld by the U.S. Supreme Court in Reynolds v. The United States of America.

In State of Bombay v. Narasu Appa the Bombay High Court held that the Bombay prevention of Hindu Bigamous Marriages Act, 1946 was intra vires the Constitution; The Act had imposed severe penalties on a Hindu for contracting a bigamous marriage. Validity of this act was attacked on the ground that it violated the freedom of religion guaranteed by article 25 and permitted classification on religious grounds only forbidden by article 14 and 15.

119. A.I.R. 1952, Bom., m 84.
120. Act XV (25) of 1946.
121. S. 5 of that Act provides that "whoever not being a minor (and a minor is a person who is under sixteen years of age) contracts a bigamous marriage shall, on conviction, be punishable with imprisonment, for a term which may extend to seven years and shall also be liable for fine".
122. Quoted in Supta note, Chapter VII.
123. Quoted in Supra, Chapter VII.
124. Quoted in Supra, Chapter VII.
It was urged that among the Hindus the institution of marriage is a sacrament, and that marriage is a part of Hindu religion which is regulated by what is laid down in the Shastras. That a Hindu marries not merely for his association with his mate but in order to perpetuate his family by the birth of sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having someone who can offer oblation to his own shade when he is dead and to the shade of his ancestors, and that there is no heavenly region for a sonless man. Therefore, the institution of polygamy is based upon the necessity of a Hindu obtaining a son for the sake of religious efficacy."

Both Chagla, C.J., and Gajendragadkar, J., rejected the above arguments. Gajendragadkar, J., was not prepared to concede that the legislative interference with the provisions as to marriage constituted an infringement of the Hindu religion or religious practice. His reasoning was that a sonless

125. Supra note 119
man could obtain a son not only by a second marriage but by adoption as well. Chagla, C.J., heavily relied on Davis v. Beason. In this case the constitutionality of an Act of the United States, which outlawed bigamy, was challenged. It was contended that the impugned Act infringed the religious freedom of the members of the Mormon Church and violated the First Amendment of the U.S. Constitution. The members of this church used to practise polygamy as a part of their religious creed. Justice Field, who delivered the opinion of the U.S. Supreme Court, however, rejected the contention and observed: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation".

126. Id. at 94.
127. 133 U.S. 333 (1889).
128. The First Amendment of the Constitution says: "Congress shall make no law respecting an establishment of religion or ....prohibiting the free exercise thereof".
129. Supra note 127
Broadly speaking, Chagla, C.J., gave three reasons to uphold the validity of the Bombay Act. First, he said that what the state protected was religious faith and belief, but not all religious practices.

Secondly, he claimed that polygamy was not an integrated part of the Hindu religion. Finally, he maintained that if the State of Bombay compels Hindus to become monogamists and if it is a measure of social reform, then the state is empowered to legislate with regard to social reform under article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion.

Regarding the discrimination made by the Act on religious ground, it was contended that the State of Bombay should not have picked the Hindu community for the purpose of legislation. It was pointed out that polygamy was prevalent and permissible among Muslims.

130. Supra note/ at 86.
131. Ibid.
132. Ibid.
living in the State of Bombay, and they could marry more than one wife with impunity, but if a Hindu living in Bombay did the same, he was liable to severe penalty. These arguments were not accepted by the court. Gajendragadkar, J., thought that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provisions. He observed: "It is now well settled that the equality before law which is guaranteed by Art. 14 is not offended by the impugned Act". Chagla, C.J., also stated:

Art. 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise".

133. Id. at 87.
134. Id. at 95.
135. Id. at 87.
and that the discrimination made by the Act between Hindus and Muslims does not offend equality provision of the Constitution.

The Madras high Court also grappled with the question of validity of a Madras law which had abolished polygamy among Hindus. The Act in question was the Madras Hindu (Bigamy Prevention and Divorce) Act of 1949. Challenge to the Act was made on substantially the same grounds on which the Bombay law was attacked, viz, the Act unconstitutionally interfered with the free practice of religion and permitted discrimination against Hindus. The above arguments were not accepted by the court. Like the Bombay High Court, the Madras High Court pointed out the abolition of polygamy did not interfere with the religion because if a man did not have a natural born son, he could adopt one. Further, relying on a passage in Reynolds v. U.S. the court said that whilst

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136. Ibid.
138. S. 4 of the Act provided: Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnization shall be void......
139. Supra note 137 at 196.
140. 98 U.S. 1874.; at 166, 167.
religious belief was protected by the Constitution,
religious practices were subject to state regulation.
The High Court observed that "The religious practice
therefore may be controlled by legislation of the
State, if it thinks that in the interest of the social
welfare and reform it is necessary to do so.
Before the Allahabad High Court the
constitutionality of two provisions was challenged.
One was a rule of Uttar Pradesh Government Servants
Conduct Rules, which provided that "no Government
servant who has a wife living shall contract another
marriage without first obtaining the permission of
the Government, notwithstanding that such subsequent
marriage is permissible under the personal law for the
time being applicable to him". The other was a
clause of the Hindu Marriage Act, which provided that
"neither party to marriage should have his or her
spouse living at the time of his or her marriage".

141. Supra note 19 at 196.
143. Rule 27 thereof.
144. S.5 (1) of the Hindu Marriage Act.
It was alleged that the provisions violated article 25 of the Constitution. The petitioner was a government engineer. He had been married for twenty years, but did not have a son. He wanted to re-marry. His alleged belief was that he could not attain salvation without a son and that a number of religious obligations would remain unfulfilled unless there was a male child in the family. The petitioner cited a number of extracts from the religious books to support his contention that one of the essential parts of the Hindu religion was that a Hindu was permitted to marry a second wife in the presence of the first if his first wife was incapable of bearing a male child. The decision of the court, in view of the two earlier precedents was a foregone conclusion. Mehrotra, J., who spoke for the court, justified the provisions on the ground that the Hindu religion only permitted "a second marriage in certain circumstances but it cannot be regarded as an integral
part of the Hindu religion". He further observed that:

The presence of a son may be essential to achieve religious salvation but that does not necessarily mean that in the presence of a wife who has a living female child and there being a right to adopt, second marriage is so obligatory as to form a part of the Hindu religion.

It may be conceded that the laws punishing the parties to bigamous marriages are a measure of social reform, and article 25(2) (b) which empowers the state to make laws for social welfare and reform appears to contemplate such a law.

It is therefore submitted that it would be in the interests of the Muslims that polygamy as a rule be prohibited. If the Muslim countries can do that, it should not be difficult for a secular country like

145. Id. at 413.
146. Id. at 413-14.
India to do the same.

Muslim law is not an heteronomous, immutable or irrational system but its enduring merit lies in its capacity to adjust to the changing human society and the needs of life, provided its religious basis is placed. Understood in its correct perspective. It is well established that the sources of Muslim law are not only the Quranic precepts, but they include legal devices such as Ijma, the consensus of the jurist, Siyas, the analogical deuctions.

The enlightened section of the Muslim community has now come forward asking for a reasonable restriction on the practice of polygamy. Professor A.A.A. Fyzee asserts that polygamy is not a fundamental right of the Muslims and as such its prohibition would not violate Article 25 of the Indian Constitution. Professor M. Basheer Hussain, advocating for reform in Muslim law says:

"It is unfortunate that the Government of India which played such an important role in reforming

the Hindu Law has allowed itself to be guided by Muslim orthodoxy in the matter of reforming the personal laws of the Muslims. Excessive fear of hurting the susceptibilities of the Muslims might have contributed to the apathy of the majority community. The failure to initiate the reforms is bound to regard the progress of this community. The fear that such reforms would offend the feeling of the minority community is an unjustified fear. Hidayatullah, C.J., in his introduction to Mulla's 'Principles of Mahomedan Law' while mentioning the reforms made by several Islamic countries, is of the view that reform in the Muslim personal law is not impossible. He says:

It is however, amply clear that reform is not impossible. If the injunctions of the Quran and Hadis are not lost sight of it is possible to make changes by legislation in a widening area. The lead is coming from Muslim countries.

and it is to be hoped that in course of time the same measures will be introduced in India".

Socially also monogamy by and large had already been adopted by many Muslims. For our own country no exact figures are available. But according to a reliable study based on an All India Survey, less than one per cent of Muslims in urban areas have more than one wife.

"Polygamy ...... is more rare among the high and middle classes than it is among the lower orders, and it is not very common among the latter......Most persons of the middle and higher orders are deterred from doing so by the consideration of the expense and discomfort which they would incur. Not more than one husband among twenty has two wives ".

149. Mulla, Muhammad, pp. Introduction by Hidayatullah, C.J., p. XI, XXXI.

150. The study made by Dr. Kanti Prakrasi of the Indian Statistical Institute, Calcutta, Says: "Nearly nine out of 1000 married Muslims in urban areas in the country are polygamous. See the Hindustan Times, December 12, 1969.

Polygamy is in fact, very rare in India, and indeed, that it does not seem to be any more common among Muslims than it is reality (whatever the law may prescribe) among Hindus—...."

Thus the abolition of polygamy in this way would facilitate the task of reforming the Muslims Law from 'within' in some of the most vital respect namely polygamy. This, in turn, would substantially in my view affect the Muslim husband's unilateral power of divorce. A power which is termed by Ryzee as 'one sided engine of oppression'. This development, however small it may seem would in our submission pave the way for bringing the Muslim community into the main stream of Indian personal laws, and would prove another step toward equality among men and women.