

Issues

Secularism on the bend

For every Shah Bano who defies the threat of ostracism and seeks justice, there are thousands of voiceless women who languish without hope of succour. An analysis and a viewpoint that should trigger a wideranging debate on the issues raised. A professor and a lawyer present their views on the Shariat in two articles that follow.

CHIEF JUSTICE Y. V. Chandrachud and his four colleagues on the Constitution Bench of the Supreme Court (Desai, Chinnappa Reddy, Venkataramiah and Ranganath Misra) who gave the ruling in Mohammed Ahmad Khan vs Shah Bano Begum (April 1985) walked into the annals of legal history with an aplomb which is perhaps unequalled in the records. Did they ever divine the volcanic eruption their judgment would provoke from the representatives of Muslim orthodoxy? Chandrachud later admitted that while he knew that the judgment would be "a significant landmark in the march of law towards social transformation" he did not anticipate the furore it would create. The Shah Bano ruling has been received as a *cause celebre*. Yet there is little reason to hail it as an unprecedented triumph of radical judicial activism over customary politico-cultural equivocation in the exalted chambers of the Indian judiciary on such matters.

The Indian Constitution does not represent the law of social differentiation. Its basis is a common, equal citizenship, notwithstanding the fervour of its founding fathers to provide specifically for the preservation of the cultural freedom of a multi-religious, multi-lingual community. On the adoption of the Con-

stitution in 1950, all the divergent personal laws of different sections of the people (Hindu, Muslim, Christian, Parsi, pagan or heathen) should have been logically treated as annulled to the extent that such laws or old, antiquated views of religious diehards of all communities ran counter to the dictates of the Constitution.

Religious extremists shouting hoarse over the Shah Bano decision evidently have lost sight of a host of judicial decisions in India which have affirmed the overriding effect of the Indian Constitution and the statute law which is the amplification, in specific areas of national life, of the provisions of the Constitution. Justice Hegde of the Mysore High Court, for instance, ruled in Syed Ahmed vs Nagath Parveen (1958) that there was no constitutional guarantee "to respect the personal law of any community." Much later in 1978 (long before the Shah Bano legal episode) in Bai Tahira vs Ali Hussain and again in 1980 in Fuzlunbi vs Khader Vali, the Supreme Court recognised the right of "talaq" Muslim wives to obtain maintenance from the husbands.

The interests which felt outraged over the Shah Bano decision had earlier overlooked a similar decision by Justice S. A. Khader of the Madras High Court in November 1984 (Ameer Amananullah vs Padikkaru Mariam Bevi). The same tenor of the law was expounded by Justice Kantharia of the Bombay High Court ruling in favour of alimony being granted to a Khoja Muslim woman, Amina Mohammedali Khoja (November 1985).

Shorn of the *obiter dicta* occasioned by it, the Shah Bano judgment amounts to a straightforward application of Sections 125 and 127 of the Criminal Procedure Code of 1973 to the predicament of Shah Bano. As the Cr. P. C. stands, a First Class Magistrate could order a person of means to make a monthly allowance of not more than Rs. 500 to his "wife" (including a divorced wife) in case the woman suffers neglect. An Indore Magistrate had, in August 1979, awarded a measly monthly allowance of Rs. 25 by a Muslim husband, a practising advocate, to his divorcee, the 74-year-old Shah Bano Begum. On a petition by the woman, under Section 127,

the Madhya Pradesh High Court had "enhanced" the allowance to an accurate-looking Rs. 179.20. It was this order that the husband wanted quashed by the Supreme Court. The Constitution Bench dismissed the appeal on merits.

The decision would not have provoked much public comment, much less consternation, but for the weighty judicial observations surrounding it. The Chief Justice had described the law contained in Section 125 of the Cr. P. C. as a security against vagrancy and destitution and as a moral edict not to be clubbed with religion. As such the law was truly secular and it made no distinction between a Muslim or a Hindu wife. The judge might well have added that such basic protection as is offered by the law seemed cardinal essential for scores of Muslim women (in the economically lower strata of the population), heartlessly abandoned by their husbands through the capricious pronouncement of "talaq" much against the spirit of the Shariat.

Muslim husbands in India, being governed by the Hanafi school of law, need not observe procedures for mutual marital release ("khul" or "mubarat") for securing divorce. For every Shah Bano or Amina Khoja, who defies the threat of ostracism and seeks justice from a court of law, there are thousands of illiterate, defenceless wives—victims of desertion, in Gujarat, Kerala, Andhra Pradesh, Karnataka and in other States—who languish without any hope of succour. Compared with their Hindu or Christian sisters exposed to gender discrimination in a variety of obnoxious ways, Muslim women are singularly disadvantaged.

Fundamentalists, who have unleashed a propaganda blitz against the Supreme Court judgment, pose as defenders of the Shariat while in fact they appear to be privy to the manifold violations of the sacred Islamic "hadis" and "ijmas". The brazen attempt to keep bonded women beyond the pale of social legislation would obviously be inconsistent with the dictates of a secular democratic polity. The founding fathers of the Indian Republic, while being acutely aware of the religious temper of the extremists in the majority and minority religious communities, had set out in Article 44 of the Constitution a clear directive of State policy, to secure in due course a unification of the civil code and thereby achieve a truly common citizenship. Article 44 has remained a non-starter, a dead-letter, a testimony to hypocrisy in society at large and in official attitudes.

The Shah Bano ruling, in retrospect, has drawn the fundamentalists out into an open confrontation with the democratic and progressive forces

among the educated, enlightened Muslim public. It is customary policy for the ultra-orthodox to dismiss advocates of social change among the community as "kafirs" (unbelievers), "dahriyas" (atheists) or as communists or radicals misled by enemies outside the community. It remains to be seen whether all these epithets will effectively contain the commitments to social change inspiring the progressive young elements among Muslims.

A uniform civil code as adumbrated in Article 44 is the desideratum of a secular society. Nevertheless it can evolve not through a peremptory stroke of the pen but only through a mature process of public discussion cutting across political party-lines and ecclesiastical obfuscations. So long as the phalanx of diehard orthodox (the Muslim League and its associate, the All-India Muslim Personal Law Board) obstructs debate on bringing over the 80 million Muslims into a common, civilised and democratic framework of social and economic rights, the concept of equality before law and equal protection enshrined in Article 14 of the Constitution will remain an utopian fantasy. Those who speak in the name of safeguarding the uncompromisable integrity of Muslim personal law would have nothing of all this process of secularisation. In the aftermath of the Shah Bano verdict, the President of the Indian Union Muslim League (IUM), Ibrahim Sulaiman Sait, went so far as to affirm that any opposition to the League's demand for non-interference in the Muslim personal law was an assault on the Constitution itself. The implication in respect of the Shah Bano judgment was obvious.

The sparks that flew out of frayed tempers and the blatantly intemperate comments on the judges by Z. R. Ansari, the unbridled Minister of State for Forests and Environment, in the Lok Sabha, jostle uneasily with the Hamlet-like stance of the Prime Minister on the entire issue. In India, a "commonwealth of religions", tolerance of diverse religious systems would preclude, according to his view, any interference in the religious affairs of any community. The Prime Minister's view is a notable example of the sense of helplessness or inadequacy which has been the hallmark of Indian public policy relating to social justice vis-a-vis religious reaction. At the All-India Momin Conference, the Prime Minister made the astounding statement that the Government was considering the demand for exclusion of Muslims from Section 125 Cr. P.C. Could this principle of exclusion not be expanded dangerously to annex other areas? □

S. SWAMINATHAN

Ignorance and injustice exist

The Koran, far from degrading women, champions their rights and equality with men; injustices to women are the result of callous misinterpretation of the Shariat for the convenience of unscrupulous men and also of ignorance among women of their rights, contends Dr. Tahir Mahmood, Head of the Law Centre II of the University of Delhi, and the Department of Islamic and Comparative Law of the Institute of Islamic Studies, Delhi. In an interview with Patricia Roberto for FRONTLINE, Dr. Mahmood clarifies some points of Muslim personal law.

QUESTION: Dr. Mahmood, I'm not a Muslim, nor am I knowledgeable in the area of Islamic law. Many people are puzzled as I am when they hear of the case of a woman who is unilaterally divorced by her husband, and who has little in the way of resources, being denied maintenance. How can this be justified under Islamic law?

Answer: Islamic law does not say that when she has nobody else in the world to support her, then also she must not be maintained by the husband. On the contrary, Islamic law is that if she cannot support herself, and there is no one else in the family of her birth who is willing or capable of maintaining her, the liability does fall on the former husband.

Q: In the Shah Bano case that was not recognised.

A: No, because Shah Bano was a rich and affluent woman. She has three grown up sons, one of them a leading lawyer. In Islamic law the liability to maintain a mother falls on her offspring, not on the husband.

Q: Why is that?

A: It is because of Islam's peculiar concept of marriage. The concept of marriage in Islam is not that of a sacrament or that of a necessarily life-long relationship. It's just a relationship between one man and one woman as per their own convenience. If one of them is fed up with the other or tired of that particular relationship, they go out of it, and the moment they go out of it, there is absolutely no relationship between them. And therefore if there can be any other arrangement for the maintenance of this woman, the husband is absolved of the liability. Both are left free by Islamic law to take care of their new life.

Q: Of course the man is left free with



Shah Bano..... in the centre of controversy.

his assets; the woman, what does she have to start her new life with?

A: All that the man has given to her is not to be returned. "Mehr" (dower) given to her by the husband is immediately payable to her if it has not already been paid. If the amount is too low, it can be raised by the court. And then any property which has vested in

this woman before divorce will not be divested.

Q: Property vested in her during the course of the marriage? Or that she has obtained on her own?

A: That she has obtained on her own or that she has inherited from some relative of the husband or her own relative. It won't be divested on divorce.

Q: No property accrues to her in community with her husband?

A: No, in Islamic law there is no concept of matrimonial property unlike the Western laws. We have the husband's property which exclusively belongs to him and he's the absolute master of it and we have the wife's property of which she is the absolute master. Both can earn during marriage but there is no common house property. There is no marriage of the incomes and properties. The properties remain separate during marriage and they remain separate after divorce.

Q: Now, most Muslim women, I assume, are involved with raising children and maintaining a household. Men are engaged in earning a livelihood. This arrangement is often characterised as a division of labour, which leaves each party free to better pursue the objectives of his or her role. Because of this it is held in some systems of law that the wife by maintaining the house, bearing and raising children and attending to the physical needs of the family contributes economically both in what she does and by freeing her husband to earn. If that is the case, what does the wife have to show in terms of property, for the economic contributions she has made when she is divorced?

A: You see, in Western society it is very different from what happens here in India. There it is a choice for the woman. She's well educated or educated enough to take up a job, and by her own volition, if she does not take up a job or gives it up and looks after the family, then it is different. But in India, in most cases the wife is wholly illiterate or maybe she's educated to about the primary level or the secondary level and she's not going to get a job at all. It's not by her own volition that she prefers to stay home and look after the children and the household but because she has no other better alternative.

Q: Are you saying that that does not constitute a contribution?

A: No. How is that an economic contribution? On the contrary, she's a liability. She needs to be maintained in any case. In Islamic law it is not the obligation of the wife to maintain the children. If she says "I don't want it", the husband cannot force her to do it. He has to make alternative arrangements for it at his own cost.

Q: But among the poor, it is not realistic to assume that would happen.

A: Technically, legally speaking, if the wife says, 'I am doing this not as the mother of my children but as an economic contribution; I am contributing to the household just as you are doing by earning' then she's entitled to compensation according to Islamic precept. And not necessarily when the marriage is broken but even during married life she can ask for compensation for that service if she declares that she is rendering that service not as the mother of the children but as an employee (laughs), as an agent of the husband.

Q: You said in an address that "talaq", the right of the husband to pronounce a divorce, and "halaq", the



Tahir Mahmood..... reforms must come from within.

right of a woman to seek a divorce, are equal rights.

A: Yes.

Q: How can that be when one party has the power within himself to void the marriage and the other must petition those having the authority?

A: No, that's not "halaq". The law is that just as the man can unilaterally discard his wife, the woman can also unilaterally discard her husband.

Q: But she has to seek permission to do so from some authority, does she not?

A: No, this belief that it is necessary, legally, is not correct. It is a male-dominated society and (if) the woman says, 'I am divorcing you' and he doesn't agree and forces her to remain his wife, in that case the remedy available to the wife is to go to the court and ask for a confirmatory decree. She's not asking

the court to grant the divorce; there is a world of difference between the two things. Granting a divorce is different from confirming that a divorce has already taken place.

Q: If that is the case, why is there so little knowledge about it among Muslims and even among interpreters of Muslim law?

A: Because of male domination. The male chauvinism. The terrible misinterpretation of the laws by the petty mullah of the mosque. But if you read the authentic books, the verdicts of great jurists, regarding "halaq", it is absolutely the same as the law of "talaq".

Q: Why is that Islam gives so much power over public life and married life to men?

A: This is again a misconception. Where does Islam give power to men? That may be the practice of the Muslim society. But if you are talking of the law.....

Q: Well, the fact is that a man may have several wives. The woman is totally dependent on the man and cannot as easily divorce him as he can her. You may say that in law she may as easily divorce him but in fact she must have an economic alternative. There would be great pressure from her family to stay in a marriage rather than return and be a burden again. So she is always more dependent on the marriage.

A: To the extent marriage in India and in other societies is seen as social security for women, it will not be as easy for them to separate as it is for men.

Q: And also, if I have understood this correctly, the man is not penalised economically for unilaterally pronouncing divorce, beyond the three months of "iddat" during which he must support his wife. But the woman, if she declares a divorce, is penalised economically because she must return the "mehr" or forego it. So how can this be said to be equitable?

A: In the case of males the penalisation is that he has to pay the "mehr" immediately upon divorce. It cannot be reduced. During marriage, if the husband thinks it is unconscionable, he may plead with the wife, she may reduce the amount. But the moment there is a divorce, there can't be any reduction in "mehr". Whatever is the "mehr", it may be a million dollars, it has to be paid immediately and so long as it is not paid, interest tacks onto it. And in "halaq" the process is the reverse. The wife, who would have been entitled to it if there was no divorce, has to forego it.

Q: But suppose she is seeking divorce for good reason. Suppose he is beating her, must she consent to continue to be beaten or forego what is

rightfully hers?

A: If she is asking for divorce for a reason, then her option is not the "halaq". Then her option is to go to court and ask for a decree of judicial divorce. In which case the "mehr" is not lost. If the court pronounces a divorce, the "mehr" is not lost and that must be on one of the grounds mentioned in law..... one of which is physical and mental cruelty. "Halaq" is for when the woman, for no reason, or for reasons she does not want to state, wants a divorce. But if she has a genuine ground for seeking divorce, then her option is judicial divorce. In the case of men, judicial divorce is not available.

Q: Because, as you imply, it's unnecessary.

A: Well, I would say there could be cases where the wife makes the life of the husband miserable, and he may want to get rid of her; but then if he does so he has to pay her dower, the "mehr". He cannot get divorced by court.

Q: Now "mehr", I understand, can be as little as, say, Rs. 100, and in many cases it is. How can that be said to be just?

A: Well, it is to be thought of at the time of marriage.

Q: You are talking about illiterate women. Sometimes you are talking about little girls. These are not particularly sophisticated people. Often they are dependent on relatives who don't want to be burdened with them. How can you tell such people they should have thought of this at the time?

A: If not them, those who have given

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them in marriage, the parents, have to think of it.

Q: But perhaps they don't. You are talking again about illiterate people.

A: Then, there is the law in this country enacted in the 1920s. Not regional but local laws, under which the amount of the "mehr" can be raised or decreased by the court. So that provision may be available if it is too low.

Q: Do you know of cases where it has been done?

A: Yes, in a number of cases. In the State of Jammu and Kashmir and in quite a few cases in Uttar Pradesh. From Rs. 33 in a case which I handled it was raised by the court to Rs. 30,000.

Q: In what kind of court?

A: Civil court, following Muslim law. There is an Act called the Muslim Dower Act under which such changes can be made. And it is based on the opinion of some classical Muslim jurists that the kazi in suitable cases, can enhance the amount of "mehr". Or, if it is too unconscionable, the court is allowed even to decrease it.

Q: Why do you think that a group of Muslim women have written a letter to the Supreme Court in which they call the Muslim personal law, and I quote, "an instrument of torture, abnegation and oppression in the hands of callous, egotistical, tyrannical and often uneducated Muslim males?" How could there be such difference of opinion between you and them?

A: Ignorance of law. I don't think there's anything surprising in it. I know the law so thoroughly from inside. And they do not know the law. They go by the practice of some unscrupulous and dishonest men and they think that is the law.

Q: Has the law, as they say, really become an instrument in men's hands? You hear of cases of collusion with the local Muslim authorities. Men leaving marriages without telling their wives they have divorced them, men going abroad and simply sending letters repudiating the woman and leaving her on her own. Even this practice of changing religion to Islam in order to be free of obligations to a divorced wife. There seem to be so many practices that one begins to wonder if the interpretations have just not caught up with a way of life that is totally different from that envisioned when the laws were framed.

A: Yes. You are right to think that these laws were enacted by the Prophet in a sense of expectation that men would know how to behave. And now that this expectation of the Prophet is being openly belied, there is certainly need of controlling man's power to impose an instant unilateral divorce on the wife. And that is why in more than 20 Islamic countries the power of instant unilateral divorce has been subjected to different kinds of controls—judicial control, administrative control, arbitral control and so forth—that just instantly the divorce does not become effective. A man might pronounce it, but then it has to evolve by process.

Q: If we can return for a minute to the Shah Bano case. How did the judgment in that case conflict with the per-

sonal law which, after all, does not forbid a husband from maintaining his ex-wife but merely gives a minimal requirement? The court based its decision on a point of the Criminal Code that had as its aim the prevention of destitution and vagrancy of the wife. May not the courts prescribe actions to prevent social evils? Where is the conflict?

A: In this case Shah Bano was a rich woman, owner of two houses worth mil-

"Shah Bano is a rich woman and does not require even a penny from the husband or anybody for maintenance. Despite that the Court had ordered maintenance to be paid by the husband. That is how it conflicts with Islamic law."

lions of rupees and had received a lot of property from her husband who cannot under Islamic law take it back. She does not require even a penny from the husband or anybody for her maintenance. Despite that, the court ordered maintenance for her to be paid by the husband. That is how it conflicts with Islamic law.

Q: In other words, if she had been a poor woman, you would have no problem with the ruling?

A: If she were a poor woman, without having rich, affluent sons, if both these things were absent, then the judgment would have been in conformity with Islamic law. Islamic law says if a woman cannot maintain herself and has no close relatives like sons or parents to maintain her, then the liability falls on her husband. No quarrel about that. But just for the sake of it? Because there must be maintenance for a divorced woman from her husband? That's against Islamic law.

Q: So you would have had no objection to the Supreme Court decision except for this?

A: No objection. It was not necessary for the Supreme Court to put a new gloss on any provision of the Koran. The court could have simply said that the Criminal Procedure Code of the country under which this party has come to us makes it incumbent that the court order maintenance for those women who cannot maintain themselves.... and this woman cannot maintain herself or cannot be maintained by her sons or

her parents. In that case there is no conflict with Islamic law and therefore we will allow it. Simply the Supreme Court could have said that. There was no need to reinterpret the Koran or to reinterpret Islamic law. Islamic law is clear on that point.

Q: You have mentioned that objective conditions can change from century to century, perhaps requiring re-interpretations of law.

A: Yes.

Q: The idea that a woman will return to her parental family or will become dependent on her children may be less realistic in terms of universal application now than it was in centuries past. Also it takes for granted a continuing state of dependency on some one. I can see a vast potential for abuse.

CURTAIL POWER OF DIVORCE

A: The remedy for all this lies not in tampering with Islamic law regarding divorcee's maintenance but in properly restricting the power of divorce, men's power of unilateral divorce. It's that which needs curtailment, which needs discipline, rather than maintenance for women.

Q: But conservative Muslims are saying that that is Muslim personal law.

A: Muslim personal law does not allow any husband to merely discard his wife, just like that. There is a procedure for that which is not being followed in this country or in many other countries. Something has to be done to see that they follow those procedures.

Q: What are those procedures?

A: The procedure is that first, there is total discouragement of divorce. Divorce is to be avoided as far as possible and used only as a last resort. There are two injunctions in the Koran and in the sayings of the Prophet to that effect.

Right now the decision whether the marriage has broken down or not depends upon the satisfaction of the man. This decision has to be withdrawn from him and vested in somebody else, another organisation or institution, may be the court, the Muslim court. The two Koranic prescriptions for arbitration, reconciliatory arbitration, can be given effect judicially. According to the Koran..... a representative of the wife and a representative of the husband and perhaps a third person must make the attempts to reconcile the parties. Only when it is certified that reconciliation is impossible will divorce be allowed. The certificate of the arbitration council is necessary that the marriage has actually broken down. If that certification is forthcoming before the end of 90 days, then with its issue the divorce becomes effective. Otherwise it becomes effective only at the end of that period of time. This is the law in Pakistan, Bang-

ladesh and many Arab countries.

Q: Why does the clergy not interpret things this way? Why does it so often seem to be furthering the rights of men at the expense of women?

A: Well, most of them sincerely believe what they do or what they think is the law. That's not correct. And some of them are bought, that is, the opinion of some of them is bought and manipulated. All sorts of things are happening in this society. There are muftis who say, "Oh, if you divorce your wife twice you cannot take her back unless the wife marries somebody else in between and where do you find somebody else? I'm available". Gross misuse and exploitation.

Q: What is the problem with instituting a uniform civil code that will simply be enabling legislation?

A: We already have it. We already have the Special Marriages Act of 1954. Anybody has an option between his own personal law and the Special Marriages Act.

Q: Then wasn't Shah Bano simply exercising that option?

A: Well, she was married long before the Act. An existing marriage can be brought under that Act by mutual consent of the parties, and then it is deemed to have been contracted under that Act.

Q: In what other ways would a uniform civil code be different?

A: How would it be different from the Special Marriages Act? Anybody who is married under the Special Marriages Act is also subject to the Indian succession law which is also a secular law. Marriage, divorce, succession, they are already provided for under these two Acts. What else is left?

Q: If a Muslim couple got married today, they would have to be married under this Act in order to be covered by the secular laws rather than the personal laws?

A: Yes.

Q: What is being talked about is a uniform civil code accessible to everybody, no matter what laws they are married under, if they choose to exercise the option.

A: But this is accessible to everybody all over the country, in all the States..... If you are unmarried, you must register to be married under that Act, under the procedures of that Act. And if you are already married you have to go and register your marriage under that Act. So the option is with the couple.

Q: It would be easy to coerce someone, particularly someone very young and impressionable. Is she really going to demand to be married under the Special Marriages Act.

A: Yes. But now the trends have changed. We are having many more

marriages under the Special Marriages Act rather than under the personal law. It's felt that it gives more security to the women.

Q: So why not extend that security to everyone (irrespective of the laws under which they are married)?

A: Yes, but one party cannot unilaterally alter the nature of the marriage. It might work out to the disadvantage of that one party, but Indian law feels that it would not be just to allow a change in the nature of the marriage..... at the demand of one party only.

MORAL DUTY

Q: Most of what is being said centres not on injustices against women at the hands of Shariat courts but on the attack, real or perceived, against Islam from the outside in India. But if injustices are perceived by outsiders, don't they have a moral duty to speak up, to ask questions? Isn't there a common sense of justice that transcends sectarianism and binds the people of a country together?

A: Yes. There should be such a sense among citizens of a country, but that is not what is operating here. This is an attack by those who want to see Muslim law abolished. Their concern for Muslim women is not genuine. Where is their concern for Hindu women, for bride burnings and dowry deaths? You would think that the plight of Muslim women is the only problem facing Indian women. But you see they are very selective in their concerns, and when we perceive such selectivity we naturally see it as an attack.

Q: And yet you have said, notwithstanding the motivations for outside criticism, that in the matter of applying Muslim law justly to women, Muslims have to put their house in order. How will that be done?

A: Yes, we do acknowledge it. That there is much injustice through ignorance and sometimes through deliberate exploitation. But Muslim society is becoming more aware of these problems. There is genuine desire to, as you say, put our house in order, if only to prevent the intrusion from the outside.

On the other hand, the Muslims of this country will not accept a uniform civil code. The indications that we have about the nature and content of what would likely be proposed are that it will conflict with basic societal values and cultural characteristics of Muslims. It will be impossible to accept in its entirety. Even if de-Islamisation continues to be foisted upon us at the present rate, it would take a hundred years. But if we are left to our own resources, our own traditions, we can make any change necessary in interpretation or administration of the personal law. □



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Deviations from the Koran

The Koran is quite clear that maintenance is the right of a divorced Muslim woman, according to lawyer Badar Sayeed. Excerpts from a paper presented by her at the seminar on the rights of Muslim women held in Madras in December:

MUSLIM personal law as stated and practised judicially deviates in a number of situations from the primary edicts of the Koran. A serious student of the Koran realises that the contentious issues raised at large in the Muslim personal law are really defects arising from incorporation and synthesis of a number of changed concepts of "hadith" (the Prophet's pronouncements) by various factions of the Muslim community with the edicts of the Koran. Such a student also realises that adherence to the Koranic edicts in their purity would create such a progressive society that there would be no contentious issues involved.

Interpreters of the "hadith" have also had a role in the present Muslim personal law deviating from the primary dictates of the Koran. This has been brought about by different interpretations creeping into the Muslim personal law. To this add a measure of politicising and these interpretations became Muslim personal law. Additionally, in a bygone Muslim society the interpreter donned on himself judicial authority. To a measure this suited the interpreters very well since, like good political scientists, their hold and control of society depended on the acceptance of their interpretations. The average Muslim woman ignorant of her dues as outlined by the Koran was subjugated to a non-entirety by these interpretations.

ACCEPTED OCCURRENCE

A widely discussed and contentious issue is "divorce" among Muslims. It is an accepted occurrence that a Muslim male may divorce his wife by pronouncing "talaq" thrice independently. The process of law has given sanction to this variety of divorce. Quantifiable array of hardships afflict Muslim women from this accepted modus of separation. First and foremost, she has

no say in the course of abdicating all her rights, or if you will, the prevalence of male dominance in the process. This form of divorce has been accepted as one of convenience.

The Koran dictates that "talaq" has to be pronounced at monthly intervals at the conclusion of monthly periods for the divorce to be effective. It is also specific in its stipulation that if the husband and wife cohabit after the first pronouncement of "talaq", the earlier pronouncement is invalid and the process of divorce has to be restarted. The usual pronouncement of "talaq" thrice in the same breath, contrary to the Koranic dictates, abolishes the stipulated need to pronounce it once each at monthly intervals for three months. At the same time, it also abolishes any chance of reconciliation between both parties, thereby according finality to the pronouncement.

In contrast, the Koran dictates that all opportunity should be available for reconciliation. Therefore the necessary stipulation that "talaq" has to be pronounced separately on three occasions with an interval between each pronouncement (Koran S.LXV).

There are other methods of "divorce". These become inconsequential due to their poor following.

The Koran dictates, "And 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." (Koran S.IV-35).

Further in S.LXV-2, the Koran clearly lays down, "Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witnesses two persons from among you endued with justice, and establish the evidence before God. Such is the admonition given to him who believes in God and the last day."

None of these ground rules is followed either by the Muslim personal law or by the judiciary. Instead, the pronouncement of "talaq" by the male partner thrice in a single breath is accepted as the *de jure* variety of divorce. Criticisms against this mode of divorce are valid and should be taken cognisance of. Besides giving the Muslim male an unfettered exercise of control over his wife, the procedure leaves very little in the hands of women, despite her involvement as the worst sufferer.

Divorce would perhaps be an inst-

ance where the Muslim personal law would need to be revised and the strict edicts of the Koran followed in the dissolution of marriage for the primary benefit of the female partner and equalisation of the male dominance in the concerned union. The Koran is very clear on the subject. It dictates that differences, if unresolvable between a husband and wife themselves, should be arbitrated by two persons, one from each side. It is specific as well in underlining that the arbitration should be undertaken by arbiters or judges and not simple lay persons or relatives. If the problem cannot be arbitrated, then and only then in the presence of two witnesses endued with justice can divorce be pronounced.

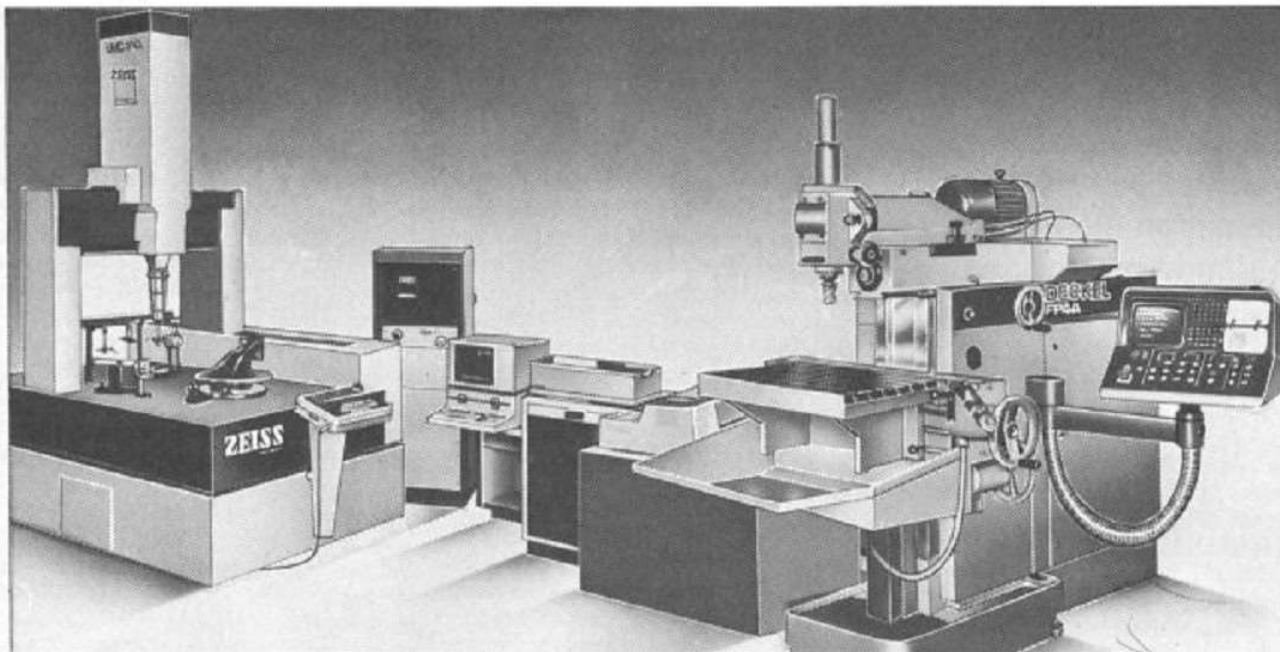
During interval between the menstrual periods of the wife, subsequent to the initial pronouncement, the husband will stay away sexually from her for the next three months (period of "iddat") and pronounce "talaq" twice at the end of the first and second periods. Then and only then the process of divorce is complete. Again it is enjoined on the Muslim that neither the woman will leave the house nor will the husband send her away during the period of "iddat." Such stipulations have been laid down to promote reunion, rather than dissolution, in any given marriage.

Nowhere does the Koran say that the Muslim male as averred by the Muslim personal law and the judiciary can divorce his wife by pronouncing "talaq" thrice in the same breath. This mode of divorce is obviously accepted and woven into the Muslim personal law by the lapse of time and by the various accommodations reached by the various timely interpreters of the sayings of the Prophet, to assuage and suit their convenience without letting loose their grip on the average Muslim woman.

* All of this can be remedied by modifying the Muslim personal law on divorce to include judicial arbitration as stated by the Koran before the pronouncement of divorce. If judicial arbitration fails, only then may divorce be pronounced in the presence of judicial witnesses as stipulated by the Koran.

A portion of the Muslim personal law bitter to Muslim women and perhaps more to non-Muslim women is the so-called "permission" granted to the Muslim male to be "polygamous." Non-Muslim women have criticised this permission for polygamy to a greater degree since the non-Muslim male finds it extremely convenient to convert to "Islam"

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overnight, divorce his wife the next morning and get married to his paramour the same afternoon. This criticism is compounded by the not-so-intelligent functioning of the kazis. Such convenient conversions have been justly and bitterly criticised by non-Muslim women. This to my knowledge is a very commonly used mode by the non-Muslim male to escape the criminal label of bigamy, as well as enjoy the illegal facility of legally commanding two women to his whims and fancies without going through the due process of divorce and sustaining the expenditure of maintaining the first wife.

NON-APPLICATION

Blemishes of the systems concerned apart, the kazis exerting such conversions should also partake of a considerable amount of criticism and blame for non-application of their minds and intelligence in these conversions. Despite financial dependencies, it should be a matter of great importance to choose men of intelligence, knowledge and independent thought process as kazis. Criminal litigation and punishment of pseudo-kazis should to a considerable measure inhibit such conversions of convenience.

An ordinary Muslim man does not go about divorcing and marrying as per the whims of his fancy. This is not to say that indiscretions do not occur, but to label a whole system as permissive with legal sanction is beyond any sense of propriety or justice. The legal process has also played its inimical role in accepting the *carte blanche* of thrice said "talaq" and permissiveness of marrying four times. The Koran neither contains an injunction nor does it permit polygamy unconditionally. The concerned segment of the Koran which deals with polygamy says: "If Ye fear that Ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three or four; but if Ye fear that Ye shall not be able to deal justly (with them) only one, or (a captive) that your right hand possesses. That will be more suitable to prevent you from doing injustice." (Koran S. IV-3).

This is the verse which is taken as granting permission to marry four times. First, it permits polygamy only under certain conditions. It does not enjoin on every person to be polygamous. It categorically states that monogamy is the suitable choice. Malinterpretation of this verse to conclude that polygamy is permitted as a matter of routine is far from the truth. This malinterpretation has been intertwined as a part of Muslim personal law and given judicial sanction.

This permission was given since during and subsequent to the battles, numerically women and orphans were

greater and such conditional permission benefited the widows and orphans. The concerned verses do not give across-the-board sanction to marry four times. It is regrettable that this false interpretation continues to be used judicially and polygamy permitted even in the envious situation of a convert to Islam specifically doing so to abrogate and dishonour wantonly his first marriage.

A small stipulation which more often is forgotten than remembered is what is called the "nikhanama." This is a contract to be agreed upon by the man and woman before the wedding and gain sanction by the courts. There is no rule in the Koran or the "hadith" which prevents the woman partner specifically stating that she should be the only wife as a stipulation in addition to various other agreed upon articles. Widespread dissemination of the concerned stipulations by the Koran as well as the unlimited provision utilisable in the contract "nikhanama" would be an act of service both to Muslim and non-Muslim women.

A further provision provided by the Koran in divorce should be made law—constituted knowledgeable judicial authority should be referred to and its permission obtained before the second marriage is contracted. Scrutiny of such permission by the registrar or the kazi should be decreed by law.

Different points of view have again arisen in regard to the husband's responsibilities to provide maintenance to a divorced wife subsequent to the period of "iddat." The problem arises due to well-defined sets of social existence. If the divorced woman has an independent means of livelihood from her own resources and inheritance and/or is in receipt of an adequate amount of dower, such claims hardly arise. Apart from a lack of adequate means of support after divorce, misunderstood and mismanaged terms of separation with ill-will towards the divorced partner initiate various bickerings. The Koran is again explicit on the subject.

S.LXV-3 clearly states: "Thus when they fulfil their term, appointed, either take them on equitable terms or part with them on equitable terms." Parting on equitable terms cannot mean that one refuses support to a divorced wife, if she has no other means of support.

"For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty of the righteous." Sura-II 241 (Yousuf Ali, Page 96).

It is at once heartening as well as disheartening that a similar problem did crop up and the judiciary followed the ultimate wisdom and interpretation of

the Koran as the Prophet wanted them to do and provided support to the divorced wife from her husband.

Nowhere in the Koran there is an admonition against the Muslim male maintaining his divorced wife beyond the period of "iddat" of three months. More, the Koran invokes that the divorced woman should be maintained each according to his means and in the same lifestyle as the man. The Koran insists there should be "mutual counsel" with "reasonableness" and is quite clear that "maintenance" is the right of the divorced woman.

It is only when misunderstanding or nefarious considerations arise, one has to perforce use the instrument of the country's law in obtaining equitable distribution. A significant portion of the misunderstanding can be obviated if at the wedding itself the instrument of "nikhanama", which essentially outlines all the specifications, stipulations, including various responsibilities (economic and otherwise) of each partner, is used and enforced.

The instrument of marriage contract is considered a recent innovation of the Western world. It should be recalled the Muslim woman had been given this right in the form of contractual agreement where she and her future husband can stipulate and agree on all conditions (including her dower, cessation from polygamy, support after divorce) before the marriage is contracted. Hardly does one hear of a "nikhanama" preceding a Muslim wedding.

What is needed primarily is the education of Muslim women on their rights. A general survey would show that their rights far exceed a non-Muslim woman's in her socio-religious environs. Muslim women cry hoarse for changing the law because they are unaware of what right the Koran bestows on them. More than changing the law it would be of enormous benefit if women's organisations and more so men's social organisations, interested in the improvement of women's status, with their infrastructure spread the word of the Koran to the Muslim women at large, educate them as to their legal bestowment and what they can demand of a situation. This itself will reduce the cruelty which the average Muslim male is presumed to bestow on his wife, married or divorced.

A note of caution is required. Along with the Muslim women, the judiciary of the land should also be persuaded to study the Koran in its entirety and not be coloured by various factions of the Muslim personal law. This single act will bring such a change, that perhaps the Muslim personal law would be changed to the extent that it follows the Koran more strictly. □