JUDICIAL INTERPRETATION OF ISLAMIC MATRIMONIAL LAW IN INDIA

S. Jaffer Hussain

I. Introduction

DURING THE colonial rule in India the British judges, who were called upon to apply an alien law in an alien country, were fully alive to the fact that the Muslims believed their law to be of divine origin and, therefore, infallible and unchangeable. They realized that law and religion were so intervowen in Islam that it was difficult to separate them. They also knew about the tremendous influence of religion upon the people who inhabited this country. For the same reasons the British Indian legislature had left the Muslim personal law more or less untouched, while gradually replacing the other branches of law, *e.g.* law of crimes, evidence, *etc.*, by modern laws of a western origin. On the contrary, Warren Hastings' plan of 1772[1] expressly stated that the Muslims of India would be governed by their own personal laws. Later, the Sharī'at Act[2] of 1937 declared, *inter alia*, that in all questions regarding marriage and dissolution of marriage, "the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (Sharī'at)".[3] Like the legislature, the judiciary too adopted a cautious approach while applying the principles of Muslim law. The scope of and limitations on judicial interpretation of the Muslim law in those days can be gathered from various pronouncements of the Privy Council. Time and again the Judicial Committee of the Privy Council expressed reluctance to depart from the opinion of the traditional Muslim jurists while interpretating the religious texts. In *Aga Mahomed* v. *Koolsom Bee Bee*,[4] it was observed :

> . . .It would be wrong for the courts on a point of this kind to put

1. Act II of 1772, adopted as Regulation of 17th April 1780, s. 27.
2. The Muslim Personal Law (Sharī'at) Application Act, 1937.
3. S. 2.
4. (1897) 24 I.A. 196.

> their own construction on the *Qur'ān* in opposition to the express ruling of commentators of such great antiquity and high authority.

Again in *Baker Ali* v. *Anjuman Ara Begum*,[5] Sir Arthur Wilson declared that new rules of law were not to be introduced although they seemed to the lawyers of the day to follow logically from the ancient texts, specially when the ancient doctors of law had not themselves drawn those conclusions.[6] This attitude adopted by the Privy Council in regard to the Muslim law is followed in letter and spirit till today.[7]

Though the British Indian courts did resort to the principles of justice, equity and good conscience to make a progressive interpretation of the Muslim law in order to meet the changing needs of the Indian Muslim community,[8] they did so only in the absence of a clear text or commentary.[9] On certain occasions the courts followed the more progressive disciples of the same school of Islamic law in preference to its founder;[10] but they did not extend their preference to the principles of one school over the other.[11] However, it was not so much the absence of a clear ruling that troubled the courts; it was the diversity of opinion among the Muslim jurists themselves which created problems. Enormous diversities are seen both in the traditional Muslim law as well as in that small area which has been codified. The purpose of this paper is to highlight the progressive interpretation of the principles of Muslim matrimonial law made by the courts in certain cases with a view to assessing the contribution made by them in this direction.

II. Polygamy

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 (*talāq al-tawfid*) 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

---

5. (1903) 30 I.A. 94.
6. *Id.* at 111-12.
7. See the observation of Govinda Menon and Ramaswami Gounder., JJ. in *Veerankutty* v. *Kutti Umma*, A.I.R. 1956 Mad. 1004, 1009; also *Amad Giri* v. *Mst. Begha*, A I.R. 1955 J. & K. 1.
8. See *Muhammed Raza* v. *Abbas Bandi* (1932) 59 I.A. 236 ; *Budansa* v. *Fatema* (1914) 26 M.L.J 260, *Waghela* v. *Sheikh Masludin* (1877) 14 I.A. 89, 96.
9. See *Aziz Banu* v.*Muhammed* (1925) 89 I.C. 690; *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I.A. 294; *Imadul Rahman* v. *Parbi Din*, A.I.R. 1937 Oudh 239.
10. See *Abdul Kadir* v. *Salima* (1886) 8 I.L.R. All. 149; *Agha Ali Khan* v. *Altaf Hasan Khan*, (1892) 14 I.L.R. All. 429.
11. See *Rajah Deedar Hussain* v. *Rance Zuhoor-oon-Nissa* (1841) 2 Moo. I.A.441, *Akbarally Adamji Peerbhoy* v. *Mohamedally Adamji* (1931) 57 I.L.R. Bom. 551.

husband. Treating Muslim marriage as a contract, the courts have held that any agreement entered into by the parties, if not opposed to public policy or the spirit of Muslim law, would be enforceable.[12] 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.[13] The Assam High Court in *Saifuddin Sekh* v. *Soneka Bibi*,[14] went a step further. In this case the *kābinnāma* 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 the option to take a divorce. Not only was such a stipulation considered valid, but such power of *talāq* given to the wife was held to be irrevocable.[15] In *Ayatunnesa Beebee* v. *Karan Ali*,[16] 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.[18] In all these cases marriages were construed as conditional.

What about cases in which no such stipulations were made by the spouses? Will the court in such circumstances refuse the decree of restitution of conjugal rights to a polygamous husband when the wife refuses to stay with him because of his having married again? Yes, it could. This is illustrated by *Itwari* v. *Ashgari*.[19] In this case the 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. In a forceful judgment, Dhawan, 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.[19]

---

12. See *Abdul Kadir* v. *Salima* (1886) 8 I.L.R. All. 149; *Ghulam Fatima* v. *Khaira*, A.I.R. 1923 Lah. 674; *Aziz* v. *Mst. Naro*, A.I.R. 1955 H.P. 32.
13. See *Saiduddin* v. *Latifunnisa* (1918), 46 I.L.R. Cal. 141; *Sadiqa* v. *Ataullah*, A.I.R. (1933) Lah. 685; *Saifuddin* v. *Soneka*, A.I.R. 1955 Assam 153. It is notable that such a stipulation is not valid under the *Shī'a* law. See II Baillie, *Digest of Moohammadan Law*, 76 (1869).
14. A.I.R. 1955 Assam 153.
15. See *Saiduddun* v. *Latifunnissa Bibi*, *supra* note 13.
16. (1909) 36 I.L.R. Cal. 23.
17. *Aziz* v. *Mst. Naro*, *supra* note 13.
18. A.I.R. 1960 All. 684.
19. *Id.* at 686.

III. Option of puberty

The law relating to option of puberty (*khiyār al-bulūgh*) can be discussed under different heads in order to see how this branch of the law has been liberalized by judicial pronouncements.

(i) *The period before 1939*

According to traditional Muslim law if a minor has been given in marriage by the father or the father's father, the marriage is binding and valid and the minor has no right to repudiate the marriage on attaining puberty, unless it could be shown that the father or the father's father has acted negligently or fraudulently; but if the minor was given in marriage by any other guardian he or she has the right to repudiate it on attaining puberty. There are two limitations under which such an option of repudiation is to be exercised; first, it should be exercised immediately on attaining puberty; and, second, the marriage should not have been consummated. Delay in notifying such an option and the fact of consummation of marriage is fatal to this right. The courts in India have applied this law in favour of females by invoking rules of equity and justice.

In an Allahabad case[20] a *Shī'a* girl given in marriage by her father to a *Sunnī* husband during minority was allowed to repudiate the marriage as it was contrary to all rules of equity and justice to force such a marriage on her, which might be repugnant to her religious sentiments. Considerable relaxation in respect of the time during which option to repudiate the marriage could be exercised was also made by courts. In *Bismillah Begum* v. *Nur Mohammed*,[21] it was held that a wife could exercise the option only after she had known that she had such a right. The Patna High Court in *Mst. Ayesha* v. *Muhammad Yunus*,[22] took the same view.[23] It was held that a minor wife did not lose her right to repudiate the marriage within a reasonable time after she became aware of her rights. These decisions, it may be pointed out are not entirely in tune with the teachings of Abu Hanifa and Abu Yusuf, according to whom a woman would lose her option of puberty even if she was unaware of the right, unless she exercised it immediately on becoming major; but they conform to the doctrine of Imam Muhammad according to whom the right will be exercisable only when the wife is acquainted with the fact that she has that right.[24] Thus, in the aforesaid cases the hardship caused by the *Hanafī* principle that option of

20. *Aziz Bano* v. *Muhammad* (1925) 47 I.L.R. All. 823.
21. (1921) 44 I.L.R. All. 61.
22. A.I.R. 1938 Pat. 604 The writer is of the view that this and the above case are against the spirit of Muslim law.
23. *Cf.* K.P. Saksena, *Muslim Law as Administered in India and Pakistan*, 184 (1963).
24. Ameer Ali at his II *Mohammedan Law* 339 (1911) favours the view of Imām Muhammad, which is more reasonable and equitable from the Indian standpoint.

puberty should be exercised immediately and that a day's delay would be fatal has been considerably mitigated. Some decisions allowed delay in the exercise of the option of puberty even on the ground of non-acquiescence.[25] As regards the rule that consummation of marriage will put an end to the right of option, it has been held that mere consummation is not sufficient; it must have taken place with the consent of the wife.[26]

(ii) *The period after 1939*

The law of option of puberty was largely modified by the Dissolution of Muslim Marriages Act 1939.[27] One of the grounds on which the Act permitted a married Muslim woman to seek dissolution of her marriage by the court was :

> that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :
> Provided that the marriage has not been consummated.[28]

It may be noticed that under the Act the traditional principle that a minor's marriage contracted by the father or the grandfather could not be repudiated has been done away with.

Conflicting decisions have gathered round the interpretation of this provision, as the remedy has been frequently availed of by Muslim women. The difference of opinion has arisen in the courts on various points such as the time within which the option could be exercised, the period during which marriage has been consummated; whether a court's decree is essential to sever the marriage tie, and whether such option could be exercised in the same suit in which the husband sued for restitution of conjugal rights.

As regards the time within which the option of puberty could be exercised, it was held in *Gulam Sakina* v. *Falak Sher Allah Baksh*,[29] that puberty is presumed in the absence of evidence on the completion of the age of fifteen years. It may be pointed out here that the Act does not speak of puberty at all, but only of an age.[30] The court in the above case[31] proceeded on the basis of the presumption that a girl attained puberty at the age of fifteen years. Therefore, when she was given in marriage before attaining the age of fifteen years and the marriage was also consummated before attaining

---

25. *Khanoo* v. *Bhag Bhuri*, A.I.R. 1925 Lah. 66; *Hussain* v. *Jivani*, A.I.R. 1924 Lah. 385; 69 I.C. 281.
26. *Abdul Karim* v. *Aminabai* (1935) 59 I.L.R. Bom. 426.
27. This Act enlarged the rights of females only. The law of option of puberty in respect of minor males is still governed by the provisions of Muslim law.
28. S. 2 (vii).
29. A.I.R. 1950 Lah. 45.
30. See Fyzee, *Outlines of Mohammedan Law*, 91-92 (1964).
31. *Supra* note 29.

that age, that consummation was given no consideration.[32] This interpretation will prevent a minor from misusing her option.

As regards the question whether a court's decree is necessary to confirm the exercise of the option of puberty and sever the marriage tie, there is difference in judicial opinion. It was decided by the Calcutta High Court that a woman who contracted a marriage after exercising the option did not commit bigamy even though the option was not confirmed by a judicial order.[33] However, in another case an application made by the wife to a judicial officer was considered by the same High Court sufficient to avoid the marriage.[34] These decisions followed the opinion expressed in *Radd al-Muhtār*, according to which a decree of the *qādī* is not necessary to dissolve the marriage.[35] But according to *Hidāya*, such a decree is essential to dissolve the marriage.[36] Accordingly, the Madhya Pradesh High Court has held that the repudiation must be confirmed by a court and that a decree dissolving the marriage is necessary.[37] In Pakistan, it has been held that the exercise of the option of puberty puts an end to marriage without intervention by the court.[38]

Regarding the question whether a wife could successfully resist the suit of the husband for restitution of conjugal rights by repudiating the marriage in such a suit on the basis of option of puberty, it has been decided in *Sk. Sahib Ali* v. *Jinnathan Nahar*,[39] that a substantive suit by the wife to exercise

---

32. The decision conforms to the Pakistan ruling in *Behram Khan* v. *Akhtar Begum* (1952) P.L.D. Lah. 548 in which it was held that the option to repudiate the marriage was lost if there was consummation after puberty, but not if it took place before puberty. The High Court of Lahore in Pakistan has held that the Act has fixed fifteen years as the age of puberty without any opportunity of rebuttal, to obviate the difficulty of proving puberty or going into the question at what age the girl attained puberty, [*Daulan* v. *Dossa* (1956) P.L.D. Lah. 786]. This over-simplified interpretation made by the Pakistan court cannot, it is submitted, stand close scrutiny. First, as has been already stated, the Act simply prescribes the age of fifteen years and does not say that in all cases puberty is necessarily attained at that age. Second, there may be cases where a girl might attain puberty either before or after that age. Therefore, if we hold that consummation before attaining fifteen years of age is no consummation for the purpose of granting relief under the Act then a minor girl who has attained puberty before attaining that age may consummate the marriage with her free will and later (*i.e.*, after attaining it) if the marriage does not suit her, come before the court and ask for a decree of divorce. Is this what the Pakistan court contemplates? In order to avoid such a situation the better way to interpret the section is to regard fifteen years of age as a legal presumption (subject to rebuttal).
33. *Badal Aurat* v. *Q.E.* 19 Cal. 79.
34. *Mafizuddin* v. *Rahima Bibi* (1933) 37 C.W.N. 104. This and the above decision were made before the Dissolution of Muslim Marriages Act was enacted.
35. See Ameer Ali, 2 *Mohammedan Law* 374, 375, (1911).
36. The *Hidāya*, 37 (Trans. by Hamilton, 1870).
37. *Pirmohomed* v. *State of M.P.*, A.I.R. 1960 M.P. 24.
38. *Muni* v. *Habib Khan* (1956) P.L.D. Lah. 403, *Mohd. Baksh* v. *The Crown* (1950) P.L.D Lah. 203, *Khurshid Jan* v. *Fazal Dad* (1964) P.L.D. Lah. 548.
39. A.I.R. 1960 64 C.W.N. 756.

the option under the Act must be instituted. But the court in Madhya Pradesh took the view that the wife could exercise the option even in a suit filed by the husband for restitution of conjugal rights.[40] This view is more reasonable as it does not force the wife to go in for a separate suit.

IV. Divorce

Of the various modes in which a marriage can be brought to termination, *talāq* is most commonly used by Muslim husbands. This power, which a capricious husband can use arbitrarily, poses a constant threat to the wife. The law of *talāq* has, therefore, been reformed in the recent years in a large number of Muslim countries, including Pakistan.[41] But in India the law on this subject still remains unreformed. The validity of *talāq al-bid'a* under the traditional *Hanafī* law is given effect to by the courts.[42] Also the rigour of the traditional principle that a *talāq* pronounced under compulsion or in a state of intoxication would be binding could not be softened by judicial decisions.[43] Tyabji said :

> By a deplorable though perhaps natural development of the *Hanafī* law, it is the fourth and most disapproved or sinful mode of *talāq* that seems to be most prevalent, and in a sense, even favoured by the law.[44]

However, the courts have helped Muslim wives by insisting upon the effective communication of the pronouncement of *talāq*. By doing so, the courts reduced the husband's proclivity to pronounce a *talāq*. Here, again, there are differences between the various courts. Some courts have strictly adhered to the rule of Muslim law and held that a *talāq* pronounced in the absence of a wife is valid, even if it is not communicated to her.[45] In *Mohd. Shamsuddin* v. *Noor Jehan*,[46] the court said that there was no authority for the proposition that *talāq* took effect from the date on which the wife came to know of it. On the other hand, in *Abdul Khader* v. *Azeera*,[47] the Madras High Court, following Ameer Ali's view, held that a *talāq* given in the absence of the wife would be effective only when it became known to

---

40. *Nizamuddin* v. *Haseni*, A.I.R. 1960 M.P. 212.
41. See S. Jaffer Hussain, 'Legal Modernism in Islam : Polygamy and Repudiation', *J.I.L.I.* 391-394 (1965).
42. *Rashid Ahmed* v. *Anisa Khatun*, 1931 P.C. 25; *Sarabai* v. *Rabia Bai* (1905) 30 I.L.R. Bom. 537; *Sheik Fazlur Rahim* v. *Mst. Aisha* (1929) 8 I.L.R. Pat. 690; *Nurbibi* v. *Ali Ahmad*, A.I.R. 1925 All. 550 ; *Ahmed Giri* v. *Mst. Begha*, A.I.R. 1955 J.& K, 1.
43. *Rashid Ahmad* v. *Anisa Khatun* (1931) 59 I.A. 21.
44. Tyabji, *Muslim Law*, 163 (1968).
45. *Fulchand* v. *Nawab Ali* (1909) 93 I.L.R. Cal. 184; *Manoli* v. *Moideen* (1968) M.L.J. (Cr.) 660.
46. A.I.R. 1955 Hyd. 144; also *Amadgiri* v. *Mst.Begha*, A.I.R. 1955 J. & K. 1.
47. A.I.R. 1944 Mad. 227.

her. The ruling in *Chandi* v. *Bandesha*,[48]—a decision of the Bombay High Court—is to the same effect. As regards a *talāq* given in writing, the courts have generally followed the principle of Muslim law that it takes effect from the time of execution of the deed.[49] The law in Pakistan on this point is the same.[50] The Muslim law recognizes two forms of writing regarding divorce—customary and non-customary. If the writing is in a customary form, *talāq* takes effect even if it is not communicated to the wife. On the other hand if the writing is in a non-customary or unusual form the *talāq* should be communicated and, further, the intention to divorce must be proved.[51] These principles of Muslim law were applied in *Rasul Raksh* v. *Mst. Bholan*.[52] The husband in this case executed a deed of divorce which was not known or communicated to any person or to the wife. Broadway and Manroe, JJ., declared this deed to be of non-customary form, and as the intention to divorce was not proved, it was held that the *talāq* deed was invalid.

V. Wife's right to maintenance

In regard to the right of a Muslim wife to get her marriage dissolved on the ground of husband's failure to maintain her, there are differences between the various schools of Islamic law. In *Hanafī* law the duty of the husband to maintain the wife is absolute; she is entitled to maintenance even though she may have sufficient means for her support.[53] Also this right is not conditional upon the right of the husband to consummate the marriage.[54] According to *Hanafī* law, however, the inability of a husband to maintain the wife would not give her a right to seek dissolution of the marriage.[55] Following the *Hanafī* law, the courts in India refused to dissolve a marriage on the ground of non-payment of maintenance.[56] The *Shāfi'ī* and the *Mālikī* law decree to the wife the right to seek dissolution of marriage if the husband fails to provide maintenance.[57] Taking advantage of the law as enunciated by the *Mālikī* school, the Dissolution of Muslim Marriages Act 1939 was passed. This Act recognized the right of a wife to dissolve the

---

48. A.I.R. 1961 Bom. 121.
49. *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 I.L.R. Cal. 833, *Mohd. Shamsuddin* v. *Noor Jehan*, A.I.R. 1955 Hyd. 144.
50. See *Lalan Bibi* v. *Muhammad Ashfaq* (1951) P.L.D. Lah. 467.
51. See Mulla, *Principles of Mohammedan Law* 260-61 (1968); also B.R. Verma, *Muslim Marriage and Dissolution*, 1962-163 (1971).
52. A.I.R. 1932 Lah. 498.
53. The *Hidāya*, 140 (Hamilton's trans.).
54. Baillie, I. *Digest of Mohammadan Law*, 441 (1875).
55. *Id.* at 447.
56. *Asmat Bibi* v. *Samiuddin*, (1925) I.L.R. Cal 533. *Cf. Khalilul Rahman* v. *Mariam*, 59 I.C. 804.
57. See Ameer Ali, 2 *Mohammedan Law*, 416, 521 (1911).

marriage on the ground of non-payment of maintenance. The Act provides that one of the grounds on which the court can dissolve a Muslim woman's marriage will be :

> that the husband has neglected or failed to provide her maintenance for a period of two years.[58]

This provision has given rise to conflicting judicial decisions.

The words 'has neglected' and 'failed to provide maintenance' have been interpreted by the courts in varying ways. This is due to the fact that under Muslim law a wife is entitled to maintenance even if she refused to live with the husband for a just cause. For example, a wife who refuses cohabitation on the ground that her prompt dower has not been paid is entitled to be maintained.[59] But if the wife does not obey reasonable instructions of her husband, she is not entitled to maintenance.[60]

Difference in judicial opinion has arisen as to whether a wife has a right to dissolve her marriage on the ground of husband's neglect or failure to provide maintenance even if she has no right to maintenance under the principles of Muslim law. In *Badrunnisa* v. *Mohd. Yusuf*,[61] the Allahabad High Court held that the word 'neglect' implies 'wilful failure' and the words 'has failed to provide' imply "an omission of duty"; therefore, where the wife's conduct was such as to absolve the husband from his duty to provide maintenance, the wife would have no right to seek a divorce on that ground. The Nagpur,[62] Calcutta[63] and Bombay[64] High Courts have taken the same view. It was held by these courts that unless there was a duty on the part of the husband to maintain the wife, it could not be alleged that the husband had failed to provide maintenance. On this reasoning these courts took the view that a wife has no right to ask for a divorce when she has refused to stay with the husband without any reasonable cause. The Sind High Court had, first, taken a similar view;[65] but in a later decision it held that the wife would be entitled to dissolution of the marriage in spite of the fact that on account of her conduct in refusing to live with the husband she would not have been entitled to enforce her claim to maintenance.[66]

The question whether a wife who has wrongfully left the matrimonial home has the right to seek dissolution of the marriage merely on the fail-

---

58. S. 2(ii).
59. *Najimunnissa* v. *Serajuddin*, A.I.R. 1946 Pat. 467. *Dastgir Sab* v. *Sharifunnissa*, A.I.R 1953 Mys. 145.
60. Baillie, 2 *Digest of Mohammedan Law* 87-98 (1869).
61. A.I.R. 1944 All. 23.
62. *Jamila Khatun* v. *Kasim Ali*, A.I.R. 1951 Nag. 375.
63. *Mabiya* v. *Shaikh Anwar*, A.I.R. 1971 Cal. 218.
64. *Bai Fatma* v. *Mumna Miranji*, A.I.R. 1957 Bom. 453.
65. *Mst. Khatijan* v. *Abdullah*, A.I.R. 1943 Sind. 65.
66. *Mst. Nur Bibi* v. *Pir Bux*, A.I.R. 1950 Sind. 8.

ure of the husband to maintain her for two years came up recently before the Kerala High Court in *A. Yusuf* v. *Sowramma*.[67] Holding that it was a "popular fallacy" that Muslim husbands had unbridled authority in the matter of divorce[68] and recognizing the right of a Muslim wife to seek dissolution of the marriage on the ground of the husband's failure to provide maintenance for two years, Krishna Iyer, J., observed :

> [T]he Islamic law's serious realism on divorce, when regarded in the correct perspective, excludes blameworthy conduct as a factor and reads the failure to provide maintenance for two years as an index of irreconcilable breach, so that the mere fact of non-maintenance for the statutory period entitles the wife to sue for dissolution.[69]

As pointed out by Danial Latifi, this judgment of Justice Krishna Iyer on various aspects of the Muslim law of divorce is exemplary in so much as it raises the status of women to that of men, who are traditionally supposed to have better rights and status than women in the matter of divorce.[70]

VI. Conclusion

It is evident from the above discussion that the courts in India have sometimes interpreted the principles of Muslim law in a progressive spirit. The need for doing so is greater today than ever before, in view of the changed socio-economic conditions. In regard to the statutory Muslim law,[71] there is larger scope for judicial liberalization of Muslim law than in respect of the traditional principles. Deviation from the established traditional principles of Muslim law may pose difficulties; though these may be largely overcome by making use of the diversity of opinion among the Muslim jurists themselves. But in regard to that part of Muslim law which is codified, the courts have more freedom and hence an easier task, since in that case they are called upon to interpret statute law which has already replaced the traditional law.

The Privy Council had no doubt endeavoured its best to apply and administer the Muslim law in a liberal way, but it seems to have hesitated on many occasions with the result that it often failed to appreciate the true spirit of Islamic law. Its approach was so cautious as to limit its vision. It refused to apply the liberal preachings of sub-schools within the same

---

67. AI.R. 1971 Ker. 261.
68. *Id.* at 264.
69. *Id.* at 266.
70. Danial Latifi, 'Muslim Woman's Right to Divorce', *Sunday World* (New Delhi) 14 Nov. 1971, p. 1.
71. *I.e.*, the Dissolution of Muslim Marriages Act 1939, the Shari'at Act, 1937 and the Mussalman Wakf Validating Act, 1913, *etc.*

school. The mantle has now fallen on the Supreme Court. Whether it will be able to break this barrier—is anybody's guess. It may be pointed out in this context that in Pakistan the courts have assumed the power to interpret the original texts of Muslim law, independently of the opinion expressed by the ancient doctors. In *Khurshid Jan* v. *Fazal Dad*,[72] Anwarul Huq, J. of the Lahore High Court observed :

> With great humility I venture to submit that it would not be correct to lay it down as a positive rule of law that the present-day courts in this country should have no power or authority to interpret the *Qur'ān* in a way different from that adopted by the earlier jurists and Imams. The adoption of such a view is likely to endanger the dynamic and universal character of the religion and laws of *Qur'ān*.

In this case the court, by a majority, refused to follow the directive given by the Privy Council in *Aga Mohomed* v. *Koolsum Bee Bee*.[73] Though our courts may not adopt a similar attitude; but it is surely possible for them to apply the principles of Muslim law in a liberal manner without claiming the powers of a *mujtahid* (re-interpreter of texts). Such a progressive judicial approach to, and a liberal interpretation of, the texts of Muslim law was strongly advocated by Tahir Mahmood in 1965.[74] And voicing a similar opinion as early as 1946, M.C. Chagla had observed :

> Now there is no doubt that these ancient Muslim texts must be considered with the utmost respect. But it must also be remembered at the same time Muslim jurisprudence is not a static jurisprudence. It is a jurisprudence which has grown and developed with the times and the quotations from Muslim texts should be so applied as to suit modern circumstances and conditions. It is also dangerous to pick out illustrations wrenched from their context and apply them literally. Illustrations merely illustrate a principle and what the Court should try and do is to deduce the principle which underlines the illustrations.[75]

The judiciary can, thus, play an important role in liberalizing and modernizing the rules of Muslim law relating to marriage and divorce. The process of judicial reform is likely to attract lesser hostility than an attempt to reform the Muslim law made by the legislature.

---

72 (1964) P.L.D. Lah. 588.

73. *Supra* note 4.

74. At his 'Dissuasive Precepts in Muslim Family Law', 2 *Aligarh Law Journal* 128-129 (1965).

75, *Ashrafalli Cassamalli* v. *Mahomedalli* (1945) 48 Bom L.R. 642, at 652.