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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **THE PENUMBRAL RIGHT TO MAINTENANCE OF MUSLIM WOMEN: A SOCIO-LEGAL CRITIQUE**

AUTHORED BY - LOKESH MITTAL & SANIGHDHA

## ***Abstract:***

It is a trite in law that a woman, after her marriage becomes a solemn responsibility of a man, who has to take care of her through thick and thin; through health and sickness; through joys and sorrows, and especially at the time of parting their own ways. All the personal laws of the world, be it the Hindu personal law, Muslim personal law, Christian, Jewish or Parsi personal laws, all validate and direct the male counterpart to pay his female life partner, an amount that would suffice her living and match up to her living standards. This is done because spiritually and metaphysically, the union of two souls is a divine intervention that must be taken as a blessing. It is so sacrosanct that living with each other is a blessing rather than an unwanted burden. Therefore, the guidelines and the concept of maintenance, alimony and shared parenthood are regarded as the highest principles of a household, when two people, are to part ways for one reason or the other. Under the Muslim Law, the amount of maintenance or the concept of maintenance has also been given place in the Holy Quran, on the guidelines that were issued by the Prophet Mohammed. Although the Islamist jurisprudence, Holy teachings, various Commentaries, and the directions as well as the observations of the Apex Court, direct the same provisions, still there are cases that come up before the Apex Court to decide and look into the already established principles. Although the law laid down by the Court is the supreme most law of the land, yet coming up of such review cases is important to keep establishing and strengthening the basic constitutional guarantees and principles of natural justice, in one way or the other, time to time. The present short article, will strive to look into the historical background of the issue and provide a comprehensive analysis of the recent judgement, while not restricting itself to a case comment but enlarging the scope to a much wider extent.

***Keywords:*** Constitution; Constitutionalism; Socio-Legal; Muslim Personal Law; The Holy Quran.



## I. INTRODUCTION: THE THEOLOGICAL BASIS OF MAINTENANCE IN MUSLIM PERSONAL LAW

The dictionary meaning of the term maintenance is support or sustenance.<sup>1</sup> The term maintenance is not defined in the marriage laws of any of the religious communities. But the entitlement of claiming maintenance is certainly based on the assumption that the claimant does not have the sufficient means to support herself. The maintenance generally covers the expenses for necessities or essentials for the substance of life. However, it is not merely a right for survival of the claimant. This is clear, which in turn, gives guidelines to the court by stating the factors to be taken into consideration for fixing the amount of maintenance. The court is to look into the possession of the property of both, the husband and the wife, ability of the husband to earn, conduct of the parties and other circumstances to decide the amount of maintenance. Before fixing the amount of maintenance the status of the parties and the standard of their life enjoyed by them, during the subsistence of marriage will have to be taken into consideration.<sup>2</sup> Therefore, maintenance is the bare necessary amount that must be given to the female, if and how the Court decides according to the facts and circumstances of the case.

The Islamic Law jurisprudence on the subject is very clear. The men and the women have absolutely no difference in the eyes of Allah and are regarded equivalent to each other, when they fulfill their spiritual and worldly duties. Under Islamic law, both men and women possess souls and a transcendental bodily matter that is satisfied only when it fulfills its responsibilities and

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<sup>1</sup> *Maintenance*, BRITANNICA, <https://www.britannica.com/dictionary/maintenance#:~:text=%5Bnoncount%5D-,1, costs%20of%20routine%20car%20maintenance>; *Maintenance*, THE MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/maintenance>; *Maintenance*, THE CAMBRIDGE LAW DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/maintenance>; *Maintenance*, THE COLLINS DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/maintenance>.

<sup>2</sup> Smt. YJ Padma Shree, IIIrd Additional Junior Civil Judge (Kadapa), *Concept of Maintenance*, THE DISTRICT COURTS, <https://districts.ecourts.gov.in/sites/default/files/1-Maintenance%20-%20by%20Smt%20YJ%20Padmasree.pdf>; DR. PARAS DIWAN, FAMILY LAW (2023); DR. RAKESH KUMAR SINGH, TEXTBOOK ON MUSLIM LAW (2017); MULA, PRINCIPLES OF MOHAMMEDAN LAW (2021); DR. PARAS DIWAN, MUSLIM LAW IN INDIA (2021); PROF. IQBAL ALI KHAN, MOHAMMADEN LAW (2021); TAHIR MEHMOOD, FAMILY LAW IN INDIA (2021); Muslim Personal Law (Shariat) Application Act 1937 (India); The Cutchi Memons Act 1938 (India); The Kazi Act 1880 (India); The Musselman wakf Act 1923 (India); The Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986) as amended by the Jammu and Kashmir Reorganization Act, 2019 (34 of 2019) (w.e.f. 31-10-2019) (India); The Muslim Women (Protection of Rights on Divorce) Rules, 1986 (India); The Dissolution of Muslim Marriages Act, 1939 (8 of 1939) as amended by the Jammu and Kashmir Reorganization Act, 2019 (34 of 2019) (w.e.f. 31-10-2019) (India); The Muslim Women (Protection of Rights on Marriage) Act, 2019 (20 of 2019) (w.r.e.f. 19-9-2018) with Model Nikahnama (India).



sincerely offers everything to the Almighty. This shows that the women in Islam are given equal treatment, more so because Prophet Mohammed himself was influenced and gained the motivation to aspire for spirituality from the women around him, only.<sup>3</sup> Surra 2 Aayat 226 (2:226) of the Holy Quran states that,

*“For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast, for men and women who guard their chastity, and for men and women who engage much in Allah's praise, for them has Allah prepared, forgiveness and great reward. (33:35)<sup>4</sup>.”*

Considering the fact that before the advent of Islam the pagan Arabs<sup>5</sup> used to bury their female children alive, make women dance naked in the vicinity of the Ka'ba during their annual fairs, and treat women as mere chattels and objects of sexual pleasure possessing no rights or position whatsoever, these teachings of the Noble Quran were revolutionary. The Quran declares: “O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, his mate, and from this pair scattered (like seeds) countless men and women. Reverence Allah, through Whom you demand your mutual (rights), and reverence the wombs (that bore you); for Allah ever watches over you. (4:1).”<sup>6</sup>

The Prophet of Islam said, *“Women are the twin halves of men.”* The Qur'an emphasizes the essential unity of men and women in a most beautiful simile: “They (your wives) are your garment and you are a garment for them. (2:187).” Just as a garment hides our nakedness, so do husband and wife, by entering into the relationship of marriage, secure each other's chastity. The garment gives comfort to the body; so, does the husband find comfort in his wife's company and she in his. *“The garment is the grace, the beauty, the embellishment of the body, so too are wives to their*

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<sup>3</sup> *The Early Life of Prophet Mohammed*, ISLAMIC HISTORY, <https://islamichistory.org/early-life-of-mohammad-saw/>; THE HOLY QURAN; KAHLIL GIBRAN, THE PROPHET (2021); DR. PARAS DIWAN, FAMILY LAW (2023); DR. RAKESH KUMAR SINGH, TEXTBOOK ON MUSLIM LAW (2017); MULA, PRINCIPLES OF MOHAMMEDAN LAW (2021); DR. PARAS DIWAN, MUSLIM LAW IN INDIA (2021); PROF. IQBAL ALI KHAN, MOHAMMADEN LAW (2021); TAHIR MEHMOOD, FAMILY LAW IN INDIA (2021); PROF. MOHAMMED SHAMIM, INTRODUCING PROPHET MOHAMMED TO THE MANKIND; UZMA AUSAF, MOHAMMED: THE LAST PROPHET.

<sup>4</sup> THE HOLY QURAN, 2:226.

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

husbands as their husbands are to them.”<sup>7</sup> The Islamic Jurisprudence also strives to punish any male who even thinks of mistreating his wife and is admonished via the verses of the Holy Quran in the following words,

*“O you who believe! You are forbidden, to inherit women against their will. Nor should you treat them with harshness, that you may take away part of the dowry you have given them - except when they have become guilty of open lewdness. On the contrary live with them on a footing of kindness and equity. If you take a dislike to them, it may be that you dislike something and Allah will bring about through it a great deal of good. (4:19).”*<sup>8</sup>

Therefore, it must be understood that the Holy Quran, the Sunnah and the various Ijmas and Qiyas are all in favour of giving women an equal status in the eyes of law, as that of the males. It is a misnomer which regards that Islamic law is not favoring the rights of the females. It is by far, a very progressive law which stands tall with women in their existence- both spiritual and worldly. Thus, even the accordance of protection of Section 125 (Section 144 Chapter X of Bhartiya Nagarik Suraksha Samhita, 2023) of the Code of Criminal Procedure 1973 to the women in cases of divorce or bitter maintenance struggle, is a step in the same direction. This has been established in the past by a series of landmark case laws, such as- *Danial Latifi v Union of India* (AIR 2001 SC) and the former locus classicus of *Mohd. Ahmed Khan v Shah Bano Begum* (1985 (3) SCR 844)). The latest judgment in the series is that of *Mohammad Abdul Samad v State of Telangana and Ors* (2024), which reiterates through strong words that the Muslim Law and the common quasi criminal law or Section 125 CrPC (Code of Criminal Procedure 1973), have to be read harmoniously and the guarantees of Articles 14, 15(3), 19, 21, 27, 38, 42 as well as other legal rights and natural justice principles have to be upheld.

## **II. THE JURISPRUDENTIAL DISCOURSE: FROM PAST TO THE PRESENT- A CRITIQUE**

The Supreme Court became cognizant with the matter of maintenance to Muslim women via the case law *Mohammed Ahmad Khan v Shah Bano Begum*<sup>9</sup>, and it was in this particular case that Section 125 of the CrPC and the Muslim personal law were interlinked to each other. However,

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<sup>7</sup> Prof. Abdur Rehman I. Doi, *Women in Quran and the Sunnah*, INTERNATIONAL ISLAMIC UNIVERSITY, MALAYSIA, [https://www.iium.edu.my/deed/articles/woman\\_quran.html](https://www.iium.edu.my/deed/articles/woman_quran.html).

<sup>8</sup> *Ibid*

<sup>9</sup> *Mohammad Ahmad Khan v Shah Bano Begum* (1985 (3) SCR 844).

this harmonious construction reached the heights of the itself in the subsequent case of Danial Latifi.

The former case law dates to 1978, when Shah Bano, a 62-year-old Muslim woman from Madhya Pradesh, was divorced after 43 years of marriage by her husband. Shah Bano had five children, all of whom were married adults. Mohd. Ahmed Khan, Shah Bano's spouse, evicted her from their marital house. The Constitutional Bench decision comprised of the then Chief Justice of India, Y.V. Chandrachud, Ranganath Misra, D.A. Desai, O. Chinappa Reddy and V.S. Venkataramiaha, JJ. Shah Bano filed a complaint under Section 125 of the Criminal Procedure Code (hereinafter referred to as "CrPC") for Rs. 500 in maintenance that he promised to furnish. Ahmed Khan then divorced the respondent by an irreversible talaq. He then excused himself by claiming that because she was no longer his wife, he no longer needed to support her. He further added that he had been paying Rs. 200 per month in maintenance for around two years. He further stated that he had deposited Rs. 3000 in dower throughout the Iddat period. This defence did not assist him evade his need to pay Shah Bano's maintenance, as the Magistrate ordered him to pay Rs. 25 per month. The Madhya Pradesh High Court enhanced the monthly sum from Rs. 25 to Rs. 179.20 in the revision appeal. Ahmed Khan filed a Special Leave Petition at the Supreme Court to dispute this verdict.<sup>10</sup>

The Supreme Court's decision in the Shah Bano case was absolutely sound and fair. The justices did not overlook the fact that there is no contradiction between the relevant clause of the CrPC and the Personal Laws. It is clear that the relevant section of the CrPC does not discriminate. Rather, a woman, regardless of religion, could seek maintenance under this section. The court correctly acknowledged that a Muslim man's obligation to pay maintenance may extend beyond the iddat term. The Hon'ble Court also correctly held that paying Mehr does not preclude a Muslim man from paying maintenance to his wife. The problem of Muslim women being included in the definition of wife (Section 125 of the CrPC) would be justified. The clause does not confine itself to wives of a certain faith but is established with a broader meaning to include all women. The Supreme Court made it clear that, in the event of a controversy, section 125 of the CrPC would

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<sup>10</sup> Payodhi Das Choudhuri, *Mohd. Ahmad Khan v Shah Bano Begum & Ors* (1985 (3) SCR 844), AISHWARYA SANDEEP, <https://aishwaryasandeep.in/mohd-ahmed-khan-vs-shah-bano-begum-and-others/>



take precedence over personal laws. The court correctly found that when the Muslim wife is unable to care for herself, she may seek legal remedy under section 125 of the CrPC. In this situation, Shah Bano was plainly unable to support herself; hence, the husband should have supported her.<sup>11</sup> However, this case led to huge public and political furor and the aftermath of the same is quite known in the general public parlance, as well. Before going further, one needs to delve into the provisions of Section 125 of CrPC to understand the connection of the same with these three leading case laws, in the field of maintenance to Muslim women. It states that (the relevant portion of the Section is reproduced below):

*“125. Order for maintenance of wives, children, and parents. -*

(1) If any person having sufficient means neglects or refuses to maintain –

***(a) his wife, unable to maintain herself, or***

***(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain himself, or***  
***(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain himself, or***

***(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father, or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:***

*Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.*

***Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct.***

*Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within*

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<sup>11</sup> *Ibid.*

*sixty days from the date of the service of notice of the application to such person.]”<sup>12</sup>*

The subsequent case law of *Danial Latifi*<sup>13</sup> strengthened this position. The Constitutional Bench of this particular case law included Honourable Justices, G.B. Pattanaik, S. Rajendra Babu, D.P. Mohapatra., Doraiswamy Raju and Shivaraj V. Patil. This locus classicus is discussed widely within the academic circles and was a precursor in determining as well as comprehending the laws such as Articles 14, 15, 19, 21 of the Constitution of India; section 125 of the Criminal Procedure Code and as well as Section 3 of the Muslim Women (Rights on Protection of Divorce) Act (MWPRD) 1986. The basic issues were whether or not the Muslim Women can take recourse under the Section 125 of the Code of Criminal Procedure (1973) and whether or not Section 3 of the Muslim women (Rights on Protection of Divorce) Act 1986 was unconstitutional and blatantly in disregard to the Constitution of India. *Danial Latifi* was the counsel of Shah Bano Begum who filed this case, for further clarification and against the appeal of the former husband of Shah Bano Begum. The following analysis will give an insight into the judgement:

1. *Muslim women can take recourse under Section 125 CrPC*: According to the Supreme Court, Section 125CrPC is secular in origin and has nothing to do with personal law. It was enacted for quick maintenance and to prevent destitution and vagrancy. According to Justice Chandrachud, "personal law (Shariat) could not override the constitutionally framed law (Section 125 CrPC). Therefore, a Muslim woman, who is unable to maintain herself, can demand maintenance from her husband even after the iddat period. The husband is legally bound under Section 125 of the CrPC to pay maintenance." The exclusion of Muslim women from Section 125 of the CrPC will constitute discrimination because it is a provision for women of all religions.<sup>14</sup>
2. *Constitutionality of MWPRD Act, 1986 - Articles 14,15 and 21 of Constitution*: While interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable

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<sup>12</sup> The Code of Criminal Procedure, 1973, section 125 (India).

<sup>13</sup> *Danial Latifi v Union of India* (AIR 2001 SC).

<sup>14</sup> *Danial Latifi v Union of India* (AIR 2001 SC), MANUPATRA, [https://manupatracademy.com/LegalPost/MANU\\_SC\\_0595\\_2001](https://manupatracademy.com/LegalPost/MANU_SC_0595_2001).

and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of *iddat* but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the *iddat* period. The MWPRD Act passed in 1986 is valid. The provisions of the Act do not conflict with the principles of the Indian Constitution. The Act and the Code of Criminal Procedure were balanced by the court. It brought back the principles of the Shah Bano case, that the husband's obligation to support his wife did not end with the *iddat* period. Even under the Act the parties agreed the provisions of Section 125 of CrPC would still apply and even otherwise. In addition, the Magistrate has the authority to order appropriate maintenance arrangements, so anything that could have previously been granted by a Magistrate under Section 125 of CrPC would now be granted by the Act itself. Given this, it cannot be argued that the Act is unconstitutional and is violative of Articles 14, 15 and 21 of the Constitution.<sup>15</sup>

Thus, both the case laws are in consonance and in consistency with each other. This is so because the rights of the Muslim women are fundamentally meant to be protected for themselves and their children in the future. This is consistent with the spiritual and materialistic vision of the Prophet as well. The recent case law, also throws light on the same thing in a similar manner, and in much stronger words, whereby Honourable Justice B.V. Nagarathana and Honourable Justice Augustine George Masih, via a Division Bench order on July 10, 2024 have decided to harmoniously balance personal law regulations and the Constitutional guarantees<sup>16</sup>.

In the present case, the petitioner, Mohammed Abdul Samad, had challenged a Telangana High Court order refusing to interfere with the maintenance order of the family court. He contended that a divorced Muslim woman is not entitled for maintenance under Section 125 of CrPC and has to invoke the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986. During the hearing, the court observed that a Muslim woman can seek maintenance from her husband under Section 125 of the CrPC and said the "religion neutral" provision of the act is applicable to all married women irrespective of their

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<sup>15</sup> *Ibid.*

<sup>16</sup> Mohammad Abdul Samad v State of Telangana and Ors (2024, SC).



religion.<sup>17</sup>

“There cannot be disparity in receiving maintenance on the basis of the law under which a woman is married or divorced. The same cannot be a basis for discriminating a divorced woman entitled to maintenance as per the conditions stipulated under Section 125 of the CrPC or any personal or other law such as the 1986 Act. I, therefore, hold that Section 125 of the CrPC cannot be excluded from its application to a divorced Muslim woman irrespective of the law under which she is divorced,” said justice Nagarathna in her judgment. Both the judges on the bench wrote separate but concurring judgments.<sup>18</sup> Thus, conclusively the Court upheld the rights of the divorced Muslim Women.

### III. CONCLUSION

Conclusively speaking, the rights of the married Muslim women, on the time of her divorce are similar to the rights that are given under any other personal law. The personal and the secular laws have to be balanced in the light of the delicate fabric of socio-legal democracy existing in India. This is so because that the diversified nature of our egalitarian society needs a strong spiritual and materialistic backing when deciding such case laws, purely on constitutional basis. Thus, the three landmark case laws in this field of Islamic family law jurisprudence have paved the way for women empowerment and the development and progress of the nation, standing true to Indian values of secularism and inclusion of one and all withing the one family bond that we share, as a nation.

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<sup>17</sup> *Supreme Court's recent judgement highlights Homemakers' Rights and Duties of a Married Man*, INDIA TODAY, <https://www.indiatoday.in/law/supreme-court/story/supreme-court-homemaker-rights-married-man-duties-muslim-woman-maintenance-order-2564949-2024-07-10>.

<sup>18</sup> *Muslim Women Entitled to Seek Alimony, Says SC*, HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/muslim-women-entitled-to-seek-alimony-says-sc-101720637069508.html>.