

[digitised by sacw.net for non commercial
and educational use]

225

Muslim Women's Act : Deathknell of Secularism

SUNIL MAITRA

COMMUNIST PARTY OF INDIA (MARXIST)

ON SALE

Political Resolution

Price : Rs. 3.00

and

Political-Organisational Report

Price : Rs. 9.00

Adopted by the Twelfth Congress of the Communist
Party of India (Marxist), held at Calcutta,
December, 25-30, 1985.

Place your orders with—

NATIONAL BOOK CENTRE

14, Ashoka Road, New Delhi-110 001

(Note : All order must be accompanied by the total amount.)

Muslim Women's Act : Deathknell of Secularism

SUNIL MAITRA

"ARUSTUL BEGUM'S right arm is a mass of scarred, burnt flesh. Pulling up the long sleeve behind which her disfigurement is hidden, she recalls the agony she underwent when, during one of the many beatings she received in her in-law's house, she was pushed on to a lighted stove. Taken to a doctor for treatment on two occasions accompanied by a sister-in-law who silently held her on a leash, Arustul Begum's arm remained a throbbing, swollen, raw lump of flesh long afterwards.

"This was the culmination of ten years of marriage, during which she was taunted and harassed for not bringing enough dowry and was beaten till she became unconscious by the father-in-law and mother-in-law, divorced sister-in-law and Arustul's fruitseller husband. At every step, she had to obey others' dictates. She was given only starvation diet, consisting of a meal of one chappati, while her husband was urged by his family to find a richer, second wife.

"When they finally threw her out of the house, Arustul Begum, who is middle-aged, looked like an old woman, a mere skeleton of her earlier self. Since that day, for the past one-and-a-half-years, she had not seen her two seven and four year-old daughters, who live in their father's house at Thane. "If I go there to see them, they will kill me", she fears.

"Arustul Begum's appeal to the Andheri court in Bombay

for custody of the children has been pending for the past six months due to the constant adjournments sought by her husband. "Only mothers and God can understand my agony. That is why I am so unwell. If I can have my children, I don't want anything more", she says."

The harrowing picture that emerges above comes from the Survey conducted by the 'Indian Express' (Bombay) in three Maharashtra cities—Bombay, Pune and Nagpur—and published on 20.4.86. It presents a grim picture of the plight of Muslim women. The Survey continues:

"If Arustul Begum's tale is disturbing, that of Madina Mulla is horrific. At the age of 25, she is a three-time divorcee with two kids. Married when 17 to a driver in Barsi, she was abandoned by her husband within 20 days. To add to her woes she was pregnant at that time; while Madina was in her mother's house, her husband disappeared without any trace.

"Madina's second marriage, after two years, at the instance of her elder brother and his wife, was to a man claiming to be a wealthy trader from Bombay. The claim was a total hoax as Madina, accompanied by a year old daughter, soon found out. Treated no better than a servant in the crowded house, she returned to her mother's home in a dejected mood.

"To her dismay, she was pregnant once again, and gave birth to a boy a few months later. Her husband, however, refused to take her back with the two kids saying, "If you want to come to my house, come alone." Madina reluctantly left her children with her mother and returned to her husband. The reunion did not last long. On being tipped off that her husband planned to sell her off to an Arab, she rushed back to her mother once again.

"Although she had no desire to remarry, Madina has no other option, as her brother could not accommodate her and her children on his meagre salary. The third husband tortured the children and she was compelled to send them to an orphanage. Harassment started soon after and, finally, a disgusted Madina walked out on her husband.

"With absolutely nothing to fall back on, Madina now works as a midwife on a casual basis in a hospital in Pune. Her biggest problem is accommodation. "There is no place where

I can spend a safe, peaceful night", she confessed:

"The trauma of a shattered marriage is not yet behind 19 years old Zahida, who sat in the Mazagon Court in Bombay, holding her two-month old child. She was barely able to speak, choking over tears of misery welling up in her eyes. So her plight was recounted by her father.

"Daughter of a cycle shop owner, she was married in December 1984. Four days prior to her wedding, her husband Shamshuddin's family demanded a Mercedes car, according to Zahida's advocate, who produced as proof a zerox copy of the letter written in Urdu. However, under threat of action under the Dowry Act, the marriage went through.

"Subject to her husband's drunken assaults, Zahida was finally physically thrown out of the house on March 26 this year. Her breast-fed baby was restored to her after she filed a police case. Zahida has filed her maintenance under Section 125 of the Criminal Procedure Code for maintenance and return of her dowry worth Rs. 30,000.

"The stories of Arustul Begum, Madina Mulla and Zahida are also the stories of countless others interviewed during the course of this Survey. A majority of the women were hardly educated, not having moved beyond class five or seven. A common thread running through their stories was of harassment to a point at which they were either forced to flee their husband's house or were physically thrown out. Thus many of these women were deserted, rather than divorced."

What happens to the women when she is divorced, deserted or thrown out? Who is responsible for her and her children's maintenance? The Survey graphically illustrates the predicament of such women and their natural families. It continues:

".....Khurshid Banu of Pune dismissed the suggestion that her parents could support her. In her early twenties, she is one of five sisters and two brothers. Her father, who is the sole bread-winner of the family, earns Rs. 450 a month.

"Having studied up to the fifth standard, Khurshid Begum was the second wife of a skilled worker employed in a factory. They were married only one and a half years ago. Khurshid recently returned to her parents' home for good. "I want taluq. It is impossible to stay with that fellow any longer. He gets

drunk every evening and thrashes me black and blue", she alleges. The unhealed wounds and bruises on her face and arms bear testimony to the torture.

"Speaking of her husband, who earns Rs. 1,000 a month and has a house of his own, Khurshid says "he can definitely afford to pay for my maintenance, and he should. Why should my parents bear the burden, when it is my husband who has forced me out? In any case, it is simply beyond my father's capacity to support me for long."

"Laila, a thin, quiet woman living in a Bombay slum, was forced to flee her husband's home following his second marriage and the "zulum" (atrocities) inflicted on her. Filing a case for maintenance with the help of the Muslim Satyashodhak Mandal, she was paid a lump sum of Rs. 3,000 and a small 'khali' from her husband's property, besides gaining custody of her three children.

"To avoid paying regular maintenance even for the children, Laila's husband resigned his Rs. 1,000/- job in a private company and lives off the income from his family property. Meanwhile, for Laila, Rs. 7 she earns through washing bottles from 9 a.m. to 6 p.m. every day is the only source of sustenance.

"With this amount, Laila manages to buy her 'dal' and 'roti'. On days when other needs are more pressing, she survives on tea and 'apu'. While her daughter is living with her mother in the village, her two sons are in a boarding school, thanks to the scholarships of the Satyashodhak Mandal. Her brother, who works as wireman and is the sole male member of the family, manages to lend her some help despite having a wife and children.

"But recently, the family received a blow. Another sister also kicked out by her husband, has come with her four children to seek shelter in Laila's hut. 'How long can we now impose on our brother?' Laila asks in despair.

"As for women having a share in the family property, Arustul Begum asks, "Who has property? When there is not even enough food to eat, the question does not arise."

"While Muslim women from the lower income groups are able to eke out a living through menial work, the plight of the lower middle class woman who has to maintain her status in

society, is pathetic. Lack of education and access to a socially acceptable job leaves women like Zahida, who come from the latter class, facing a grim future. Despite the ill-treatment of her husband, she says she will go back to him if he will accept her. On remarriage, she admits, "I will have to marry for money, not because I want to."

".....It is, perhaps, the quiet Laila who best summed up the views of the innumerable divorced and deserted women. "Why should we become a burden on our old parents? If men use *gunja*, is that not against Koran? If they throw us out of the house, is that not against Islam? They have ruined our lives. Women have been left helpless by men who have given us no chance to come out. Our life is useless. Why should Islam be made a 'rakawat' for us alone?"

"Perhaps the people who suffer the most are the parents of divorced or deserted women. In their age, when their resources and strength are limited, they find themselves facing the prospect of providing security for their daughter and her children."

.....We have quoted a bit extensively from the Survey conducted by the 'Indian Express' (Bombay) regarding the plight of divorced or deserted Muslim women as published by it in its edition dated 20.4.1986. It mirrors the Indian society as it is, wrapped up in the cocoon of mediaval beliefs and practices, oblivious of the world passing by. It is as if the time has stood still in this country. Otherwise, how one can explain the barbaric way the women are treated and the fact is tolerated?

For once the conscience of the country was roused when the Supreme Court gave its judgement on the Shah Bano case and the Muslim fundamentalists gave the war cry to annul it. For once, the country took a look into its rotten core. And there was stirring. People spoke up. Women came to the streets and in unison shouted for justice. There were rallies and demonstrations. There were conventions and meetings. Women marched to the Parliament. The most oppressed, the most humiliated section of the Indian society, the Muslim women stirred. Muslim intellectuals, both men and women, came forward and demanded reforms. Thus when within the Muslim community the opposing forces were grouping to confront each other, when forces of progress and reform were challenging the forces

of status quo, the Rajiv Gandhi Government came forward with a helping hand, not to the oppressed Muslim women, but to the oppressor fundamentalists. There were protests from the Muslim women and intellectuals, from the secular forces, from the intellectuals. There were protests from within the party of Rajiv Gandhi.

But Muslim Woman (Protection of Rights on Divorce) Bill 1986 was forced through the Parliament. Rajiv Gandhi whipped his herd hard to get the Bill passed. He was so hell-bent to pass the Bill that Pranab Mukerjee had to be expelled from his party and a batch of five leading party members suspended. Even then, at the height of the debate in Lok Sabha, the resigning Minister of State for Home Affairs, Arif Mohammed Khan, defiantly stood up to announce that he still was opposed to the Bill and that he would vote for the Bill only because there was a whip. Had Rajiv Gandhi allowed a free vote in the Parliament, there is absolutely no doubt that the Bill would have been thrown out. No discussion in depth was held either in the Congress(I) party at large or in the parliamentary party. Only when there were murmurs of protest in the ranks of the Congress(I) parliamentary party, the MPs were called in groups of three and four by the lesser luminaries of the party and got frightened with the prospect of weaning away of Muslim votes. With the spadework done, Rajiv Gandhi went through the motion of calling a general body meeting of the Congress parliamentary party and harangued them to vote for the Bill. Even then he was not sure of its safe passage. A whip was issued, thus warning the Congress(I) MPs of the danger of losing their berths in the Parliament. All opposition within the party, even murmurs of protest, were smothered and the Bill was steamrollered.

THE SHAH BANO CASE AND AFTER

The enactment of the Muslim Woman (Protection of Rights on Divorce) Bill 1986 is the culmination a protracted battle between the forces of religious obscurantism and fundamentalism and those of progress and reform. It has been a long battle indeed. Right in the morrow of India's independence the battle had started in the Constituent Assembly. The question posed then was whether India would remain a captive of the

antiquated social and religious taboos by maintaining the status quo in social relationships or, breaking the shackles, would surge forward and in the process modernising the society, creating for itself new social relationships and values. But whatever little headway could be made in this regard, the advance was sought to be stopped and rolled back by Rajiv Gandhi. The alibi was supposed to be the ire of the Muslim community that was raised by the Supreme Court Judgement in Shah Bano Case.

The facts of the case themselves amply demonstrate how inhuman the social laws are for a considerable number of our women-folk. Shah Bano Begum was married to Mohd. Ahmed Khan in 1932. She bore him three sons and two daughters. After living as husband and wife for 43 years, in 1975, Shah Bano was driven out of the husband's house. In April 1978, Shah Bano filed a petition in the court of the First Class Judicial Magistrate of Indore asking for maintenance at the rate of Rs. 500 a month. On November 6, 1978 Ahmed Khan divorced her by an irrevocable talaq. Thereupon in the court he took the plea that since she was no longer his wife, he was under no obligation for her maintenance. This, he argued, was in accordance with the Muslim Personal Law by which his marriage and divorce were guided. It should be mentioned here that Ahmed Khan was an advocate by profession and his monthly income was around Rs. 5000 a month. In August 1979, the Magistrate directed Ahmed Khan to pay Shah Bano the princely sum of Rs. 25 a month for her maintenance. In July 1980, in a revisional application filed by Shah Bano the Madhya Pradesh High Court enhanced the amount to Rs. 179.20 a month. The Supreme Court in an elaborate judgement upheld the judgement of the M.P. High Court with Rs. 10,000 as costs payable to Shah Bano, with the rider that Shah Bano was free "to make an application under Section 127(i) of the Code for increasing the allowance of maintenance granted her on proof of a change in the circumstances as envisaged by that section".

It was not for the first time that a hapless, unfortunate Muslim woman dared to go to court of law praying for her maintenance on divorce; others had gone to different courts at different times in the past and also managed to obtain some

relief. But it was for the first time that the Supreme Court made a comprehensive exposition of the relevant laws and opined that such interpretation of the law did not clash with the Muslim Personal Law. The fanatic fundamentalists reacted violently. Soon after, the arch-reactionary Muslim League member of Lok Sabha, Banatwala, moved a private member's bill in March 1985 seeking to take the entire Muslim community out of the purview of the common law of our country. The bill was stoutly opposed by the then Minister of State for Home Affairs, Md. Arif Khan. It was not fortuitous that Mohd. Arif Khan so passionately spoke up against the bill. Meanwhile, the Government of India had taken the decision to oppose Banatwala's bill. In its note dated May 25, 1985 the Law Ministry categorically stated that "A careful reading of the judgement would show that the honourable court has simply interpreted the relevant provision of the Cr. P.C. without any interference with the Muslim Personal Law as such." The Law Secretary was more emphatic. In his note the Law Secretary said: "I have perused the judgement of the Supreme Court rendered in Mohd. Ahmed Khan vs. Shah Bano Begum and others with due care and attention. While performing its constitutional duty of interpreting section 125, particularly clause (b) of the explanation to sub-section (1) of the said section, the court has held that a Muslim wife who has been divorced and has not remarried is entitled to maintenance under section 125 and this provision does not conflict with Muslim Personal Law. In support of this conclusion reliance has been placed by the court not only on authoritative commentaries but also on Ayat No. 241 and 242 from the Holy Quran. According to the court, these Ayats leave no doubt that the Quran imposes an obligation on Muslim husband to make provision for or to provide maintenance to the divorced wife. The court has also construed the expression *Mahr* to mean a sum payable to the wife out of respect to her. Another point decided by the court is regarding the true scope of sub-section (3) (b) of section 127 vis-a-vis the right to claim maintenance by a divorced woman under section 125. The decision of the court cannot be regarded as an encroachment on the Muslim personal Law. The Muslim Personal Law is of a civil nature, whereas section 125 is a provision contained in

the criminal procedure code.

"In view of the foregoing, the bill to amend section 125 and 127 of the Cr. P.C. should be opposed."

The note was endorsed by M.R. Bhardwaj, the Minister of State for Law, on June 1, 1985 and by Ashok Kumar Sen, the Law Minister on June 2. On the basis of the unanimous opinion of the Law Ministry, the Home Ministry prepared a lengthy note dated July 24, 1985 elaborating more or less the same arguments and in the end opined: "In view of the position explained above, it is proposed that the bill may not be accepted either in its present form or in any modified form. The bill, therefore, be opposed. Any motion and/or amendment which may be moved for the circulation of the bill to elicit public opinion or its reference to a Select or Joint Committee may also be opposed."

Both the Law and Home Ministries were unanimous that Banatwala's bill should be opposed. This was the backdrop when Mohd. Arif Khan took the floor of the Lok Sabha on August 23, 1985 and lambasted Banatwala in defence of Muslim women's right to alimony. When he finished his speech and took the seat he received a tremendous ovation from the Congress (I) as well as Opposition benches. Even as late as November 19, 1985, Minister of State for Law in a reply to a question in Lok Sabha said: "The Government cannot reverse the Supreme Court Judgement in the Shah Bano case. The whole controversy created over this was political. Mr. Bhardwaj observed that a constitutional Bench of the Supreme Court had, in formulating the judgement, incorporated relevant parts of the Holy Quran and the "Shariat" Law. Judgements are obeyed and not discussed.

..... Referring to section 125 of the Criminal Procedure Code the Minister said it was social security measure. He also said it was a dignified move and civilised society should accept it. The provisions do not touch Personal Law. It refers to maintenance of wife and children, whose well-being was a social responsibility" (Hindustan Times, dated 20.11.1985). Yet hardly three months had elapsed when the same government brought the so-called Muslim Woman (Protection of Rights on Divorce) Bill 1986 in February this year to sabotage whatever

little gains had accrued to the hapless Muslim women as a consequence of the Supreme Court judgement on Shah Bano Case. What happened to the Minister's concept of alimony as a 'social security measure'? Why the "dignified move" of the Supreme Court was being sought to be scotched? In just three months did India stop being "a civilised society"?

THE DASTARDLY BETRAYAL

In between something happened. Rajiv Gandhi lost the Assam elections and, together with Assam, Congress (I) lost quite a number of by-elections. All on a sudden, the charming Mr. Clean was no longer the magnet that attracted the votes. The conclusion was that Muslim votes had been alienated because of the Supreme Court judgement. Desperate to woo back the Muslim votes, the ruling coterie decided on the volte face and succumbed to fundamentalist pressure and embarked on the course which will prove disastrous for millions of Muslim women.

While thus Rajiv Gandhi surrendered to Muslim fundamentalists, at Faizabad, U.P., he buckled under the pressure of Hindu fundamentalists and allowed the disputed Ram temple/Babri Masjid to be opened after 35 years. It was an unmitigated provocation to the Muslims which was fully exploited by the Muslim fundamentalists.

In the aftermath of the Supreme Court judgement, it is true that the fundamentalists had raised a hue and cry with age-old moth-eaten slogan of "Islam in danger", but it is also equally true that from among the Muslims, a determined group of liberal social reformers was emerging. 118 eminent Muslims of our social, political, educational and cultural life had signed a petition supporting the Supreme Court judgement. For the first time in independent India, the Muslim community was stirring. Muslim women in their hundreds for the first time found the language to communicate their tales of woe. They for the first time shouted, loud and clear, for an end to their servitude and for reforms. It was this anguish and hope that found their articulate expression through the speeches of Mohd. Arif Khan of the Congress (I) and Saifuddin Chowdhury of the CPI (M) in the Lok Sabha. On December 20, 1985, participat-

ing in the debate on Banatwala's bill Saifuddin Chowdhury, the CPI(M) M.P., repeatedly clashed with the obscurantist Minister of Rajiv Gandhi, Z.A. Ansari who as his wont supported the Muslim League M.P. Banatwala. It was the CPI(M) M.P., who cried out from the floor of this country's legislative forum that "justice today is crying in the form of a woman living in Indore". The bigots and the fundamentalists kicked up a row and din, but voices of reason, reform and secularism also were audible.

Cutting across all political barriers, illustrious Muslims in the educational, cultural and professional fields met in Delhi on April 26, 1986 and fervently appealed to the Prime Minister not to press the bill.

"The proposed Muslim Women Bill was denounced as anti-Koran, anti-Islamic, anti-women and anti-progress by its stout opponents at a convention organised on Saturday by the Committee for the Protection of the Rights of Muslim Women.

"In impassioned speeches, noted Muslims from all walks of life appealed to the Government to withdraw this "retrograde" measure which not only denies Muslim women the fundamental rights guaranteed to all Indians under the Constitution but is also an outright appeasement of communal and fundamental elements in Muslim society.

"Among those who spoke were Baharul-Islam, Congress-I M.P., Mr. Moonis Raza, Delhi University, Vice-Chancellor, Mr. Rais Ahmed, former Vice Chairman of the UGC, Mr. Saifuddin Chowdhury, CPM M.P., Mr. Dania Latifi, a Supreme Court advocate, Ms Abida Samiuddin, a reader from Aligarh Muslim University, Ms Ghazala Ansari, a former AMU professor, Mr. Rashid Talib, journalist, and Ms Reshma Arif Khan, wife of the Congress-I M.P. who resigned from the Cabinet recently in protest against the Government's decision to sponsor the Bill.

"Referring to the much quoted verse 241 of the Koran which specifies the rights of divorced Muslim women, Mr. Baharul-Islam pointed out that this verse does not say anything about a divorced woman being entitled to maintenance only during the 'iddat' period.

"He said the verse clearly states that Muslim women have the right to maintenance till they remarry.

"Mr. Moonis Raza, in his speech, warned of the dangers of appeasing communal elements, going back into history to point out how communalism has today become a respectable phenomenon.

"Temples and mosques have become the centre of political activity today and if the country is moving forward this way, the future is full of dangers, he emphasised.

"He denounced the proposed Bill as "a measure to appease the fundamentalists among the Muslims by sacrificing major secular elements in our policy".

"Mr. Saifuddin Chowdhury described the Bill as "not a codification of Muslim personal law but a fortification of fundamentalism".

"Ms Abida Samiuddin and Ms Ghazala Ansari, while making passionate plea on behalf of the millions of destitute women who will be affected by this Bill, pointed out that the Bill was totally un-Islamic in character.

"The Bill makes no mention of 'matta' which is a form of compensation apart from the 'mehr' to which divorced women are entitled under the Shariat. Nor does it deal with the responsibilities of men towards their children. The Bill's provision, which makes it obligatory for men to support their children for only two years is again un-Islamic as the Koran says clearly that a man will bear the responsibility of his children till they attain majority, they declared.

"A resolution passed at the convention pointed out that a large number of divorced Muslim women belong to the economically deprived sections of society. This Bill will take away the only option they have of protecting themselves from destitution.

"The resolution also called on the Government to ensure adequate protection of the rights and security of the minorities who are feeling insecure today because of the growth of communalism in the country" (Indian Express, dated 27.4.1986).

Now listen to the angry voice of revolt, a teenager from Kerala :

"If the Muslim women's bill is passed, my sister and I have decided we will not marry. We don't want to ruin our lives. The Bill gives men the licence to divorce and marry as many times as they want to, like changing clothes", exclaimed 17-year-

old Nadira, one of the 1,500 odd women who participated in a rally at Boat Club today to demand the withdrawal of this retrograde piece of legislation.

"Nadira, a member of a Kerala-based women's organisation, has travelled all the way from Calicut alongwith her three sisters and mother to take part in today's rally. "Mr father doesn't know we are here. We told him we had gone on a pilgrimage", she said, adding that most Muslim women were actually opposed to the Bill, which seeks to exclude them from the purview of section 125, but were too scared to talk about it in public. According to Nadira they secretly encouraged them to seek the Bill's withdrawal.

"Nadira, in contrast, is full of fight and spirit and uncaring of the consequences. "I don't care if I am even excommunicated by the community and not allowed to go to the mosque. If they do not allow my body to be buried, I would rather donate it to a medical college for a good cause. I've also studied the Quran but I know that this Bill is basically anti-Islam. Marriage for a Muslim woman is like a lottery and I refuse to play this game", she added on a confident note.

"Nadira was not alone in her fight to ensure the Bill's defeat. There was Rehmat Bano from Udaipur, Roja Bivi from Madurai and Aslema Begum from Burdwan district, to name a few. They were among the large number of Muslim women who came from all parts of the country to participate in the rally" (Times of India, dated 18.4.86)

Not only that ; 118 eminent Muslim intellectuals from all walks of life, in a memorandum to the Prime Minister, opposed the withdrawal of the safeguard given to the women under Section 125 of the Cr. P.C. The Memorandum is reproduced :

MEMORANDUM ON THE RIGHT TO MAINTENANCE OF DIVORCED MUSLIM WOMEN

"We consider it an important gain of our independence struggle that it led to the establishment of a secular state which contrasts with the situation obtaining in our neighbouring countries, as well as in most of the newly liberated countries of the third world. Today, however, the secular fabric of our society is under severe pressure from various quarters. In our

view the stable foundation of our secular polity can be strengthened not by offering concessions to communal/sectarian groups and interests with a view to achieving short-term political or electoral gains, but through positive and principled interventions which would preserve our secular identity. This course would best ensure the interests of all sections of our society, including the minorities. We view the specific question of the right to maintenance of divorced Muslim women in this perspective.

"We believe that Muslim women have the right to maintenance—a right that they enjoy in several Muslim countries, through the rational and progressive interpretation of the Islamic principles, as in Morocco, Iraq, Egypt, Turkey, Libya, Tunisia, Syria and Algeria. The interpretation being put forward by a section of the Muslim religious leadership in India, on the other hand, expresses a backward-looking perspective. We therefore specifically recommend the following for a careful and comprehensive consideration of the Government of India—

- 1.1 We emphasise the necessity of safeguarding the interests of all sections of the minorities. That is why the demand to exclude Muslim women from the purview of Section 125 of the Cr. P.C. (under which a divorced woman is entitled to take maintenance from her husband) would adversely affect both the rights and interests of Muslim women.
- 1.2 There is no provision in the Muslim Law which directly or indirectly prohibits a former husband from paying maintenance to his ex-wife after the *iddat* period. It is therefore erroneously argued that maintenance beyond the *iddat* period is contrary to the *Sharia*.
- 1.3 Prior to the inclusion of Section 125 in the Cr. P.C. which came into force in 1973, there was a provision for maintenance in Section 488 in the old Cr. P.C. But there was no liability of payment to a divorced wife. Taking advantage of this lacuna many Muslim husbands divorced their wives when an application for maintenance was filed and thus escaped the liability to payment. To prevent this abuse and the hardship it caused to women, Section 125 has rightly put the liability on the husband to pay

maintenance even if he divorces his wife. However, it is given only in cases where husbands possess sufficient means to pay the maintenance allowance. The liability of the husband to pay maintenance, even if he divorces his wife, would act as an effective deterrent against hasty and irresponsible divorces. This is another reason why this provision should not be diluted.

- 1.4 The introduction of Section 127 (3) (b) was a concession to the unreasonable demands of certain vested interests, who wanted to deny maintenance beyond the *iddat* period, on the plea that the *mehr* and maintenance during the *iddat* period would suffice. We consider this inimical to the interests of divorced Muslim women.
- 2.1 We feel that the right to maintenance beyond the period of *iddat* is an important and a positively helpful provision which provides security to a divorced woman. Evidence from different parts of the country indicates that a large number of Muslim women, particularly belonging to poorer families, are divorced and deserted. This can be corroborated by a survey of cases registered in rescue homes. This, in our view, reinforces the need for Muslim women particularly to have recourse to Section 125.
- 2.2 Regardless of the rights and privileges that Islam may have conferred on Muslim women, they should not be denied the rights guaranteed by the Indian Constitution based on the recognition of equality, justice and fraternity of all citizens. It is imperative in a secular polity like ours to go beyond the rights conferred by various religions in order to evolve laws which would provide justice and succour to all women, irrespective of their religious beliefs.
- 3.1 Whereas criminal laws in their entirety apply to every community, it is really surprising that only one of its positive provisions—relating to women's rights—should be sought to be deleted on the dubious assumption that it is contrary to the Muslim Personal Law. The Muslim Personal Law, for instance, stipulates specific punishments for crimes such as theft, robbery and rape which are rightly not accepted and are not applied. Likewise, the more

humane civil and secular laws should be applied to all women regardless of their faith, and notwithstanding a conservative interpretation of personal laws by a section of the community.

- 3.2 Section 125 is a criminal law applicable to all citizens. Though the right to maintenance is a civil right, it forms a part of the criminal law so as to prevent a divorced woman from becoming a destitute. The provision of Section 125 Cr. P.C. seeks to prevent vagrancy which would occur in the case of poor Muslim women. Most women who seek maintenance have no means of livelihood. For them and for their children, maintenance is an absolute economic necessity.
- 3.3 Clearly Section 125 is meant for indigent women as the maximum amount stipulated by this provision is only Rs. 500.
- 4.1 The judgement of the Supreme Court in the Shah Bano case has led to an intense controversy among Muslims particularly. It is evident that those Muslims who have opposed the judgement have done so in the name of religion. They have used all the platforms available to them to reassert their weakening hold on Muslim public opinion, and sought to exploit religion for sectional and communal political ends. They have taken advantage of the sense of insecurity among Muslims, caused by the persistence of communal riots and by discrimination in jobs and vocations. We feel that the growing influence of such exploitative communal elements should be effectively curbed, and they should be prevented from suppressing the rights of Muslim women under the cover of some religious decrees which are neither authentic nor consistent with the humanistic and rational spirit of Islam which lays considerable emphasis on the elevation of the status of women.
- 4.2 It is noteworthy that many important sections of Muslim public opinion, particularly among the educated and professional groups and segments, have supported the right to maintenance. These include the intelligentsia, lawyers, teachers, social workers and even experts in the Shariat

Law like Mirza Hamidullah Beg, the late Justice Murtuza Fazl Ali, Justice Khalid, former Judge of the Supreme Court, Baharul-Islam, former Chief Justice of the Calcutta High Court, S.A. Masud, Judge of the Ahmedabad High Court, Sattar Qureshi, Supreme Court Advocate, Daniel Latifi and A.G. Noorani. In the light of their views and judgement the government would do well to consult a wider range of enlightened Muslim opinion, including competent jurists and legal experts in Islamic Laws, before arriving at a decision on the matter.

- 4.3 Several articles and letters have appeared in the Urdu press, particularly in the 'Qaumi Awaz', in which several women and men have strongly supported the right to maintenance under Section 125 Cr. P.C. An attitude survey of Muslim women conducted by the Institute of Islamic Studies, Bombay, revealed that a large number of Muslim women also favour changes in rules relating to marriage, divorce and maintenance.
- 4.4 Equally, the experience of womens organisations working among Muslim women indicates that many amongst them have supported the right to maintenance. In our view, if avenues are open to them they would come forward to take advantage of this right, for at present the legal scales are heavily tilted against them. It is worth recording that an increasing number of cases for maintenance are being filed by Muslim women all over the country. In Calicut, for example, 200 such cases are filed every year. This is an indication of both their support and need for maintenance. We believe that they should continue to receive state protection for the right to maintenance which is in accordance with the true spirit of Islam. In fact, experts have quoted extensively from the Quran to this effect. These include the learned commentaries and translations of the Quran made by Maulana Abul Kalam Azad, Allama Abdullah Yusuf Ali, Ahmad Reza Khan Barclvi and Fateh Mohammad Jullundhari. Reference should also be made to the Report of the Pakistan Government Commission on Family laws.
- 5.1 It has been brought to our notice that the government is

sympathetic to the suggestions of a section of the *ulema* and some Muslim leaders who have argued that the responsibility of maintenance after *iddat* should be shouldered by the father, or in his absence, either by the brothers or the relatives, or alternatively, the responsibility is to be shared by the Muslim community as such. We understand that the government is also examining the possibility of incorporating the provisions regarding maintenance (according to Muslim usage in India) into the Cr. P.C. through legislation. In support of such a move it is asserted that it would place Muslim women on a stronger footing and, in addition to the *mehr*, enable them to claim not only maintenance from their paternal/maternal family, but also enable them to have their claims legally enforced. Frankly we do not share such optimism. Indeed we consider such a move as retrogressive, and one which might well act as an impetus to divorce amongst Muslims, particularly among the poorer sections.

5.2 The suggestion that Muslim women after divorce should have legal recourse only to her own family and not to her husband for maintenance is ludicrous. It would imply that a marriage contract for a Muslim woman involves only obligations and no rights which is totally contrary to the concept of *nikah* which essentially is a contract implying rights and obligations for both the parties. This means that after the woman has given the best of her life to her husband and raising his family she can be discarded and have no recourse to maintenance from her husband.

5.3 It seems extremely unlikely and unrealistic that a destitute woman would fight a legal battle against her own family for maintenance. The natural recourse of a woman in such circumstances is to fall back on her family for substance. If such support is not forthcoming it seems to us impractical that she be advised to file a suit against members of her own paternal/maternal family. With the break-up of the joint family system and the pressures of the economic crisis caused by galloping inflation, the woman may not like to add to the burden of her wider family. It is, however, possible that women who would not

be welcomed in fathers' and relatives' homes would find their position a little secure if a monthly allowance, even if it is a niggardly sum of Rs. 200, was given to them.

5.4 In exonerating the husband from all responsibility of maintenance for a wife whom he has divorced for his own reasons is against the principles of social justice. The parents of the divorced woman cannot be expected to shoulder the responsibility and burden of their daughter who has been deserted/divorced for no fault of theirs.

5.5 Any attempt to change, alter or modify Section 125 will hit the poor and the needy. The proposed law will violate Article 14 of the Indian Constitution which guarantees equal protection before the law: the state shall not deny to any persons equality before the law or the equal protection of the laws within the territory of India. Any law which violates Article 14 would be void.

6.1 We understand the government is considering codification of Muslim Personal Law which, in its judgement, would protect women by making the payment of *mehr* commensurate with an increase in the husband's income. We do not believe this to be right. We fear that *mehr* will become a legal substitute for maintenance. Its taxation, in most cases, is a paper transaction. Its taxation in the Indian sub-continent is more of a ritual and a formality rather than a realistic assessment of the genuine requirements in the event of a divorce. At any rate, the amount of the *mehr* is often most inadequate for anybody's life-long maintenance. Given the status of most women, it is neither possible for the family to fix a reasonable amount of *mehr* nor desirable to insist on a large *mehr* figure as the prospect of divorce is not taken into account at the time of marriage. So the question arises: can the divorced/deserted wife be debarred from further maintenance from her husband even if the amount paid to her is nominal?

6.2 We believe that *Mehr* cannot absorb the husband's liability to further maintain his divorced/deserted wife. *Mehr* is merely a consideration of money given at the time of marriage by the husband to the wife, as a token of his regard and responsibility. It can neither be a reason-

able substitute for maintenance nor can it be treated as a final settlement in the event of divorce.

- 7.1 Several Muslim countries have interpreted the Muslim Personal Law, over the centuries in accordance with the spirit of Islam, and the specific requirements of their polity and society. It can be argued that this indeed is consistent with the ideas of justice, tolerance and compassion that the Quran enjoins on all Muslims. For instance, Syria, Iraq, Pakistan, Bangla Desh and Sri Lanka, in particular, have modified Muslim family law and have set up arbitration councils to decide on its various aspects. India is among the few nations where the Muslim Personal Law continues to determine rules relating to polygamy, inheritance, and instant divorce. We are of the firm opinion that reforms in such areas, along with the right to maintenance, would enable Muslim women to acquire the rights and dignity they have been denied for so long.

We call upon the Government of India to ensure that the rights guaranteed by the Indian Constitution to women are upheld. We emphasise this in relation to the Muslim women particularly, who have been subjected to discrimination for so long. In our opinion, to deprive them of the rights granted by secular laws would be a retrograde measure. We therefore reiterate that under no circumstance should Section 125 Cr. P.C. be repealed or any amendment introduced to exclude Muslim women from its beneficial purview."

The churning within the Muslim community was obvious. The voice of reform was loud and clear. For the first time, Muslim women had come out and demanded justice. They were backed up by Muslim intelligentsia, jurists, writers, film makers, artists, educationists, M.Ps, M.L.As and a host of others.

If really Rajiv Gandhi and his friends had firm secular convictions, which side would they have taken? The side of stinking obscurantism or the side of fresh air, of the liberals, the reformers, those who wanted to go forward breaking the shackles of antiquated feudal concepts and values? Rajiv chose the former, the mullas and the ulema. Mohd. Arif Khan was betrayed and so were thousands and thousands of Muslim progres-

sives and women. At the back of the party and the country, Rajiv Gandhi struck up a deal with the Banatwalas. How did it matter if it entailed destruction of thousands of Shah Banos? What mattered was votes, Muslim votes. And who applauded Rajiv? The most backward looking and the most reactionary among the Muslims. It was a political deal. It was also a total surrender to obscurantists and fundamentalists.

THE FIGHT MUST GO ON

A battle is lost, but war is not lost. The war goes on. As a matter of fact, as said earlier, the war has been going on since the morrow of independence. It has been a protracted war of ideas, between the old and the new, between the antiquated and the modern, between reaction and progress.

In 1972, the old Criminal Procedure Code was sought to be replaced by a new code. How Section 125 and 127 in new Code were amended presents an interesting reading. One of the leading participants in the Lok Sabha those days was Madhu Limaye. He has given a graphic picture of what happened in the Lok Sabha then. Writing in 'The Telegraph' dated 26.2.1986, Madhu Limaye writes: "Section 125 of the new code was substituted for Section 488 of the old code. The new section changed the definition of the word 'wife' and enlarged it to include a divorced woman who had not remarried. This definition diverged from meaning of 'wife' under the Muslim Personal Law (MPL) as hitherto interpreted. To that extent the new Code could be said to have broken new ground and to have supplanted Muslim Personal Law."

"The new provision was inspired by humanitarian considerations. The report of the joint parliamentary committee (JPC) makes the humanitarian standpoint abundantly clear. After a wife filed a petition under Section 488 of old Cr. P.C., "the unscrupulous husband frustrated a woman's object by divorcing her forthwith, thereby compelling the magistrate to dismiss the petition. Such divorce can be made effective easily under the personal law applicable to some communities in India. This causes special hardship to the poorer sections of the community who become helpless. Amendments made by the committee are aimed at securing social justice to women belonging to the

poorer classes" (Page XIII of the J.P.C. Report presented to Rajiv Sabha on December 4, 1972). The payment of maintenance to a divorced woman suggested by the Committee was not only not prohibited by the Quran but was in fact enjoined by it.

"The Cr. P.C. as reported by the IPC was discussed and approved without changes by the Rajya Sabha. It came up before Lok Sabha on May 9, 1973. The discussion could not be concluded on May 10, 1973 and was postponed to the next session.

"The clause-by-clause consideration of the new CrPC could not be concluded during the monsoon session of 1973. Only certain clauses were adopted. On August 30, 1973, clauses 125 and 127 were adopted. The reactionary and communal Muslims raised a howl against section 125 and 127.

"The government surrendered to this clamour. The government wanted to reopen section 127.

"Virtually, the government forced to reopen section 127. Ram Nivas Mirdha was piloting the Bill. "His amendment namely 127(3) (b) said that the magistrate's order directing maintenance would be cancelled if the woman has been divorced by her husband and that she has received, whether before or after the date of said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce".

Thus the onward march was sought to be halted and the country was again taken back to the position of status-quo-ante. The good work of the Parliament was negated. All this was done with an eye on the Muslim votes in the forthcoming U.P. mid-term elections. Naturally, the fundamentalists were encouraged. They too thought that they had a lever which could be utilised as and when necessary. Within seven years of Indira Gandhi becoming Prime Minister of India, the political philosophy of ruling Congress party was dovetailed to the electoral requirements.

Indira Gandhi injured the provisions of Sections 125 and 127 of Cr. P.C. What Rajiv Gandhi has done is to altogether abolish Sections 125 and 127, so far as Muslim women are concerned.

THE BILL

Muslim Woman (Protection of Rights on Divorce) Bill 1986 seeks to rob the hapless Muslim women of whatever little they were entitled to in the Supreme Court judgement in the Shah Bano Case.

Firstly, any Muslim woman divorced by her husband is not entitled to any maintenance beyond the period of three months, i.e. iddat.

Both in Section 125 of Cr. P.C. as well as in the Muslim Woman (Protection of Rights on Divorce) Bill 1986, the husband having sufficient means is condition precedent to the maintenance of divorced wife. In the case of women, it is the indigent woman who cries for maintenance. Whereas the Supreme Court judgement conferred on the divorcee the right to maintenance till she remarries or dies, Rajiv Gandhi's present dispensation is to restrict such maintenance to three months only, as the fundamentalists demanded. How is the indigent divorced woman expected to maintain herself after the iddat period?

Secondly, if a magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relations as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance as he may determine fit and proper. "... in the event of their inability to pay, the magistrate will order the other relations to pay if they have the means. If not, the magistrate may ask the State Waqf Board to shoulder the responsibility of payment of the maintenance".

"For the divorcing husband, Rajiv Gandhi has granted an unrestricted licence. With divorce so easily obtained by uttering one single word Talak thrice, and the added legal sanction gratuitously granted by Rajiv Gandhi's enactment, the husband may marry and divorce at will with almost no responsibility for the maintenance of the divorced wife, except payment of niggardly amount for a period of three months. The cast away woman immediately becomes a burden. To the original family of the parents, she is unwelcome. If the parents have died meanwhile, brothers in most cases are unwilling to carry

the burden. Where else can she turn to? The latest ridiculous suggestion is to turn to the state Wakf Boards. Even the framers of this bill were not aware of the fact that all the states are not having Waqf Boards. In Maharashtra, for example, only 6 districts of the erstwhile Nizam's Hyderabad State are having Waqf Boards. Elsewhere in the state the Muslims are governed by the Charities Act" (Times of India, dated 25.2.1986).

But more importantly, are the Waqf Boards in a position to meet such financial obligations? Most of them are not even in a position to meet their day-to-day expenses, not to speak of shouldering such additional burdens of meeting the cost of maintenance of divorced women. Where then the divorced Muslim woman is to turn to?

Thirdly, the enactment provides that if the divorced woman is saddled with the children, the husband should pay for the maintenance of the children for a period of two years only!

What magnanimous and lofty values! The husband can divorce the wife at will, the husband need not accept the responsibility of maintaining the divorced wife for more than three months; if he has fathered children, his responsibility for them ceases after two years! What then the divorced Muslim woman is to do? Either become a prostitute or commit suicide?

'Hindustan Times', in its edition dated 13.5.86 flashed a news item with the caption: "Destitute women forced into whoring".

"NEW DELHI, May 12—About 90 per cent prostitutes in Bihar, Uttar Pradesh, West Bengal, Madhya Pradesh, Maharashtra and Andhra Pradesh are Muslim women.

"This is stated in a survey report prepared by the Tata School of Social Work for the Planning Commission, it is reliably learnt.

"The report states that most of these prostitutes are single deserted women who are forced to live immorally owing to no other means of livelihood.

"Sources said this report was submitted by the Tata School of Social Work to the Planning Commission last year. The latter, however, it is learnt, refused to accept and publicise this report. Sources said that the Planning Commission officials asked

the Tata School of Social Work to modify the "objectionable" facts and figures in the report, but the latter did not agree. Hence, the report was shelved.

"The report, it is learnt, also reveals other startling facts regarding the living conditions of Muslims in the six states mentioned. It also refers to a increase in number of Muslim women being taken to the middle east" (*Hindustan Times*, 13.5.86).

Such ultimately is the dispensation of Rajiv Gandhi government. The alibi which Rajiv Gandhi took to perpetrate such monstrosity was that he had gone by the counsel of the leaders of Muslim community. In the secular Indian society, as one columnist aptly exclaimed in a newspaper article, "Muslims alone can speak for Muslims." Such is the logic of the secular Prime Minister of secular India! What about those who came from all corners of our vast subcontinent to gather in Delhi and demonstrated against the bill? What about those Muslim women who met the Prime Minister and pleaded for withdrawal of the bill? What about those intellectuals in the Muslim community who for once taking enormous risks came forward to lend a helping hand for the country to go forward?

Admittedly it is not a smooth passage for social reforms in a tradition bound feudal society. But at some point of time, some have to pick up the gauntlet. For the Hindus, at some point of time, to burn the wife on the funeral pyre of the dead husband was considered to be a religious duty! And for this posthumous award use to be—Satee. The great social reformer Raja Rammohan Roy revolted against this outrageous practice. In those days, he had to face the ire of the Hindu counterparts of the mollas and ulemas. He withstood them and persevered. Similar were the struggles against child marriage. The widow marriage had to face such obscurantist opposition. Even as late as in the fifties of the present century Hindu Marriage Act had to face tremendous opposition from the Hindu fundamentalists and obscurantists. But social progress takes place only through fighting such deeprooted obscurantist ideas. With the passage of the bill, the Muslim fundamentalists scored a victory and the divorced Muslim

women have been offered as sacrificial goats to keep the Muslim fundamentalists happy and contented.

Hardly a year back, in July 1985, India participated in the U.N. Women's Conference in Nairobi. India's women delegation was led by Mrs. Margaret Chandrasekhar, Minister for Social and Women's Welfare. On returning to the country, she told the press that "the Nairobi Conference had looked into and made recommendations for 'forward looking strategies' for the advancement of women upto the year 2000. All facets of women's development, including their participation in policies and decision making, equality before law, their access to education, health services, food, economic activities, finance and property, equal conditions of work and remuneration, technology, social security, control over fertility were discussed" (Times of India, dated 9.8.1985). Going through this piece now, one is tempted to quip—Preacher, heel thyself first! How hollow and meaningless those pompous declarations sound, especially when they come from Rajiv's Minister for Women's Welfare! The lady who made such declarations hardly a year back continues with a clean conscience in Rajiv's government even when such flagrant violation of women's rights takes place! She is indeed Minister for Women's Welfare!

Article 51A(e) of the Constitution of India states: "It shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women." If one aids and abets the process of turning divorced wives into prostitutes, destitutes and vagrants, is it derogatory to the dignity of women? If one aids and abets the process which compels a divorced wife to commit suicide, is it derogatory to the dignity of the women? Rajiv Gandhi has to answer some day; if not today, tomorrow for sure. This is what Congress has come to be. It is beyond redemption.

PROVISION IN OTHER MUSLIM STATES

While thus the so-called secular ruling party in India developed cold feet, the world around us is surging forward. In very many countries where the Muslims are in overwhelming majority, the reforms in Muslim society are way ahead than India. Take, for example, the following countries

Egypt: If legal married wife is divorced against her will and for no reasons on her part, she is entitled to a 'pleasure' allowance in addition to her 'Iddat' allowance. The 'pleasure allowance' is equal to the sum of 2 years alimony at least, according to the financial status of the husband, conditions of divorce and period of marriage. The divorcing husband should provide a suitable independent home for his children and guardian mother. If he does not do that during the 'Iddat' period, they will continue to occupy the rented matrimonial home without the husband during the period they are in their mother's custody. The divorced wife's alimony is estimated according to the financial status of the husband at the time the alimony is due, provided that in case of the husband's straitened circumstances the alimony should not be less than the amount needed to cover basic needs. The right of the woman to keep the children in her custody ends with the child reaching the age of 10 if he is a boy, and 12 if a girl. The judge after this age may decide to keep the boy with the mother until he is 15 and the girl until she gets married without receiving the expenses of guardianship if this is in the girl's interest.

Indonesia: Under Article 41(c) of the Indonesian Marriage Law, a court of law may confer the obligation upon the ex-husband to pay alimony.

Iraq: When a husband arbitrarily divorces his wife thereby causing her harm, the courts in Iraq can order the husband to compensate her appropriately, keeping in mind his financial status. Such compensation is to be paid in lump-sum subject to the fact that it does not exceed her alimony for the period of 2 years in addition to her other fixed rights.

Libya: The problem of providing for divorced wife has been tackled through two pronged system of observance of religious injunctions by the individual and an enactment of a social security law. The former takes care of the payment of 'Mehr' on the basis of the marriage contract and payment of maintenance towards the upkeep of their children upto the age of 11 years (who would be under the care of the mother). The social security law on the other hand covers financial assistance to persons having no means of livelihood. In addition to this, certain other legislation provides relief in maintenance, e.g. the

housing authority recognises the right of the divorced wife to continue living in the house without threat of eviction till she remarries.

Morocco : The divorced wife is entitled to three months rent in case she is not pregnant, and if she is pregnant, the rent will have to be paid by the husband till she delivers baby. In case the couple have children at the time of divorce, the divorced wife could ask the husband to pay a specified amount, which will finally be decided by the tribunal, if the husband is not willing to pay.

Peoples's Democratic Republic of Yeman (PDY) : In PDY, though the people are predominantly Muslims, the Shariat Law is not applicable. All cases of divorce have to be decided by a court of law. If the wife has no income, the court may award her maintenance allowance to be paid by the husband, till she remarries or takes up a paid job or adopts a profession.

Qatar : A fully divorced woman has no right for maintenance compulsorily but she will be given compensation as per her satisfaction. As for the amount of compensation it is entrusted to the judge, who will consider the status of the husband and fix an average amount.

Sudan : Even after the divorce, the man has to provide for his ex-wife all the basic needs of life, as a minimum, whatever his financial position. The ex-wife cannot marry again within three months of the divorce, if she is carrying a child. When the child is born, the ex-husband must provide for both the mother and the child. The woman loses all rights for compensation, once she marries again. Even if the ex-husband marries again, while ex-wife does not do so, he has to support his first wife and child.

Tunisia : A statute of personal law was passed soon after independence covering all personal matters such as marriage, divorce, inheritance and adoption, and there is no more recourse to Islamic law under Islamic courts. A Muslim husband is obliged to provide full support for his wife during the period of divorce proceedings and for a period of three months, if the wife is not pregnant, or till the birth of the child, if the wife is pregnant. In addition to the support payable to the ex-wife she can also be awarded an income payable monthly as compensation for the material or moral wrong which she had

suffered and decided on the basis of the standard of life to which the wife had been used to during the married life and specifically includes the place of residence, which commences from the end of the validity period and continues till the death of the divorced, or till significant changes intervene in her social position by reason of her remarriage or by reason of her not needing such maintenance.

Turkey : The Civil Law provides for grant of maintenance allowance to the divorced woman provided the divorce is given by the man and not at the asking of the woman concerned. The quantum of the maintenance allowance is determined by the court keeping in view the total income of the husband. The question of grant of maintenance allowance to divorced woman in Turkey comes under the jurisdiction of the Civil Law and not the Criminal Law. (Source : Government of India's Background Paper regarding Muslim countries).

Most of them call themselves Islamic countries, some of them are theocratic states. Islam came to these countries hundreds of years before it came to India. Some of them, specially Egypt, Iraq and Turkey had at different periods of Islamic history been the great centres of Islamic culture and civilisation. When they started, they were very much guided by the Quran and the Shariat. But gradually they too had to change. Nothing is immutable ; everything changes. Because change is the law of nature. If the original Muslim communities are changing, why India's Muslim community should lag behind ? Is it because of the resistance of a handful of obscurantist mullas ? More than this, the complete surrender of Rajiv Gandhi to those forces emboldened the fundamentalists to cry jehad. Hunger, unemployment, destitution and poverty are more compelling factors than fundamentalism. The very same Muslim community would have risen like one man and thrown out the fundamentalists had not Rajiv Gandhi refused to pick up the gauntlet.

OUR DUTIES AND RESPONSIBILITIES

Coming as it did when the whole of the country was engaged in a very serious battle to preserve and maintain its unity and integrity, Rajiv Gandhi's bill on Muslim Women has dealt a body blow to the concept of secular and democratic polity of

India. Religious obscurantism, national chauvinism, caste war and many more are trying to tear the country apart. Behind these forces, the sinister shadow of imperialism is lengthening. In such a situation, surrender to obscurantist forces will only whet the appetite. It is foolish to think that these forces will stop at this. The meteoric rise of Muslim League between 1940 and 1945 should not be forgotten. The present Prime Minister did not go through that grinding mill of pre-partition days, but all the same it would do him good to go through history carefully. Concession to and compromise with obscurantist forces is no solution to the problems of minorities.

In a situation where the communal and divisive forces of all hues are on the rampage, the Rajiv government's surrender to fundamentalism in the form of the Muslim Women's Act is going to provide further filip to these forces, with Muslim women being the victims. The challenge to secular and democratic values is serious. All brands of fundamentalism and obscurantism—Hindu, Muslim, Sikh and Christian—are today corroding the fabric of a secular society. All Indian citizens, men and women, who cherish secularism and democracy have to join hands to stem this onslaught. A great responsibility lies with the enlightened sections of all communities, including the Muslim community, to unite with all others to defend national unity, secularism, and the fundamental rights of women.

The fight, therefore must go on. It is a battle of ideas having immediate and long term impact on the life of our people, especially the poorer sections of our people, the illiterate, the ignorant women ground down by superstition and feudal values. There are reasons to feel proud of the role played by the Left forces, specially the CPI(M). They have, along with other progressive sections, particularly women's organisations such as the All India Democratic Women's Association, come out as consistent champions for progress and implacable foes of obscurantism and fundamentalism. Opportunist considerations of vote-banks and elections could not deter them. From Kerala, Tamilnadu to West Bengal, Tripura to Delhi to Bombay, they fanned out among the Muslim masses, especially Muslim women, and told them that God had not willed them to become destitutes and prostitutes; it is the obscurantists who are condemning them

to this wretched conditions of existence. Millions were reached in the process and told to fight. The words have gone home. But the campaign has to be kept up relentlessly without any respite.

This campaign requires the united effort of all democratic and progressive sections of all communities and creeds. In order that such a campaign can be undertaken effectively, we are publishing herewith a compendium of useful materials—newspaper articles and editorials, speeches in Parliament—a broad spectrum of secular-democratic opinion so that the debate can be informed and meaningful. □

A Step Back

IT IS clear by now that the Government erred greatly in taking the Muslim fundamentalists' orchestrated demand for annulling the Shah Bano verdict to be the voice of the entire community. In trying to buy peace thus for short-term electoral gains it has virtually smothered the inarticulate cry for justice coming from one half of community numbering 40 million, which had a right to expect at least a sympathetic approach from a State wedded to secularism. This has been highlighted in the memorandum signed by 125 prominent Muslim educationists, scholars and jurists urging the Government to uphold, if nothing else, the rights guaranteed in the Constitution to all women. While opposition parties have generally condemned the path of "appeasement and compromise" followed by the Government in bringing forward the Muslim Women (Protection of Rights on Divorce) Bill, lawyers have gone to the extent of demanding a common civil code to subject all personal laws to fundamental rights.

Far from conferring any additional protection, the Bill in some respects dilutes the safeguards provided to divorced Muslim women under the Shar'iat dispensation, while the husband's right to acquire and discard a wife at will remains intact. Since the "reasonable provision and maintenance" within the Iddat period has not been specified, the financial obligation cast on the husband as the price of divorce remains minimal. Restricting his responsibility to maintain the children born before or after divorce to just two years is another retrograde aspect that compounds the injustice done to the divorcee by virtually exonerating the husband. As it is not an inherited law, the burden thrust on relatives to look after the abandoned woman according to the share of her property they stand to inherit will not be binding on anyone, leaving her to the tender mercies of the Wakf Board, which has neither the resources nor the inclination to discharge this additional duty.

Even if the protection of the natural family is available, it is a humiliating experience for the discarded woman to be forced to live on charity. Supporters of the measure who maintain that alimony offends the recipient's self-respect have chose to remain silent on this point. If the Government persists in going ahead with the Bill, it will only betray its anxiety to win over conservative sections of the community, blocking in the process the emergence of a more humane order. The issue would not have been blown up so much but for the Muslim fear that the Shah Bano verdict is being exploited by some people to introduce a common civil code through the backdoor. While the educational backwardness and the minority syndrome of the community have greatly aided the efforts of the fundamentalists in clouding the issue, the Government would be abdicating its responsibility if it takes away the option available to divorced Muslim women merely because the orthodox sections want to follow the personal law of the community.

Editorial
The Hindustan Times
February 28, 1986

Scrap the Bill

MR. ARIF Mohammad Khan has made history. He has demonstrated that some Congressmen still possess a conscience which stirs on certain issues; since the early sixties it is difficult to recall the last occasion when a Congress Minister resigned on an issue of principle. Mr. Khan's action is historic on two other counts. First, he is a Muslim, and let us face it, Muslim Ministers must feel even more helpless than Hindu Ministers in standing up to the Prime Minister. Secondly, he has resigned in protest against a Bill which, on any reckoning, enjoys significant, if not majority, support in the Muslim community. There can be no question that the Muslim Women (Protection

of Rights on Divorce) Bill is a wholly retrograde piece of legislation and that its introduction in the Lok Sabha represents a violation of the assurance the Prime Minister had given; he has not held the wide consultations he had promised and he has blatantly disregarded the opinion of educated Muslims. But the fact of support for it in the Muslim community cannot be denied. It is doubtless true that obscurantist mullahs and communalist Muslim leaders and organisations have used the Supreme Court's judgement in the Shah Bano case to whip up emotions and put pressure on the government to exclude the Muslims from the purview of Section 125 of the Criminal Procedure Code. But emotions have been stirred. So in the act of resigning on this issue Mr. Khan has also taken up a battle against entrenched conservatism among the Muslims. All in all he has shown a kind of courage which has become rare in the Congress Party, indeed the country.

We have more than once expressed the view that change to bring the Muslims forward, though highly desirable in the interest of national integration, cannot be forced on them. But if there is a case for the government's neutrality on the issue of a common civil code for all Indians which would do away with the Muslim Personal Law, there can be none for the government's intervention in favour of retrogressive elements in the community. Mr. Rajiv Gandhi has chosen to make precisely such an intervention. It is not possible for us to identify those in his entourage who have advised him and persuaded him to make such a humiliating surrender to the Muslim League and other forces of reaction. Perhaps not much persuasion was required; perhaps he was desperately keen to win back the Muslim vote which was supposed to have been alienated partly as a result of the Shah Bano affair. But whatever the factors at work behind the closed doors of the South Block, it is shocking beyond words that the Prime Minister, who had made "march into the 21st century" his battlecry, should have endorsed a march into the seventh century for one-eighth of the Indian people. The measure must be scrapped.

Mr. Arif Mohammad Khan has not spelt out the reasons for his resignation. We know the main reason; we do not know

the details. But as a Congressman he must find the acknowledgement by Mr. Rajiv Gandhi or the Muslim League as the spokesman of the Muslim community galling. This recognition is implicit in the government's decision to prepare the controversial legislation at the urging of the League and its desperate anxiety to introduce it. This must worry every Muslim in the Congress and in every other secular political party. Indeed, it must worry every nationalist Indian. The Muslim League is a fact and it certainly enjoys influence among the Muslims, especially in Kerala. But no Prime Minister has ever accepted or can ever accept it or any other communal organisation as a spokesman of the community in question. Our parliamentary democracy is based on joint electorates: the founding fathers deliberately rejected separate electorates; which had led to partition in 1947 and would surely have produced another disaster in independent India. This means that a legislator represents the whole constituency and not a section of it. The concept of sovereignty of Parliament cannot rest on any other basis. If Mr. Gandhi and his hand-picked aides are too young to have known the trauma of partition and to have drawn the necessary lesson, there are in the Congress Party old enough men to have done so. Mr. Khan has given them an opportunity to speak up; he has obliged the leadership to convene a meeting of the parliamentary party on Friday. They should use it to demand that a measure wholly offensive to the party's nationalist tradition be scrapped. The expedient of a reference to a select committee of both Houses of Parliament can provide the necessary face-saver.

Editorial
The Times of India

Courage of Conviction

INSTANCES OF courage of conviction are getting to be so rare among men in public life that Mr. Arif Mohammed Khan's resignation from the Union Council of Ministers on the issues of the Muslim Women (Protection of Rights on Divorce) Bill assumes special significance. When most of the Muslims in the ruling party, caving in under pressure from fundamentalist groups, made common cause with the communal elements campaigning against the Supreme Court's judgement in the Shah Bano case, he had boldly come out against the clamour to change the law. Citing the views of religious scholars, he argued in the Lok Sabha that the Supreme Court verdict did not run counter to Islamic teachings, as was sought to be made out by obscurantists with a vested interest in keeping large segments of the community under virtual subjection. Later on, the House heard a vituperative attack on the court from another member of the Council of Ministers. Mr. Z. R. Ansari, whose brazen advocacy of medieval concepts seemed to mock at the Prime Minister's professed desire to lead the country into the 21st century. When the time came to choose between the rival viewpoints championed by his ministerial colleagues, the Prime Minister sadly opted for the obscurantist line, evidently on the assumption that appeasement of the fundamentalists will promote his party's electoral prospects. Whether this calculation is right remains to be seen, but after the Prime Minister threw his weight behind the move to nullify the Shah Bano judgement, the only honourable course open to Mr. Arif Mohammed Khan was to bow out of the Government.

It is now clear that large sections in the Congress (I) have misgivings about the Government's move. How the leadership tackles this problem will have far-reaching consequences not only for the party but also for the parliamentary system. One aspect of the Bill now before the Lok Sabha does not seem to have received adequate attention before the Government introduced it with unseemly haste. This relates to the fact that it will have the effect of extending the principle of separate codes to the realm of criminal jurisprudence in as much as it seeks to exclude the women of the Muslim community from the

purview of the provisions of Section 125 of the Criminal Procedure Code. Considering the serious implications of the step, the Government should resist the temptation to rush through the legislation using its brute majority. Instead, the Bill must be circulated to elicit public opinion. This will give all sections an opportunity to express their views on the measure before it is taken up for consideration by Parliament. It will also be in the fitness of things for all parties, including the Congress (I), to refrain from issuing whips and to give their members freedom of vote when the Bill comes up for adoption.

Editorial
Deccan Herald
February 28, 1986

The Personal Law Fall-Out

THERE HAVE been, paradoxically, some benefits from the introduction of the Protection of Rights of Women Bill in Parliament and perhaps the most important of these is that the liberal Muslim has suddenly discovered his voice. Moreover, it is a pleasant sound. A momentum that was growing in different parts of the country found a culmination in the resignation of Mr. Arif Mohammad Khan from the government. And it is this assertion of liberal Muslim opinion, rather than protests from anywhere else, which has put the government on the defensive. But it is necessary to understand the compulsions which forced the government to bring in this Bill, and to appreciate when precisely the first and crucial round of this battle was lost.

When the Supreme Court judgement on the Shah Bano case was delivered, the response of the conservatives was hardly unpredictable. It was evident that they would oppose what they believed to be interference in the personal law of the

Muslims; and it was equally obvious that their support on this issue would extend beyond simply conservative pale. But even so, they could not build a public movement on this issue very easily. It was only after they put into effect a clever and well-tryed ruse that the response began to come from ordinary Muslims. What they did was simple: they shifted the issue involved in the Supreme Court judgment. The Supreme Court had ruled essentially on the rights of women in Muslim civil law. What the conservatives turned the battle into was the rights of Muslims in secular India. Instead of taking a position on whether women should be given protection from errant, aggressive and sometimes fickle husbands, the conservatives labelled the Supreme Court judgement the death warrant of Muslim identity in a Hindu-majority state. From pulpit and rostrum, in city street and village mosque, the maulvis spread the fear that this was the beginning of a fresh assault on the Muslim pattern of life. Full use was made of a few incidental and unfortunate remarks made in the course of the judgement which tended to disparage Islam. Today, they said, it was just the divorce law; tomorrow, the Supreme Court would begin to arbitrate on whether Muslims should be allowed to sound the azaan or pray in their mosques. (And a not-so-subtle use was made of the disputed monuments like the Babari mosque or the Ram Janma Bhoomi.) After Mr. Mohammad Khan, with the encouragement of the Prime Minister, put up his brilliant defence of the Supreme Court judgment in Parliament, the focus of the attack became Rajiv Gandhi, and the aim became political, the use of his confrontation to destroy the Muslim support base of the Congress. Moreover, an opportunity was beckoning—the byelections of Dec. 85.

The tragedy is not that the conservatives played the game, after all, nothing else could have been expected. The truth is that the Opposition parties, with commendable and praiseworthy exception of the Communists, participated fully in this dangerous communal politics. Leading the field in this was, unfortunately, the Janata Party: and we say unfortunately because there is a strong section of the party which watched helplessly as it moved into dangerous areas. From the

Janata Platform during the by-elections the cry went up in front of Muslim audiences that Islam was once again in danger in India and it was time for the Muslims to show Delhi the extent of their power through the ballot box. It was, again, not only Syed Shahabuddin who made use of this strategy in his election from Kishanganj; the Muslim leaders who campaigned in Kendrapara in Orissa, as Chief Minister J. B. Patnaik ruefully complained, had the same message to offer. The strategy worked. And all the Congressmen who had kept their views to themselves, suddenly popped up; after all, if there is one thing which a Congressman finds hard to swallow, it is defeat.

And Rajiv Gandhi too began to panic. He understood as much as anyone else that there was no way that the Congress would win an election without the support of the Muslims. The price that the leaders of the anti-Shah Bano case agitation demanded was an insurance policy—through a Bill in Parliament. It is hardly surprising that the Janata still has not been able to make up its mind on how to vote on the Bill. And Syed Shahabuddin, of course, is sitting pretty for a while, he is a little more important than his colleagues. Cynicism has been the basis of decisions by everyone in this sordid business, and the trap has now securely tightened. The P.M. has told the Lok Sabha (to cheers from MPs) that the decision to bring in the Bill was in continuation of the promise made at the time of framing the Constitution that the identity of every minority in India would be protected, implying that if this is the asking price then the government has no option but to pay it.

The only parties to emerge with any credit are the Communists, and in particular the CPI(M), because the CPI(M) has to survive in the states with strong Muslim populations, West Bengal and Kerala. But the CPI(M) has been able to stick to its principled stand because it is a political party in the true sense, with a cadre which can go to the people and fight the battle against vested interests at the ground level. The Congress, which should have played a similar role, did not do so for the simple reason that the Congress party organisation just does not exist; it is only a label which proves useful during elections rather than a political and ideological organisation. It is this

weakness which has proved so dangerously suicidal for the Congress in this crisis. It does not need much intelligence to guess what the implications of this are for the future.

Editorial
The Telegraph, Calcutta
 March 7, 1986

The Whip Hand

WHILE PASSAGE of the Muslim Women (Protection of Rights on Divorce) Bill was only to be expected, it is distressing to think that many Congress(I) MPs must have subordinated sound personal judgement to the party whip. Not for them the courage that Mr. Arif Mohammed Khan displayed in denouncing the measure as "inhuman" and "un-Islamic" though even he was forced to vote for it. This is certainly not the internal democracy that Mr. Rajiv Gandhi promised the nation; but then, it is not the only expectation in which the public is disappointed. If there were any lingering doubts about the Government's determination to pander to communalism, they were dispelled when the Union Law Minister announced a subsequent speaker as "the Muslim voice". If MPs are to be regarded as spokesmen of minority interests, we might as well dispense with the pretence of a uniform Indian label and amend the Representation of the Peoples Act to provide for separate electorates. But the CPI(M)'s Mr. Saifuddin Chowdhury was not quite correct in claiming that each member of the Lok Sabha "represents his own voice": Monday's voting made it abundantly clear that ruling party legislators are merely numbers on a score board chalked up by their high command.

Even the suspended Mr. Sripat Mishra's courage seems to have failed him at the last moment when he should have moved the amendment he had tabled referring the Bill to a joint select committee, while the conflict between Mr. P. Kolandaivelu's

remarks and conclusion confirmed that even the AIADMK dare not offend its senior partner. This rigorous insistence on obedience is, of course, explicable in the light of Mr. Gandhi's recent difficulties with a recalcitrant old guard which astutely chose to make an issue of a measure that is retrograde by any reckoning. Since Mr. Kamalapati Tripathi, Mr. Pranab Mukherjee and others had reportedly demanded a free vote, the least sign of opposition within the Congress(I) would undoubtedly have been regarded as a gain for the dissidents. Mr. H.A. Dorn of the Telugu Desam was, therefore, right to point out that the Prime Minister's prestige was at stake; but his prestige would have commanded wider public respect if it had been staked on some less unworthy cause.

It bears reiteration that the Bill offends the basic principles of equality in the eyes of the law and of women's emancipation, making a mockery of Mr. Asoke Sen's entirely fanciful suggestion that the Government is still working towards evolving a uniform civil code. It has also to be stressed that such a sectarian measure is bound to revive the Sikh demand for revision of Article 25(2) (B) and may well encourage a host of other demands emphasising individual identities at the cost of the national ideal. If, as Mr. Madhu Dandavate said, this surrender to bigotry wins back some of the Muslim fundamentalist support for the Congress(I), it will be, at best, a limited gain of dubious value: it will then have revealed the Prime Minister and his advisers as cynical politicians prepared to jettison the country's good for their own survival. The double speak employed in moving and justifying the Bill, and the ruthlessness with which it was forced through the Lok Sabha, do not augur well for the future conduct of a regime that started on such a promising note.

Editorial
The Statesman, New Delhi
 May 7, 1986

Bigotry And Women's Bill

IT IS a very deceptive victory that the Government has won with the passage of the Muslim Women (Protection of Rights on Divorce) Bill. The majority support marshalled for the measure in the Lok Sabha does not represent collective wisdom of the kind that must ideally prevail in Parliamentary democracy. There is little need to argue all over again the unwisdom of the steamrollered legislation of a social atavism. Enough has been said on the subject, with every shade of enlightened opinion concurring in this view (and with no revision of it being warranted by the official amendment to the Bill). The most vocal backing for the enactment has come from organised obscurantism, with which a reform movement inside the nation's largest minority community itself is locked in a bitter struggle. Implicitly acknowledged has been the fact of the measure being an attempt to placate, for the undoubted capacity of bigotry for mass manipulation has been the only substantial argument cited in favour of the statutory undoing of what was achieved with the Supreme Court verdict in the Shah Bano case, despite all its controversial nuances. The advice tendered from a secular and democratic standpoint for wider consultations and referral of the Bill to a joint select committee of Parliament did not find favour. The argument that the measure would remove apprehensions of the Muslim minority may turn out to be illusory because the communalists would, no doubt, invent some other excuse to incite irrational passions to perpetuate fundamentalists stranglehold on the minds of their innocent followers.

For, the issues raised during the controversy on the Bill are of vast social significance and whether it will result in victory or a setback for secular trend will become clear only when its consequences unfold themselves. As of now the enactment threatens to aggravate considerably an explosive communal situation which inspired it in the first place. Unless care is taken, it is bound to strengthen both the major and conflicting variants of communalism, in different ways, as also the common threat they pose in ill-concealed collaboration to national unity. Even as, in the long-term perspective, the measure puts off the

day of a "uniform personal law" in practice despite the promised legislation for the purpose, its immediate impact is to be watched for in the kind of scripture-quoting devilry that can most rapidly promote destabilisers' designs through Ayodhyas and other issues of raked-up irrelevance. The political fall-out of it all is nonetheless disturbing to being predictable.

We had said, while the fate of the Bill was yet uncertain, that its passage would hardly mean an end to the struggle for social reform. This must and will go on. So must continue, and even be heightened, the nation's vigilance against revival of what has historically proved the biggest threat to its unity and integrity.

Editorial
Patriot, New Delhi
May 7, 1986

The Muslim Women Bill

Perversion of Personal Law

Danial Latifi

THE MUSLIM Women (Protection of Rights on Divorce) Bill is premised upon a supposed summary of the Supreme Court's judgement in the Shah Bano Case. This summary is contained in the statement of objects and reasons of the bill. According to this summary in that case the Supreme Court "has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of *iddat* it does not contemplate or countenance the situation—where the divorced wife is unable to maintain herself after the period of *iddat* . . . therefore . . . she is entitled to have recourse to section 125 of the Code of Criminal Procedure. . . . This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has therefore been taken to specify the rights which

a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. . . ."

But this is not a correct presentation of what the Supreme Court decided in the Shah Bano case. The former husband, Ahmad Khan's case was that he had already paid Shah Bano "the whole of the sum which, under the customary or personal law applicable to the parties, was payable on . . . divorce" as provided in section 127(3).

The only question before the Supreme Court was whether Ahmad Khan had paid this entire sum. The answer to this question is given by the court in paragraphs 15-23 of the judgment.

The historic contribution of the judgement in the Shah Bano case is its recognition of the right of a Muslim divorced woman to *Mattaun-bil-Maaroof*—a reasonable and fair provision to be made and/or paid to her on divorce, as provided by the Quran II 241.

HUSBAND GUILTY

The court held that the husband, Ahmad Khan, having failed to discharge his obligation aforesaid, "to maintenance to the divorced wife" had failed to fulfil the condition stipulated in section 127 of the Code of Criminal Procedure, namely to discharge "the whole of the sum which under any customary or personal law applicable to the parties was payable on . . . divorce". In the circumstances the court held that the maintenance order, passed in favour of the divorced wife by the magistrate, must continue.

It thus appears that the statement of objects and reasons of the bill proceeds on an incorrect reading of the judgement of the Supreme Court, which seems to have held the exact opposite view.

If some doubts exist as to what the Supreme Court actually held, the matter could be clarified in another case. Actually one such case is now pending in the Supreme Court.

At this point it may be useful to set down the gist of the argument at the bar in the Shah Bano case where I had appeared for Shah Bano Begum and certain interveners.

The main objections raised by Mr. Yunus Saleem, counsel

for the Muslim Personal Law Board, were two :

First, he said that the amount of *mataa* referred to in the Quran II 241 was a lump sum payment and not a recurring amount. This point was easily answered because it was not really an issue in this appeal. It was nobody's case that Ahmad Khan had paid any sum, whether lump sum or recurring, by way of *mataa* to Shah Bano. A careful reading of the judgement of the court will show that this question has not been decided and it is still open.

Secondly, Mr. Yunus Saleem, relying on the Privy Council judgement in *Agha Mohd. vs. Kulsum Bai* (1897) 24 IA 196 argued that, according to him, the payment of *mataa* under the injunction of the Quran II 241 was optional and not compulsory. To this my reply was that the great Shia jurist, Imam Jafar-as-Sadiq had declared the *Matta* referred to in the Quran verse II 241, as *fariza wajida* (obligatory duty). M. Yunus Salim conceded this but said that this ruling applied only to Shias. I then said that I also had the ruling of Imam Shafei, acceptable to all Sunnis to the same effect. Upon this the Chief Justice, Mr. Y. V. Chandrachud, interjected that since the Quranic verse itself was so crystal clear, it seemed unnecessary to go to other sources.

IMAMS' VERDICT

I acquiesced in this view and did not insist upon citing the authority of Imam Shafei which I had ready in my mind. I may say that both the citations and full references to Imam Jafar-as-Sadiq and Imam Shafei were contained in my written arguments which I had filed in court and supplied to all parties.

This is a sound and ancient rule of Muslim jurisprudence, evolved in the period of the Umayyad and Abbasid monarchies, to limit judicial discretion within the parameters of the rulings of the great jurists of Islam. This was to prevent extravagant constructions being put on Quranic verses by judges presurised by corrupt rulers.

Here I may mention that Article 18 of Egyptian law No. 100 of 1985, passed only last year by the Egyptian Parliament, after full discussion with the scholars of the renowned Al Azhar University of Cairo entitles a divorcee, over and above her

Mehr and maintenance, to a compensation from her former husband amounting to minimum two years' maintenance (with no maximum). The husband may be permitted to pay this amount by instalments.

Let us now see what the present bill actually seeks to provide: Section 2(a) of the bill defines a 'divorced woman' to mean a Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with Muslim law." ; Section 2(b) says that 'Iddat period' means, in the case of a divorced woman, (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; (iii) if she is enceinte, at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier" (emphasis added).

These provisions appear to be patent violations of Muslim law, for the following reasons.

The Muslim law provides a number of procedures for divorce. Among these the most important are: *mubarraat* (divorce by mutual consent), *khada* (divorce at the wife's instance), *faskh* (divorce by court, now regulated by the Dissolution of Muslim Marriages Act 1939), and *talaq* (unilateral divorce by the husband). Of *talaq* there are three kinds, *talaq-ahsan* (least disapproved by the Prophet), *talaq-hasan* (less disapproved by the Prophet) and *talaq-ul-bidaat* (forbidden by the Prophet, but allowed by the present interpretation of the Hanafi School of Law). (See Mulla's *Mohamedan law*, 18th Ed. by Hidayatullah, pp 329-331).

The last of these, the *talaq-ul-bidaat* is the dire "triple *talaq*" pronounced in one breath, that is a nightmare for every Muslim wife subject to it. It was illegally smuggled into the law by fatwas issued at the behest of the Umayyad monarchs and is today also, continued as the favourite practice of the elements sponsoring the present bill. *Talaq-bidai* is regarded as sinful by all schools of Muslim law and is held illegal by all Shia schools.

In the *talaq-ahsan* (least disapproved by the Prophet) the three months *iddat* (probation) period which is provided for enabling reconciliation of the spouses, precedes and does not follow the

divorce. During the *iddat* period the woman is not known as a *Muttalaqata* (divorcee) but is a *Muttadac* (woman in probation).

Thus, reading together sections 2(a) and 2(b) of the bill, the result, would be that at least the *talaq-ahsan* would cease to be a recognised mode of divorce and possibly so also the *talaq-hasan*. Hereafter only the universally execrated *talaq-bidai* would hold the field. No doubt this is the form that some of our *maulanas* seem to favour. But the law ministry should know better. These kinds of technical flaws abound in almost every section of the bill. This makes it eminently desirable that it should be subjected to detailed scrutiny by experts in the Muslim law, among others, before it is further considered by Parliament.

SERIOUS OBJECTION

The most serious objection to the bill is its purported "definition", actually mutilation, of the Muslim women's right on divorce against her husband, as secured to her under her personal law, and as declared by our highest court.

This is done by sub-section (1) (a) and (b) of sections 3 of the Act. The former, in a seemingly deliberately garbled sentence, offers the woman: "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband". It is difficult to understand the purpose of inserting the words "within the *iddat* period" in this sub-section.

Alternatively, one may say, it is difficult to understand the purpose of jumbling together two distinct ideas and concepts in a single sentence. These two distinct ideas and concepts are: (1) a reasonable and fair provision (which could be a capital sum, property or usufruct), and (2) maintenance for *iddat* period.

The latter is not applicable in the case of *talaq-ahsan* where the wife is kept and maintained in the divorcing husband's house in the same status as before in the terms spelt out in Quran LXV 1-7.

The two distinct rights enumerated in two distinct provisions in the Quran, namely II.241 and LXV.1-7 are sought to be jumbled and telescoped into one sentence in the Muslim women

(Protection of Rights on Divorce) Bill with a sacrifice of clarity and introduction of possibilities of errors and adverse judicial determination. It is difficult to see why the legal draftsman has tried to compress so much into a single sentence in this clause which is perhaps the most important in the whole bill.

As the law now stands, a Muslim divorcee is entitled to reasonable maintenance during the *iddat* period and also as held by the Supreme Court in Shah Bano's case to *mattaun-bil-marooif*, which may be translated correctly as "a reasonable and fair provision". However, by the strange juxtaposition of words it has been made possible for a husband to argue that section 3(i) (a) of the bill restricts this amount to a provision only for the *iddat* period of three months.

Now, is the "reasonable and fair provision and maintenance" one provision or two distinct provisions? If the latter, why not deal with them separately in two sub-sections? If the sub-section deals with only one indivisible right, then why so much verbiage? Is it that the wife is entitled to a reasonable and fair provision in addition to maintenance for the *iddat* period? If so, why does it not say so in plain language?

I have already pointed out that anomaly of referring to the *iddat* period as being subsequent to the divorce. The *talaq-ahsan* is done by the husband pronouncing a single *talaq* while the wife is in a free state and thereafter living with her under the same roof for three menstrual courses without resuming cohabitation. Upon the expiry of the *iddat* period in this case, the *talaq* becomes final and irrevocable. But the parties are free to remarry. Such the parties are free to remarry cannot be repeated more than twice. This was the form of *talaq* recommended by the Prophet, as already stated.

MINOR CHILDREN

The other provisions of the bill may be dealt with briefly. They read like pages from *Alice in Wonderland*. Section 3(i) (b) says that a divorced woman shall be entitled: "where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the dates of birth of such minor children."

It is not clear whether this refers to the children of the divorcing husband or to the children of some other man.

If this refers to the children of the divorcing husband, then the Muslim law has always insisted upon the liability of the father to maintain them during minority, no matter in whose custody they are. So this bill is also an attack on the rights of children.

Section 4 of the Act makes a provision for relatives, including collateral, maintaining a divorced Muslim woman.

So far only the Hanafi law has had such a provision (see *Fatawa Alamgiri*) but such obligation is limited to relatives within the prohibited degrees. The draftsmen of the bill have overlooked this limitation. The Shia and Shafei law further limit such obligation to ascendants and descendants. (See *Imamiah Minhaj-at-Talibin*, Vol. 3, pp 93-97). This provision would be most cumbersome and in practice difficult to enforce, particularly for a magistrate's court, on account of difficult and complex questions of law and fact.

ESCAPE DUTY

It would appear that any relative charged with an obligation under this section who wished to escape from it, could easily do so by registering his marriage (if married) under the Special Marriage Act. So in any event the woman would get nothing from an unwilling relative. The willing ones would support her anyway. The provision invades the rights of Shias and Shafeite Sunnis. It is an exercise in futility and should be scrapped.

Lastly, there is the provision also in section 4, making a divorced woman's maintenance a charge on Muslim waqfs. The law of Islam is very strict on the point that a benefaction must be applied to the purpose specified by the *wakif*—founder of the trust. It cannot be changed by anybody. Legislative interference in the objects of trusts is an outrage against constitutional principles. It would, *inter alia*, violate Article 30 of the Constitution, which Muslims have, in the past, fought to uphold.

All in all, the bill as it stands is obnoxious to Islamic principles, derogatory to human rights, violative of the rights of

women and children, and also of the rights of the minority community to establish and administer charitable and educational institutions of their choice. It may, if persisted in, involve the political leadership and the country as a whole in increasing difficulties and may founder on the bedrock of our Constitution.

The earlier it is withdrawn the better for all concerned. The bill as drafted is an insult to the traditions of Islamic civilization.

The Times of India, New Delhi
Dated 12 March, 1986

Bill That Strikes At The Root of Secularism

THERE HAS been considerable heated debate and discussion on the validity as well as the propriety of the Muslim Women (Protection of Rights on Divorce) Bill 1986 (referred to in this article for the purpose of convenience as the Bill).

In the statement of objects and reasons it is said that as the decision of the Supreme Court in Shah Bano's case (AIR, 1985 S.C. 945) has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife, opportunity has been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. In this article it is proposed to discuss this Bill from four aspects: (1) the justification or need for such a Bill, (2) how far it achieves its object of protecting the interest of a divorced Muslim wife, (3) its effect on the principle of secularism to which the Constitution is committed, (4) its Constitutional validity.

Scope of Supreme Court decision: As the Bill is the immediate consequence of the judgement of the Supreme Court it is

necessary to consider the exact scope of that decision. Shah Bano, the wife of a Muslim advocate, alleging that she was driven out of the house claimed maintenance under Sec. 125 Cr. P.C. When the application was pending the husband divorced his wife by irrevocable Talak. Under Muslim Law a Muslim is entitled to divorce his wife orally without assigning any reason. Under Sec. 125 Cr. P.C. if any person having sufficient means neglects or refuses to maintain his wife who is unable to maintain herself, she can apply to the Magistrate to issue a direction to the husband to pay her maintenance at a rate not exceeding Rs. 500 a month. Under Sec. 125(1), Explanation (b), wife includes a divorced woman who has not remarried.

The Supreme Court had no hesitation in holding that Sec. 125 Cr. P.C. applied to all persons irrespective of their religion, and even assuming there is any inconsistency between the personal law of Muslims and the Cr. P.C. the latter will prevail. On behalf of the husband reliance was placed on Sec. 127(3)(b) of the Cr. P.C. which provides that the Magistrate shall cancel the order of maintenance if the wife is divorced and has received the whole of any sum which under any customary or personal law applicable to the parties was payable on such divorce.

It would appear that the divorce effected by the husband after the filing of the petition for maintenance was only with a view to enable him to rely on this provision. It was argued that as the husband had paid to her the sum of Rs. 3,000 agreed to be paid as Mehr (Dower), the provisions of Sec. 127(3)(b) applied. The Supreme Court had, therefore, to consider whether Mehr is an amount "payable to the wife on divorce" within the meaning of Sec. 127(3)(b) Cr. P.C. The Supreme Court held that Mehr is an amount paid in consideration of marriage and cannot be regarded as a sum payable on divorce and hence Sec. 127(3)(b) had no application. In the result it held that the wife was entitled to be paid maintenance under Sec. 125 Cr. P.C.

Liability of husband: The Supreme Court further held that the liability of the husband under Muslim Law is not limited to the period of 'Iddat' where the wife is unable to maintain herself. They made it clear that they were not concerned with

the broad and general question whether the husband is liable to maintain his wife, including a divorced wife, in all circumstances and at all events as Sec. 125 Cr. P.C. deals only with cases where the wife is unable to maintain herself.

Clause 3 of the Bill deals with provision of maintenance, Mehr and other properties to be given to a divorced Muslim woman. On a careful reading of the clause it would appear that she is not entitled to maintenance from her husband after the period of Iddat except in the situation covered by clause 3(1)(b); where she herself maintains the children in which case a reasonable amount is to be paid to her for a period of two years after the birth of such children. Clause 4 deals with maintenance after the Iddat period to a divorced woman who has not remarried and is not able to maintain herself. The liability to maintenance is cast on certain relatives specified in the clause or by the State Wakf Board.

It is not easy to see why there was any necessity to come forward with this Bill. The ratio decidendi (basis) of Shah Bano's case is that a person unable to maintain herself can claim maintenance under Sec. 125 Cr. P.C. irrespective of her personal law. This decision is in conformity with prior decisions of the Supreme Court. The Supreme Court held that Sec. 488 of the old Cr. P.C. (corresponding to Sec. 125 of the new Code) is applicable to all persons belonging to all religions and has no relationship with the religion of the parties. The Bill also does not say Sec. 125 is not applicable to Muslims. But as Clauses 3 and 4 are to apply "notwithstanding anything contained in any other law", it follows Sec. 125 will not apply to cases covered by the provisions of the Bill. If under Muslim law the divorced woman is fully provided for, there is no need for her to invoke Sec. 125 Cr. P.C. If on the other hand she is unable to maintain herself justice requires that she should be provided at least with the bare means of livelihood, especially in the case of Muslims where the husband can divorce his wife without assigning any reason. A sum of Rs. 500 a month is the maximum prescribed under Sec. 125 Cr. P.C. and there is no reason why even this pittance should be denied to a woman who is unable to maintain herself. The period of Iddat is only three months (or three menstrual courses as the case may be) and

it is not right that she should be helpless after that.

Unjust and unfair: No doubt under Clause 4 in such a case the relatives or the Wakf Board are made liable for her maintenance. This is absolutely unjust and unfair to the relatives. If the husband divorced his wife without assigning any reason, why should the relatives be made to suffer for his misconduct simply because at a distant future they may inherit some property? What is the justice in exonerating the husband from maintaining her after the period of Iddat? Why should the Wakf Board be made to pay maintenance? The Wakf Board is maintained mainly by the State funds. In other words the tax-payer is made to pay the maintenance to a divorced woman for the wrong done to her by her husband.

It is clear from the foregoing discussion that there is absolutely no justification for this Bill and instead of safeguarding the rights of a divorced Muslim woman it jeopardises her rights and places her at the mercy of her relatives, or allows a person who has divorced his wife (even without any justifiable reason) to escape from the obligation of maintaining her after the period of Iddat, and as a last resort tries to throw the burden on the tax-payer through the instrumentality of the Wakf Board. The Muslim community as a whole must rise in protest against such a Bill. It is surprising that a section of the community is supporting this Bill though a large section has expressed its resentment.

Uniform Civil Code: Apart from these considerations there is the more important aspect of the Bill on the concept of secularism to which the Constitution and the nation is committed. A Bill which seeks to exempt persons belonging to a particular community from the provisions of Sec. 125 Cr. P.C. strikes at the root of secularism. On the other hand, the Constitution provides as one of the directive principles that there should be a uniform Civil Code (Art. 44). The Supreme Court has repeatedly stressed the need for moving in the direction of having a uniform Civil Code (*Olga Tell vs. Bombay Municipal Corporation*, AIR 1986 S.C. 180).

It is true that in a country of diverse religions and different personal laws it is no easy task to have a uniform Civil Code. But in order to achieve national integration immediate steps

must be taken in that direction. Some measures have to be undertaken even if they are not palatable to certain sections of the people. Personal law, even if it is based upon ancient texts and scriptures like the Vedas, the Smritis or the Quran, is not inviolable. They were laid down to suit the needs of that particular age or period. But ideas are changing rapidly. Advance of science and technology has completely altered even social values.

In the olden days when physical strength was a paramount importance the ancient law givers felt that a woman who was physically weaker than man had to be protected. While she was entitled to respect as a mother or consideration as a wife she was not given a position of equality. But to-day physical strength plays very little part in the lives of people. With the help of gadgets and scientific instruments women are even able to fly planes and take part in combat. Intellectually they are not inferior to men and in the field of science, medicine, law politics and in all cases where physical strength is of no consequence they have proved themselves equal to men.

In these circumstances there is no reason why ancient laws should still continue to operate even if some of them are not as harsh on women as others. If the law laid down in the Vedas or Smritis can be altered by statutory law, there is no reason why what is stated in the Quran or other ancient Muslim law should not be altered to suit the present conditions. Therefore, every effort must be made to have a uniform Civil Code. This does not mean imposing Hindu Law on the nation. The best and most desirable law suited to modern ideas and conditions must be applied to all instead of making an effort in the direction of having a uniform Civil Code; by the introduction of this Bill even the uniformity of the Criminal Code which all these years applied to all persons irrespective of their religion is being disrupted. No doubt the expression used in Art. 44 is "uniform Civil Code." The expression "Criminal" was not used because the Constitution framers were aware that the criminal code was uniformly applicable to all and there was never any question of its being differently applied to different religions.

An Infringement : Further, the constitutional validity is not

free from doubt, it has been held by the Supreme Court that the right to life in Art. 21 includes the right to decent livelihood and a law which interferes with such a right should be unreasonable. Taking away the right under Sec. 125 Cr. P. C. of Muslim divorced woman unable to maintain herself for maintenance by her husband is a serious infringement on her right to livelihood and it may be reasonably argued that the Bill violates Art. 21. The right to obtain maintenance from the relatives or from the Wakf Board entails considerable difficulty in ascertaining the relatives, their means, making them parties and so on. From the point of view of relatives it would be an unreasonable restriction on their right to property as they are made to pay for the wrong of another person with which they had no concern whatsoever. It would also violate Art. 14 as making a distinction between Muslim and non-Muslim women in regard to the right to maintenance under Sec. 125 Cr. P. C. It cannot be contended that there is a proper classification, for the classification into Muslim and non-Muslim does not bear a just relation to the purpose of Sec. 125 Cr. P. C. as it is aimed at helping destitute women who are deserted by their husbands and there cannot be a reasonable classification based on religion in regard to such women.

Art. 51 A of the Constitution lays down that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Is it not derogatory to the dignity of women divorced by their husbands to be forced to apply to their relatives for maintenance instead of claiming it as of right from the husband? Does the Article prescribe it only as a fundamental duty of the citizen and not of the State which represents its citizens?

Alladi Kripkuswami,
Chief Justice (Retd.)

Andhra Pradesh.

The Hindu, Dated April 1, 1986

Muslim Women Awakening

TWO EVENTS which took place in the last few weeks in Lahore and New Delhi represent a significant advance in history of Muslim women. A participant in both these events, Ms. Shahnaz Sheikh, whose divorce case has been much written about and who is perhaps the only Muslim in the world to have challenged the Muslim Personal Law through a petition, gave her assessment to ENS on her return to Bombay.

The first event was an international gathering of Muslim women, from Algeria to Malaysia, in Lahore from February 28 to March 5, organised by "Simorgh", a women's publication centre in Pakistan. At this conference a resolution was adopted by the delegates, representing ten Muslim nations criticising the Indian government's Muslim Women Protection of Rights Bill, as being opposed to the spirit of Islam and the principles of equality. The resolution was later unanimously passed on March 3, at a public meeting of 500 Muslim men and women in Lahore.

The conference was the first-ever international gathering of Muslim women who sought a global solution to the problem of repression of women, perpetrated by the rising forces of Islamic fundamentalism. They sought to consider women's emancipation and liberation in relation to Islam, and to discuss their status in the community and cultural set up.

The second event in New Delhi on April 17, was a demonstration by 1,500 Muslim women from all over India. This represented the coming together for the first time of a number of progressive Muslim organisations protesting against the Muslim Women Bill. Even the Shariat Board of Kerala participated in the rally. It was also the first time since Independence, that Muslim women came out of their own houses to fight for their rights, and brought to the streets the "hush hush" issue of Muslim Personal Law.

Ms. Shahnaz, who has fought a lonely battle till now for reform and faced ostracism from her community and family for her efforts, said she was overwhelmed by the sympathy and support she received on her Pakistan trip. Unlike the Urdu

press in India which has labelled her as "Kafir", leading papers in Pakistan like Jung did a two "part interview with Ms. Shahnaz, among other write-ups".

Recalling the response of ordinary Muslim women when she spoke at public meetings in Lahore, Ms. Shahnaz said she was astonished to find that she did not have to explain anything to the audience which fully understood the implications of her simple speeches. Ordinary Pakistani women were also well aware of events in India through their press and everyone knows about Shah Bano. For them the issue of maintenance for divorced women was not connected with Islam, and its denial was considered inhuman, Ms. Shahnaz said.

Ms. Shahnaz said, unlike in India, because Muslims are not in a minority in Pakistan, the Muslim Personal Law is not a symbol of their identity. In fact the "identity crisis of the Indian Muslims is a myth", she held.

At the international conference in Lahore, where issues like divorce, maintenance, polygamy and meher were discussed, Ms. Shahnaz found that unlike the Muslim personal law in India, other Muslim nations had codified their laws, even if the status they accorded to women varied.

Even countries like Pakistan have banned unilateral talaq whereas in India we still continue this practice, Ms. Shahnaz said. According to her a Pakistani man wanting to take divorce or to take a second wife has to go through a properly laid down official procedure. Polygamy is frowned upon and the man has to prove that something is wrong with the first wife to justify a second marriage.

In Pakistan there is also a standard Nikahnama, where before entering into a marriage contract, a man and a woman agree to the terms of their marriage. The clauses of the Nikahnama refer to issues such as the second wife. In many countries the meher amount is also fixed by law. In Libya, for example, a man has to leave his house to the wife after divorce. Ms. Shahnaz feels that the battle in India has to be fought at different levels. One is the legal aspect requiring codification of the progressive aspects of Muslim Personal Law, and a standardised Nikahnama. The latter would go a long way in ending the present discrimination against women, for the men

would be legally bound to the provisions of the contract. The creation of a Family Ordinary Act, banning unilateral talak would also be a step in the right direction, she said.

At social level, many un-Islamic practices such as dowry and the stigma attached to divorces, needed to be fought against from within the community, she said.

The Indian Express Write-up
New Delhi
Dated May 15, 1986

Muslim Law Reform

GLARING FLAWS IN THE NEW BILL

IT IS yet not too late to repair the damage to the values and interests so wantonly inflicted by the Muslim Women (Protection of Rights on Divorce) Bill. In one fell swoop it impairs the confidence which should exist between the Prime Minister and the Opposition in the consultative stage of legislation and seeks to put on the statute book a measure which is intrinsically impractical and detrimental to Muslim interests. Its title is a classic instance of Orwell's Newspeak. It does lasting damage to the Muslim community itself. Yet it fosters the impression of a special favour. Muslim grievances remain unredressed. Their isolation increases. The very elements that oppose redress of their grievances will taunt them with the Bill in the years to come. Even those who are sympathetic to minority rights regard the Bill with dismay.

There is time enough to pause and reflect before the Bill is rushed to its disastrous conclusion. The Prime Minister, Mr. Rajiv Gandhi, bears a particular responsibility for averting that. It was his departure from the agreed procedure which created the sorry mess in which he finds himself to day. However, the record itself provides clues for a solution.

At the Prime Minister's meeting with Opposition leaders on

December 4, it was agreed "that they should avoid any kind of confrontation on the issue of Muslim personal law". It was felt that there should be a consensus on the follow-up on the Shah Bano case.

Divorcee wife: Only a day before he had assured the Muslims that the Government was seriously considering the matter. He had already assured Parliament that he would not undertake amendment in the personal law of any minority unless the initiative comes from the community itself.

The Prime Minister's next meeting with the Opposition on December 17, yielded tangible results. While accepting that the Shah Bano ruling was resented by a "majority of Muslims", Mr. Rajiv Gandhi candidly posed two queries, "If Muslim women think they are not sufficiently protected, what do we do? Are the Muslim women being looked after well enough?" It was agreed that the Government would prepare a comprehensive "back ground paper". Even its Contents were specified—summaries of the relevant details in the constituent Assembly and in Parliament in 1973 on Sec. 125 and 127 of the Criminal Procedure Code, the text of the Shah Bano judgement plus a legal analysis of it, and the state of Muslim law in other countries, Muslim as well as secular. The paper would be prepared "at the earliest" and would be followed within 10 days thereafter by any other meeting with Opposition leaders. There was not one objection to this remarkably detailed decision.

On December 20, two significant events took place. First, the Prime Minister said that the Government "is looking at the issue in its totality". If words mean anything, these spell comprehensive reforms based on study and consensus.

Next, Mr. Z.R. Ansari denounced the Supreme Court, but appealed to the Muslim Ulema to review the laws "so that we can go with the times". The community must take stock of the situation. It was true, he added, that divorced women in indigent circumstances were running from pillar to post for maintenance. "Some have the wrong impression that time will stop for them. Time does not stop. We have to bring about change."

Financial implications: Finally, the Prime Minister met some Muslim leaders on December 21, and a set of proposals

was discussed. It was then that the suggestion of passing the "burden" of maintenance of a divorced wife, from an errant husband to the parents, brothers and uncles, in that order, and failing them to the Wakf funds, was first mooted. Six per cent of the funds would suffice for the purpose, the Prime Minister was confidently told. On his suggestion some of these leaders "discussed the financial implications and legal issues involved in the proposals with the Law Minister" on that very day.

Three days later (December 24), the Prime Minister informed representatives of five women's organisations and a number of Muslim women, that the Government had prepared, not the background paper, but certain proposals on the basis of a note submitted by some Muslim jurists. His proposals were quite similar to those put forth by the Muslim leaders. Reportedly, Mrs. Margarat Alva, a Central Minister of State, described them as "not very practical".

The Prime Minister, however, offered two assurances to the delegation. He would take a final decision only after meeting them once again. "In any case, at the time of discussing this issue in Parliament, we will not issue any whip to our party members." The first assurance—as the one to the Opposition—was violated. It remains to be seen if the one concerning a free vote will be carried out.

Against this background, it is not surprising that the Opposition declined the Prime Minister's invitation to discuss the issue on February 19, after the Bill had already been finalised for introduction in Parliament two days later.

When it was eventually introduced on February 25, Mr. Madhu Dandavate pleaded for delay not merely on the ground that the Prime Minister had broken his promise of consultation with the Opposition. He pleaded for a more acceptable Bill which would take into account the sentiments of the community, as well as ensure justice to the women.

The Bill does neither. Its flaws are glaring. It limits to a period of two years only even the maintenance payable by a former husband to his children in the custody of a divorced wife. This is shocking. If she is unable to maintain herself after iddat, her relatives who would be entitled to inherit her

property on her death, according to Muslim Law in the proportions in which they would inherit her property, would be liable to pay for her maintenance by a magistrate's order. Failing them, he could order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay. Are these cumbrous remedies the ones the law should provide for a divorced destitute woman in any humane society? The Bill does not penalise the relative who is able to pay but refuses to do so, not even by loss of inheritance rights or by levy of fine.

Immediately on the introduction of the Bill, the Chairman of the Madhya Pradesh Wakf Board, Mr. Nizamuddin welcomed it only to add that he would appeal to the Centre to allocate money to the Board for those purposes because of its poor financial condition. Spokesmen of the U.P. and Bihar Wakf Boards have also complained of their financial incapacity. Members of the Central Wakf Board have met Dr. Rajendra Kumari Bajpai, Union Minister of State for Welfare, seeking Rs. 50 crore as a recurring grant for the same reason. They also pointed out the anomalies in the Bill.

The Central Wakf Council is set up under the Wakf Act, 1954. It is an advisory body consisting of the Union Minister for Wakfs as ex-officio Chairman (Mr. A.K. Sen) and 20 members nominated by him. Its income consists of government grants (Rs. 50 lakh) and contribution by the State Wakf Boards to the extent of one per cent of their income (Rs. 6 lakh). Income from dividends, etc. is to the tune of Rs. 22.81 lakh.

Wakf Management : Every State has a Wakf Board constituted under the Act to exercise "general superintendence of all Wakfs" in the State. Its object is only to ensure proper management in conformity with the purposes of the Wakf which it is bound to respect besides "any usage or custom of the Wakf sanctioned by the Muslim Law". Maintenance of destitute widows is hardly one of them. In 1984 an amendment to the Act was rushed through Parliament whose effects, as Mr. S. Shahbuddin, M.P. put it, is "virtual nationalisation of the Wakfs."

The Act sets up a Wakf Fund comprising grants, donations and contributions by Wakfs of six per cent of their annual

income. Mismanagement and politicisation are common complaints against Boards. It is these bodies functioning in State capitals whom Magistrates in far-flung towns will order to pay maintenance to a widow, no matter where resident in the State. The Wakfs themselves are known for "meagre income" and for being the most mismanaged almost throughout the country. Why is it at all necessary to devise this absurd remedy?

Both, Mr. P.V. Shoukat Ali, Chairman of the Islamic Shariat Board, Calicut, in his memorandum to the Prime Minister on February 1, and Mr. Rafullah Shahab in a recent article in *The Pakistan Times* have cited chapters and verses from several authorities to demonstrate that the Shariat does sanction payment of maintenance allowance by the husband to a divorced woman beyond iddat. Assuming they are all wrong, can such payment be dubbed a violation of the Shariat? And what of the persistent violation of the Quranic verse which enjoins "For divorced women also there shall be provision according to what is fair. This is an obligation on the righteous".

Quranic verse: Perversely, while the Quranic verse is dubbed as merely "recommendatory", the family is saddled with a legal obligation to provide for the divorced wife.

Several factors, legal and practical, are glossed over. S. 125 of the Criminal Procedure Code does not embody the civil law of maintenance. It only provides a summary statutory procedure for relief in the event that the wife is "unable to maintain herself" and the husband has "sufficient means" yet "neglects or refuses" to maintain her. A wife so treated can complain to the Magistrate. But, having been turned out by her husband, can one conceive of a woman in Indian society proceeding in the courts against her nearest relatives as well? The Shah Bano judgement which is binding on all courts as law, considered "the entire conspectus of the Muslim personal law" on the husband's liability to maintain his wife. It ruled that "The argument of the appellant that according to the Muslim personal law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact that she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the

husband's liability to provide maintenance ceases within the expiration of the period of iddat".

The husband's legal liability as declared by the Court can be enforced in two ways by the summary procedure provided under S. 125 of the Criminal Procedure Code, which the Bill wipes out, or by a civil suit for maintenance which the Bill does not alter. What is there to prevent a divorced wife from suing in a civil court for maintenance and claiming interim relief? This alone suffices to show how the ill-considered Bill can be exposed to sheer ridicule.

Indian Express

New Delhi

Dated 25th March, 1986

PARLIAMENT DEBATES

Smt. Sarojini Mahishi :

... Whichever law it may be, every law traces its origin to a divine source because the people may get scared of the consequences if they do not comply with that law. But, later on, in course of time, the various disciples and the vested interests tried to interpret the law in different way.....what actually we see is only the deformities and the discrepancies which have crept into the body of the law. Therefore, it is very necessary, not for any particular law, but for every law, to undergo certain changes and it cannot remain static. Alongwith the changes in society, the socio-economic changes, the changes in the way of life of the people, law also gets itself changed. Therefore, if a law remains static, should we not take it for granted that the thinking process of the people of the country has become also static? The law of any living people cannot be static. It is always flowing and it is assuming new values also many a time according to the convenience of the society at large.....In this case also, I would say that the Hon'ble Minister, Shri Shiv Shanker was wrong when he said that when the Hindu Law

was also amended, the people were in favour of that and the people had given their consent to that. I do not agree with him there. Rather I agree to disagree with him in this matter because there was a lot of resistance at that time and there were black flag demonstrations arranged before the Parliament in the year 1956 and the Constituent Assembly Members had to face all these things also who became Members later. They had to face all these things trying to convince the people. When the daughters were allowed a share of their fathers' property, the fathers, brothers and others came in a demonstration, holding black flags, and they said that if the daughter got a share of her father's property, then there would be no love between the brother and the sister. But what guarantee could they give that there would be love between the brother and the sister if the daughter was not allowed to have a share of her father's property? They could not answer this question. But, in spite of the resistance of the conservative people then, there was codification and an attempt was made at the codification of the Hindu Law.....

Sir, I do understand Hon'ble Shiv Shanker telling us to see these things from the Muslim angle and not from the Hindu angle. I do appreciate his point because he is looking at it from the Muslim angle and therefore he has been able to say it perhaps. We would like to look at it from the 21st Century angle, latter part of the 21st Century. We are now on the way to the 21st Century. We want it from the Indian angle also, from the Indian point of view also. We do not make a distinction whether it is the Hindu woman or Muslim woman or Christian woman or Parsi woman. She is woman after all. Her dignity has got to be maintained. She cannot be left on the streets of this country. She cannot be left to the wolves also.....

Then, the title itself is the Muslim Women (Protection of Rights on Divorce) Bill 1986. On divorce, Muslim women's rights have got to be protected. What are the rights of the Muslim woman on divorce? According to Explanation (b) in Section 125 of the Cr. P. C., 'Wife' means a wife belonging to any community—Hindu, Parsi or whosoever, or Muslim also. Therefore, the whole question arises whether she has to be guided by Sec. 125 to 127 of the Criminal Procedure Code.

The Supreme Court would not have referred to this also but for the fact that the appellant referred to this and tried to seek shelter under 127. Otherwise the Supreme Court would not have referred to these things also.

Therefore, the whole thing is that the Chief Justice of the Supreme Court who happened to be the chief author of the judgement, went to the extent of saying: 'I am only interpreting the Muslim personal law. I am not interfering with it.' The Supreme Court interpreted the Muslim personal law. It never interfered with it. Therefore, this is what the Supreme Court has got to do. Can we say that the Supreme Court has no right to interpret the personal law of any community? We cannot say that. There were days during the British Rule when the British Courts interpreted the Muslim law with the help of Maulavis and the Hindu law with the help of Pandits. We accepted that. Now, today we say that the Supreme Court has got no right to interpret the law. Are we questioning their right? They have interpreted. Of course, what it is that they have interpreted? They have interpreted the relief and redressal under Section 125 in the Criminal Procedure Code for a woman seeking relief and redressal of her grievance and she is entitled to it as a citizen of this country. . .

Sir, under Section 5 of this particular thing she is to approach a relative. What relative is there? What brother, cousin-brother, half brother, full brother is there, who is going to entertain a divorced sister in his house? Is his wife going to allow such a thing? Let me know what is the practice. Can she go back to her father's place? She may go if he is alive. She may get a piece of bread in the father's family if he is alive. But suppose he has married again and her own mother is not alive, what will happen to her? To which relative will she go? Who will entertain her without any selfish interest? Any such person may take away her property. . .

Have you understood the economic position of women in the country, the social position of women in the country? Therefore, it may be any community women, we have to understand the social predicament, the economic predicament in which the woman is. Even though there is codification of Hindu law, we find a daughter can get property share in her

father's house but she cannot become a co-partner in the property. She cannot claim the partition in the property. Even today the position of women is like that. You can see that in the House of 250 members, there are hardly 3 or 4 or 5 women which can be counted on fingers. Proper representation is not there either in this House or the other House. You can make out whether you have the representation of women, women who can speak with authority, women who can act, who can give vent to their feelings and women who can fight for their rights. Can a Muslim woman go to court? It was a coincidence and an accident that Shah Bano went to the court and that too was on account of her sons. I had the opportunity of talking to Shah Bano. She went with the help of her sons to the court and she continued for such a long period. Is it possible for a Muslim woman to attend the court and bear all the expenses by herself? Here, the women will go to the Magistrate and the Magistrate will give his judgement in one month's period. The husband pays her for the period of Iddat and then the relatives. Who is to find out the relatives? Will the Magistrate find out or the lady will find out? Who is to find out the relatives? And if the relatives do not make payment, then Wakf Board makes the payment. Wakf Board has to make payment for her subsistence. But how many Wakf Boards are capable of paying in this country? My friends know about the administration of the Wakf Boards and under what difficulty they are. How are they capable of making payment? The Madhya Pradesh Wakf Board came forward to ask: "If the Central Government pays so many crores of rupees, we will be able to give something to the divorcees who come to beg of us". That is how we have to maintain the dignity, the integrity and the individuality of the citizens of this country. We shall have to give this dignity to the women whom we have respected in our scriptures. We shall have to find out practical ways for her sustenance, for her living. Therefore, under these circumstances, Wakf Board may not be a substitute.

..... What I am saying is, Sir, just as the Hindu law went on curtailing the rights of the woman that is the weaker section of the society, I am telling that it is the weaker section of the Society which has fallen a victim to the men-dominated society.

And it is this society which has framed the laws for the women, whom they considered no more than a toy or a commodity, and she could be thrown away at any time..... The vested interests in these religious interpretations of the dogmas came forward to see that her rights are curtailed. I am speaking for the women of this country. I am speaking here that in the whole world also, this situation is going on. It is the woman who has fallen a victim..... I know, Sir, that many of my friends on the other side are also capable of going with me; they are also capable of coming along with us. But they have got a whip on them..... I know the tongues of these are tied. They are under restriction. Therefore, they cannot come out. Would you like to throw our women, whether Hindu women or Parsi women or Muslim women to the streets? What is the alternative for her? Is she capable of having any vocation? Is she capable of earning for herself? I know, Sir, when the Supreme Court gave the judgement, no less a person than the Union Minister, Mr. Ansari, went to the extent of saying that it is a mean attack on Islam. Is that the interpretation, is that the accusation to be made of the highest court of the land? He went on to say that it has come out as a judicial intolerance and motivated interpretation of the Shariat. Can it come from a person of responsibility, a person who is supposed to be holding a post of responsibility? On the contrary, Sir, I had an opportunity of listening to Mr. Arif Mohd. Khan, who had to pay heavily for this thing. He said, I do know of the practice. When the Mahr is given, Mehr is not given after the divorce. But Mehr is given immediately after the marriage. It is not consideration for the divorce. It is consideration for the marriage.....

I am happy in one way that it has tried to open the eyes of Muslim women. It has opened the eyes of Muslim women in the country. They are becoming conscious of these things and it has given them an opportunity to discuss all these things. Otherwise, it had become, so to say, a static thing. Now Sec. 3 mentions mehr or other properties of Muslim woman to be given to her at the time of divorce. Mehr is not in consideration of divorce. Mehr is in consideration of the marriage. It has to be paid earlier. At the time of the divorce, it has got

to be paid. But then of course, all these things are mentionedAfter the period of iddat is over, where is she to go? She is to marry another person. Will anybody come to marry her and that too in the middle age or after a particular age; after she has three or four children, with all the liabilities, they are not assets, at that time? Whom is she to marry? Even among the Muslims, I do know they do not go for marrying a divorced lady. Under these circumstances, where is she to go? I do feel that the Shariat has made provision earlier but only if it is practised. Now, the times have changed. The practices have become obsolete for them. So much of water has flowed under bridges. Now we have to bring a new approach and new amendments and a whole new approach has to be brought about.....Now, Sir, under Section 4 of this Bill it has been said that she can go to a relative, inherit property from the father, brother, etc. But how many parents are there who can give property to their daughters? How many of them have got the will to stay with their daughter? Secondly, when they can have four wives or three wives, they have got to protect children. I am not speaking of tall highly placed persons who go verbatim by the word of the Koran.....

I am speaking on behalf of the common Muslim women, amongst whom there are bidi workers, illiterate women, who do not understand anything, and a large number of whom are below the poverty line and who are treated as domestic servants; of course, I have no hesitation in saying that they are treated as domestic servants...

Prof. Madhu Dandavate :

Some of us went with a delegation to the Prime Minister. A number of women's delegations met the Prime Minister and I can tell you what the Prime Minister categorically told the women's organisations and the opposition delegations. He said, "I am studying the entire situation and unless we take you into confidence, no new legislation shall be brought". As far as Criminal Procedure is concerned, at one stage he said, "A rumour is going on that I am likely to amend the Criminal Procedure Code, Section 125, but there is no basis in that. You are trying to read too much into this particular statement or

some of the speeches that I had made....."

...Therefore, this is my point of view. The Bill seeks to keep the Muslim women out of the ambit of Article 125, leaving them to the tender mercy of her relations and the insolvent Wakf Boards. All of us know very well what is the financial position of the Wakf Boards. With the best of intentions, the framers of the particular Bill had taken care to see that if they are taken out of the ambit of Section 125 of the Cr. P.C., so that beyond a particular limit of iddat, she will not be able to get any maintenance from her husband. In that case, for maintenance and assistance, she should go to the relatives; and if the relatives are not in a position to help, then she will go to the Wakf Board. But what is the financial position of the Wakf Boards? Even for their normal activities, these Boards are coming to the Central Government saying: "We are in an extremely bad position financially. Even our routine activities that have been prescribed by the Board's rules we are not able to carry on; and therefore, financial assistance should be made available to us." This is the position.

I met some of the Muslim parents. Shall I communicate to the House a very interesting reaction by some poor families? One man in Bihar told me: "I have got six daughters. One is married. But, God forbid, she does not get Talaq-ed; but if she is divorced she comes back to me. I am already finding it difficult to maintain these five daughters. They are yet to get married. If my married daughter after *talaq* comes back to me, tell me, Mr. Dandavate, how will I be able to look after her; even with the best of desire?" He said: "I am prepared to die, so that my daughter can be protected." But he told me with tears in his eyes: "Even if I shed my blood, I will not be able to protect my daughter, because I am living in such a manner that even I am not able to make both ends meet; and as a result of that, it will be difficult for me to maintain her." According to the law that you are formulating, she will have to go to the Board. He then said: "My friend happens to be a Muslim. He should know the status of the Wakf Board. What will happen is that such women will be thrown before them."

I may quote a very interesting story, which is full of pathos. You can check it with the Prime Minister. Muslim women went

to the Prime Minister with tears in their eyes. One Muslim girl said: "Mr. Prime Minister, for the third time I have been offered *talaq*. And if you are talking in terms of going to the 21st century, why do you throw ladies like us back to the 6th century? Don't send us to the tender mercy of these people."

You can check it from the Prime Minister. I still remember the image of the eyes of the Prime Minister when that lady said: "After getting *talaq* three times, if I am not saved by my parents and I am not saved by the Wakf Board, the only two alternatives that will be left open to me are to live the life of a prostitute or to commit suicide".....

...An interesting amendment has come. The amendment is this. If the divorced wife and the husband have an understanding, then the matter can be referred to 125 of the criminal procedure code. Can there be anything more?

That means, it is like this: A man who commits a crime, and a man who is a victim of the crime, they have agreed together, that "Let us go to a court of law and seek justice", and so justice should be allowed. It is so ridiculous.....

...It is only with the consent, joint consent of the husband, that is the oppressor, who is a male chauvinist, who is accused of exploiting the lady, if he has to be allowed, which means that if the oppressor gives his consent for the liberation of a woman whom he has oppressed, then only with the joint united front of the oppressor and the oppressed there can be some sort of an order in the court of law, but Sir, there is only one court today to which I would like to make a reference.

P. Kolandaivelu:

With regard to this Bill, I would say that the Criminal Procedure Code of 1973 is a gift of Mrs. Gandhi to this nation. When Mrs. Gandhi gave the Act in 1973 she wanted to help the poor and destitute women under Section 125 of Cr. P.C. That is why she brought in the new Act in 1973.

But unfortunately we see now the right being taken away under this new Bill. So, what Madam Gandhi wanted to give to the poor and the destitute women, that kind of right is being taken away by the son. So, actually this Bill is bound to see the

nation sharply divided. Even the Government is submitting itself to the pressure of communal and sectarian forces. That is why this Bill has been brought in.....

If the free voting is allowed, I would say that even among the Congress MPs, most of the Congress MPs will vote against the Bill that is the position.

Yes, I know, that is the position.

P. Upendra

This is essentially a human problem which has been coloured by religious and other considerations. What is the religion in this if a helpless woman or if a divorced woman is paid a maximum of Rs. 500? Is it a crime against the religion? Every religion preaches compassion, including Islam. If some thing extra is going to a woman, why there is such a danger to Islam, danger to Shariat? I am very sorry to say that even the Government was taken in by this kind of argument.....

We have changed several laws. We changed the Hindu law. We have brought the Hindu Code. Even Manu said something disparaging about woman. He said, a woman has to take the protection of the parents in childhood, of the husband in the middle age, of the children in her old age. But that concept has changed. Today we are not accepting that concept. Today woman are independent and they are managing themselves. Every society is changing and accordingly every religion has to bring changes in its fold. . .

H.A. Dora

I would like to submit that Telugu Desam Party has no other option but to oppose the Bill, as the Bill itself encroaches on the rights of the Muslim women and on the Muslim Personal Law. At the outset, I may be permitted to submit that it is not a bill but a bull let loose to trample over the rights of the Muslim women and children. . .

Saifuddin Chowdhary

Today is the test for all those who speak for secularism, who speak of equality of law for all the citizens of our country.

Today is the test of our conscience. And that cannot be whipped.

Sir, to that person, the Law Minister, who some people say is the giant star of our legal galaxy—may be, I do not know. I request that after this he should not touch the soil of Bengal. Bengal gave birth to a man by name Raja Ram Mohan Roy and his going there will be a slur on that memory.

About constitutional aspect, I would say, this Bill is anti-constitution. It is anti-human, it is anti-secular. It is anti-children. It violates Articles 14 where it says that the "State shall not deny any person equality before Law or equal protection of law within the territory of India."

It violates Article 15(i) where it stated that "The State shall not discriminate against any citizen on grounds only of religion, race, sex, place of birth or any of them." It violates Article 51 A(e) where it says: "Renounce practices derogatory to the dignity of women". It violates Article 39(f) of the constitution which says that "Children are given opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and that children and youth are protected against exploitation and against moral and material abandonment". Now this bill provides for 2 years of maintenance to the child. After that, who will take care of the child?...

AVAILABLE

Selected Writings of Shaheed Bhagat Singh

edited

with an Introduction by

SHIV VERMA

Foreword

B.T. RANADIVE

Price : Rs. 15.00 (Paperback)

Rs. 40.00 (Hardbound)

Place your orders with—

NATIONAL BOOK CENTRE

14, Ashoka Road, New Delhi-110 001

August 1986

Price : Rs. 3.00

Distributed by—
National Book Centre,
14, Ashoka Road,
New Delhi, 110 001

Published by Hari Singh Kang on behalf of the Communist
Party of India (Marxist), from 14, Ashoka Road, New
Delhi, 110 001, and printed by Progressive Printers, C-52-53,
DDA Sheds, Industrial Area, Okhla, Phase-I, New Delhi, 110 028.

[digitised by sacw.net for educational and
non commercial use]