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**Submission**

*Dhaka University Law Journal* is interested in original contributions on contemporary or jurisprudentially important legal issues from scholars and professionals. This is a peer-reviewed journal, and papers and critical essays are published only after the author(s) has/have resubmitted the paper in compliance with reviewers' suggestions and recommendations, if there be any.

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The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of Citation. Thus the style should be as follows:

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**Journal Articles: Multiple Authors**

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John Finnis, *Natural Law and Natural Rights,* (Oxford University Press, 2nd ed, 2011) ch 4. [Here, a broad reference is made to chapter 4 of the book.]

**Books: Multiple Authors**

Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, 2006) 49.

Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

**Books: Edited**

Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012). [Note: where there are more than one editor, '(eds)' should be used instead of '(ed)'.]

**Chapters in Edited Books**

Jon Elster, 'Clearing and Strengthening the Channels of Constitution Making' in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012) 15, 18.

**Books: Corporate Author**

McGill Law Journal, *Canadian Guide to Uniform Legal Citation* (Carswell, 7th ed, 2010).

American Psychological Association, *Publication Manual of the American Psychological Association* (6th ed, 2010) 176. [Note: a publisher's name should *not* be included where the publisher's and the author's names are the same.]

World Bank, *Gender and development in the Middle East and North Africa: women in the public sphere* (2004).

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Naim Ahmed, *Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh* (PhD thesis, SOAS, 1998).

**Working Paper, Conference Paper, and Similar Documents**

Jens Tapking and Jing Yang, 'Horizontal and Vertical Integration in Securities Trading and Settlement' (Working Paper No 245, Bank of England, 2004) 11–12.

James E Fleming, 'Successful Failures of the American Constitution' (Paper presented at Conference on The Limits of Constitutional Democracy, Princeton University, 14-16 February 2007) 13.

**Newspaper**

Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7.

Imtiaz Omar and Zakir Hossain, 'Coup d' etat, constitution and legal continuity', *The Daily Star* (online), 24 September 2005 <http://archive.thedailystar.net/law/2005/09/04/alter.htm> accessed 9 March 2014.

**Internet Materials**

International Whaling Commission, *Extending the Global Whale Entanglement Response Network* (28 January 2014) <http://iwc.int/extending-the-global-whale-entanglement-response-n> accessed 9 March 2014. [Note: here the date within parentheses is the last date of update of the web page, and the date after the URL is the date of last access.]

**Cases**

*A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

*Additional District Magistrate, Jabalpur v Shivakant Shukla* AIR 1976 SC 11207.

*A T Mridha v State* (1973) 25 DLR (HCD) 335, 339. [Here, the case is reported on page 335, and the pinpoint is to page 339. Full stops should not be used in abbreviations.]

*Bangladesh Environmental Lawyers Association (BELA) v Bangladesh* [1999] Writ Petition No 4098 of 1999 (pending). [Note: '& others,' '& another' should be omitted.]

*Shahida Mohiuddin v Bangladesh* [2001] Writ Petition No 530 of 2001 (unreported).

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Family Courts Rules 1985, r 5.

Financial Institutions Regulations 1994, reg 3.

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The abbreviation 'Ibid' should be used to repeat a citation in the immediately preceding footnote. Standing alone, 'Ibid' means strictly 'in the very same place' while 'Ibid, 231' means 'in the same work, but this time at page 231.' Avoid the use of 'Latin gadgets' such as *supra, infra, ante, Id, op cit, loc cit,* and *contra,* which are not widely understood. For cross reference and other purposes, following introductory signals can be used: See; See, eg,; See also; See especially; See generally; Cf; But see; See above/below n.

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## Contents

Juristic Preference or *Istihsan* in the Judgment of Shariah Court in Malaysia 1
*Ahmad Hidayat Buang*
*Mohd Hafiz Jamaludin*

Public Interest Litigation: An Effective Mechanism for Securing Human Rights and the Rule of Law 17
*Dr S M Hassan Talukder*
*Md Jobair Alam*

Utility of Marriage Stipulations to Remove Gender Inequalities and to Protect the Rights of Women 37
*Dr Muhammad Ekramul Haque*

The PRSP Process and Contents: A Rights-Based Assessment for LDCs 53
*Quazi MH Supan*

Gender Justice in Bangladesh: A Time and Cost Impact to Resolve Family Disputes through Litigation vs. Court-Connected Mediation 77
*Dr Jamila A Chowdhury*

Rethinking the Plights of Divorcee under Islamic Family Law 93
*Mohammad Azharul Islam*
*Azizun Nahar*

# Juristic Preference or *Istihsan* in the Judgment of Shariah Court in Malaysia

**Ahmad Hidayat Buang***
**Mohd Hafiz Jamaludin****

## Introduction

Interpretation of legal texts or law statutes is inevitable in any legal system given the fact that the wording of the law should be flexible to deal with changing circumstances. But at the same time the law should not be too specific that will make its implementation or enforcement difficult or rigid. Many factors may contribute to understanding of the meaning of the law, principally intention of the legislature. In most legal system, the court of law is given the task to interpret the law when there is a dispute as to its meaning arisen or even when in the case there is now statutory provisions of the law. Although the general perception that Islamic law is destined to be eternally fixed in its provisions because its religious and doctrinaire character, close examination shows that its detailed provisions have constantly been subject to changes and modifications of social and political undercurrents. This process continues up until today even in the field of family law which some consider to be the last bastion of the Islamic Shari'ah *par excellence.*[1]

Muslim society and state always have the passion to demonstrate their loyal observance to the Shariah Law as expounded by the past scholars as a sign of religious continuity and spirit of a single community or *ummah.* It is therefore quite frequent that the ulama or Islamic scholars have never hesitated to blame their political ruler for their neglect of the Sharia law.[2] As in case of Malaysia as well as in Brunei the school of Shafi'i and the theological doctrine of Ash'ari is declared to be official and no other

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1 Ziba Mir-Hosseini, *Marriage On Trial: A Study of Islamic Family Law* (I B Tauris, 2nd revised ed) 12.

2 Joseph Schacht, 'Islamic Law in Contemporary States' (1959) 8(1-4) *The American Journal of Comparative Law* 133.

interpretation is allowed particularly the latter to be disseminated among the Muslim public, although it is not an offence to practice other than the above school and doctrine in private. As such in Malaysia the use of *ijtihad* or fresh interpretation of the text is rare and attempt of doing is perceived with cynicism however elegant and subtle the exercise may be. Nonetheless behind the scene, the effect of fresh interpretation of the text from time to time appears to substitute the teaching of the past scholars. In the field of Islamic banking and finance in Malaysia, some verdicts of the Shafi'i school of law are ignored and it is only used whence the expedience presents itself and this is also true in other sphere of law namely family and social relations and habits.[3] The means and mechanic to achieve this is not necessarily *ijtihad*, as it will be discussed below but rather through methods some of which are hitherto considered controversial in the Shafi'i school are employed to achieve the resultant effect of fresh interpretation.[4] The use of these methods can be seen in the legislations and also in the decision of the courts. Using examples from the judgment of the Shariah Courts in Malaysia, this article aims to demonstrate the changing facets of Shariah law as decided by the Shariah judges in Malaysia.

## Juristic Preference or *Istihsan* in Islamic Law

*Istihsan* is one of the sources in Islamic law that is accepted by most of schools of law, but is strongly opposed by al-Shafi'i (d. 820). The concept of *Istihsan* is formulated by the supporter of this concept in order to avoid the total dependency on the explicit understanding of the texts or *Zahir al-Nas* either from the Qur'an, *Sunnah* or *Ijma'* (Consensus). It is also developed to avoid the excessive use of *Qiyas* (analogy) that can upset the principle of *Maslahah* (public interest) in the application of a particular law. The word *Istihsan* from the language point of view is an Arabic word derived from the word *al-husn* which means good which is the opposite meaning of *al-qubh* which means bad. The word is used to express of decorating or improving or considering something to be good.[5] There is however a disagreement among the scholars as to its technical definition which is due to their disagreement on the acceptance of *Istihsan* itself as a source of law. For scholars who reject the validity of *Istihsan,* consider it as free reasoning without the guidance from the texts which is prohibited.

Naturally the supporters of *Istihsan* rejected this by maintaining that it is a comparison among the sources of Islamic law with the objective to choose the much stronger in authority and most beneficial to mankind. This definition is offered by Hanafi jurist al-Karkhi (d.952) and was

3 The recent Malaysian Central Bank Directive on September 2012 on the use of *Bay' al-'Inah* as permitted in the Shafi'i school, although still allowing its use in the financial and banking products has put conditions and restrictions almost amounted to its discontinounce.

4 Many have been discussed in the employment of these methods. See notably J N D Anderson, *Law Reform in the Muslim World* (Athlone Press, 1970) 34ff.

5 Zayn al-Din Muhammad bin Abi Bakr bin 'Abd al-Qadir Al-Razi, *Mukhtar al-Sihhah* (Maktabah Lubnan Nasyirun, 1995) 167.

recognized by most of the scholars as the best and the most comprehensive definition of *Istihsan.*[6] However, al- Karkhi's definition does not include *Maslahah* which is the main reason for scholars to use *Istihsan* as indicated by Maliki jurist al-Shatibi (d.1388).[7] Combining between Karkhi definition and *Maslahah* of Shatibi the technical meaning of *Istihsan* can be best described as an effort to arrive at a legal solution which is different through the use of *Qiyas* because there is a stronger case or evidence to relieve or to avoid hardship. The effect of this definition in substance is not uncommon to the Shafi'is as avoidance of hardship is a core and centre of the Shariah principles. What that is objected here to the Shafi'is is to discard of *Qiyas* or legal analogy in favor of reasoning based on *Istihsan.* To the Shafi'is a relief from the provision of the Shariah law based on hardship is permissible not because of reasoning but of the texts which provide an exception to the rule of law. As such the basis for such legal solution ultimately must be from the authority of the texts. From technical point of view the Shafi'is scholars achieved this through the use of legal maxims or *qawa'id fiqhiyyah.* Through the support of the legal texts not only from the Qur'an and Sunnah but also from decisions of the early Caliphs and companions known as *qawl sahabi* together with the combination of the rulings in actual cases of the law, many practical answers and solutions were given in form of these legal maxims.

The aim of these legal maxims are to assist a Qadi (judge) or Mufti to provide answer based on public interest or *maslahah,* avoidance of hardship or *masyaqqah,* elimination of harm or *darar* and appreciation of habits and norms or *adat.* The final effect on the use of these maxims is similar to that *istihsan* although in contracts to the Hanafis, the Shafi'is do not consider the maxims as the source of the law but rather a rule or guide in providing the solution to legal problems. Justification to support the use of legal maxims is that every rule in the Shariah must be formulated to achieve the objectives or *maqasid* of the Shariah. For this reason and since the use of legal maxims is widespread in all Islamic legal schools including that of the Shi'is, some scholars view that legal maxims are used quite aggressively to resolve problems that normally thought can be settled through *ijtihad.*[8] It appears that the use of legal maxims in the recent development of Islamic law is so refreshing and efficient simply because the broad and all-encompassing principles of *maqasid* and *maslahah* underpinning the maxims in solving practical issues and problems.

6 See Sulayman bin 'Abd al-Qawi bin al-Karim Al-Tufi, *Syarh Mukhtasar al-Rawdah* (Mu'assasah al-Risalah, 1987) vol 3, 190; 'Abd al-Wahhab Khalaf, *Masadir al-Tasyri' al-Islami fi ma la Nassa fihi* (Dar al-Qalam, 2005) 93; Mustafa Ahmad al-Zarqa', *Al-Istislah wa al-Masalih al-Mursalah fi al-Syari'ah al-Islamiyyah wa Usuli Fiqhiha* (Dar al-Qalam) 23.

7 Abu 'Ishaq Ibrahim bin Musa Al-Syatibi, *Al-Muwafaqat* (Dar Ibn 'Affan, 1997) vol 5, 194.

8 Muhammad Hashim Kamali, 'Legal Maxims and Other Genres of Literature in Islamic Jurisprudence' (2006) 20(1) *Arab Law Quarterly* 79.

**Cases Reported in the Jurnal Hukum for the Year 2005-2009**

Following the example of the Civil Courts which maintain law report as a source of unwritten law, the Shariah Courts in Malaysia also started to compile its judgment officially since 1980 in a Journal known as *Jurnal Hukum* (or Law Journal). The reporting of cases having Shariah issues tried in the Civil Court has actually been made by the Malayan Law Journal (MLJ) long before the *Jurnal Hukum* was published since British colonial times. Nevertheless, reports of the MLJ were used solely for the purpose of the Civil Courts and only acquired attention of the Shariah judges off late. The purpose of this compilation of cases decided in the Shariah Courts in the *Jurnal Hukum,* in contrast to law reports in MLJ, is not to make these reports as an authoritative source of law that is binding to the Shariah Court since in the Shariah, a judge is free to decide as according to the merit of the case even though there was precisely the same case in fact and law in the past. The compilation or reporting of the Shariah court judgments was rather for the purpose of education, training and research both for the junior Shariah judges and academics. It is this sense quite similar to the legal system of European countries and most of the Arab countries. Overtime the reports also serve as guidance for the lower Shariah courts, especially decision coming from the Shariah Appeal and High Court.

In Malaysia the practice and culture of the Civil Courts have a very strong influenced upon the Shariah Courts especially in terms of procedures, court manners and ethics. Even the Chief Justice of the Civil Court once made a remark that the Shariah Court has been civilized by the Civil Court. Because of this trend, reports of Shariah Courts decision are also published by professional law reports such as Malayan Law Journal in a special edition known as Syariah Law Reports. It is also published by publisher Current Law Journal known as the same. The current article will only use law reports from the *Jurnal Hukum* since it is the oldest and official publication of the Shariah Courts. The authors have selected the cases reported in the *Jurnal Hukum* by limiting the judgments made by Appeal and High Shariah Court judges from the Federal Territory of Kuala Lumpur, Selangor, Penang and Negeri Sembilan. The reason for limiting the cases from these four states as for representative purpose of the whole cases reported.

From statistical point of view eighty reported cases reported were selected from the time span of February 2005 to June 2009. Out of these cases, thirty one cases were from the Federal Territory of Kuala Lumpur, twenty one from Selangor, nine from Penang, and nineteen from Negeri Sembilan. Out of 80 cases examined, only eight cases were discovered to have judgments applying the principle of *Istihsan* which represents ten percent of the total cases. Of these eight cases, three were from Negeri Sembilan, two from Penang and Selangor respectively and one from Federal Territory. Table 1 below shows the distribution of cases by state and information about the cases using *Istihsan.*

Table 1: Reported Cases Using *Istihsan*

| NO. | STATE | NUMBER OF CASES EXAMINED | NUMBER OF CASES USING *ISTIHSAN* | CASE DESCRIPTION USING ISTIHSAN |
|---|---|---|---|---|
| 1 | Negeri Sembilan | 19 case | 3 case | *Radziah binti Ibrahim* *v* *Peter R.Gottschalk* (Application for an *ex-parte* order to obtain temporary custody) |
| | | | | *Noraishah bt Ahmad* *v* *Omar bin Jusoh and six others* (Claimation of jointly acquaired property) |
| | | | | *Sabariah binti Md Tan* *v* *Busu bin Md Tan* (Claimation of jointly acquaired property) |
| 2 | Pulau Pinang | 9 cases | 2 cases | *Zarina Hashim* *v* *Jamaluddin bin Saidon* (Claimation of child custody, child maintenance and jointly acquaired property) |
| | | | | *Ibrahim bin Hj. Ishak* *v* *Anuar bin Ahmad and two others* (A request from plaintiffs to visit and bring the daughter and grandchildren home twice a week) |
| 3 | Selangor | 21 Cases | 2 Cases | *Maryam binti Abdullah* *v* *Hithir bin Rashid* (Claiming to reverse the previous court order of child custody and child maintenance) |
| | | | | *Mustapha bin Ismail* claiming the distribution of the inheritance property of the deceased Che Fatimah binti Abdul Razak. (Compulsory Will) |

Table 3.1, Continued.

| | | | | |
|---|---|---|---|---|
| 4 | The Federal Territory of Kuala Lumpur | 31 Cases | 1 Case | *Mazitah binti Hussin v Rahiman bin Selamat* (Application to extend the interim order of injunction) |
| | **Total** | **80 Cases** | **8 Cases** | |

Source: *Jurnal Hukum* Volume 19 Part I & II; Volume 20 Part I & II; Volume 21 Part I & II; Volume 22 Part I & II; Volume 23 Part I & II; Volume 24 Part I & II; Volume 25 Part I & II; Volume 26 Part I & II; Volume 27 Part I & II; Volume 28 Part I & II.

**Analysis the Cases of *Istihsan***

The judgments in the above eight cases did not state explicitly that the concept of *Istihsan* was used. This is well understood as the judges are trained in Shafi'i school will avoid using *Istihsan* in his judgment. Nevertheless reading through the justification of the judgments made one cannot escape but to conclude that the principle of *Istihsan* was used. For the purpose of expediency the issues in the judgments have been categorized into six topics for analysis. These topics are (a) judgment in the absence of the defendant or *ex-parte*, (b) child maintenance, (c) jointly acquired property during marriage, (d) obligatory bequest, (e) visitation's rights and (f) injunction order.

***Judgment in the Absence of the Defendant and the Ex-Parte Judgment:***

Judgment or decision of the court must in full presence of both plaintiff and defendant. This is the rule in the Shariah law based on the hadith of the Prophet narrated from 'Ali bin Abi Talib (d.661) that instructed a Muslim judge to hear arguments from both disputing parties before dispensing judgment.[9] Nevertheless in another hadith the Prophet was reported to give judgment to Hind bint 'Utbah, wife of Abu Sufyan in the latter's absence.[10] It was reported that Caliph 'Umar and Caliph 'Uthman decided the same.[11] It was later a settled law that the judge is permitted to declare judgment in the absence of defendant. The basis of this is *Istihsan* based on the hadith. The permissibility of this judgment is also based on *Qiyas* or analogy

9 Abu al-'Ala' Muhammad bin 'Abd al-Rahman Al-Mubarakfuri, *Tuhfah al-Ahwazi* (Al-Maktabah al-Salafiyyah,1963) vol 4, 561.

10 Ahmad bin 'Ali al-'Asqalani Ibn Hajar, *Fath al-Bari Syarh al-Sahih al-Bukhari* (Bayt al-Afkar al-Dawliyyah, 2006) vol 2, 2399.

11 Syams al-Din Muhammad bin al-Khatib al-Syirbini Al-Khatib, *Mughni al-Muhtaj* (Dar al-Ma'rifah, 1997) vol 4, 542.

whereby jurists agree that judgments can be made for a minor or a deceased as well as against an absconded defendant in their absence. In addition, through reasoning if the judge is not permitted from making a judgment in the absence of the defendant while the plaintiff has produced all the necessary evidence to support the claim, the situation can be considered as denying the rights of the plaintiff. It is also contrary to the responsibilities of a judge to grant and protect the rights of a citizen.[12]

In Malaysia the permission to declare judgment *in absentia* is already provided in the Shariah Civil Procedure Law as will be shown below. Nevertheless it is quite interesting to see grounds made by the court to permit such a judgment. Thus in the case of *Zarina bt Hashim versus Jamaluddin bin Saidon*[13] involving the claims of child custody, child maintenance and jointly acquired property, the defendant failed to appear in all of the proceedings. The court decided to proceed with the trial by referring to section 121(1)(b) Penang Shariah Court Civil Procedure Enactment No.6/2004. In addition to this provision of the law, the court was of the view that if the summon was fully served to the defendant and by refusing to attend or answer the claims shall indicate that the defendant had admitted to the allegations put to him. This is based on the maxim of Islamic jurisprudence that silence in the matter that a person must speak is a confession.[14] The court also refers to the Shafi'i's manuals of *I'anah al-Talibin*[15] and *Mughni al-Muhtaj*[16] that permit the court to make judgments to the defendant who is absent on condition that the plaintiff has to produce evidence for each allegations and claims. The judge also stressed that the court is a place to obtain the rights by disputing parties. Therefore, the court shall perform its inherent responsibility to declare judgment in the interest of justice.[17]

The same argument was also presented in the case of *Maryam binti Abdullah versus Hithir bin Rashid*[18] involving application to change previous court order on child custody and maintenance. However in contrast to the above case, the defendant was not present in the early stage of the proceedings. The judge initially postponed the case due to incomplete process of serving the summon to the defendant. After this had been satisfied the Court proceeded with the trial without the presence of the defendant by referring to section 121(1)(b) of the Selangor Syariah Court Civil Procedure Enactment No.4/2003. The court also refers

12 Ibid.

13 *Zarina bt Hashim v Jamaluddin bin Saidon* (2007) 23(1) JH 143 ('*Zarina*').

14 (السُّكُوْتُ فِيْ مَعْرَضِ الْحَاجَةِ بَيَانٌ), refer to Ahmad bin Muhammad Al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah* (Dar al-Qalam, 1989) 341.

15 Abu Bakr 'Uthman bin Muhammad Syata al-Dimyati al-Bakri, *Hasyiyah I'anah al-Talibin* (Dar al-Kutub al-'Ilmiyyah, 1995) vol 4, 238.

16 Al-Khatib, above n 11, 542.

17 *Zarina* (2007) 23(1) JH 143.

18 *Maryam binti Abdullah v Hithir bin Rashid* (2005) 19(2) JH 242 ('*Maryam*').

to Shafi'i manual *I'anah al-Talibin.*[19] The judge maintains that the decision to proceed with the trial is consistent with the maxim of Islamic jurisprudence (الضَرَرُ لاَ يُزَالُ بِالضَّرَرِ)[20] which means the harm cannot be eliminated by causing harm to others and the maxim (أَرْتِكَابُ أَخَفِّ الضَّرَرَيْنِ)[21] which means implementing one of the lesser harm.[22]

A similar position is also expounded in the case of *Radziah binti Ibrahim versus Peter R Gottschalk@Yusuff bin Abdullah.*[23] In this case, the applicant applied from court an *ex-parte* order for temporary custody of a child. The applicant requested that this case must be heard quickly because the she was worried that the respondent would take away her daughter from her based on intimidations and threats made by the respondent. When judgment was made, the judge has stated in advance that any dispute shall be heard from both sides, so that, each party can give their evidence to ensure fairness to all. However, there are exceptions from this principle if there is element of hardship (*masyaqqah*) or harm (*darar*) that may occur if the original law was to be followed. The judge in this case allowed the *ex-parte* application based on two principles of *masyaqqah* and *darar* which allowed the obligation to be exempted.[24] Based on these principles, the original rule of law was set aside to remove the hardship or harm to human being. In this case, it was further reasoned by judge that there exists element fears for the safety of child, as there were threats from the respondent to bring back his daughter overseas at any time and addition to the allegation by the applicant that the respondent is not a practicing Muslim. All these claims form a basis for a potential harm to the child.[25] The reasoning of this judgment is similar to that of *Istihsan.*

### *Child Maintenance as a Debt*

The Shariah law prescribes that a father has the responsibility to provide maintenance to his children as provided in the Quran.[26] The verse also indicates the duty of a father to compensate his wife for service of breastfeeding to his children and this also true to other ancillary payment as required by the children.[27] In addition to the verse, the hadith allows the child's mother to take the property of her husband for the purpose child

19 Al Bakri, above n 15, 391-2.

20 Salih bin Ghanim, *Al-Qawa'id al-Fiqhiyyah al-Kubra wa ma Tafarra'a 'anha* (Dar al-Balnasiyyah, 1996) 512.

21 Ibid, 528.

22 *Maryam* (2005) 19(2) JH 242.

23 *Radziah binti Ibrahim v Peter R.Gottschalk@Yusuff bin Abdullah* (2009) 27(2) JH 259 ('*Radziah*').

24 Ghanim, above n 20, 247.

25 *Radziah* (2009) 27(2) JH 259.

26 Al-Qur'an 65:6.

27 Al-Khatib, above n 11, vol 3, 585.

maintenance if the father failed to do so as shown above in the case of Hind bint 'Utbah. However, the duty of the father to provide maintenance to his children is dependent on his ability to provide such maintenance. This is based on the hadith of the Prophet narrated from Jabir (d. 697).[28] Nevertheless, if the child owns property or capable of earning on their own, a poor father will not be asked to maintain his child. This is also based on the hadith which enjoins Muslim to provide adequate means of livelihood to oneself and his family as to best of his abilities.[29] However the flexibilities of the law are usually taken advantage by some irresponsible father and thus resulting in the mother to suffer the burden of providing the needs of the children. As rule once maintenance is paid to a child from whatever source it may be, normally by the wife, the father is no longer liable to pay them. To maintain this rule will make wife suffers and releasing the father from his responsibility on the grounds of poverty. Thus it is in the interest of the wife and the children that any payment made by wife or other sources should be considered as a debt to the husband. In this situation, a judge can order the father to pay the maintenance of his children. If the father still does not perform this obligation, the maintenance will be considered as a debt and is due to be claimed in the court by a competent plaintiff.

Thus in the case of *Zarina bt Hashim versus Jamaluddin bin Saidon,*[30] the plaintiff claimed to the court for child maintenance amounting to RM12,000 (or USD4,000) from the defendant. The plaintiff had earlier obtained an interim order for custody of the child and the maintenance order amounting to RM300 (USD100) per month. However, the defendant had ignored the order and cause the plaintiff to bear all expenses of the children which should be the duty of the defendant. After the court satisfied with the arguments and documents submitted by the plaintiffs, it was declared that the amount of RM12,000 of unpaid maintenance is a debt owed by the defendant to the plaintiff. The defendant was ordered by the court the pay such amount. The power to make an order is actually contained in section 70 of the Penang Islamic Family Law Enactment 2004 which provides that the maintenance can only be considered as debt and can be claimed if there is an order from the court. In addition to the provision of the law the court referred to Shafi'i manual *Mughni al-Muhtaj* and comparative fiqh book *al-Fiqh 'ala al-Madhahib al-Arba'ah* which state that the maintenance cannot become debt until after the judge made compulsory the maintenance or the father himself allow the maintenance to be owed.[31]

28 Abu al-Husayn Muslim bin al-Hajjaj al-Naysaburi Muslim, *Sahih Muslim* (Dar al-Mughni, 1998) 499.

29 Ibn Hajar, above n 10, 2399.

30 *Zarina* (2007) 23(I) JH 143.

31 'Abd al-Rahman Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-'Arba'ah* (Dar al-Kutub al-'Ilmiyyah,1990) vol 4, 514; Al-Khatib, above n 11, vol 3, 588.

### *Jointly Acquired Property or* Harta Sepencarian

The rule in the acquisition of property in the Shariah law is through recognized means such as sale contract, gift, inheritance etc based the verse of the Quran[32] and hadith.[33] Islamic Shariah does recognize the principle of contract sanctity of which no third party is allowed to claim. The Malay custom of *Harta Sepencarian* on the other hand allows spouse, upon divorce or death of either party, to claim property acquired during their marriage, although they are not directly involved in the acquisition of the property as a co-purchaser or co-sharer etc. Many discussions have been made by scholars to justify the permissibility of this customary practice.[34] It has been maintained that the practice is analogous to the topics of *mata' al-bayt* (home appliances) or *mal al-zawjayn* (property of husband and wife) discussed in the fiqh manuals.[35] The issues discussed under these topics are related to a dispute by the spouse to properties acquired during marriage of which the ownership is not properly determined. Thus Shafi'i in his *al-Umm* discussed dispute between husband and wife on the ownership of house appliances in which they have lived. To solve this problem, Shafi'i was of the opinion that the appliances shall be divided equally between them.[36]

In other schools of law, on the other hand, view the division of the property should be based on the nature and type of the property. Thus according to Malik (d.796), as quoted in *al-Mudawwanah*, if the property is more suitable to be owned by a man, it is given to the husband and *vice-versa*.[37] This opinion was also agreed by Abu Hanifah (d.767) and Muhammad Ibn al-Hasan (d.805), as quoted by al-Sarakhsi (d.1056) in his *al-Mabsut* with the provision that both husband and wife are still alive. If both or either one is dead, the rights to the property will be returned to both heirs.[38] Ibn Qudamah also solves the dispute in the same manner with the exception for a property that is suitable to be owned by both parties where he views that the property should be divided equally between husband and wife and not solely belongs to the husband alone.[39]

32 Qur'an 1:275.

33 Abu 'Abdillah Muhammad bin Yazid Ibn Majah, *Sunan Ibn Majah* (Maktabah al-Ma'arif) 376.

34 See Ahmad Ibrahim, *Undang-Undang Keluarga Islam di Malaysia* (Malayan Law Journal, 1999) 232-3, 239-40; M B Hooker, *Islamic Law in South-East Asia* (Oxford University Press, 1984) 161-3.

35 Suwaid bin Tapah, *Konsep dan Amalan Pembahagian Harta Sepencarian Orang-Orang Islam di Malaysia [The Concept and Practice of The Distribution of Muslims' Jointly Acquired Property in Malaysia]* (PhD Thesis, University of Malaya, 1996) 122.

36 Muhammad bin 'Idris Al-Syafi'i, *al-Umm* (Dar al-Fikr, 1983) vol 5, 103.

37 Malik bin Anas, *al-Mudawwanah al-Kubra* (Dar al-Hadith, 2005) vol 2, 389.

38 Muhammad bin Ahmad Syams al-A'immah Al-Sarakhsi, *al-Mabsut* (Dar al-Ma'rifah, 1986) vol 6, 213.

39 'Abdullah bin Ahmad Muwaffaq al-Din Ibn Qudamah, *al-Mughni* (Dar al-Hadith, 2004) vol 14, 245.

The writer of the Shafi'i manual *Bughyah al-Mustarsyidin* of the eighteen century Southeast Asia while following the view of Shafi'i maintains that the ownership of the property should be withheld until the real owner can be determined based on the evidence or confession of the party. If the evidence is not forthcoming the property will be divided equally between husband and wife.[40]

It is obvious that above discussions of the jurists is different from the Malay customary practice of *Harta Sepencarian*, as they were in relation to the mixed property between husband and wife in which both claims to acquire it through recognized legal means. Nevertheless the legislature and Shariah courts in Malaysia, since the colonial time up to present date, as well Islamic scholars consider *Harta Sepencarian* as part of the Islamic Family law under the principle of *'adat*[41] or custom as it is beneficial to the spouses and generally consonant with the verse of the Quran which states that both men and women are equally rewarded for what they have earned.[42] Thus the Negeri Sembilan Islamic Family Law Enactment 2003 in section 2(1) defines jointly acquired property during marriage or known in local as *Harta Sepencarian* as a property acquired by husband and wife either directly or indirectly during the marriage period in accordance with the conditions specified by Shariah. Under the law both husband and wife has the right to claim *Harta Sepencarian* upon divorce or death of either partner. The task of the court is discover whether there is evidence of contribution by both parties either directly or indirectly towards the acquisition of the property.

Thus in the case *Sabariah binti Md Tan versus Busu bin Md Tan,*[43] plaintiff claimed, among others for a declaration of a house and two parcels of land as a jointly acquired property. Plaintiff also claimed that any benefit obtained from the land and monthly pensions paid by the Federal Land Development Authority (FELDA) is to be equally divided. The court agreed with the claims and found evidence of direct and indirect contributions on part of the plaintiff in the property. Among the contributions made by the plaintiff on all the assets acquired by the defendant was through the joint participation of defendant and plaintiff's in the FELDA program. All the lands and the house were acquired by the defendant after they were both accepted to participate in FELDA as marriage is a condition set by FELDA for acceptance to participate in this program. Plaintiff also performed her household duties such as taking care of the children, the needs of husband and doing other outside jobs to increase the family income. All these were considered by the court as an

40 'Abd al-Rahman bin Muhammad Ba'lawi, *Bughyah al-Mustarsyidin* (Dar al-Kutub al-'Ilmiyyah, 1998) 358-9.

41 Ghanim, above n 20, 325.

42 Qur'an 4:32.

43 *Sabariah binti Md Tan v Busu bin Md Tan* (2009) 27(2) JH 303 (*'Sabariah'*).

indirect contribution from the plaintiff in helping the defendant to obtain the assets.[44]

In the case of *Noraishah bt. Ahmad versus Omar bin Jusoh and six others*, the plaintiff requested the court to declare the property or the value of the property listed by the plaintiff in the assets of the deceased as jointly acquired property. Defendants are the legal heirs of plaintiff former husband who is a deceased. Although the case was settled as the defendants agree to the claim, the court still requires evidence from the plaintiff to support her claim. Among of the evidence presented is that the plaintiff had made several loans for the convenience and comfort of the deceased, such as a hire purchase agreement to purchase a car, a housing loan and monthly payment on the use of credit card for the convenience and needs of their households.[45]

Based on the above cases, the findings of the court on the indirect contribution of the plaintiffs which is non contractual can be considered as the basis of co-ownership of a property in marriage. However, the principles of Shariah on the acquisition of property are not taken into account in order to appreciate the Malay customary practice of *Harta Sepencarian*. Although the court and the legislation have not specifically justified their reasons based on *Istihsan*, the result speaks for the use of *Istihsan* by *'Urf* or custom.

***Obligatory Bequest***

Under the Shariah, it is a settled law by the majority of Muslim jurists that making a bequest to family members who are not legal heirs, within the permitted one third of the estate, is recommended and not compulsory.[46] It was however obligatory in early Islam in but it was then abrogated.[47] Because of this, there was a debate among Islamic jurists on the status of bequest in Islam to argue that making bequest is compulsory in the Shariah. Taking this dissenting opinion, through legislation in Muslim countries starting in Egypt in 1943 provision was made to provide orphaned grandchildren who are excluded from the inheritance receiving maximum one third of the deceased estate through a bequest which is presumed obligatory on part of the deceased to have been made to the benefit of the grandchildren. This kind of bequest is technically known as *Wasiyyah Wajibah*. The rational of this kind of bequest as being discussed elsewhere is the fear that these orphaned children after being excluded from the inheritance will be left without support and thus becoming poor and

44 *Sabariah* (2009) 27(2) JH 303.

45 *Noraishah bt Ahmad v Omar bin Jusoh and 6 others* (2008) 26(1) JH 97.

46 Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuhu* (Dar al-Fikr, 1985) vol 8, 10-11.

47 Abu 'Abdillah Ahmad bin Muhammad bin Hanbal, *Musnad al-Imam Ahmad bin Hanbal* (Mu'assasah al-Risalah, 2001) vol 45, 475.

destitute.[48] Such a provision has been adopted in Malaysia in section 27(1)(2)(3) Selangor Muslim Wills Enactment No. 4, 1999.

Thus in case of *Mustapha bin Ismail in the distribution of the inheritance of the deceased Che Fatimah binti Abdul Razak*,[49] the Kuala Lumpur Shariah High Court after decided the legal heirs to the estate made an order of obligatory bequest to grandchildren whose father predeceased the deceased as provided by the Selangor Muslim Will Enactment No.4/1999. The court in support of the law justified that jurists like Sa'id ibn al-Musayyab (d.715), Hasan al-Basri (d.728), Ishaq bin Rahawaih (d.853), Dawud al-Zahiri (d.883), Ibn Jarir (d.923), Ibn Hazm (d.1064) and others are of the view that making bequest to close family members who are excluded from the inheritance is mandatory based on the verse of the Quran as quoted above. Although it is against the view of majority but the ruler or government based on the principle of public interest can decree to the reverse.[50] Again as mentioned above this justification is producing the law based on *Istihsan*.

### *The Right to Visit Children and Grandchildren*

Islam strongly encourages good relation among family members and relatives so that life will be more comfortable and pleasant as enjoined in the Quran.[51] There are also many hadith from the Prophet relating to the duty of preserving this relationship[52] and stern warning for those who trying to destroy it.[53] Good relationship among relatives means doing good to close family members in matters that are permitted by Islam. This includes looking after the family members and visiting them. It is wrong and prohibited for any Muslim who tries to prevent this relationship especially of meeting or visiting one's child or grandchild.[54] Nevertheless, there were instances where the Court made an order preventing certain family members to visit child and grandchild for the interest of family unity. Thus in the case of *Ibrahim bin Hj. Ishak and one other versus Anuar bin Ahmad and two others*[55] the court rejected

48 See, eg, 'Abd al-Ghaffar Ibrahim Salih, *Ahkam al-Mirath wa al-Wasiyyah wa al-Waqf* (Matba'ah Jami'ah al-Qahirah, 1987) 212; Asnawil G Ronsing, *Islamic Law on Succession* (University Book Centre-Mindanao State University) 20-2; Muhammad Taha Abu al-'Ula Khalifah, *Ahkam al-Mawarith Dirasah Tatbiqiyyah* (Dar al-Salam) 630-1.

49 *Mustapha bin Ismail in the distribution of the inheritance of the deceased Che Fatimah bint Abdul Razak* (2009) 28(1) JH 55.

50 Jalal al-Din 'Abd al-Rahman bin Abi Bakr Al-Suyuti, *al-Asybah wa al-Naza'ir* (Dar al-Kutub al-'Ilmiyyah) 121.

51 Qur'an 4:36.

52 Muslim, above n 28, 1383.

53 Ibid.

54 Hajar, above n 10, vol 1, 1690.

55 *Ibrahim bin Hj. Ishak and one other v Anuar bin Ahmad and two others* (2005) 19(2) JH 234.

application by plaintiffs to visit their daughter and granddaughter. Plaintiff's daughter is defendant's wife and the granddaughters in question are defendant's children under his custody. The court based on two police reports submitted and evidence from the witnesses found that the first plaintiff had attacked defendant at his work place and his house was thrown with stones, wood and steel.

In justifying the decision, the court was of the view that plaintiff's application to see and take his daughter and grandchildren back home in a tense mood should not be allowed. There is no intimacy between the plaintiff and the defendant and even more, the plaintiff wish to take revenge against the defendant. On this basis, the court decided to reject the application submitted by plaintiff. The court is of the view that the decision is to avoid quarrels and hostilities that will divide this family. The court considers that the defendant is entitled to defend his right for not to obey the plaintiff to ensure that the good family relationship will be return to normal. This decision is issued, as asserted by the court, based on *Maslahah* for the benefit of defendant in preserving his family and reframing greater harms if the conflict continues.

### *Application for Injunction against the Husband*

Relation between husband and wife in Islamic law is based on certain rights and obligations. A husband is enjoined by the Quran to treat his wife with kindness whether by action or by speech.[56] A similar message is also reported in the hadith which says "*The best among you is the best to his family and I was the best to my family*".[57] Among the husband's obligations towards his wife, as quoted by al-Qurtubi (d.1273) when interpreting the above verse is to pay dower and maintenance to his wife, not frowning his wife for no reason, not speaking to his wife in a harsh manner and not to disclose his tendency to other woman other than his wife.[58] For these duties, Islamic jurists using the Quranic verse[59] consider husband as the leader of the household to his wife and children.[60] This also means that the husband has full access and authority over his family and no one has the right to deny it. In fact one who prevents the husband from performing his responsibilities is committing a great sin.

This is the law that needs to be held by all parties when there is no urgent or pressing matter to change it. The decision of the Shariah court is otherwise. Thus in the case of *Mazitah binti Ibrahim versus Rahiman bin Selamat*[61], the court allowed an application to extend the

56 Qur'an 4:19.

57 Majah, above n 33, 342.

58 Muhammad bin Ahmad Al-Qurtubi, *al-Jami' li Ahkam al-Qur'an* (Dar 'Alam al-Kutub, 2003) vol 5, 97.

59 Qur'an 4:34.

60 Wahbah al-Zuhayli, *al-Tafsir al-Munir* (Dar al-Fikr al-Mu'asir, 1997) vol 5, 54-5.

61 *Mazitah binti Ibrahim v Rahiman bin Selamat* (2008) 27(1) JH 157.

validity of *ex-parte* interim order, previously obtained by the applicant, to refrain the respondent from trespassing, forcing and acting with hostility against the applicant. The respondent is also ordered to refrain from doing a list of things which among other from approaching the applicant within 100 meters while their divorce proceeding is in progress. Nevertheless the court rejected application that the respondent will observe the same to the children and their maid.

Legally speaking, the court has discretionary power to grant any interim order on any terms as it deems fit based on section 197 (a) of the Shariah Court Civil Procedure (Federal Territories) Act 1998. As such it is matter of establishing the facts to the case that warrants such an order that the court needs to do. It is has been accepted and argued in many places in Malaysia that *ex-parte* interim injunction order is based on necessity or *darurah*[62] in order to avoid harm or *darar.* [63] This power is also provided in section 107 of the Islamic Family Law (Federal Territories) Act 1984 whereby the court can grant an injunction or prohibition order to parties of whom their divorce proceedings is in progress. Although there is no specific mentioning that the power to grants such an order is based on *Istihsan*, it is obvious that the original law that the husband should not be prevented from living with his family members especially wife and children is disregarded. This is indeed a hallmark of *Istihsan* which can be categorized as *Istihsan* by *Maslahah.*

**Conclusion**

The results of the studies on the cases reported in the *Jurnal Hukum* show that the principle of *Istihsan* is directly employed in the judgments of the Shariah Courts in Malaysia. As much as the court desires to apply the principles of Quran and Sunnah as against the rules discussed in the fiqh manuals, which a noble effort in itself, these are only incidental to the articles of the law which provide for such an application as it has been shown above. This is hardly a case of innovation and reinterpretation of texts of the law as some researcher may want to argue.[64] It is therefore the farmers of the legislation which incorporate the application of these principles who are actually the innovator. The courts in all instances of the cases observed above are merely establishing the facts of the cases so that these principles can be properly applied. From the theoretical classification of *Istihsan*, all of the cases, except two, employed what that is known as *Istihsan* by *Maslahah* or public interest. However, it should be noted here that *Maslahah* alone is not sufficient to abandon the original law.

62 Ghazali Jaapar, *The Concept and Application of Equity in Islamic Law and The Shari'ah Courts in Malaysia* (PhD Thesis, University of Birmingham, 2005) 292-3.

63 Based on the hadith reported by Ibn Majah, above n 33, 400; see also Ghanim, above n 20, 493.

64 For discussion on this matter see Ramizan Wan Muhamad, 'Shariah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study' (2009) 29(1) *Journal of Muslim Minority Affairs* 127-39.

It must be supported by other evidence either from the Quran or the Sunnah, even though in general and this is duly observed by the Shariah Courts. The rest of the classification is by Sunnah and *'Urf* or custom. The latter is probably the most notable contribution of the Malaysia Shariah law as it is cannot be found elsewhere outside the Malay Archipelago,[65] although numerous customary practices are absorbed to become part of the Shariah law in the rest of the Muslim world. In conclusion, the findings of the above discussion can portray a general impression that the use of *Istihsan* was accepted indirectly in the Islamic judicial system in Malaysia and this actually support the claim that the Shafi'is finally yielded to the practical solution offered by *Istihsan* albeit indirectly.

65 M B Hooker argues that there has been a movement in Southeast Asia, especially in Indonesia to formulate a new kind of fiqh that appreciates the local needs. As some of the customary practices are common in both countries in Malaysia and Indonesia especially the Harta *Sepencarian*, it is consequential to apply this statement to Malaysia. See M B Hooker, *Indonesian Shariah: Defining a National School of Islamic Law* (Institute of Southeast Asian Studies, 2008), 40-41 and introductory section.

# Public Interest Litigation: An Effective Mechanism for Securing Human Rights and the Rule of Law

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## Introduction

Lexically, the expression 'Public Interest Litigation' (hereinafter referred to as PIL) means litigation filed in a court of law for the protection of 'Public Interest', such as pollution and constructional hazards; terrorism, issues of livelihood and public safety and so forth. PIL is not defined in any statute. It has been interpreted by judges to consider the interest of public at large.[1] Although, the main and only focus of such litigation is on 'Public Interest' there are various areas where a PIL can be filed.[2] It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. The court can itself take cognizance of the matter and proceed *suo motu* or cases can be commenced upon the petition of any public-spirited individual in that situation.[3] Such cases, however, may be accommodated when the victim does not have the necessary resources to commence and continue litigation or his freedom to move the court has been suppressed or encroached upon. So, PIL is the power given to the public by courts through judicial activism[4] to protect, secure and uphold various rights which are very likely to be jeopardized otherwise. Hence, PIL can broadly work as a catalyst to secure human rights *vis-a-vis* rule of law because the latter is based on the belief that every individual has the right to enjoy the dignity of man.[5] The object of this paper is to assess the efficacy of PIL as an effective mechanism for securing human rights and the rule of law. This will be done mainly by analysing case law relating to PIL of various jurisdictions as well as by

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1 Rajendra Ramlogan, *Sustainable Development: Towards a Judicial Interpretation* (Martinus Nijhoff, 2011) 248.

2 Basant Lal Wadehra, *Public Interest Litigation: A Handbook* (Universal Publishing, 2009) 47.

3 Pravin H Parekh (ed), *Human Rights Year Book-2010* (Universal Publishing, 2010) 206.

4 *Francis Coralie v Union Territory of Delhi* (1981) 1 SCC 688; Jamie Cassels, 'Judicial Activism and PIL in India: Attempting the Impossible?' (1989) 37 *American Journal of International Law* 495, 495-512.

5 M Ershadul Bari, 'The Rule of Law and Human Rights' (1990) 13 *Bangladesh Journal of Law* 53, 53-6.

exploring the interface between and among them, i.e., PIL, Human Rights and the Rule of Law.

**Conceptualising Public Interest Litigation**

When there is an abuse or misuse of power, who can bring a case before the court? Can any member of the public come? Or must he have some private rights of his own? In many statutes or constitutional enactments it is enacted that in case of non-compliance, a 'person aggrieved' may complain to the court or to a tribunal. During the 19th century, those words were construed very restrictively.[6] It was said that a man was not a 'person aggrieved' unless he himself has suffered particular loss in that he had been injuriously affected in his money or property rights. He was not 'aggrieved' simply because he had a grievance. It was not enough that he was one of the public who was complaining in company with hundreds or thousands of others. That was laid down in 1880 by a distinguished Judge, Lord Justice James, in the *Sidebotham case.*[7] But, subsequently in *R v Thames Magistrates' Court,*[8] Lord Justice Parker and Denning departed[9] from that old test. Thus, the usual and traditional concept of *locus standi*[10] as evolved from the Anglo-Saxon Jurisprudence[11] is vitiated in cases of PIL. And in recent years the old position has been much altered. There have been a remarkable series of cases in which private persons (third parties)[12] have come to the court and have been heard. There is now a much wider concept of *locus standi* when complaint is made against a public authority. It extends to anyone who is coming to the court on behalf of the public at large.[13]

The intervention of the court may be sought by way of PIL in cases where- a) the statutory provisions have overlooked the interests of a significantly affected group that would otherwise suffer in silence; and b) the existing rules and standards are not complied with due to indifference towards a particular group unjustly denying them any legal entitlements or resulting in unfair and hostile treatment. PIL, hence, in the legal regime provides a platform for protecting human rights of those who are not in a position to go to court for legal remedy mainly due to poverty and ignorance among other things. The emergence of PIL over the last twenty years has been a

6 K L Bhatia, *Judicial Activism and Social Change* (Deep & Deep, 1990) 200.

7 (1880) 14 Ch D 458, 465.

8 (1957) 5 LGR 129.

9 They shifted their position from *economic injury* concept to *non-economic injury* concept of aggrieved person.

10 Ordinarily *Locus Standi* means right to sue.

11 Anglo-Saxon Jurisprudence means jurisprudence of the old English people before Norman Conquest.

12 Third party (not the aggrieved) means that which is not directly injured in money or property. He is not the actual victim but a party (plaintiff) to the litigation.

13 Lord Denning, *The Discipline of Law* (Butterworths, 1979) 117.

salutary development towards providing the vast majority of citizens with access to justice and effective protection of their fundamental rights. PIL has thus, evolved as a powerful tool capable of fulfilling the promises that the constitutions held out resulting in the establishment of the rule of law.

So, where a legal wrong or injury is caused to a person or persons due to violation of any constitutional or otherwise guaranteed rights[14] and the aggrieved persons are not in a position to challenge the illegality due to poverty, helplessness or financial inability and thus, cannot go before the court, such matters and cause of action can be brought before the court by any such individual who feels that justice must be brought to these aggrieved acting *pro bono publico.*[15] Even in some situations the court may take reasonable steps *suo moto*, as it deems appropriate for the ends of justice, although the court itself is not an aggrieved party.

In *Miss Benazir Bhutto* Case,[16] the full bench of the Pakistan Supreme Court held that in cases of violation of fundamental rights of a class or a group of persons who are unable to seek redress from a court the traditional rule of *locus standi* can be dispensed with and procedure available in Public Interest Litigation can be made use of, if it is brought to the court by the person acting *bona fide*. The Court also held that the rule of *locus standi* can be relaxed in order to include a person who in a bonafide manner makes an application for the enforcement of the human rights of a detrimental class of persons whose grievances go unnoticed and so unredressed.

Hence, it is convincing that Public Interest Litigation is a concept which recognizes maintainability of legal action by a third party (not the aggrieved) in a unique situation.[17] If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, it means that some person is left free to violate the law, and that is contrary to the rule of law and public interest. If the case is accepted to ensure public interest, it is referred to as Public Interest Litigation.

**Conceptualising Human Rights**

Human rights are those rights which a person can claim because he is a human being. Human rights literally mean the rights of man. They are also called natural rights. Thomas Paine may have been the first to use the term human rights,[18] in his English translation of the 'French Declaration of the Rights of Man' adopted by the National Assembly of France in 1789 which prefaced the Constitution of 1791. Later on, the term 'human rights' has

14 Holning Lau and Jen Yap Po (eds), *Public Interest Litigation in South Asia* (2011) 35.

15 *S P Gupta v Union of India* AIR 1982 SC 149.

16 1988 PLD SC 416.

17 Unique situation means a situation where third party acts as friend in good faith without any malafide intention *pro bono publico*, not for his own vested interest.

18 Thomas Paine, *The Rights of Man* (Gutenberg, 1789).

been used in the English text of the *Universal Declaration of Human Rights, 1948*[19] and such usage continues in this day.

So, human rights are commonly understood as worldwide inalienable fundamental rights backed up by state obligations and are essential for the existence of human beings themselves.[20] They are intrinsic to every human being, simply because of being human. They include all, and only, human persons. Around the world, people and nations have recognized the importance of human rights as a fundamental part of social justice.[21] They represent the minimal moral standards for human society.[22] The possession of human rights is the principal means for maintaining a notion of human dignity. Human rights are concerned with the dignity and self-esteem of the individual that are essential for securing personal identity and promoting human community.[23]

Since, human rights inhere universally in all human beings and the principal means for preserving the notion of human dignity, they unlike other 'possessions' cannot normally be traded off. 'Universal inherence' and 'inalienability' are the two principal characteristics which distinguished human rights from other rights.

For promotion and protection of human rights, PIL carries a compendious value as it has the ability to correct decisions and render government authorities accountable to citizen. It can encourage governments to make their human rights obligations meaningful to all parts of society and thus contribute to social and environmental justice. It may encompass elements of other legal remedies such as class actions which determine the rights of large numbers of people whose cases involve common questions of law or fact. PIL often also entails a form of judicial review, examining the legality of decisions and activities of public authorities or the constitutionality of the law. Hence, for the promotion and protection of human rights PIL plays a capacious role. Some important human rights, which public interest litigation ultimately establishes, promotes and secures are, among others: right to life, liberty and personal security,[24] right to equality before the law,[25] right to freedom from arbitrary arrest and detention;[26] right to freedom of

19 Alan S Rosenbaum, *The Philosophy of Human Rights: International Perspective* (Greenwood Press, 1980) 9.

20 Samantha Power and Graham Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan, 2000) 357.

21 Curtis F J Doebbler, *Introduction to International Human Rights Law* (CD Publishing, 2007) 173.

22 Morris B Abram, 'Freedom from Thought, Conscience and Religion' (1967) 2 *Journal of the International Commission of Jurists* 40.

23 Abdul Aziz Said, *Human Rights and World Order* (Praeger Publisher, 1978) 1.

24 The Universal Declaration of Human Rights, 1948, art 2.

25 Ibid, art 7.

26 Ibid, art 9.

movement;[27] right to own property;[28] right to social security;[29] right to education;[30] right to a standard of living;[31] right to health;[32] right to housing;[33] right to freedom from discrimination[34] etc.

**Conceptualising the Rule of Law**

The 'Rule of Law' means literally what it says: the rule of the law. The origin of this term may be ascribed to Edward Coke in England with his milestone remark that the King must be under God and the law. So, the term 'Rule of Law' is used in contradiction of the rule of man. In any society in which rule of law prevails it is the law that governs even though instrumentally of man, and no man is independent of or above the law. In such a society every executive action must have legal sanction behind it and there is no place for executive action that springs from individual whim, caprice or malice. Thus, the arbitrary action is complete antithesis of the rule of law.[35] The government is merely to act as per the dictates of law. Hence, the ideal of the rule of law in its narrow sense is often expressed by the phrase 'government by law and not by men'.

According to A V Dicey, the rule of law connotes at least three elements, *firstly*, the absolute supremacy of regular law; secondly, equality before law; and *thirdly*, the law of the constitution is not the source but the rights of individuals.[36] Criticizing this notion, Ivor Jennings opined that the rule of law more essentially means a democratic government.[37] Wade and Phillips in this connection added that "it involves the absence of arbitrary power and proper exercise of power".[38] The Indian Supreme Court affirmed that "the absence of arbitrary power is the first essential of the rule of law . . . decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If any decision is taken otherwise that is antithesis of the

27 Ibid, art 13.

28 Ibid, art 17.

29 Ibid, art 22.

30 Ibid, art 26.

31 Ibid, art 25.

32 International Covenant on Economic, Social and Cultural Rights, 1966, art 12.

33 Ibid, art 11.

34 Ibid, art 2.

35 Bari, above n 5, 53-8.

36 A V Dicey, *Law of the Constitution* (Macmillian, 1939) 202-3.

37 Ivor Jennings, *The Law and the Constitution* (University of London Press, 1959) 47-8.

38 E C S Wade and Godfrey Phillips, *Constitutional Law* (Oxford University Press, 1967) 58.

rule of law".[39] Bhagwati J in *Bachan Sing v State of Punjab* observes, "... its postulate is intelligence without passion and reason free from desire. Whenever we find arbitrariness or unreasonableness there is denial of the rule of law".[40]

However, the principal notion of the rule of law in its substantive sense appears to be 'the availability of justice' to the masses at large in a determined territory without any distinction of religion, race, caste, sex, place of birth, etc. This is because, the rule of law is an ideal of constitutional legality, involving open, stable, clear and general rules and more importantly, even-handed enforcement of those laws.[41]

In this connection, it would be no exaggeration to mention that the rule of law is a basic feature of the constitution of Bangladesh. It has been pledged in the preamble[42] to the Constitution that the fundamental aim of the state is to realize a society in which rule of law will be secured for all citizens. The framers of the Constitution, after mentioning 'rule of law' in the preamble, took care to mention other concepts touching on the qualitative aspects of law, thereby showing their adherence to the concept of rule of law. So, to attain this fundamental aim of the State, the Constitution has made substantive provisions, where every functionary of the State must justify his action with reference to law. Here, 'Law' does not mean anything that Parliament may pass. Article 27 forbids discrimination in law or in State action and article 31 provides protection of law. Again, article 7 imposes limitation of the legislative that no law which is inconsistent with any provision of the Constitution can be passed and article 26 declares that all existing law inconsistent with the provisions of fundamental rights of the citizens, to the extent of such inconsistency, shall become void.

## Securing Human Rights and the Rule of Law through PIL

PIL is closely linked to human rights and the rule of law. To the downtrodden and the deprived, the fundamental rights which are of deep and daily significance are the rights of survival or subsistence. Without these rights the exercise of other basic freedoms becomes theoretical and remote.[43] PIL is a saviour of many human rights, such as civil rights, poverty, women's rights, child exploitation, etc.[44]

39 *S G Jaisinghani v Union of India and Others* AIR 1967 SC 1427.

40 AIR 1982 SC 1325.

41 P W Hogg and C F Zwibel, *The Rule of Law in the Supreme Court of Canada* (UTLJ, 2005) 715-18.

42 The Constitution of the People's Republic of Bangladesh, preamble, para 3.

43 Soli J Sorabjee, 'Protection of Fundamental Rights by Public Interest Litigation' in Sara Hossain, Shahdeen Malik and Bushra Musa (eds), *Public Interest Litigation in South Asia* (UPL, 1997) 27-42.

44 Available at: <http://books.google.com.bd/books?id=kw9JkggYj9EC&pg=PA57&lpg=PA57&dq> accessed 29 January 2013.

The rule of law, on the other hand, is linked to human rights, because the former is based upon the notion that it must create an environment for establishing social, economic and cultural conditions, which enable men to live in dignity and to live with aspirations.[45] It requires an ordered legal framework which will permit the full development of the individual by ensuring certain human rights and fundamental freedoms. Again, it is a cardinal principle of the rule of law that human rights must of necessity be safeguarded and respected. A mere declaration and insertion of fundamental rights in the constitution is meaningless unless an effective and easy remedy or machinery is provided for enforcing these rights. In the case of *Saiyyid Abu A'la Moudoodi and Others v Federation of Pakistan*,[46] Habibur Rahman J. observed: "the basic principles underlying a declaration of Fundamental Rights in a Constitution is that it must be capable of being enforced not only against the executive but also against the legislature by judicial process." But, everybody may not have the capacity to visit the court owing to financial incapacity.[47] So, if any person comes before the court on behalf of that incapable person, the former should not be barred on the ground of not having the *locus standi*. In order to securing the rule of law, the judicial process must be liberal and expansive. This expansion has been made in PIL by the court through liberal interpretation of *locus standi*.

Again, PIL is not only an isolated phenomenon concerning the problem of either *locus standi* or human rights, but also an integral part of the concept of rule of law. This is because rule of law cannot be segregated from the issue of access to law and justice. Without easy access to justice, legal and constitutional rights would be mere parchment promises or teasing illusions. This would further constitute a denial of justice, which judges are pledged to uphold.[48] Hence, PIL works as a nexus between 'under privileged group' and 'judiciary' and the outcome of which is the upliftment of human rights, civil and political as well as economic, social and cultural.[49]

45 *Benazir Bhutto v Federation of Pakistan* [1988] PLD (SC) 416, 421.

46 [1964] PLD (SC) 673.

47 PIL was started to protect the fundamental rights of the people who are poor, ignorant or in socially and economically disadvantaged position.

48 R W M Dias terms such failure as a kind of 'abuse of power', see, R W M Dias, *Dias on Jurisprudence* (1985) 30.

49 After the World War II, the concept of the 'Rule of Law' has undergone a radical change, which is now thought to be concerned not only with the negative aim of protecting the individuals from arbitrary power of the executive, emphasis is also placed on a more positive aspect of the rule of law. Although a free society primarily recognizes civil and political rights of the people, such right may seem a shadow rather than substance to large sections of the population, who lack minimum standard education and economic security. The panoply of law to hungry people may enforce obedience, but it does not attract respect or support. Accordingly, the proper operation of the rule of law is very difficult to achieve, unless economic conditions assure a reasonable standard of living and stability for the population. It is for this reason, emphasis is placed both on ESC rights as well as CP rights, see, Report of

It is a fact that most of the people of third world countries live below subsistence level.[50] Only because of the prohibitive cost of litigation,[51] they cannot even think of going to the court of law for justice. So, unlike traditional litigation, the lawyers, magnanimous individuals and social service organizations are coming forward for the cause of justice to these poor and disadvantaged people through PIL, and thereby the rule of law and human rights are getting secured.

In the same vain, while writing his judgment in *Miss Benazir Bhutto Case*,[52] Muhammad Haleem CJ held that the rationale behind the traditional litigation, which was essentially of adversarial character in which only the person who was wronged could initiate proceedings, was 'to limit it to the parties concerned and to make the rule of law selective to give protection to the affluent or to serve in aid of maintaining the *status quo* of the vested interests'. In the judgment it was declared that the relaxation of the rule of standing requirement provides, 'access to justice to all', and also gives a broad-based remedy against the violations of human rights. Besides, emphasized was given that while interpreting the constitution, interpretation must be derived from the provisions of the constitution which 'saturate' and 'invigorate' it like the objective resolution, fundamental rights and directive principles. This, it was declared, would amount to socio-economic justice and would lead to the establishment of an egalitarian society through a new legal order which will string and uphold 'equality before law' and 'equal protection of law'. Indeed, these two norms are closely associated with the protection of human rights and establishment of the rule of law. And owing to such nexus the urge for these two norms could be found in different human rights instruments, for example: Article 7 of the *Universal Declaration of Human Rights, 1948*[53] provides: "All are equal before law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." The International Covenant on Civil and Political Rights, *1966* in Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." In the same way, the International Covenant on Economic, Social and Cultural Rights, *1966* in Article 3 declares that state parties must ". . . ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant."

the International Congress of Jurist, *Delhi Declaration*, 1959; African Conference on the Rule of Law, *Law of Lagos*, 1961.

50 World Bank, *Poverty Around the World* (2008) 2.

51 Anurodha Rao, *Public Interest Litigation: A Tool for Social Action and Public Accountability* (Public Affairs Centre, 1999) 19.

52 PLD 1988 SC 388.

53 Adopted and proclaimed by General Assembly (GA) resolution 217(A)(III) of 10 December 1948.

The above-mentioned human rights norms have also found expression in major regional human rights instruments[54] and national constitutions[55] throughout the world. And from that point of view, it is convincing that the concept of PIL plays an important role in advancing human rights norms- 'equality before law' and 'equal protection of law' on one hand, and the rule of law on the other. Because, strict follow up of the rule of *locus standi* stands as an impediment, rather than carrying into effect these two significant human rights norms. So, to overcome this impediment and to ensure equality before law in practice, the concept of PIL developed by the court [56] has been playing an effective role. Actually, when the court passes any orders in PIL, the court does not do so with a view to mocking at legislative or executive authority or in a spirit of confrontation but with a view to enforcing the constitution and the law. Because, it is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the constitution and the law should be carried out faithfully and properly within the legal paradigm.

PIL has thus, developed a new jurisprudence of accountability of the state for constitutional and legal violations, adversely affecting the interest of the weaker sections in the community. Various PIL decisions in different jurisdictions demonstrate how courts have given impetus to the promotion and protection of human rights,[57] by expanding the meaning of fundamental right to equality, life and personal liberty. In this process, the rights to speedy trial, free legal aid, dignity, education, medical care, right against torture, sexual harassment, solitary confinement, and so on have emerged as human rights.[58] This further gives the idea that, at least in those cases human rights would have been threatened if they were thrown away. PIL is thus, a part of a process of ensuring access to law and justice as well as a

54 This view of equality before law and equal protection of law is also inserted in major regional human rights instruments. For example, Article 4 of the *African Charter on Human and Peoples' Rights, 1981* provides that every individual shall be equal before law and every individual shall be entitled to equal protection of the law. Article 24 of the *American Convention on Human Rights, 1969* provides that all persons are equal before law. Consequently, they are entitled, without discrimination, to equal protection of the law.

55 For example, Article 31 of the Constitution of the People's Republic of Bangladesh states about 'Right to Protection of Law'.

56 *R D Shetty v International Airport Authority* (1979) 3 SCC 489.

57 Christine M Forster and Vedna Jivan, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3(1) *Asian Journal of Comparative Law*; Parmanand Singh, 'Human Rights Protection through Public Interest Litigation in India' (1999) 45 *Indian Journal of Public Administration* 731; S Susman Susan, 'Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation' (1994) 57 *Wisconsin International Law Journal.*

58 Available <http://www1.umn.edu/humanrts/research/india-litigation.html> accessed 22 January 2013.

part of constitutional commitment.[59] Various instances of judicial activism can be referred to here where the court through PIL has established, promoted and secured human rights and the rule of law.

Though in India, Krishna Iyer J. introduced an expansive construction of *locus standi* in 1976,[60] in Bangladesh [61] it happened 20 years later when BELA filed a case, commonly known as *FAP-20 case.*[62] Prior to that, Dr Mohiuddin Farooque, founder of BELA, filed a petition[63] against the four authorities of the government[64] responsible for the enforcement of various civil rights[65] like, encroaching on public properties at the time of election campaign; saturation of footpaths and other public places with election camps; incessant use of loudspeakers and other noisy instruments; covering walls with election slogans; traffic jams resulted from unscheduled and unregulated processions and so on. The High Court Division (HCD) of the Supreme Court of Bangladesh issued a *Rule Nisi* upon the respondents asking them to show cause as to why they should not be directed to comply with the directives issued by the Election Commissioner touching upon various laws. The rule, however, was disposed of, following assurance from the Attorney General that the government would take all necessary steps to implement all the directives of the Election Commission. So, this case worked as a catalyst for protection of certain human rights[66] which in essence has advanced the rule of law.

In *Dr Mohiuddin Farooque v Election Commission & Others,*[67] a writ petition was filed by Dr Mohiuddin Farooque in the HCD of the Supreme Court praying for intervention of the court in restoring the public medical services and care all over the country disrupted by the continuous strike of

59 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' [1985] *Third World Legal Studies* 107, 111-32; Singh, 'Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation' in Goerlich Singh, and Michael Von Hauff (eds), *Human Rights and Basic Needs* (1998); Sripati, 'Human Rights in India Fifty Years after Independence', [1997] *Denver Journal of International Law and Policy* 93; C M Abraham, *Environmental Jurisprudence in India* (Kluwer) 31.

60 *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455 [7].

61 Available at <http://www.banglapedia.org/HT/P_0307.HTM> accessed 3 February 2013.

62 *Dr Mohiuddin Farooque v Bangladesh* (1997) 17 BLD (AD) 1.

63 *Dr Mohiuddin Farooque v Election Commission & Others* [1994] Writ Petition No 186/1994.

64 Accordingly the respondent was the state.

65 Those rights are internationally recognized mainly by the *International Covenant on Civil and Political Rights, 1966* and also by various regional human rights instruments.

66 Mainly civil rights.

67 [1994] Writ Petition No [1994] 1783/1994.

Bangladesh Civil Service (Health) cadre doctors. The respondents[68] were directed by way of mandatory injunction to call off the strike of the doctors of all the government medical hospitals, complexes and centres immediately with effect within 24 hours from the date of service of notice and to join their offices respectively. It was a case of great public importance and involved the interest of the nation as a whole, as the entire system for getting treatment by the people had become paralyzed and the sufferings of the people knew no bounds. Similarly, the court has broadened its mandate by giving protection to the consumers against all unscrupulous activities in releasing the consignment of radiated milk[69] as well as contaminated drink.[70]

On the basis of PIL, the meaning of 'right to life' has been given an extensive meaning and is still expanding. The Supreme Court of Bangladesh made it clear that 'right to life' includes anything that affects life, public health and safety. It includes the improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.[71] In *Biplob Kumar Roy v Bangladesh & Others*[72] the court cancelled a lease of open fisheries for protecting the rights of the poor fishermen community and ensuring their livelihood. In another case,[73] the court directed to ensure safe and healthy environment to the workers also. Moreover, various matters of environmental issues have been brought before the court in Bangladesh by way of PIL where the court has been approached to redress a variety of issues like, air pollution,[74] vehicle pollution,[75] unlawful construction,[76] lake filling up,[77] unregulated operation

68 The petition was filed against the following respondents: (1) Bangladesh, represented by the Secretary, Ministry of Health and Family Welfare, (2) The Director General of Health Services, (3) The Bangladesh Medical and Dental Council, and (4) The Bangladesh Medical Association.

69 *Dr Mohiuddin Farooque v Election Commission & Others* [1996] Writ Petition No 92/1996.

70 *Dr Mohiuddin Farooque v Bangladesh & Others* [1997] Writ Petition No 867/1997.

71 (1997) 49 DLR (AD), at p.1.

72 [1997] Writ Petition No 1840/1997.

73 *Sramik Nirapatta Forum and Others v Bangladesh and Others* [2005] Writ Petition No 3566 of 2005.

74 *Dr Mohiuddin Farooque v Election Commission & Others* [1994] Writ Petition No 891/1994.

75 *Dr Mohiuddin Farooque v Election Commission & Others* [1995] Writ Petition No 300/1995.

76 *Sharif Nurul Ambia v Bangladesh & Others* [1995] Writ Petition No 937/1995.

77 *Dr Mohiuddin Farooque v Bangladesh & Others* [1997] Writ Petition No 948/1997.

of brick fields,[78] hill cutting,[79] gas explosion,[80] Sundarbans conservations,[81] illegal sand collection,[82] stone crush[83] and so forth. It is pertinent to mention here that right to environment is an important human right, which is frequently ascribed to 'right to life'. The origin of a right to environment can be found in the Stockholm Declaration.[84] Subsequently, several international and regional human rights instruments have included various statements of the right to environment.[85]

78 *Dr Mohiuddin Farooque v Bangladesh & Others* [1997] Writ Petition No 1252/1997.

79 *Dr Mohiuddin Farooque v Bangladesh & Others* [1997] Writ Petition No 6020/1997.

80 *Dr Mohiuddin Farooque v Bangladesh & Others* [1997] Writ Petition No 6105/1997.

81 *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* [2004] Writ Petition No 2224 of 2004.

82 *Bangladesh Environmental Lawyers Association (BELA) and Thengamara Mohila Sabuj Sangha (TMSS) v Bangladesh and Others* [2004] Writ Petition No 4244 of 2004.

83 *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* [2005] Writ Petition No 8603 of 2005.

84 Available at <http://untreaty.un.org/cod/avl/ha/dunche/dunche.html> accessed 3 March, 2013.

85 *The United Nations Charter, 1945* does not define human rights to environment. However, the term can be interpreted through the concept of 'well-being'. Similarly, the *UDHR, 1948* does not mention a human right to environment. It affirms the right to life and a right to a standard of living adequate for health and well-being. The *ICCPR* and the *ICESCR* affirm that every human being has the 'inherent right to life' and the right of everyone 'to the enjoyment of the highest attainable standard of physical and mental health' through 'the improvement of all aspects of environmental and industrial hygiene'. In environmental terms the 'right to life' may include a positive obligation on the state to take steps to prevent a reduction of or an extension of life expectancy. For example, by providing better drinking water or less polluted air. Article 8 of the *European Convention on Human Rights* incorporates the right to be free from interference with one's home and property. The limited case law in this area usually deals with noise pollution, for example, in alleged nuisance complaints about excessive aircraft noise at Heathrow Airport the *European Court on Human Rights* found that the benefits to the community out-weighed the individual's right to bring a claim. However, in the case of *Lopez Ostra v Spain* (20 EHRR 277 of 9 December, 1994), the Court ruled that the applicant suffered health problems from the fumes of a tannery waste treatment plant operating a few meters away from her home. Again, Economic, Social and Cultural rights include the right to a healthy environment, a decent working environment, decent living conditions and to health. These rights are covered by various treaties which establish the close relationship between socio-economic development, environmental and human rights concerns. The *1981 African Charter on Human and Peoples' Rights* was the first human rights treaty to expressly recognize the right of '[a]ll peoples' to a 'satisfactory environment favourable to their development'. Within Europe, the *Organization of Economic and Development (OECD)* stated that a 'decent' environment should be recognized as one of the fundamental human rights. The *Organization of American States* introduced a right to environment in its *1988 Protocol of San Salvador.*

Since 1996, Bangladesh Legal Aid and Services Trust (BLAST)[86] has filed 82 public interest litigation petitions in the Supreme Court of Bangladesh.[87] These petitions have resulted in judicial orders for government action to comply with statutory duties, and have led to expanded interpretation of fundamental rights guaranteed under the Constitution of Bangladesh. Significant PIL petitions include: challenging arbitrary arrests and unreasonable police remand and obtaining guidelines to safeguard persons under arrest and detention;[88] securing the right to fair trial;[89] challenging delays in trials of under-trial prisoners;[90] challenging incarceration of children in prisons;[91] securing consumer safety;[92] safeguarding health rights;[93] seeking protection of workers' rights for safety in the workplace;[94] ensuring access to justice;[95] preventing forced eviction and displacement and securing alternative rehabilitation of slum dwellers;[96] challenging gender discrimination in public employment;[97] challenging the failure of state authorities to ensure safety and security of women through taking

86 BLAST is a non profitable organization established in 1993 to provide legal aid for the establishment of valid claims of and protection for the marginalized and the poor through the judicial system of Bangladesh. It has now emerged as one of the leading free legal aid services organizations in Bangladesh. See Muhd Rafiqauzzaman, 'Public Interest Litigation in Bangladesh: A Case Study', (2002) 6(1-2) *Bangladesh Journal of Law*.

87 Vide Official website of BLAST. Available at <http://www.blast.org.bd/whatwedo/pilandadvocacy> accessed 17 April 2013.

88 *Bangladesh Legal Aid and services Trust and Others v Bangladesh* (2003) 55 DLR 363.

89 *Bangladesh Legal Aid and Services Trust and another v Bangladesh and Others* (2002) 22 BLD (HCD) 206.

90 *Bangladesh Legal Aid Services Trust and others v Bangladesh and Others* [2003] Writ Petition No 7578 of 2003.

91 *Bangladesh Legal Aid Services Trust and others v Bangladesh and Others* [2003] Writ Petition No 7578 of 2003.

92 *Bangladesh Legal Aid and Services Trust v Bangladesh (Secretary, Ministry of Health and Family Welfare) and Others* (2005) 25 BLD (HCD) 83.

93 *Bangladesh Legal Aid and Services Trust v Bangladesh (Secretary, Ministry of Health and Family Welfare) and Others* Writ Petition No 1043 of 1999.

94 *Ayesha Khanam and others v Bangladesh, represented by Secretary, Cabinet Division, Bangladesh Secretariat, Dhaka and Others* (2006) 11 MLR (AD) 237.

95 *Bangladesh Legal Aid and Services Trust v Bangladesh (Secretary of Law, Justice and Parliamentary Affairs) and Another* (2008) 60 DLR (HCD) 234.

96 *Bangladesh Legal Aid and Services Trust and Others v Bangladesh and Others* (2008) 13 BLC (HCD) 384.

97 *Mosammat Nasrin Akhter and Others v Bangladesh and Others* Writ Petition No 6309 of 2003.

action against extra-judicial penalties by informal village tribunals;[98] and directions for the establishment of courts and furthering the separation of the judiciary from the executive in the Chittagong Hill Tracts.[99]

Indeed, apart from the PIL petitions initiated by BLAST, a large number of PIL petitions (referred to earlier) were initiated by Ain O Salish Kendro (ASK), Bangladesh National Women's Lawyers Association (BNWLA), and Bangladesh Environmental Lawyers Association (BELA) whereby millions of people were benefited and thereby human rights were secured. For instances, Doctors strike case,[100] where the court ordered the doctors to join to their respective hospitals immediately and thereby the common people got a reality to their right to medical care; Slum dwellers case,[101] where the court ordered not to evict the slum dwellers from Dhaka city and thus they got secured their right to shelter; Industrial pollution case,[102] where the court ordered to ensure appropriate pollution control measure and thereby general people got a reality to their right to health.

Thus, the aforesaid matters of great public interest, brought before the court through PIL, have protected, promoted and secured human rights in respective fields. And at the same time, in a society where human rights are given proper protection, the rule of law gets secured in a parallel way. Hence, as a whole, for securing human rights and the rule of law, PIL is causative perhaps, effective.

In India, M.C. Mehta, as a petitioner in person, was a pioneer in bringing a large number of issues to the court concerning environmental and economic degradation. These included the issues arising out of the leak of oleum gas from a factory in Delhi,[103] pollution in Delhi,[104] the danger of the Taj Mahal from the Mathura refinery,[105] regulation of traffic in Delhi[106] and the degradation of the Ridge area in Delhi.[107] The Indian court, has given

98 *Bangladesh Legal Aid and Services Trust and Others v Bangladesh and Others* Writ Petition No 5863 of 2009 with Writ Petition No754 of 2010 and Writ Petition No 4275 of 2010.

99 *Bangladesh Legal Aid and Services Trust v Secretary, Ministry of Law, Justice and Parliamentary Affairs* (2009) 61 DLR (HCD) 109.

100 *Dr Mohiuddin Farooque v Election Commission & Others* [1994] Writ Petition No 1783/1994.

101 *Ain O Salish Kendra (ASK) and Others v Government of Bangladesh and Others* Writ Petition No 3034 of 1999, (1999) 19 BLD HCD 488.

102 Writ Petition No 891 / 1994.

103 *M C Mehta v Union of India* (1996) 4 SCC 750.

104 *M C Mehta v Union of India* (1996) 4 SCC 351.

105 *M C Mehta v Union of India* 8 SCC 770.

106 *M C Mehta v State of Tamil Nadu* (1996) 6 SCC 756.

107 *M C Mehta v Union of India* (1997) 11 SCC 227.

remedies in various other matters like, health right of workmen,[108] right to emergent treatment,[109] right of patients undergoing ophthalmic treatment at Eye Camps, right against medical negligence, right to quality blood transfusion, right to protection against injurious drugs,[110] etc. Besides in Pakistan also, the term 'right to life' covers clean atmosphere and unpolluted environment,[111] adequate level of living,[112] quality of life,[113] clean water,[114] etc.

However, owing to the elaborative attention given in the field of PIL, now the ambit of PIL is not confined to any particular field. For example, relief was granted and appropriate directions were given in respect of sexual exploitation of juvenile under-trial prisoners,[115] illegal detention for three decades,[116] holding under-trial prisoner for eight years without trial,[117] trafficking of children by foreigners,[118] allotment of a space reserved for a park to a private hospital,[119] death by starvation,[120] challenging international treaty[121] and so on.

These cases have clearly led to an expansion of the concept of *locus standi.* Along with this, the court's doors have been opened for the voiceless poor, the disadvantaged and weaker sections of citizens who are otherwise powerless and unable to gain access to law and justice. By giving a constitutional dimension to applicable rules and procedures, particularly in the field of human rights enforcement, the court has spearheaded judicial activism ensuring compliance with and the implementation of human rights guarantees. The court is no longer a mere umpire for adversaries who choose to fight their gladiatorial legal battles before it.[122] Instead, it has undertaken factual investigation in appropriate cases or directed that- a)

108 *Consumer Education and Research Center v Union of India* (1985) 3 SCC 42.

109 *P R Subhas Chandran v Govt of A P* AIR 2000 AP 272.

110 *Vincent Panikurlangara v Union of India* (1987) 2 SCC 165.

111 *Shehla Zia v Pakistan* PLD 1994 SC 693.

112 *Employees of the Pakistan Law Commission v Ministry of Works* [1994] SCMR 1548.

113 *Amanullah Khan v Chairman, MRC* [1995] SCMR 202.

114 *Salt Miners Case* [1994] SCMR 2061.

115 *Munna v State of Uttar Pradesh* AIR 1982 SC 806.

116 *Veena Swthi v State of Bihar* AIR 1983 SC 339.

117 *Kadra Pehadiya v State of Bihar* AIR 1981 SC 939.

118 *Lackshmo Kant Pandey v Union of India* AIR 1984 SC 469.

119 *Bengalore Medical Trust v B. S. Muddapa* AIR 1991 SC 1902.

120 *Kishan Patnayak v State of Orissa* AIR 1989 SC 677.

121 *Kazi Mukhlesur Rahman v Government of Bangladesh* (1974) 26 DLR (SC) 44; *Tanakpur case* of Nepal; *Mc Whirter's case* of England.

122 M Amir-Ul Islam, 'A Review of Public Interest Litigation Experiences in South Asia' in Sara Hossain, Shahdeen Malik and Bushra Musa (eds) *Public Interest Litigation in South Asia* (UPL, 1997) 55-78.

reports are to be filed in compliance with its directions and orders; and b) steps have to be taken to monitor such compliance under its direct supervision.[123] Thus, such judicial activism has enabled the court to play the role of a social auditor or judicial ombudsman by providing a powerful check on executive excesses and corruptions through preventing misuse or abuse of powers and wastage of public funds.

**Prospects of PIL in Securing Human Rights and the Rule of Law**

PIL as it has developed in recent years marks a significant departure from traditional judicial proceedings. The court is now seen as an institution not only providing relief to citizens but also venturing into policy formulation, which the state must follow. With the liberalization of *locus standi*, PIL has greater prospects in ameliorating the conditions of the downtrodden and deprived sections of the people by providing remedy to their sufferings and making fundamental rights in the constitution a reality.

In United States of America, where the liberalising trend in the rule of standing has already reached maturity, courts have recognized not only taxpayers' or competitors' or consumers' standing asserting economic or uneconomic interests but also the standing to include aesthetic and environmental interests also.[124] The courts have recognized standing in citizens' groups concerned with protection of natural, scenic and historic resources and a National Conservation Organization challenging the construction of expressway;[125] a public benefit corporation bringing a class action against a proposed nuclear detonation;[126] an organization devoted to environmental protection challenging the use of DDT;[127] a citizens' group attacking a model cities programmer;[128] and a conservationist organization challenging mining and timber cutting in a national forest.[129]

In the United Kingdom, the PIL movement started with the *Blackburn cases.*[130] Blackburn, a former Member of Parliament, took up many cases before the Court of Appeal which involved matters of public concern. The court granted him *locus standi* to challenge the police inaction in prosecuting big gambling houses,[131] governmental action relating to the joining of European Economic Common Market,[132] and enforcing

123 Ibid.

124 *Sierra Club v Morton* 405 US 727 (1972).

125 *Citizens' Committee v Volpe* 425 F 2nd 97 (1970).

126 *Crowther v Seaborg* 312 F Supp 1205 (1971).

127 *Environmental Defence Fund v Hardin* 428 F 2nd 1093 (1970).

128 *North City Area Wide Council v Romney* 428 F 2nd 754 (1970).

129 *West Virginia Highlands Conservancy v Island Creek Coal Co.* 411 F 2nd 232 (1971).

130 Denning, above n 12, 117.

131 *R v Commr. of Police of Metropolis* (1968) 2 QB 118.

132 *Blacburn v Attorney General* (1971) 1 WLR 1037.

pornography law.[133] Similarly, the court allowed standing to Ross McWhirter (he was one of twin brothers who produced the Guinness Book of Records) to file petition for injunction restraining Independent Broadcasting Authority from telecasting a film which according to him was outrageous – 'a shocker, the worst ever';[134] to seek a writ of prohibition for failing to properly use their censorship powers;[135] to challenge the actions of public officials,[136] etc.

In India, until the PIL was developed by the Supreme Court, justice was a remote and theoretical notion for the masses. They were unaware of the law or of their legal rights, unacquainted with the niceties of procedure involved, and too impoverished to engage lawyers, file papers and bear heavy expenditure on dilatory litigation. The vested interests that exploited them were emboldened to continue with their cruel and illegal practices with impunity. By propounding the thesis that citizens should be enabled to enjoy the 'right to life' and 'liberty' guaranteed under Article 21 of the Constitution,[137] the Supreme Court of India enlarged the scope of *locus standi* to include the rightful concern of other citizens willing to espouse the cause of their less fortunate countrymen. Understandably, an increasing number of cases have come up before the Supreme Court and in some instances it has acted *suo motu* in converting newspaper reports and letters recounting incidents of gross exploitation and inhumanity into writs.[138]

In Bangladesh, besides other cases of public interest, some writ petitions have also been filed and disposed of by the Supreme Court specially in order to address environmental justice. Here the agenda of PIL was mainly based on strategic issues to generate awareness amongst the common people and all the actors for development of a realistic regulatory framework and environmental jurisprudence. Following a BELA case[139] in 1996, the concept of PIL was recognized by the judiciary that has allowed the millions of voiceless an access to the formal justice system. Meanwhile, BELA,

133 *R v Police Commissioner* (1973) QB 241.

134 *A G v Independent Broadcasting Authority* (1973) QB 629.

135 *R v Greater London Council* (1976) 1 WLR 550.

136 *R v Secretary of State for the Environment* (1990) 1 QB 504.

137 The Constitution of India.

138 Justice Rajendra Sachar and Justice R. N. Aggarwal have *suo motu* taken notice of a news report about convicts sentenced to simple imprisonment in Tihar Jail being forced to serve rigorous imprisonment. Newspaper reported the cases of convicts who had been asked to affix their thumb impression on the convict history ticket. Below the thumb impression a jail officer had allegedly written in Hindi which on translation in English would read: "I want to get my simple imprisonment changed into rigorous imprisonment."

139 *Dr Mohiuddin Farooque v Bangladesh* (1996) 9 BSCR (AD) 27; (1997) 17 BLD (AD) 1.

BLAST as well as other NGOs (non- government organizations)[140] have initiated a large number of public interest cases. These cases, also stated earlier, involve a wide range of issues including river pollution,[141] industrial pollution,[142] vehicular pollution,[143] labour welfare,[144] compensation for losses inflicted by development projects,[145] encroachment of important wetland and relocation of industry,[146] payment of environmental compensation in development project,[147] unlawful filling of flood plan zones,[148] etc. As a result of those cases, millions of common people have been benefited and thereby human rights have been protected ultimately resulting in the establishment of the rule of law.

Thus, a change is taking place in the judicial process through various public interest cases,[149] where the court has introduced new methods, devises and strategies for the purpose of providing access to justice to the common mass deprived of their basic human rights. In this connection, it would be worthwhile to quote a passage from Mr Justice Krishna Iyer from his book *Law and the Urban Poor in India:*

> Please remember that procedure is not an *alibi* to strangle the right to life, nor a priestly ceremonial for a decent burial of a fundamental liberty. Considerations of a routine kind cannot hold good where human disasters are the price.[150]

[140] These are, among others, Ain O Salish Kendro (ASK), Bangladesh National Women's Lawyers Assocation (BNWLA) and Bangladesh Society for the Enforcement of Human Rights.

[141] *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh & Others* Writ Petition No 4098/1999 (pending).

[142] *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh & Others* Writ Petition No 4098/1999.

[143] *Dr Mohiuddin Farooque v Election Commission & Others* Writ Petition No 300/1995 (pending).

[144] *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* Writ Petition No 2911 of 2003 (pending).

[145] *Dr Mohiuddin Farooque v Bangladesh & Others* Writ Petition No 7422/1997.

[146] *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* Writ Petition No 488 of 2006 (pending).

[147] *Sramik Nirapatta Forum and Others v Bangladesh and Others* Writ Petition No 3566 of 2005 (pending).

[148] *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* Writ Petition No 3336 of 2002 (pending).

[149] These are, among others, *BSER v Bangladesh* 3 DLR 2001; *BLAST v Bangladesh* 4 BLC 600; *ASK v Bangladesh* 19 BLD 488; *ETV Ltd v Dr Chowdhury Mahmood Hasan* 54 DLR (AD) 130; *Engineer Mahmudul Islam & Others v Govt of Bangladesh & Others* (2003) 23 BLD (HCD) 80.

[150] V R Krishna Iyer, *Law and the Urban Poor in India* (BR Pub, 1988) 89.

So, PIL represents a daring, and in some respects unique response to a problem of unparalleled proportions in the legal world. The commitment of judges to PIL reflects their conviction that the courts are bound to make a relevant and meaningful contribution to the alleviation of tensions[151] and to preservation of the social fabric. The phenomenon of PIL is one, which seeks to reach out to the segments of a community bereft of influence, privilege or even basic opportunity, and to assure them, at least in a fundamental sense, of the benefits of the legal order, which could hardly be achieved through conventional litigation.[152] PIL brings justice within the reach of the poor masses. It has the objective of promoting and vindicating public interest which ensures that violation of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantageous position, must not go unnoticed and unredressed.

**Conclusion**

In the legal discourse, PIL has achieved an identity of its own in spite of the refusal of the concept of *actio popular*.[153] The emergence of the concept and, even more strikingly, its unrepentant dimensions in the current practice of various courts, clearly in conflict with traditional norms of judicial detachment and objectivity, represent a bold response to the perceived implications of social inequality and economic deprivation.[154] The poor and the disadvantaged, in comparison with the rich and advantaged, are entitled to 'preferential consideration'[155] owing to their own wretched standing and stinted capacity.[156] But, that treatment was frequently denied to them till the emergence of PIL. Today, that denial is difficult, perhaps impossible. This is because other people can bring the case before the court of law on behalf of those poor segments of society. Today people do not feel that- a) the constitution and the law are meant only for the benefit of a fortunate few; and b) have no meaning for the large number of poverty-stricken, half-clad, half-hungry people. And these are the feelings which should never be

151 G L Peiris, 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions' (1991) 40(1) *The International and Comparative Law Quarterly* 66.

152 Ibid, 89.

153 Andrewe Byrnes, Jane Frances Connors and Lum Bik (eds), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (1997) 135.

154 Ibid, 68.

155 Ibid.

156 The Indian Supreme Court held that "The concern shown (by the law) to the rich and well-to-do much greater than that shown to the poor and disadvantaged because the former can, on account of their dominant social and economic position and large material resources, resist aggression on their rights where the poor and the deprived just do not have the capacity or the will to resist and fight," see, *Bihar Legal Support Society v Chief Justice of India* (1986) 4 SCC 769. See also, for discussion of general aspects of public interest litigation, S K Agarwala, 'Public Interest Litigation in India: A Critique' (K M Munshi memorial lectures, 1985); P N Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 *Columbia Journal of Transnational Law* 561.

allowed to grow[157]- as these feelings have already been clarified by PIL as perilous to human rights and the rule of law.

Hence, the role of PILs provides a useful illustration of how their contribution to human rights have improved and strengthened the rights of disadvantaged groups on one hand and secured the rule of law on the other. The broader is the application, the more is the success. So, it would be no exaggeration to conclude that PIL, under the prevailing conditions stated above, has emerged as an effective mechanism of judicial activism to secure human rights and the rule of law.

[157] AIR 1985 SC 910.

# Utility of Marriage Stipulations to Remove Gender Inequalities and to Protect the Rights of Women

**Dr Muhammad Ekramul Haque***

## Introduction

Marriage in Islamic law is in the nature of a contract. This has created a scope for inserting stipulations in a contract of marriage. The general trend of Islamic family law is to grant more rights to men. However, the *sharia* itself kept an option open for women to negotiate some of those marital rights and obligations by inserting stipulations in their favour. Thus, it is possible to bring a degree of gender balance utilizing the scope for negotiation of stipulations in a contract of marriage. The objectives of writing this article are three fold: firstly, to critically analyse different opinions of Imams about stipulations in order to determine the widest possible scope for stipulations; secondly, to review the modern legislation relating to marriage stipulations in different countries, and finally, to suggest some appropriate recommendations to better protect the interests of women.

## Contractual nature of marriage

Marriage in Islamic law is treated as an *'ibadat'* or a good deed of religious nature. There is no doubt that the marriage under Islamic law has a religious overtone. However, in essence, it is basically a contract. Because, unlike in some other religious laws, such as Hindu Law or Christian law, marriage under Islamic law can take place by performing simple contractual formalities: offer and acceptance by competent parties. That is why the jurists have generally considered it to be a contract. It is true that there are some differences between a purely civil contract and a contract of marriage under Islamic law, but basically a Muslim marriage is a contract. It has been debated whether it is a purely civil contract or of contractual nature. For example, the Indian Supreme Court held in *Abdul Kadir v Salima* that a '[m]arriage among Muhammadans is not a sacrament, but purely a civil contract.'[1] While the Supreme Court of Pakistan in the famous *Khurshid Bibi*[2] case said that a marriage is a contract of civil nature. It is submitted that there is no controversy on one point: marriage in Islamic law is an agreement of contractual nature.

## Scope for stipulations

Although a marriage in Islamic law is of contractual nature, the parties to a marriage do not enjoy absolute liberty to insert any stipulation whatsoever.

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1 (1886) ILR 8 All 149.

2 PLD 1967 SC 97.

Since, Islamic marriage has a religious overtone, so there are some limitations on the power of inserting stipulations in a contract of marriage. Thus, the power of inserting stipulations in a contract of marriage is regulated both by law and *sharia*. In other words, a stipulation cannot be inserted in a marriage deed violating either law or *sharia*. There are different opinions of Imams about the range of stipulations. A stipulation delegating the power of talaq to wife is generally accepted as permissible by all *madhabs*. However, there are some stipulations which are controversial. For example, a stipulation that the husband will not take a second wife is invalid in *Hanafi* school, although *Hanabali* school allowed such a stipulation.[3] There are other such controversial stipulations like a stipulation that the husband will not prohibit his wife to do work or a stipulation that the husband will allow her to complete her study. This will be discussed in detail later in this chapter.

Obedience of a wife to her husband is the foremost legal effect of a marriage. But what are the parameters of the wife's obedience? For example, Will a wife be able to complete her study denying her husband's prohibition? Such parameters of obedience are possible to be fixed by the parties at the time of marriage by inserting stipulations. There may be another important type of stipulation by which husband's obligations may be defined or expanded. For example, a wife may insert a stipulation regarding management of matrimonial property (that the wife will get certain portion of the husband's property at the dissolution) if a divorce takes place without the consent of the wife. Or, if the husband pronounces a 'no-fault'[4] divorce to his wife, then the wife will be entitled to get a certain amount of compensation.

**History and practice**

Unfortunately, in the modern time, there is not much practice of inserting stipulations in a contract of marriage. In the middle age, it was a common practice in some countries to negotiate different terms and conditions at the time of a marriage contract. In the modern time, in most of the Muslim countries, the parties to a marriage sign a formal deed of marriage provided by the statute. For example, in Bangladesh, a formal deed of marriage, commonly known as *'kabinnama'*, has been provided by the statute. Clause 18 of the *'kabinnama'* has provided the parties an opportunity to negotiate a stipulation regarding delegation of the power of *talaq* to the wife. Clause 17 has created a scope for inserting any stipulation at the will of the parties to a marriage. In practice, the opportunity of inserting additional

3 Amira Mashhour, 'Islamic Law and Gender Equality— Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' (2005) 27 *Human Rights Quarterly* 562, 576; with reference to Patricia Kelly, 'Finding Common Ground: Islamic Values and Gender Equity in Reformed Personal Status Law in Tunisia', in *Shifting Boundaries in Marriage and Divorce in Muslim Communities* (Special Dossier 1, Women Living Under Muslim Laws, 1996) 88.

4 This term has been used by many modern authors to mean a unilateral divorce by the husband where the wife has not been found to be guilty of any fault.

stipulations under clause 17 is used in very rare cases. Probably, the reason behind this lack of interest to insert stipulations as per individual needs of the spouse is lack of knowledge of the common people about the contractual nature of the marriage. People generally treat the *'kabinnama'* as a formal document that merely registers a marriage.

Modern states have provided a formal deed of marriage for general convenience of the people. Even before the states provided the formal deed of marriage, a strong practice prevailed in some Muslim societies regarding negotiations of stipulations and concluding a marriage agreement at the end. For example, such a practice is found in Egyptian society even in the Ottoman period.

The contract of marriage prepared by the parties to marriage according to their individual needs was a much important document in Egypt. In describing the marriage contracts, Mona Zulficar summed up:

> One element introduced by Islamic law was the validation of individualized optional stipulations in the contract. Court archives in Egypt demonstrate that marriage contracts were concluded according to the principles of Shari`a during the Ottoman period, and that these contracts included additional substantive conditions. It was common for marriage contracts in towns and cities to include conditions restricting the husband's right to take a second wife and providing for the wife's right to compensation, divorce, or both in case of breach of this undertaking or mistreatment. Contracts included the husband's commitment to support his wife's children from a previous marriage and not to be absent or depart from his wife for longer than an agreed period of time. In case of breach by the husband, the wife could seek and obtain a divorce (*tatliq*, judicial divorce) from the Shari`a judge without forfeiting any of her financial rights and might also be entitled to damages if it were so provided in the marriage contract.[5]

Thus, an interesting phenomenon of Egyptian marriage system was to confer certain power of divorce to the wife in the marriage agreement. This practice is found in Egyptian society as back as in the 3rd century AH, which seems to be a form of *talaq-i-tafwid* or delegated divorce, where the wife was not required to relinquish her financial rights unlike in a *khul*. Sonbol commented:

> Comparing pre-modern contracts to those from the modern period shows how pre-modern women had much greater ability to negotiate marriage terms and thereby exert some control over their married lives. While both bride and groom could add conditions to the contract, they were more important to a bride, since a husband could get out of a marriage at any time, but a wife, to get out of a

5 Mona Zulficar, 'The Islamic Marriage Contract in Egypt' in Asifa Quraishi and Frank E Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Islamic Legal Studies Program-Harvard Law School, 1st ed, 2008) 231, 233-4.

> marriage, usually had to give up her delayed dower and alimony and sometimes had to pay compensation. However, if a husband were in "breach of contract" for breaking a condition included in the marriage contract, the wife could receive a divorce while preserving her financial rights, she could sue for enforcement of those conditions, or she could negotiate a new marriage contract after divorce (sometimes in court and sometimes out of court). In renegotiation, new conditions could be added, usually in answer to problems that had plagued the marriage.[6]

However, subsequently, the marriage contract got a formal legislative shape in 1920. The most recent standard format of a marriage contract was issued in 2000 by the Egyptian Minister of Justice,[7] which also provides a blank page to insert stipulations by the parties at their will. A marriage contract, thus, may contain different terms and conditions under which, especially, the rights of the wives would be more protected and the formal litigations on different matters could be avoided. Mona Zulficar gave the following examples of the conditions which can be inserted in a marriage contract:[8] ownership of the assets of the conjugal home, the conjugal home,[9] agreements to payments to the wife in case of divorce against her will, the wife's right to work, continuing education or travel, agreements not to take a second wife, the wife's right to divorce.[10]

6 Amira El-Azhary Sonbol, 'A Histroy of Marriage Contracts in Egypt', in Asifa Quraishi and Frank E Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Islamic Legal Studies Program- Harvard Law School, 1st ed, 2008), 87, 90. She also cited there extracts from a few contracts, for example: "[...] promised (wa-*sharat*, lit. "took as condition upon himself"] to his wife Aisha that he would fear God and treat her well and provide her a good life with him, as ordered by God and according to the *sunna* (example) of the Prophet, to hold with good treatment or to let go in peace (*al-imsak bi-maruf aw al-tasrih bi-ihsan*). He [also] added the condition (*sharata*) that if he were to take any other wife, then her [i.e., the new wife's] marriage (*uqdat al-nikah*, lit. "marriage knot") would be in the hands of Aisha [...] to divorce her [i.e., the second wife] whenever she wished her to be divorced.": at 94. She added that the 'conditions included in early contracts allowed women much greater control within the marriage than is seen in later Ottoman contract records.': at 94. She further said: 'Conditions included in these early contracts, like their pre-Islamic counterparts, mostly favoured the wife, guaranteeing her an honourable dissolution of the marriage if her husband does not abide by her general expectations as well as by specific requirements she considered necessary.': at 96.

7 Zulficar, above n 5, 252.

8 Ibid, 247-52.

9 A stipulation reserving the right of a divorced wife to use the conjugal home after the divorce takes place would better protect the interests of the divorced wives who become helpless after divorce.

10 Mona Zulficar said:

> A wife's right to delegated divorce (*isma*) is a legitimate right under the principle of Shari`a, and its inclusion in the marriage contract gives the wife the right to divorce herself before the marriage registrar, without recourse to the court. Moreover, it does not prejudice the husband's right to divorce, contrary to popular belief. The legal effect of this condition is to confirm equal rights of termination for both the husband and the wife. This is a natural

**Nature and types of stipulations:**

As regards the contents of stipulations, they may be of two different types:

1. Stipulations that reinforce the normal incidents of marriage
2. Stipulations that vary the normal incidents of marriage

**1. Stipulations that reinforce the normal incidents of marriage**: There may be some stipulations which do not make any change in the existing bundle of legal effects of a marriage; rather they just reinforce or set some parameters of those effects. For example, stipulation regarding the time of payment of dower or stipulation regarding amount of maintenance. There is no legal restriction in making such types of stipulations as they do not bring any change in the existing *sharia* scheme. The legal status of such stipulations is that they are valid.

**2. Stipulations that vary the normal incidents of marriage**: There may be some stipulations that bring some changes in the normal incidents of a marriage. For example, a stipulation regarding non-payment of dower or maintenance. It is one of the normal incidents of marriage that dower will payable in a marriage. However, if there is any stipulation that says that no dower will be payable in the marriage, then such stipulation will be termed as a stipulation that varied the normal incidents of a marriage. The legal status of a stipulation that clearly varies the normal incidents of a marriage is void. However, there may be some stipulations that become valid although they vary the normal incidents of a marriage. For example, it is one of the normal incidents of a marriage that the wife will reside with the husband wherever the husband lives. But, if any stipulation is inserted in a contract of marriage that says that the husband will settle in a specific city and the wife will not be obliged to live with the husband except in that city, then such stipulation is valid and the husband cannot subsequently compel her to live in a different city. Thus, there are incidents of a marriage that can be varied and there are certain other incidents which cannot be varied. There may be another type of stipulation (which varies normal incidents of marriage) which is not only void rather that has an invalidating effect on the whole marriage, which is discussed below.
As regards legal validity, stipulations may be of three types:

1. Valid.
2. Void.
3. Invalidating.

reflection of the contractual nature of the marriage contract. If a contract is concluded based on mutual consent, it is natural to require termination by mutual consent or provide for a unilateral right of termination by either party. In addition, including this condition in the marriage contract would save the wife lengthy, costly, and strenuous procedures before the court—which could continue for as long as seven or eight years without success—or alternatively would save her the loss of her financial rights to deferred dower and financial maintenance as in the case of *khul`*.

Zulficar, above n 5, 252.

1. Valid stipulation: Valid stipulations are those which reinforce *sharia* obligations or are not contrary to *sharia* principles. For example, fixing a date for payment of dower, fixing the amount and scale of maintenance of the wife, delegating divorce power to the wife. A valid stipulation is binding and there is no controversy about the enforcement of a valid stipulation.[11]
2. Void stipulations: They are those which are contrary to *sharia* or vary such incidents of a marriage which cannot be varied. A stipulation that cancels a right granted by the *sharia* is a good example of void stipulation. For example, stipulations regarding non-payment of dower or maintenance. A stipulation to do anything that is prohibited by *sharia* or to abstain from doing anything that is compulsory to do under *sharia* also falls in this category. In case of a void stipulation, the marriage will remain valid except the stipulation. For example,[12] article 47 of the Moroccan Family Code (Moudawana), 2004 said:

> All stipulations are binding except stipulations that contradict the terms and objectives of the marriage contract and legal rules; these stipulations are void while the contract remains valid.

3. Invalidating stipulations: An invalidating stipulation is void in itself and that also makes the whole contract void. Thus, this is not only a void condition; it at the same time has an invalidating impact on the contract of marriage. For example, a stipulation regarding duration of a marriage—if a marriage is constituted with a stipulation that the marriage is for 2 days or two months or two years, the stipulation is void and consequently the whole contract of marriage will be void.[13] Sudanese law clearly mentioned that a stipulation prescribing a particular 'time limit' will invalidate the marriage.[14]

11 For example Article 40(3) of the Kuwaiti family law of 1984 says: 'If it is accompanied by a stipulation that does not conflict with its basis or its requirements and is not forbidden in law, then the stipulation is valid and must be fulfilled. If it is not fulfilled then the person who made the stipulation has the right to seek judicial dissolution (faskh).' Qatar adopted the same law in 2006.

12 Article 40(2) of the Kuwaiti family law of 1984 says: 'If it is accompanied by a stipulation that does not conflict with its basis, but conflicts with its requirements, or is forbidden in law, then the stipulation is voided, and the contract is valid.' Qatar adopted the same law in 2006.

13 Article 40(1) of the Kuwaiti family law of 1984 says: 'If the contract of marriage is accompanied by a stipulation that conflicts with its basis, the contract is voided.'

14 Article 42(2) of the Sudanese family law of 1991 says: 'If the contract is accompanied by a stipulation that contradicts its purpose or intentions, then the stipulation is void and the contract valid, apart from the stipulation of a time limit which voids the contract.'

**Stipulations in a marriage contract: opinions of different schools of law:**

Stipulation is an area that has not been elaborated either in the Qur'an or in *Hadith* clearly. This led the jurists to be divided into manifold opinions on different points regarding stipulations. Among the four *sunni* schools, Imam *Ahmad Bin Hanbal* is the most liberal one regarding the freedom of insertion of stipulations in a contract of marriage. All other Imams adopted restricted views in the matters regarding the possibility of changing the normal incidents of a marriage by inserting stipulations in a contract of marriage.

We may categorize some stipulations as controversial. They are the stipulations which will 'benefit the wife, but are neither prohibited, nor expressly allowed in Islam.'[15] It is termed as controversial because the *madhabs* differed sharply on the point of validity of such stipulations. For example, a stipulation that the husband will not take a second wife or that the husband will not compel his wife to live out of her matrimonial city. All *sunni* schools except the *Hanbali* treat such stipulations as invalid. The *Hanbali* school considers such stipulations, if are agreed by the parties to a marriage, as valid and completely binding.

The main argument of the majority opinion is a *Hadith* where the Prophet (PBUH) said: "Any stipulation that is not in the book of Allah (the Qur'a¯n) is void."[16] It is argued that '[t]he majority of scholars believe that the above-stated stipulations are not mentioned in the Qur'a¯n and are, therefore, not binding.'[17] In evaluating this argument, Munir concluded:

> Thus forbidden postulations are those that are expressly outlawed by the Holy Qur'a¯n. For instance, a man or a woman cannot stipulate that he or she will not have sexual relations with his or her spouse, or one put forward by a man trying to escape the obligation of maintaining his wife, and so on. Ibn Taymiyah (d. 728 A.H.) argues that something that is 'not in the book of Allah' implies that which is not expressly prohibited by the Qur'a¯n.[18] Thus things which are prohibited cannot be covenanted while mubah or permissible matters may be agreed upon and consequently they will be binding on both parties.[19]

15 Muhammad Munir, 'Stipulations in a Muslim Marriage Contract with Special Reference to talq al-tafwid provisions in Paksitan' (2005-2006) 12 *Yearbook of Islamic and Middle Eastern Law* 235, 237.

16 Abu 'Abd Allah Muhammad Ibn Isma'il al-Bukhari, *Al-Jami al-Sahih* (Maktabah Madaniyah), Vol 1, 1143-4, 1153–7, 1234, 1238–9.

17 Munir, above n 15, 237.

18 Taqi al-Din Ibn Taymiyah, *Al-Away 'id al-Rumania al-Fisheye* (Dar al-Narwhal al-Jeddah, 1980) 229.

19 Munir, above n 15, 240.

Thus, there is no harm in inserting a stipulation that is not clearly forbidden in Islam. There are some Quranic authorities in favour of the opinion of Imam *Ahmad ibn Hanbal*:

> The Holy Qur'a¯n states: "O you who believe abide by your contracts".[20] Abu Bakr al-Jassas al-Razi (d. 370 A.H.) quotes on the authority of 'Abdullah ibn 'Abbas, Mujahid, Ibn Jurayj, Abu 'Ubaydah and others that the Qur'a¯nic word Uqud mentioned in the above verse means promises and agreements,[21] including those stipulations put forward at the time of nikah. He argues that any condition that a person promises to fulfil in the future is binding.[22] This verse, being the basis of all contracts, prevails and therefore all obligations, when undertaken, should be carried out accordingly. The Hanbalis regard the above verse as the basis of the law of contract, thereby invoking the principles of both freedom of contract and *pacta sunt servanda*. Another Qur'a¯nic verse that is cited to support this view is: "And fulfil every engagement, for it will be enquired into (on the day of the Reckoning)" (27:34). These arguments are further supported by the following verse, "And fulfil the covenant of Allah when you have covenanted."[23] According to Qurtubi, 'ahd' mentioned above denotes 'common', encompassing any promises and commitments that person makes, whether it concerns business, relationships or anything else that is allowed in religion.[24]

The established practice of the companions of the Prophet (PBUH) is also a strong argument in favour of *Hanbali* opinion:

> 'Abd al-Rahman ibn Ghunaym narrates that a couple came to 'Umar (the second Caliph) in his presence, and woman complained that her husband, having agreed at the time of their *nikah* to keep her in her paternal home, should now abide by it and not take her out of there. 'Umar consequently ruled in her favour.[25] (It should be noted that this event took place in Madinah and no Companion had objected to it, so it is considered *Ijma'* as well.)[26]

It is argued that the adoption of *Hanbali* opinion instead of accepting the opinions of other Imams would make the relevant law more reasonable, especially for women who could improve their status utilizing the

20 Qur'a¯n, 5:1.

21 Abu Bakr al-Jassas, *Ahkam al-Qur'a¯n* (Matba' at Awqaf al-Islamiyah, 1916) vol 3, 283–4.

22 Ibid, 285.

23 Qur'a¯n, 16:91.

24 Qurtubi, *Ahkam al-Qur'a¯n*, vol 6, 32.

25 Abu 'Isa Muhammad ibn 'Isa al-Tirmidhi, *Sunan* (Maktabah madaniyah) vol 1, 347.

26 Munir, above n 15, 239.

opportunity to insert some stipulations in their marriage contracts. In justifying this opinion, Amira argued:

> It is odd that today Muslim revivalist groups use interpretations of law from various medieval legal schools (sing. *Madhhab*, pl. *Madhahib*) as if they constitute "the" sharia, unchanged and unaltered. This is odd because even though pre-modern qadis practicing in Sharia courts belonged to various *madhahib*, they considered the *madhhab* to which they belonged as a guide, and not as providing the ultimate ruling. ... Today, however, conservative traditional practices and existing personal status laws are being defined as "Islamic" and discussions are confined within *fiqh* discourses.[27]

It is worth mentioning here that even the stipulations about which there is no controversy they are also usually not inserted in the marriage contract due to lack of awareness of women about their rights in a patriarchal form of society. For example, the provision for wealth management or compensation to be paid by the husband in case of a 'no-fault divorce' pronounced by the husband.

**A brief review of different countries' statutory laws regarding stipulations in a marriage contract**

The first codified provision regarding stipulation is found in Turkey, which was enacted in 1917. Section 38 of the Ottoman Law of Family Rights provides:[28]

> Where a woman stipulates with the husband that he would not marry another wife and that if he does so she or the second wife would stand divorced, the contract of marriage shall be valid and the condition enforceable.

Thus, it appears that the above provision was about one specific stipulation regarding prohibiting the husband's right to polygamous marriage, in contravention of which either of the two marriages will be void. However, the classical *Hanafi* jurists have not considered such a stipulation as valid. Because, it takes away a right of the husband allowed by the *sharia* and it irrationally imposes the possibility of divorce on the second wife. This law was subsequently abolished in Turkey, although such a provision still stands in Lebanon. In Morocco, the law of 1957 and 1958 incorporated such type of provision in a little bit different way, which said that in contravention of such a stipulation against the polygamous marriage, the wife will have the right to terminate the marriage.[29] According to article 40 of the

27 Sonbol, above n 6, 89.

28 This was repealed subsequently in Turkey.

29 Article 31 of the Moroccan Code of Personal Status (book 1 and 2 of Mudawwanah) of 1957 and 1958 has a similar provision: "A woman has a right to stipulate in the marriage contract that her husband should not take any co-wives, and that if the

Moroccan Family Code (*Moudawana*), 2004 polygamy is 'forbidden when the wife stipulates in the marriage contract that her husband will not take another wife.' Tunisian law of 1956 allows both spouses to insert lawful stipulations contravention of which 'will give rise to the possibility of a petition for dissolution through *talaq*.'[30]

Article 19 of the Jordanian law of 1976[31] declared a marriage stipulation to be valid on satisfaction of four conditions: (i) that the stipulation is of benefit to one of the parties, (ii) that is not inconsistent with the intention of marriage, (iii) that does not impose something unlawful and (iv) that is registered in the contract document. Jordanian law thus openly declared that both husband and wife can take the advantage of inserting some additional stipulations within the legal framework.

In particular, article 19(1) has elaborated wife's right to insert stipulations. It says that any beneficial stipulation for a wife, which does not violate either law or the right of the other, is valid, and enforceable. If the husband does not fulfil any of those stipulations, the contract of marriage will be dissolved on the application made by the wife and the wife will get all matrimonial rights. The law has provided a few examples of such enforceable stipulations: he shall not remove her from her own city, shall not contract a polygamous marriage, delegation of power of *talaq* to the wife. It is not clear whether she can stipulate regarding doing a job after the marriage. But, article 19(2) clearly mentioned that the husband will be able to insert

husband does not comply with that to which he has bound himself, the wife shall have the right to demand that the marriage be terminated."

30 Article 11 of the 1956 law.

31 Article 19 of *the Jordanian law of Personal Status No 61 (1976)*: If a condition is stipulated in the contract that is of benefit to one of the parties, is not inconsistent with the intentions of marriage, does not impose something unlawful and is registered in the contract document, it shall be observed in accordance with the following:

1) if the wife stipulates something to the husband that brings her a benefit that is lawful and does not infringe upon the right of the other, such as if she stipulates that he shall not remove her from her [home] town, or shall not take another wife during their marriage, or that he shall delegate to her the power to divorce herself, this shall be a valid and binding condition, and if the husband does not fulfil it, the contract shall be dissolved at the application of the wife, and she may claim from him all her matrimonial rights;

2) if the husband stipulates to the wife a condition that brings him a lawful benefit and does not infringe upon the rights of the other, such as if he stipulates that she shall not go out to work, or that she shall live with him in the area in which he works, this shall be a valid and binding condition, and if the wife does not fulfil it, the contract shall be dissolved at the application of the husband and he shall be exempted from paying her deferred dower and maintenance during the idda period;

3) if the contract is constrained by a condition that contradicts the intentions of marriage or imposes something unlawful, such as if one of the spouses stipulates that the other shall not live with him/her, or that they shall not share marital intimacy, or that one of them shall drink alcohol, or shall break off relations with their parents, then the condition is void while the contract remains valid.

a stipulation regarding her abstinence to do any work outside home. It submitted that analysing both articles 19(1) and (2) it may be concluded that a wife also would be able to insert a stipulation that she will go out for work after the marriage.

It is interesting to note that the Jordanian law created a scope for a husband to insert some stipulations and if the wife violates any of those stipulations then the marriage will be dissolved on an application made by the husband where he will not have to pay the 'deferred dower' to his wife. This is a different type of statutory protection given to husband, by which a husband may evade paying a portion of the dower money to his wife. It is submitted that such a statute is controversial. Because, dower is the foremost legal effects of a marriage, which is payable after the marriage takes place. It is illogical to connect the payment of dower to the dissolution of a marriage by the husband. The Jordanian law of 1976 is an example by which a husband may enjoy an extra benefit of evading dower under the statutory protection in the name of violation of a 'stipulation' by the wife. It is worth mentioning here that a husband always reserves the right to divorce his wife for 'fault' or 'no-fault' on her part. Thus, it is a harsh law that deprives a divorced woman from getting her already established legal entitlement to some financial benefits.

The Syrian law of Personal Status (1975) incorporated general provisions on stipulation, which is different from the above countries in the sense that no stipulation can be inserted which restricts 'the freedom of the husband in his lawful personal affairs.' Other conditions are similar to Jordanian conditions.

In Algeria,[32] either of the parties may stipulate regarding wife's work after the marriage. Thus, a woman may reserve the right to do work after her marriage. Mauritanian law seems to be more elaborate for women, which expressly allowed women to insert stipulations regarding their work and study. Article 28 of the Mauritanian law of 2001 says:

> The wife may stipulate that her husband shall not marry another woman, that he shall not absent himself for more than a given period, that he shall not prevent her from pursuing her studies or from working as well as any other condition not contrary to the permanence of the marriage contract.

The wife may ask for a judicial dissolution on failure of the husband to comply with any condition totally partially. In addition she may sue for a 'gift of consolation (*muta'*) the value of which is at the discretion of the judge.'[33] The laws of UAE, Qatar and Kuwait have clearly mentioned all three types of stipulations: valid, void and invalidating.[34]

[32] According to article 19 of the law of 1984 as amended in 2005.

[33] Article 29 of the law of 2001.

[34] Qatar 2006: Article 53: If the contract of marriage is accompanied by a stipulation that contradicts its basis, the contract is voided. If it is accompanied by a stipulation

Islamic law generally recognized the concept personal ownership of one's own property. Thus, personal ownership of one's own property is not lost even upon a marriage. However, the contractual nature of marriage created a scope for negotiating the division of property during the continuance of marriage or on divorce. Since the husband can control the movement of the wife (including her option for doing work), it is a good opportunity for a wife to negotiate some proprietary rights on the husband's property. Such an arrangement would act as financial security in case of dissolution of the marriage. Deciding about the division of the property and their control at the time of marriage is generally known as 'deciding a property regime.'[35] There are some countries that have made statutory provisions regarding the 'property regime.' For example, the Moroccan Family Code (*Moudawana*), 2004, the new family code adopted in Morocco, included provision regarding stipulation on division of property between husband and wife. This is an

that does not contradict its basis but contradicts the requirements of the contract, or is forbidden in law, then the condition is voided, but the contract is valid. If it is accompanied by a stipulation that contradicts neither the basis nor the requirements of the contract, the stipulation is valid and shall be fulfilled. If it is not fulfilled, the person who made the stipulation has the right to seek judicial dissolution. Article 54: The right of judicial dissolution lapses if the one so entitled waives it explicitly or implicitly.

Kuwait 1984: Article 40(1) If the contract of marriage is accompanied by a stipulation that conflicts with

its basis, the contract is voided. (2) If it is accompanied by a stipulation that does not conflict with its basis, but conflicts with its requirements, or is forbidden in law, then the stipulation is voided, and the contract is valid. (3) If it is accompanied by a stipulation that does not conflict with its basis or its requirements and is not forbidden in law, then the stipulation is valid and must be fulfilled. If it is not fulfilled then the person who made the stipulation has the right to seek judicial dissolution (faskh).

UAE: Article 20: (1) Spouses shall fulfil their stipulations, apart from a stipulation that makes what is prohibited (haram) lawful (halal) or makes lawful what is prohibited. (2) If a stipulation is made that contradicts the basis of the contract of marriage, the contract is voided. (3) If the stipulation does not conflict with the basis of the contract but conflicts with its requirements or is prohibited by law, then the stipulation is voided, and the contract is valid. (4) If a stipulation is made that does not conflict with the basis of the contract nor with its requirements, and is not prohibited by law, then the stipulation is valid and shall be fulfilled. If the person to whom the stipulation is made violates it, then the person who made the stipulation is entitled to seek judicial dissolution, whether this be from the side of the wife or the husband; the husband shall be exempt from paying the maintenance for the idda period if the violation is from the part of the wife. (5) If one of the spouses stipulates that the other shall have a particular quality and the opposite transpires, then the person who made the stipulation shall be entitled to seek judicial dissolution. (6) In the event of denial, no stipulation shall be considered unless it is written in the documented contract of marriage. (7) The right of dissolution lapses if waived by the person so entitled, or by explicit or implicit consent to the violation. The passage of one year after the occurrence of the violation with the stipulating party's knowledge thereof shall be considered implicit consent, and similarly with [the right to] final talaq.

35 <http://muslimmarriagecontract.org/familylaws.html>.

important stipulation by which a wife can reserve a right to her husband's property even if divorce takes place. Article 49 of the 2004 Code says:

> Each of the two spouses has an estate separate from the other. However, the two spouses may, under the framework of the management of assets to be acquired during the marriage, agree on their investment and distribution.
>
> This agreement is indicated in a written document separate from the marriage contract.
>
> The Adouls (public notaries) inform the two parties of these provisions at the time of the marriage.
>
> In the absence of such an agreement, recourse is made to general standards of evidence, while taking into consideration the work of each spouse, the efforts made as well as the responsibilities assumed in the development of the family assets.

One remarkable feature of the present Moroccan law is that it directed the public notaries to inform the spouses that the law has given them a scope to decide about the 'property regime.' This information to be provided in the marriage ceremony serves an important purpose: the ignorant spouses will be able to know that they got this option legally, and it will act as a good reminder for them who knew about that. In Iran, '[t]he standard marriage contract includes an optional clause stating that wealth accumulated during the marriage will be divided in half on divorce.'[36] The laws of Philippines, Cameroon and Senegal also provided a scope for deciding 'property regime' by the parties, in the absence of which settlement the statutes provided some specific guidelines for distribution of the matrimonial property.[37] Tunisian law also allowed stipulations regarding both person and property, on contravention of which the other party can apply for dissolution of marriage.[38] Turkish law has given an option to the spouses to settle the 'property regime' and has provided an option to choose anyone from three different options.[39]

36 *Knowing Our Rights: Women, family, laws and customs in the Muslim world* (Women Living Under Muslim Laws, 3rd ed, 2006) 326.

37 Ibid.

38 The Code of Personal Status (CPS), adopted in 1956 and came into force in 1957.

39 Turkey: Under A. 186-237 of the CC, a couple has the option of choosing between three different property regimes upon marriage: separation of goods (each party owns the goods and property that are registered in his/her name prior to and throughout the course of the marriage), union of goods (all goods and property owned by each party prior to and during the marriage are considered joint property of the couple); aggregation of goods (through a prenuptial agreement both parties decide upon which goods will constitute the joint property of the couple). Under A. 170, where a couple has not specified a property regime applicable to their marriage union, they are automatically considered to have accepted the separation of goods property regime.

Knowing Our Rights, above n 36, 173.

**Utility of stipulations in a contract of marriage: a mechanism to improve the status of women**

The scope for inserting stipulations is more important for women than men. In most of the areas, a husband, in contrast to a wife, enjoys absolute and superior power. If a wife wants to make any change in the existing scheme of husband dominated system, she can take the opportunity by inserting stipulations in her contract of marriage. For example, if it is inserted in the marriage contract that the husband will permit her to engage in legal profession, then the husband cannot prohibit her after their marriage to engage in the legal profession. Otherwise, husband could exercise his power to prohibit her to doing the job. Because, a husband acquires a right to control the movement of his wife and the wife must be obedient to her husband. Thus, the scope for inserting stipulations is a great opportunity for women to protect their interests against the excessive power of husbands under the *sharia* law. Thus, *Nasir* rightly commented: 'Within the framework of spousal relations, special stipulations may seek to clarify or modify the parameters of the wife's duty of obedience, or to expand the obligations on the husband.' One such important stipulation is regarding division of property acquired during the marital life. For example, a wife may stipulate that in case the marriage is dissolved by the husband unilaterally without any fault on her part, the wife will get a portion of the property of the husband acquired during their marital life. Such a stipulation, although does not violate the traditional *sharia* law, can protect the financial interests of women who are divorced without any fault on their parts.

**Statutory laws regarding 'stipulations' in Bangladesh**

In Bangladesh, there is no statutory provision on stipulations. However, in the standard marriage contract form[40] (which is known as *kabinnama*) there is a scope for insertion of some stipulations. The relevant clauses merely provided to insert stipulations without mentioning any other provision on validity or invalidity of stipulations. The *kabinnama* is also is totally silent about the effect of contravention of those stipulations. Columns 18 of the *kabinnama* is about delegation of power of *talaq* by the husband to his wife and column 19 is about whether husband's power of *talaq* has been curtailed in any way. Column 20 is about whether any deed has been made relating to dower, maintenance, wife's allowance, etc. Column 17 is the place where both parties may insert stipulations, which says: 'Description of special conditions, if there is any'.

The reality in Bangladesh is that people are generally not aware about the scope of insertion of stipulation in the column 17. The matter of stipulations is not a much focused issue in Bangladesh even among the lawyers. In the light of the statutes made in different countries, Bangladesh should make some statutory provisions regarding stipulations in a contract of marriage. For example, a statute should be passed which will include, inter alia, the following: option for insertion of stipulations, conditions for valid

40 *The Muslim Marriages and Divorces (Registration) Rules 1975*, form E.

stipulations, criteria for stipulations to be void, impact of void stipulations, legal effect of contravention of a valid stipulation, scope of stipulations by husband and wife and examples of a few stipulations in order to make the theories clear. In addition, considering the socio-economic condition and the general needs of the women in Bangladesh, the government should prepare an optional list of stipulations which will be accompanied with the '*kabinnama*' as an annexure. At the same time, the *Kazi* or the marriage registrar should be directed to readout the document with a reminder to the parties that they can insert some stipulations if they like. I am recommending the following matters, inter alia, to include in such a list of stipulations:

- Stipulation regarding dower: It will include the mode of payment of dower and the time for payment of deferred dower.
- Stipulation regarding rights and obligations: It may include, inter alia, the requirement of mutual consultation regarding all family affairs including fixing a location for residence, sharing household activities and taking care of the children.
- Stipulation regarding work: The wife may reserve her right to be allowed to go out for work.
- Stipulation regarding study: That the husband will allow his wife to complete or continue her study.
- Stipulation regarding 'property regime': Stipulations regarding control and distribution of matrimonial property.
- Stipulation regarding polygamy: The wife may insert a stipulation that will restrict the husband to contract a polygamous marriage.
- Stipulation regarding power of divorce: Whether husband has given any power of divorce to his wife. At the same time whether husband's power of *talaq* has been restricted by some limitations.
- Stipulation regarding compensation on divorce: If the husband pronounces a 'no fault' divorce to his wife unilaterally, then the wife will entitled to get an amount of compensation.

**Conclusion**

Marriage in Islamic law is of contractual nature. This unique feature of Muslim law created a scope for insertion of stipulations in a contract of marriage. Islamic family law, generally speaking, granted more rights to a husband in contrast to a wife. However, Islamic law kept an option open for the parties to marriage to insert some stipulations. Thus, the opportunity to insert stipulations can be utilized more by women in order to limit their 'obedience' or expand their horizon of rights during their marital lives. Among all *madhabs*, the *Hanbali* seemed to be the most progressive. Many Muslim states adopted different statutory laws on stipulations. In the light of *Hanbali madhab* and modern statutes, it is possible to enact a suitable law regarding stipulations in Bangladesh, which would be able to better protect the rights of married women in Bangladesh. In a patriarchal form of society where women are generally neglected and do not enjoy real freedom and liberty even to enjoy their legal rights, it is preferred that instead of

completely leaving the matter of inserting stipulations on the discretion of the women, the state will provide a list of possible stipulations with the deed of marriage, from where a woman (to be wife) would be able to choose and insert stipulations of her own choice. This will also help to create social morality in favour of giving married women a real opportunity to improve their status even within the traditional *sharia* framework.

# The PRSP Process and Contents: A Rights-based Assessment for LDCs

**Quazi MH Supan***

The liberalisation of markets called for by stabilisation policies introduced by structural adjustment programmes (SAPs) under the guidance of the International Monetary Fund (IMF) and the World Bank (WB) often resulted in delays in growth.[1] To reduce the negative impacts of these delays, the IMF introduced an Enhanced Structural Adjustment Facility (ESAF) for poor countries in September 1987.[2] In November 1999 the Poverty Reduction and Growth Facility (PRGF) replaced the ESAF. The aim of the PRGF is to support programmes to strengthen substantially and in a sustainable manner balance of payments positions and to foster durable growth. At the same time, the Poverty Reduction Strategy Papers (PRSPs)[3] replaced the Policy Framework Papers (PFP) which underpinned ESAFs. National programmes for poverty reduction are the foundation for IMF and WB lending programmes and for HIPC debt relief.[4]

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1 These programmes were introduced in mid-1980s and the main objective was economic development which is essentially a tool for human development (HD) but may not contribute to HD.

2 ESAF enabled selected poor countries to received assistance over a period of up to 3 years with reimbursement stretched out over a period of 10 years, in contrast to its regular credits, which were to be repaid within one to two years.

3 PRSPs are documents whose preparation is mandatory for countries wishing to be considered for concessional lending and debt relief under the enhanced Highly Indebted Poor Countries (HPIC) Initiative. The Bretton Woods institutions have adopted the PRS as the primary tool for policy dialogue for *all* countries applying for concessional lending. Intended to cover a multi-year or three-year time frame, the PRS has replaced the Policy Framework Paper (PFP) as the guiding instrument for policy setting and resource allocation.

4 The principal objective of the Debt Initiative for the heavily indebted poor countries (HIPCs) is to bring the country's debt burden to sustainable levels, subject to satisfactory policy performance, so as to ensure that adjustment and reform efforts are not put at risk by continued high debt and debt service burdens. In 1996 the World Bank and the International Monetary Fund first suggested that a group of Heavily Indebted Poor Countries (HIPC for short) should receive debt relief within the framework of a programme called the HIPC Initiative. It should apply to all forms of debt: bilateral debt with foreign governments, multilateral debt with international financial institutions (especially the IMF and the World Bank) and debt with private banks. In June 1999 the "Cologne Debt Initiative" (HIPC II) called for a noticeable broadening of the terms of the HIPC Initiative. At that Economic Summit, the G7 countries decided to lower the debt sustainability level. On a medium-term basis, up to 36 countries would benefit from debt relief. Proposals were also made to reform the conditions governing debt relief. It was decided that relief was to be granted only if the debtor countries worked out poverty reduction strategies. Governments were expected to involve their civil societies in formulating these strategies.

HIPC and PRGF countries are required to produce a PRSP before they can seek new programme support from the IMF or the World Bank. The Boards of the IMF and the Bank must approve a country's PRSP before a lending programme is agreed with the Bank and Fund. The Boards of the IMF and the Bank accept a PRSP on the basis of a coherent policy strategy, which will be assessed jointly by the Bank and Fund staff in terms of its objectives and policy content. Further, the Boards are required to review the extent to which Governments have consulted with civil society and how governance issues will be addressed.

There are five core principles underlying the development and implementation of poverty reduction strategies. The strategies should be:[5]

- country-driven — involving broad-based participation by civil society and the private sector in all operational steps;
- results-oriented — focusing on outcomes that would benefit the poor;
- comprehensive in recognizing the multidimensional nature of poverty;
- partnership-oriented — involving coordinated participation of development partners (bilateral, multilateral, and non-governmental);
- based on a long-term perspective for poverty reduction.

This article examines the PRSP process and contents from a rights-based perspective. In doing so I will select the rights-based features to assess the PRSP process and examine the PRSP process in light of the selected features and then I will examine the contents of the PRSPs from a rights-based perspective. In this regard, I have examined the PRSP process and contents of four African LDCs[6] namely, Malawi, Mozambique, Rwanda and Tanzania – of these Malawi and Rwanda have reached decision point and Mozambique and Tanzania have reached completion point.[7]

[5] World Bank <http://www.worldbank.org/poverty/strategies/overview.htm> accessed 31 August 2010.

[6] The list of least developed countries (LDCs), which is reviewed every three years by the Economic and Social Council (ECOSOC), refers to forty-nine specific countries. These are the poorest and weakest members of the international community, characterized by a series of vulnerabilities in terms of access to services and resources, an acute vulnerability to external 'economic shocks', as well as man-made and natural disasters. The criteria for determining the list of LDCs are under review. The Committee for Development Policy has recommended that the Economic Diversification Index be replaced by an Economic Vulnerability Index reflecting the main external shocks to which many low-income countries are subject, and incorporating the main structural elements of the countries' exposure to the shocks, including their smallness and lack of diversification.

[7] A total of 42 countries are considered HIPCs of which 32 countries are LDCs. Nineteen LDCs have reached the decision point under the enhanced HIPC initiative (i.e., have

**The Yardstick**

The UNCHR defines a rights-based approach to development as 'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights."[8] It further adds:

> Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.
>
> The norms and standards are those contained in the wealth of international treaties and declarations. The principles include equality and equity, accountability, empowerment and participation. A rights-based approach to development includes the following elements:
>
> - express linkage to rights
> - accountability
> - empowerment
> - participation
> - non-discrimination and attention to vulnerable groups.[9]

Elementarily, the same view has been expressed in a plethora of literature.[10] The recent debate of the RB approach is centred on the right to development. The RB approach is spearheaded by the UN and the UN agencies are deeply divided regarding the right to development.[11] Despite this division the basic features of a rights-based poverty reduction strategy has been summarised

been approved for debt relief): Benin, Burkina Faso, Chad, Ethiopia, The Gambia, Guinea, Guinea Bissau, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tomé & Principe, Senegal, Tanzania, Uganda, and Zambia. To date, three of these countries (Mozambique, Tanzania, and Uganda) have reached completion point, or the point at which the full amount of committed debt relief is given.

8 UNCHR <www.unchr.org> accessed 18 August 2006.

9 Ibid.

10 For example, see Philip Alston, 'What's in a Name: Does it Really Matter if Development Policies Refer to Goals, Ideals or Human Rights?' in Henny Helmich and Elena Borghese (eds), *Human Rights in Development Co-operation* (Utrecht, 1998); Julia Hausermann, *A Human Rights Approach to Development, Rights and Humanity* (1998); The Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance* (1995).

11 Such division is evident from various UN documents; for example, compare the Reports of the independent expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with various Commission resolutions and OHCHR, Human Rights and Poverty Reduction: A Conceptual Framework, United Nations, New York and Geneva, 2004.

in two different UN documents – one[12] is based on the right to development and the other[13] is independent of the RTD. In his RTD-DC approach, the UN independent expert on the right to development, Arjun Sengupta, proposes four basic operational elements: [14]

(a) A rights-based development programme – A development approach and policy prescription that is rights based implies a process that is equitable, non-discriminatory, participatory, accountable and transparent. Equity (or diminishing disparities) is an overarching theme in the right to development, and equity with respect to growth of resources (including GDP, technology and institutions) is central to the RTD-DC approach.

(b) Poverty reduction and social indicator targets – This requires identifying appropriate indicators and benchmarks to monitor the status of realization of each of the rights, as well as a mechanism for evaluating the interaction among the indicators.[15]

(c) Development compacts – A mechanism for ensuring that all stakeholders recognize the mutuality of obligations, so that the obligations of developing countries to carry out rights-based programmes are matched by reciprocal obligations of the international community to cooperate to enable the implementation of the programmes.

(d) Monitoring mechanism – A mechanism to monitor the implementation of the right to development.

On the other hand the basic features of the RB approach are Empowerment of the poor, explicit recognition of national and international human rights normative framework, Accountability, Non-discrimination and equality and participation.[16]

Among these features, I will select only the common features of the model, i.e. explicit recognition of rights,[17] accountability, participation, non-

[12] Hereinafter referred to as RTD-DC (Right to Development – Development Compact) approach.

[13] Hereinafter referred to as RB (Rights-Based) approach.

[14] See Frameworks for Development Cooperation and the Right to Development, Fifth report of the independent expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2002/69.

[15] For elaborate discussion, see the Fourth report of the independent expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2001/9.

[16] See generally OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (United Nations, 2004).

[17] Since the RTD is a composite right, explicit recognition of normative human rights framework is inherent in the RTD-DC approach. See the first three Reports of the independent expert on the right to development, Mr. Arjun Sengupta submitted in accordance with various Commission resolutions.

discrimination and equality. For both these models other human rights are also important for any poverty reduction strategy

**The PRSP Process**

The only common element between the basic features of the RB approach and PRSP approach is participation. The other core features of the PRSP approach are of course helpful for the RB approach, but explicit recognition of national and international human rights normative framework, accountability, empowerment of the poor and non-discrimination and equality are missing from the official features of the PRSP approach. It is relevant to examine the PRSP approach in the light of the basic features of the RB approach.

**Explicit Recognition of Rights and Accountability**

Both the World Bank and International Monetary Fund are creations of international law and they also create international law by signing binding agreements with countries. And as such these institutions are under certain international legal obligations.[18] Among these obligations, one particular obligation is very pertinent for the purpose of this article, i.e., the obligations of these institutions under international human rights law in formulating and implementing poverty reduction strategies. This is very important because:

> The essential idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in the international law of human rights. Whether explicit or implicit, norms and values shape policies and institutions. The human rights approach offers an explicit normative framework – that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies.[19]

The development discourse of the World Bank has changed over time. The World Bank, which was known for its single-minded preoccupation with economic growth, began to demonstrate its support for sustainable development in the late 1980s.[20] In the early 1990s the Bank realized for

[18] This is an emerging debate; for a current state of the debate, see generally, Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law* (Oxford, 2003).

[19] OHCHR, Human Rights and Poverty Reduction: A Conceptual Framework, (United Nations, 2004) 33.

[20] World Commission on Environment and Development, Our Common Future, Oxford University Press, 1987: the Commission's report emphasized that empowering people's organizations and strengthening local democracy are indispensable to sustainable development.

the first time the need for popular participation in development and at the end of the decade it recognized that sustainable development is impossible without the protection of human rights.[21] The development of the social and environmental policy framework at the World Bank was an important step in moving the institution toward a rights-based approach to development, greater accountability, and the goal of sustainable development. Despite these realizations, the Bank is still firm on its untenable position of dividing civil and political rights and economic, social and cultural rights – interdependence and indivisibility of both sets of rights constitutes one of the fundamental concepts of the RB approach.

During the Cold War era the World Bank maintained a strict separation between economics and politics, in other words, between civil and political rights and economic, social and cultural rights. There are several reasons behind Bank's position. Firstly, in the early years of Cold War, the Bank focused on consolidating its credibility as a multinational financial institution.[22] Secondly, the Bank preferred to facilitate the acquiescence of the USSR to the Bretton Woods institutions than to involve in political affairs.[23] Thirdly, the division is inherent in the Article of Agreement.

The World Bank Articles of Agreement read:

> The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.[24]

In line with its Articles of Agreement, the Bank clarifies its position:

> Except in situations where the violation of human rights has created conditions hostile to effective implementation of projects or has other adverse economic consequences, or where there are

21 World Bank, *Development and Human Rights: The Role of the World Bank* (1998).

22 David Gillies, 'Human Rights, Democracy and Good Governance: Stretching the World Bank's Policy Frontiers' in Jo Marie Griesgraber and Bernhard G Gunter (eds), *The World Bank: Lending on a Global Scale* (1996) 119.

23 Henry J Bittermann, 'Negotiation of the Articles of Agreement of the International Bank for Reconstruction and Development' (1971) 5 *International Lawyer* 59, 79.

24 World Bank Articles of Agreement, art. IV, sec. 10 (as amended Feb. 16, 1989). There is an argument that the political prohibition originated with John Maynard Keynes and the British delegation, in part, as a result of Britain's concern for post-war economic sovereignty. The United States, the dominant party in the negotiations, may have agreed to this provision in the Articles of Agreement for the International Bank for Reconstruction and Development (IBRD) in order to placate the British, since it had advocated against a similar prohibition in the founding provisions of the International Monetary Fund (IMF). See John D Ciorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement' (2000) 33 Cornell International Law Journal 331, 365, 366.

> international obligations relevant to the Bank, such as those mandated by binding decisions of the U.N. Security Council, the World Bank does not take into account the political dimensions of human rights in its lending decisions...[25]

And 'the focus of the Bank's efforts in the area of human rights is on those rights that are economic and social in nature.'[26] From a rights-based perspective this position is questionable. As I have mentioned earlier the only common feature of the RB and PRSP approach is participation – and the right to participation is a political right. Furthermore, in the recent time the Bank is focussing on good governance, corruption, rule of law – these issues are all political in nature and call for CP rights.[27]

From this background the absence of explicit recognition of national and international human rights normative framework in the PRSP approach is easily understandable. Such a recognition is absent in the PRSP Source Book and also in the guidelines and consequently it does not appear in either of the selected PRSPs, i.e., PRSPs of Malawi, Rwanda, Mozambique and Tanzania.

Accountability derives from obligations. One way of accepting obligations is recognition of human rights. In the absence of explicit recognition of human rights there is no guarantee of accountability to hold the Governments or the Bank for the possible perverse effects of the process.

**Participation**

The World Bank defines participation as a 'process by which stakeholders influence and share control over priority setting, policymaking, resource allocations, and/or program implementation.'[28] The Bank does not define participation as a right linking it to other relevant rights without which participation becomes ineffective and meaningless, e.g., right to information, freedom of expression, etc. On the other hand the RB approach requires an active and informed participation of the poor in the formulation, implementation and monitoring of poverty reduction strategies. This approach identifies the right to participation as a crucial and complex human right which is linked to other rights:

> The enjoyment of the right to participate is deeply dependent on the realization of other human rights. For example, if the poor are to participate meaningfully in PRSs, they must be free to organize

[25] World Bank, *Governance: The World Bank's Experience* (1994) 53.

[26] Ibid.

[27] For detailed discussion, see, Dana L Clark, 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 (Spring) *Harvard Human Rights Journal*; see also, Korinna Horta, 'Rhetoric and Reality: Human Rights and the World Bank' (2002) 15 (Spring) *Harvard Human Rights Journal* 227.

[28] World Bank, *Source Book for Poverty Reduction Strategies* (2002) 237.

> without restriction (right of association), to meet without impediment (right of assembly), and to say what they want without intimidation (freedom of expression); they must know the relevant facts (right to information) and they must enjoy an elementary level of economic security and well-being (right to a reasonable standard of living and associated rights).

The RB approach links the right to participation fundamental democratic principles. Thus the RB approach refers to democratic participation. Most importantly, it asserts that such participation cannot be hurried.

And the expected participants are:[29]

(1) The general public, particularly the poor and vulnerable groups;

(2) The government, including parliament, local government, line and central ministries;

(3) Civil Society Organisations such as NGOs, community-based organisations; trade unions and guilds, academic institutions;

(4) Private sector actors such as professional associations;

(5) Donors, both bilateral and multilateral.

An examination of the participation trends in the PRSP process of four African LDCs reveals that various factors hindered participation. These include hurried process of participation, secrecy and exclusion.

**Malawi**

Good governance, Decentralisation, Macro-economic Stability, Safety Nets, Taxation, Public Expenditure, Credit, HIV/AIDS, Gender and Empowerment, Infrastructure and Environment were considered to have serious implication for poverty reduction but these factors did not have much civil society input. In the thematic working group drafting team, none of the Civil Society was involved and they were denied access to drafts. Though civil societies are believed to be partners in the process, they were forced to play a submissive role.

The final PRSP was drafted by the Technical Committee alone without any representation of the civil society. Despite appeals from the civil society, drafts were never made available. Information sharing in the PRSP process was one way – from civil society to the government. The process was mostly secretive and civil society had to hunt and smuggle information.[30]

Ordinary people's participation was supposed to happen through district-level workshops, but these workshops were dominated by elected local officials, government employees, traditional authorities, and influential people within the District. District Chief Executives were responsible for the

[29] Ibid, 250.

[30] MEJN, 'Position Paper on the status of PRSP and Civil Society involvement in Malawi' (Malawi Economic Justice Network, 4 September 2001).

list of invitees to the workshops, with no guidance from the central government to ensure good participation of ordinary people.[31]

**Mozambique**

The government of Mozambique understands participation in terms of information dissemination and consultation on prepared drafts rather than any more far-reaching involvement by non-government actors.[32] Thus the process was consultative rather than participatory in nature. Initial conditions in the Mozambique PRSP process were not favourable for a good quality participatory process. Consultation by government was limited and civil society lacked the capacity and expertise to set up its own process to compensate for limitations of the official process and consequently, civil society had little impact.[33]

The whole PRSP process was undoubtedly compromised by time pressure, self-imposed by the government; keen to access debt relief, rather than by the IFIs who were conscious that a rushed process would compromise quality. Many CSOs attended in the sectoral consultation meetings but those CSOs do not share the government's view that their attendance constituted participation in the PRSP. A range of provincial and central government officials attended the consultation meetings but it is not clear how many CS actors did. Information has been severely restricted throughout due to poor organisation and reluctance. The level of provincial CS's awareness was very low. No popular version or translations of key messages into local languages was produced.

**Rwanda**

In Rwanda, by contrast, the government made a strong effort to hear ordinary people's views. Existing indigenous participatory practices known as Ubedehe was incorporated into the PRSP process to achieve broad based participation. A large segment of the population participated in the National Poverty Assessment, a study involving 1,000 sectors (the second lowest organisational level) that included outreach to communities and households. The government also undertook a Policy Relevance Test in 38 out of 100 districts, in which 10,000 people participated in focus group discussions on the effectiveness of proposed policies.[34] Thus, in Rwanda, the PRS process was characterised by a relatively high level of participation

[31] Christian Aid, *Quality participation in poverty reduction strategies: Experiences from Malawi, Bolivia and Rwanda* (2002).

[32] Rosemary McGee and A Norton, 'Participation in Poverty reduction strategies: a synthesis of experience with participatory approaches to policy design, implementation and monitoring' (IDS Working Paper No 109, 2000).

[33] Rosemary McGee, Josh Levene and Alexandra Hughes, 'Assessing participation in poverty reduction strategy papers: a desk-based synthesis of experience in sub-Saharan Africa' (IDS Research Report No 52, 2000).

[34] E Bugingo, 'Missing the Mark? Participation in the PRSP process in Rwanda' (Christian Aid Research Report, 2002) <http://www.christianaid.org.uk/indepth/0212rwanda/rwanda.pdf.> (file with the author).

of ordinary people. The government explicitly tried to include the most excluded groups. Focus groups in the Policy Relevance Test were organised with attention to social stratifications, such as class, age, and gender. However, few people in rural areas participated.[35] Mutebi et al observed:

> In Rwanda, broad participation was achieved by incorporating existing indigenous participatory practices known as *Ubedehe* into the PRSP process. This involved a bottom- up approach to participatory design, the government targeting 9,000 *cellules* to produce public action priority rankings and community development plans, as well as a PPA and Policy Relevance Test to collect poor peoples' opinions on the relevance of sectoral policies Participation appears to have been largely home-grown as a result, with broad consensus that there was grassroots participation at most stages which has helped in the post-conflict reconciliation and peace-building process.[36]

International NGOs, national NGOs, trade unions, and some churches participated in the process. But religious organisations, rurally-based NGOs, peasants' associations and the informal sector were not fully involved.[37]

**Tanzania**

The perspective of Tanzanian NGOs, following presentations from the government, the World Bank and the IMF regarding the PRSP was that Tanzanian CSO involvement in the preparation of the PRSP was consultative but not participatory. One of the deficiencies of a consultative approach is that it does not give those being consulted fair time and adequate resources and space for presenting their views. And, too often issues and concerns voiced during the consultation have little impact.[38]

Throughout the PRSP processes, civil society organisations were demanding for more active involvement and participation in the process of both NGOs and communities. However, on the whole CSOs were involved in a superficial and half-handed manner. The government developed the document internally, while civil society organisations were involved in a separate process, convened by the Tanzania Coalition for Debt and Development (TCDD). At a later stage, the civil society working groups managed to participate in the sharing sessions in the documents already prepared by the government (the zonal workshops). Rather than having a joint-sharing process about the best way to merge the civil society and

35 Christian Aid, above n 31.

36 F Mutebi, S Stone and N Thin, 'Rwanda' [2003] (2) *Development Policy Review* 253-70 (italics in original).

37 Rosemary McGee, 'Assessing participation in poverty reduction strategy papers: a desk based synthesis of experience in sub-Saharan Africa' (IDS Research Report No 52, IDS, 2002).

38 TASOET, 'Summary of report from Tanzania Social and Economic Trust' (2003).

government inputs, the inputs prepared by the civil society organisations were simply sent to the government-led processes for integration. The consultation that was done was all in a rushed manner, not allowing for true dialogue, discussion, and debate. The latest stage, the National Workshop carried after the zonal workshops of the government process, involved NGOs to some extent, in that some NGOs were invited to comment at that workshop on all the topics in the strategy paper. Some of their inputs were very critical but ended there. They were not again called for their participation in the final drafting of the paper, although they had argued that the final process should include representatives of civil society organisations. In this way, civil society organisations were involved only at late stages of the process and did not truly participate in the process of preparing the poverty strategy paper for the United Republic of Tanzania.[39]

Thus, the participatory process in each of the four countries was marked by some form of exclusion. Ordinary people, and in particular excluded groups, faced the greatest difficulty in gaining access to the PRS processes in their countries. Each government made some attempts to facilitate the participation of excluded groups (notably women's groups), but the impact of these efforts was minimal. Civil society faced barriers to participation, and some kinds of CSOs were excluded, e.g. rural organisations and indigenous peoples' organisations.

In all the countries, ordinary people, excluded groups, and CSOs had a hard time participating in policy-making, but CSOs were more likely to contest their exclusion. If governments are serious about hearing the voices of ordinary people, they need to actively seek out those voices. An active civil society is helpful in bringing about a participatory process, but the expectations, political will, and actions of the central government have a far greater influence on the quality of the process. In the countries, participation was easier during the analysis and information-gathering stage of the policy cycle, and more difficult during policy formulation and implementation. Lack of time, language barriers, and poor information flows characterised the process in each country. But the most crucial barrier is lack of knowledge:

> [T]he majority of HIPC countries simply do not have the necessary up-to-date poverty data and the institutional and analytical capacity to undertake extensive poverty monitoring and integrate poverty reduction strategies into a macroeconomic framework. In the absence of this critical knowledge infrastructure, it is unrealistic to expect that these countries can come up with a consensus-based national poverty reduction framework.[40]

This participation of the stakeholders in the preparation of the PRSPs, though limited, does not necessarily mean the same is guaranteed in the

[39] TGNP, 'Discussion Paper' (2004).

[40] Fantu Cheru, *The Highly Indebted Poor Countries (HIPC) Initiative: a human rights assessment of the Poverty Reduction Strategy Papers (PRSP)* (ECOSOC, 2001).

implementation of the PRSPs. All these four PRSPs fail to produce any viable and effective mechanism for popular participation in the implementation levels.

Participation always works towards a goal - in this case, the production of a poverty reduction plan capable of gaining the approval of the IFIs. The process is thus designed by and for groups able to express their project in the technocratic language of planning and poverty. But few such groups exist. In most countries civil society organisations rooted in popular constituencies draw on history, culture, religion, place, group, interests and political ideology to build their programmes. Many are unable to both present themselves in liberal, technocratic terms and to truly represent their constituencies.

The PRPS is not only a strategy, it may also be described as a device which recognises participation to increase and legitimate the influence of IFIs on the governments and populations of the poor countries. Such participation can be manipulated to achieve the outcomes the facilitators want. This is evident from the fact that civil societies are always demanding for participation, but when they get an ample opportunity, they fail to raise a concerted voice against an extremely partial view of trade liberalization in the PRSPs.[41] If they succeed to incorporate a balanced trade policy into the PRSP, that will go against IFIs' template delaying, reducing or even vanishing the chance of debt relief.

Extensive participation has been introduced to increase national ownership of programmes. But the problem with ownership begins with the calculations which form the basis for relief decisions. These calculations are done exclusively by the staffs of the IMF and the World Bank. These calculations are extremely complex and the IMF and the World Bank entertain sole monopoly in the technical field. A CAFOD Policy Paper states:

> Given the complexity of the calculations required and the extreme importance of predictions for the evaluation of the need for relief, even relatively well-equipped players such as the German government are hardly in a position to make a critical assessment of the data presented. Aside from investigating certain key indicators, there is nothing they can do to arrive at a decision but consider the information presented by the World Bank and the IMF.[42]

Therefore, it is hard to imagine the LDCs will be able to take part in these procedures. Even if they are able to overcome their technical barriers, there is absolutely no provision for objections on the part of the debtors.

[41] This argument is only relevant to four LDCs I am examining, i.e. Malawi, Mozambique, Rwanda and Tanzania.

[42] CAFOD, 'A Joint Submission to the World Bank and IMF Review of HIPC and Debt Sustainability' (CAFOD Policy Paper, August 2002) <http://www.cafod.org.uk/policy/debtsustainability20020902.shtml>.

Since the PRSPs must be approved by the IMF and World Bank, they will never be fully nationally owned. The fact that they are being developed in the context of obtaining debt relief under the Highly Indebted Poor Countries initiative (HIPC) or PRGF loans means that in most cases their content reflects the priorities of the Bretton Woods Institutions. The role of the World Bank and the IMF as overseers of poverty reduction programmes in debtor countries is exclusive. They are accountable to none. Involvement of other UN bodies like UNDP, UNICEF, ILO and UNCTAD could ensure a balance to some extent. But that did not happen.

Real national ownership cannot happen under threat of conditionality. Fantu Cheru observes:

> Linking debt relief to the preparation of the PRSP removes the "autonomy" of countries to come up with a framework that clearly makes an explicit connection between macroeconomic policies and poverty reduction goals.[43]

And,

> Although there is no clear evidence that shows that the IMF and World Bank are directly dictating policies to HIPC countries, Governments know by experience what the two powerful institutions expect of them.[44]

**Non-discrimination and Equality and other Social protection issues**

The integration of human rights into anti-poverty strategies helps to ensure that vulnerable individuals and groups are treated on a non-discriminatory and equal basis and are not neglected.[45]

The phrase non-discrimination does not appear in any of these PRSPs. There is no provision relating to any form of discrimination in the Mozambique PRSP. Malawi, Rwanda and Tanzania PRSPs only talk about gender equality and discrimination against women.

Stringent macroeconomic goals are a prominent feature in these PRSP. But these issues are not integrated with broader social development goals. Fantu Cheru finds the answer to the disconnect between macroeconomic components and the poverty reduction goals in:

> [T]he unequal power relations between indebted countries and the institutions that manage the HIPC process, namely, the IMF and the World Bank. What is obvious from our analysis is that countries have tried to read too much into the minds of the IMF and the World Bank. The Governments of HIPC try to make their PRSP meet the lending criteria of the Fund and the Bank, and have thus put too

[43] Cheru, above n 40.

[44] Ibid.

[45] OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (OHCHR, United Nations, 2004) 17-18.

> much emphasis on macroeconomic considerations, fiscal reform and privatization measures to placate these powerful institutions, without thinking through how such policies impact on poverty reduction and in what context. At the end of the day, what matters the most to these Governments is that they get the badly needed cash flow from these institutions.[46]

In respect of overall orientation, these PRSPs follow the prescripts set out in the World Bank 1990 World Development Report. Though social protections issues are incorporated, e.g., gender, environment, HIV/Aids, education, the highest priority is given to economic growth to reduce poverty.

The growing emphasis on the importance of social protection in Washington is not reflected in these and PRSPs, suggesting that its role in poverty reduction is still understood, in the main, as limited and optional, rather than as an integral element. Furthermore, a substantial section of the PRSP sourcebook – a guidance manual on PRSP development – is devoted to social protection; but this area seems to be receiving so little systematic attention.[47]

Limited social service provision and coverage may therefore be ineffective in addressing the poverty situation. The most probable consequence is the continued reliance on user fees to finance social service provision. This tends to restrict access to services by the poor and to exacerbate poverty itself.

PRSP processes have considerable significance in the LDCs where children form both the bulk of the population and the majority of those that live below the poverty line. This means that the LDCs, children are the locus of poverty, and strategies that prioritise children's rights and target child poverty reduction ensure a bias towards pro-poor growth and development policies.

Although they do not specifically prioritise children, they do discuss a limited range of interventions that are directed towards reducing child poverty and improving children's future opportunities. These include measures to promote school attendance, to improve access to basic health services and better nutrition, and to raise family incomes or livelihoods. They also present some recognition of and support for particularly vulnerable groups of children. But a common feature is the absence of a gender and child-focused demographic and poverty information and analysis. This lack of child-focused information at the outset does not augur well for the prioritisation and implementation of pro-poor social development policies and interventions that favour all women and children and address their rights. For example the Rwanda PRSP admits:

[46] Cheru, above n 40.

[47] Rachel Marcus and John Wilkinson, *Whose Poverty Matters? Vulnerability, Social Protection and PRSPs* (Childhood Poverty Research and Policy Centre, 2004).

> The war and genocide left 85,000 child-headed households. Some of the children have since grown up or been absorbed into other households, but most of them still face a higher burden of responsibility and work than their peers.

But there is no mention about child labour. In fact there is no systematic presence of child, women, and indigenous people issues in these PRSPs.

Thus the statement of Alfredo Sfeir-Younis, Director of the World Bank Office in Geneva, does not reflect the reality when he says:[48]

> The World Bank is already making a major contribution to the implementation of the RTD and we are ready to continue to do so.

**Benefits from HIPC Initiative: Extent and Sustainability**

A growing body of literature suggests that debt relief is the most efficient and effective form of resource transfer with many indirect benefits for the macro economy, growth prospects, the prudential management of public resources, and development policy as a whole.

Debt relief minimises the unpredictability of aid flows. Many bilateral aid programmes are still bedevilled by problems of low stability and low predictability and high pro-cyclicality. Moreover the granting or withholding of aid tends to aggravate economic cycles. Empirical analyses by the IMF show that aid flows tend to be more volatile than fiscal revenue or output, and highly unpredictable. In one in five African countries there is a divergence of at least 30% between budgeted and actual spending – and this is exacerbated by fickle aid flows.[49] Debt relief on the other hand is highly predictable, stable and, therefore, can act as a counter-cyclical source of finance. As a result, debt relief helps low-income governments to strike a balance between meeting poverty reduction expenditure commitments, while striving to maintain fiscal stability. Debt relief is anti-inflationary. A recent IMF paper points to a strong correlation between higher levels of indebtedness and increased inflationary pressures.[50]

Debt relief spurs economic growth. There is a positive correlation between debt relief and domestic private savings and investment, as well as FDI.[51] Some African finance ministries and regional analysts suggest that high

[48] Alfredo Sfeir-Younis, 'The Right to Development: The Political Economy of Implementation' in *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development* (Franciscans International, 2003) 7, 19.

[49] S Feeny and M McGillivray, *Aid, Public Sector Fiscal Behaviour, and Developing Country Debt*; G Dijkstra and N Hermes, *The Instability of Debt Service Payments and Economic Growth: Is there a Case for Debt Relief*; Ales Bullit and Javier Hamann, *How Volatile and Unpredictable are aid flows and What Are the Policy Implications* (IMF, 2001).

[50] Carmen M Reinhart and Kenneth S Rogoff, *Africa: The Role of Price Stability and Currency Instability* (International Monetary Fund, 2004).

[51] Government of Tanzania, Private Capital Flows to Tanzania in 1999-2000, 2002 and Government of Uganda, Private Capital Flows to Uganda in 1999-2000, 2002.

levels of indebtedness lead to HIPC governments increasing their borrowing from domestic credit sources resulting in higher interest rates and the crowding out of local investors to affordable credit. Debt write-offs can relieve the pressure on domestic borrowing, increasing the availability, and reducing the cost, of domestic credit thereby acting as a spur to economic growth. On the other hand, there is little if any evidence of a positive interaction between aid flows and domestic investment and savings.[52] Debt relief acts as *de facto* budget support. According to a CAFOD Policy Paper:[53]

> By enhancing central government spending capacity, debt relief supports the development of locally owned government expenditure priorities and monitoring systems. In line with donors' emphasis on Medium Term Expenditure Frameworks, debt relief acts as an important boost for (some) donors' efforts to increase the predictability of flows and enhance coordination and common pool approaches. Where debt relief results in increases in national budgets, it facilitates a closer integration of budget management systems and an improved coordination between capital and recurrent expenditures. Aid, however, can distort the relationship between recurrent and capital spending. Some donors prefer to spend on tangible capital projects as opposed to meeting recurrent budgetary costs. Aid, unlike debt relief, can leave recipient governments cash poor and project rich.

Debt relief cuts down on transaction costs. Aid can tie up recipient governments' meagre administrative staff in endless negotiations, report writing and separate auditing procedures with an array of official donors. Some estimates suggest that officials can spend half their time on donor-related activities rather than on improving the delivery of public sector services and administration.[54]

Debt relief improves local accountability and good governance. Debt relief within the context of locally developed and owned Poverty Reduction Strategies has the added benefit of increasing, and sometimes even kick-starting, political participation in decision-making over the management and distribution of public resources. As development agencies, we have heard many of our partners in recipient countries express their frustration with national governments, and particularly with the official donor community, regarding their unwillingness to take seriously the inputs of a wider group of stakeholders in the design and implementation of national Poverty Reduction Strategies. Nevertheless, some have reported improved access to key decision-making processes and a rise in public accountability regarding the management of public finances.

[52] Ibrahim Elbadawi and Alan Gelb, 'Financing Africa's Development: Towards a Business Plan?' (Paper for AERC Policy Seminar, 2002).

[53] CAFOD, above n 42.

[54] World Bank, *Can Africa Reclaim the 21st Century* (2000) 45.

But these benefits are not taken for granted. The level and quality of benefits depend upon the soundness of the particular debt relief programme and its successful implementation. Again successful execution of any debt relief initiative depends on the effective applicability of the programme design. Any flaw and weakness in the conceptual basis and design will negate other benefits that might ensue from such initiatives. The SAPs are the best examples of such programmes where weak design and flawed conceptual basis frustrated their objectives.

Debt relief through HIPC Initiative has resulted in demonstrable social and economic gains for some eligible LDCs as the HIPC Initiative reduces the average debt service paid these countries by about one third. It has made possible for these countries to increase social spending, especially in the areas of education and health care and such expenditures are expected to increase from the previous levels.[55] Resources freed up from debt servicing have been used in new development programmes and economic progress in some LDCs. Examples includes:

- Mozambique has introduced a free immunisation programme for children;
- Governments of Malawi, Tanzania and Uganda have ended primary school fees. Elementary school attendance in Uganda has been tripled with debt savings. Benin has abolished user fees in rural areas.
- Mali, Mozambique and Senegal will be able to increase spending on HIV/AIDS prevention and treatment in an effort to slow the spread of infection.
- Uganda and Mozambique, among the early beneficiaries of debt relief and enhanced aid flows, have consistently sustained annual growth rates over 5%.
- The requirement to engage in a consultation process in designing Poverty Reduction Strategies has helped to increase the potential for poor people to influence national resource allocation processes.

These examples demonstrate that debt relief can generate additional resources that contribute to furthering human development. They also highlight the human cost of transferring limited public resources from governments in poor countries to creditors. However, these socio-economic gains under HIPC are by no means universal and, where they exist, they are limited and precarious. The HIP LDCs, as with all low-income countries, continue to face development challenges such as the spread of HIV/AIDS, low levels of literacy and poor nutrition, equipped with only scarce and highly vulnerable domestic resources. LDCs face development challenges equipped with only scarce and highly vulnerable resources. The fragile

[55] Lucia Hanmer and Ruth Shelton, 'Sustainable Debt: What has HIPC Delivered?' (August 2001).

economic and human conditions prevalent in these countries suggest that the benefits derived from limited amounts of debt relief are likely to be small or easily reversed.

The results of the enhanced HIPC initiative, as shown by the World Bank and IMF,[56] have been described as modest. According to a CAFOD Policy Paper:[57]

- Out of 20 HIPCs which have already reached HIPC decision point, 4 countries (Mali, Niger, Sierra Leone and Zambia) will have annual debt service payments due in 2003-2005 which will actually be higher than their annual debt services paid in 1998-2000.
- 3 LDCs will be paying almost as much in debt service payments as before HIPC (Ethiopia, Guinea-Bissau and Uganda).
- In 6 countries, annual debts serviced will be reduced by a modest $15 million in 2003-2005.
- The medium to longer term projections on debt servicing are also alarming - Senegal's debt service jumps by 61 per cent in 2004; Nicaragua's rises by 60 per cent in 2002; Mauritania's rises by 46 per cent in 2007.
- Over half of the HIPCs are spending more than 15% of their government revenue on debt servicing.

Debt relief does not occur immediately. Depending on the relief method chosen, debt relief is implemented over as long as 30-40 year periods. Therefore Board papers' assertion that debt sustainability will be reached on Completion Point may give a wrong idea over the time at which countries achieve debt sustainability.

There is little guarantee that the Initiative's graduates will be in a position to sustain their debt-servicing liabilities in the short term. For example, Uganda, the first HIPC graduate, currently has debts of over 200% of the debt-to-exports ratio. This will be the third time Uganda has exceeded its debt sustainability after reaching Completion Points. In short, the development gains made with the small additional resources provided by the enhanced HIPC Initiative will be swept away without additional financing.

**Debt relief through HIPC and over optimistic assumptions**

The World Bank and IMF projections bear no relation to the past achievement rates of growth, investment and financial inflows. These rates are very unstable in the LDCs, but the World Bank and IMF estimates are based on stable rates.

[56] IMF, 'Financial Impact of the HIPC Initiative – First 26 Countries' (July 2002).

[57] CAFOD, above n 42.

LDCs' high concentration of exports on a limited range of commodities leaves them acutely sensitive to external shocks in commodity prices and climatic conditions. The current export criterion of the Net Present Value of debt to exports for debt sustainability analysis therefore has a limited use. And its reliance on the narrow and highly volatile variable of export earnings as a means to calculate future debt sustainability has been described as the 'key failing' of the HIP Initiative.[58] Exports alone do not reflect the resources available to HIPC governments for poverty reduction expenditures. It would be quite possible, under the current criteria, for a country's debts to be considered sustainable from the point of view of external viability, while having insufficient resources to meet even the most basic poverty reduction expenditures.

In African LDCs, the scourge of HIV/AIDS will leave over a million children without teachers. In Mozambique alone, the Government estimate that 17% of their children will die of AIDS by the end of this decade.[59] The World Bank estimates that combating HIV/AIDS will cost low-income countries at least 1 to 2 per cent of GDP.[60] Most of the LDCs receiving debt relief are still spending more on debt than on public health. For example, Zambia has almost one million people affected by HIV/AIDS, but is spending 30 per cent more on debt servicing than on health.[61] For almost all HIPCs, private sector flows will not make up for chronic resource deficits. The marginalisation of the African continent from global trade is equivalent to a loss of 21 per cent of regional GDP or $68 billion per annum.[62] For Africa in 2001, adjusting for inflation, non-fuel commodities are at one half the annual average value for the period 1979-81. The World Bank and IMF estimate 8-10 of the HIPC countries most affected by the slump in commodity prices will have higher debt to export ratios by completion point than the 150% target set by HIPC itself.[63]

The HIPCs continue to rely on external official assistance, particularly in the form of grants, to fund their domestic spending and balance of payments gaps. Despite optimistic projections in decision point documents, new HIPCs are not receiving the levels of external financing anticipated that will in turn help them achieve the MDGs.[64]

For African LDCs, it is estimated that halving the proportion of people living in extreme poverty by 2015 will require growth rates of around 7-8 per cent[65]

58 Ibid.

59 Stephen Lewis, 'UNAIDS' (June 2002).

60 World Bank, *Can Africa Reclaim the 21st Century*, above n 54, 236.

61 Oxfam, 'Debt Relief and the HIV/AIDS Crisis in Africa' (July 2002).

62 World Bank, *Can Africa Reclaim the 21st Century*, above n 54, 47.

63 Ibid, 51.

64 Oxfam, 'The Enhanced HIPC Initiative and the Achievement of Long-Term External Debt Sustainability' (April 2002).

65 World Bank, 'African Development Indicators, 2001'.

and investment levels of more than 30% of GDP.[66] However, the continuing stagnation of Africa's terms of trade coupled with low saving rates will require the continent to access other sources of external finance if African countries are to achieve this level of economic growth. Even when the commitments made at Monterrey and in the G8 Africa Action Plan are taken into account, the pledged ODA increases fall far short of the levels of additional resources needed to achieve the MDGs.[67] It is not likely that private sources of credit will fill this gap. Low-income countries face continuing difficulties in reversing their marginalisation from global flows of private sector finance - difficulties that are exacerbated by the current investment climate and slowing of global growth.

The General Accounting Office of the US Congress (GAO) has pointed out that, even after being granted debt relief, all seven HIPCs investigated in a comprehensive case study will have to depend on outside assistance to finance their balance of payments deficit.[68] This necessary capital import will consist of a mixture of subsidies, concessional loans and – in spite of expressed commitments to the contrary on the part of most HIPCs – here and there also of loans at market rates. For this reason, many members of the HIPC group will relatively soon (most of them between 2010 and 2015) again have debt stocks exceeding their pre-HIPC level.[69]

On this basis, the GAO denies that the HIPC Initiative will lead to sustainable external viability for the participating countries. Apart from the consequences for their long-term debt repayment capacities, this also means that the accompanying poverty reduction programmes will be financed completely with borrowed money.[70]

Unless consistently high growth rates are attained, the unavoidable accumulation of new debt after HIPC relief is the beginning of a new debt crisis. The additional loans can in fact only be serviced if the growth rates of the gross national product and, in particular, export earnings and public revenue are greater than net new indebtedness (i.e. the growth rate of the total debt stock considering principal repayments and the incurment of new loans). Only under these conditions can the additional income cover debt servicing and make a contribution to the financing of development.

Thus the World Bank's assumptions appear extremely optimistic. The average growth rate of the countries involved up to the end of the year 2000 was 3.1% for the period from 1990 – 1999. The average rate for 2000 – 2010

66 World Bank, *Can Africa Reclaim the 21st Century*, above n 54.

67 A Joint Submission to the World Bank and IMF Review of HIPC and Debt Sustainability, CAFOD Policy Paper, August 2002. <http://www.cafod.org.uk/policy/debtsustainability20020902.shtml> (file with the author).

68 GAO 2000, 'Developing Countries: Debt Relief Initiative for Poor Countries Faces Challenges'.

69 Ibid.

70 Ibid.

is now estimated at 5.6%. Export income is even supposed to more than double from a yearly average of 4.2% to 8.9%. Not attaining the estimated levels will mean that through debt service the relatively heavy strain on the economies in question will lead to repayment problems and the subsequent build-up of new external debt.

At the same time, even in the cases in which the estimates are based on growth rates actually attained in the past, it must not be overlooked that the economies in question are structurally extremely sensitive to external shock. In the face of such considerations, even the prediction of continued growth at the rate that occurred in the nineties is actually over-optimistic if the Initiative is to lead a country safely out of the snares of heavy debt.

This is illustrated by the case of Zambia: immediately after receiving a debt relief commitment within the framework of HIPC II the country needed more money to mitigate the effects an income shortage produced by the terms of trade deterioration in the face of rising oil prices. And Zambia is no exception.

The relief offered so far under the HIPC and Enhanced HIPC Initiatives does not go far enough. Part of the problem with HIPC is that, in making determinations about debt reduction, the IFIs do not take into account new debt that countries incur while they try to meet the HIPC program requirements. Additionally, HIPC is not intended to do away with the debt of heavily indebted countries; instead, it aims to reduce that debt to a "sustainable" level.

The assumption that classical structural adjustment measures will automatically lead to a stabilization of the economy and a consequent improvement of conditions for the poor is unrealistic. With HIPC II the World Bank and the IMF have finally acknowledged that a well-directed effort is needed if debt relief is to be of benefit to the poorest population sectors.

Another major flaw of the HIPC initiative, at least in relation to the LDCs, it does not take into account the overall decrease in ODA flows to the LDCs. From the combination of decrease in effective development assistance in the heavily indebted LDCs and the World Bank emphasis on policy conditionality and country selectivity in aid allocation, it emerges that not all heavily indebted LDCs are sure to benefit from the HIPC Initiative in terms of higher economic growth.[71]

**Conclusion: A Rights based debt relief**

Despite all the goodwill and promises made by the international community in the LDC conferences, LDCs' situation has consistently worsened while their numbers have more than doubled. Although a broad range of factors explain this situation, debt certainly represents one of the main stumbling blocks to LDCs' capacity to reverse this trend. Excessively high debt

[71] Henrik Hansen, 'The Impact of Aid and External Debt on Growth and Investment' (CREDIT Research Paper No 02/26).

burdens have a direct effect on economic and social development a growing share of LDCs' governments scarce resources is used to service external debt. Despite repetitive debt rescheduling, the total debt stock of LDCs amounted to US$ 154 billion in 1998, almost four times the level of 1980.[72]

These crude statistics show that past attempts by the international community to solve the LDCs debt crisis have all failed. The HIPC initiative, launched in 1996, is the latest of such attempts. It is scheduled to provide debt relief to 32 LDCs whose debt stock represented 80% of LDCs total debt outstanding in 1999. However, although the outcome of this initiative is of critical importance for the long term prospect of LDCs debt burden, it is necessary to examine whether it can deliver, in its current form, what is needed by LDCs.

Eleven LDCs have not yet been approved for relief: Burundi, Central African Republic, Comoros, the Democratic Republic of Congo, Laos, Liberia, Myanmar, Sierra Leone, Somalia, Sudan, and Togo. In many of these cases, approval has been delayed due to internal conflicts and/or concerns about terrorism and human rights violations. Angola and Yemen, are thought to have potentially sustainable debts, and may not receive further debt relief.

There are 17 LDCs that still remain outside the HIPC initiative[73] and several of them are having significant debt burdens. This is particularly the case for some countries whose debt levels are unsustainable levels even according to the conservative criteria set by the World Bank and the IMF to benefit from the initiative.[74]

The PRSPs currently permit little scope for the civil society to significantly contribute to programme design. Governments appear to take a bigger role, but are also heavily constrained, especially with respect to macro-policy.[75] The fact that the content of PRSPs is very similar to previous adjustment packages suggests that little real change has occurred through this process.

Although there has been progress on debt relief for the world's poorest countries ,a pro-poor, deeper and broader and human development approach to debt relief is needed as over half of the countries receiving debt relief still spend more than 15% of their government revenues on debt servicing, diverting precious resources away from poverty reduction.

[72] Eurodad, 'Why HIPC still fails to deliver to LDCs' (Eurodad briefing for third Least Developed Countries Conference, Brussels, July 2001).

[73] Afghanistan, Bangladesh, Bhutan, Cambodia, Cape Verde, Djibouti, Equatorial Guinea, Eritrea, Haiti, Kiribati, Lesotho, Maldives, Nepal, Samoa, Solomon Islands, Tuvalu and Vanuatu.

[74] Bangladesh, Cambodia, Haiti, and Nepal have debt-to-export ratios exceeding the 150% threshold required to qualify to the Enhanced HIPC Initiative.

[75] Frances Stewart and Michael Wang, 'Do PRSPs empower poor countries and disempower the World Bank, or is it the other way round?' (QEH Working Paper Series-Working Paper No 108, 2003).

The debt relief initiatives must go beyond 'sustainable' level. The commitment 'to implement the enhanced programme of debt relief for the heavily indebted poor countries without further delay and to agree to cancel all official bilateral debts of those countries in return for their making demonstrable commitments to poverty reduction'[76] must be fulfilled. Anything less than that would mean rise in the overall level of debt and debt service burdens erasing the gains the LDCs have made in the social sectors. To achieve that a clear link must be established between Millennium Declaration goals and debt relief strategies.

No debt relief initiative should be put in isolation. It must be a part of global effort to mobilise the resources required for human development as enshrined in the UN Millennium declaration and Monterrey Consensus. The G7 and staffs of the World Bank and IMF are obliged to take into account the role of debt relief in meeting the 2015 Millennium Development Goals following their international undertakings in the *Monterrey Consensus*.

Under the Initiative relief is formally tied to the formulation of a poverty reduction programme by the government and the civil society of each of the debtor countries. Almost all of the LDCs are plagued by civil war or subject to a military dictatorship. Preparation of PRSP requires time, knowledge and the presence of a viable civil society. In social and political disruptions civil societies do not get the required time space to acquire knowledge and strength to constitute themselves as viable actors of social progress. In these situations debt relief must be freed from PRSPs.

The countries should enjoy more independence in preparing their PRSPs. This is the only way to make the Initiative country-specific. Debt relief must be comprehensive and sustainable – no matter how much debt needs to be cancelled in order to arrive at this level. The option of a 100% debt cancellation must be given serious consideration. Multilateral debt (particularly with the World Bank and the IMF) has become a problem especially for the poorest countries, since it tends to increase in size with every bilateral settlement. The dogma that multilateral debt must always be serviced and must never be cancelled is no longer tenable, neither politically nor from a fiscal point of view. Debt relief must include all categories of debt. The cost of total cancellation of all debt of the LDCs is not significant for the creditors.

The criteria of calculation of debt sustainability must be based on a broader set of social, economic and human development objectives. Foreign exchange earning capability should not be the sole judging factor of sustainability.

The international donors and creditors must take measures to ensure that past patterns of anti-poor borrowing and lending are not repeated. It is not enough that civil society should be involved in preparing PRSPs, its effective participation in any decisions to contract new debt and in how those

[76] Article 15, paragraph 3, the United Nations Millennium Declaration.

resources are used must be ensured. In this connection the donors can help the recipient countries in building their capacity to manage debts. Such management must be kept transparent at all levels and transparency can be achieved by all documents including loan documents available to public.

And for the achievement of all these, explicit recognition of human rights is essential in the process. The Bank and the Fund have moved a step forward from its controversial structural adjustment policies, but still such initiative falls short of a right-based approach.

# Gender Justice in Bangladesh: A Time and Cost Impact to Resolve Family Disputes through Litigation vs. Court-connected Mediation

**Dr Jamila A Chowdhury***

## Introduction

Delay in litigation *'[h]as reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long protracted and torturing process, not knowing when it will end'.*[1] The problem of delay in litigation vividly persists in Bangladesh. Delay discourages two-thirds of the plaintiffs from entering the formal court process.[2] Of those interviewed in a survey conducted by the Transparency International, Bangladesh, 53.9 per cent of plaintiffs/ defendants were uncertain about when their cases might be resolved.[3] The *'existing judicial system cannot ensure justice for the poor; many people in this country are never produced before the court because of their poverty and the loopholes in our system'.*[4] As women are the poorest section of the society, they have particular problems of access because of their reduced ability to bear the costs of justice.[5] Therefore, *'the formal legal system has no attraction for the people [of Bangladesh] especially women'.*[6]

Apart from delay or the overwhelming pressure on the limited number of judges to hear thousands of cases, one more reason for the backlog might be flaw in case management. Another important factor that hinders people's access to justice is the cost of the dispute resolution process. Cost is important because we live in *'a system in which money often matters more*

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1 M Shah Alam, 'A possible way out of backlog in our judiciary', *The Daily Star* (Dhaka), 16 April 2000.

2 UNDP, *Human Security in Bangladesh: In Search of Justice and Dignity* (2002) 9.

3 Transparency International, 'Corruption in South Asia: Insights and Benchmarks from Citizen Feedback', (2002) <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019883.pdf> accessed 18 June 2009.

4 The former Minister of Law Justice and Parliamentary Affairs, Bangladesh, Barrister Moudud Ahmed was speaking as chief guest at the inaugural function of a division-level training workshop on 'Mediation techniques: Alternative Dispute Resolution (ADR) in the civil justice delivery system in Bangladesh' held at a city hotel on 24 July, 2003.

5 ADB, 'Bangladesh: Gender, Poverty and MGDs 2004' (2004) <http://www.adb.org/Documents/Reports/Country-Gender-Assessments/ban.asp> accessed 15 February 2010. See further Sumaiya Khair, *Alternative Approaches to Justice: A Review of ADR Initiatives under the Democracy Partnership* (Asia Foundation, 2001); Nusrat Ameen, 'Dispensing Justice to the Poor: The Village Court, Arbitration Council *vis-a-vis* NGO' 16(2) *Dhaka University Studies: Part F* 103.

6 USAID, *Alternative Dispute Resolution Practitioners Guide* (1998)

*than merits'*.[7] In Bangladesh, sometimes costs are exacerbated due to delay. As the disposal of cases is delayed, total charges paid to the lawyers increase with consecutive court appearances. An increased number of court appearances also involve higher transportation costs, more forgone daily wages and other incidental expenses incurred at court. All these expenses pose an additional burden and may cause economic hardship to the poor, especially to poor women. In fact, *'[i]ncreasing expenses of litigation, delay in disposal of cases and huge backlogs in our legal system have virtually shaken the confidence of people in the judiciary'*.[8]

Though many protective legal provisions are theoretically available in different laws of the country, because of the high-cost and delay in litigation, women may not be able to access the benefits of such laws. As prudently observed by Rhode, *'[p]rocedural hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment'*.[9] To make a clear distinction between 'availability' and 'accessibility', Hutchinson rightly linked availability *'to the question of whether a service exists'* and accessibility *'to the question of whether a service is actually secured'*.[10] Therefore, a mere availability of legal provisions carries only a little meaning to the 'accessibility' of justice to many poor women in Bangladesh.

Enforcement of legal orders is yet another important criterion for measuring access to justice. If court decrees cannot be enforced then what people win in the court may not become a win in their life.[11] As women are facing a power disparity in relation to their male counterparts in Bangladesh where husbands usually control family finances,[12] women may have no means of support until they can achieve a realisation of their post-separation entitlements. Thus, enforcement, or what is in Bangladesh called 'execution of the decree' is significant to enhance people's access to 'real' or 'ultimate' justice.

Availability of adequate legal aid is another factor that can affect the ability of poor people to access justice through litigation[13] Adequacy of legal aid is important because otherwise many litigants who are theoretically entitled

7 Deborah L Rhode, 'Access to Justice' (2000-01) 69(5) *Fordham Law Review* 1785, 1785.

8 K M Hasan, 'A Report on Mediation in the Family Courts: Bangladesh Experience' in S Islam and M Shahiduzzaman (eds), *Reviewing the Family Courts Ordinance 1985* (Bangladesh Legal Aid and Services Trust, 2008) 7, 8.

9 See Rhode, above n 7, 1787.

10 Allan C Hutchinson, *Access to Civil Justice* (Carcwell, 1990) 181.

11 See Rhode, above n 7, 1787.

12 Roushan Jahan, *Hidden Danger: Women and Family Violence in Bangladesh* (Women for Women, 1994) 91; see also R I Nasir, 'Role and Status of Urban Working Women' (1991) 8(1-2) *Social Science Review* 135, 141-4.

13 Shepherd Tate, 'Access to Justice' (1979) 65(6) *American Bar Association Journal*, 904, 906; see also B Dickson, 'Access to justice' (1989) 1 *Windsor Review of Legal and Social Issues* 1, 3.

to get service from the state appointed lawyers, may not get quality services or have to suffer long delays if *'court appointments are a financial loss for lawyers'*.[14] Although barriers to accessing justice due to the high-cost of litigation can be eased by the provision of legal aid, the scarcity of legal aid funding from both government and NGOs in Bangladesh means that women's access to justice through litigation is extremely difficult.[15]

Among the barriers to access to justice, sometimes complexity of process is also identified.[16] Literature shows that litigation is a much more complex procedure than mediation. In Bangladesh, there is some procedural complexity in dealing with civil disputes (including family disputes) that severely affect plaintiffs who do not have sufficient means to finance protracted litigation. In the 283 court files examined for this study (litigation and in-court mediation), in more the 90 per cent of cases, family suits are filed by women as plaintiffs. This is because, family courts broadly deal with two types of family cases depending, on the status of the conjugal relationship between disputing parties: family cases filed after divorce (i.e. dower, maintenance and custody of children) and family cases filed before divorce with/without separation (dissolution of marriage, restitution of conjugal life). Women were plaintiffs for all cases filed after divorce relating to dower and maintenance. However, another type of case filed after divorce is the custody of children, where both husband and wife can be a plaintiff. Nevertheless, as observed in the mediation sessions and also confirmed by the mediators during interviews conducted under this study, in more than 80 per cent of cases, women are plaintiffs as husbands are not willing to take physical custody of their children after divorce. Similarly, wives generally initiate the filing of cases for dissolution of marriage as husbands are not willing to initiate divorce to pay dower and maintenance after divorce.

Further, husband initiated suits declined after the Supreme Court's decision in *Nelley Zaman's* case where the court expressly rejected a suit that was filed separately claiming only the restitution of conjugal life, the ground generally used by husbands in the past when they initiated a family suit.[17] Thus, after banning the most used grounds – restitution of conjugal life – where husbands could sue against their wives, we can reasonably expect that in most of the family cases, women become plaintiffs and men are defendants/respondents. Since in the family court women are generally the plaintiffs, any procedural complexity affecting plaintiffs in litigation

14 Laura Mansnerus, 'A Brake on the Wheels of Justice; Shortage of Lawyers for the Poor Plagues the Courts', *The New York Times* (online), 17 January 2001, <http://www.nytimes.com/2001/01/17/ nyregion/brake-wheels-justice-shortage-lawyers-for-poor-plagues-courts.html> accessed 10 July, 2010.

15 Nusrat Ameen, 'The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid' (2004) 15(2) *Dhaka University Studies Part F* 59.

16 Jamila A Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge Scholars Publishing, 2012) 6.

17 *Nelly Zaman v Giasuddin Khan* (1982) 34 DLR (SC) 221.

disproportionately affects women. One such procedural complexity that arises out of litigation is non-acknowledgement of summons by the defendants. According to the *Code of Civil Procedure 1908* (CPC)[18], a summons may be issued at the initiation of a case ordering a defendant to appear before the court. In the case of family disputes, when a case is heard *ex parte*, a delinquent husband who fails to attend the court may claim that the summons was not duly served and ask that the *ex parte* decree be set aside, thus requiring the filing of a fresh suit.[19] The problem escalates when the plaintiff has to bear any cost of issuing such a summons. According to Order IX, Rule 8 of CPC 1908, a suit will be considered as a default if the plaintiff fails to provide costs for issuing a summons or sending summons to the defendant through postal delivery. Such delinquency may occur if the plaintiff is a woman and, for example, is not able to bear the cost of service.

Even when a woman may overcome the procedural complexities to initiate a case through the issuance of a summons etc., complexity may again arise in the realisation of post-separation entitlement as ordered in a court decree. Though a family court is a civil court, it can also act as a Magistrates' Court for the execution of monetary decrees (e.g. execution for unpaid dower or maintenance) and a sentence of three months' imprisonment may be imposed on a delinquent husband[20] by issuing a 'show cause' notice to the judgment-debtor to respond why he should not be committed to a civil prison.[21] Nevertheless, one rule that may work against the female decree-holder is the provision that:

> No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into the Court such sum as the judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court.[22]

Because of this rule, women having insufficient financial capacity to pay money may fail to ask the court to issue a warrant against the judgment-debtor. But in the case of mediation, women may not have to bear such extra cost to realise the decree money from the judgment debtor because, in most cases the amount of post-separation entitlements settled through mediation is paid in a lump-sum amount. But, as demonstrated in this paper, for litigation, post-separation entitlements are not usually paid until the women file a further execution suit.

Another important complexity of the formal court system is its procedure being difficult to understand by poorly educated, illiterate women. It has been shown that women do not understand what is happening and they

18 Provisions of the *Code of Civil Procedure 1908* are applicable where the *Family Courts Ordinance 1985* does not provide any specific procedural guidance.

19 *Code of Civil Procedure 1908*, Order IX, Rule 6.

20 *Family Courts Ordinance 1985*, Section 16(3B)-(3C).

21 *Code of Civil Procedure 1908*, Order XXI Rule 2(1).

22 *Code of Civil Procedure 1908*, Order XXI, Rule 39.

therefore do what their lawyers tell them to do.[23] Once the dispute reaches the lawyers, they take control and parties just follow their instructions. This turns the matter of dispute from a difference between two laymen to a battle between two well-trained professionals who are arguably motivated primarily for enhancing their financial gain.[24] An earlier study in Bangladesh indicates that, in terms of the complexity of process, women in Bangladesh feel much more comfortable with mediation than with litigation.[25] In several focus group discussions conducted with the family court clients, it was unanimously agreed by the participants (women) that they did not understand the court procedure; and had to depend completely on the lawyers from the beginning to end.[26] Complexity in litigation goes one step further because sometimes witnesses are hired to fabricate a case. In one survey conducted by Transparency International, Bangladesh[27], hiring witnesses was reported by 19.8 per cent of the households involved in court cases. Twenty-eight point six per cent of urban households are markedly higher than the 18.9 per cent of rural households hiring paid witnesses. This type of fabricated witness can destroy any remnant of faith and honour remaining between the parties for each other. Their primary objective appears to be one of simply getting rid of their opponent rather than of making any amicable or fair settlement.

As 'available' modes of litigation remain 'inaccessible' to many poor and disadvantaged people in Bangladesh, it becomes imperative to find an alternative means that will render justice accessible to women. Whilst we know that there are problems with access to justice via litigation, there is no existing empirical data comparing litigation and mediation. Thus, this paper compares access to justice through mediation in comparison with litigation on the basis of time-to-resolution, time-to-realization, and cost of resolution. The following part demonstrates how court-connected mediation is enhancing women's access to justice in Bangladesh in terms of its quick

23 Jamila A Chowdhury, *Women's Access to Justice in Bangladesh through ADR in Family Disputes* (Modern Book Shop, 2005).

24 Formanul Islam, *The Madaripur Model of Mediation: A New Dimension in the Field of Dispute Resolution in Rural Bangladesh* (research paper, file with the author).

25 See Chowdhury, *Women's Access to Justice in Bangladesh*, above n 23, 33.

26 Ibid.

27 '*Survey on Corruption in Bangladesh*' conducted for the Transparency International Bangladesh by the Survey and Research System, *Dhaka*, Bangladesh with the assistance for The Asia Foundation, Bangladesh. The survey was divided in to two phases. Phase I consisted of a 'pilot study' to ascertain the nature, extent, intensity wherever possible, of corruption, and the places where corruption occurs. In the pilot study, a small scale national household survey was undertaken to obtain information on public delivery services and their corruption in providing those services. This study was performed in six different public sectors among which judiciary deserve a particular mention. Phase II was a large scale survey to provide baseline information on corruption in a sample of 2500 households.

and low-cost resolution and better realization of decree money when compared with litigation.[28]

One alternative adopted by many other developed and developing countries to reduce the backlog and delay in courts is the use of mediation that may provide a low-cost quick access to justice for women. Because it has the potential to provide a low-cost alternative means to access justice, family mediation has become popular in the family courts of Bangladesh since 2000[29]. *'Mediation has flourished in the country against the backdrop of a logjam of cases, leading to unacceptable delay and expenses in the adjudication of disputes and stagnation of civil litigation'.*[30]

The reform movement which started at the beginning of 2000 has made initial progress in developing mediation in a more methodical way in the

28 Empirical data from a representative sample was collected to make such comparison. To represent urban, rural and suburban areas, the three districts of *Dhaka* division were chosen under this study were *Dhaka*, *Mymensingh* and *Narayanganj*. The features of urbanisation determining which of these three districts were urban, suburban, and rural are based on the percentage of women living in rural, urban and suburban areas according to the latest Population Census Report in 2007 . These districts were chosen in such a way that the difference between rural and urban women could easily be understood from the sample. For example, in aggregate, 77.33 per cent of all women in Bangladesh live in rural areas. But *Dhaka, Mymensingh* and *Narayanganj* districts were chosen to represent urban, rural and suburban areas where 9.35, 44.62 and 85.58 per cent women lived in rural areas respectively. Thus, the sample districts were not chosen to ameliorate the national average of rural women rather than to make the rural urban difference more vivid in this sample. The choice of sample on the basis of rural, urban and suburban variation of the districts also reflects the difference in the literacy rate of adult women and women's participation in economic activity. For example, among the three districts chosen, the percentage of literate adult women in *Dhaka* (urban) district was 60.74 per cent, compared with 48.10 per cent in *Narayanganj* (suburban) and 34.84 per cent in *Mymensingh* (rural) districts. Likewise, regarding the economic participation of women, the rate within *Dhaka*, *Mymensingh* and *Narayanganj* districts was 16 per cent, 8.69 per cent and 7.77 per cent respectively. These factors may affect women's capacity to negotiate in mediation. Further, the three districts examined in this study incorporate 11.83 per cent of women living in the 61 districts of Bangladesh who attended family courts in 2007. The sample of these three districts can be considered as representative of Bangladesh as they cover the variation in rural, urban and suburban areas, and are the domiciles of more than 11 per cent of the total population of women in Bangladesh. The total number of women in Bangladesh in 2007 was 60,264,000. The number of women in the three districts *Dhaka*, *Narayanganj* and *Mymensingh* was 3,800,000; 1,012,000 and 2,193,000 respectively. For details on statistics, see Bangladesh Bureau of Statistics. 2007. *Population census 2001*. Dhaka: Bangladesh Bureau of Statistics.

29 Though the provision of conducting mediation by family court judges was inserted in ss. 10 and 13 of the FCO 1985, this provision was hardly used by the family court judges before policy makers took the initiative to popularise the use of mediation in the family courts in 2000.

30 The former Chief Justice in an workshop on 'Mediation Techniques-Alternative Dispute Resolution in the Civil Justice Delivery System in Bangladesh', organized by the Legal and Judicial Capacity building Project (LJCBP), financed by world Bank, held at *Chittagong*, Bangladesh on 17 July 2003.

family courts of Bangladesh thus mitigating backlogs of cases and getting enormous support from the legal community at large.[31] The former Chief Justice K.M. Hasan observes:

> Within this short period, the mediation course embraced an unexpected and commendable success. Average rate of substantive disposal by mediation has come up to 60 [per cent] in comparisons with contested decrees.[32]

As further stated by Hasan:

> Statistics show that the total realisation of money, through execution of decree in suits disposed of, by [litigation], is far below the total realisation of money in disputes settled through mediation. From 1985 to 2000 the total money realised in connection with Family Courts cases of the three courts is Tk. 6,199,759.5 [USD 80,516.36] whereas the total realisation through mediation since the introduction of mediation in the same Courts from June 2000 up to 16 May 2001 i.e. in twelve months is Tk. 50,94,50.[33]

However, such assessments were made by scholars in Bangladesh based only on the performance of 16 pilot family courts covered under the World Bank project in 2000[34]. Such positive remarks, therefore, reflect neither the performance of those other family courts which were not included in the pilot project nor the performance of NGOs conducting out-of-court mediation. Subsequent research has not evaluated the efficiency of mediation at providing speedy access to resolution of disputes either. All these unexplored issues are considered in this paper.

In order to address these issues, this paper examines whether court-connected mediation can provide a low-cost quick access to dispute resolution for women, in comparison with litigation. However, as existing literature on this issue is scarce in Bangladesh, the analysis is made on the basis of documentary data collected from family courts providing mediation services in Bangladesh. Based on these data, this paper makes a comparative evaluation between court-connected mediation and litigation to

31 Mustafa Kamal, 'Introducing ADR in Bangladesh: Practical model' (Paper presented at the Seminar on Alternative Dispute Resolution: In quest of a new dimension in Civil Justice System in Bangladesh', Dhaka, 2002) 1-20; see also K M Hasan, 'Mediation in the Family Courts: Bangladesh Experience' (Paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 2002)1, 1-2.

32 Ibid.

33 K M Hasan, 'Alternative Dispute Resolution' in R Waliur amd M Shahabuddin (eds) *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference* (Bangladesh Institute of Law and International Affairs, 2005) 123, 133.

34 Under the World Bank project in 2000, 16 family courts in 14 districts of Bangladesh were chosen as pilot family courts to popularise the practice of mediation in family courts. Each of the 14 districts except *Dhaka* has only one pilot family court. Three pilot family courts were set up in *Dhaka* district.

examine whether court-connected mediation continues to provide a quicker resolution of disputes and execution of decrees compared with litigation. After demonstrating that court-connected can provide quicker resolution and timely realisation of post-separation entitlements of family disputes compared with trial, based on the analysis of empirical data collected from lawyers in family courts, this paper also highlights that court-connected mediation is a less costly method of providing resolution compared with trial.

Whilst we know that there are problems with access to justice via litigation, there is no existing empirical data comparing litigation and court-connected mediation.[35] This paper, therefore, compares access to justice through court-connected mediation in comparison with litigation on the basis of time-to-resolution, time-to-realization, and cost of resolution. The following part demonstrates how family mediation (court-connected mediation) is enhancing women's access to justice in Bangladesh in terms of its quick and low-cost resolution and better realization of decree money when compared with litigation.

## Access to Justice through Resolution of Family Disputes: Court-connected Mediation vs. Litigation

This part compares the time taken by women to get their disputes resolved through mediation (court-connected mediation) and litigation. It also considers the time taken for the realisation of post-separation entitlements under mediation and litigation. To do so, a comparison between mediation (court-connected mediation) and litigation is made in terms of the time-to-resolution and time-to-realisation. Though mediation services in Bangladesh are provided in-court and also out-of-court by NGOs, discussion of mediation in this paper is concentrated on court-connected mediation. A consideration of time-to-realization is important because getting a dispute resolved is of little use, if it cannot be executed. However, the existing literature does not provide sufficient data to make a comparison of realization through mediated agreements and court orders. Therefore, as mentioned earlier this study collected data from court registries of three districts in *Dhaka* division – *Dhaka, Mymensingh* and *Narayanganj*. This paper therefore provides original analysis that allows for the first time a comparison between time-to-resolution and time-to-realization for court-connected mediation and litigation in Bangladesh.

### *Rate of Resolution through Court-connected Mediation and Litigation*

Aggregate data collected from court registries summarised in Table 1, indicate that 9 to 24 per cent of cases filed in court were resolved through court-connected mediation. Among the total 592 cases resolved through in-court mediation and litigation in the specialised family courts in *Dhaka* district, 424 cases (72 per cent) were resolved through in-court mediation,

35 See Chowdhury, *Women's Access to Justice in Bangladesh,* above n 23.

while only 168 cases (28 per cent) were resolved through litigation. But, in the mixed family courts of *Narayanganj* and *Mymensingh* districts, the rate of resolution was much lower. Nine per cent of the total number of cases was resolved through in-court mediation in *Narayanganj* and 10 per cent were resolved through in-court mediation in *Mymensingh*. In the case of *Narayanganj* and *Mymensingh* districts, out of 212 cases resolved through in-court mediation and litigation, only 75 cases or 35 per cent were resolved through in-court mediation with as many as 137 cases (65 per cent) needed to be resolved through litigation. The percentage of cases resolved through in-court mediation is significantly higher in *Dhaka* district when compared with *Narayanganj* and *Mymensingh* districts.

It is pertinent to mention that, family courts in *Dhaka* district are specialised courts that deal only with family disputes. Family courts in *Narayanganj* and *Mymensingh* districts, on the other hand, are mixed courts that try both family disputes and other civil disputes. One reason for the higher rate of resolution in specialised family courts in *Dhaka* district could be that these courts do not have the case loads of other civil disputes which mixed courts have. However, this proposition is not tested in this paper and thus might be an area for further research.

**Table 1 Disposal of Family Court Cases through Court-connected Mediation and Litigation (2006)**

| | *Dhaka* | | *Narayanganj* | | *Mymensingh* | |
|---|---|---|---|---|---|---|
| | Number | Percentage | Number | Percentage | Number | Percentage |
| Litigation | 168 | 9% | 29 | 10% | 108 | 21% |
| *Ex parte* | 621 | 35% | 115 | 39% | 111 | 22% |
| Dismissed | 580 | 32% | 126 | 42% | 233 | 47% |
| **Total** | 1793 | 100% | 297 | 100% | 500 | 100% |

*Source: Unpublished data from court registries of Dhaka, Narayanganj and Mymensingh districts, Bangladesh.*

As mentioned earlier, women as plaintiffs generally file family suits. Therefore, we can reasonably expect that most of the *ex parte* cases[36] are granted to women and dismissal orders[37] are passed against them. This rate of dismissal of cases suggests that women as plaintiffs may begin, but not

36 According to Order IX, Rule 6(1)(a) of the *Code of Civil Procedure* 1908, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, and if it is proved that the summons was duly served, the court may proceed *ex parte*.

37 According to Order IX, Rule 8 of the *Code of Civil Procedure* 1908, where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed.

be able to continue more than one-third of the total cases filed. This high rate of dismissal order against women implies that the women are absent in court, but the respondents (men) appear. This might be due to the poor economic condition of women that make them unable to bear the cost of a lawyer, transportation and lodgings to be present in court. This could be a reason for higher rate of default in family cases.

On the other hand, although as many as 33 per cent of total cases in three districts were dealt with *ex parte*, only 5 per cent of the total realisation was made under *ex parte* cases. This means that though in one-third of the total cases women who were heard *ex parte* get a decree, they may not be successful in the ultimate outcome. It is possible that one reason is the procedural complexity in the litigation mentioned earlier. In *ex parte* cases, respondents (usually husbands) have the opportunity under law to revive the case by claiming that the suit was *ex-parte* because the summons was not served properly. As cases dismissed and heard *ex parte* do not ensure 'ultimate' justice to women through realisation of post-separation entitlements, the analysis below concerns only cases resolved through court-connected mediation and litigation.

### *Time-to-resolution: Court-connected Mediation vs. Litigation*

Average times-to-resolution for in-court mediation and litigation in the three districts suggest a longer time for litigation cases when compared with in-court mediation. While the average time-to-resolution for in-court mediation is around 10 months, the average resolution time for contested litigation is more than 17 months (Table 2). Therefore, the average time-to-resolution for in-court mediation is more than 7 months less than the average time-to-resolution experienced for litigation cases.

**Table 2 Average Time-to-resolution (months) for Court-connected Mediation and Litigation in Dhaka, *Narayanganj* and *Mymensingh* Districts**

| Type of Resolution | Specialised court | Mixed court | | Total |
|---|---|---|---|---|
| | *Dhaka* | *Mymensingh* | *Narayanganj* | |
| Litigation | 17.6 | 16.5 | 16.9 | 17.1 |
| Court-connected mediation | 9.8 | 11.5 | 10.2 | 10.3 |

*Source: data collected from family court case files in Bangladesh.*

Average time to resolution for in-court mediation in specialised family courts of *Dhaka* is 0.4 months to 1.7 months less than the mixed courts in *Narayanganj* and *Mymensingh* respectively. Such difference may result because specialised courts can spend more time in resolving disputes through mediation and is thus able to solve more cases through in-court mediation at a lower average time to resolution.

**Table 3 Distribution of Time-to-resolution (months) for Court-connected Mediation**

| Time-to-resolution | Cumulative Number of cases resolved | Cumulative % of cases resolved |
|---|---|---|
| Less than three months | 32 | 19.0% |
| Less than six months | 68 | 40.4% |
| Less than twelve months | 120 | 71.4% |
| Twelve months or more | 168 | 100% |

*Source: data collected from family court case files in Bangladesh.*

An analysis of Table 3 indicates that though court-connected mediation settled the cases quicker than litigation, around 60 per cent of court-connected mediation cases remain unresolved within a period of six months. Therefore, despite the potential of court-connected mediation to resolve family disputes much quicker than litigation, whether such quicker resolution can also ensure fair outcomes for women and whether such rate is also competitive with that of NGO mediation is not discussed under the purview of this paper.

## Access to Justice through Realisation of Post Separation Entitlement: Court-connected Mediation vs Litigation

Discussion so far shows that court-connected mediation resolves disputes much quicker than litigation. Further, rates of resolution vary between in-court mediation conducted by specialised courts and mixed family courts. Perhaps, because of the lower case-loads of specialised family courts, they show a quicker resolution of disputes in comparison with mixed family courts. However, attainment of compromise/contested decrees benefits women only if those decrees can be executed through a realisation of post-separation entitlements. Therefore, the following part discusses the success of specialised/mixed family courts in the realization of decrees and mediation agreements respectively. The following discussion closely examines the time required for such realisation — an important issue indispensably related to access to justice.

**Table 4 Realisation under Court-connected Mediation and Litigation (2006)**

| District | Following a compromise decree* under mediation | | Following a contested decree | | Following an Ex-parte decree | Total |
|---|---|---|---|---|---|---|
| | Before execution suit | After execution suit | Before execution suit | After execution suit | | |
| *Dhaka* | 65 (62%) | Nil | 01 | 31 | 8 | 105 |
| *Mymens-ingh* | 22 (34%) | 3 | 02 | 38 | 0 | 65 |
| *Narayan-ganj* | 09 (36%) | 1 | 00 | 14 | 1 | 25 |
| Total | 96 (49%) | 4 (2%) | 07 (3.5%) | 79 (41%) | 9 (4.5%) | 195 |

*Source: data collected from family court case files in Bangladesh.*

** Agreement reached through in-court mediation and further endorsed by the court as compromise decree.*

The situation was even worse in cases of realisation through litigation. As delineated in Table 4, while for all three districts 52.5 per cent of total cases were realised before the execution suit, 49 per cent out of those 52.5 per cent of cases were dealt with by mediation. In the case of trial, only 3.5 per cent of total cases were realised before filing an execution suit. Among the total cases realised, 26 per cent cases were realised though a one-time or lump-sum payment made by clients. But all of these lump-sum payments were made for cases settled through mediation. None of the cases resolved through litigation resulted in payment of a lump sum for the realisation of a decree. Realisation of post-separation entitlement through mediation was better for specialised family courts in *Dhaka* district, than when compared with the mixed family courts in *Narayanganj* and *Mymensingh* districts. According to Table 4, 62 per cent of total realisation in *Dhaka* district was through mediation (without requiring any execution suit) in comparison with 36 per cent and 49 per cent for *Mymensingh* and *Narayanganj* districts respectively.

There might be two more reasons why in-court mediation cases in *Mymensingh* and *Narayanganj* districts portray lower realisation rates than those in *Dhaka* district. Firstly, in *Narayanganj* and *Mymensingh* districts, in most cases, compromise decrees through in-court mediation were made for the reconciliation of the spouses. Compromise agreements were drafted in vague language without mentioning any objective criteria that could be reviewed later. Typical orders were that a husband and a wife will continue

their conjugal life peacefully and the husband will provide maintenance to his wife according to his ability[38]. Secondly, another type of compromise decree made during in-court mediation does not specifically mention restitution but asserts that parties agree to withdraw their cases under a compromise reached between them. In these cases also, the terms and conditions of the compromise were not specifically mentioned in the compromise agreement submitted to the court. However, this type of reconciliation or withdrawal of cases was less frequent in the specialised family courts in *Dhaka.*

Therefore, mediation in family courts offers women quicker resolution of their disputes and realisation of their post-separation entitlements than litigation. For example, as shown in Table 4, out of the total 52.5 per cent of cases that were realised before filing of an execution suit, 49 per cent came from in-court mediation; and in the case of litigation, only 3.5 per cent of cases can be realised before filing an execution suit.

However, to tap into all these benefits, women must have the capability to access mediation. Although mediation ensures quicker resolution of disputes, it may not be the least costly method for dispute resolution in every situation.[39] While acclaiming mediation as a means to enhance access to justice for the poor, earlier literature in Bangladesh has not addressed the issue of cost. Therefore, the following discussion compares the costs that women have to bear for in-court mediation, and litigation.

**Access to Justice through Cost Efficiency of Court-connected Mediation over Litigation: An Empirical Evaluation**

As discussed earlier, most women in Bangladesh have lower education, lower income and less opportunity to work outside home. Therefore, the high-cost of any dispute resolution system or mechanism may restrain their ability to access a means of resolution. Moreover, to access justice, even at the lowest tier of a formal court, a disputant woman who lives in a village has to come to the district level which may be three administrative units away from her hamlet. Since many women in Bangladesh are housewives, they do not earn money and they live in distant villages. In addition to the added burden of long distance travel costs, women may have to bear the costs of meals and accommodation plus court fees, lawyer's fees, and the costs of collecting evidence.[40] Transportation and accommodation costs could be significant for women; those for each day of court appearance under in-court mediation and litigation would be the same because both of

38 After *Nelly Zaman's* case, couples cannot file cases for the restitution of their conjugal rights. However, it is possible that a separated wife may initially file a case for maintenance or custody of children, but subsequently agree to reconcile with her husband.

39 Hilary Astor and Chinkin Christine, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002) 53.

40 The Asia Foundation, *Access to Justice: Best Practices under the Democracy Partnership* (2002) ch 1.

them are conducted at the same venue. Another major cost could be the fees for lawyers paid by the parties under in-court mediation and litigation. Therefore, the aggregate amount is likely to be too expensive for many poor women, especially when time-to-resolution and execution is long. On the contrary, a shorter time-to-resolution for in-court mediation compared with litigation suggests that clients might have to travel to courts on fewer days and so bear a lower total cost for transportation and accommodation.

Because of the importance of cost for women, this part of the paper compares the cost involved in in-court mediation and litigation. While comparing various methods of resolution based on their cost, one important consideration is the question of who bears such cost. We might ask whether it would be sufficient to look only at the cost of the concerned parties or whether the costs borne by the government and society should also be included.[41] However, the concern of this paper is not to determine the exact cost of mediation or litigation. Rather it is to look at accessibility of various methods for women. Therefore, this part compares only the major costs involved for the parties and how these costs may vary among clients who seek justice through in-court mediation and litigation.

A questionnaire survey was conducted among family court lawyers in Bangladesh to determine the total amount usually charged by lawyers for cases resolved through court-connected mediation and litigation. Thirty lawyers were chosen randomly from the registers maintained in the various district Bar Council offices in three districts and were surveyed. Questionnaires were designed to measure comparative costs of in-court mediation and litigation.

### *Cost of Court-connected Mediation and Litigation*

It has already been mentioned that lawyers' costs constitute a major part of the total cost incurred by family court clients. Therefore, lawyers were asked to indicate what they usually charged their clients to resolve their cases through mediation and litigation. Responses from lawyers in all three districts (Table 5) clearly indicated that lawyers charged a higher amount to resolve cases through litigation. From the perspective of the lawyers involved, more than 50 per cent of them charged over Tk.10,000 (USD129.87) to resolve family cases through litigation, while none of the lawyers charged more than Tk.10,000 (USD129.87) to resolve a case through mediation. Almost 25 per cent of the lawyers charged less than Tk. 2000 (USD24.46) to resolve cases through mediation, while none of the litigation cases were resolved with a lawyer's fee of less than Tk.2000 (USD25.97). In fact, 95 per cent of the total cases resolved through mediation required a lawyer's fee of Tk.5000 (USD64.94) or less, while only 25 per cent of total litigation cases were resolved with fees lower than this for lawyers.

[41] See Astor and Christine, above n 39, 52.

**Table 5 Lawyers' charges in court-connected mediation and litigation cases**

| | *Dhaka* | | *Narayanganj* | | *Mymensingh* | | Three districts together | |
|---|---|---|---|---|---|---|---|---|
| Tk. | Mediation | Trial | Mediation | Trial | Mediation | Trial | Mediation | Trial |
| <2000 | 2 | nil | 3 | nil | 3 | nil | 8 | nil |
| 2000 to <5000 | 10 | 2 | 8 | 3 | 7 | 3 | 25 | 8 |
| 5000 to <10,000 | 2 | 3 | nil | 2 | nil | 4 | 2 | 9 |
| >10,000 | nil | 9 | nil | 6 | nil | 3 | nil | 18 |

*Source: data collected through questionnaire survey of lawyers in Bangladesh.*

Therefore, parties who resolved their cases through court-connected mediation received some cost advantage over those parties who resolved their cases through litigation. Although family court mediation involved a much lower cost for clients when compared with litigation, an even greater cost reduction would be possible if lawyers were enthusiastic to solve a higher number of cases through mediation.

There are indications in literature that lawyers may not expedite resolution of cases by mediation.[42] The former Chief Justice K. M. Hasan also asserts that *'the lawyers and bar council should change their mindset and come forward to strengthen the mediation system in the judiciary'*.[43] There seems to be a possibility that lawyers may not consider mediation as financially beneficial for them. The tendency of lawyers to make unnecessary time petitions was highlighted by many family court judges[44] Therefore, most of the judge-mediators prefer direct interaction between them and their clients in settling disputes and to minimise the involvement of lawyers.

According to all of the lawyers surveyed under this study, the number of cases resolved through litigation was higher than the cases resolved through mediation. It was evident from the questionnaire survey that lawyers rarely

42 See Chowdhury, *Women's Access to Justice in Bangladesh,* above n 23, 8-9; See further Kamal, above n 31.

43 See Hasan, above n 31, 15.

44 Jamila A Chowdhury, *Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?* (PhD thesis, University of Sydney, 2011) 212.

initiate resolution of disputes through negotiation before filing a suit, nor do they try to resolve them outside court prior to court proceedings. Minimal involvement of lawyers and effective intervention by judges may contribute to reducing delay in the disposal of cases through mediation. However, an in-depth analysis of the causes of delay is beyond the scope of this paper and should be addressed by further research.

**Conclusion**

The earlier discussion has illustrated that, women in Bangladesh get better access to justice through court-connected mediation than litigation. However, while indicating a concern for access to justice through cost, time-to-resolution and time-to-realisation of post-separation of entitlements, one should not forget about the 'quality' of justice.[45] Getting quicker access to justice through mediation may not ensure that women are getting 'fair' justice. Women in Bangladesh may get speedy access – but because of gendered power disparity and family violence, there remains a concern that access may not ensure fair outcomes to women. The presence of gender power disparity and family violence increases the possibility that women in Bangladesh might not be able to participate effectively in mediation and therefore fail to attain fair outcomes. Further research on the quality of justice attained by women through mediation can confirm this issue.

[45] See Astor and Christine, above n 39.

# Rethinking the Plights of Divorcee under Islamic Family Law

**Mohammad Azharul Islam***
**Azizun Nahar****

## Introduction

Family[1], the very basic foundation of the Islamic society, is treated as an abode of peace and tranquillity and it seems that in this institution the heavenly fragrance is felt by the spouses who are enjoined under *Shariah* to live with each other on a footing of mutual love and mercy, solace and repose, affection and compassion. Comprehending the innate traits of human psyche Islam espouses and fosters a pragmatic and compassionate view of human interaction and as a natural corollary of this, it appends grand magnitude to the eventual contentment of both the spouses.[2] Diametrically converse panorama of this blissful tie depicts a venomous conjugal life full of abhorrence and antipathy, and not less probably it may wreck the lives of the concerned partners or at least one of them.[3] However, Islamic edict leaves no stone unturned to protect the sacred nuptial tie. But if the vital purpose of marriage is severely perturbed the recourse is made to dissolve the consecrated union. Once it is justifiably established that a marriage has proved a failure, canons of Islam do not scruple to allow the parties to separate from each other.[4] Both the spouses are endowed with the options to severe the marital bond within the purview of Shariah. But before making recourse to this last resort certain formalities are needed to be fully observed. A meticulous appraisal of the Qur'anic and Sunnatic provisions and their apposite contextualization in the contemporary era highly convince the authors to advocate that if the marriage breaks down through the whimsical exercise of *talaq* by the husband, it is of course, within the legitimate authority of a state[5] to make room for the

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1 Family, in its truest sense, stems from the sacred bond of marriage. The very word *'Nikah'* literally means joining together. Technically, it implies marriage. *Nikah* in the Holy Qura'n (*Al-Nisa* 4: 24 & 25), has been designated as *hisn,* that is a fort, meaning the protection it affords social, physical and moral, to the couple joined together in a valid wedlock. See for details, Tanzil-ur Rahman, *A Code of Muslim Personal Law* (Hamdard Academy, 1980) vol 1, 17.

2 K N Ahmad, *Muslim Law of Divorce* (Kitab Bhavan) 1.

3 Ibid.

4 Ibid.

5 Exercising this authority is possible through the proper appreciation of *Siyasah shariyyah.* Kamali ventured to translate it as *Shariah*-oriented policy. To him, this is generally regarded as a viable instrument of elasticity and expediency in *Shariah,* devised so as to serve and ensure the ultimate cause of justice and good government

compensation payable to the wife. However, though it is, to a certain extent, beyond the level of human efforts to patch up the psychological trauma of the spouses especially the divorced woman, Islamic Shariah, to relieve them with a soothing touch, gently makes provisions in the nature of *mut'ah*, a post divorce financial support, severely but spontaneously neglected, in spite of its firm root in the Qur'an, Sunnah as well as in the enriched juristic magnum opus, throughout the glorious history of Islamic Law. In this article, the authors venture to focus on these issues in the light of Qur'anic and Sunnatic injuctions, juristic writings, *maqasid al-shariah*[6] comparative analysis of legislation as well as judicial decisions of the courts of different states.

**Philosophy of Dissolution of Marriage in Islam**

The dissolution of marriage is formally recognized in Islam on the very philosophy that instead of dragging on with an astringent and dejected existence in forced partnership, it would unquestionably be more conducive to the wellbeing of the parties to part with poise, elegance and benevolence.[7]One renowned author rightly observes:

> ...Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of family than to wreck the future happiness of the parties by binding them to a companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children...[8]

Islamic Family Law treats wedded bond as a sort of religiously sanctified social contract, and it is predisposed to be disbanded when it ceases to dole out its key purpose(s). This harsh reality does not necessarily proffer that marriage does not have any sanctity, solemnity or sombreness in Islam.[9] One author has taken pain to recapitulate the philosophy of Islamic Law regarding marriage and divorce in the following way:

> The analysis of marriage and divorce laws recognized by Islam clearly shows that the martial tie is to be respected and continued as far as possible. The mutual adjustment and tolerance are emphasized beyond proportions just for the sake of keeping intact the marital tie. The parties also lose some social respect on separation. The parties, their well-wishers and courts are required

especially when the canons of *Shariah* fall short of addressing certain situations or developments. See Mohammad Hashim Kamali, *Shariah Law An Introduction*, (Oneworld publications, 1st South Asian ed, 2009) 225.

6 *Maqasid al-Shariah*, is generally interpreted as goals or objectives of *Shariah*.

7 Firasat Ali and Furqan Ahmad, *Divorce in Mohammedan Law: The Law of Triple Divorce* (Deep & Deep Publications, 1983) 9.

8 G C Chesire, 'The International Validity of Divorces' (1945) 61 *Law Quarterly Review* 352, n 7.

9 See Ali and Ahmed, above n 7, 10.

> not to leave any stone unturned for the subsistence of marital tie in case of dispute and disagreement between the parties. The dissolution is provided as a last resort in such circumstances. The marriage under such extreme circumstances may be dissolved by the parties or by the court.[10]

Islam maintains a moderate approach between the over-restriction and over-liberalization regarding the dissolution of marriage. One eminent author rightly points out:

> ...Islam has taken a position between categorical proscription and unqualified liberalization of divorce. It neither instituted the practice nor ignored its reality and occurrence. An outright prohibition would probably remain an "ideal" or merely a state of mind, but hardly a pattern of actual behavior, because absolute self-control is not always attainable. Such a prohibition, then, would seem incompatible with Islamic ideology which, as a matter of principle, prescribes only what is humanly attainable. On the other hand, any unregulated liberalization of divorce, is socially inconceivable and would almost certainly result in chaos, peril, and such traits that are destructive as well as intolerable.[11]

Islamic Family Law is in favour of dissolving the marital tie as a final resort. Even divorce is treated as an awful and abominable practice in those cases which lack lawful excuse and used mere out of whims and caprices. Dr Jamal A Badawi has summed up this issue in the following manner:

> Islam makes legal provision for divorce as a last and final resort, although it is a highly discouraged action according to the Qur'an and the sayings of the Prophet. The Prophet (SAWS) said, "The most detestable act that Allah has permitted is divorce"; this saying however, refers to divorce in situations where there is no good reason for it and the provision is simply being abused - divorce for a good reason would not be detestable and may even be commendable! In all cases however, divorce should be the last resort after all other avenues have been explored in trying to reconcile the couple.[12]

## Steps Preceding to Dissolution of Marriage

Islamic Law of dissolution of marriage as it appears from the Qur'an, Sunnah of the Prophet (PBUH) and juristic decisions of the scholars is so well designed that it prescribes certain steps before effecting divorce as a last resort. Islamic injunction urges Muslims to marry after looking into

10 Ibid.

11 Hammudah Abd al Ati, *The Family Structure in Islam* (American Trust Publications, 1977) 219.

12 Jamal A Badawi, *Islamic Teaching Course: Social System of Islam*, vol 3, G-43 <http://www.witness-pioneer.org/vil/Books/JB/IslamicTeaching Course-3.htm1# G-43> accessed 10 May 2012.

religious piety of man and woman.[13] Firstly, after the completion of marriage both the spouses are enjoined to observe the teachings of Islam as reflected in the Qura'nic verses and the traditions of the Prophet (PBUH). In case of dissolution of marriage by the husband it is essential that he must be major and a person of sound mind. Husband must have reasoned scruples, must be cautious and free from unwarranted and excessive resentment. Pronouncement of divorce under the sway of intoxication and compulsion is void, though some jurists held these valid. Unequivocal intent to cease the nuptial tie on the part of the husband is a sine qua non of the divorce though some schools accept as valid the divorce pronouncements of a jesting and thoughtless or forgetful husband.[14] Of course, the wife must be in a state of *tuhr* i.e. free from menstruation and the usual postnatal fluxes and she must not have had a consummation during this period of fresh purity.[15] Pertinently mentionable that pronouncement of divorce during this period is both religiously outlawed and legally invalid according to the Shia and Zahiri schools of law while it is religiously proscribed but legally valid to other jurists.[16]

**Modes of Dissolution of Marriage**

Under the Islamic Law, marital bond can be dissolved during the life-time of the parties thereto: a) by the act of the parties (*talaq*); b) by mutual agreement (*khula* or *mubaraat*); and c) by a judicial order of separation in a suit by the husband or the wife (*tafrid*).[17]

To Jamal J. Nasir, these are the forms of dissolution of marriage that have been documented in the contemporary legislation on personal status.[18] Apart from these, there are three more forms which are recognized by the classical jurists, but have diminutive practical efficacy and bearing in contemporary world. These are i) Injurious Assimilation (*Zihar*), ii) Vow of Continence (*Ila*) and iii) Imprecation (*Lian*).[19] It is worth mentioning here that some people especially westerners, even some Muslim scholars and feminists seem to believe that the husband reserves the absolute,

13 This statement finds its recognition in a *hadith* of the Prophet (PBUH) narrated by Abu Huraira. He reported that the Prophet said, "A woman is married for four things, i.e., her wealth, her family status, her beauty and her religion. So you should marry the religious woman (otherwise) you will be a losers". *Sahih Bukhari*, vol. 7, Book 62, Wedlock, Marriage (Nikaah), Hadith no.27. Though this *hadith* focuses on the vital criteria of selecting a bride this necessarily carries insinuation regarding the choice of groom as well.

14 See al Ati, above n 11, 227.

15 See Ibid.

16 See Ibid, 227-8.

17 Jamal J Nasir, *The Islamic Law of Personal Status* (Graham & Trotman, 2nd ed, 1990) 112. See also Jamal J A Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation* (Brill, 3rd ed, 2009) 117-19.

18 Ibid.

19 Ibid, 112-113.

unconditional and exclusive right to divorce. But, Islamic Law equally bestows upon both the spouse to dissolve the hallowed union if it is proved to be a staid failure.[20] As regards the nature of the modes of dissolution of marriage one author observes:

> ...the mechanisms or channels vary in kind and accessibility from case to case. Some channels are open to the man only; some to the woman only, with or without judicial intervention; and some to both, directly or through judicial process, with or without partner's consent.[21]

While *talaq* is usually initiated by man, the women's right to dissolve matrimonial tie either accrues as a result of a pre-nuptial accord, or is secured by a compromise with the husband, or can be exercised by filing proceedings of dissolution of marriage in the Court of Law.[22]

One contemporary scholar opines that as marriage is a very sacred and solemn, and sanctified religious contract, a unilateral repudiation by the husband must be treated as a stern breach warranting fitting financial and social sanctions.[23]

As per this article is concerned, the concept of *talaq* deserves to be defined properly.

## Conceptualizing *Talaq*

The very word *'talaq'* has been derived from the root word *'talqun'* meaning freedom. It also comes from a root *(tallaqa)* which connotes "to release (an animal) from tether." Literally, it means to snap off or to separate.[24] Within the framework of Shariah, *talaq* means the termination of marital bond with explicit or implied words.[25] Divorce, as Tanzilur Rahman puts adroitly, is the snapping off the nuptial tie, with express or implied words, by the husband personally or through an agent or delegate making it effective immediately or consequentially.[26] Talaq may be classified from different perspectives namely, religious sanction, mode of expression and effects of divorce. From the viewpoint of religious sanction, *talaq* is divided into *talaq-*

20 See al Ati, above n11, 242.

21 See Ibid. *Mutazila* School, however, believes that the reasons of divorce by the husband must be tested by an unbiased judge and consequently no divorce is permissible without the sanction of the court. See Syed Ameer Ali, *Mahommedan Law* (Law publishing House, 7th ed, 1979) vol 2, 432.

22 Justice Aftab Hussain, *Status of Women in Islam* (Law Publishing Company, 1987) 638.

23 Fazlur Rahman, 'A Survey of Modernization of Muslim Family Law' (1980) 11 *International Journal of Middle East Studies* 451.

24 Tanzil-ur Rahman, *A Code of Muslim Personal Law* (Hamdard Academy, 1980) vol 1, 309.

25 Ibid.

26 Ibid.

*us-sunnat*[27] and *talaq-ul-bidat*[28]. *Talaq-us-sunnat* is further divided into *Talaq al-Ahsan* (most approved form of divorce) and *Talaq al-Hasan* (proper divorce).

### Arbitrary and Oppressive *Talaq*

No water-tight definition of arbitrary or oppressive *talaq* is unsurprisingly feasible and enviable since proper contextualization of each and every case of *talaq* is inextricably allied with this definitional aspect. However, the *talaq* which is pronounced without any legal justification or which fails to protect the interest of the spouse(s) or tantamounts to injury to one of them or both of them or above all which is pronounced without following the dictates of the Qur'an and Sunnah is usually designated as whimsical, arbitrary and oppressive *talaq*.

To one renowned scholar, this oppressive type of *talaq* usually takes place in the following two circumstances[29].The first category embraces that type of divorce when the husband divorces wife during his death-bed illness in order to deprive the wife from inheritance. This type of *talaq* is abominable in the eyes of Allah (SWT) as well as an inhuman and barbarous act. Juristic opinions differ as to the entitlement of women's inheritance rights in this situation. To Imam Shafii, if the husband dies within the *iddat*[30] period the wife would not be entitled to inherit as *talaq-al- bain* puts an end to the marital relation. He also continues to say that his act certainly amounts to sin and for this he would be liable to suffer punishment in the hereafter world.[31] It doesn't have any impact upon his worldly affairs.[32] Other Imams namely Imam Abu Hanifa, Imam Malik and Imam Ahmad bin Hanbal opine that this person becomes eligible for punishment in accordance with the principles of Islamic Justice or *adl* as he pronounced *talaq* for causing injury to the wife.[33]According to Imam Malik the wife will be entitled to inheritance always irrespective of the death of the husband before or after the *iddat*. She is entitled to inheritance even if she embroiders another wedded thread with other person.[34]Imam Abu Hanifa opines that the wife is entitled to inheritance only if the husband dies within the *iddat* period.[35]Imam Ahmad

27 Divorce pronounced in accordance with the dictates of the Qur'an and Sunnah of the Prophet (PBUH).

28 Divorce pronounced in derogation of the principles of the Qur'an and Sunnah. It is also known as innovated and impious divorce.

29 Mustafa As-Sibayee, *Islam O Pashchatyo Samaje Nari* (Akram Farooque trans, Bangladesh Islamic Centre, 4th ed, 2007) 98 [trans of: *Women in the Islam and the West*].

30 It literally implies waiting period. *Iddat* has to be observed by the wife on the death of the husband or due to the dissolution of the marriage.

31 See As-Sibayee, above n 29, 98.

32 See Ibid.

33 See Ibid.

34 See Ibid.

35 See Ibid.

bin Hanbal steers a middle course as he says that the wife is disentitled to inheritance if she enters into wedlock with other person after the observance of the *iddat* otherwise she will be entitled to the same irrespective of the death of the husband before or after the *iddat* period.[36] Dr Sibayee has accepted the opinion of Imam Ahmad.[37]

The oppressive talaq also takes place when it is pronounced without any justification. The wife may be poor or she may reach extremely old age in which case remarriage is rarely possible or her reputation may be severely injured which makes her remarriage very difficult. This incident makes her life miserable and causes innumerable pains and sufferings to her. Undoubtedly, husband will be liable for such kind of offensive and sinful action to Allah (SWT). Islamic Law, in a straight line, does not provide compensation to the wife for being harmed in consequence of such arbitrary divorce. On the other hand, it is equally appropriate to say that Islam does not proscribe to provide compensation to the wife. However, the well-grounded principle of *adl* of Islam as firmly established through the Quranic verses and the *ahadith* of the Prophet (PBUH), the practices of the companions especially the Rightly Guided Caliphs and the juristic principles deduced from these and overall the *maqasid al sharia* dictate to make proper arrangements for payment of compensation to the wife.

**Arbitrary Repudiation and Reliefs provided under Islamic Laws.**

The underlying spirit of the laws of talaq as espoused in the Qur'an and Sunnah convince a group of jurists to opine that divorce is prohibited except in certain exceptional reasons.[38] A large and influential group of jurists allows talaq only in case of dire and extreme necessity namely the adultery of wife.[39] On the other hand, a body of jurists consisting mainly of the Mutalzila scholars vehemently opposes *talaq* without the sanction of an impartial judge or court dealing and administering Islamic Law. They opine that any such cause as may justify separation and remove *talaq* from the category of being forbidden should be tested by an unbiased judge;[40] to support their opinion they mention the commandment of Allah (SWT) as espoused in Sura Al-Nisa 4:35 to appoint impartial arbitrators to settle family disputes arising between the spouses. They also refer the words of Prophet (PBUH) that of all the lawful acts the most detestable to Allah is divorce.

Under Islamic Law a husband is legally duty bound to provide maintenance to the wife. Upon divorce, he has to provide maintenance during the *iddat* period and in addition to that he has to make a reasonable and fair provision

36 See Ibid.

37 See Ibid.

38 Syed Ameer Ali, *Mahommedan Law* (Law publishing House, 7th ed, 1979) vol 2, 432. Quoted from Radd-ul-Muhtar, vol 2, 682 .

39 Ibid.

40 Ibid, 433.

for the divorced wife. *Talaq* may take place before or after consummation. As regards *talaq* before consummation the Holy Qur'an focuses in the following verse:

> You will incur no sin if you divorce women while you have not yet touched them nor settled a dower upon them; but [even in such a case] make provision for them - the affluent according to his means, and the straitened according to his means - a provision in an equitable manner: this is a duty upon all who would do good.[41]

Allah (SWT) reiterates this right of the divorcee and obligation of the husband in the following verse:

> O YOU who have attained to faith! If you marry believing women and then divorce them ere you have touched them, you have no reason to expect, and to calculate, any waiting-period on their part: hence, make [at once] provision for them, and release them in a becoming manner.[42]

It also ordains:

> And if you divorce them before having touched them, but after having settled a dower upon them, then [give them] half of what you have settled - unless it be that they forgo their claim or he in whose hand is the marriage-tie forgoes his claim [to half of the dower]: and to forgo what is due to you is more in accord with God-consciousness. And forget not [that you are to act with] grace towards one another: verily, God sees all that you do.[43]

The aforesaid verses established the rights of the wife repudiated by the husband before consummation of the marriage. However, if the marital bond is disbanded after consummation the rights of the wife naturally become stronger. As per the commandment of Allah (SWT) as revealed in Al-Ahzab 33:49 is concerned no question of *iddat* arises if marriage is annulled before sexual intercourse between the spouses. The question of *iddat* arises only when the marriage is consummated. Iddat can be regarded as the partial extension of the marital bond which is evident from the husband's strict obligation to provide maintenance to the wife during this period.[44] The Qura'nic injunction is very clear regarding this. It provides:

> O PROPHET! When you [intend to divorce women, divorce them with a view to the waiting period appointed for them, and reckon the period [carefully], and be conscious of God, your Sustainer. Do not

41 Al-Baqarah 2: 236, Mohammad Asad, *The Message of the Qur'an*, <http:www.geocities.com/masad> accessed May 19, 2009. Translations of the different verses of the Qur'an as mentioned in different places of this article are taken from this source.

42 Al-Ahzab 33:49.

43 Al-Baqarah 2: 237.

44 Ali and Ahmed, above n 7, 246.

> expel them from their homes; and neither shall they [be made to] leave unless they become openly guilty of immoral conduct. These, then, are the bounds set by God and he who transgresses the bounds set by God does indeed sin against himself: [for, O man, although] thou knowest it not, after that [first breach] God may well cause something new to come about.[45]

The obligation of the husband to pay maintenance during this period specifically stems from the commandment of Allah (SWT) as espoused in the following verse:

> [Hence,] let the women [who are undergoing a waiting-period] live in the same manner as you live yourselves, In accordance with your means; and do not harass them with a view to making their lives a misery. And if they happen to be with child, spend freely on them until they deliver their burden; and if they nurse your offspring [after the divorce has become final], give them their [due] recompense; and take counsel with one another in a fair manner [about the child's future]. And if both of you find it difficult [that the mother should nurse the child], let another woman nurse it on behalf of him [who has begotten it].[46]

Apart from providing maintenance during *iddat* period the Qur'an speaks for endowing the divorced wife with *mutat.*[47]

## Meaning of Mata

The very Arabic term *mutah* linguistically connotes enjoyment, pleasure, delight, satisfaction, contentment, and happiness as opposed to gloominess, despair, depression, dejection, melancholy, misery, anguish and grief.[48] Idiomatically it is used to denote the post-divorce financial support, or post-divorce payment, provided by a divorcer to divorcee, in an endeavour to fortify the divorcee's sense of confidence, self-esteem, to empower her with reasonable sustenance as well as to help her maintain social standing with poise and seemliness by toning down the effects of divorce negatively affecting her.[49] John Penrice defined Mata as household stuff, goods,

45 At-Talaq 65: 2.

46 At-Talaq 65: 6.

47 See Al-Baqarah 2: 241. In this article the very term *mut'ah* is spelt variously namely *mata, mutat, motah* etc. This carries the same connotation.

48 Mohammad Adam Sheikh, 'Post-Divorce Financial Support from the Islamic Perspective' in Mahmoud Ayoub (ed), *Contemporary Approaches to the Qur'an and Sunnah* (International Institute of Islamic Thought, 2012) 173.

49 Ibid. To the author, though the chic of defining mut'ah in such fashion painstakingly focuses on the psychological aftermath of divorce it omits to construct an inclusive framework of rights pertaining to women and thereby it, not reluctantly, fails to concede that mut'at al-talaq is the primary right of the divorcee from the composite estate of the family unit whereof she was part and a full partner in ownership.

chattels, provision, convenience[50]. Dr Balbaki endeavoured to define mata' as effects, goods, wares; chattel(s).[51] Hans Wehr defines mata' as enjoyment, pleasure, delight, gratification; object of delight, necessities of life; chattel, possession of property; goods, wares, commodities, merchandise, furniture; implements, utensils, household effects; baggage, luggage, equipment, gear; useful article, article of everyday use; things, objects, stuff, odds and ends.[52] Evidently it seems that he tried, in a very scholastic way, to decode the generic features involved in the term *mata'*.

Mut'ah, as one author scrupulously observes, is one of the three fixed rights billed to the women apart from her right of inheritance in the event of the death of her husband.[53]

Now we would proceed to interpret the verse with special reference on the word *'mutat'* in the light of renowned exegeses of the Qur'an.

To Ibn Abbas,[54] Allah (SWT) orders the husband to provide fair provisions for the wife in case of divorcing her before sexual intercourse. Undoubtedly, the arrangement of fair provision is dependent on the financial capacity of the husband. According to him, this is in surplus of the price given to the prostitute for her services (mahr al-baghiy) and the least amount of it consists of a chemise, a head covering and a wrap. Ibn Abbas believed that this order of Allah (SWT) imposes a bounden duty upon the husband for the very reason that it serves as a substitute for dower.

Ibn Abbas, being a respected companion of the Prophet (PBUH), a versatile genius as well as a highly acclaimed exegete of the Qur'an, properly articulated the nature and scope of the post-divorce financial support. He though, very contextually, mentioned the minimum amount of *mut'ah* ungrudgingly left to provide the maximum amount. Here lies the real wisdom of this unique scholar since determination of the amount of *mut'ah* corresponds to the time, society and most pertinently the financial capacity of the husband.

50 John Penrice, *A Dictionary and Glossary of the Qur'an* (Other Press, revised ed, 2006) 210.

51 Rohi Balabaki, *Al-Mawrid: A Modern Arabic-English Dictionary* (Dar-El-Ilm Lilmalayin, 9th ed, 1997) 949.

52 Miton Cowan J (ed), *Hans Wehr's A Dictionary of Modern Written Arabic* (Lebanon Library, 3rd ed, 1980) 890.

53 These three rights under the comprehensive framework of Shariah embraces dower(*mahr*) in the event of marriage, maintenance (*nafaqa*) during the subsistence of marital tie as well as *iddat* period, *mut'at al-talaq* after the happening of the irrevocable divorce. See Abdel Karim Shabun, *Sharh Mudawwanah al-Ahwal al-Shakhsiyyah al-Maghribiyyah* (Maktabah al-Ma'arif, 1987) vol 1, quoted in above n 48.

54 Abdullah Ibn Abbas, *Tafsir Ibn Abbas*, (Mokrane Guezzou trans, Royal Aal al-Bayt Institute for Islamic Thought,) [trans of: *Tafsir Ibn Abbas*] <http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=74&tSoraNo=2&tAyahNo=236&tDisplay=yes&UserProfile=0&LanguageId> accessed 27 August 2009.

One of the most ancient but illustrious exegetes of the Qur'an Imam Abū Ja'far Mohammad b. Jarīr al-?abarī, (d. 310 H.) in his fêted exegesis *Jāmi' al-bayān 'an ta'wīl āy al-Qur'an* candidly and boldly advocated the rights of women to the *mut'ath.*[55] His sound knowledge on different sources and aspects of Shariah led him to conclude that *mut'ah* was a strict obligation on the husband.[56] Moreover, he, after focusing on the different opinion of jurists on the said matter, vehemently asserted:

> I believe what represents the truth among all of the above jurists' arguments is the argument of those who say that post-divorce *Mut'ah* is mandatory for all divorced women, because Allah has said: 'For all divorced women *Mut'ah* is a duty on the *muttaqīn.*[57]

Being an authoritative and commanding jurist, instead of merely borrowing and reflecting on the opinions of other scholars he exploited the tool of *ijtihad* judiciously and after refuting the blemished arguments of scholars belonging to the adverse plinth assertively avows[58]:

It is my conviction that post-divorce *Mut'ah* is an obligatory payment on the husband who divorced his wife, and he is liable to pay her *Mut'at-al-?alāq* just like he is liable to pay her due dowry, and he will never be exonerated from such obligation until he pays her or her proxies or heirs, and that *Mut'at-al-?alāq* is like other debts that are due to her, and the husband is subject to incarceration and his property can be sold for not paying his divorced wife her post-divorce due *Mut'ah.*[59]

The aforesaid stance of Imam Tabari evidently goes to the extent of impudently claiming that husband's duty to pay *muta'h* is equivalent to the payment of dower and as a natural upshot of this his liability will not be dissolved until and unless he pays this debt like obligation to her or her heirs or legal representatives. Moreover, he bluntly opines that husband can be imprisoned as well as his property can be sold for the extreme failure to provide the wife with *due mut'ah.* This well-argued liberal interpretation of the Qur'an indubitably feels the psychosomatic poignant trauma of the divorcee and calls for refurbishing her right to *mutat-al-talaq* in order to relieve, as far as possible, her from such abysmal and appalling order.

Muhammad ibn Ahmad al-Ansari al-Qurtubi, eminent Maliki scholar, in his celebrated commentary of the Qur'an[60], departing from the widely held view

55 See Sheikh, above n 48, 174.

56 See Ibid.

57 Muhammad ibn Jarir al Tabari, *Jami al-Bayan 'an Tawil ay al-Qur'an* (Resaalah Foundation, 1994) vol 2, 81-100; see also al-Qurtubi, *al-Jami li Ahkam al-Qur'an,* (Dar Ihya al-Turath al-Arabi, 1985) vol 3, 196-208, 227-9. Quoted in n 48.

58 See Sheikh, above n 48, 174-5.

59 Muhammad ibn Jarir al Tabari, *Jami al-Bayan 'an Tawil ay al-Qur'an* (Mu'assassaat al-Risalah, 2000) vol 2, 80-2. Quoted in n 48.

60 Muhammad ibn Ahmad al-Ansari Qurtubi, *Al-Jami' li Ahkam al-Qur'an* (Dar al-Kitab al-Arabi, 1967).

of the Maliki School spontaneously held, through the meticulous utilization of the tool of *ijtihad*, that the verse relating to the payment of *mut'at at-talaq* was revealed as a command and thus binding.[61] Furthermore, in reply to the claim of one group of scholars that payment of *mut'at-al-talaq* was only binding on the *muhsinin* (righteous people) and the *muttaqin* (pious people of means) Qurtubi opined that this fact rather illustrates and strengthens the right of divorcee to post divorce *mut'ah* since each and every Muslim requires to be a *muhsin* and a *muttaqi*.[62] Apart from this, he vehemently refuted the claim of those scholars who held that *mut'ah* was prescribed only for those women whose marriage had remain unconsummated and whose dower was not determined.[63]

Ibn Kathir,[64] in explaining the verse, mentions that it is the commandment of Allah (SWT) towards the husband to compensate the wife for incurring loss resulting from the divorce before consummation. He expressed that this would be a gift of reasonable amount. To him, this meaning suited the very word *'mutat'*. Here the most decisive factor in determining the reasonableness of amount is the financial status of the husband. That is, the compensation paid by the opulent would vary from the pauper. In this connection he cited an illustration from the *hadith* of the Prophet (PBUH). The *hadith* is like as follows:

Narrated Sahl and Abu Usaid: The Prophet married Umaima bint Sharahil, and when she was brought to him, he stretched his hand towards her. It seemed that she disliked that, whereupon the Prophet ordered Abu Usaid to prepare her and to provide her with two white linen dresses.[65]

Thus the Prophet (PBUH) ordered to provide provisions along with two garments. But it is not possible, from this tradition, to determine the cost of the dresses and the nature of provisions he provided. But it can, without difficulty, be presumed that the dresses supplied and the provisions provided by Him were reasonably sufficient in accordance with the status of the lady and the financial ability of the Prophet (PBUH).

Imam Fakhr al-Din al-Razi, a renowned exegete and scholar, in his voluminous and well-articulated commentary of the Qur'an, after dividing the divorced women into three different categories (Sura al-Baqarah 2:236), wisely argued that the very preposition letter *'ala* in Arabic language implies that the issue in question is neither discretionary nor recommendable, but rather is fittingly mandatory.[66]

61 See Sheikg, above n 48, 175.

62 See Sheikg, above n 48, 175-6.

63 Muhammad ibn Ahmad al-Ansari Qurtubi, *Al-Jami' li Ahkam al-Qur'an* (Dar al-Kitab al-Arabi, 3rd ed, 1999) vol 3, 200-1, quoted in n 48, 176.

64 See <http://www.tafsir.com/default.asp> accessed 28 August 2009.

65 *Sahih al Bukhari* vol 7, Book 63, Divorce, Hadith no. 182. See also Hadith no 183.

66 Fakhr al-Din al Razi, *Tafsir al Kabir*, (Dar al-Fikr, 1995) vol 5, 150-1 quoted in Sheikh, above n 48, 177.

According to tafsir al-Jalalayn[67], the very word matā'an, implies 'comforts'. Here Allah (SWT) obliges the husband to make provision of comforts for the divorced wife honourably, giving them what they can enjoy. Of course, the arrangements provided by the husband would vary according to the economic condition of the husband.

This commentary of the Qur'an, however, like many commentaries, fails to construct the essential framework to elucidate the concept of *mut'ah*. It, instead of explicating the real nature of comforts or provisions, merely depicts the skeleton.

Abul al-Qasim Mahmud ibn Umar al-Zamakhshari, one of the most eminent exegetes, in lieu of commending the opinions of scholars like Sa'id ibn Jubayr, Abu al-Aliyah and Al-Zuhri who regarded *muta'h* obligatory compensation for all divorcee he approved Imam Malik who held *mut'at-al-talaq* to be compulsory only for women divorced before the consummation of marriage, and only recommendable for other divorcees.[68]

Shaykh Rashid Rida, a prominent scholar of relatively modern time, in his well-known commentary of the Qur'an *Tafisr al-Manar*, very beautifully, after weaving and embroidering the tapestry of his infrastructure of logic, advocated for the enforcement of the rights of the divorcee to post-divorce financial support. Endorsing the views of scholars who robustly defended the rights of divorcee to post-divorce support as obligatory responsibility, he enthusiastically regenerated this stream of thought in modern times.[69]

As regards the verse 241 of Chapter 2 Sayyed Abul Ala Maududi in his renowned exegesis Tafheem ul Qur'an[70] comments that if the loss ensues to the woman in consequence of the severing the matrimonial contract the husband shall have to pay compensation for the loss according to his capacity. He elucidated that this is an order from Allah (SWT). Maududi translated the word *'mutat'* as something anyhow. In commentary, he marked it as compensation. Therefore, it can be aptly remarked that the husband must compensate the wife as Allah has commanded him to do so for his act causing detriment to the latter. Though Maududi is generally regarded as a rigid scholar, he even, endeavoured to unveil the divine intent which is undoubtedly not misogynist in nature. However, his understanding regarding the nature and breadth of *mutah* is vitiated by the influences of

67 Tafsir al-Jalalayn, translated by Feras Hamza, published by Royal Aal al-Bayt Institute for Islamic Thought, Amman, Jordan retrieved from http://www.altafsir.com/Tafasir.asp?tMadhNo=0&t TafsirNo=74&tSoraNo=2&tAyahNo=236&t Display=yes & UserProfile=0 & LanguageId=2 visited on August, 27, 2009.

68 Abu al-Qasim Mahmud ibn Umar al Zamakhshari, *Al-Kashshaf an Haqaiq al-Tanzil wa Uyun al-Aqawil fi Wujuh al-Tawil* (Dar al-Fikr) vol 1, 337 quoted in Sheikh, above n 48, 177.

69 Rashid Rida, *Tafisr al Manar* (Dar al-Fikr, 1947) vol 2, 430-1, quoted in n 48, 178.

70 See <http://www.islamicstudies.info/tafheem.php?sura=2&verse=236&to=242> accessed August 27, 2009.

classical orthodox scholars. Moreover, he spared to contextualize this divine intent in contemporary period as well as evaded to spend more ink to portray the utter significance of *muta'h* for the divorced wife.

Mufti Shafi[71] commented that the verse 236 of chapter 2 deals with that circumstance where no dower is fixed and consummation has not taken place. He mentioned that in this circumstance, it is true that no dower is due but it becomes obligatory for the husband to render something to the wife who has been divorced before consummation. He interpreted the term *'mata'* as compensatory benefits. To him, the least amount of that would be a set of clothes. He commented that, thoug'h the Holy Qur'an does not specify the amount for this gift it indicates that the affluent should furnish in accordance with their capacity, which carries an element of persuasion for the wealthy who should not be miser in this act of grace. Citing from the *Qurtubi* he pointed out that Sayyidina Hasan, in a situation like this, gave a gift of twenty thousand *dirhams* to the divorced woman, and Qadi Shurayh, that of five hundred dirhams; and Sayyidna Ibn Abbas expressed that the lowest degree here is to give one set of clothes. Mufti Shafi, in keeping pace with the aforesaid explanation of the eminent classical scholars, commented that husband is under an unyielding legal obligation to provide such kind of provision.

So, Mufti Shafi, a prominent commentator of the Qur'an of the Indian sub-continent, palpably appreciated the weight of the commandment of Allah (SWT). Moreover, his citation of the illustrations of Sayyidina Hasan and Qadi Shurayh, repels the cloud of confusion regarding the fixation of amount of *mut'ah* as well as unfailing clarifies the 'variable' character of the *mut'ah*.

Allama Tabatabai[72] interpreted the word *"al-Mut'ah"* and *"al-mata"* as what may be used, or enjoyed. In keeping pace with this line, he expressed that *"matti'uhunna"* means 'give them usable, enjoyable goods or wealth. Thus, Allah (SWT) ordered the husband to make provision or provide wealth to the wife for divorcing her before consummation of the marriage. To him, as doing of good to others is not incumbent, the order decreed by Allah (SWT) apparently seems in the nature of recommendation or a non-compulsory law. He continues, to say that patent traditions of *Ahlu'l-bayt* reveal that the order is undoubtedly compulsory and obligatory. He clarified this stance in the following manner:

> Perhaps it may be inferred from this verse in this way: Allah has earlier said, "Divorce is twice; then keep (them) in fairness or let (them) go with kindness". There the Arabic word, for which we have used "Kindness", is *al-ihsan,* which in this verse has been translated as doing good to others. Anyhow, kindness and doing good is incumbent on those who let the women go, that is, those who give

71 <http://www.islamibayanaat.com/MQ/English-MaarifulQuran-MuftiShafiUsmaniRA-Vol-1-Page-587-637.pdf.> accessed 2 February 2010.

72 <http://www.shiasource.com/al-mizan> accessed 27 August 2009.

> divorce. Therefore, the divorcers are obliged to be doers of good. And this verse orders the doers of good to make provision for the divorced women. In other words, it obliges the divorcers to make such provision. (And Allah knows better).

Tabatabi, the renowned exegete, successfully appreciates the obligatory nature of *mut'ah* which a husband must pay for annulling the marital tie.

Sayyid Qutb observes that in such circumstances the husband is obliged to recompense her according to his means. He clarifies this by saying that the nature and size of the gift offered in such situation is left to the discretion and reasoned conscience of man but of course, within his financial capacity. He amazingly summed up the true intent of this gift in the following words:

> Such a gesture would have an immense psychological impact on the woman, who would be devastated at having her marriage dissolved before it has even begun. It would go a long way towards dissipating any bitterness or acrimony left in her heart. The unfulfilled marriage would be understood as an unfortunate mistake rather than a reflection on her suitability or integrity. The aim would be to diffuse the tension and conduct the severance of the relationship amicably, in a spirit of fairness and with no hard feelings.[73]

In explaining the verse 241 of Chapter 2 Sayyid Qutb vehemently opines that the 'provisions' referred to here are not identical to and same as maintenance.[74] Though few scholars hold the opinion that the right given to the divorcee in this verse was superseded by other verse he strongly argues that the context and the spirit of these Qur'anic passages suggest that such provisions are a right of all divorced women irrespective of whether the marriage was consummated or a dower agreed and settled.[75] Being a renowned exegete, he observes that these provisions are designed to alleviate the bitterness and acrimony associated with divorce, and to compensate or offset some of the grief, anguish, and distress that follow the severance of nuptial tie.[76]

73 Sayyid Qutb, *In the Shade of the Quran* (Adil Salahi and Ashur Shamis trans, The Islamic Foundation, revised ed, 2003) vol 1, 372 [trans of: *Fi Zilal al-Qur'an*].

74 Ibid, 375. Here he defies the opinion of different scholars as well as translators of the Qur'an who hold the view that *mut'ah* as embodied in this verse require to be construed as maintenance. Thus, he disagrees with the view of Muhammad Asad who translated the word *mut'ah* in the perspective of this verse as maintenance. See Muhammad Asad, *The Message of the Qur'an*, (Dar Al-Andalus, 1980) 54. In the same vein another scholar, after examining the connotation of the very term *mata'* as elucidated by different exegetes of the Qur'an, stringently insists that the translation of Abduallah Yusuf Ali is erroneous since no significant Arabic lexicons construe the aforesaid word as maintenance. See Syed Athar Hussain, *Muslim Personal Law: An Exposition* (All India Personal Law Board, ) 121-6.

75 Ibid, 375-6.

76 Ibid, 376.

Though it is alleged that Sayyid Qutb belongs to the group of unbending scholar, the aforementioned vindication stunningly shuts up the mouth of the critics at least regarding this issue. He, with a rhythmic tone of progressiveness and liberalism, appraised the Qur'anic *Weltanschauung* or worldview exclusive of divorced women and furbished the path for them to be bestowed with the divinely ordained *mut'ah*. Being empathized he endeavoured to feel psychological trauma of the divorcee and after appraising the divine intent boldly expressed that *mut'ah* must be paid to all divorcee as outlined above. Though very simply put but very revolutionary while he manifestly maintained that, the claim of *mut'ah* stands in a quite distinct platform from maintenance or *nafaqa*.

**Payment of Mutat: Obligatory or Merely Recommended.**

Inevitable offshoot of Islamic legal pluralism also leaves its scar on the issue of *mut'ah*. Divergent approach towards the interpretation of the Qur'an and the Sunnah is the prime mover to contrive the scholastic division among the scholars. Undoubtedly each scholar, very logically as well as unsurprisingly, in this process was critically influenced by his own society and time and thereby it is not entirely illusory to claim that their understanding of Shariah, to assume its shape, borrows the stream of thought extant at that period.

Regarding the nature of *mut'ah* juristic opinions spawn two different brooks of thought.[77] While some scholars portray the post-divorce financial support as obligatory others venture to regard it merely recommendable.[78] Beyond this theological apparent dissection, as one author bewails, in terms of practicality, Muslim scholars generally treat *mut'ah* as merely recommended not fittingly mandatory and even the jurists who enthusiastically regard it obligatory miserably fail to sponsor this idea.[79]

Hanafi School of jurisprudence, excepting in the following two cases, fervidly opposes to bestow divorcee with *mut'ah*.[80]

The first case relates to *al-mufawadah*, referring to a woman entered into wedlock without determination of dower and divorced before consummation of the nuptials.[81] Second case embraces the case of a divorcee whose dower though fixed but her matrimonial alliance was severed before the consummation of marriage.[82]

This stance of Hanafi School, most ancient Sunni school of fiqh with huge number of devout followers, drive many Muslim scholars, judges and

77 See Sheikh, above n 48, 179.

78 See Ibid.

79 See Ibid.

80 See Ibid, 180.

81 See Ibid.

82 See Ibid.

masses to regard *mut'ah* merely recommendable.[83] This predominant view, very willingly overlooking the other cases of divorce excepting the aforesaid two, spontaneously provokes innumerable plights for the divorced women.

Imam Malik ibn Anas and most of the scholars of Maliki School of jurisprudence basing their logic on the interpretation of words *muhsinin* and *muttaqin*, opine that *mut'ah* is recommended for all divorcees except those with fixed dowers and whose marital tie was annulled before the consummation of the matrimony.[84]

Imam Malik in *Al-Muwatta*, a noted *Hadith* Book, mentioned the following *ahadith* regarding compensation to the divorced wife under the heading titled 'Compensation in Divorce'. The first *Hadith* spelt out that compensation paid by Abd-ar-Rahman ibn Awf, a renowned companion of the Prophet (PBUH) to his divorced wife was a slave girl, an essential and precious gift during that period. The *Hadith* is as follows:

Yahya related to me from Malik that he had heard that Abd ar-Rahman ibn Awf divorced his wife, and gave her compensation in the form of a slave-girl.[85]

Imam Malik opined that every divorced woman has compensation except the one who is divorced and is allocated dower but of course before consummation. The *hadith* reads as follows:

Yahya related to me from Malik from Nafi that Abdullah ibn Umar said, "Every divorced woman has compensation except for the one who is divorced and is allocated a bride-price and has not been touched. She has half of what was allocated to her."[86]

The following *hadith* also emphatically affirms that each and every divorced woman has compensation.

Yahya related to me from Malik that Ibn Shihab said, "Every divorced woman has compensation." Malik said, "I have also heard the same as that from al-Qasim ibn Muhammad."[87]

As regards the amount of compensation Imam Malik opined that there is no limit of compensation. The following statement as embodied in Al-Muwatta clarifies this.

Malik said, "There is no fixed limit among us as to how small or large the compensation is."[88]

83 See Ibid.

84 See Ibid, 180-1.

85 Al-Muwatta Book 29 Divorce, Section: Compensation in Divorce, Hadith no: 29:16:45.

86 Ibid.

87 Book: 29 Divorce, Section Compensation in Divorce Hadith no: 29:16: 46.

88 Ibid.

Thus, the stance of Imam Malik becomes clear regarding *mut'ah*. His thought, regarding amount of post-divorce financial support, is revolutionary since he is quite aware of the *maqasid al-sharia* underlying the provisions of the *mut'ah*. He kept it open and made space for the upcoming scholars to determine the amount of *mut'ah* in their own time and society after taking into consideration the different factors regarding the said divorce, plights of divorcee as well as the financial capability of the husband.

Imam al-Shafii, very erudite scholar of Islamic jurisprudence, holds that a divorcee who is not divorced due to her own fault is entitled to *mut'ah*. This School held that there is no prohibition to pay *mutat* to the wife divorced before consummation. One eminent scholar of the Shafii School mentioned:

> A woman repudiated before or after the consummation of marriage, to whom the law does not allow half dower, may demand a pecuniary indemnity called *motah*. This is also in the case of separation, at any rate when this separation is not the result of anything for which the woman is responsible. ...where the parties cannot agree as tho the amount of the *motah*, the decision rests with the court, which should take into account the condition of both the litigants. Some authorities, however, maintain that the court should have regard to the husband's condition only; some only to that of the wife; others admit no legal minimum, provided that the *motah* consists of something that can form the basis of a legal obligation.[89]

The position of scholars of Hanbali School of jurisprudence corresponds to those of the Hanafi and Shafii Schools.[90]

All the divorced women are entitled to *mutat* though few scholars exclude the women who fall within the category as mentioned in Chapter 2: 237. On the other hand others in relation to the *mutat* as mentioned in Chapter 33: 49 unhesitatingly opine that this *mutat* is in addition to the half dower payable to the divorced wife by them under Chapter 2: 237. They further advance the argument by saying that if the dower had not yet been determined the *mutat* would in all its probability be larger, and it would certainly absorb the *mutat* prescribed in Chapter 2: 236.[91]

89 Mahiudin Abu Zakaria Yaha Ibn Sharif En Nawawi, *Minha Et Talibin: A Manual of Muhammadan Law According to the School of Shafii* (E C Howard, Law Publishing Company, undated) 313.

90 See Sheikh, above n 48, 183-4.

91 Abdullah Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary*, (Goodward Books, first published 1934, 2009 ed) 1121. He translated the word *mutat* here as present or gift. On the other hand, Muhammad Asad translated *mutat* as provision. See above n 41.

**Views of Contemporary Scholars**

Dr Sibayee[92] vehemently supports the approach followed by the different modern states specially Syria, his native land. But he raised an objection regarding the legislation enacted by Syria. His objection is concentrated on the point of payment of compensation in addition to the maintenance for the waiting period as it specifies a time limit i.e. in an amount not exceeding three years' maintenance *(he mentioned the time limit as one year but it is now 3 years).* After raising this objection, he asserts that the arrangements should be made in such a way which would compel the oppressor husband to provide compensation to his wife until she remarries if she remains eligible for marriage *(of course, this is only possible if she expresses her desire to do so)* and if she is aged lady for which she is not in an eligible state of marriage she must be reimbursed in such a manner that she could lead her remaining life honourably i.e. she should be provided with secured abode and minimum standard provision for protecting her life and honour. He also opines that if the husband is not so financially well-off, the state shall have to bear the expenses after husband's arrangement's provided in accordance with his financial ability. He very beautifully sums up the philosophy of this when he articulates that Islamic *Shariah,* as it's intrinsic nature ensures justice, does not tolerate the whimsical conduct of the husband which expose the women in an inhuman situation i.e. she has spent the golden time of her life with that husband and in the last phase of her life she will be approaching the death without getting any reward from the family bondage that has been severed arbitrarily by the husband. It would be very much injustice for the husband not to provide any sustenance to the wife.

If a husband pronounces a *talaq* and it is apparent to the judge that the husband has acted arbitrarily and without reasonable cause, and that the wife will suffer misery and hardship, the judge may make an award against him for compensation to the wife according to his circumstances and the degree of arbitrariness in an amount not exceeding three years' maintenance for a woman of like social status. This shall be in addition to the maintenance for the waiting period. The judge may rule that this compensation be paid as a lump sum or in monthly instalments according to the circumstances.

Rafiallah Sahab, a pakistani scholar were succeeded in appreciating the true nature of Islamic Law in early periods regarding the issue of *mutat* and also urged the members of the contemporary community to understand the dynamics of Islamic Law in the context of modern complexities. After referring to a *hadith* and opinions of a group of scholars he asserts:

> ...good Muslims in the early period of realm always paid a handsome amount to their divorced wives so that someone may contract marriage with them for the sake of this money. Servants were provided to those divorced women who had passed the limit of

92 See As-Sibayee, above n 29, 99.

> marriageable age. The expenses of this servant were always borne by the divorcing husband. If the husband is expected to pay the expenses of a servant, he can do so in respect of payment of maintenance allowance to her...In the light of these details, it is suggested that the ulema should study this issue in the light of the teaching of the Qur'an and Sunnah.[93]

Fayyazur Rahman, another scholar of Pakistan agrees with this view.[94]

Ashraf Ali Thanvi, a renowned scholar of the sub-continent opined that divorced may be effected only when all the efforts to keep intact the marital bond fails and husband should have to provide maintenance to the wife until her death or remarriage. He issued the following verdict while Maulana Abdul Majid sought his valuable opinion regarding his intention to divorce his disobedient wife:

> I agree with you that you would arrange another husband for her. This is one alternative which you think suitable but this may have some defects. If at another place she is unable to maintain harmonious relationship and in case her marriage tie irretrievably breaks down then you would be responsible for that. You think over the matter again and again and if it is inevitable for you in the present circumstances and you have decided to divorce her you should do it with the condition that if she does not marry again, you will pay her an amount of Rs 5 per month for ever during her life time and if she remarries you will give her an amount of Rs 10 per month until her second marriage.[95]

Another contemporary scholar Khaliq Ishaque severely criticized the stance of those early jurists who interpreted the provisions as found in Sura Al-Baqara 2: 241-2 from a misogynist point of view since they interpreted the injunction to pay *mutat* as a moral obligation instead of legally enforceable obligation. He laments:

> Qur'an gives special status to women, but in the standard projections of Islam this point is overlooked: and in some cases even explained away. For instance, Qur'an says that provision be made for the maintenance of divorced women apart from that provided for

93 Rafiullah Sahab, 'A Pakistani View of Muslim Law' in Lucy Carroll (ed), *Shah Bano and the Muslim Women Act a Decade On: The Right of the Divorced Muslim Woman To Mataa* (Grabels, 1998) 54-5 cited in Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 230-1.

94 See for details Fayyazur Rehaman, 'Post Divorce Maintenance for Muslim Women in Pakistan and India' (1998) 2(1) *Bangladesh Journal of Law* 26, 51.

95 Furqan Ahmed, 'Role of Some Indian Muslim Jurists in Development and Reform of Muslim Personal Law in India' (1992) 34(4) *Journal of Indian Law Institute* 575, quoted in Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 231.

the period of iddat. But the juristic view prevailing is that this provision only requires a pair of clothes and food for one to three days![96]

**Modern Legislations designed to provide Reliefs to the Divorcee**

It is noticeable that certain modern states have legislated in this regard.[97] Those states through their laws provide that if the husband arbitrarily divorces his wife or abuses his power of talaq recompense must be paid to the wife by the husband for the injury inflicted on her.

Art 52 of the Family Code 1984 of Algeria provides that if the judge considers that the husband has abused his right of *talaq* he shall award the wife the right to damages and benefits for the harm which she has suffered.

In Egypt Art. 18 of the Law no 25/1929 as amended by Law no. 100 0f 1985 provides that a woman with whom a valid marriage has been consummated, whose husband divorces her without her agreement and without any cause on her part shall in addition to the maintenance for her waiting period be entitled to compensation (*mut'a)* which shall be assessed as at least two years' maintenance, taking into consideration the circumstances of the divorcing husband in terms of wealth or poverty, the circumstances of the divorce and the length of marriage. The divorcing husband shall be permitted to pay the compensation in instalments.

Art. 134 of Jordanian Family Law of Personal Status says that if a husband pronounces *talaq* arbitrarily, that is if he divorces his wife without reasonable justification, and she makes a claim to the judge for compensation, he shall award her, against her divorcing husband, the compensation which he sees appropriate on condition that it shall not exceed the amount of her maintenance for one year. The husband shall pay this compensation in full or in instalments according to the requirements of the situation, and the circumstances of the husband in terms of wealth or hardship shall be taken into account. This shall not affect the other matrimonial rights of the divorced woman including maintenance for the waiting period.

Art. 165 of Kuwaiti Code of Personal Status provides that if a valid marriage is dissolved after consummation the wife shall be entitled, in addition to her maintenance, to compensation which shall be assessed at an amount not exceeding one year's maintenance, in accordance with circumstances of the husband, and which shall be given to her in monthly instalments following

96 Sabeeha Hafeez, *Metropolitan Women in Pakistan* (1981) xi; see also Lucy Carroll, 'Divorced Muslim Women and Maintenance' (1986) 38 *PLD Journal* 1, quoted in Alamgir Muhammad Serajuddin, *Shari'a Law and Society Tradition and Change in the Indian Subcontinent* (Oxford University Press, 2nd ed, 2001) 316.

97 For a critical analysis on this issue see Lynn Welchman, *Women and Muslim Family Laws in Arab States A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007) 125-31.

the completion of her waiting period, provided the parties have not agreed otherwise with regard to the amount or the manner of payment.

Exceptions to the preceding paragraph shall be:

i. divorce for non-payment of maintenance due to hardship of the husband;

ii. divorce on grounds of *dharar* if caused by the wife;

iii. divorce by consent of the wife;

iv. annulment of marriage at the request of the wife;

v. death of one of the spouses.

Article 117 of Syrian Law of Personal Status (*Qanun al-Ahwal al-Shakhsiyya*), 1975 says that if a husband pronounces a *talaq* and it is apparent to the judge that the husband has acted arbitrarily and without reasonable cause, and that the wife will suffer misery and hardship, the judge may make an award against him for compensation to the wife according to his circumstances and the degree of arbitrariness in an amount not exceeding three years' maintenance for a woman of like social status. This shall be in addition to the maintenance for the waiting period. The judge may rule that this compensation be paid as a lump sum or in monthly instalments according to the circumstances.

Art. 31 of Tunisian Law of Personal Status, 1956 says that decree of divorce shall be made:

a. on the basis of the request of the husband or the wife on the grounds specified in the articles of this law;

b. by mutual agreement of the spouses;

c. at the will of the husband if he wishes to divorce or at the request of the wife. In this instance the judge shall determine what financial compensation shall be due to the wife as reparation for harm caused to her, or what compensation she should pay to the husband.

Art. 71 of Yemeni Law of Personal Status provides that if the man divorces his wife and it becomes apparent to the judge that the husband has divorced her arbitrarily without any reasonable cause and that this will cause her distress and hardship the judge may rule in her favour in accordance with the husband's circumstances that he pay her compensation not exceeding the amount of one year's maintenance for a woman of her status in addition to the maintenance for the waiting period. The judge may make payment of this compensation a lump sum or monthly in accordance with the requirements of the situation.

Section 56 of Islamic Family Law (Federal Territories) Act 1984 wonderfully focuses on mutah or consolatory gift to woman divorced without just cause. It provides that in addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband may apply to the

Court for *mut'ah* or a consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to Hukum Syara.[98]

Under the *Kompilasi Hukum Islam di Indonesia (KHI)*[99], *mutat* must be compulsorily paid if the wife is divorced before consummation and where no amount of dower is fixed and where divorce takes place at the will of the husband.[100] In other cases payment of mutat falls within the category of sunnah.[101] Payment of mutat is dependent on the financial capacity of the husband.

The aforesaid discussion reveals that different states of Middle East, North Africa, and Southeast Asia legislated to provide compensation, *mut'ah* to the wife who has been divorced arbitrarily. Legislation of different states, though made references to maintenance, it was just because to measure the amount of compensation, not to treat the compensation as maintenance. Few states, however, clarified that this payment of compensation is in addition to the maintenance payable to the wife during *iddat* period. So, in no way, those provisions can be regarded as provisions made for maintenance of unjustly divorced wife.[102] Equating and construing and above all terming compensation as maintenance will inevitably lead to erroneous conclusion.

**Judicial Activism relieving the plights of Divorced Women**

Regarding the interpretation of Sura Al-Baqara 2: 241 the Indian Supreme Court in *Mohd. Ahmed Khan v Shah Banu Begum,* AIR 1985 SC 945 held that the liability of the husband to provide maintenance to the divorced wife goes beyond the period of iddat. It also held that the explanation appended to section 125(1) of the Code of Criminal Procedure includes a divorced wife within the definition of wife and it contains no words to exclude Muslim women from its scope. Thus, a divorced Muslim woman would retain her status as a wife until her remarriage.[103] The court continued by saying that

98 For a general discussion on the Law of Maintenance in Malaysia, see Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 51-7.

99 This is a compilation of Islamic Law authored by officials from the Ministry of Religion. This is followed since the mid-1980s. See Abdullahi A An-Na'im (ed) *Islamic Family Law in a Changing World A Global Resource Book* (Zed Books, 2002) 264.

100 See section 158(a) and (b) of the *Kompilasi Islam di Indonesia.*

101 Section 159 of the *Kompilasi Islam di Indonesia.*

102 Alamgir Muhammad Serajuddin termed compensation as maintenance. See Alamgir Muhammad Serajuddin, *Shariah Law and Society Tradition and Change in the Indian Subcontinent* (Oxford University Press, 2nd ed, 2001) 325-6; see also Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 232.

103 *Mohd Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945, 948-9.

no conflict or contradiction exists between the provisions of section 125 and Muslim personal law regarding the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.[104] It observed that though the Muslim personal law limits the husband's liability to provider maintenance up to the iddat period it fails to contemplate the situation envisaged by section 125 and hence it cannot be concluded that the Muslim husband is in no way liable to provide maintenance beyond the iddat period to his divorced wife who is quite helpless to maintain herself.[105]

This decision stirred the whole country with agitation and ultimately led the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 to specify the rights of a Muslim divorced woman at the time of divorce and to protect her interest.[106]Section 3(1) of the Act provides that a divorced woman shall be entitled to "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband."[107] Under section 3(1)(c) and (d) she is also entitled to "an amount of *mahr* or dower" due to her and all the properties given to her as marriage gifts. Failure to make a reasonable and fair provision and maintenance or the non-payment of dower or the non-delivery of property entitle the woman to file an application to a Magistrate for an order for payment of such provision, maintenance or dower of property. Section 4 provides that where a Magistrate is satisfied that a divorced woman is unable to maintain herself after the expiry of *iddat* period, he may order such of her relatives as would be entitled to inherit her property after death, to pay such reasonable and fair maintenance to her which deems proper an fit to him. In case of inability of any one of the relatives to pay her maintenance, the Magistrate can direct the State Wakf Board to pay her such maintenance as may be determined by him.[108]

One renowned author commented that the Act begs the following questions:

(i) Whether it takes away the rights which are conferred upon the divorced women under the personal law as interpreted by the Supreme Court in the Shah Bano Case.

(ii) Whether the words 'provision' and 'maintenance' which occur in section 3(1)(a), mean the same obligation or two separate and distinct obligations.

104 Ibid, 950-1.

105 Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 56.

106 Ibid, 60.

107 Ibid, 61.

108 Ibid.

(iii) Whether the liability to make a reasonable and fair provision and pay maintenance is only restricted to the *iddat* period or whether it extends beyond the *iddat* period.[109]

After a number of conflicting decisions in different courts of different provinces of India the aforesaid issues were finally settled by the Supreme Court of India in the celebrated case of *Danial Latifi v Union of India*[110]. The court while upholding the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 summed up its conclusions in the following manner:

1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife, which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of Section 3(1)(a) of the Act.
2. Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the *iddat* period.
3. A divorced Muslim woman, who has not remarried and who is not able to maintain after the *iddat* period, can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law, from such divorced woman including her children and parents. If any of the relatives is unable to pay maintenance, the Magistrate may direct the State Wakf Board to pay such maintenance.
4. The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.[111]

The aforesaid attitude of the Indian judiciary though endeavours to remedy the plights of divorcee but fails to unveil the true utility and vitality of the *mut'ah* as a post-divorce financial support. Moreover, to comply with the legislation it takes an apologetic feat and creates a burden on the shoulder of the husband to make fair and reasonable provision within the *iddat* period.

Neither the Parliament nor the Courts of Pakistan took any step to relieve the destitute wives from the distress inflicted upon them by their husband through arbitrary repudiation.[112]

109 Ibid.

110 2001 FLC 513, AIR 2001 SC 3958, (2001) 7 SCC 740.

111 *Danial Latifi v Union of India,* 2001 FLC 513 at 529-30.

112 To develop an overall idea on the Muslim Family Law in Pakistan, see above n 105, 104-87.

In Bangladesh a Division Bench of the High Court Division (HCD) of Supreme Court held that a divorced woman is entitled to maintenance on a reasonable scale from her former husband until remarriage. The court asserted:

> Considering all aspects we finally held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period that is to say till she looses the status of a divorcee by remarrying another husband.[113]

The HCD in interpreting sura al Baqara 2:241 took the help of the Dictionary and Glossary of the Koran of Jhon Penrice (for the meaning of the words *mootakallat, mataaoon* and *maaroof*) and the translation of the Qur'an by Abdulla Yusuf Ali.

However, the decision was reversed by the Appellate Division (AD) of the Supreme Court of Bangladesh chiefly on the following grounds:

1. The HCD wrongly interpreted *mata* as maintenance since *Mataa'um-Bil-Ma'ruf* in its Arabic meaning in the Holy Qur'an cannot mean "maintenance on a reasonable scale". If amplified, it means compensation in the form of a presentation of some means of enjoyment which is an article of everyday use and which can take the shape of a dress, money, chattel, property or any other means of enjoyment according to prevalent practice.[114]
2. The HCD disregarded the well established principle of interpretation of the Qur'an as it is not proper and advisable to interpret one verse in a disjoined manner and to ascertain the real meaning of one verse only without reference to other verses on the same subject.[115]
3. There being no direction of payment of maintenance during the period of *'iddat'* in the Holy Qur'an one is bound to follow the other sources of Islamic law for a guidance on the question of granting maintenance to a divorced woman. The judgment is based on no sound reasoning and it is against the principles set up by Muslim jurists of the last fourteen hundred years.[116]

Though the AD conceded that *mataa* is considered as recompense for the injury inflicted by the husband on his wife through his whimsical exercise of divorce by the different states of the world it willingly restrained itself to take any attempt to establish such sort of relief through judicial activism. Moreover, while HCD, to construe the very word 'mut'ah, wrongly opined that it meant maintenance[117] AD outright failed to appreciate the divine

[113] *Hefzur Rahman v Shamsun Nahar Begum and another* (1995) 47 DLR, 57, para 23.

[114] Ibid, para 142.

[115] Ibid, para 168.

[116] Ibid, para 172.

[117] This type of erroneous interpretation also finds its place in a research article of Ayesha Shahid. See Post Divorce Maintenance for Muslim Women in Pakistan and

intent underlying the provision of *mut'ah* as ordained in the Qur'an, its basic meaning (since it very narrowly interpreted the term), nature, breadth as well as its true significance for the divorced women in different ages.[118] The stance of different researchers also clouded the ground and failed pessimistically to construct a comprehensive framework for the alleviation of the plights of divorcee. One group of scholars emphatically and enthusiastically termed the decision of the HCD bold[119], pure and simple judicial activism[120] but their stances despondently failed to go beyond the rim defined by western scholars. They always tended to consider the *mut'ah* as post-divorce maintenance[121] instead of comprehending its generic character as post-divorce financial support. Even some scholars go to the extent of arguing that post-divorce maintenance could be regarded as compensation after taking into consideration the contractual nature of marriage. This vein of argument also lacks ingenuity since marriage under Islamic Law, as one scholar, appreciating its nature as sanctified religious contract having moral, social as well as spiritual nuances, reiterates, never resembles the contract entered into under the conventional law of contract and considering so will expose it to suffer the fate of so called judicial remedy namely restitution of conjugal rights introduced by the colonial power, on the basis of same understanding, in the Indian sub-continent.[122]Moreover, payment of compensation is not always dependent upon the existence of an agreement rather compensation becomes always mandatorily payable due to the injury caused to anyone unjustifiably. Though the latter scholar very magnificently pointed out that one should not worry to find out the solution

Bangladesh: A Comparative Perspective, (2013) 27(2) *International Journal of Law, Policy and the Family* 197.

118 In this regard Shahdeen Malik very aptly criticizes the attitude of the apex court. See Shahdeen Malik, 'Laws of Bangladesh' in A M Chowdhury and Fakrul Alam (ed), *Bangladesh on the Threshold of the Twenty- First Century* (Asiatic Society of Bangladesh) 433, 461-2.

119 Ridwanul Hoque and Md Morshed Mahmud Khan, 'Judicial Activism and Islamic Family Law: A Socio-legal Evaluation of Recent Trends in Bangladesh' (2007) 14(2) *Islamic Law and Society* 204, 225. For a detailed discussion on this judgment See also Md Mohiuddin Khaled and Ridwanul Hoque, 'Right to Post-Divorce Maintenance in Muslim Law: The Shamsun Nahar Revisited' [1999] (4) *Chittagong University Journal of Law* 1.

120 See above n 105, 226. See also Alamgir Muhammad Serajuddin, 'Judicial Activism and Family Law in Bangladesh' (2010) 55(1) *Journal of the Asiatic Society of Bangladesh (Humanities)* 47, 65.

121 One scholar, even unjustifiably ventures to treat the verses of the Qur'an on *mut'ah* as verses on post-divorce maintenance. See Rabia Bhuiyan, *Gender and Tradition in Marriage and Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh* (United Nations Educational, Scientific and Cultural Organization, 2010) 231.

122 Anisur Rahman, 'Unlocking the Gate of Ijtihad Heffzur Rahman Revisited' [2011] (2) *Stamford Journal of Law* 155, 172. The last argument was borrowed by the author from other scholar. For this, see Shahdeen Malik, 'Muslim Family Courts Ordinance, and Relevant Reported Judgments' (Reader for the Students of the School of Law, BRAC University, 2005) 44.

beyond Islamic traditions[123], he abortively bungled to portray *mut'ah* as a post-divorce financial support. Another scholar, after emphasizing on the striking of right balance between the need of the divorced women and the affluence of the husband, asserts that the right of the divorcees to post-divorce maintenance[124] should be subject to duty to mitigate their own anguish and vulnerability and to effect this she urges them to be self-reliant as far as possible.[125] Furthermore, she believes that this will "have a positive impact upon the acceptability of the obligation to pay post-divorce maintenance on the part of the divorcing husband"[126].

We submit here that conforming to this view will, certainly put severe blow to the egalitarianism of Islamic faith since women cannot be burdened forcefully to earn their livelihood though they have absolute liberty to earn a lot if they wish. Secondly, this is not charity rather the right of the wife to be compensated by the divorcing husband for injuring her through arbitrary repudiation. Thirdly, this attitude will facilitate the husband to evade from his liability to support wife already divorced by him without justifiable rhyme or reason.

One scholar, though ventured to pose doubt regarding the implementation of decisions of the highest level of judiciary as to the maintenance in general, termed the judgment of the HCD on post divorce maintenance as celebrated one.[127] Since the HCD instead of appreciating the divine intent behind the verses on *mut'ah* travelled a complete different path its judgment eventually failed to ensure justice for the divorced women. Erroneous construction of *mut'ah* as maintenance debars us to dub it an illustrious judgment.

The leading British scholars after appreciating the modern social welfare rationale behind post divorce maintenance as reflected in the Indian decision of *Mohd Ahmed Khan v Shah Banu Begum,* AIR 1985 SC 945 and Islamic interpretation as advanced by the HCD of Bangladesh[128] in *Hefzur Rahman v Shamsun Nahar Begum and another* 15 BLD(1995) p. 34 opined that though the Qur'an obliged the husband to maintain divorced wife this beneficial legislation was ultimately narrowly interpreted by the jurists to

123 Ibid.

124 Beyond the *iddat* period the husband is responsible to provide post-divorce financial support not maintenance. This argument is already spelt out earlier in this write up.

125 Naima Huq, 'Post-Divorce Maintenance: Legal and Social Appraisal' in Tahmina Ahmad and Md Maimul Ahsan Khan (ed) *Gender in Law* (Adtam Publishing House, 1998) 61, 82.

126 Ibid.

127 Taslima Monsoor, *From Patriarchy to Gender Equity, Family Law and Its Impact on Women in Bangladesh* (University Press Limited, 1999) 217.

128 They mentioned it as Dacca High Court. This provides a wrong overview regarding the structure of apex Court of Bangladesh under its constitutional scheme. As per Article 94(1) of the Constitution of Bangladesh the highest court of Bangladesh is named as Supreme Court and it is divided into two separate divisions namely Appellate Division and High Court Division. However, the very word Dacca was replaced by Dhaka in 1983.

the effect that husband is liable to provide maintenance to the wife up to *iddat* period.[129] These scholars, we believe, did not provide due notice to the ever evolving dynamic and organic character of *mut'ah* or post divorce financial support. Moreover, they labelled the interpretation put by the HCD of Bangladesh as Islamic interpretation but the fact is that the interpretation placed by the same division is essentially flawed due to its piecemeal approach in defining *mut'ah,* deliberate negation to follow the different principles of interpretation of the Qur'an, disregard of authentic *Sunnah* of the Prophet (PBUH), negligently overlooking divergent juristic interpretations of different schools of thought and overall failure to comprehend the *maqasid al-Shariah* underlying the verses on *nafaqa* as well as *mut'ah.* The renowned scholars conceived of Qur'anic foundation but void of authentic *Sunnah* of the Prophet (PBUH).

### *Harta Sepencarian*- A great Relief to Divorced Muslim Women

*Harta Sepencarian,* division of the matrimonial assets on death or divorce, serves a great relief to both the spouses. Both the spouses are entitled to claim *Harta Sepencarian* on the death of one of them or on case of dissolution. Division of matrimonial assets stems from the local *urf* of Malaysia. This is in vogue since colonial time and seems to be analogous to *mata' al-bayt* (home appliances) or *mal-al-zawjayn* as spelt out in different legal texts of different schools of jurisprudence. This custom has already secured its place in the Islamic Family Law (Federal Territories) Act, 1984.

Section 58(1) provides that the Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

Section 58(2) says that in exercising its power of granting *harta sepencarian* the court shall take into consideration the following factors.

*(a)* the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets;

*(b)* any debts owing by either party that were contracted for their joint benefit;

*(c)* the needs of the minor children, of the marriage, if any, and, subject to those considerations, the Court shall incline towards equality of division.

Section 58(3) further provides that the Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

[129] David Pearl and Werner Menski, *Muslim Family Law* (Sweet and Maxwell, 3rd ed, 1998) 205.

However, the court requires to take into consideration the following matters while exercising its powers under section 58(3).

*(a)* the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;

*(b)* the needs of the minor children of the marriage, if any, and, subject to those considerations, the Court may divide the assets or the proceeds of sale in such proportions as the Court thinks reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

Section 58(5) says that for the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

The claim to *harta sepencarian* depends not on the circumstances of the dissolution of the marriage rather on the contributions of the spouses during their conjugal life.[130] The wife, whose housework might be said to have indirectly contributed to the husband's acquisition of property, is entitled to claim one-third of the property acquired during the marriage. She is entitled to claim half if it is shown that she contributed directly towards its acquisition. The claim can be made upon divorce or before the husband contracts a polygamous marriage.[131]

Under the *Kompilasi Hukum Islam di Indonesia (KHI)* if one of the spouse dies the living spouse is entitled to the half of the *harta bersama*[132] and in case of talaq both are entitled to half in the absence of any stipulation in the marriage contract to the contrary.[133]

1992 amendments to the Iranian Divorce Law allow "domestic wages" (calculated by placing monetary value on housework) for the work a wife has done during the marriage if the divorce is not initiated by her or caused by any fault of hers.[134] Domestic wages, as one noted author opines, is probably the conglomeration of mutat and *harta sepencarian.*[135] Though this reform is evidently revolutionary in nature one scholar asserts, the

130 Nik Nooriani Nik Badli Shah, *Bibaho O Bichhed Islami Den Dharonar Aloke Ainer Shansker* (Shajahan Faroque trans, Asia Foundation, ) 103 [trans of: *Marriage and Divorce Law Reform within Islamic Framework*].

131 <http://www.sistersinislam.org.my/BM/baraza/reforming.htm> accessed 12 September 2012.

132 Section 96(1) of the *Kompilasi Hukum Islam di Indonesia*, 1991.

133 Section 97 of the *Kompilasi Hukum Islam di Indonesia*, 1991.

134 See Shah, above n 130.

135 See Shah, above n, 130, 104.

measure is undoubtedly tough to apply in practice partly due to the intricacies involved in determining wages for housework[136].

**Conclusion**

In view of the above discussion, it appears that Qur'anic laws require to be interpreted from an emancipatory point of view instead of a misogynist point of view. Under Islamic Law the husband has to follow certain prerequisites as espoused in the Holy Qur'an before initiating talaq since disregard of those commandments of Allah (SWT) shall tantamount to outright violation of His Laws. However, if husband abuses his right of talaq he can be held liable for paying compensation to the divorced wife for such kind of injury inflicted on her. This is effectively possible through the enactment of a sound piece of legislation which falls within the purview of *Siysa al Shariah* of a state. Reforms of certain states bear this testimony. Those states draw the spirit of reform from the verses of the Qur'an regarding *mutat*. They treat *mutat* as a recompense for the injury inflicted on the wife by the husband arbitrarily. This fact also, to us, finds its recognition in the *hadith* of the Prophet Muhammad (PBUH) saying that "there should be neither harming (*darar*) nor reciprocating harm (*dirar*)"[137]. In the context of Indian Sub-continent the reforms which took place in India is also appreciable but not like those of Arab, African countries, Iran, Malaysia and Indonesia. Since the Supreme Court of India failed to perceive the holistic, functional and organic nature of *Shariah* especially the Qur'anic and Sunnatic provisions regarding *nafaqa* as well as *mut'ah* the interpretations placed by it could not assume the feat like the aforesaid states. The interpretation of HCD of Bangladesh Supreme Court utterly failed to appreciate the real spirit and philosophy of Qur'anic Laws. On the other hand, AD of the Supreme Court though conceded the concept of recompense payable to the injured wife took no initiative to establish such right of the divorced Muslim women through judicial activism. Apart from these, the concepts of *harta sepencarian, harta bersama*, domestic wages (the proper term may be honorarium) as

[136] Abdullahi A An-Na'im (ed) *Islamic Family Law in a Changing World A Global Resource Book* (Zed Books 2002) 110.

[137] This *hadith* was related on the authority of Abu Sa'id Sa'd bin Malik bin Sinan al-Khudri. Ibn Maajah treats it as *hasan* (good) *hadith*; Ad-Daaraqutnee and others regard it as *musnad* (supported) *hadith*. It is also related by Imam Malik in his *Muwatta* in *mursal* (hurried, broken chain) form from Amar bin Yahya, from his father, from the Prophet (PBUH) but dropping (the name of) Abu Sa'id from the chain. Other chains of transmission of this *hadith* strengthen one another (thus it may be regarded as of sound *isnad* or chain). Imam Nawawi mentions it in his manual of Forty Hadith. Hadith no 32. See <http://www.bible-quran.com/islam-hadiths-hadiths-32-34-nawawi> accessed 25 March 2014; see also <http://www.40hadithnawawi.com/index.php/the-hadiths/hadith-32> accessed 25 March 2014.

introduced in the laws of Malaysia, Indonesia and Iran respectively deserve critical appreciation and should, after apposite contextualization, be introduced in our country to alleviate the position and strengthen the financial status of the divorced Muslim women. Among the scholars the approach of Dr Mustafa As-Sibayee deserves high regard due to its radical, dynamic, beneficial as well as *Shariah* compliant stance. In fine, it can be concluded that since Qur'an is a living and dynamic book it can be diversely interpreted, of course in accordance with the dictates of Allah (SWT) and authentic *Suunah* of the Prophet (PBUH), by the apt scholars of Islamic Law to resolve any problem confronting the *ummah* in a given society or a period of time. The non-biased, non-sexist, non-sectarian and overall an emancipatory reading of the Qur'an as well as the proper understanding of *Maqasid al-Shariah* can guide the *ummah* to appreciate the divine intent as far as possible.