Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 2355 OF 2015

Shahab Saqib

Vs

Sadaf Rasheed, etc.

PETITIONER BY: Mr. Naseer Anjum Awan, Advocate

RESPONDENTS BY: Mr. Aman Ullah Kayani, Advocate.

DATE OF HEARING**:** 01.03.2021.

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BABAR SATTAR, J.- The petitioner is aggrieved by judgment and decree dated 31.01.2015, whereby the learned Additional District Judge **(ADJ)** upheld the ex-parte judgment and decree of the learned Judge Family Court to pay maintenance in the amount of Rs.2,000/- per month for the benefit of respondent No.2 from the date of her birth subject to increase of 10% per annum and further ordered that respondent No.1 be paid monthly maintenance in the amount of Rs.5,000/- from the date of filing of the suit till such time that the parties either decide to live together or divorce, and 5 Tola gold ornaments as part of her dower.

2. Brief facts of the case are that respondent No.1 filed a family suit on 19.09.2008 which was decided ex-parte against the petitioner on 31.03.2009. The petitioner while seeking the setting aside of ex-parte judgment and decree passed by the

learned Judge Family Court came to know that respondent No.1 had filed an appeal against it and that an ex-parte judgment and decree had been passed by the learned appellate Court. The petitioner moved an application for setting aside of the judgment and decree passed by the learned ADJ which was allowed and the ex-parte judgment and decree was set aside by order dated 02.06.2014, after which the learned ADJ passed the impugned judgment and decree dated 31.01.2015.

3. Learned counsel for the petitioner stated that the impugned judgment and decree suffer from material illegality as after setting aside the ex-parte judgment and decree, the matter should have been remanded back to the Family Court to provide an opportunity to the petitioner to file a written statement on the basis of which issues should have been framed to uphold the rights of the petitioner under Article 10A of the Constitution. He submitted that the impugned judgment and decree has been passed in breach of mandatory procedure prescribed under the West Pakistan Family Court Act, 1964. He relied on Bashir Hussain Shah v. Mujeeb Ahmed Khan (2012 SCMR 1235) and Mst. Parveen Akhtar v. Subash Chandar (2016 MLD 1596). The learned counsel further submitted that given that respondent No.1 was a working woman, she was not entitled to any maintenance. And further that when a wife is not living with her husband she is not entitled to be maintained by the husband and placed reliance on Mukhtarul Hassan Siddiqui v. Judge Family Court, Rawalpindi (1994 CLC 1216). The learned counsel further stated that now that the petitioner and respondent No.1 are divorced, the petitioner is willing to settle his dispute with

respondent No. 1 by paying Rs.500,000/- as dower to respondent No.1 and is also ready to pay for the maintenance of his daughter/respondent No.2.

4. Learned counsel for the respondent, on the other hand, stated that the ex-parte orders passed by the learned Judge Family Court and the learned ADJ did not suffer from any illegality. That the petitioner was duly served at the same address that he himself provided in the instant petition and his nonappearance before the courts was deliberate. He further submitted that in the application moved for setting aside of ex-parte judgment and decree passed by the learned ADJ, the prayer sought by the petitioner was only that the ex-parte judgment and decree dated 13.10.2009 be set aside and there was no prayer seeking the judgment and decree of the learned Family Court to be set aside. That order dated 02.06.2014 through which the learned appellate Court set aside the ex-parte judgment and decree passed by such court and allowed the petitioner to present arguments was never challenged and has attained finality and consequently the petitioner having accepted such order cannot now challenge it through this writ petition. That the petitioner was provided full opportunity to present his case before the learned ADJ and it is settled law that the appeal is continuation of the trial and the petitioner could have taken up any and all grounds in his defence. That after hearing the parties the learned ADJ passed the impugned judgment and decree which suffer from no illegality. That according to the nikhah nama, respondent No.1 was entitled to payment of Rs.500,000/- on demand and 5-tola gold was payable immediately, therefore

the said dower was liable to be paid to respondent No.1. That the petitioner's conduct is questionable as he has not paid a single penny in lieu of maintenance to even his daughter since her birth for the past eleven years and such conduct disentitles him to any equitable relief in this petition.

5. Learned counsel for the petitioner, in rebuttal, stated that the entire dower i.e. Rs.500,000/- and 5-tola gold was a deferred dower (غیرمعجـل) and was not required to be paid by the petitioner as claimed by respondent No.1.

6. The questions before this Court are the following:

1. Does the impugned judgment and decree suffer from any illegality because the learned ADJ did not remand the matter to the learned Family Court and whether rights of the petitioner to fair trial and due process were breached?

2. Is a wife entitled to maintenance when she is separated from her husband and the spouses are not living together and whether a working woman is entitled to be maintained by her husband?

3. Did the learned ADJ err in holding that part of the dower was payable on demand?

4. Is the petitioner entitled to discretionary equitable relief?

7. It is now a settled proposition that a remand order must not be passed as a matter of routine. Proceedings in appeal are a continuation of the trial and to the extent that an appellate court is able to adjudicate the matter before it in view of the record and evidence before it, there arises no occasion to remand the matter to the trial court. The order of remand delays

adjudication of the case and execution of the adjudicatory order, and such delay inevitably benefits the party that has an interest in delaying enforcement of the adjudicatory order. There is a growing propensity to dodge service and not appear before the trial court deliberately with the intent to seek adjudication of the matter afresh at the appellate stage on the basis that not doing so will undermine principles of natural justice and Article 10A. Article 10A requires that due process be afforded to a person whose rights are being determined. But should such person chose not to benefit from due process and elect not to avail the opportunity to be heard, providing such person repeat opportunities would be tantamount to undermining the due process rights of the other persons whose rights and interests are also tied up in the litigation.

8. Let us consider select dicta of the august Supreme Court on the issue of remand.

I. In Fateh Ali v. Pir Muhammad (1975 SCMR 221) it was held by the august Supreme Court that if any issues are left undetermined by the first appellate court, the High Court is competent to dispose of the issues and is under no obligation to remand the matter.

II. In Nasir Ahmed v. Khuda Bakhsh (1976 SCMR 388), the august Supreme Court held that, "*the Civil Procedure Code specifically invests an appellate Court with the same powers as the Court below. There are also provisions in Order XLI, C.P.C. to the effect that if there be sufficient material on the record the appellate court may itself decide an issue which has not been determined by the first Court.*"

III Chairman Wapda, Lahore vs. Gulbat Khan (1996 SCMR 230)

It was held that, *"[R]emand of case is not a routine matter nor should it be adopted as a matter of course to allow a party or an authority to fill in the lacuna or to improve upon the case."*

IV. In Ashiq Ali vs. Mst. Zamir Fatima (PLD 2004 SC 10) The august Supreme Court held that *"remand would be ordered in those cases, which could not be decided on basis of available record as the same would be in the interest of justice* ***...*** *Remand is not made if the defect is due to negligence and default of party desiring remand."*

V. Shahida Zareen v. Iqrar Ahmed Siddiqui (2010 SCMR 1119)

It was held that, *"[R]emand of the case should be ordered in exceptional circumstances when it is found necessary by the appellate court to determine the question of fact which appears to the appellate court to be essential for a right decision of the suit upon its merits."*

9. Any person aggrieved by an order or judgment, who has not filed an appeal against such order, can bring his stance before the appellate court through a cross-appeal. Let us consider relevant caselaw on the matter:

I. Khairati and 4 others v. Aleem-ud-Din and another (PLD 1973 SC 295).
"*a respondent can support a decree even on points decided against him, but a respondent cannot attack a decree or ask for its variation without a cross-objection.*"

II. Ghulam Rasool v. Muhammad Hussain and others (PLD 2011 SC 119)

"*Respondent could have verbally challenged the findings on any issue going against her at the time of hearing of the respondents appeal while supporting the decree, but it was not legally permissible to assail the decree without*

cross appeal etc. therefore, such a decree for all intents and purposes which was founded on the findings of the trial Court on Issue No.1 had not only attained finality against her, but also the appellants who were/are the successors in interest of the lady."

In the instant case, after the ex-parte judgment and decree was set aside by the learned ADJ, the petitioner chose not to file a cross-appeal against the ex-parte judgment and decree of the trial court.

10. The scope of powers of the appellate court is also well settled by now. Excerpts from a couple of judgments of the august Supreme Court are as follows:

I. Fazal Jan v. Roshan Din (PLD 1992 SC 811)

"The trial court was not denuded of powers to summon all the necessary Revenue Record and also to summon the Patwari so as to supply omissions from both sides. It was also the duty of the two higher appellate courts. It seems that was an appropriate case for exercise of power under O.XLI, R.27, C.P.C. for bringing on record additional evidence."

II. Ghulam Zohra, etc. v. Nazar Hussain (2007 SCMR 1117)

"The learned Appellate Court under sub-rule(b) of Rule 27 of Order XLI, C.P.C. should have received the copies of Revenue Record as additional evidence in order to do complete justice and in order to avoid passing a decree in favour of the pre-emptor having no superior right. The question of filling in the lacunae is not of prime importance because no such word is mentioned in the rule itself."

11. There is also the issue of limitation left unattended by the petitioner. The petitioner has not placed any material on record to establish that the judgment and decree of the learned

trial court was not in the knowledge of the petitioner, and that he was not barred by limitation in seeking to have such ex-parte judgment and decree set-aside. First of all, the petitioner never sought to have the judgment and decree of the trial court set-aside or have the matter remanded by the learned ADJ to the trial court. But even if he had, he would face a bar under Article 164 of the Limitation Act, 1908.

12. The petitioner never filed an application to have the judgment and decree of the learned Family Court set aside within the limitation period prescribed under Article 164 of the Limitation Act, 1908. Even after his application to have the ex-parte judgment and decree of the learned ADJ set aside was accepted, he never sought the matter to be remanded back to the learned Family Court and he never filed a cross-appeal or any application to bring on record any additional evidence before the appellate court. Even during these proceedings, the learned counsel for the petitioner has not pointed to any record or facts, which he would have brought to the notice of the learned Family Court, and in view of which the learned Family Court or the learned appellate court might have come to a different conclusion. The lazy and bald argument on the petitioner's behest that the case should be remanded back for adjudication afresh in the interest of Article 10A rights of the petitioner is misconceived. The Article 10A rights of the respondent are no less valuable than those of the petitioner. And "delayed justice" equally undermines Article 10A rights of a person seeking a remedy from the court. The impugned order thus suffers from no infirmity for not ordering a remand.

13. The second question is whether a wife separated from her husband and living separately, and a wife who is a working woman, is entitled to maintenance.

14. There is no consistency in the caselaw on the question of the entitlement of a wife to maintenance, and whether or not grant of maintenance to a wife for the period during which she has remained in the bond of marriage can be subjected to conditions, including, *inter alia*, that she should be financially dependent on her husband or that she should be living in the same house as him or that she should be obedient to him. Let us first consider the dicta of superior courts on the question of right of a wife to maintenance and the sources of law used by the courts to determine the entitlement to maintenance.

I. Sardar Muhammad vs. Mst. Nasima Bibi and others (PLD 1966 Lahore 703).

7. The proposition cannot be questioned that it is incumbent on a Muslim husband to maintain his wife, subject of course to her loyalty and readiness to perform marital obligations. The following passage from Ameer Ali's Muhammadan Law may be reproduced with advantage in which reliance has been placed on Fatawa-i-Alamgiri and Raddul Muhtar:

"If the husband be a minor and the wife an adult, and the incapacity to complete or consummate the contract be solely on his part, she is entitled to maintenance. If the minor has no property, the obligation of maintaining the wife devolves on his father with a right of recovery against him when he is in a position to repay the amount expended on his behalf. When both husband and wife are minors and cohabitation is impossible, there is no liability, for maintenance."

"It makes no difference in the husband's liability to maintain the wife, whether he be in health or suffering from illness, whether he be a prisoner of war or undergoing punishment, "justly or unjustly", for some crime, whether he be absent from home on pleasure or business, or gone on a pilgrimage, and whether he be rich or poor. In fact, as long as the status of marriage subsists and the wife is subject to the marital power, she is entitled to maintenance from him. Nor does she lose her right by becoming afflicted with any disease after marriage.

"But when she becomes ill before she has taken up her abode in the conjugal domicile there is no obligation on the husband to provide for her maintenance."

8. A woman is also entitled to her maintenance though refusing herself to her husband on the ground that he had not paid her dower, Mulla in his Principles of Muhammadan Law at page 238, 1961 Edn. has observed as follows:

> *"Husband's duty to maintain his wife."*
>
> *"The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him, or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of proper dower, or she leaves the husband's house on account of his cruelty."*

Thus, it is abundantly clear that the husband's obligation to maintain his wife commences with the performance of marriage subject to certain conditions. But the authorities cited earlier and relied upon by the learned counsel for the petitioner seem to lay down in un-mistakeable terms that in the absence of an agreement between the spouses or a decree by the Kazee, a wife is not entitled to a decree for past maintenance. The reasoning seems to be that if the wife

has somehow managed without maintenance and has not cared to approach the Kazee, a decree for past maintenance may be justifiably refused to her. In other words, the argument is that a person who does not care to promptly seek a legal remedy or has somehow managed to do without it may be afforded a relief only when he seeks it and not for an earlier period of time. This position seems to be rather inconsistent with the view expressed in the above cited authorities that normally obligation to maintain a wife starts from the time of marriage.

9. It appears necessary to appreciate the difference between dower for which the word "Ager" (Singular) or "Aagur" (plural) has been used in the Qur'an and maintenance or "Nufqua" Marriage in Islam being in the nature of a contract, dower is the consideration agreed between tine parties which the husband has to pay to the promptly or subsequently in accordance with the terms of the agreement. On the contrary, maintenance is an obligation one of the essential incidents of marriage, liable to suspension or forfeiture under certain circumstances. The two, therefore, proceed on entirely different bases. So far as the payment of dower is concerned, once it is stipulated, its payment becomes obligatory on the husband and even if the wife is divorced by the husband before she is touched, he is bound to pay half of the dower money as would be clear from the following verse No. 236 of Sura Albaqra.

It could of course, be quite different if the wife voluntarily foregoes the dower.

10. As against this, the obligation of the husband to maintain his wife has been derived from an earlier verse No. 232 of the Sura Albaqra which enjoins upon the father of a suckling child to feed and clothe his wife according to usage:

This finds further support from the famous tradition of the Holy Prophet (peace be upon Him):

The argument in favour of forfeiture of arrears of maintenance for the past seems to have been based on the assumption that "maintenance is an obligation in the manner of a gratuity Almuwaqat" i.e., an ex gracia grant which is paid by way of sympathy and charity which cannot be claimed as of right. This is "clearly laid down in Hamilton's Translation of Hedaya of which the relevant portion has been reproduced earlier in this judgment. In all humility and with the utmost respect we find it difficult to endorse this view as the consensus of opinion as shown from the authorities cited earlier seems to be that the maintenance of a wife is the bounden duty of a husband, irrespective of his minority, illness or imprisonment or the richness of the wife, so much so that the obligation devolves on the father of a minor husband with a right of recovery against him when he is in a position to repay the amount as held by Amir Ali on the authority of 'Fatawa-i-Alamgiri' and Radd-ul-Muhtar, alluded to earlier. It is thus difficult to say that it is in the nature of an ex gracia payment which cannot be claimed for a past period of time.

II. Muhammad Nawaz v. Mst. Khurhsid Begum (PLD 1972 SC 302) which upheld Sardar Muhammad (PLD 1966 Lahore 703) and cited it with approval.

III. Ghulam Rasool v. Collector, Lahore (PLD 1974 Lahore 495).

The learned Lahore High Court distinguished the jurisprudence produced under erstwhile section 488 of Cr.P.C that prescribed various conditions to be satisfied before upholding the wife's claim for maintenance and held that such conditions could not be imported into section 9 of the Muslim Family Laws Ordinance. Let us reproduce the relevant part of the judgment:

"9. The provisions of section 9 of the Muslim Family Laws Ordinance are, however, different. Under this section wife is entitled to maintenance, not only when she is not living with the husband but whenever it is proved that the husband fails to maintain her adequately or where there are more wives than one,

fails to maintain the wife seeking maintenance, equitably.

The recovery is also not subject to the condition of failure to comply with the order of payment of maintenance without sufficient cause as has been seen in subsection (3) of section 488, Cr.P.C. Subsection (3) of section 9 of the Family Laws Ordinance provides that any amount payable under subsection (1) of section 2, if not paid in due time, shall be recoverable as arrears of land revenue. The authorities relied upon by the learned counsel for the petitioner or the other authorities about suspension of the order during the period of re-union between the spouses are not, therefore, applicable to a case falling under section 9 of the Family Laws Ordinance. According to this section complete neglect or failure on the part of the husband to maintain the wife is not necessary to be established to attract the provision of this section. Even if it is proved that the wife is being maintained by the husband but the Arbitration Council comes to the conclusion that there is failure to maintain a single wife adequately or in case there is a plurality of wives one of the wives equitably, although the husband and wife are living together, the order of payment of maintenance can be passed. The mere re-union, therefore, does not make any difference. The provision about recovery is couched in mandatory form. If it is once proved that the amount payable has not been paid it shall be recovered as arrears of land revenue. This leaves no doubt that the order of payment of maintenance is neither terminated nor suspended by any act of parties for so long as they remain husband and wife. I am of the view that the order of the Arbitration Council issuing the certificate of recovery and the order of Collector have not been passed without any lawful authority.

IV. Mohd. Ahmed Khan vs. Shah Bano Begum and others (AIR 1985 SC 945)

15. There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will". (The Quran- Interpreted by Arthur J. Arberry). Verses (Aiyats) 241 and 242 of the Qur'an show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives. The Arabic version of those Aiyats and their English translation are reproduced below:

Arabic version	*English version*
Ayat No. 2412 *WA LIL MOTALLAQATAY MATA UN BIL MAAROOFAY HAQQAN ALALMUTTAQEENA*	*Maintenance (should be (Scale.) This is a duty on the righteous.*
Ayat No. 242 *KAZALEKA YUBAIYYANULLAHO LAKUM AYATEHEE LA ALLAKUM TAQELOON.* *(See 'The Holy Quran' by Yusuf Ali, Page 96)*	*Thus doth God Make clear His Signs To you: in order that ye may understand.*

The correctness of the translation of these Aiyats is not in dispute except that, the contention of the appellant is that the word 'Mata' in Aiyat No. 241 means 'provision' and not 'maintenance'. That is a distinction without a difference. Nor are we impressed by the shuffling plea of the All India Muslim Personal Law Board that, in Aiyat 241, the exhortation is to the' Mutta Queena', that is, to the more pious and the more God-fearing, not to the general run of the Muslims, the 'Muslminin'. In Aiyat 242, the Quran says: "It is expected that you will use your commonsense".

16. The English version of the two Aiyats in Muhammad Zafrullah Khan's 'The Quran' (page 38) reads thus:

"For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand."

17. The translation of Aiyats 240 to 242 in 'The Meaning of the Quran' (Vol. I, published by the Board of Islamic Publications, Delhi) reads thus.

"240-241.

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All Powerful, All-wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

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Thus Allah makes clear His commandments for you: It is expected that you will use your commonsense."

18. In "The Running Commentary of The Holy Quran" (1964 Edition) by Dr. Allamah Khadim Rahmani Nuri, Aiyat No. 241 is translated thus:

"241

And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower); (This is) a duty (incumbent) on the reverent."

19. In "The Meaning of the Glorious Quran, Text and Explanatory Translation", by Marmaduke Pickthall, (Taj Company Ltd. ,karachi), Aiyat 241 is translated thus:

"241.

For divorced women a provision in kindness: A duty for those who ward off (evil)."

20. Finally, in "The Quran Interpreted" by Arthur J. Arberry. Aiyat 241 is translated thus:

"241.

There shall be for divorced women provision honourable-an obligation on the god fearing."
So God makes clear His signs for you: Happily you will understand."

V. The issue of whether a wife after being divorced could claim maintenance for Iddat period came before the august Supreme Court in Muhammad Najeeb v. Mst. Talat Shahnaz (1989 SCMR 119), wherein it was held that," when *an application is made by an ex-wife for maintenance regarding period when the wedlock was intact and also for the Iddat period it would be made by the so called divorced wife and would be covered by the word "wife" as contained in section 9",* of the Muslim Family Laws Ordinance, 1961.

VI. It was held by the learned Peshawar High Court in Aqal Zaman v. Mst. Azad Bibi (2003 CLC 702) that, "*it is the bounden duty of a husband to keep his wife with love and affection, respect and provide her maintenance during subsistence of marriage…* It is not denied that *dower is a debt and the husband under an obligation to pay the same on demand."*

VII. Mst. Farah Naz v. Judge Family Court, Sahiwal and others (PLD 2006 SC 457).

"[T]he appellant having been lawfully wedded to the respondent in the absence of any proof of dissolution of marital tie, it was his legal, moral as well as social duty under the Islamic principles to provide adequate maintenance for her respectable living as in law he could not neglect to maintain her during the subsistence of the marriage tie."

IX. Abdul Rafay Butt v. Additional District Judge and other (PLD 2015 Lahore 258)

"14. The ordains of Almighty Allah as revealed in the Holy Qur'an and practised by the Holy Prophet Hazrat Muhammad (Peace be upon him) manifest complete code of life to enable us to order our lives in the individual and collective spheres in accordance with the

teachings of Islam. The words (Fa mate o hunna) (to provide) and (fa anfiqo) (to spend) used in above referred verses of the Holy Qur'an reveal the commands of Allah to a Muslim husband rendering him under obligation to maintain his divorced wife during the period of 'Iddat' as per injunctions of Islam. It may be a one time provision or in shape of affordable installments for the period of 'Iddat'. Needless to say that intent and spirit of above referred Commands of Allah is to provide for maintenance to a divorced wife during the period of 'Iddat' for the simple reason that as per injunctions of Islam a divorced woman cannot remarry during the period of 'Iddat'. Above noted Commands of Allah therefore create a right of maintenance in favour of a divorced wife and an obligation upon a husband to maintain her during the period of 'Iddat'. In our country such right of maintenance is enforceable by a Family Court having exclusive jurisdiction under Family Courts Act 1964. I therefore do not find any legal infirmity or jurisdictional error in the findings of the learned Appellate Court declaring the respondent entitled to get maintenance allowance for 'Iddat' period."

X. Manzoor Hussain v. Mst. Safiya Bibi (PLD 2015 Lahore 683)

"6. It is the duty/obligation of the father to maintain his daughter till her marriage and the same passes on to her husband after her marriage. The liability of the husband continues till the subsistence of the marriage but after the dissolution of marriage, female loses her marital status and liability again shifts toward her father. Petitioner being real father of the respondent is legally and morally bound to maintain his divorced daughter. It is evident from the evidence that respondent has no source of income and her expenses are borne by her real paternal uncle. This very fact has also been admitted by the petitioner in his cross examination. Therefore, plea of the petitioner that he is not bound to pay maintenance to respondent after her marriage has no force."

15. The question of whether "maintenance" fell within the scope of section 2 of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 **("Act of 1962")** came before the learned Lahore High Court in Haji Nizam Khan v. Additional District Judge, Lyallpur (PLD 1976 Lahore 930) and the following was observed in the context of how sources of law have evolved in the Indian Sub-continent:

> *13. Main argument of the learned counsel for the petitioner is that the subject of maintenance has been intentionally omitted from the category of subjects dealt in section 2 of the* West *Pakistan Muslim Personal Law (Shariat) Application Act, 1962. Section 2 reads as follows:*
>
> > *"2. Application of the Muslim Personal Law.- Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wilts, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."*
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> *Amongst other laws the Muslim Personal Law (Shariat) Application Act of 1937 "in its application to West Pakistan" was repealed by section 7 of the 1962 Act. Section 2 of the 1937 Act had provided that notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provisions, of personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, li'an, khula' and mubara'at, maintenance, dower, guardianship, gifts, trust and trust properties, and wakfs (other than charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties Muslims shall be Muslim Personal Law (Shariat). In so far as Punjab is concerned, this subject has been dealt also in*

section 5 of the Punjab Laws Act of 1872 (Act IV of 1872) which (section) to the extent of its inconsistency with the provisions of the 1937 Act was repealed by section 6 thereof (the Shariat Act of 1937). Section 5 of the Punjab Laws Act reads as follows:-

> *"5. Decisions in certain cases to be according to native law.- In questions regarding succession, special property of females, betrothal, marriage divorce, dower, adoption, guardianship, minority, bastardy, family relations, will, legacies. gifts, partitions, or any religious usage or institution, the rule of decision shall be-*
>
> *(a) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;*
>
> *(b) the Muhammadan Law, in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to."*

14. There appears to be considerable force in the argument of the petitioner's learned counsel that the omission of 'maintenance' from section 2 of the 1962 Act, in the background of its specific inclusion in the Shariat Act of 1937, could not be other than intentional. The other view that the expression "family relations" would also include `maintenance' does not appear to be sound: If such a general expression is held to include specific subjects like maintenance, then there was no need to specify the other subjects like betrothal, marriage, divorce, adoption, guardianship, minority, legitimacy or bastardy in section 2. Looked at in this context, it is clear that the expression "family relations" has been used in a loose sense so as to refer to social and general relations involving moral and social obligations as enjoined by Shariat. On consideration of the other aspects of the question, in any, case, it is inconsequential whether maintenance is or is not included in section 2 of the 1962 Act.

15. In case it is assumed that a particular field of law is neither covered by statute law as generally understood, nor

custom as it remained applicable to certain subjects and up to a period of time, nor personal law as applied by statutes to some specified subjects, the all important question would then arise as to what would be the rule of decision in Pakistan. The aforementioned Punjab Laws Act (Act IV of 1872), in section 6 thereof, furnished the answer, namely, that "in cases not otherwise specially provided for the Judges shall decide according to justice, equity and good conscience".

In the next section 7, all local customs and mercantile usages were also made subservient to the rules of justice, equity and good conscience. Similar provisions existed for other provinces/regions of undivided India from nineteenth century [For N.-W. F. P., Law and Justice Regulation VII of 1901; for Bombay and Sind, see section 26 of Regulation IV of 1827; for British Baluchistan, see British-Baluchistan Civil Justice Regulation IX of 1896; and for Bengal, Agra and Assam, see section 37(2) of the Bengal, Agra and Assam Civil Courts Act, 1887]. Earlier thereto, during the eighteenth century, we find the Governor-General's Regulations of 1781 and 1793 whereby, amongst other matters, it was provided that Judges were to act according to justice, equity and good conscience in cases for which no specific rule existed. There was no such condition in these laws so as to indicate that the rules of equity, justice and good conscience as they prevailed in England were to apply in the sub-continent. On the other hand, the expression "justice, equity and good conscience" remained undefined and was left to be interpreted and applied by the Judges in accordance with their own understanding thereof. This omission, in my view, was intentional because in some other almost contemporaneous laws, where it was intended that the general law of England shall govern a certain situation, the same was provided in statutory form. For example, section 7 of the Indian Divorce Act (IV), 1869 laid down that the Courts shall in all proceedings under the said Act follow the principles and rules which "are as nearly as may be conformable to the principles and rules on which the Court

for Divorce and Matrimonial Causes in England for the time being acts and gives relief".

16. The above conclusion is further strengthened by reference to still earlier period of the British advent in the sub-continent. The King of England, by various Charters, authorised the East India Company to govern its servants on the ships as also in the trading settlements on the coasts of India. The laws applied in aid of such governance were to be purely British. More specific provision was made in the Charter of 1661 where under the Company was empowered to "judge all persons . . . under them, in all causes, whether civil or criminal, according to the laws of this Kingdom, and to execute judgment accordingly". This shows that the substantive and procedural laws to be applied by the company were all those which were then in force in England. Thus, the British law, including all its branches, statute, common law and equity were applicable to all persons, whether servants of the Company or living under it, in the trading settlements and they were, under the Charter of 1661, subject to those laws. The Charter of 1668, under which Bombay was transferred to the Company, empowered the latter to make laws, Ordinances and Constitutions for the good government of the island. If this Charter were to be treated as the then Constitution, it provided that the laws authorised by it had to be in accord with reason and further-they could not be repugnant, but be as near as might be agreeable, to the laws of England. The procedures followed by the Courts established by the company were similarly those of the Courts of England. Similar but fluid situation with regard to substantive and procedural laws prevailed till the early part of eighteenth century; where after, it appears, various Acts and Regulations, earlier referred to, made provisions for equity, justice and good conscience as sources of residuary law when a situation was not provided for through other branches of law-statute and customary. This would show that during the early period it was provided through Charters that Courts shall follow British substantive and procedural laws and further that the new laws to be made for Indian settlements could not be contrary to the laws of England. During the later

period, i.e., eighteenth and nineteenth century, however. the residuary law in the absence of statutory provisions was to be found in equity, justice and good conscience without any specific rider to emphasize that this branch of law was to be developed on the same pattern as that of England. In other words, for the purpose of finding the residuary law, the choice was left to the good conscience and sense of justice as also the standards of equity known to the Judges, serving in India.

17. This was a turning point for the development of jurisprudence in India, The Judges were at liberty to follow the philosophy underlying the Muslim Law which was applicable in the sub-continent for centuries or to follow the general principles of British Jurisprudence with particular reference to common law and equity prevailing in England. For various reasons including psychological, the Judges of Indian origin also, by and large, preferred and followed English rules till the advent of Independence but this submission and surrender was not, without raising of substantial controversies by some of them. Mahmood, J. of Allababad was one of them. His thought process on this question is discernible in his dissenting judgment in Queen-Empress v. Pohpi and others ((1891) 13 All. 171) which will be presently analysed in another connection. The above analysis has been made to show that even during the pre-Independence period, in so far as the then prevalent enforceable law since the middle of eighteenth century is concerned, it did not require the Judges specifically, to follow the British rules of equity, justice and good conscience as residuary law, if general Muslim Law, or, to put it differently, the Muslim Common Law would have been applied through its own principles of equity and justice as residuary law, strictly legally speaking, they (the Judges) would not have contravened any law determining their jurisdictions and governing and controlling their functions. I would revert to this subject again when dealing with the question whether, even after Independence and under the present constitutional arrangements, the Judges are to follow any other law than Muslim Common Law as residuary source of law in Pakistan.

> *54. There is another aspect of the matter. If it is assumed that this mandate has been enjoined by Article 29 (1) read with Article 7 upon "the State", as defined, it would mean that all the organs and authorities of the Federal Government, Parliament, a Provincial Government, a Provincial Assembly and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess, are duty bound to carry it out. This does not mean that other authorities, etc., though not bound, are prohibited) from carrying it out. To impute such intention to the Constitution-makers would be without justification. Thus other authorities, etc. are at liberty (though not bound) to follow and carry it out. To put it in a different form, while the organs at authorities of the State mentioned in Article 7 have no choice not to follow the directive principles of policy, the other organs and authorities of the State including the judiciary would have discretion either to follow or not to follow the same, of course, depending upon the circumstances.*

16. The question of maintenance and whether it falls within section 2 of the Act of 1962, then came before a single bench of this Court in Muhammad Usman Iqbal Jadoon v. Mst. Saadia Usman and others (2010 YLR 1539) among other issues. The relevant part for the judgment is as follows:

> *On 5-12-1935, N.W.F.P. Muslim Personal Law (Shariat) Application Act, 1935 was promulgated. Section 2 of the Act is reproduced:-*
>
> > *"2. Decision in certain cases to be according to Muslim Personal Law.-- In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts, or any religious usage or institution including Waqf (trust and trust property), the rule of decision shall be the Muslim Personal Law (Shariat), in cases where the parties are Muslims:*

Except in so as far as such law has been altered or abolished by legislative enactments or is opposed to the provisions of the North-West Frontier Province Law and Justice Regulation, 1901."

On 7-10-1937, Muslim Personal Law (Shariat) Application Act, 1937 was enacted. Section 2 of the Act reads as under:
"Application of Personal Law to Muslims. Notwithstanding any custom or usage to the contrary in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract of gift or any other provisions of Personal Law, marriage, dissolution of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubarat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

On 15-3-1948, the Punjab Muslim Personal Law (Shariat) Application Act, 1948 came into a force. Section 2 of 1948 Act is as under:--

"Notwithstanding any rule of custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions including waqfs, trusts and trust property, the rule of decision shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."

On 31-12-1962, West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 was enacted. Section 2 of Act, 1962 provides:-
"Application of the Muslim Personal Law. Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills,

legacies, gifts, religious usages or institutions including Waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."

I have reproduced relevant sections of laws, which were promulgated from time to time on the subject. Except section 2 of Act of 1937, the word "maintenance" has not been used in any other law. However, in section 2 of 1937 Act, the words "Family Relations" have not been used though these words were mentioned in section 5 of the Punjab Laws Act, 1872 and section 2 of N.-W.F.P. Act, 1935. The words "Family Relations" have also been used in Act of 1948 and Act of 1962. If section 2 of 1937 Act is examined, the subjects to which Muslim Personal Law would be applicable are given in details. However, in other laws, the words "Family Relations" have been used apart from mentioning other subjects. I am of the opinion that the words "Family Relations" have been used in laws other than Act of 1937 in a wide sense to include residuary subjects not specifically mentioned including maintenance. I am conscious of the fact that a different view was taken by a very celebrated Judge Muhammad Afzal Zullah J, in judgment reported as Haji Nizam Khan v. Additional District Judge, Lyallpur and others PLD 1976 Lah.930. At any rate, practically speaking, it would not make any difference because in Nizam-ud-Din's case either, Lahore High Court ruled out that while deciding question of maintenance, rule of decision would be Muslim Personal Law as the Honourable Judge was of the opinion that if there is no law covering the field, Muslim Personal Law would be applicable as a rule of justice, equity and good conscience. It is thus held that while deciding the question of maintenance in respect of a Muslim, rule of decision shall be Muslim Personal Law.

This interpretation of section 2 of the Act of 1962 by the High Court was never challenged before the august Supreme Court, as the arguments before the apex Court were limited to the question of dower. However, in view of (i) the judgment of

the august Supreme Court in Muhammad Najeeb v. Mst. Talat Shahnaz (1989 SCMR 119) wherein deciding the issue of maintenance of wife, the apex Court looked exclusively to the text of section 9 of the Muslim Family Laws Ordinance, 1961 **("MFLO"),** and (ii) settled principles of interpretation of statutes and principles guiding courts regarding the sources of law to be relied upon in deciding cases, as addressed in the later part of this judgment, this court is not inclined to follow the obiter comments of the learned judge-in-chambers regarding section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 and the suggestion that "family relations" as used in the said section is an all-encompassing concept that includes "maintenance".

17. Islamabad High Court's ruling in Muhammad Usman Iqbal Jadoon was challenged before the august Supreme Court. In Saadia Usman v. Muhammad Usman Iqbal Jadoon (2009 SCMR 1458) the august Supreme Court held that, *"deferred dower is payable on the time stipulated between the parties, but where no time is stipulated, it is payable by dissolution of marriage either by death or divorce"*. The submissions before the august Supreme Court were limited to the question of dower. The issue of maintenance was not touched upon in the arguments before the apex Court and consequently the august Supreme Court had no occasion to consider if commentaries on Muslim Personal Law can be read into section 9 of the MFLO and be used to guide decisions on the question of maintenance.

18. Let us first consider (i) the provisions of the Constitution of the Islamic Republic of Pakistan, 1973 relevant to the question of interpretation of law and sources of law together with substantive provisions of law that could be germane to the determination of the rights of a wife in relation to maintenance, (ii) caselaw regarding interpretation of provisions of the Constitution for purposes of enforcing the Islamic way of life in Pakistan, and (iii) excerpts from treatises regarding the interpretive project undertaken by the Courts, before returning to the wife's entitlement to maintenance under Muslim Personal and the MFLO. The relevant provisions of the Constitution are as follows:

> ***Article 4. Right of individuals to be dealt with in accordance with law, etc.***
>
> *(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*
>
> *(2) In particular:-*
>
> > *(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*
> >
> > *(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*
> >
> > *(c) no person shall be compelled to do that which the law does not require him to do.*
>
> ***Article 5. Loyalty to State and obedience to Constitution and law.***
>
> *(1) Loyalty to the State is the basic duty of every citizen.*

(2) Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

Article 7. Definition of the State.

In this Part, unless the context otherwise requires, "the State" means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.

Article 25. Equality of citizens.

(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex alone.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

Article 29. Principles of Policy.

(1) The Principles set out in this Chapter shall be known as the Principles of Policy, and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.

Article 30. Responsibility with respect to Principles of Policy.

(1) The responsibility of deciding whether any action of an organ or authority of the State, or of a person performing functions on behalf of an organ or authority of the State, is in accordance with the Principles of Policy is that of the organ or authority of the State, or of the person, concerned.

(2) The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State or any organ or authority of the State or any person on such ground.

Article 31. Islamic way of life.

(1) Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

Article 34. Full participation of women in national life.

Steps shall be taken to ensure full participation of women in all spheres of national life.

Article 35. Protection of family, etc.

The State shall protect the marriage, the family, the mother and the child.

Article 203D. Powers, Jurisdiction and Functions of the Court.

(1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List, or the Concurrent Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in the Federal Legislative List, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect:

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of said lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

Article 203G. Bar of Jurisdiction

Save as provided in Article 203F, no court or Tribunal, including the Supreme Court and a High Court, shall entertain any proceeding or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court.

Article 203GG. Decision of Court binding on High Court and Courts subordinate to it

Subject to Article 203D and 203F, any decision of the Court in the exercise of its jurisdiction under this Chapter shall be

binding on a High Court and on all courts subordinate to a High Court.

Article 227. Provisions relating to the Holy Qur'an and Sunnah.

(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.

Article 230. Functions of Islamic Council.

(1) The functions of the Islamic Council shall be,

(a) to make recommendations to Majlis- e- Shoora (Parliament) and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah;

(b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

(c) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and

(d) to compile in a suitable form, for the guidance of Majlis-e-Shoora (Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

Oath of office of Chief Justice of Pakistan or of a High Court or Judge of The Supreme Court or a High Court

[Articles 178 and 194]

(In the name of Allah, the most Beneficent, the most Merciful.)

I, _____, do solemnly swear that I will bear true faith and allegiance to Pakistan:

That, as Chief Justice of Pakistan (or a Judge of the Supreme Court of Pakistan or Chief Justice or a Judge of the High Court for the Province or Provinces of _____) I will discharge my duties, and perform my functions, honestly to the best of my ability and faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law:

That I will abide by the code of conduct issued by the Supreme Judicial Council:

That I will not allow my personal interest to influence my official conduct or my official decisions:

That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:

And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favor, affection or ill-will.

May Allah Almighty help and guide me (A'meen).

19. In Hakim Khan and 3 others v. Government of Pakistan through Secretary Interior (PLD 1992 SC 595), it was held that:

"Now the well-established rule of interpretation is that a Constitution has to be read as a whole and that it is the duty of the Court to have recourse to the whole instrument in order to ascertain the true intent and meaning of any particular provision. And where any apparent repugnancy appears to exist between its different provisions, the Court should harmonise them, if possible (See Reference by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan (PLD 1957 SC 219 at p.235).

This rule of interpretation does not appear to have been given effect to in the judgment of the High Court on its view that Article 2A is a supra-Constitutional provision. Because, if this be its true status then the above-quoted clause would require

the framing of an entirely new Constitution. And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution. According to the opening clause of this Resolution the authority which Almighty Allah has delegated to the State of Pakistan is to be exercised through its people only "within the limits prescribed by Him". Thus all the provisions of the existing Constitution will be challengeable before Courts of law on the ground that these provisions are not "within the limits of Allah" and are in transgression thereof. Thus, the law regarding political parties, mode of election, the entire structure of Government as embodied in the Constitution, the powers and privileges of the President and other functionaries of the Government will be open to question. Indeed, the very basis on which the Constitution is founded namely the tracheotomy of powers i.e. that the three great organs of the State have their own particular spheres of authority wherein they exercise their respective powers or the system of checks and balances could be challenged, along with all the ancillary provisions embodied in the 1973 Constitution in relation thereto. Thus, instead of making the 1973 Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form.

It certainly was not the intention of the law-makers who enacted Article 270-A (vide section 19 of the Constitution (Eighth Amendment) Act, 1985 which provision affirmed and adopted, inter alia, P.0.14/1985 (whereby Article 2A was inserted in the Constitution). Their intention simply was that the Objectives Resolution should no longer be treated merely as a declaration of intent but should enjoy the status of a substantive provision and become equal in weight and status as the other substantive provisions of the Constitution. In case any inconsistency was found to exist between the provisions of the 1973 Constitution and those of the

Objectives Resolution would, they expected, be harmonised by the Courts in accordance with the well-established rules of interpretation of the Constitutional documents already mentioned. Being creatures of the Constitution, it was not visualised that they could annul any existing Constitutional provisions (on the plea of its repugnancy with the provisions of Article 2A) as no Court, operating under a Constitution, can do so. To use the picturesque words of Mr. Justice (Rtd.) Sh. Aftab Hussain, former Chief Justice of the Federal Shariat Court, in his discourse on the subject of "the Shariat Bill and its implications" PLD 1986 Journal 327, "The Courts are the creation of the Constitution and on no principle of law can they be allowed to cut the tree on which they are perched". The learned Chief Justice, in the same discourse, in which he made the above observation, proceeded to observe that "the objection in respect of the un-Islamic character of the Constitution is more ill-advised. It was passed by a Parliament consisting of renowned Ulema representing all our politico religious organizations all of whom approved it. This is sufficient certificate for its Islamic character. If someone thinks that some of its provisions are contrary to Sharia, he should raise the issue in the Majlis-i-Shoora (Parliament)".

Obviously, these observations flow from him finding that it is not open to Courts to invalidate a provision of the Constitution, being creatures of the same Constitution. According to him, even if the inconsistency alleged is in relation to an Islamic Injunction, the issue should be raised in the Majlis-i-Shoora and the remedy obtained through it (Parliament) rather than from the Courts.

20. In Malik Muhammad Mumtaz Qadri v. The State and Others (PLD 2016 SC 17), the august Supreme Court unequivocally held the following:

"With respect and without prejudice to the strong religious and philosophical views expressed before us we must state at the outset that we, in terms of our calling and vocation and in accord with the oath of our office, are obligated to decide this case in accordance with the law of the land as it

exists and not in accordance with what the law should be. There is no gainsaying that the provisions of Article 203G of the Constitution of the Islamic Republic of Pakistan, 1973 categorically oust the jurisdiction of this Court in matters of interpretation of the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet Muhammad (peace be upon him) falling within the exclusive domain, power and jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench of this Court with reference to an existing law and essentially this Court's jurisdiction in such matters is limited to application of the principles where they are settled. Apart from that, by virtue of the provisions of Article 230 of the Constitution, it is one of the functions of the Council of Islamic Ideology to interpret the Injunctions of Islam with reference to an existing or proposed law and we would not like to usurp that function either."

21. Sections 3 and 4 of the Enforcement of Shariah Act, 1991 state the following:

3. Supremacy of Shari'ah.

(1) The Shari'ah that is to say the Injunctions of Islam as laid in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan.

(2) Notwithstanding anything contained in this Act, the judgment of any Court or any other law for the time being in force, the present political system, including the Majlis-e-Shoora (Parliament) and Provincial Assemblies and the existing system of Government, shall not be challenged in any Court, including Supreme Court, the Federal Shariat Court or any authority or tribunal:

Provided that nothing contained herein shall effect the right of the non-Muslims guaranteed by or under the Constitution.

4. Laws to be interpreted in the light of Shari'ah. *For the purpose of this Act—*

(a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the

Islamic principles and jurisprudence shall be adopted by the Court; and

(b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court.

22. Section 2 of the Act of 1962, states the following:

2. Application of the Muslim Personal Law.— Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims.

23. The approach of a judge to the interpretative project in view of the precedents was aptly explained by Justice Benjamin N. Cardozo in the Nature of the Judicial Process (13th Ed. Yale University Press, 1946; P.14)

"Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the sources are obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statue, but a statue, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statues do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared."

24. Also relevant for purposes of understanding the evaluation of principles and role of *ratio decidendi* to the following excerpt from Sir John Salmond's Jurisprudence (Page 175):

> *"Whence, then, do the courts derive those new principles, or rationes decidendi, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense. Judges are appointed to administer justice—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature. Where the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that any man may know them, and the light of nature is often but an uncertain guide. Instead of trusting to their own unguided instincts in formulating the rules of right and reason, the courts are therefore, wisely in the habit of seeking guidance and assistance elsewhere. In establishing new principles, they willingly submit themselves to various persuasive influences which, though destitute of legal authority, have a good claim to respect and consideration. They accept a principle, for example, because they find it already embodied in some system of foreign law. For since it is so sanctioned and authenticated, it is presumably a just and reasonable one. In like manner the courts give credence to persuasive precedents, to judicial dicta, to the opinions of text-writes, and to any other forms of ethical or juridical doctrine which seem good to them. There is, however, one source of judicial principles which is special importance, and calls for special notice. This is the analogy of pre-existing law. New rules are very often merely analogical extensions of the old. The courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old—of the ratio juris, as the Romans called it."*

25. Let us now consider paras 277 and 278 from D.F Mulla's Principles of Mohammedan Law (Page 795):

277. Husband's duty to maintain his wife.—The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him, or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt (S.290) dower, or she leaves the husband's house on account of his cruelty.

278. Order of maintenance.—if the husband neglects or refused to maintain his wife without any lawful cause, the wife may use him for maintenance, but she is not entitled to a decree for past maintenance, unless the claim is based on a specific agreement. Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1898, section 488 in which case the Court may order the husband to make a monthly allowance in the whole for her maintenance not exceeding five hundred rupees.

26. For purposes of understanding the historical background of evaluation of case law on the issue of maintenance the text of repealed section 488 of the Criminal Procedure Code, 1898 **("Cr.P.C")** is as follows:

Order for maintenance of wives and children. (1) if any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, a Magistrate of the first class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred rupees in the whole, as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) Enforcement or order. If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of such month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made;

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Provided further that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reasons she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases;

Provided that if the Magistrate is satisfied that he is willfully avoiding service or willfully neglects to attend the Court the Magistrate may proceed to hear and determine the

case ex-parte. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

[Section 488 of Cr.P.C was repealed by Ordinance XXVII of 1981]

27. Section 9 of the MFLO which is the relevant statutory law in force in Pakistan that establishes and regulates the right of a wife to maintenance is as follows:

9. Maintenance.– (1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

(1A) If a father fails to maintain his child, the mother or grandmother of the child may, in addition to seeking any other legal remedy, apply to the Chairman who shall constitute an Arbitration Council and the Arbitration Council may issue a certificate specifying the amount which shall be paid by the father as maintenance of the child.]

(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(3) Any amount payable under sub-section (1) or (2), if not paid in due time, shall be recoverable as arrears of land revenue.

Provided that the Commissioner of a Division may, on an application made in this behalf and for reasons to be recorded, transfer an application for revision of the certificate from a Collector to any other Collector, or to a Director, Local Government, or to an Additional Commissioner in his Division.

28. Let us now consider the case law wherein it has been held that the grant of maintenance to a wife during subsistence of marriage might be subject to certain conditions. In Mst. Resham Bibi v. Muhammad Shafi (PLD 1967 AJ&K 32), it has been held that the right of the wife to obtain maintenance is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and failure of the husband to provide her with maintenance in those circumstances would not entitle the wife to dissolution of the marriage. In Majida Khatun Bibi Vs Paghalu Muhammad (PLD 1963 Dacca 583), it has been held that where the wife refuses herself to return to her husband's house without sufficient cause she is not entitled to maintain. In Mukhtar ul Hassan Siddiqui v. Judge Family Court, Rawalpindi (1994 CLC 1216) it has been held that disobedient wife and disobedient major children are not entitled to claim maintenance husband/father. The Lahore High Court in Mst. Shazia Kausar v. Muhammad Ahmed (2006 CLC 251) held that, "*wife cannot claim maintenance if she is living separately from her husband without any justification, but it is equally recognized that wife can refuse herself to go to the husband's house and also can live separate*

from him unless the proper dower is paid by the husband during the period of such separation, the husband is duty bound to maintain his wife" It was held by a Judge-in-Chambers of the Lahore High Court in Ghulam Yasin v. Mst. Nasreen (2006 YLR 967) that*, "it is admitted fact that according to Islamic Law a wife is bound to live with her husband and follow him wherever he desires to go and she cannot refuse to live with her husband without any plausible reason, however, there are exceptions to the general rules."* The Court on the facts of the case however found that the petitioner had agreed to live with his wife in a house constructed by her parents in a compromise agreement and he could not renege upon such agreement. In Gakhar Hussain v. Surraya Begum (PLD 2013 Lahore 464), the Lahore High Court held that a daughter, even if alleged to be disobedient was entitled to be maintained by her father and relying on Mian Muhammad Sabir v. Mst. Uzma Parveen (PLD 2012 Lahore 154) it was held that father is bound to maintain even a divorced daughter if she is living with her mother instead of the father. In Majid Hussin v. Farrah Naz (2019 MLD 1999) it has been held that, *"husband is bound to pay maintenance allowance to wife till she is faithful and lives with him. Where wife voluntarily leaves the house of her husband, she is not entitled to get maintenance allowance. Wife's refusal to live with her husband without lawful excuse, desertion or otherwise willful failure to perform martial duties would result in loss of her claim for maintenance allowance."*

29. Let us make sense of the case law reproduced above as well as constitutional and statutory provisions and excerpts from commentaries on sources of law informing judicial decisions.

30. As a historical matter, certain relationships, such as marriage and interactions within the family, were left outside the domain of public law and were regulated by the personal law of the community in question. The customs and personal laws of communities came to be guided by their respective religious beliefs and edicts. And the process of codification of personal laws of communities also began taking root. Therefore, codified statutory provisions as well as uncodified personal law both constituted sources of law guiding courts in reaching decisions in areas that traditionally belonged to the province of private law. The issue of maintenance in the Indian sub-continent illustrates this scheme of things. There existed section 488 of Cr.P.C that regulated the issue of maintenance as part of codified law. And there also existed statutory instruments such as N.W.F.P Muslim Personal Law (Shariat) Application Act, 1935 and Muslim Personal Law (Shariat) Application Act, 1937, which directed that disputes on issues such as marriage, divorce and maintenance were to be decided on the basis of Muslim Personal law, making codified statutory law and uncodified Muslim Personal Law, both formal sources of law guiding court decisions. It is thus that we see caselaw produced by courts in British run Indian sub-continent citing treatises such as Ameer Ali's and D.F Mulla's commentaries on Mohammedan law as authorities for reaching conclusions recorded in their judgments.

31. Overtime there has been a rethink on the virtues of learning certain relationships, such as marriage and whatever transpires within it, in the private realm. The state has found that it has a legitimate interest in regulating these relationships as well, and we have consequently seen legislation on the issue of domestic abuse and statutory law regulating marriage, divorce and maintenance etc. The Muslim Family Law Ordinance, 1961 is one manifestation of the evolving jurisprudential approach with the state regulating relationships that erstwhile fell outside the public domain and were treated as a private matter regulated in accordance with customs as informed by the religious beliefs of communities.

32. The caselaw on the question of maintenance that evolved prior to the creation of Pakistan was guided by section 488 of Cr.P.C that contained in sub-section (4) a condition that in order for the wife to be entitled to receive maintenance she must not be living in adultery or living separately from her husband without sufficient reason. It was also guided by section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, which held that the question of maintenance will be guided by Muslim Personal Law. As an example paras 277 and 278 from D.F Mulla's Mohammedan Law have been reproduced above, which, along with other treatises, mention conditions that are to be satisfied by the wife to entitle her to claim maintenance, such as being obedient, faithful, living with the husband, making herself available for sexual intercourse, complying with commands of the husband and not being sick etc. Due the import of such conditions from commentaries on Mohammedan

Law into caselaw, what emerged was a subjective set of rules determining the right to maintenance that could be employed in view of the proclivities of the presiding judge, as opposed to any objectively justiciable principle that would add certainty to the question of maintenance and a wife's entitlement to it. Even within the domain of Muslim Personal Law there is no consensus among scholars as to the conditions that attach to a wife's entitlement to maintenance. There are schools of thought that argue that various conditions are to be satisfied by wife to be eligible for claiming maintenance from the husband. There are others who argue that the right to maintenance is unconditional and a wife refusing to live with the husband is a ground for divorce but not to deny her maintenance during such period when she is still in the bond of marriage. In the Shah Bano Begum case (AIR 1985 SC 945), the Indian Supreme Court had held, for example, that a Muslim husband was liable to maintain even a divorced wife on the basis of principles it extracted from the Holy Qur'an.

33. As a matter of personal faith for a Muslim judge, it might be inconceivable that his religion would deny the right of maintenance to a wife who has fallen sick, or who might be in an abusive relationship and to avoid which she is forced to live away from any accommodation provided by her husband, or that the husband can be allowed to renege of his obligation to maintain his wife on the basis that his wife does not abide by his commands, or that the obligation to maintain one's wife is a legal obligation by virtue of the nature of the relationship as opposed to being a means-driven obligation depending on the

respective financial means of the husband and the wife. Another Muslim judge, as a matter of personal faith, might believe the opposite. And this is why the distinction between matters of law and matters of faith becomes critical on questions such as that of maintenance. The judgments of the Supreme Court are binding on everyone in terms of Article 189 of the Constitution and the judgments of High Courts are binding on all subordinate forums in terms of Article 201. Under the oath sworn by judges, they are obliged to dispense justice in accordance with the law and the Constitution. Judges are not legislators and their personal religious and moral beliefs can play no part in influencing the discharge of their judicial functions. Even as a matter of public policy, Pakistan, with over 96% of its population being Muslim, has followers of different schools of Islamic thought. It can thus not be permissible for a judge to assume the role of the legislature and determine what the Muslim Personal Law ought to be (which determination is then binding in terms of Articles 189 and 201 of the Constitution) on the basis of his preference for a certain school of Islamic thought or his personal understanding of Usool-al-fiqh and Shariah.

34. The Constitution has thus addressed this issue as also elucidated by the august Supreme Court in Malik Muhammad Mumtaz Qadri *(PLD 2016 SC 17)*. A provision of law that is considered to fall foul of the commands of *Shariah* can be challenged only before the Federal Shariat Court in terms of Article 203D of the Constitution and the jurisdiction of the High Courts is ousted for such purpose under Article 203G. For the present purposes, a challenge was brought against the MFLO in

the Federal Shariat Court in Allah Rakha and others v. Federation of Pakistan and others [PLD 2000 FSC 1]. However, Section 9 of the MFLO was not declared to be repugnant to the injunctions of Islam. Further the Council of Islamic Ideology has been created under Article 228 of the Constitution, which is conferred with the authority to make recommendations to the Parliament and Provincial Assemblies as to ways and means to enable Muslims of Pakistan to enable their lives in accordance with the injunctions of Islam. It is then for the Parliament to amend existing laws or promulgate new laws for such purpose. It is however, nor for the High Court to usurp the jurisdiction of the Federal Shariat Court on the one hand or the Council of Islamic Ideology comprising religious scholars and the Parliament on the other, by importing one's personal understanding of principles emanating from the Quran and the Sunnah in deciding cases in the presence of clear statutory provisions addressing the subject matter.

35. On the question of maintenance Section 9 of the MFLO is unequivocal and its language does not open the provision to multiple interpretations with regard to affixing the obligation of a husband to maintain his wife. There are no conditions prescribed therein that need to be satisfied prior to establishing the eligibility of the wife, who remains in the bond of marriage, to maintenance and none can be imported into it on the basis of commentaries in various treatises on the principles of Mohammedan Law. Section 9 of the MFLO simply states that, "if any husband fails to maintain his wife adequately," the wife can apply to Chairman Arbitration Council for enforcement of the

obligations or seeking any other legal remedy available such as before the Family Court etc.

36. In terms of statutory background, section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, included within it maintenance as a subject matter to which Muslim Personal Law would apply. There also existed provincial statutes such as the North-West Frontier Province Muslim Personal Law (Shariat) Application Act, 1935, and the Punjab Muslim Personal Law (Shariat) Application Act, 1948 etc. These included "family relations" as a subject matter to which Muslim Personal Law applied but did not include "maintenance" specifically in contrast to the Muslim Personal Law (Shariat) Application Act, 1937. The Act of 1962, then repealed the N.W.F.P. Act of 1935, Punjab Act of 1948 and the Muslim Personal Law (Shariat) Application Act, 1937. The Act of 1962 omitted the term "maintenance" from the scope of Section 2 and it was thus that the learned Lahore High Court held in Ghulam Rasool v. Collector, Lahore *(PLD 1974 Lahore 495)*, consistent with settled principles of statutory interpretation, that the use of words in the statute and omission of "maintenance" from Section 2 is to be deemed to be intentional. An obvious reason for the omission is the MFLO which was promulgated in 1961, Section 9 of which created an unambiguous obligation for the husband to maintain his wife. However, along with Section 9 of the MFLO, Section 488 of Cr.P.C. also stayed in the field till it was repealed by Ordinance XXVII of 1981 on 08.07.1981. Therefore, in applying the principle of harmonious interpretation, the condition for grant of maintenance under Section 488 (4) of Cr.P.C. was to be read

together with Section 9 of the MFLO from 1961 through 1981 when Section 488 of Cr.P.C. was repealed by the legislator in its wisdom.

37. The Enforcement of Shariah Act, 1991, was then promulgated and Section 4 clearly provides that laws to be interpreted in the light of Shariah where more than one interpretation of a statutory provision is possible and one such interpretation is consistent with or promotes the jurisprudence and principles of Islamic Law. In other words, jurisprudence and principle of Islamic Law can be used as a tool for interpretation of statutes where the text of the statute in view of its plain meaning can be accorded more than one interpretation. If the language of the statue unequivocally conveys the intent of the law, no external source of law can be employed to read into the statute. Framed another way, the jurisprudence and principle of Islamic Law do not trump the principle of *casus omissus*. A court cannot supply to a statue language that is not provided therein. It is only while undertaking an interpretive exercise to resolve some ambiguity in statutory law that Section 4 of the Enforcement of Shariah Act, 1991 comes into play and the jurisprudence and principles of Islamic law can be used as sources of law to guide the interpretive exercise.

38. As already stated above, Section 9 of the MFLO is not ambiguous and consequently conditions for grant of maintenance to a wife cannot be read into it by virtue of erstwhile Section 488 of Cr.P.C. or Section 2 of the Muslim Personal Law (Sharia) Application Act, 1937, or case law evolved at a time when such

statutory provisions were in the field. In this view of the matter, the respondent is entitled to maintenance for the entire period that she remained married to the petitioner unconditionally, and no preconditions can be imposed the satisfaction of which would be a prerequisite to assert her entitlement to maintenance. The learned ADJ therefore made no mistake in law in granting maintenance to the respondent.

39. On the question of dower, it was held in Dr. Anees Ahmed v. Mst Uzma (PLD 1998 Lahore 52) that payment of dower was obligatory on husband which is the entitlement of the wife as consideration of marriage. In Muhammad Azam v. Addl. District Judge (2006 YLR 33), the Lahore High Court held that dower, whether prompt or deferred, was the inalienable right of the wife, which became vested upon consummation of the marriage. The impugned judgment and decree of the learned ADJ suffers from no infirmity for granting to respondent No.1 such part of the dower that was not deferred. The petitioner's offer to pay the deferred dower in the amount of Rs.500,000/- to settle the respondent's claim to maintenance is misconceived. Maintenance during the subsistence of marriage and payment of dower agreed upon at the time of marriage are both obligations created by law and one cannot be used as a bargaining chip to defray the other. The parties are now divorced as per their counsel. The petitioner's obligation to pay the deferred dower has now matured and discharge of such obligation cannot be used to set-off his obligation to pay maintenance to his wife, which has been long overdue.

40. And finally, the petitioner is not entitled to any equitable relief in any event in view of his conduct. Respondent No.1 instituted a suit for maintenance on 19.09.2008. During the pendency of the suit her daughter was born, who is respondent No.2. Almost thirteen years have passed and the petitioner has not bothered to pay anything to maintain his wife or even his own daughter. In view of the clearly affixed obligation under Section 9 of the MFLO, the petitioner's conduct has been unconscionable to put it mildly.

41. This petition is ***dismissed*** with a cost of Rs.50,000/- imposed under Section 35(1)(iii) of the Civil Procedure Code, 1908, payable by the petitioner to the respondent within a period of 14 days.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 03.05.2021.

JUDGE

Approved for reporting.

Saeed.