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CASE COMMENT

THE DIFFERENCE METHOD MAKES: JUDICIAL RESTRAINT AND JUDICIAL CREATIVITY IN RANA NAHID V SAHIDUL CHISTI

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ABSTRACT

Restraint and creativity are both necessary judicial attitudes. But when should judges exercise restraint in adjudication and when, creativity? This is the question posed by the Supreme Court's 2020 split verdict in the case of Rana Nahid v Sahidul Chisti, which required the Court to decide whether Family Courts had jurisdiction over maintenance claims under the Muslim Women (Protection of Rights on Divorce) Act, 1986. By contrasting the two approaches taken by the judges to statutory interpretation in this case, the note argues that while judges should refrain from arbitrary rule making, creativity must be viewed as duty when it can fill a gap in the law or prevent an unreasonable outcome and is in furtherance of pre-existing legal principles.

I. INTRODUCTION

The title of this piece is borrowed from Christine Littleton's 1989 review essay on the noted feminist legal theorist Catharine MacKinnon's book, *Feminism Unmodified: Discourses on Life and Law*.¹ Littleton argues that MacKinnon's chief contribution to feminist jurisprudence is methodological, which uniquely entails 'believing women's accounts of sexual use and abuse by men.'² While this piece is about neither MacKinnon's feminism nor feminist jurisprudence in general, Littleton's title captures precisely the point that I highlight here, namely, the significance of (judicial) method.

On 18 June 2020, a two-judge bench of the Supreme Court of India, having failed to reach a consensus on an issue, referred the case to a larger

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1 Christine A. Littleton, 'Feminist Jurisprudence: The Difference Method Makes' (1989) 41(3) *Stanford Law Review* 751.

2 *ibid* 752.

bench. The case, *Rana Nahid v Sahidul Chisti*,³ involved a question about the jurisdiction of Family Courts. Justice R. Banumathi concluded that Family Courts did not have the jurisdiction to decide maintenance claims of divorced Muslim women, while Justice Indira Banerjee concluded that they did. Put simply, the case resulted from an inconsistency between a general and a group-specific statute dealing with post-divorce maintenance—a commonplace scenario in India’s family law landscape. The two opinions in the case demonstrate two different approaches to such statutory inconsistencies and, in turn, two different understandings of the judicial role. I argue that Justice Banerjee’s is the correct approach for it creatively uses interpretation to harmonise seemingly irreconcilable statutes and avoid an unreasonable and discriminatory outcome.

II. FACTUAL BACKGROUND

Rana Nahid sought maintenance for herself from her husband, Sahidul Chisti, under Section 125 of the Code of Criminal Procedure (CrPC). While the case was pending, Sahidul divorced Rana. The Family Court where Rana had filed her case for maintenance held that since she had been divorced, she was no longer eligible to claim maintenance under the common anti-vagrancy provision of the CrPC, but that her claim had to be decided under the group-specific law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 (MWA). The Family Court thus converted Rana’s original petition under Section 125, CrPC into one under Section 3, MWA, and ordered Sahidul to pay her a lumpsum amount of ₹300,000 as maintenance.

Both Rana and Sahidul filed revision petitions before the Rajasthan High Court against the Family Court’s order—the former, to have the amount raised, and the latter, to have it reduced. In 2010, the High Court decided the petitions, where it held that the Family Court’s order was without jurisdiction since only a Magistrate is authorised to decide cases under the MWA. Rana appealed the judgement before the Supreme Court, where a division bench of Justices R. Banumathi and Indira Banerjee heard the matter, resulting in two different opinions. While Justice Banumathi dismissed the appeal holding that a Family Court could not decide a matter under the MWA, Justice Banerjee allowed it, concluding that it could.

3 *Rana Nahid v Sahidul Haq Chisti* [2020] 7 SCR 324.

To be sure, the question raised by the case predates the matrimonial dispute between Rana and Sahidul and, in fact, goes back to the enactment of the MWA. In 1984, the union government enacted the Family Courts Act (FCA) to provide a mechanism for the resolution of matrimonial disputes, unencumbered by the features of regular civil proceedings. Consequently, Family Courts were authorised to devise their own rules of procedure and evidence, enlist the help of social workers and counsellors, and even dispense with lawyers to allow disputants to plead their cases themselves.⁴ Furthermore, the jurisdiction of Family Courts was not tied to the religion of the parties but defined in terms of subject matter, such as nullity, divorce, child custody, maintenance and so forth.⁵ Thus, Family Courts were authorised to decide maintenance claims both under group-specific personal law and the group-neutral CrPC. However, two years later, the enactment of the MWA—which provided that divorced Muslim women could claim maintenance only as per Muslim Personal Law—conferred jurisdiction on Magistrates but failed to mention Family Courts. As Flavia Agnes remarks: ‘If one recalls the controversies and polemics around the enactment [of the MWA] after the *Shah Bano* ruling, it is understandable that the drafters of the statute did not concern themselves with seemingly innocuous concerns like jurisdiction.’⁶

The harms of the oversight became evident the moment the Family Courts started becoming operational. Agnes notes that in a typical case, a Muslim woman would seek maintenance from her husband under the CrPC in a Family Court, but during the pendency of the case, the husband would divorce her, with the result that she would have to make a fresh application for maintenance in a Magistrate’s court to be decided as per the MWA.⁷ Furthermore, women would often make a common application for maintenance under the CrPC for themselves and their children. But on being divorced, they would have to pursue two cases of maintenance—one for themselves and one for their children—in two separate courts, often forcing them to prioritise one over the other on account of the double cost of litigation.⁸ And yet, in case after case where the question came up, High Courts refused to recognise the Family Courts’ jurisdiction, pleading

4 Family Courts Act 1984, ch IV.

5 *ibid* s 7(1).

6 Flavia Agnes, *Family Law Vol II: Marriage, Divorce, and Matrimonial Litigation* 287 (Oxford University Press, New Delhi 2011).

7 *ibid*.

8 *ibid*.

helplessness in the face of clear statutory words.⁹ As we will see below, it was possible for these Courts to hold otherwise. *Rana Nahid* was an opportunity for the Supreme Court to rectify the legislative oversight in the drafting of the MWA and to remove the unreasonable barriers to Muslim women's access to post-divorce maintenance. But instead, the case resulted in a split verdict.

III. TWO MODELS OF JUDICIAL ETHICS

The two opinions in the case demonstrate two different understandings of the judicial role, which can be characterised as judicial restraint and judicial creativity. Judicial restraint can be defined as an attitude that faithfully applies the positive law and is indifferent to the outcomes of such application. In contrast, judicial creativity is an attitude that is sensitive to outcomes; it does not leave every matter to the legislature but attempts to solve the issue through interpretation when the law appears incomplete or unfair. A substantial body of scholarship spanning domestic labour law,¹⁰ international criminal law,¹¹ common law¹² and statute law¹³ argues that judicial creativity is essentially a disciplined exercise of judicial power. Joseph Powderly has helpfully distinguished judicial creativity from what is commonly referred to as judicial activism:

Judicial creativity implies the filling of *lacunae* on the basis of the reasoned development of acknowledged pre-existing legal principles, which takes into account both the teleological underpinnings of the law in question and issues of public policy affecting its application. On the other hand, judicial activism implies arbitrary rule creation which has no foundation in pre-existing principles or rules and is based not on teleology, but rather on the subjective desires of the bench.¹⁴

9 *Karim Abdul Rehman Shaikh v Shehnaz Karim Shaikh*, II (2000) DMC 634; *Patnam Vahedullah Khan v Ashia Khatoon* (2000) Cri LJ 2124; *Anjum Hasan Siddiqui v. Salma B.*, II (1992) DMC 1.

10 Cornelius J. Peck, 'Judicial Creativity and State Labor Law' (1965) 40(4) Washington Law Review 743.

11 Joseph Powderly, *Judges and the Making of International Criminal Law* (Brill, Leiden 2020).

12 Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co., Boston 1960).

13 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, Cambridge 2013).

14 Joseph Powderly, 'Distinguishing Creativity from Activism: International Criminal Law and the "Legitimacy" of Judicial Development of the Law' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Ltd 2013) 229. See also, Roger J. Taynor, 'The Limits of

Thus, unlike judicial activism, which connotes an exceeding of the institutional boundary of the judiciary, judicial creativity is very much within the zone of proper judicial role. We could conclude then that restraint and creativity are not antagonistic positions. Indeed, as Timothy Endicott remarks, ‘a judge in a healthy legal system sees *both* restraint and creativity as duties.’¹⁵ The important question in assessing any judicial opinion, therefore, is whether restraint or creativity is the appropriate attitude to assume or duty to follow in a particular case, in view of the scope for constrained creativity existing therein. This section describes the two judicial attitudes present in *Rana Nahid*, while Section V evaluates them.

A. Justice Banumathi’s Restraint

Justice Banumathi’s reasoning is straightforward and based on a plain reading of the statutory provisions. Her line of reasoning is as follows: The MWA confers jurisdiction on First Class Magistrates alone.¹⁶ On the other hand, the Family Courts Act, 1984 (FCA) provides that a Family Court’s jurisdiction will be that which is exercised by a District Court or any subordinate civil court¹⁷; a Magistrate under section 125 of the CrPC¹⁸; and that which is ‘conferred on it by any other enactment’.¹⁹ Since the MWA does not fall under any of the three categories specified by the FCA, Family Courts do not have the jurisdiction to entertain cases filed under the MWA. For Justice Banumathi, therefore, the statutory words are clear and, even if they result in two separate mechanisms for maintenance claims—one for Muslims and another for the rest of the Indians—judges have no choice but to give effect to that statutory scheme.

B. Justice Banerjee’s Creativity

If the MWA and the FCA being unavoidably separate mechanisms is the central feature of Justice Banumathi’s opinion, then for Justice Banerjee,

Judicial Creativity’ (1978) 29 Hastings Law Journal 1025 (‘If he [the creative judge] is on guard against mechanical incantations of obsolescent rules in the name of ancestral loyalty, he is also on guard against mechanical rejections of sturdy rules in the name of social justice.’ 1033).

15 Timothy A.O. Endicott, ‘Was *Entick v Carrington* a Landmark?’ in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing 2015) 109. Emphasis original.

16 Muslim Women (Protection of Rights on Divorce) Act 1986, s 3(2).

17 Family Courts Act 1984, s. 7(1)(a).

18 *ibid* s 7(2)(a).

19 *ibid* s 7(2)(b).

it is the potential for harmony between the two statutes. Section 7(1), Explanation (f) of the FCA gives Family Courts jurisdiction over 'a suit or proceeding for maintenance'. And Section 20 gives the FCA overriding effect with respect to any other law. These provisions suggest that Family Courts have jurisdiction to decide Muslim women's claims for maintenance. However, as noted above, the MWA also states that it will supersede any other law when it comes to maintenance for Muslim women.²⁰ For Justice Banerjee, it is perfectly feasible to harmonise these two seemingly conflicting statutes. The FCA, being the general law laying down the procedure for the resolution of matrimonial disputes, applies to all Indians, but as for the substantive law on maintenance for Muslims, the MWA would override any other substantive law on the subject.²¹

To hold otherwise, Justice Banerjee notes, would be to exclude Muslim women from the beneficial provisions of the FCA that are meant to support female litigants in particular, and would amount to unreasonable discrimination against them.²² To hold otherwise, she also finds, would be to disregard India's international human rights obligations, since the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires state parties to ensure a women-friendly legal system.²³

But a harmonised reading of the two statutes is not enough to conclude that Family Courts have the jurisdiction to decide maintenance claims under the MWA. One must still locate that authority in the text of the statute—more specifically, within the scope of section 7 of the FCA, which deals with the jurisdiction of Family Courts. Justice Banerjee notes that since proceedings under Section 125, CrPC have been held to be civil proceedings and on the parity of reason, the nature of reliefs that a Magistrate can grant under the MWA are such that the Magistrate must also be deemed a civil court. Thus, she concludes that Family Courts derive

20 Muslim Women (Protection of Rights on Divorce) Act 1986, s 3.

21 For a descriptive account of harmonization as a dominant mode of legal change in Indian family laws, See Saptarshi Mandal, 'Towards Uniformity of Rights: Muslim Personal Law, the Domestic Violence Act, and the Harmonization of Family Law in India' in Indira Jaising and Pinki Mathur Anurag (eds), *Conflict in the Shared Household: Domestic Violence and the Law in India* (Oxford University Press, New Delhi 2019) 171-199.

22 *Rana Nahid* (n 4) [33] (Banerjee J).

23 *ibid* [32] (Banerjee J).

the authority to decide cases under the MWA from Section 7(1)(a) since deciding an application under Section 3 of the MWA is, 'in essence and substance',²⁴ the jurisdiction of a subordinate civil court.

V. RESTRAINT AND CREATIVITY IN *RANA NAHID* EVALUATED

All acts of interpretation involve making choices, and so does statutory interpretation. Indeed, a growing scholarly movement that involves rewriting existing judgements to incorporate alternative arguments, sources or methods, is premised on the view that appellate adjudication invariably involves choosing between competing interpretations of the law.²⁵ The rewritten judgements demonstrate that it was possible for the case to be decided differently, with the same facts and based on the same legal provisions and precedents that were available to the original judges. The notion that Justice Banumathi's opinion also involved choosing a particular construction of the statute over another equally viable one, becomes evident when we read Justice Banerjee's opinion. But which of the two choices was the better one?

Justice Banumathi's restrained approach is based on two assumptions: first, that the meaning of the term 'Magistrate' in the MWA is clear and requires no interpretation, and second, that the 'clear' wording of the statute reflects the intention of the Parliament which the Court must respect. As for the first, Justice Banumathi's fidelity to the 'plain meaning' of 'Magistrate' attracts the usual criticisms levelled against this approach to interpretation: that the meaning of statutory words is hardly ever plain to begin with;²⁶ that the plain meaning approach is impervious to the unreasonable and unfair outcomes that it often produces;²⁷ and that it is based on an understanding of the judicial role that is both inaccurate at a

24 *ibid* [76] (Banerjee J).

25 Aparna Chandra, Jhuma Sen, Rachna Chaudhary (eds), Special Issue on The Indian Feminist Judgments Project (2021) 5(3) *Indian Law Review* 261; Gabrielle Appleby and Rosalind Dixon (eds), *The Critical Judgments Project: Re-reading Monis v The Queen* (The Federation Press, Annandale 2016); Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, Oxford 2010); Jack M. Balkin (ed), *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York University Press, New York 2001).

26 Justice G.P. Singh, *Principles of Statutory Interpretation* (LexisNexis, Gurgaon 2016) 59.

27 Jerome Frank, 'Words and Music: Some Remarks on Statutory Interpretation' (1947) 47 *Columbia Law Review* 1259.

descriptive level and indefensible as a prescriptive proposition.²⁸ As we will see below, the term 'Magistrate' does have scope for interpretation.

The legislative intention assumption also stands on shaky ground. Both legal philosophers and judges tell us that the meaning of the oft-used phrase 'legislative intention' can only be understood by observing how it is used.²⁹ A practice-based account of legislative intent suggests that it is simply a reference to any text-centred process of interpreting legislation.³⁰ Indeed, to consider the practice of the Supreme Court of India, judges have imputed intention to the Parliament to broaden the scope of a clear word used in the statute;³¹ modified a procedural requirement on the argument that not doing so would cause harms not intended by the Parliament;³² and disregarded known intention of the Parliament altogether and interpreted a statute in a manner that would prevent it from being declared unconstitutional.³³

In each of the above cases, judges have claimed their role as interpreters rather than mere enforcers of legislative instructions, made interpretive choices, and justified them with reference to a range of normative goals drawn from the Indian Constitution or a general consideration for

28 Upendra Baxi, 'On How Not to Judge the Judges: Notes Towards Evaluation of the Judicial Role' (1983) 25(2) *Journal of the Indian Law Institute* 211; Richard A. Posner, 'Statutory Interpretation – in the Classroom and in the Courtroom' (1983) 50 *University of Chicago Law Review* 800. See also, Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116(19) *Harvard Law Review* 19 ('I reject the contention that the judge merely states the law and does not create it. It is a fictitious and even a childish approach.' 23)

29 Brian Bix, 'Questions in Legal Interpretation' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* 137 (Clarendon Press 1995); Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40(1) *Statute Law Review* 53.

30 Bix (n 30) 146 ('Legislative intent in England and America at least ... appears to stand for whatever aspect of legislative texts or the legislative record is used to clarify or settle the meaning and application of legislation, and the way in which such material might be so used.')

31 *Badshah v Sou. Urmila Badshah Godse and Anr* (2014) 1 SCC 188 (holding that the word 'wife' in Section 125 of the CrPC would include women whose marriages were not legally valid for there is no reason to believe that the Parliament intended to exclude women caught in fraudulent marriages from the scope of a beneficial law.)

32 *ABC v State (NCT of Delhi)* (2015) 10 SCC 1 (holding that the word 'parents' in Section 11 of the Guardians and Wards Act, 1890 must be read as 'the parent who is the sole caregiver' in the case of illegitimate children, since involving both parents in guardianship proceedings in such cases may result in harms not intended by the Parliament.)

33 *Danial Latifi and Anr. v Union of India* (2001) 7 SCC 740 (holding that a Muslim husband's liability to provide for his divorced wife was limited to the *iddat* period, but such provision must be made keeping in view her needs beyond the *iddat*.)

fairness.³⁴ Their interpretive efforts have been geared towards generating practical yet principled solutions to the problems posed by statutory words and avoiding unreasonable or discriminatory outcomes. In this context, Justice Banumathi's restraint in *Rana Nahid* is unsatisfactory for it shows minimal interpretive effort. She accepts too readily the proposition that if the Parliament had intended Muslim women to approach Family Courts for maintenance under the MWA, it would have explicitly said so.

Justice Banerjee, on the other hand, asserts her interpretive role and spots the areas where it could be productively used to avoid a discriminatory and unreasonable outcome.³⁵ Furthermore, consistent with the practices of the Supreme Court referred to above, she turns to a creative interpretation based on the argument that the Parliament could not have intended a discriminatory outcome.³⁶ But most importantly, her concern for outcomes does not come at the cost of judicial discipline; nor does she indulge in interpolation in the name of interpretation. Let us see how.

Justice Banerjee makes two interpretive moves. The first is to hold that the two statutes can be reconciled since the MWA deals with substantive law and the FCA with procedural law. The important question to ask here is whether such a reading offends the schemes of either of the statutes. The answer is that it does not. The MWA remains the substantive law on maintenance for Muslims, as intended by the legislature, and Muslims can also make use of the beneficial procedural aspects of the FCA. Justice Banerjee's second interpretive move is to hold that the term 'Magistrate' in the MWA must be understood to signify civil proceedings. Justice Banerjee does not allude to this, but it is settled law that 'the character of the proceeding...depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right

34 For an argument that such resort to principles of legality is also ultimately rooted in the regard for legislative intent, see Sales (n 23).

35 *Rana Nahid* (n 4) [62] (Banerjee J): '...this court is duty bound to clear the ambiguity by interpreting the law in consonance with the fundamental rights'; *ibid* [75] (Banerjee J): 'The proposition of law which emerges from the judgments referred to above is that, in discharging its interpretive function, the court can even correct obvious drafting errors.'

36 *ibid* [68] (Banerjee J): 'In my view, it was never the intention of the 1986 Act ... to deprive divorced Muslim women from the litigant friendly procedures of the Family Courts Act and denude Family Courts of jurisdiction to decide applications for maintenance of divorced Muslim women.'

violated and the appropriate relief which may be claimed.’³⁷ Thus, her interpretation of the Magistrate’s role under the MWA as the jurisdiction exercised by a subordinate civil court is simply a restatement of the existing law.

VI. CONCLUSION

Rana Nahid v Sahidul Chisti tells two stories. One is that of Rana Nahid, the petitioner, who approached the legal system to obtain maintenance from her husband, but whose case soon turned into a dispute over which court had the power to decide her claim. Twelve years after she got her first (unsatisfactory) court order, the highest appellate court in the country delivered a split verdict on the question of jurisdiction, thereby delaying a decision on her actual claim even further.

The Family Court had directed Sahidul to pay Rana a lumpsum amount of ₹3 lakh as maintenance under the MWA. While their appeals were pending before the Rajasthan High Court, he paid her ₹1 lakh—presumably the only amount he was willing to pay. When the High Court set aside the Family Court’s order, it let Rana retain the amount she had already received, subject to the Magistrate’s decision on her claim under the MWA, should she make one. Rana’s application under the MWA, however, was rejected by the Magistrate in 2019, and the appeal against it before the Sessions Court ‘has not seen the light of the day as yet’.³⁸

But *Rana Nahid* must also be read as an account of the failure of appellate adjudication, given that for over three decades so many judges failed to rectify a minor legislative oversight, which, as Justice Banerjee’s judgement shows, was very much within their power to address. Unfortunately, the larger bench of the Supreme Court to which the case was referred continued the trend. In an order passed on 22 September 2022, a three-judge bench of the Court awarded Rana an interim maintenance of ₹20,000 per month pending the Sessions Court’s decision and concluded that it was no longer required to address the question of law referred to it (regarding the Family Court’s jurisdiction) since Rana was pursuing her case in the Sessions Court.³⁹ *Rana Nahid* demonstrates rather

37 *S.A.L. Narayan Row and Anr v Ishwarlal Bhagwandas and Anr* AIR 1965 SC 1818. See also, *The Dargah Committee, Ajmer v State of Rajasthan* AIR 1962 SC 574; *Ram Kishan Fauji v State of Haryana* (2017) 5 SCC 533.

38 *Rana Nahid v Sahidul Haq Chisti*, Criminal Appeal No. 192/2011. Order dt 22 September 2022, Supreme Court of India.

39 *ibid*

succinctly that method does make all the difference. But it also raises the question as to why judges prefer restraint over creativity, when there are good reasons to do otherwise.

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