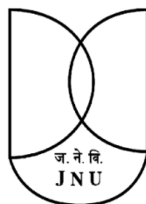
MODERN STATE, SECULAR LAW AND THE MINORITIES: THE CULTURAL POLITICS OF ALL INDIA MUSLIM PERSONAL LAW BOARD (1973-2010)

Thesis submitted to Jawaharlal Nehru University
in partial fulfilment of the requirements
for award of the degree of

DOCTOR OF PHILOSOPHY

Abhay Kumar



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2018

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DECLARATION

I, Abhay Kumar, hereby declare that the thesis titled **"Modern state, Secular Law and the Minorities: The Cultural Politics of All India Muslim Personal Law Board (1973-2010)"** submitted by me in partial fulfillment for the award of the degree of **Doctor of Philosophy** to Jawaharlal Nehru University is my original work. The thesis has not been previously submitted in part or in full for the award of any degree of this or any other university.

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CERTIFICATE

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CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

Prof. Aditya Mukherjee
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To
Mai, Champa Devi, and Papa, Uma Kant Mishra

ACKNOWLEDGEMENT

I would like to express my deep gratitude to my supervisors Prof. Aditya Mukherjee for his guidance and help. I am also indebted to Prof. Neeladri Bhattacharya and Prof. Bhagwan Singh Josh, who guided my work before and after their retirement. Prof. Sucheta Mahajan, the Chairperson of the Centre for Historical Studies (CHS), has always been helpful, particulary at difficult times. Let me extend special thanks to her. Professor Najaf Haider often showed a great interest in my work and I express my gratitude to him.

Outside JNU, Dr. Zafarul Islam Khan, noted Islamic scholar, always encouraged my work and allowed me access to his personal library. I would like to thank him from the depth of my heart. I want to offer a word of thanks to Dr. Manisha Sethi for reading my draft and making corrections.

In giving shape to this work, the contribution of my friends is beyond acknowledgement. Gautam was awake at night with me for weeks and read all my chapters. He not only edited the chapters but also offered sharp critiques. Some of them I was able to incorporate in the final draft. Amitanshu--who has sharp eyes and a great editing ability--remained awake several nights and went through the draft. Iqbal, my friend at CHS, was a great companion at library. He not only edited my chapters but also made invaluable suggestions. I am also grateful to Ravi and Badre Bhai for reading a part of my draft.

A word of thanks is due to my friends, who always helped me in difficult times. They include Eisa Bhai, Dharmraj, Neetisha, Kumar Saurabh, Chandni, Shama, Dastagir, Tahira, Iqbal Danish, Wasim, Abdul Hakim, Akram Nawaz, Manilata, Martand, Anubhuti, Prashant, Soheb, Fahad, Niharika, Suraj, Afzal, Deepali, Ashwin, Jasmeet, Chandrasen, Raza Bhai, Shadab Bhai, Rupali, Angana, Sudha, Aiyaz Bhai, Aabha, Shahid Jamal, Iqbal Abhimanyu, Swetank, Raihan, Akhilesh, Alam, Mohan, Gopal, Krishna, Jaffu Bhai, Sunil, Pappu, Hridya, Anuj, Anzar, Mahtab, Arastu Lenin, Areeb, Javaid, Avinash, Kundan, Baljeet, Dashrath, Aftab, Alok, Santosh, Varun, Mahfooz, Anupam, Aarti, Naeem, Rishi, Shashwat, Sanjay, Vinod, Mukhtiyar Bhai, Mujib, Samim Asgor Bhai, Rajan, Raghib, Uzair Bhai, Qamar Shaban and Sanjeev.

I am grateful to the the mess staff of Brahmputra Hostel where I spent three years during my PhD. They always approached me as if they were my family members. Yadav ji, who runs a tea stall there, was very caring. Security guards at the hostel were also like my family members. Bittu, who runs a shop at Ganga Dhaba, always helped me.

Moreover, Delhi office of All India Muslim Personal Law Board (AIMPLB) provided me pamphlets and booklets and I would like to thank the AIMPLB for cooperation. The cooperation of the library staff of Dr. B.R. Ambedkar Library, Jawaharlal Nehru University is also appreciated.

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INTRODUCTION

MUSLIM PERSONAL LAW:
DEFINITIONS, SOURCES AND CONTESTATIONS

Often, when I mentioned to some of my respondents--experts and laymen alike--that I was researching the issue of the Muslim Personal Law (the MPL), they responded with enthusiasm. “It is a very hot topic” was a standard reply I received. Interestingly, while they were keen to initiate a debate around the theme, I found, sometimes to my discomfiture, a barrage of questions directed at me, such as: “What are your views on triple *talaq*?” But even before I could answer, they would shoot another question at me:“Should not the Government scrap Muslim personal Law as it is against the Constitution?”, “Reforms in the Christian and Hindu communities have already happened but the Muslim community is yet to initiate reforms”, they would add for good measure. Eventually, the apparent lack of reforms among the Muslim community came to be seen by a large number of these respondents as one of the main reasons for the “backwardness” of the Muslim community, particularly women. “Muslim men are so cruel that they divorce their women on mobile phones”. They exhibited a great deal of concern for the Muslim woman.

Most of these people happened to be Hindus. In my interactions with Muslims during the course of my study, I found them also inclined to stress the need for the reforms in the MPL. For lack of reforms, they blamed the community leadership, both political and religious. However, a noticeable difference could be observed between these two sets of perceptions. While the criticisms of the Hindus against the MPL often flew from their negative perceptions about Muslims and their religion and culture, those of the Muslims emanated from their sense of “guilt” and “inferiority”. In addition to that, the Hindu respondents were all praise for the ruling Hindu-nationalist Narendra Modi-Government--which came to power in 2014--for its “crusade” against the “anti-modern” and “gender-unjust” MPL; the Muslims, on the other hand, did not show any such expectation. They, instead, were suspicious about the intention of the government.

Am I making too sweeping a generalisation? Many would argue that not all Hindus are opposed to the MPL, nor do they all look negatively at Muslims, their religion and culture. Similarly, all Muslims do not hold a uniform view about the government and the MPL. Any attempt to simplify things is likely to yield only a narrow view of social reality. The views of the All India Muslim Personal Law (the AIMPLB) – an umbrella organisation of the Indian Muslims formed in 1972 in a conference held in Bombay to protect the MPL from any governmental interference, and the subject of the present study – are themselves seemingly contradictory, allowing for no simplistic reading. It mobilized thousands of Muslims, both men and women, during the Shah Bano episode in 1985. More recently, its public mobilizations and rhetoric have been around the subject of triple talaq. The practice of triple talaq refers to an act of divorce which comes in force when a husband unilaterally utters or communicates in writing the word “talaq” thrice in one go to his wife. In some cases, Muslim men divorced their wife through the practice of triple talaq by writing talaq thrice on a letter or by sending text messages. The AIMPLB has called these practices un-Islamic and sinful but nevertheless upheld them as “valid”. How does one explain this apparent contradiction?

Given all of these complexities, any simplified explanation about the MPL and the AIMPLB would be theoretically as well as empirically untenable. Needless to say, these issues are highly complex and deeply contested. Any study about these issues cannot ignore the interplay of the modern state, secular laws and minorities. Unfortunately, there is no full length study of the AIMPLB. Leave alone a scholarly monograph on the institutional history of the AIMPLB, its description has often been limited to a few dismissive terms. Instead of looking at the AIMPLB in all its complexity – its history and social location, scholars have been in a hurry to stick labels at it as an organisation representing “fundamentalist” and “obscurantist” forces.[1] The tendency to simplify and cede to prejudices has been lately fortified by the debates both in the public-political as well as the legal arena on the question of triple talaq.

One effect of all this has been the crystallization of the perception that sees Muslim women as perpetual victims – a perception that sees Muslim women as “oppressed”, and Hindu women, by contrast, are seen as fully empowered. Noted scholar of law and activist, Flavia Anges, is critical of the current discourse for its anti-Muslim slant. She argued that the

[1] Zoya Hasan, ‘Minority Identity, Muslim Women Bill Campaign and the Political Process’, *Economic and Political Weekly*, Vol. 24, No. 1 (Jan. 7, 1989), pp. 44-50.

perception that MPL were against their women, whereas Hindu personal laws were egalitarian, was misplaced. Put differently, it is wrong to argue that the MPL falls short on the parameter of "gender justice", while Hindu laws are "egalitarian, uniform and gender-just."Flavia Agnes brought the Hindu Code Bill--a cluster of laws enacted by the Nehruvian state from 1955 to 1956 in the name of empowering the Hindu women-- to the debate and argued that the Bill did not treat all Hindu women equally.[2] However, the Government does not seem to have taken any cue from her arguments and its campaigns for "empowerment" remain directed towards Muslim women, the MPL and the AIMPLB.

This discourse simultaneously feeds into, and is in turn fed by, a frenzied and communally-charged atmosphere in which any critical and dispassionate deliberation seems very difficult to pursue. For example, the anchors of primetime television scream and project the MPL as a set of gender-unjust laws that are hurdles to country's development.

I would like to make a clarification here. I do not intend to argue that the controversy around the MPL is recent in its origin. It did not emerge with the coming of the Modi Government. In fact, the controversy has a long history, dating back to the colonial and post-colonial periods. While the Hindu nationalist Bharatiya Janata Party (BJP) came to power after the late 1990s, the politics around the MPL was earlier fuelled by the parties which were then in power. Since postcolonial India was largely dominated by the Congress, it constructed its own discourse around the MPL. A party committed to secularism in its claim, the Congress could not take up the question of the MPL in a consistent manner. Mostly, it tried to please different sections and thus often upheld contradictory positions, an issue which will be discussed in the second chapter. The BJP--which brazenly exhibits its Hindutva ideology—does not have any such inhibitions and, thus, it has often argued in favour of reforms in the MPL and imposition of the Uniform Civil Code (the UCC). For example, it was at the forefront in criticising the Congress and the AIMPLB during the Shah Bano episode and it stressed the need for reforming the MPL – an issue that will be discussed at length in chapter three. In the 1989 General Elections, the BJP raised the demand of scrapping the MPL and it asked for enactment of the UCC. The BJP's advocacy for the UCC created a deep sense of fear among a large section of Muslims. They interpreted it as a move to impose Hindu personal laws on them. The fear emanated from BJP's manifesto, which called for

[2] Flavia Anges, 'Gender justice, in fact', *The Indian Express*, New Delhi, November 14, 2016, p. 15. Accessed (online) May 25, 2018, URL, *http://indianexpress.com/article/opini/columns/gender-justice-uniform-civil-code-hindu-muslim-marriage-discriminati-patriarchal-society-4379411/*

incorporating "the fair and equitable ingredients" from various personal laws. Note that the BJP talks of enacting the UCC out of the best elements from various personal laws; but the minorities perceive it as an attempt to scrap their own personal laws.

Since the 1989 General Elections, the agenda of the UCC has never been dropped. Elections after election the BJP put it on its manifesto. However, it knows that its imposition is easier said than done. While the previous BJP governments did take up the issue, the current Modi-Government has been more vigorous in pursing it. Though it has not done anything noteworthy so far regarding the UCC, it has largely been successful in bringing the issue of MPL to the centre of Indian politics. Unlike previous regimes led by BJP, the current government has made it one of the major electoral planks for mobilising voters. From Prime Minister Modi to the party president Amit Shah, from M. G. Vaidya, one of the top ideologues of BJP's parental organisation Rashtriya Swamsewak Sangh (RSS) to Venkaiah Naidu, former party president and current Vice-President of India, all have spoken against the "archaic", "anti-women" and "anti-democratic"[3] MPL. Needless to say, this issue has given Hindu nationalist forces an opportunity to attack their political opponents, including the Congress, for being "silent" on the question of oppression of Muslim women due to cater to a minority "vote-bank".

Apart from the government and the media, the judiciary has shown a great deal of interest in the MPL. The Supreme Court of India (SC), the apex court of the country, conducted a speedy hearing of cases related to triple talaq. It should be noted here that the opinions of Muslims are divided on the issue of triple talaq. For example, the Jamiat Ahle Hadees Hind (henceforth Ahle Hadees)--a group of Sunni Muslims who do not follow any of the medieval jurisprudence school in totality--and the Shia Muslims do not accept the practice of triple talaq. The AIMPLB—which is dominated by the Sunni-Deobandi Hanafi School of jurisprudence--keeps defending it in the name of "faith". Moreover, the AIMPLB, calls triple talaq as a "part" of the MPL which fall within the ambit of the Constitutionally-guaranteed fundamental rights of religious freedom.

It is not the first time that cases of triple talaq have been brought to the court. In the past too, the courts did hear cases related to divorce and maintenance and passed several

[3] M Venkaiah Naidu, 'A practice against modernity', *The Indian Express*, New Delhi, October 18, 2016. Accessed line May 6, 2018, URL, *http://indianexpress.com/article/opinion/columns/islam-triple-talaq-all-india-muslim-personal-law-board-aimplb-muslim-quran-a-practice-against-modernity-3088439/*

(controversial) rulings. Unlike in the past, the SC has showed a great deal of expediency this time. Interestingly, both the opponents and supporters of triple talaq have taken recourse to the Constitution to defend their case. While the supporters of reform in the MPL have justified their position in the name of fundamental rights of personal liberty and equality, its opponents have argued that the rights of religious freedom do not allow any intervention in the MPL. The SC, as argued by the some of the legal experts, has formulated its own guidelines about these issues. According to this, the SC will desist from interfering if a particular practice/ritual of religion is "inseparable" part of it. It can nevertheless scrap any practice/ritual if it is not the fundamental part of religion.

It should be noted that in 2015 a bunch of cases—all related to triple talaq—were filed in the SC by a group of divorced Muslims. The Constitutional bench of the SC took up the issue and heard the cases on a daily basis. On August 22, 2017, it pronounced its ruling, calling the practice of triple talaq not only "invalid" but also "unconstitutional". Within four months, on December 28, 2017, the BJP Government brought the Muslim Women (Protection of Rights on Marriage) Bill, 2017 to the Lok Sabha, the lower house of Parliament, and got it passed. The Bill, which stipulates three-year imprisonment for Muslim husbands who give triple talaq, has generated a great deal of controversy. So far, it remains stalled in the Rajya Sabha, the upper house of the Parliament due to criticism from the opposition parties.

However, it would be wrong to characterise all criticism against the MPL as politically motivated, or to say that all cries for reforms in MPL are sponsored by "the enemies" of Muslims and Islam[4]. A large section of Muslims--including the liberal and progressive sections among the community—has been demanding reforms in the MPL, particularly those laws which are related to triple talaq, *halala* and polygamy. The AIMPLB, instead of listening to their demands, has often dismissed them and accused them of working under the influence of the enemies of Islam.

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[4] 'Islam as a new religion had appeared on the globe in the early years of 7th century AD in the historic Arab city of Makkah now situates in the Saudi Arabia. It was proclaimed by Prophet Muhammad (570-662 AD), posthumous child of Abdullah son of Abdul Muttalib, hailing from the noblest Arab family of the time—the Quraish—which claimed descent from patriarchal Abraham through his younger son Islami'. The basic creeds of Islam is *Tawhid* ('belief in one Supreme God only to the exclusion of all other god], *Risalat* ['belief that Hazrat Muhammad was God's Rasool or Prophet/Messenger'), belief in 'attributes of God, His angels, His Prophets, His Books, the Day of Judgment, good and bad luck being from God, and Life after Death'. See, Tahir Mahmood, Saif Mahmood, *Introduction to Muslim Law,* Universal Law Publishing Co., New Delhi, 2013 p. 2.

The media--with its wide coverage of these cases—brought the issue to almost every household like never before. But unfortunately, the debate has been shaped in such a manner that a dispassionate discussion about the issue seems unlikely to be pursued at this moment. When the Government of the day is desperate to make the MPL an electoral agenda and "a stick" to beat its opponents, it becomes even more necessary to study these complex issues in their nuances. This thesis, a product of its context and time, makes a modest attempt to study the cultural history of the AIMPLB with all its complexities and nuances. Let me begin with the basics. What is the MPL? How is it different from the *Shariat* (Islamic Laws)? What are its sources? Is the MPL based on divine law? Or is it a man-made law?

Definitions and Sources: A Brief Overview

The term "personal" in personal law should not be confused with "individual". It has nothing to do with individualism or individual rights. We often hear someone saying, "do not disturb my personal life". Here the use of the term "personal" [as in personal life] is completely different from the term "personal" in personal law. As scholar Partha S. Ghosh argued, there was nothing personal (individual) about personal law. Rather, it refers to specific community laws.[5] More precisely, personal law is related to a particular community, tribe or ethnic group. It is also contrasted with the territorial/secular laws, which are applicable to all citizens, irrespective of their religious and ethnic identities. Contrary to that, the "systems of personal law"--in contrast to territorial law--are those laws, which are related to "marriage, dowry, divorce, parentage, legitimacy, guardianship, religious and charitable endowments, wills, inheritance, succession, and so forth". In postcolonial India too, these laws "continue to operate for Hindus, Muslims, Parsees, and Christians".[6] Sometimes a misconception is created that the Muslim community alone has a set of personal laws. But the fact of the matter is that a separate personal law is in place for other religious groups too. Hindus, Buddhists, Sikhs and Jains are clubbed together under the Hindu personal law. The major enactments related to Hindu-law came up in the year 1955-1956. Similarly, the Christian Marriage Act 1872 and the Indian Divorce Act 1869 are related to the Christian personal law. For Zoroastrians, there is the Parsi Marriage and Divorce Act 1936.

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[5] Partha S. Ghosh, 'Politics of Personal Law in India: The Hindu-Muslim Dichotomy', *South Asia Research*, February 1, 2009, Vol. 29 (1), pp. 1-17.

[6] Gerald James Larson, 'Preface' in Gerald James Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment*, Social Science Press, Delhi, 2001, p, vii.

Another important point to be kept in mind is that no community is exclusively governed by its personal laws. In addition to its personal law, other general legislative enactments may also have bearing on them. As noted scholar of Muslim personal law and former chairperson of the National Minority Commission (NMC), Tahir Mahmood and Saif Mahmood clarified: "No community is, however, governed entirely or exclusively by its personal law. Under a dual family law regime in force in the country there are, besides the various community-specific personal laws, a number of general legislative enactments in the areas of family law and succession which apply to all the religious communities including Muslims".[7]

Similarly, the well-known Islamic scholar and secretary of the AIMPLB Khalid Saifullah Rahmani defined personal law (*aayili qanun*) as the law related to family life i.e., marriage (*nikah*), divorce (*talaq*), the rights of parents (*walidain*), children (*awlad*) and spouses (*zaujain*), inheritance (*miras*), will (*wasiyat*) and so on. Another important feature of personal law is that it gets "attached" with people since their birth. As the historian Archana Parashar aptly put it, the personal law is "attached to an individual at birth and applied to the person wherever he or she went".[8]

It is evident here, that scholars by and large agree to what the area of application of the personal law is. However, they are sharply divided over its sources. This is also linked to the whole controversy around the interference and reforms the personal law. The AIMPLB considers that the MPL is based on *Shariat*, which literally means "path". But here it connotes divine Islamic Laws-- and it is, therefore, immune from any human intervention. Such an argument is based on the orthodox Islamic position that only God can make laws and human beings—be it the Prophets or the sovereigns—cannot amend or change them. The role of the Prophets and the sovereigns is limited to ensuring their implementation. Contrary to this, liberal and secular scholars argue that the MPL has evolved through centuries and it has been enacted/codified/reformed through human interventions. These include the institutions of state such as judiciary and legislative bodies.

Related to this is the confusion over Shariat (Islamic Laws) and the MPL. Note that before the establishment of the modern state, religious communities were governed by their own

[7] Tahir Mahmood, Saif Mahmood, *Introduction to Muslim Law*, Universal Law Publishing Co., New Delhi, 2013, p. 19.

[8] Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality*, Sage Publications, New Delhi, 1992.p. 47.

religious laws and customary practices. For example, the Muslims of India were governed by Shariat before the establishment of the British colonial government in India. To what extent Shariat was implemented and ignored was always decided by the political expediencies of the age. But, soon after the establishment of the colonial state, a process of imposition of secular and uniform laws was introduced and the scope of Shariat was limited. For example, the Islamic criminal laws were replaced with the Criminal Penal Code. However, the British colonial government did not abrogate those parts of Shariat which were related to family, marriage, divorce, inheritance, charity and so on and the colonized subjects continued to be governed by their religious laws in these areas. The personal laws, therefore, can also be defined as those parts of Shariat which were not abrogated or left untouched by the colonial government.

Let me also clarify the difference among Shariat (Islamic Laws), fiqh (jurisprudent) and personal laws. According to Islamic scholar and author Zafarul Islam Khan, Shariat is "the set of eternal basic beliefs based on divine revelation" and thus, it is "permanent" and "unchangeable". Fiqh, on the other hand, is the result of "human understanding", "interpretation" and "codification of those beliefs". Thus, fiqh is based on "the reasoning and understanding of the compilers". Put differently, Shariat is "one" while fiqh are "many". This distinction should always be kept in mind. Many people wrongly argue that the MPL comes under Shariat. Contrary to this, the MPL, as argued by Khan, is within the domain of fiqh. Once MPL is accepted within the domain of fiqh, a scope for multiple interpretations of Shariat opens up. As Khan argued, "Contrary to the belief that *Shariat* is divine and permanent, the legal system of Muslim personal law prevailing in India is based on the Shariat Application Act passed by the British colonial rulers in 1937."[9]

As far as the main sources of the Islamic Laws are concerned, they are the Quran, the Hadees, customs, legislation, case law, according to the Cambridge-educated eminent legal scholar Asaf A. A. Fyzee.[10] Other important sources are classical texts such as the *The Hedaya* or Guide translated by Hamilton and *Fatawa Alamgiri,* translated by Baillie, named after the seventeenth century Mughal Emperor- Alamgir Aurangzeb. Also useful are the works of

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[9] Zafarul-Islam Khan, 'Muslim Personal Law and Uniform Civil Code', *The Milli Gazette* (online), November 09, 2016. Accessed (online) May 18, 2018, URL, *http://www.milligazette.com/news/15084-india-muslim-personal-law-and-uniform-civil-code*

[10] Fyzee rose to become the Vice-Chancellor of Jammu and Kashmir University. He was also an ambassador of India to Egypt. See, *The Times of India*, 'Fyzee urges chair for Hindu law', August 19, 1975, p.3.

Tyabji, Mulla, Wilson and Ameer Ali in the Indian context. Acts like the Waqf Act, 1913; the Shariat Act, 1937; the Dissolution of Muslim Marriage Act, 1939; or the Special Marriage Act, 1954 are also important. Moreover, the Succession Act, the Registration Act, the Limitation Act and the Stamp Act are also "relevant".[11]

In his work *The Reform of Muslim Personal Law* (1971), Fyzee discussed sources and origin of Islamic Laws in some detail[12] and I shall largely draw on his work here. The origin of Shariat canbe traced to the period of the Prophet from AD 622-632 (Hijri 1-10). All agree that the Quran and the Hadees are "primary sources" of Islamic Laws. The believing Muslims hold that the Quran is the most authentic source of Shariat. The Quran is believed to be "a book of divine injunctions in Arabic believed to have been gradually revealed by God to Prophet Muhammad through archangel Jibreel (Gabriel) in a period of about twenty-three years, which he "memorized and revealed to his followers. These injunctions used to be recorded on his instructions by some of his close disciples on materials then available for writing and were collected, in a single 114-chapter volume, during the reign of his third successor about fifteen years of his demise".[13] These words were memorised and later compiled into a book called the Quran. Since the Quran does not explain everything in detail, the life of the Prophet, considered by Muslims as a model for humanity, became a very important source to fill the gap. The Hadees is a set of books compiled after the death of the Prophet, comprising the story of his life, his sayings and deeds. To reiterate the point, the status of the Hadees is second to the Quran among the primary sources of the Islamic Laws.

In the early period of Islam, the Quran and the Hadees provided the governing principles for Muslims. As time passed, the frontiers of Islam spread far and wide and from AD 662-1000, the Islamic Empire came to rule over several continents. By that time several new problems and challenges came up whose references could not be found directly in the Quran and the Hadees. After the demise of Prophet Muhammad and passing away of his Companions--

[11] Asaf A. A. Fyzee, *The Reform of Muslim Personal Law*, Nachiketa Publications Limited, Bombay, 1971, pp. 11-12.

[12] For the sources of the MPL, I have mostly drawn on the work of Asaf A. A. Fyzee, particularly *The Reform of Muslim Personal Law*, Nachiketa Publications Limited, Bombay, 1971.

[13] Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent*, All India Reporter Ltd., Nagpur, 1983, p. 1.

whom Muslims consider to have led exemplary lives—Muslims looked for a guide to "give the necessary directions".[14]

In order to meet the new challenge, scholars began to apply their human reasoning because the Quran and the Hadees did not provide a direct reference to the problems of the day. This gave birth to *fiqh*--literally means "intelligence" but technically it refers to "Islamic jurisprudence"[15]. Several jurists came to apply their reasoning to make laws in the spirit of the Quran and the Hadees. As society became more complex and Islam encountered more and more differences, new interpretation was needed to find out the answer to new challenges. On many occasions, the Quranic message was interpreted in more than one way and differences of opinions were noticed. This was the context behind the emergence of several schools of jurisprudence. The Muslim jurists—though having unanimity over the Quran as the primary source--did not agree to each other all the time. As a result several schools of jurisprudence came up in the early period but most of them could not survive for long. Only a few of these schools still survive and are followed till today.

With the passage of time, the scope of law and *fiqh* widened. In this exercise, the role of human reasoning played an important role because the messages and teachings of the Quran are more philosophical in nature and they speak--on several occasions-- in symbols. Even Prophet Muhammad himself gave importance to human reasoning. Take the example of the well-known Hadees of Mu'adh, the Companion of the Prophet. The Prophet told him to apply his reasoning in the development of Islamic Laws when the Quran and the Hadees do not have direct reference to the problem. As has been narrated, the Prophet once appointed Mu'adh as the governor of a province and asked him to dispense justice. Since there was a scarcity of trained lawyers in those days the Prophet asked him: "According to what shalt thou judge?" And Mu'adh replied: "According to the Scripture of God". And if such references were not available in the Scripture of God (the Quran), then what, asked the Prophet, will you do? Mu'adh answered: "According to the Traditions of the Prophet of God". But what if there was no direct reference in both the Quran and the Hadees?, the Prophet further queried."Then I shall interpret with my reason," answered Mu'adh. To this,

[14] Fyzee, 1971, p. 5.

[15] I have used fiqh and jurisprudence interchangeably in this study.

the Prophet gave his seal of approval: “Praise be to God who has favoured the messenger of His Prophet with what the Prophet is willing to approve.”[16]

Mu’adh’s Hadees clearly shows that human reasoning has been accorded a very important place in adjudicating justice and developing Islamic Laws. In the later period, the *Qazis* (the judge of Shariat court) began to use human reasoning and deduction (*qiyas*). With the passage of time, Islamic Laws reached an advanced state and a “regular system” of law came up. Meanwhile, the process of collection of authentic traditions and some of the earlier traditions was also underway. In the period of the eighth and ninth centuries, *the Muwaṭṭa`* of Imam Malik was written, which dealt with the subject of Islamic Laws. It was soon followed by several prominent works such as the collection of *Bukhari, Muslim, Abu Da’ud, Tirmidhi, Nasa’i, and Ibn Maja*. These works were considered to be “authoritative” and they are known as “the Six Correct Books (*sihah sitta*)”.[17]

Well-known scholar of Muslim Law, Paras Diwan, had divided the historical development of Muslim law into five periods. The first Period (from A.H. 1 to A.H. 10)[18] was “the period covering the last ten years of the Prophet’s life”.[19] This period was “the most glorious and fruitful in the history of the development of Muslim Law. It was during this period that all the verses of the *Koran* [the Quran] were composed, and most of the *Ahadis* [the Hadees] came into existence.”[20] The second period was from A.H. 10 to A.H. 40, which is also the period of the first four early Caliphs. The beginning of the second phase of Muslim law began with the election of Abu-Bakr as the first Caliph.[21] The third period was from A.H. 40 to A.H. 300. The period began from the demise of the fourth Caliph Ali, to A.H. 300. This was the time when Sunni and Shia schools of jurisprudence came into being after the Muslim community was divided into two sects.[22]

The differences between Shias and Sunnis had its root in the conflict over the question who would succeed Prophet Muhammad as the caliph. According to noted scholar of the MPL,

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[16] Fyzee, 1971, pp. 5-6.

[17] Fyzee, 1971, p. 6.

[18] Hijri year begins in 622 AD.

[19] Paras Diwan, *Muslim Law in Modern India*, Allahabad Law Agency, Allahabad, 1977, p. 10.

[20] Ibid. 1977, p. 11.

[21] Ibid. p. 11.

[22] Ibid. pp. 11-12.

Tahir Mahmood, sectarian differences among Muslims arose soon after the demise of the Prophet in 732 AD. The differences were mainly over the caliphate. Who was the legitimate successor of the Prophet, who would lead the community in his absence? The majority of Muslims were in favour of election to decide the successor, while a small group wanted Ali, the Prophet's cousin and his son-in-law to take over the reign. The majority group--who supported Abu Bakr and held that the order of succession of the caliphs as proper-- came to be known as Sunnis. Contrary to that, the minority group—who believed that Ali was the most legitimate successor of the Prophet and the early three caliphs were usurpers—were later known as Shias. As thing turned out, Abu Bakr, the Prophet's father-in-law, took over as the first Caliph of the Muslim community and Ali became the fourth Caliph. It is evident here, that the sectarian differences between Shias and Sunnis are of a "political" nature. As the time passed, political differences also gave rise to the theological differences. While both Sunnis and Shias share fundamentals of Islam and have complete faith in the Quran and the Prophet, they both have differences over the Hadees because the Shias believed they were collected under the regime of earlier Caliphs. Differences of views were also found over jurisprudence. Among several differences, one is regarding the Imams. Unlike Sunnis, Shias recognised Ali's descendants as Imams. There is a difference in the connotation of Imam for Shias and Sunnis. While Sunnis believe that Imam is "their leader" but is a "servant of the law", Shias believe that Imam is "the supreme law giver". For the orthodox Sunnis, the Shariat (Islamic Laws) is based on the words of God and they cannot even be changed or amended even by the Prophet. This is the very logic on which the AIMPLB argues that the MPL is immune from any human interference.

Moreover, Shias believe that Imams are descendants of the Prophet. The outgoing Imam nominates the next Imams. This is the reason why Shias believe the first three Caliphs (Abū Bakr, Umar ibn al-Khattab, Uthman ibn Affan) were "usurpers" and thus Shias do not recognise them. Instead, they consider Ali as "their first rightful Caliph and the Imam". Another important aspect is that an Imam cannot be removed by people as he is appointed through "divine will"[23].

Later, Shias developed three major schools of jurisprudence, i.e. *Ithna Asharis* (or Twelvers; also known as the Jafaris), *Zaidis* and *Ismailis*.[24] The Ithna Ashari School of jurisprudence

[23] Diwan, 1977, pp. 12-14.

[24] Tahir Mahmood, 'Reform Friendly: Parts of Shia', *The Times of India*, December 11, 2006, p.16.

spread to several regions such as Iraq and Persia. Among the Shias of India too the Ithna Ashari School of jurisprudence prevails. Besides these three major schools, there was also a less-known school of jurisprudence founded by the Fatimid Caliphs in Egypt. Unfortunately, this school disappeared from its place of origin as it was "driven off" and it later took refuge in Yemen. The Bohra Muslims (western Ismailis) of western India still follow the Fatimid Caliphs.

Meanwhile, the Sunni Muslims developed four major schools of jurisprudence. They are as follows. First, the Kufa School or the Hanafi School named after Imam Abu Hanifa (699–767) is the "oldest school" that "lays emphasis on the *kiyas* as a source of law". The Hanafi laws are followed by a majority of the Muslims in the subcontinent. It was founded by Abu Hanifa whose followers regarded him as "the Great Imam". Majority of Muslims of the world are followers of the Hanafi School and they are, thus, called *ahnaf* (plural of Hanafi). The Hanafi fiqh took roots in central Asia, Turkey, Egypt and India. As far as South Asian Muslims are concerned, the overwhelming majority are followers of Hanafi fiqh. Note that Sunni Muslims constitute the majority of Muslims in India, Pakistan and Bangladesh and Shias are in minority. Among Sunnis, there are two major sects--the Barelvis and the Deobandis. Both follow Hanafi fiqh and are known as *muqqalid*. The Barelvi Muslims are the followers of the Islamic reformer Imam Ahmad Reza (d. 1921) who founded the Barelvi Movement. The Deobandi Muslims are named after the world-famous Islamic seminary Darul Uloom Deoband established in 1866 in Deoband, a *qasba* in the western Uttar Pradesh. Darul Uloom Deoband is known for its opposition to the colonial rule and worked as an ally of the Congress during the National Movement. A major group of Deobandi Muslims was opposed to the Partition of British India based on religion. As far as its interpretation of Islam is concerned, it was more textual and puritan in its approach. The reformist movement known as *Tablighi Jamaat,* launched in the 1920s against the activities of the Arya Samaj, is also linked to the Deoband Movement.

Second, the Madina or the Maliki School is named after its founder Abu ʿAbd Allah Malik ibn Anas (714–795ce). The Maliki School of jurisprudence--founded by Malik ibn Anas--is followed by Muslims in North Africa. The Maliki schools rejected the *kiyas* and emphasized the traditions and the *ijma*. Third, the Shafi'i School founded by Muhammad ibn Idris al-Shafiʹi (767.–820 CE) has its followers in Egypt, Sudan and some eastern African countries, coastal Arabia, south India and South East Asia. Al-Shafii was "the protagonist" and

"propounder of the classical theory of Islamic jurisprudence". He gave primacy to the *ijma* and established the science of *usul*. Among the four major Sunni jurists, Fyzee calls Shafi'i a "brilliant jurist" who, according to him, "enunciated the fundamentals of the science of Islamic jurisprudence". Forth, the Hanbali school was founded by Ahmad ibn Hanbal (d. 855) (780—855 A.D.), who underscored the importance of tradition or Sunnat. The Hanbali School of jurisprudence is found only in the centre of Arabia.[25]

But the fourth period of Islamic Laws (.A.H. 300/962 A.D. to 1924 A.D) saw the big changes. This period saw the abolition of the Caliphate and the founding of the British colonial rule in India. This is a period which is considered as "a period of general decadence".[26] This period began at the time of the Abbasids. When the 37th Abbasid ruler was in power, the Mongols attacked Baghdad in 1258 A.D. Al-Musta'sim Billah along with his family members was assassinated. After his demise, the Caliphate passed on to Abdul Kasim Ahmed. He was made the Caliph of the Sunni sect at Cairo in 1261 A.D. For 250 years, Abdul Kasim and his dynasty ruled as the Caliph. However, these Caliphs were "shorn off all temporal powers". By the beginning of the 16th century, the Ottoman ruler Selim I came to power. Now the seat of the power shifted to Constantinople and Selim I was given the keys of Ka'aba by the Sherif of Mecca. The second decade of the twentieth century saw the rise of Mustapha Kemal Ataturk in Turkey and he played a key role in the abolishment of the Caliphate of Turkey in 1924 by the National Assembly.[27]

The fourth period marked the end of "the formative period of Muslim law". It was in this period that "the gate of independent reasoning was closed". *Ijtihad*--which literally means "exerting oneself to the utmost degree to attain an object"--came to have a different connotation in Islamic Laws. *Ijtihad* connotes "independent reasoning" and it was an important means for "the development of Muslim law during its formative period". According to Paras Diwan, "technically, it (ijtihad) came to signify the laying down of a rule of law by independent reasoning." In the early days, the sphere of ijtihad was "very wide".[28]

One of the reasons for the closure of the gates of ijtihad was the belief that the "remoter one goes from the founder of the school, the inferior becomes the authority of the jurist". As a

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[25] Diwan, 1977, p. 12.

[26] Ibid. pp. 12-14.

[27] Ibid.

[28] Ibid. pp.12-14.

result of this belief, gradually the *mujtahid*--one who does *ijtihad*--were discouraged and the process of ijtihad was banned, which is known as “the closure of the gate of independent reasoning”. By this time, it was believed that the jurists had already discussed, answered and settled all the questions for ever and therefore there was no requirement for the further independent interpretation.[29]

The closure of the gates of ijtihad set the stage of the doctrine of *taqlid* (imitation/following/conformity) to come into existence. Taqlid means that a person has to follow the opinion of a jurist. For example, the majority of Indian Muslims are Hanafis and they are called so because they follow Abu Hanifa in the matter of Islamic Laws.

Many Islamic scholars and reformers termed the closure of the gates of *ijtihad* as the beginning of the process of the “stagnation” in Islamic Laws. Fyzee expressed his disappointment, “A Muslim has to follow the law; every man in the street could not be learned in the rule of *sharait*; being ignorant, he was asked to follow the opinion of those who knew better. Those who knew better, the *ulama*, were denied independence of judgment in any vital matter. Hence the vicious circle of *taqlid*”.[30]

But the doctrine of the taqlid was not acceptable to all Muslims. The *Zahiri* school--founded by Dawud ibn Khalaf--was at the forefront to oppose the doctrine of *taqlid*. Ibn Tumart, the founder of the Almohad movement, Ibn Taymiyya, an eminent Hanbali, his disciple Ibn Kayyim al-Jawziyya, and the Wahhabis opposed the doctrine of taqlid and they do not follow any school of jurisprudence in toto. The Ahle Hadees Muslims of India are influenced by Ibn-Taymiyya and Abdul bin Wahhab and are not *muqqalid* (followers) of any particular school.They instead advocate consulting the Quran and the Hadees directly, a position which is opposed to that of the majority Hanafi Muslims of India. The Hanafi ulama argued that asking for consulting the Quran and the Hadees directly would put too many burdens on the lay man.[31]

In the colonial period from the 19th and 20th centuries, Islamic Laws began to be heavily influenced by the “foreign laws” such as French laws (having its deep impact on North

[29]Diwan, 1977, pp. 12-14.

[30]Asaf A. A. Fyzee said, cited in Diwan, 1977, pp. 12-14.

[31]Barbara Daly Metcalf, ‘Islamic Revival in British India: Deoband, 1860-1900’ in *India’s Muslim: An Omnibus*, Oxford University Press, New Delhi, 2007, p. 265.

Africa) the English laws (impacting laws in India) and the Dutch laws (in Indonesia). Moreover, several legislations enacted by the colonial government also had their influence on the Islamic Laws. Now the principles of English law with respect to "justice", "equity" and "good conscience" came to influence the Islamic Laws and it resulted in several modifications and abrogation.[32]

Shariat became more of a "moral code" as Muslim rulers were not around to administer it. This was the time when law could develop through legislation. This has happened in India and many other countries as well. Even in the Muslim majority countries, western influence was felt on the Islamic Laws. Thus, a process of codification began from the nineteenth century. In Egypt, Muhammad Kadri Pasha was "the first to undertake such a codification in respect of the Hanafi family law" in 1875-76, which Paras Diwan classified as the beginning of the fifth period. Lebanon in 1943 and Syria in 1947 made modifications in their respective Islamic Laws. As Paras Diwan said, "The modernist legislation has invaded many Muslim countries, west of India. Far reaching reforms in family law have been enacted in Egypt, Syria, Lebanon, Sudan, Jordan, Iraq and Libya".[33]

Over the period of the fifth phase of the Islamic Laws there is a difference of opinion between Fyzee and Diwan. According to Fyzee, the fifth and the last period in the development of Islamic Laws started from 1924, when the Caliphate was abolished in Turkey. In the fifth period, India was under the colonial rule and after 1947, it became independent. An important feature of this period is that no Muslim ruler was around to impose the Shariat rule in India. In the final stage, Shariat was reduced to an "ethical code"; the MPL, as in the case of India, was heavily influenced by Muslim laws and they were based on the ideas of conscience and equity. [34]Fyzee contended that with the final stage of Islamic Laws, Islamic jurisprudence "becomes an ethical code rather than legal system"[35].

On the contrary, Diwan traced the fifth period in India back to the establishment of the British colonial rule. It led to the abrogation of several Islamic Laws. One of the most important changes was the abrogation of the Muslim Criminal law, which was replaced by

[32] Fyzee, 1971, p. 8.

[33] Diwan, 1977, pp. 12-15.

[34] Fyzee cited in Diwan, 1977, p. 10.

[35]Fyzee, 1971, p. 8

the Indian Penal Code, 1860. Gradually, a number of Islamic Laws were abrogated and thus what was left was mostly related to marriage, divorce, inheritance, charity, etc.[36]

Contestations: Legal Uniformity versus Pluralism

Several areas of contestation can be identified in relation to the MPL. One of them is the construction of the binary between the secular/territorial and personal/religious laws in the modern period. The secular laws were painted as "rational" and "universal", while the religious/customary laws were pushed into the domain of "irrational", and "backward". The context of the creation of this binary was the emergence of the modern state and the capitalist economic system. The new changes required a reformulation of the laws. Thus, the drive for uniformity was made. The proponents of the secular/universal laws, thus, gave an ideological connotation to the whole debate. They called the secular/universal laws as "rational" and "legal", while the religious/customary/personal laws were held "inferior" and "unfit" for the time. Social theorist Max Weber contributed largely in creating this binary, which persists till today and whose resonance is felt in the contemporary debate as well.

Weber criticised Shariat for being "irrational" and "incompatible" with changing times. Well-known sociologist and an expert on Weber, Bryan Turner, has discussed Weber's views on Islamic Laws in detail[37]. According to Bryan, Weber's binary between "puritan asceticism" and "the mystical ethics of Asian religion" dismissed the Islamic institutions as "incompatible for capitalism" as they were "dominated by patrimonialism". [38] Patrimonialism refers to a system of government in which power flows directly from the ruler. For him, Islam could never become a "salvation religion", despite its origin in Jewish-Christian monotheistic tradition due to warrior religiosity and Sufi mysticism.

In addition to religion, Weber created a binary between secular/rational law and Islamic Laws. According to him, Islamic Laws as practiced by the *Qazi* were "ad-hoc", "irrational", "substantive", "arbitrary", and "personal". Moreover, they were "not based on general principle" and were lacking "generality" and "stability". Afterwards, he made a big statement that Islam did not possess "a universal legal code". While Weber conceded that Shariat was substantive and rational, at the same time he considered it as "extra-legal" because it was

[36] Diwan, 1977, pp. 12-15.

[37] Bryan S. Turner, 'Islam, Capitalism and the Weber Theses', *The British Journal of Sociology*, Vol. 25, No. 2 (June, 1974), pp. 230-243.

[38] Ibid. pp. 230-243.

based on “prophecy” and “revelation”. Thus, Weber gave his verdict that Islam was incompatible with capitalism. Bryan Tuner summarised the Weberian verdict: “Islam lacked a necessary condition for capitalist development, namely a systematic formal law tradition”, which contributed to “the stagnation” in the Muslim world and “immobilization of capital”.[39]

Having discussed Weber’s ideas, Turner also expressed his disagreement with him. He was right to say that while Weber identified “formal legal law” as the pre-condition for capitalism, the practice of “judge-made legal system” in England never acted as a stumbling block to the rise of capitalism. While largely agreeing with Turner’s criticism of Weber, I would like to add here that the fallacy of Weber wasthat he never accepted colonialism as a factor contributing to the rise of western capitalism. Despite elements of generalisation in Weber’s argument, his formulation continues to cast its shadow over the debate on the UCC, the MPL and the AIMPLB.

Let me also clarify that my critique of Weber for his dismissal of Islamic Laws does not mean that I am against any reform in the MPL. As I have mentioned earlier, the Islamic Laws have been evolving through the ages. In the colonial period, the MPL was formulated based on the Shariat. But at the same time, it might be more fruitful to go beyond the binary between secular/universal laws versus religious/personal laws. For example, all uniform laws are not progressive, nor are all personal laws regressive. Those who advocate for uniformity should never be oblivious to the fact that the Hindu Code Bill erased a large number of customary practices which were progressive in nature and imposed uniformity. Occasionally several Brahminical practices were made into universal laws, making them binding on all Hindus. Those who advocate uniformity and critique the MPL are unwilling to accept that uniformity is also culturally embedded.

It should be noted that uniformity is not only resisted by Muslims. Other minorities such as Sikhs, Buddhists and Jains were also critical of imposition of uniformity. The Sikhs, for instance, opposed their inclusion within the Hindu personal laws in the 1980s. They came up with their own personal laws, which diverged from Hindu personal laws on many occasions[40]. This study then prefers the stance of *legal pluralism* to uniformity and examines the question of the MPL from this perspective.

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[39] Turner, 1974, pp. 230-243.

[40] K.S. Khosla, 'Sikh personal law draft ready', *The Times of India*, August 15, 1983, p. 12.

Why legal pluralism? It is because imposition of uniformity is an "ambition", which requires violence to implement it. It has to do with existence of difference and plurality in the society. As legal scholar Faizan Mustafa has showed, one law does not govern even all the Hindus. While marriages among close relatives are "prohibited" in north India, such marriages are considered "auspicious" in south India. This is also true of Muslim and Christian communities. Moreover, the Indian Constitution safeguards local customs of culturally distinct regions like Nagaland and Mizoram.

Another example of legal pluralism is the exemption of tribals from the ambit of the UCC. The laws passed by the Indian Parliament cannot be imposed on Jammu and Kashmir which has got special status protected under article 370 of the Indian constitution. The example of Goa is often cited by the champions of UCC. But they ignore the fact that "the Hindus of Goa are still governed by Portuguese family and succession laws. The reformed Hindu law of 1955-56 is still not applicable to them. The unreformed shastric Hindu law on marriage, divorce, adoption and the joint family is very much valid."[41] Similarly not all Muslims are governed by the Shariat Act of 1937. "Goan Muslims are governed by Portuguese law as well as the shastric Hindu law, and not by Muslim personal Law."[42] The Hindus of Jammu and Kashmir are governed by "the local statutes" that differ from the laws enacted by the Indian Union government.[43]

Divine versus Human

Contestations are also found over the sources and evolution of the MPL. The ulama consider it to be "divinely revealed" and "sacrosanct" and, therefore, immutable. It cannot be changed, amended or altered.[44] For example, the ulama associated with the Jamaat-e-Islami Hind--one of the most influential Muslim organisations founded on August 26, 1941 on the ideology of the influential Islamic scholar Maulana Maududi—recently held a fifteen-day long campaign for creating awareness about MPL. In this meeting, it reiterated that no one was authorised to amend the MPL. If the Prophet, according to the Jamaat, was not allowed to make a change

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[41] Faizan Mustafa, 'Why Legal Pluralism Matters', *The Indian Express*, New Delhi, November 16, 2015. Accessed (online) May 7, 2018, URL, http://indianexpress.com/article/opinion/columns/why-legal-pluralism-matters/

[42] Ibid.

[43] Ibid.

[44] Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality*, Sage Publications, New Delhi, 1992.p. 47.

in the Shariat, nobody could be allowed to make such changes.[45] Speaking on the occasion, Khalid Saifullah Rahmani, the secretary of AIMPLB, argued that the personal laws of non-Muslims were never tempered during the period of Muslim rulers in India and even during the British period the Shariat Act, 1937 was passed.[46].

But such an argument is not borne out by history. Neither during the reign of Muslim rulers nor in the colonial period was Shariat implemented completely. When the British came to power, they abolished Islamic Laws in criminal matters (*faujdari*), and though the laws related to family matters were not abolished, a number of modifications, amendments and annulments were made in the period. Rahmani's insistence that personal laws were not interfered within the British and the medieval periods was perhaps driven by a desire to dissuade post-colonial governments from interfering in the MPL.

Underscoring the importance of the MPL, Rahmani cited the example of the Quran, which explained laws related to marriage, divorce, and inheritance in more detail than the issues related to the prayers (namaz), fasting (*roza*) and Haj (pilgrimage to Mecca). Thus, he cautioned Muslims not to go against MPL. If Muslims did not follow them, they could be declared sinners (*gunahgar*) and if they preferred man-made law (secular laws) to divine law, this would amount to *kufr* (disbelief).[47]

Contrary to this, many scholars have critiqued AIMPLB's position that personal laws are based on divine laws. However, there is no single view among the critics who adopt different approaches towards MPL. For example, Hamid Dalwai, a Konkani Muslim, went to the extent of advocating "modernization" of MPL and demanded imposition of the UCC. He said: "Islamic personal law runs contrary to the modern notions of human rights. Its anomalies are obvious to anyone except Muslim males."[48]Those Muslims, who refused reforms, he said, should be denied their fundamental rights to vote: "Those Muslims who oppose these reforms should not be entitled to full citizenship rights. For instance, they should have no right to vote."[49] Ironically, M.G. Vaidya, a top ideologue of the communal

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[45]*Inquilab*, New Delhi, May 9, 2017, p. 15.

[46]*Inquilab*, New Delhi, May 9, 2017, p. 15.

[47] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 22

[48] Hamid Dalwai, *Muslim Politics in Secular India*, Hind Pocket Books, New Delhi, 1972, p. 95.

[49] Ibid. p. 108.

organisation Rashtriya Swayamsevak Sangh (RSS), used the same threatening language in 2016: “those who do not want to be governed by Article 44 [the UCC] will forfeit their right to vote in the elections to the state legislature and Parliament”.[50]

Little wonder then that Dalwai’s position did not enjoy acceptance in the community and his ideas remained acceptable only within a limited circle of “modernising” intelligentsia. Compared to him, the criticism of Asaf A.A. Fyzee was far more scholarly. Fyzee, while showing the development of the Islamic Laws, said that Islamic Laws in the twentieth century--after the fall of Caliphate—had entered their fifth phase when there was no Muslim ruler around to administer Shariat. Therefore, Shariat no longer had legal force but became a moral code. For him, the MPL was not based on Shariat or divine laws but was the product of codification and legislation. He argued that the English law and its principle equity, justice, had left a deep impact on the making of MPL. That is why MPL cannot be equated with Shariat.

He remarked that MPL was not based on Shariat. “Muslim personal law in India is by no means to be equated with Shariat. Shariat is the name given to the Islamic corpus of law, religion and ethics. It was in the past administered by a Muslim ruler, with the Muslim judges, for the Muslim subjects. The law in India is secular; the religion of the President of India, judges and litigants is immaterial except that in the case of Muslim litigants, a few rules of law drawn from Shariat with an admixture of English law are applied, provided they are not against justice and equity.”[51]

Similarly, Islamic scholar Zafarul Islam Khan agrees with Fyzee at this point that MPL was not based on Shariat. Rather, it was based on the Anglo-Mohammedan Laws, which were codified during the colonial period. Khan contends that “Before the advent of the British colonial rule, Shariat in its totality was applied to the Muslim subject while non-Muslims were free to follow their personal laws. The British enforced their criminal laws and allowed Muslims and others to follow their personal laws that do not affect other communities. Thus, the Shariat Act 1937 allows Muslim to follow their *fiqh* in a number of fields including

[50] *The Indian Express*, November 1, 2016. Accessed (online) June 30, 2017, URL, *http://indianexpress.com/article/opinion/columns/uniform-civil-code-debate-indian-constitution-3731459/*

[51] Asaf A. A. Fyzee, 'Muslim Personal Law: to the Editor’, *The Times of India*, January 31, 1972, p. 8.

inheritance, marriage, dissolution of marriage through talaq, ila, zihar, lian[52], khula or mubarraat [the divorce made through mutual consent], maintenance, mehr, guardianship, gifts, trust and wakfs etc). But these rules too were framed by the British judges according to their understanding of Islam. Thus, the Muslim personal law applicable in India is a British law based on Indian British courts judgments which were compiled by many legal scholars, which include the *Principles of Mahomedan Law* compiled in 1906 by Dinshah Fardunji Mulla."[53]

A.G. Noorani, too, critiqued the position that MPL was based on Shariat. He argued that MPL was rather a perversion of Shariat. He, thus, juxtaposed the MPL against Shariat and termed the former to be a "perverted law". It not only "violates" Shariat but also remains "oppressive" to women. He unambiguously says that MPL "flagrantly violates the Sharia" which is "ordained by the Quran". As a result, "the perverted law [the MPL] now in force is oppressive to women, specifically the arbitrary triple divorce and polygamy". According to him, the reason why such violations take place is because of MPL which was based on the Anglo-Mohammedan Law and not on Shariat. "It is not Sharia", he asserted, "that is followed in this but the Anglo-Muhammadan law of British times". Having said that, he chided the AIMPLB for its conservative approach, "the All India Muslim Personal Law Board is in the grip of dinosaurs. A besieged community is a conservative community".[54]

In the light of the scholarship of Fyzee, Zafarul Islam Khan and A G Noorani, it appears that AIMPLB's stand that the MPL is based on divine law is less to do with historical facts and more to do with political expediency. The AIMPLB is afraid that once it accepts that MPL came into being in the colonial period and is much influenced by colonial jurisprudence, it would amount to opening the gate for amendment of MPL. Consequently, the desirability of reforms in the MPL is not completely against the trends which could be found historically with respect to such codification that we call the Islamic Laws. It must nevertheless be kept in mind that such reforms should not overlook the dynamics internal to consensus, collaboration and confrontation within a religious formation. At the same time, let me also accept that the fear of the AIMPLB is not completely justified.

[52] 'Ila, zihar, and lian are-pre Islamic customary concepts retained in the old texts of Islamic Laws but no more in use anywhere.' See Tahir Mahmood and Saif Mahmood, 2013, p, 44.

[53] Zafarul-Islam Khan, 'Muslim Personal Law and Uniform Civil Code', *Milli Gazette* (online), November 09, 2016. Accessed (online) May 18, 2018, URL, *http://www.milligazette.com/news/15084-india-muslim-personal-law-and-uniform-civil-code*

[54] A. G. Noorani, 'Uniform Civil Code: Hindutva's Stick', *Frontline*, Vol. 32, No. 23, November 27, 2015, p. 64.

Moreover, the perceived threat to MPL from the Hindu-majoritarian state is also not baseless. After the rise of representative politics based on electoral majority, Muslim intellectuals realised that their chances of sharing power had become remote. Having realised it bitterly, they thought they should at least take an assurance from the majority community that if they came to power, they would not attack the cultural and religious identity of Muslims. It was within this context that the Jamiat Ulema Hind (Delhi) president Mufti Kifayatullah wrote a letter to the Congress in 1931 and agreed to support majority rule in India, provided that the latter ensured cultural autonomy for Muslims. The letter read:"Religious beliefs, religious actions, religious customs, special culture, language, letters, religious propaganda, religious institutions, religious movements, religious processions and meetings, places of worship and mosques of different communities inhabiting India, shall be free. The Government should not interfere with them."[55]When the AIMPLB argued that the MPL was based on Shariat and it was immune from Government's interference, it was expressing the same concern.

Thus, the AIMPLB was opposed to interference in the MPL. For them, the Indian Constitution has given Muslims the religious and cultural freedom as their fundamental rights and any attempt to interfere in the MPL, thus, amounts to violation the law of the land. Yet, another reason for their strong support for the MPL is their belief that it would be sinful for the Muslims to give up the MPL, believed to be based on Shariat.

In opposition to them, the modern, secular and progressive Muslims and non-Muslims support reforming the MPL. The demands were made in favour of a rational, humanistic and just law for human affairs. Similarly, some others would argue that Constitutional ideas of liberty, equality and justice, not religion, should be the guiding principle for enacting the laws. For example, organisations such as the Indian Secular Society at Pune prepared a detailed draft– the first of its kind – for a Uniform Civil Code (UCC). Likewise, Dalwai's Muslim Satyashodhak Mandal, an organisation mostly active in western India, took up the issue during the late 1960s. The Hindu Right in India also opposes the MPL and supports the UCC. However, there is a difference between the Hindu Right's advocacy of UCC and the feminist or progressive Muslims' call for reforms, or even UCC, as the former is informed by its desire to impose a majoritarian culture, and the UCC often becomes merely a ruse.

[55]*The Times of India*, 'Religion and the Law under Swaraj', July 29, 1931, p.6.

There is a third group that operates outside this binary of opponents and supporters of reforms. It opposes both the "hard" secularists and the "conservative" religious and community leaders. They do not deny the need to have reforms in the MPL. Yet, they do not support the imposition of any reform on people from the top. In other words, they do not want the State to forcefully impose reforms of MPL, yet they would like to see reforms in the MPL emerging from within the community. Scholars like Partha Chatterjee[56] and Veena Das[57], in my reading, would find themselves closer to the third approach as they prefer community-led reforms overstate-led reforms.

Among these conflicting positions on the MPL, this study shares the views of the third group of scholars, who support reforms in the MPL emerging from within. This study has critiqued the secularists and the modernists as they are unwilling to recognise the consequences of the state-led reforms. They often tend to overlook the fact that the process of codification of laws by the state involves legitimization as well as de-legitimisation of social practices. Several social practices, which were otherwise much more egalitarian, were suddenly delegitimized during the codification of the Hindu Code Bill. When the state-led Hindu Code Bill was imposed on people, this exercise ended up imposing a Brahminical version of laws on the rest of India.

Themes of the Study

This work begins by narrating the evolution of the Muslim Personal Law (MPL) in the colonial period. With the establishment of the colonial rule, the process of application of the "western principles" began. This set off the process of reforming Shariat. The term "reform" was largely a euphemism for reducing the role of Shariat in the public domain and limiting it to the private. Shariat laws regarding crime, commerce and judiciary were replaced with secular ones. The Shariat Laws were limited to the matters concerning family, marriage, divorce, inheritance and so on. The drive for uniformity not only shrank the role of Shariat but also made the modern state an authority to "redefine" the laws. It was evident in both colonial and postcolonial period. The postcolonial state, similarly, imposed uniformity in the name of reforming the Hindu personal laws (Hindu Code Bill). It, thus, erased a wide range

[56] Partha Chatterjee, 'Secularism and Tolerance' in *Economic and Political Weekly*, July 9, 1994.

[57]Veena Das, 'Cultural Rights and the Definition of Community', in Oliver Mendelsohn and Upendra Baxi, *The Rights of Subordinated Peoples*, Oxford University Press, Delhi, 1996.

of customary laws and practices, some of them being much more progressive than the reformed laws. It is to be kept in mind that colonial administrators were also divided in their approach to personal laws. While the early orientalist colonial administrators tried to rule the native subjects within the latter's language, idioms and culture as much as possible, their opponents, who were influenced by Bentham's utilitarianism and rational ideology, looked at the native subjects' religion and culture with contempt and advocated imposition of secular and uniform laws. This tension between a drive for uniformity and existence of pluralism can be seen throughout the colonial period. The postcolonial state also faced a similar situation when it tried to impose the UCC (the first chapter).

Due to opposition from the Muslim members in the constituent assembly the agenda of the UCC was put in abeyance. Meanwhile the Hindu Code Bill was passed and the state claimed that it empowered the Hindu women. It should be noted that the Hindu Code Bill was vigorously opposed by Hindu nationalists, who later became self-proclaimed "champion" of reforms in the MPL ostensibly for the sake of the "oppressed" Muslims women. Though the Nehru Government desisted from interfering directly in the MPL as demanded by the Hindu nationalists, the Congress Government in the 1950s and the 1960s spoke in multiple voices that created fear and suspicion among Muslims that the Government was planning to impose the UCC on them, after scrapping their personal laws. It is within this context that the AIMPLB was formed on December 27-28, 1972. A historic conference was held in Bombay which was supported by all sects and schools of thought of Muslims. Calling the MPL as "immutable", the speakers in the two-day long AIMPLB's convention expressed their opposition to attempts of reforms, which were, according to them, "interference in the religion of Islam". It said that the MPL was "the law of God" and it could not be amended by legislation.[58] The convention also condemned the attempt to impose the UCC by some people, referring to its supporters like Dalwai and his followers (the second chapter).[59]

No discussion on the MPL and the AIMPLB can be complete without a reference to the gender question. That is why historian of law Robert D. Baird said that "Most of issues related to personal law are really about issues of gender".[60] Similarly, Maulana Khalid Saifullah Rahmani, an important office-bearer of the Board and an expert of Sharia laws,

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[58] *The Times of India*, 'Shariat laws sacred, avow Muslims', December 29, 1972, p. 5.

[59] Ibid.

[60] Gerald James Larson, 'Introduction: The Secular State in a Religious Society' in Gerald James Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment*, Social Science Press, Delhi, 2001, p. 9.

underscored the centrality of the woman question in the MPL in these words. "Most of the issues related to the Muslim personal law are connected (*marboot*) to women".[61] One of the obvious criticisms against the AIMPLB has been that in the name of opposition to reforms, it was trying to uphold patriarchy to the disadvantage of the rights of Muslim women. The Board has always denied such charges and it holds that Islamic Laws have given adequate rights to women.

The question of gender and the MPL was raised during the Shah Bano episode (1985) and the triple talaq (2017) debate. Shan Bano Begum, a Muslim woman from Indore, Madhya Pradesh was divorced by her husband at the age of 62. She sought maintenance allowance and the case was finally brought to the Supreme Court. On April 23, 1985, Chief Justice Y Chandrachud gave his judgment. In the ruling, he said that a divorced Muslim wife is also "entitled to apply for maintenance under section 125 of the Code of Criminal Procedure Code." This ruling angered the AIMPLB and it mobilised thousands of Muslims on the streets. The Government finally passed a law to annul the SC judgment. In contrast to that legislation, almost after thirty years in 2017, the BJP Government brought a Bill and got it passed in the Lok Sabha that criminalised the act of triple talaq, four months after the SC's ruling calling the practice of triple talaq as "unconstitutional" (the third chapter).

It is true that the AIMPLB had shown its strength to the Government and was able to mobilise a large number of Muslims for the protection of the MPL. It is also true that the AIMPLB is one of the key Muslim organisations since its inception in 1972. But at the same time, its claim to represent all Muslims has been contested several times. In the last 15 years, several other Muslim personal law boards have been formed. The Shias, the Barelvis and the Women all came up with their own boards and critiqued the AIMPLB for failing to take up their interests. The AIMPLB has been criticized for imposing Hanafi jurisprudence, which is followed by the majority of Indian Muslims such as Sunni-Deobandi and Barelvi Muslims also known as *ahnaf* (the fourth chapter).

A close study of the discourse and tropes of the Hindu Right is indispensible in order to have a comprehensive picture of the MPL. A close study of the Hindu nationalists' discourse reveals that they heavily borrow their arguments from orientalist scholars of Islam. Like

[61] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 29.

orientalist scholars, the Hindu Right criticises Islam and the Muslim world for failing to embrace modernity. In other words, they have appropriated the discourse of "modernity", which they use as a "stick to beat" Muslims. This was seen in the arguments and polemics of the Hindu Right during the triple talaq controversy. Moreover, they are also rearticulating the colonial category-- which was used against the colonised Indians earlier—to demonise the minority community and portray them as being trapped in deep "religiosity", "fanaticism", oppressing their women etc. Ironically, the same Hindu Right never gets tired of dismissing the modern-western society in comparison to the "greatness "of Indian culture, which is an ideological construction of the Hindu communal forces (the fifth chapter).

CHAPTER - 1

MODERN STATE, SHARIAT AND MUSLIM PERSONAL LAW IN INDIA

Social theorist Max Weber called Shariat (Islamic Laws), as practised by *Qazi*, as "ad-hoc", "irrational", "substantive", "arbitrary" and "personal", lacking "generality" and "stability". Since Shariat-Weber contended, as summarised by noted sociologist Bryan Turner-is based on "prophecy" and revelations", it is incompatible with capitalism. Influenced by such ideas, there was a drive towards enacting "legal", "rational" and "uniform" laws in the non-West regions and later in the colonies where the modern state emerged.[62] To what extent the modern state was successful in achieving uniformity and replacing "irrational" laws with "rational" can be debated, and it is possible that the level of uniformity may vary from one context to another. Moreover, uniformity in laws—considered desirable for the flourishing of capitalism-has hardly been achieved even in the advanced capitalist countries. For example, Turner pointed out that rational and uniform laws-contrary to the formulation of Weber-were not always the necessary pre-requisite for capitalism because the practices of judge-made legal system did not thwart the flourishing of capitalism in England.

On the complex relation between modern state, religion and Shariat, eminent anthropologist Talal Asad offered important insights. Asad's contribution is his formulation that the modern state redefined religion and the former subordinated the latter. In other words, the religion was relegated to the private domain. He further said that the process of reconstitution of the modern state required "the forcible redefinition of religion as belief, and of religious belief, sentiments, and identity as personal matters that belong to the newly emerging space of private (as opposed to public) life".[63] For the proponents of the centralised modern state, he argued, "religious belief was the source of uncontrollable passions with the individual and of

[62] Bryan S. Turner, 'Islam, Capitalism and the Weber Theses', *The British Journal of Sociology*, Vol. 25, No. 2, June, 1974, pp. 230-243.

[63]Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*, Johns Hopkins University Press Baltimore, 1993, p. 205.

dangerous strife".[64] Therefore, it could not "provide an institutional basis for a common morality". It was within this context that a hierarchy was created in which secular arguments (also secular laws) were considered "superior" and "rational", while religious arguments (religious laws i.e. Shariat) were considered its opposite i.e. "irrational" and "rigid".[65] Thus, the trope of "civilised" West versus "uncivilized", "stagnant" and "backward" non-West was constructed.

As large parts of the world gradually came under the rule of centralised colonial state, it began the process of imposing uniformity. A discourse was constructed that uniform, secular and rational laws were "superior" to non-rational and arbitrary customary and religious laws. Like Weber, utilitarian positivist philosophers—such as Jeremy Bentham (1748-1832) and John Stuart Mill (1806 –1873)—also spoke in favour of uniformity. They had "disdain" for tradition and thus advocated radical reform by the state. As historian Neeladri Bhattacharya showed, they attacked the tradition advocated by orientalist colonial administrators and "criticized the "obscurantist" reverence for tradition and linked such traditionalism to the ruling conservative ideology of eighteenth-century Britain, which was pathologically opposed to liberal reforms. The task of law, for the Utilitarians, was to define the basis of new social and political order, rather than conserve the old regime; the valid concern for law-maker was not the discovery of past custom—the law as *it is*—but rather the law as it *ought to be*".[66]Thus, utilitarians and modernists--inspired by Roman as well as European legal systems—favoured uniformity in laws[67], while the pluralists supported legal pluralism. Note that the influence of utilitarians was felt more in the later part of colonialism. In the early phase of colonialism, the state was more hesitant to interfere in personal laws. But as time passed and colonial state consolidated itself, it shed such hesitation.

Contrary to utilitarians, early colonial administrators under the East India Company were English orientalists, who "invoked the authority of custom" and tried to present colonial rule" "rooted in indigenous society".[68] They were ideologically opposed to "radical" reformers like

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[64] Asad. 1993, p. 205.

[65]Ibid, 1993, p. 205.

[66]Neeladri Bhattacharya, 'Remaking Customs: The Discourse and Practice of Colonial Codification' in R. Champakalakshmi and S. Gopal, eds., *Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar*, Oxford University Press, New Delhi, 1996, p. 24.

[67] Partha Ghosh, 'Politics of Personal Law in India: The Hindu-Muslim Dichotomy', *South Asian Research*, Vol. 29 (1), February 1, 2009, p. 5.

[68]Bhattacharya, 1996, p. 22.

utilitarian positivists and not in favour of supplanting the colony's traditional systems. Influenced by orientalist ideas, the early colonial administrators, similarly, held that attempts to erase the culture and traditions of the native subjects would be counter-productive from the perspective of the East India Company rule. Warren Hastings, Sir William Jones (1746–1794 and H.T. Colebrooke (1765–1837), who were much interested in oriental knowledge, were hesitant to thrust wider reforms on the native subjects. It was this interest in oriental culture and religion that informed Sir William Jones, on his part, to painstakingly work for codifying Hindu and Muslim laws. Charles Hamilton, on his part, translated important Islamic legal treatises.[69]

In spite of this, they contributed to homogenization of the laws. Their drive to codify Hindu and Muslim laws based on "authentic" religious texts was bound to erase diverse customary practices. The textualization and canonization of the laws—which may appear distasteful to the utilitarian positivists, who wanted them to be scrapped and replaced with uniform, secular and rational laws-brought about uniformity in their own way. It is true that the colonial state did not abrogate Shariat completely and left untouched the parts concerning family matters (personal laws). But such a policy did not deter English administrators from reforming and codifying personal laws.

Reforming Shariat

In India, the same "Western principles" were applied and the process of reforming Shariat got underway. The term "reform" was largely a euphemism for reducing the role of Shariat in the public domain and relegating it to the domain of the private. Those parts of Shariat—which were related to crime, commerce and judiciary-were replaced with secular/universal laws. Those parts of Shariat-which were not abolished—largely dealt with the matters such as family, marriage, divorce, inheritance and so on. The drive for uniformity not only reduced the role of Shariat but also made the modern state an authority to "redefine" laws. This was evident in both colonial and postcolonial period. The postcolonial state, similarly, gave uniformity to the Hindu personal laws (Hindu Code Bill), erasing a wide range of customary laws and practices, some of them being much more progressive than the reformed laws.

[69] Partha Ghosh, 'Politics of Personal Law in India: The Hindu-Muslim Dichotomy', *South Asian Research*, Vol. 29 (1), February 1, 2009, p. 2.

Noted scholar A. G. Noorani was critical of the process of uniformity. As he put it, it was "lust for uniformity that alienates people"[70]

The remaining parts of Shariat laws-which were not abrogated-were later known as the Mohammedan Law or the MPL. In other words, the MPL is the remaining parts of Shariat-mostly related to family laws—which were not abolished. But how did the MPL come into being in the colonial period?

The transfer of the Diwani Rights in 1765 was emblematic of the decline of the Mughal Empire and the ascendance of the East India Company. Through the Treaty of Allahabad with the Fifteenth Mughal Emperor Shah Ali II, the East India Company became entitled to collect revenues and decide civil cases in Bengal, Bihar and Orissa. It was soon followed by reforms in the existing legal systems. Since an effective judicial system was considered "vital" for the "prosperity" of East India Company, attempts were made to "improve the indigenous judicial systems". Thus, proposals were made to establish a judicial court in each district under the 1772 plan of Warren Hastings (1732–1817), the first Governor-General of Bengal.[71] While Hastings talked of "the laws of Koran, with respect to the Mohammedans, and those of the shastras with respect to the Gentoos [Hindus]", it did not deter the colonial state to initiate reforms in Shariat. As a result, the East India Company established the civil courts, which had jurisdiction over all civil disputes including cases related to debts, contracts, rent, property, inheritance, marriage and caste. However, the significant feature of these civil courts was the application of a set of separate religious laws to Hindus and Muslims only in their personal matters such as marriage, inheritance, caste as well as other "religious usages" and "institutions".

Establishment of the Supreme Court (SC) in 1774 in Calcutta was one of the key movements in the evolution of the MPL. The SC was given civil jurisdiction over the subject population through the Act of 1781. Noteworthy was section 17 of the Act which talked of extending separate religious laws to Hindus and Muslims: "their inheritance and succession to land rent and goods and all matters of contract and dealing between party and party should be

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[70]A.G. Noorani, 'The Uniform civil code vs triple talaq vs the Talaq', *The Indian Express*, New Delhi, December 15, 2016, p. 15. Accessed (online) May 7, 2018, URL,*http://indianexpress.com/article/opinion/columns/triple-talaq-uttar-pradesh-elections-islam-modi-abolition-mizoram-special-status-4427245/*

[71] Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality*, Sage Publications, New Delhi, 1992, p. 62.

determined in the case of Mahomeddans and Hindus by their respective laws and where only one of the parties should be a Mahomeddan or Hindu by the laws and usages of the defendant."[72] Note that the provision of the act of 1781 incorporated two common provisions of the plan of 1772 of Hastings such as inheritance and contract.

Soon, civil courts-under the East India Company's rule laid the foundation of the application of separate religious or personal laws to their subjects.[73] This policy of application of separate personal laws continued in the following centuries as well.

The enactments of the laws related to the MPL also involved a process of modification in Shariat. That is why Noorani-contrary to the position of the AIMPLB—argued that the MPL was based on Anglo-Muhammadan Law, which he termed as a perversion of Shariat. As he contended, the MPL "flagrantly violates the Sharia". He added that MPL was based on the Anglo-Mohammedan Law and not on Shariat, "It is not Sharia".[74] Similarly, Zafarul Islam Khan argued that the MPL is not based on Shariat, "Contrary to the belief that *Shariat* is divine and permanent, the legal system of Muslim personal law prevailing in India is based on the Shariat Application Act passed by the British colonial rulers in 1937."[75]

That is why the argument that the colonial state maintained non-interference in religious matters including personal laws was not immune from criticism. It is true that the colonial and postcolonial state did not completely abolish Shariat and avoided making a direct and blunt interference in MPL. But it is also difficult to deny that the colonial government operated with its own rationality and technique of governance. The modern political and economic system required the colonial state to limit the scope of Shariat.

In this context, Flavia Anges made a persuasive argument that the British legal system-despite the British crown's assurance that the personal matters of natives would not be interfered with-did interfere under the influence of principles such as justice, equity, good conscience and public morality. She rightly underscored the influence of British legal system on the evolution of personal laws in India. "A judicial bias crept into the Indian legal system

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[72]Parashar, 1992, pp. 62-63.

[73]Ibid. p. 62.

[74]A. G. Noorani, 'Uniform Civil Code: Hindutva's Stick', *Frontline*, Vol. 32, No. 23, November 27, 2015, p. 64.

[75] Zafarul-Islam Khan, 'Muslim Personal Law and Uniform Civil Code', *Milli Gazette* (online), November 09, 2016. Accessed (online) May 18, 2018, URL, *http://www.milligazette.com/news/15084-india-muslim-personal-law-and-uniform-civil-code*

by the introduction of principles of Anglo-Saxon jurisprudence such as *justice, equity, good conscience* and *public morality*, and through the legal concept of *stare decisis*. Despite the stated policy of the British crown, namely that the non-interference in the personal laws of the natives, these concepts moulded personal laws in India."[76]Similarly, Fyzee noted the influence of the English principles in the making of MPL.

Noorani argued that British jurists left their mark on the evolution of personal laws of both Hindus and Muslims. In the application of these personal laws of Hindus and Muslims, they used their own understanding and interpretation. Besides, "the rules of procedure and evidence" were "alien" to Islamic and Hindu laws and when they were applied to these systems, it resulted in "transforming" them to a large extent.[77]

In the process of compiling the laws, the British government created distortions in personal laws.[78]It has been argued that "custom", "tradition", and "native law" were fundamentally altered—if not invented—by the colonial rulers, even as they sought to compile, preserve and know them. As a result of these processes, "the law was gradually", Rina Verma Williams argued, "transformed from being a vast body of texts and locally variegated customs, all of which was constantly interpreted, to a rigid, codified body of legal rules—the personal laws".[79]

The MLP in India

The colonial administrators were involved in shaping the MPL, a point which was made by Flavia Anges. William Jones wrote a letter on March 19, 1788 to Cornwallis and apprised him of his plan to compile a digest of Hindu and Muslim laws with an English translation. He compiled a complete digest of Hindu and Muslim law entitled *Al Sirajiyyah: Or the Mohammedan Law of Inheritance*, in 1792, and *The Institutes of Hindu Law: Or the Ordinances of Manu* (1776). His letter, similarly, talked of governing native Hindus and Muslims as per their sacred laws in private matters, "Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had

[76] Flavia Anges, 'Women, Marriage and the Subordination of Rights', in Partha Chatterjee and Pradeep Jeganathan (eds.) *Community, Gender and Violence*, Permanent Black, Delhi, 2000, p. 119.

[77]Parashar, 1992, p. 72

[78]Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, Oxford University Press, 2006, p. 7.

[79]Ibid, p. 7.

ever considered as the rules of their conduct and engagements in civil life; nor could anything be wiser than by a legislative Act to assure the Hindu and the Mussulman subjects to Great Britain that the private laws which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system."[80]

Later, the Cornwallis Code of 1793-a body of legislation enacted by the East India Company to "improve its governance" in India-also stressed the need to apply separate laws to Hindus and Muslims "in suits regarding succession, inheritance, marriage and castes, and all religious usages and institutions, Mahommedan law with respect to Mahommedans and Hindu law with respect to Hindus are to be considered as the general rules by which judges are to form their decisions." The 1793 legislation was named after the Governor-General of Bengal, Lord Cornwallis, as he developed this code.[81] In this process, the British not only "gave birth to the system of communal personal laws" but also played a role in shaping their contours, to an extent. Note that the British Bengal (Bengal, Bihar and Orissa combined) was the first region to give "a formal recognition" to Hindus and Muslim personal laws.

Though the colonial rule saw the emergence of MPL, it should not be overlooked that the colonial polices in this regards varied from context to context. While the British in the New World and the Caribbean worked to supplant the legal systems of the natives, it could not do so in India and instead adopted a considerable part of the existing system. This has to do with the ideological orientation of the early British officers, who believed India to be an ancient civilisation, which had its own distinct culture. Similarly, colonial policies within India also differed from one region to another. While in the Bengal region, text was privileged, in Punjab customs were given importance and "the sacerdotal codes of Hindu and Muslim law were to be followed only to an extent that they coincided with, and had been absorbed within, customary practice".[82]

With consolidation of colonial power in India, the state began to make big changes. The colonial state perceived existing legal system to be "complicated" and "anarchic". Among the first reforms undertaken by the colonial state was the abolition of slavery in 1843. According to legal scholar Fyzee, Islam recognizes certain rights of the children of a slave. If

[80] Cited in Parashar, 1992, p. 64

[81] Parashar, 1992, p. 66.

[82] Bhattacharya, 1996, pp. 24-25.

a slave enters into a sexual relation with his/her master and thereby they beget a child without entering into a proper marriage, that child has certain rights as per Islamic rules. But the British rule in India did not recognize such rights. Similarly, if a Muslim turns a *murtad* (apostate), he, as per the Islamic Laws, comes to forfeit his rights to inherit property from his Muslim parents and, in certain cases, may be given capital punishment. But such rules were no longer applicable after the British took over. The Caste Disabilities Removal Act (xxi of 1850) did away with the Islamic Laws related to *murtad* and a person even after converting to another religion did not lose his share in his parents" property and the share would be determined by the law applicable to his father. In the case of Muslim parents, the Muslim personal law would be applicable.

Changes were made in the field of criminal law as well. The criminal laws of Islam were abolished and the Penal Code, 1860 came to replace them. The draft of the Penal Code was prepared by Lord Macaulay. Gradually, the native subjects, across religions and faiths, came to be governed by the same Penal Code. Another change was the establishment of the High Court of Judicature in each of the Presidency towns. Thus, the High Courts came up in Calcutta, Bombay and Madras Presidencies in 1861. One of the major fallouts of the setting up of the High Court was that any person, if he/she was qualified and had the stipulated eligibility, could become a judge. The Islamic rule however said that only a Muslim judge (*Qazi*) could adjudicate the matters involving Muslims. Such a condition was abolished.

In the matter of evidence, also changes were made. The Indian Evidence Act, 1872 came to replace the Islamic Laws of evidence. The Act was drafted by Justice Stephen, an English judge. Under the Islamic Laws of evidence, only a Muslim can give evidence against a Muslim and in the case of adultery, four eye-witnesses are required "for the proof of adultery". Moreover, the Civil Procedure Code (1908) based on secular laws was enacted. With this, there emerged a civil code under the British rule. Apart from them, the Waqf Act, 1913 and the Shariat Act, 1937 were landmark legislations during the colonial period. In addition, issue of texts versus customs came up. Which of them should be given a greater importance? If texts and customs are in conflict, which of them should prevail? As far the Hindu legal theory is concerned, it recognised customs and gave them precedence over the written text while Islamic legal theory gave supremacy to the written text or Sharia. As a result, the ulama as a social group appealed to the British government to codify personal

laws, giving them precedence over the "un-Islamic" customs of Muslims.[83]Even Ambedkar mentioned in his book *Pakistan or the Partition of India* that much before the passing of the Shariat Act, there were instances when Muslims used to follow Hindu laws in some regions, "In some sections of Muslims, the law applied is Hindu Law in the matter of marriage, guardianship and inheritance. Before Shariat Act was passed, this was true even in the Punjab and N.W.F.P."[84]

When the ulama came to know that many Muslims such as the Mopillas of South India, Punjab and the Memon Muslims of western India were following several customs which were "opposed" to Shariat, they began to work for reforming the society, calling upon these Muslims to strictly follow Islamic Laws. Moreover, they also asked colonial government to adopt Shariat.

Earlier, the Jamiat-e-Ulema-e-Hind-one of the most influential religious and social organisations of Muslims- passed a resolution, in its sixth annual session held in 1925, for the enactment of Sharia law under the chairpersonship of Molvi Syed Muhammad Sajjad. In 1926, the Jamiat passed a similar resolution under the chairmanship of Maulana Syed Sulaiman Nadwi and authorised Muslim delegations to go to Punjab and Bombay and other parts of India to persuade Muslims to give up their customary laws supposed to be "un-Islamic". At the same time Ashraf Ali Thanvi published a monograph (*al-Ghasab al Mirath*, usurping the Heritage). In 1928, the Jamiat-e-Ulema-e-Hind held its session in Peshawar and asked the government to do away with customary laws. The Jamiat-e-Ulema-e-Hind, under the leadership of Mufti Kifayatullah, got a huge response from the people of North West Frontier Province (NWFP). Subsequently, the Jamiat-e-Ulema-e-Hind worked for enforcing Sharia law in the region. Thus, Sharia Bill was moved in NWFP provincial legislative assembly in 1933 and eventually it was enacted as the North-West Frontier Province Muslim Personal Law (Shariat) Application Act, 1935. It came into force on Dec 6 1935. When the Bill was published, it was supported by ulama and other Muslims but it was opposed by *nawabs* and *taluqedars* who thought that if it was enacted this would take back the ruling rights of the adopted son or another person of their choice. Interestingly, the Muslim League leader Muhammad Ali Jinnah proposed an amendment that Muslims should have a choice to

[83] Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent*, All India Reporter Ltd., Nagpur, 1983, pp. 2-3.

[84] Dr. B.R. Ambedkar, *Pakistan or the Partition of India*, Writings and Speeches, Vol. 8, Education Department, Government of Maharashtra, 1990, p. 32.

opt out of either Islamic or customary law. Jinnah made an appeal to make personal law optional. For this, he made a reference to Cutchi Menon Act of 1920s by which Muslims had an option to follow it or not. Jinnah's view was strongly opposed by the Jamiat-e-Ulema-e-Hind. Eventually the Shariat Act of 1937 was enacted on Sep 16, 1937.

The Muslim Personal Law (Shariat) Application Act 1937 was enacted. But the more important development was enactment of the Shariat Act, 1937 because by this act certain customs contrary to Shariat being practised by Muslims in some parts of India were not recognised. To put it simply, under the Act, a set of rules related to the Muslim personal laws were enacted and it was given the status of cannon and authoritative text against which practices would be judged. Under the Sharia Act, laws related to marriage, divorce, succession, etc were codified and it was not to be applicable all across India. By this act, much confusion was removed regarding legitimate rituals and practices of Muslims but this process also resulted in homogenizing the community and a particular interpretation of Islam was sought to be imposed all across India.

Another important aspect of the Shariat Act 1937 is the use of the term MPL and Shariat in the parenthesis. While the terms MPL and Shariat have not been defined, it is assumed that MPL are those parts of the Shariat which are related to family laws, marriage, divorce, inheritance and so on. It should be noted that the term Shariat has a "much wider connotation and covers the entire gamut of Muslim Law".[85]

Another limitation of the Shariat Act is that Muslim community is not a homogenous community and is divided into sects, classes, castes, and regional identities. Among Muslims there are at least seven main schools of jurisprudence. Four are for the Sunni Muslims and three are for the Shia Muslims. While the Shariat act has the ambition of reaching uniformity, it could not impose a unified version of personal law on all Muslims. As Tahir Mahmood and Saif Mahmood put it, "As is well known Muslim law has various versions, known as schools of law, agreeing with each other in the basics but differing in details. Four of the seven such schools prevail in India—the Hanafi and the Shafei schools among the Sunni Muslims and the Ithna Ashari Jafari and Ismaili schools among the Shias. The Shariat Act is silent on the point whether it means that a particular school of Muslim law will be applicable to all the Muslims, or the followers of various schools would be governed by their respective

[85] Tahir Mahmood, Saif Mahmood, *Introduction to Muslim Law,* Universal Law Publishing Co., New Delhi, 2013, p. 38.

principles."[86] For example, in the *Deedar Hossein v Zuhoor-oon-Nisa* case (1841), the Privy Council had ruled that "if each sect has its own rule according to Mohammedan law that rule should be followed with reference to the litigants of that sect". Since then Muslims have been governed by their own sect's personal laws and the Shariat Law has followed the precedence set by the Privy Council."[87] However, during the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986 by Rajiv Gandhi-led Congress Government, the legislation was "drawn on particular schools of law" and "uniformity" was applied to all Muslims.[88]

While the Shariat Act tried to impose homogeneity and uniformity, it had its limitation. The most interesting part is that while it defines the subject matter of the personal laws, it does not define the word Muslims and those who are covered and not covered by the word "Muslims." As Tahir Mahmood and Saif Mahmood put it, "Unlike the four Hindu law enactments of 1955-56 each of which defines the word "Hindu" as used in them, this Act gives no indication as to who would be covered or not covered by the word "Muslim" as used in its provision. This is a serious lacuna that ad led to undesirable results. In several cases the courts have had to dwell on the religious beliefs and practices of some Muslim sects in order to determine if they are part of the Muslim community or not."[89]

While the Shariat Act, 1937 was limited to the British India, later it was extended to other parts as well. The section two of the Shariat Act 1937 says it "extends to the whole of India except the State of Jammu and Kashmir."[90]It should be noted that the extension of Shariat Act was done through several legislations i.e. Merged (States) Laws Act 1949, Union Territories (Laws) Act 1950, Bombay Act IV of 1950, Miscellaneous Personal Law (Extension) Act 1959, Dadra and Nagar Haveli Regulation VI of 1963, Lakshadweep Regulation VII of 1965.[91]

However, some parts of India are still outside the ambit of the Shariat Act. Since Goa and Daman and Diu were under Portuguese control and could become free and part of India much later, they still follow their own Portuguese laws. Since Jammu and Kashmir was given

[86] Mahmood, Tahir abd Saif Mohabbat. 2013, pp. 38-39.

[87] Ibid. p. 39.

[88] Ibid., p. 39.

[89] Ibid. p. 34.

[90] Ibid. p. 33.

[91] Ibid. p. 39.

special status under article 370 by the Indian Constitution, no law enacted by Indian Parliament, is applicable there. That is why the Shariat Act could not be extended to Jammu and Kashmir. However, its assembly enacted its own Muslim Personal Law (Shariat) Application Act 2007. But that is "substantially different from the Shariat Act 1937.

Moreover, the issue of MPL was also linked to the Hindu-Muslim question in the National Movement. For example, the Congress in 1931 made a promise that it would not interfere in the personal laws of Muslims. Its Working Committee declared that "personal laws shall be protected by specific provisions to be embodied in the Constitution". Moreover, Nehru assured Mohammad Ali Jinnah, in a letter dated April 6, 1938, that the Congress had "declared that it does not wish to interfere in any way with the personal law of any community".[92] Apart from Nehru, Gandhi, too, assured Muslims that their right to have personal laws in free India would be protected[93]. As Noorani argued, "Before Partition, Muslims were offered solemn pledges of respect for their personal law; by Gandhi on October 28, 1931, the Congress in October 1937 and by Nehru on April 6, 1937. Gandhi offered "protection by specific provisions" in the Constitution." While the Congress talked of giving cultural autonomy to Muslims, a large group within it was in favour of imposition of uniformity. Such tension was also evident in the Constituent Assembly when both the supporters and the opponents of the UCC locked horns with each other.

The Uniform Civil Code

Like the colonial state, the postcolonial State in India had the ambition for uniformity. It, however, faced at least two difficulties in imposing it. First, the Congress- during the National Movements-had promised that its Government would not interfere in the MPL in Independent India. Second, erasing difference and pluralism were not easy, despite the strong demands from the Hindu Right both within the party and outside. Unlike the Hindu communalists, the leaders from the Muslim community defended their cultural autonomy. Given the contestation and opposition to the UCC, this issue was postponed for future consideration by putting it in the Directive Principles of State Policy. . Unlike the Fundamental rights, the Directive Principles of State Policy—if they are not enacted- remain

[92] A. G. Noorani, 'Uniform Civil Code: Hindutva's Stick', *Frontline*, Vol. 32, No. 23, November 27, 2015, p.64.

[93] A.G. Noorani, 'The Uniform civil code vs triple talaq vs the Talaq', *The Indian Express*, New Delhi, December 15, 2016, p. 15. Accessed (online) May 7, 2018, URL,*http://indianexpress.com/article/opinion/columns/triple-talaq-uttar-pradesh-elections-islam-modi-abolition-mizoram-special-status-4427245/*

"not enforceable". The Article 44 [the UCC] of the Directive Principal of State Policy, thus, asks the State "to endeavour to secure for citizens a Uniform Civil Code throughout the territory of India". Such postponement of the matter was preceded by a hotly contested debate over the issue.

The first round of Constituent Assembly Debate on Uniform Civil Code was held on 28 November, 1948.[94] Speaking on the occasion, Naziruddin Ahmad could not reject the common laws and called them "desirable" but he also argued that changes should be gradual and with the consent of people concerned. In other words, he argued that the state should not make an intervention without the consent of the people.

Mr. Naziruddin Ahmad says that interference in personal laws should be gradual and time should be taken for moving towards common civil laws. He also cites the example of the British government which, according to him, did not interfere fundamentally in personal laws. Moreover, he tried to highlight the fact that even the MPL has already been affected by some parts of the Civil Procedure Code. As he argues, "I submit, Sir, there are certain aspects of the Civil Procedure Code which have already interfered with our personal laws and very rightly so. But during 175 years of British rule, they did not interfere with certain fundamental personal laws. They have enacted the Registration Act, the Limitation Act, the Civil Procedure Code, the Criminal Procedure Code, the Penal Code, the Evidence Act, the Transfer of Property Act, the Sarda Act and various other Acts. They have been imposed gradually as occasion arose and they were intended to make the laws uniform although they clash with the personal laws of a particular community. But take the case of marriage practices and the laws of inheritance. They have never interfered with them. It will be difficult at this stage of our society to ask the people to give up their ideas of marriage, which are associated with religious institutions in many communities. The laws of inheritance are also supposed to be the result of religious injunctions. I submit that the interference with these matters should be gradual and must progress with the advance of time. I have no doubt that a state would come when the civil laws would be uniform. But then that time has not yet come."[95]

[94] This debate has been reproduced by *The Muslim India,* June 1985.

[95] Ibid.

By reading the statement of Naziruddin Ahmad, it be can observed that he, being a Muslim Member, found it difficult to out rightly reject the UCC, whereas Muslims began to reject it in the later part of the twentieth century. The best he could do was to ask for more time and delay the process. However, these attempts to impose uniform civil code were opposed by other Muslim members of the constituent assembly. It was not an easy task for them. This is also one the reasons that they could not argue for substantive rights of Muslims when other deprived communities were talking about these issues.

This is also evident in the speech of Naziruddin Ahmad, who could not dare to openly reject the UCC. Ironically, while he opposed the sudden imposition of UCC, he accepted its imposition in a gradual manner. It should be noted that his advocacy of a gradual imposition was a way to postpone the issue. As he contended, "the goal should be towards a uniform civil code but it should be gradual and with the consent of the people concerned…. What the British in 175 years failed to do or was afraid to do, what the Muslims in the course of 500 years refrained from doing, we should not give power to the State to do all at once. I submit, Sir, what we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy."[96]

Another Muslim member Pocker Shahib, who supported the motion moved by Mr. Mahamed Ismail, similarly opposed state intervention in personal laws. He also mentioned the example of the British who could not interfere in personal laws and as a result they were able to rule over this country for over 150 years. Both of them, it may be noted, were giving the logic of legitimacy. If people were not ready to accept a particular law, it couldn't be imposed on them. As Pocker Shahib argues, "One of the reason why the Britisher [the British], having conquered this country, has been able to carry on the administration of this country for the last 150 years and over was that he gave a guarantee of following their own personal laws to each of the various communities in the country. This is one of the secrets of success and basis of the administration of justice on which even the foreign rule was based. I ask, Sir, whether by the freedom we have obtained for this country, are we going to give up that freedom of conscience and that freedom of following one's own personal law and try or aspire to impose upon the whole country one code of civil law."[97] Finally, Pocker Sahib also says that if the

[96] *The Muslim India,* June 1985, p. 246.

[97] Ibid.

government imposes common civil code and “uniformity of law”, this would be a “tyrannous provision which ought not to be tolerated”. [98]

The argument of the AIMPLB is also similar. It defends personal laws based on the fundamental rights of religious freedom. While the opponents of MPL or the supporters of reforms in MPL also draw on another set of fundamental rights to oppose the MPL i.e. personal liberty and equality.

Another powerful argument Sahib put forward in the form of questions to the members of constituent assembly was over the fact that they did not have legitimacy undertake such reforms as they were not elected by people. It should be noted that a similar argument was given by the right-wing Congress leader Rajendra Prasad, who asked Nehru if the Constituent Assembly had been mandated to reform the Hindu Code Bill.

Another Muslim member Hussain Imam put for the argument of diversity to oppose the UCC. “India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything. In a country so diverse, is it possible to have uniformity of civil law? We have ourselves further on provided for concurrent jurisdiction to the provinces as well as to the Centre in matters of succession, marriage, divorce and other things. How is it possible to have uniformity when there are eleven or twelve legislative bodies ready to legislate on a subject according to the requirements of their own people and their own circumstance?”[99]

Like Naziruddin Ahmad, Hussain Imam also believed that uniformity in laws should be brought at a later stage, “It is all right and a very desirable thing to have a uniform law, but at a very distant date. For that, we should first await the coming of that event when the whole of India has got educated, when mass illiteracy has been removed, when people have advanced, when their economic conditions are better, when each man is able to stand on his own legs and fight his own battles. Then, you can have uniform laws.”[100]

Interestingly, Hussain used the argument that people of India were illiterate and the economic conditions of India were also not better, thus, Indian state should wait till the time India

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[98] *The Muslim India,* June 1985, p. 246..

[99] *The Muslim India,* June 1985, pp. 246-247.

[100] Ibid, p. 247.

became advanced and educated. This argument was effective in fending off a move to impose the UCC.

Contrary to the contentions of these Muslim members, Hindu nationalist K. M. Munshi from Bombay spoke in favour of the imposition of UCC. He was also supported by other Hindu members. In his argument, he said that the UCC was not only opposed by Muslim members, but also by many Hindus. This did by no means, as he argued, stop us to take the UCC forward. . It is, therefore, not merely a question for minorities but it also affects the majority. I know there are many among Hindus who do not like a uniform civil code because they take the same view as the honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession, etc. is really a part of their religion".[101]

It should be noted that the Hindu Right has largely supported the imposition of UCC. The only notable exception is RSS Chief M.S. Golwalkar. In an interview with RSS mouthpiece *Organiser* in 1972, he opposed the UCC. When asked if the UCC was necessary for promoting the feeling of Nationalism", his reply was, "I don't. This might surprise you or many others. But this is my opinion. I must speak the truth as I see it". The interviewer again asked him if "uniformity within the nation would promote national unity", he again replied in the negative, "Not necessarily. India has always had infinite variety. And yet, for long stretches of time, we were a very strong and united nation. For unity, we need harmony, not uniformity".[102]

However, a few years back, Balraj Madhok, writing a pamphlet entitled *Why Jana Sangh*, spoke in favour of the UCC. Madhok was at that time the top leader of the Bharatiya Jana Sangh, a political-wing of the RSS. Unlike Golwalkar, Madhok criticised the rival Congress party for its "failure to extend the common civil code to the muslims[103] [Muslims], whose women need its protection most, is a clear proof of the communal thinking of the Congress

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[101] Maneesh Chhibber 'Uniform Civil Code debate is not new, divided Constituent Assembly as well', *The Indian Express*, October 17, 2016. Accessed (online) May 17, 2018, URL,*http://indianexpress.com/article/explained/in-fact-uniform-civil-code-debate-is-not-new-divided-constituent-assembly-as-well-3086583/*

[102] Golwalkar said this in an interview with RSS mouthpiece *Organiser*, August 26, 1972. Cited in Moosa Raza, 'Uniform Civil Code', *The Milli Gazette*, October 31, 2015. Accessed (online) June 30, 2018, URL, *http://www.milligazette.com/news/13252-uniform-civil-code*

[103]It is difficult to say that when he wrote 'muslims' (Muslim) with small 'm', whether it is a typological mistake or he deliberately wrote it in small letter.

party".[104]Moreover, the BJP—a new avatar of the Jana Sangh—favoured the imposition of UCC in its 1989 General Election Manifesto. Since then, it has figured on its successive manifestoes.

The Chairman of the Drafting Committee, Dr. B.R. Ambedkar, differed with both the views: namely those who wanted to have UCC by enacting a state legislation, and those who opposed it vehemently. He nevertheless also agreed with both the views to an extent. He supported state intervention in reforming society and religion. Having been influenced by rational and humanist ideas, he advocated reforms in religion and was opposed to all "social evils". He was, however, not averse to state interference in "personal laws". His only concern was that while enacting any law the state should be careful not to antagonise the people. Speaking in the constituent assembly, he made it clear that he was not in favour of giving immunity to personal laws from state intervention. His position on Muslim personal laws was that there was nothing wrong in giving power to the state to deal with and amend Personal Laws. However, he also said that no government should try to enact a law which was not accepted by people, whether they are Muslims or Christians, else, they would rise in rebellion. However, he also made it clear that seeking protection in personal laws in the name of religion was not justified. By contrast, he saw it as an agency to intervene through laws in social matters. He said that if personal laws would remain untouched, this would lead to an impasse with respect to social issues. He was by no means unaware of the dangers of misuse or inappropriate exercise of state power in meddling with the Muslim laws. At the same time, he did not have any objection in state's intervention in religious matters. As he puts it, "….I should like to say this, that if such a saving clause [saving personal laws] was introduced into the Constitution, it would disable the legislatures in India from enacting any social measures whatsoever. The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a stand-still. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be government by religion. In Europe there is

[104] Balraj Madhok, *Why Jana Sangh*, New Delhi, 1961, p. 26.

Christianity, but Christianity does not mean that the Christians all over the world or in any part of Europe where they live shall have a uniform system of law of inheritance. No such thing exists. I personally do not understand why religion should be given this vast, expensive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system which is so full of inequalities, so full in inequalities, discriminations and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State. Having said that, I should also like to point out that all that the state is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. It is only giving a power. Therefore, no one need to be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that maybe found to be objectionable by the Muslims or by the Christians or by any other community in India.

We must all remember—including members of the Muslim community who have spoken on this subject, though one can appreciate their feelings as well—that sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No Government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad Government if it did so. But that is a matter which relates to the exercise of the power and not to the power itself."[105]

As is evident here, Ambedkar, though he favoured the UCC, was opposed to its imposition and gave the minority an assurance that the UCC would not be thrust upon them.[106]It should be noted that in the cotemporary debate on UCC, the Hindu-right wing often quotes Ambedkar to argue that the UCC was supported by him and it is, therefore, desirable. However, they deliberately present a half-truth. Ambedkar was against its imposition on the minority if Muslims were not ready to accept it.

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[105]*The Muslim India* June 1985, p. 247.

[106]Ibid. p. 248.

The Hindu Code Bill

Yet another critical period in the history of personal law was the debate around the Hindu Code Bill. The British colonial Government had already reformed much of the religious laws and replaced them with secular laws. Like Muslim community, the colonial government made several laws about religious and cultural practices of the Hindu community. Needless to say, the early social reformers in Bengal raised the plight of Hindu women, despite the fact that the agendas of the social reforms were limited in its scope and reach. Practices like Sati were opposed and voices were raised in favour of widow remarriage. However, there were still some practices which needed to be weeded out. While the practice of polygamy was seen as working against the interests of the Hindu women, the existing Hindu laws needed reforms to ensure the share of Hindu women in inheritance.

While the position of the state in favour of reforms in Hindu laws rested upon women empowerment, the main motive behind these reforms was to facilitate the establishment of bourgeoisie property relations. If postcolonial Nehruvian state had been propelled by the ideas of gender justice, it would have not let Ambedkar become frustrated and resign as the law minister over the Hindu Code Bill. In 1951, he resigned from the Nehru Government as he faced huge opposition in getting the Hindu Code Bill enacted. Ambedkar took great interest in the Hindu Code Bill because he realised that "progress of the community is measured by the progress of women". On his resignation, he expressed his disappointment that ignoring inequality based on gender was to "make a farce" of the Constitution and was similar to building a house on a "dung heap". "To leave inequality between class and class between sex and sex which is the soul of Hindu society untouched and to go on passing legislation relating to economic problems is to make a farce of our Constitution and to build a place on dung heap. This is the significance I attached to the Hindu Code". [107]

Hindu code Bill refers to four acts which consist of the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority and Guardian Act, 1955, Hindu Adoption and Maintenance Act, 1956. They were passed. The Bill was first introduced in the Constituent Assembly on 11th of April 1947. Afterwards, it was referred to the Select Committee for one

[107] Sharmila Rege, *Against the Madness of Manu: B.R. Ambedkar's Writings on Brahminical Patriarchy*, Navayana, 2013, p. 199.

year.[108]Nehru decided to drop the Hindu Code Bill in September 1951. When the Hindu Code Bill was passed, Ambedkar was not the Law Minister.[109]

The main opposition to Hindu Code Bill came from the Hindu Right leaders, both within the Congress and outside. One of the main reasons of discussing their views here is the similarity between the views of Hindu-right wing leaders and the leaders of the AIMPLB, who are opposing state intervention in MPL.

Some of the leaders of the Hindu Right brought up the issue of MPL during the Hindu Code Bill debate. They contended that while the Hindu personal laws were being reformed, the MPL was left untouched. They did not realize that the scope of Shariat had already been limited by the colonial government, which saw a great deal of reforms in Shariat. In spite of this, the resonance of such arguments is still felt in society. The stereotypes—as discussed in the previous chapter—continue to inform people's opinions about the MPL i.e. the Muslim/Islamic society—remains unreformed. Participating in the debate, the Hindu Right attacked the Congress party for "thrusting" state intervention in the matter of Hindu community while it did not dare to touch the Muslim community, giving rise to the discourse of so-called Muslim appeasement.

Hindu Right opposed Hindu Code Bill vigorously. They raised the issue that why Hindu laws were being reformed whereas those of Muslims remained untouched. They also referred to the Directive principle of the state policy which advocates UCC. On February 5, 1951, V.S. Sarwate, during a debate on Hindu code bill, advocated UCC for all religions in the country. Indra Vachaspati, member of UP, also supported UCC. Lakshmi Kanta Maitra, parliamentarian from West Bengal, who opposed the Hindu Code Bill during an earlier debate, said: "You dare not touch the Muslims but you know that Hindu society today is in such a bad way that you can venture to do anything with it. Only a few ultra-modern persons who are vocal but have no real support in the country, are interested in this Bill".[110]

Rajendra Prasad, Nehru's colleague in the Congress party and the first president of India, was critical of Nehru over the Hindu Code Bill. On July 31, 1948, He sent a letter to Patel, which

[108]Rege, 2013, p. 197.

[109]*The Muslim India*, June, 1985, p. 248.

[110] Chitra Sinha, *Debating Patriarchy: the Hindu Code Bill Controversy in India (1946-1956)*, Oxford University Press, New Delhi, 2012, p. 172

he had sent to the PM Nehru earlier, with a request that it should be read out in the meeting of the Congress party. In this letter in this letter, Prasad said that provisions in the draft of Hindu code Bill were "foreign to Hindu law" and it might "cause disruption in every family". Moreover, he also raised the point as to whether the Constituent Assembly had the mandate to reform the Hindu Code Bill.

Participating in a legislative debate, Babu Ramnarain Singh, who was a legislator from Bihar, saw the move to enact the Hindu code Bill as a "conspiracy" which had been "hatched to disrupt Hindu society". He compared the move to enact the Bill as an invasion of Hindu society.[111] Rajendra Prasad wrote to Nehru on July 24, 1948 and argued thus: "The present Constituent Assembly is hardly a body to take up this fundamental legislation for the simple reason that it has not been convened to deal with the personal law of any particular community but for drawing up a Constitution for the State."[112]

Lakshmi Kanta Maitra went on to oppose liberals for their reforms. "Whether a system is good or bad, it is for the society to judge; it is not for disappointed or disgruntled persons to judge. But I may say that the one surest proof of its soundness is that it has been able to stand the test of centuries. No system which is intrinsically bad, unsound or unjust can endure for a long time. Hindu law and the Hindu social system governed by it have been able to withstand the shocks and revolutions which have swept over the country during the ages past. Historic cataclysms have swept off the foot of ancient civilization of countries like Greece, Rome, Assyria, Babylonia—which have all crumbled down—whereas Hindu culture or community, which cannot date its origin, still continues to function with all the vigour and vitality, and I am sure, providence will allow it to function, till we set about to undermine its foundations, by legislating in these reckless and light-hearted ways. If there was anything essentially weak in the foundations of Hinduism it would not have been able to survive the upheavals that overwhelmed it throughout its long and chequered history".[113] Moreover, Maitra opposed laws on marriage and polygamy and said marriage was sacred in Hindu religion. He also opposed the provision of divorce: "Hindu marriage as ought to be known to everyone who professes himself to be a Hindu, who honestly takes pride in calling himself a Hindu, as I myself do, is a sacrament and not a civil contract and as such it will not be difficult for him to

[111] Sinha, 2012.

[112] Ibid. p. 163

[113] Ibid. pp. 173-174.

admit that divorce is absolutely foreign to its concept. Union by marriage, according to the Hindu *Shastras*, is sacred and absolutely indissoluble."[114] He, therefore, said that there should be no reform from the above but that it should happen from within. A similar argument is now being forwarded by the AIMPLB, and is being opposed, in the case of MPL, by the Hindu Right. As Maitra puts it, "I do not know of any honourable Member in this House who really does not want monogamy. Monogamy every one of us wants, not for our mere likes; circumstances have forced us to accept this monogamous marriage. It is a fact. Polygamy has passed away completely from the upper classes of this country not by legislation. This is my main contention. If you want to eradicate a social evil you should work up from within, not from above."[115]

The Hindu Maha Sabha was also at the forefront of opposition to the Hindu Code Bill. It "exploited the situation" very well. It was active in mobilising public opinion against the [Hindu Code] Bill. On December 12, 1949, it held a demonstration comprising around five hundred people, who gathered near the Parliament House. These demonstrators expressed their anger against the Nehru government and chanted "Down with Hindu Code Bill" and "Down with the Nehru Government".[116] N.C. Chatterjee of Hindu Mahasabha opposed the Hindu Code Bill in Parliament. Prabhudatta Brahmchari, a *sanyasi*, contested election against Nehru from Allahabad constituency in 1952 and opposed the Hindu Code Bill in his campaign.

The Bharatiya Jana Sangh, a political-wing of the RSS formed in 1951, also opposed the Hindu Code Bill. It objected to the secular state interfering in the personal laws of the Hindus. In its 1951 Manifesto, Jana Sangh states: "The party holds that social reform should not come as imposition from above. It should work from within the society. Any far-reaching changes as envisioned in the Hindu Code Bill, therefore, should not be made unless there is a strong popular demand for them and a clear verdict is obtained from the electorate."[117] Similarly, there was also opposition from the Ram Rajya Parishad (Forum for Rama's Kingdom). Founded by Swami Karpatri (1905-1980) in 1948, Ram Rajya Parishad won three seats in 1952 General Elections and two seats in 1962 General Elections and won several

[114] Sinha, 2012, p. 172

[115] Ibid. p. 176.

[116] Ibid. p. 175.

[117] Ibid. p. 184.

seats in assembly elections in the Hindu belt, mostly in Rajasthan. Swami Karpatri was born in Pratapgarh, UP and was a disciple of the Shankaracharya of Jyotirmath, Swami Brahmananda Swaraswati. In his speech in Delhi and elsewhere, he challenged Ambedkar for a debate on the issue and he opposed Hindu code Bill. He led 1,25,000 protestors to Parliament against cow slaughter.

Golwalkar, the second Sarsanghachalak of Rashtriya Swayamsevak Sangh (RSS) from 1940-1973, expressed his opposition to the Hindu Code Bill. In March 1950, he said the Government should not be path-pointers. The path-pointers should be those who were away from mundane life. In other words, Nehru government was not suited for enacting Hindu Code Bill. As he puts it: "In the course of the natural progress of society it so happens that laws are naturally formed and confirmed, and are afterwards recognized by the ruling party. This is the way of progress. The governments" action should only be one of recognition, not path-pointing. Path-pointers must be personally aloof from mundane matters. They must be men who think, without prejudice, only of the good of the people. In our country in ancient times, men who guided the society were sages and hermits living in the jungles. The kings only enforced their guidance. Today various parties try to foist their views on the society to mould it according to their own political preconceptions."[118]

Finally, the Hindu Code Bill was passed in a diluted form. While the Hindu Code Bill was celebrated by liberals, the fact remains that it has largely failed to ensure gender justice. Scholars like Chitra Sinha and Archana Parashar--who have worked on personal laws—tended to paint a very rosy picture of these reforms. They broadly argued that the Hindu Code Bill played a role in "social transformation", working towards "transformation of social consciousness"[119]Contrary to this position, the feminists rightly argue that use of law by the state cannot ensure gender justice. For example, noted feminist scholar Nivedita Menon argued that the Hindu Code Bill was formed in the image of north Indian upper castes. As a result, the Hindu Code Bill hurt certain women by ending matrilineage and other practices that women benefitted from.[120]Other feminists have argued that the state was biased in favour

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[118]Sinha, 2012, p. 183.

[119] Ibid. p. xxiii.

[120] Amulya Gopalakrishnan, 'Is a common civil code a good idea?' *The Times of India*, New Delhi, November 2, 2015, p. 16. Accessed (online) May 16, 2018, URL, *https://timesofindia.indiatimes.com/india/Is-a-common-civil-code-a-good-idea/articleshow/49623419.cms*

of men and thus any law made by the state could not give justice to women. That is why Western feminists had already abandoned rights-based claims and argued that state-made law was a hurdle to social change. Moreover, they rightly critiqued that the dichotomy between the private and the public was upheld by the law and such distinction was disadvantageous to women.

Mark out the irony. While the Hindu Right opposed reforms in the Hindu Code Bill and called the state to be undeserving to carry out such works, they were never tired of speaking in favour of state-led reforms in the MPL for liberating the "oppressed" Muslim women. The Hindu Right, which opposed the Hindu Code Bill tooth and nail, has now become a great champion of the Muslim women's rights. Another irony is the similarity between the arguments of the Hindu Right in opposition to the Hindu Code Bill and the AIMPLB's opposition to the reforms in the MPL. Both of them contended that the state did not enjoy legitimacy to carry out reforms. But this argument is now forgotten by the Hindu Right, because now they have captured political power and the state, for them, has become an agent of reform.

CHAPTER – 2

FORMATION OF THE ALL INDIA MUSLIM PERSONAL LAW BOARD

وہ ہند میں سرمایہ ملت کا نگہبان
اللہ نے بروقت کیا جس کو خبردار[121]

(*Woh Hind men sarmaya-e-millat ka nigehban*
Allah ne bar-waqt kiya jis ko khabardar[122])

It was a Thursday evening, December 29, 1972. The site was Y.M.C.A. Ground, Maharashtra College, in Bombay. A big convention- attended by thousands of Muslims from Maharashtra and other states -- entered its second and last day. It had been called by Sunni-Deobandi ulama (religious scholars). However, the ulama and community leaders from various sects and organisations also turned up. Also present in the convention were (Muslim) intellectuals, politicians, judges, advocates, and so on. From this platform, the ulama sent out a clear message to the Government that the Indian Muslims would not tolerate any interference in the Muslim Personal Law (MPL). Meanwhile, a group of over two dozen protestors came to the venue and started raising slogans against the agendas of the convention. Their disagreement was with the ulama over the MPL. While the protestors were in favour of reforms and modernisation of MPL, the ulama, on the contrary, considered it divine, and thus, immune from any human interference. Soon, the supporters of the ulama came up to oppose the reformist-protestors. Numerically speaking, the ulama-led group was in majority, while the reformist-protestors were in minority. In the ensuing scuffle, four reformists and one constable were hurt as the supporters of the convention- according to the report of *The*

[121] Cited in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 7.

[122] In India, it's the custodian of community's wealth/ God alerted the AIMPLB in time. Translation is mine.

Times of India[123]- allegedly threw stones. The police intervened and resorted to lathicharge to disperse the crowd. In the police lathicharge, seven persons were reported to have sustained injuries. The police detained over two dozen persons in custody. [124]

Leading the protestors against the ulama was Hamid Dalwai, a Konkani Muslim and a big supporter of reforms and modernisation in the MPL. He alleged that the ulama-led group had treated them with violence as they were in minority. Moreover, he accused the ulama of double standards as they (the ulama) complained of the majoritarian violence while they themselves inflicted violence on the minority section (the reformist-protestors) within Muslims. "How can", he asked, "the ulama now complain about the use of violence by the majority in the country when they themselves use violence on the minority brethren?" [125]

Dalwai's version was contested by an *alim* (religious scholar) present in the convention. Recalling this incident in his biography written almost a decade later, he blamed the Dalwai-led reformist protestors for trying to disturb the convention. As a result, the participants, according to the alim, became annoyed. No sooner had the reformist group- the alim recalled the incident- reached the venue than the participants of the convention "welcomed" them with floaters (*chappal*) and shoes. Had the police, the alim said, not come in time, the situation could have become worse.[126] Note that the alim did not mention anywhere that the ulama-led convention had pelted stones at the reformist demonstrators, an incident reported by *The Times of India*.

It was from this two-day long convention (December 27-28 December, 1972) that the All India Muslim Personal Law Board (AIMPLB) came into being. The alim, present in the convention, was Syed Abul Hasan Ali Nadwi (1914-1999), who headed the AIMPLB as its president for almost two decades till his death. Popularly known as Ali Mian, Nadwi was also at the helm of the AIMPLBs affairs during the Shah Bano controversy, which will be discussed in the third chapter.

Why did the AIMPLB come up in the 1970s? One possible explanation was Muslims insecurity that their cultural identity was under threat. The threat was believed to emanate

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[123] *The Times of India*, 'Five hurt in stoning of Muslim reformists', December 29, 1972, p.5.

[124] Ibid.

[125] He was quoted as saying by *The Times of India*, 'Five hurt in stoning of Muslim reformists', December 29, 1972, p.5.

[126] Syed Abul Hasan Ali Nadwi, *Karwan-e Zindagi*, Vol. 2. Maktaba Islami, Lucknow, n.d., p. 138.

from the state, its institutions as well as the civil society. While the Constitution guaranteed religious freedom and safeguarded minority's cultural and community rights, there was also a parallel discourse, critiquing the minority's distinct cultural identity and seeking imposition of uniformity. The decades from the 1950s to 1960s were dominated by the Congress party- which claimed to be committed to secular principle. While the top leaders of the Congress generally avoided speaking for interference in the MPL, its lower rung leaders— including ministers and state-level leaders as well as the offices of the state's institution such as the Law Commission- spoke differently, accentuating the fear among the minority community.

The perceived threat of losing their cultural identity was also intensified by Muslim communities' gradual decline, compared to other religious communities, in the material domain. Contrary to the principles of secularism enshrined in the Constitution, the Indian Muslims in post-Partition period faced institutionalized discrimination. Noted political scientist Zoya Hasan also implied this when she argued that the plight of Muslims had gradually become worse since the Partition, "If we take 1947 as the baseline, Muslims have suffered downward mobility."[127] Similarly, political scientist Steven Wilkinson refuted the impression that the post-Independence India was a golden period for the Muslims. Instead, "things were never", as he argued, "quite as good for Muslims during the golden era of Congress Party [1947-1967] secularism as many believed".[128] That is why when the AIMPLB was formed, material issues— i.e. declining representation of Muslims, the discriminatory policy towards Urdu etc. - were also raised.

Several factors contributed to downward mobility of Muslims in post- Independence India. A large section of middle-class Muslims migrated to Pakistan at the time of Partition and those who were left behind largely belonged to less affluent classes. The violence of Partition inflicted irreparable damage on Indian Muslims. Worse were the shifts in policies and the structure of postcolonial Government. The communal–majority came to decide as to who would have access to power, reducing the importance of minorities in electoral politics to a large extent. Furthermore, several provisions and schemes related to Muslims were removed. These changes were justified in the name of secularism and the argument was put forth that a "secular" state could no longer keep "religion"-based policies. The special mechanism for the

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[127] Zoya Hasan, *Congress after Indira*, Oxford University Press, 2012, p. 173.

[128] Steven I. Wilkinson, 'Muslim in Post-Independence India' in Knut A. Jacobsen, ed., *Modern Indian Culture and Society*, Routledge, London, 2009, p. 269. The article was first published in John L Esposito, John O. Voll and Osman Bakar, eds., *Asian Islam in the 21th Century*, Oxford University Press, Oxford, 2008.

minority- which was in place during the colonial period placed— was removed, pushing minorities into a disadvantageous position. For example, the postcolonial Indian state did away with separate electorates—a mechanism put in place by the British Government in 1909 to ensure political representation of Muslims—in the name of secularism and it was replaced with joint electorates. With the absence of separate electorates, the joint electorates—justified in the name of secularism and universalism— failed to provide adequate representation to the minorities. That is why political representation of Muslims, since Independence— has been on the decline. To ensure fair representation of Muslims, no new mechanism was put in place. Moreover, Muslim and Christian Dalits -through a presidential order of 1950— were suddenly pushed out from the Scheduled Castes lists and were denied reservation. The untenable argument was given that caste did not exist outside the Hindu religion, and non-Hindus, therefore, were not eligible to be included in the Scheduled Caste group.

Those who had hoped that Partition was the last incident of communal violence were soon proved wrong. Throughout 1950s and 1960s, the communal flame remained ablaze with the state police and other institutions failing to discharge their duties. Hundreds of incidents of communal violence that took place in these periods took a heavy toll on the lives of Muslims. Besides these, they were stigmatised and demonised in the cultural domain. Stereotypes were constructed that Muslim society was opposed to reforms and modernisation. These stereotypes starkly contrasted "backward", "religious", "fanatic", "fundamentalist" and "anti-modern" Muslims with "progressive", "secular", "tolerant", "liberal" and "modern" Hindus. Moreover, Muslims were homogenised and presented as a monolithic group as if there were no class, caste and sectarian differences among them. In addition, they were presented as "manipulated" and "driven" by the conservative ulama. It should be noted that these stereotypes and generalisations about Muslims were informed by orientalist construction of the image of Muslims, a point which will be discussed in detail in the fifth chapter.

These stereotypes were strengthened by the vulgar-liberal discourse. Under the pretext of "radical" individualism and rationalism, religious practices and community rights of Muslims were attacked. Even minority educational institutions were not spared and their special character was projected as being "antithetical" to secularism. The whole controversy around the minority character of Aligarh Muslim University was placed within this context.

The MPL was also attacked by the supporters of Uniform Civil Code (the UCC). Unsubstantiated arguments were put forward that the "unreformed" MPL was a hurdle in the path of "nation-building" and "national integration". Driven by the "lust" for uniformity, the supporters of the UCC saw any mark of difference and pluralism as a weakness instead of strength. Even during the debates on Hindu Code Bill— as discussed in the previous chapter— the reference to the MPL was made. Charges were hurled that Muslims-protected under the MPL- were marrying four wives and producing more children. By such an act, Muslims were not only increasing their population but also changing the demography of the country. In short, the undercurrent of this whole discourse implied that the "unreformed" MPL was a threat to the nation and its development. Moreover, it was seen as a big threat to the demography of the country.

Uniformity: Ploy for Integration

Let me briefly trace some of the key movements in postcolonial India when the issue of the MPL came up. When the issue of Hindu Marriage Act came up in 1953, the Government was asked if it had plans to enact the UCC and extend the Hindu Marriage Act to all, it replied in negative. The then Union Law Minister Charu Chandra Biswas- who was presiding over a symposium on the Hindu Marriage and Divorce Bill- refused to extend Hindu Marriage and Divorce Bill to Muslims. When asked about the UCC, he said that India - being a secular state- could not impose reforms on any particular community. Reforms, he said, should come from within. "We cannot have a uniform patter of law affecting personal relations."[129]

Two years later the Minister for Legal Affairs, H. V. Pataskar, however, gave a contradictory statement. In a radio speech- on August 25, 1955- Pataskar said that the Government was moving towards implementing the UCC.[130] In 1963, the Government set up a Commission to look into the matter of reforms in MPL but this commission- due to opposition from Muslims- could not be set up and the matter was put on the back burner. Speaking in the Rajya Sabha, the upper house of Parliament, on August 22, 1963, the then Law Minister Ashoke Kumar Sen clarified that the Government had no intention to amend the MPL.[131] He reiterated that unless the Muslim community itself wanted, the Government would not go for

[129] *The Times of India*, 'Marriage and Divorce: Uniform Law for all Impossible', January 15, 1953, p.3.

[130] Maulana Syed Shah Minnatullah Rahmani, *Muslim Personal Law Board ka Masalah: Naye Marhale men*, Markazi Daftar All India Muslim Personal Law Board, New Delhi, 2011, pp. 9-10.

[131] Ibid.

the amendment in the MPL. As he put it, “The initiative for reform must come from these communities. It is not the policy of the Government to place itself in the position of the initiator.”[132]

Three years later in 1966, the then Union Law Minister Gopal Swarup Pathak made an ambiguous statement in Parliament that the Government had to “take caution” in the matter of the UCC, triggering a mixed reaction from the members of Parliament. Some of the members criticised the Government for not being “bold enough” to implement the UCC. Prakash Vir Shastri, a member of parliament, went on to link the lack of reforms in the MPL to the high growth of Muslim population in the country. He claimed- citing the 1961 Census- that overall population grew by 24 percent while Muslim population increased by 38 per cent. The Muslim members of parliament- contrary to Shastri- defended the MPL, asking the Government to desist from interfering in it. Moreover, they also opposed imposition of the UCC.[133]

Almost seven months later, the then Law Minister took a different turn and sent a letter to states, seeking their opinions about the UCC.[134] The letter read, “Among the Muslims, however, opinions are divided on this point. Many of them are not in favour of abolishing of polygamy. According to them the shariat (Muslim personal law) is a part of their religion, and therefore, is protected from interference by Parliament under Articles 25 and 29 of the Constitution”. [135] Four years later in 1970, the Government planned to head a panel to look into the issue of personal law.[136] The then Law Minister P. Govinda Menon- speaking in Parliament- said that he was considering appointing a commission- to be headed by the Chief Justice of SC, Hidayatullah- to look into the issue of the MPL.[137]

Two years later in 1970, the Indira Gandhi Government said that it had no intention to interfere in Muslim personal laws[138]. A year later the then Congress president Dr. S.D. Sharma denied the speculation that the Government had any plan to intervene in the MPL.

[132] *The Times of India*, 'Amendments to Muslim Law: No committee proposed', August 21, 1963, p.4.

[133] *The Times of India*, 'M.P.s Resent Government Approach To Uniform Civil Code', May 18, 1966, p.10.

[134] *The Times of India*, 'Polygamy among Muslims', December 5, 1966, p.8.

[135] Ibid.

[136] *The Times of India*, 'Panel on Muslim personal law', May 6, 1970, p.15.

[137] Ibid.

[138] *The Times of India*, 'Personal law change if Muslims seek it', December 29, 1972, p.6.

Speaking at a public meeting organised by the Delhi Pradesh Congress Committee on the 77th birth anniversary of Netaji Subhas Chandra Bose, Sharma said the minorities were entitled to follow their personal laws and his party was not going to introduce changes.[139] A year later, the Deputy Law Minister and Company Affairs Barua told the Rajya Sabha (Upper House of Parliament) that the Government had no intention to change the MPL and any such changes would only come when they were taken forward by the Muslim community.[140] In the same year in 1973, the Prime Minister Indira Gandhi met former Prime Minister of Jammu and Kashmir Sheikh Abdullah-led delegation and discussed several issues that had agitated Muslims including the MPL. Media reports suggested that the Prime Minster Gandhi was learnt to have assured him that the Government had no intention of changing the MPL.[141]

As a whole, the top leadership of the Congress at the centre almost maintained a "no-interference" policy. In the subsequent periods, this line was largely maintained by Prime Ministers Rajiv Gandhi[142] and Narasimha Rao[143]. This, in turn, invited criticism from the communal Bharatiya Janata Party (BJP), which accused the Congress of doing Muslim "appeasement".

However, the position of the same Congress governments in the states was contradictory on several occasions. Besides the state-level Congress leaders, the top officers at state institutions such as the Law Commission also spoke in favour of reforms, intensifying the fear of Muslims.

Particularly noteworthy was the Maharashtra Congress government, which- unlike its own central Government- strongly opposed the MPL and spoke in favour of reforms and modernisation in the MPL and enactment of the UCC. Perhaps, this was also one reason why the AIMPLB chose Bombay as the site for holding its first meeting.

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[139] *The Times of India*, 'Bid to change Muslim personal law denied', January 24, 1973, p.11.

[140] *The Times of India*, 'No change in Muslim personal law: Barua', September 2, 1973, p. 9.

[141] *The Times of India*, 'No plan to change Muslim law: PM', August 19, 1973, p.9.

[142] During the Shah Bano controversy, Prime Minister Rajiv Gandhi told the press in Bangalore that Goverment would not interfere in personal law of any community (read Muslim community). He also clarified that the Government was not going to bring about The UCC. 'But we will not interfere in the personal law of any community', he said. See, *The Times of India*, 'Annul verdict: Shah Bano', November 17, 1985, p.5.

[143] Prime Minister P.V. Narsimha Rao, while addressing an election rally in Silchar, Assam, said, 'When it comes to personal laws, there is no question of imposition. If anybody wants to do it, we will oppose it. See, *The Times of India*, 'Rao rules out meddling in personal laws', April 21, 1996, p.24.He also attacked the BJP for demanding THE UCC. Rao, thus, asked, 'Can a Hindu marry his first cousin?'

Six months before the formation of the AIMPLB, A.R. Antulay (1929 –2014) - Maharashtra's Minister of Law- told the state assembly that the government was going to appeal to the central Government to ban polygamy. He also claimed that on this issue there was unanimity in the assembly.[144] To justify his argument, he cited the Quran and asked the Muslims not to marry more than one wife. He claimed that Islam permitted marrying more than one wife only in some "exceptional circumstances".[145]

However, the interesting part of Antulay's argument was that the UCC-like the ban on polygamy- was in conformity with the Quran. In defence of the UCC, he also drew on the Constitution. But what was most interesting was his reference to the issue of cow slaughter. He clubbed the matters of polygamy, the UCC and cow together. He contended that Islam did not say that cow should be slaughtered. He, thus, criticised those Muslims who argued that cow-slaughter was an "injunction" of the Quran.[146]

The statements of Antulay were perceived as a big threat to the religious and cultural identity of Muslims. If a Government based on Hindu-majority placed a Muslim minister at the front to speak against the MPL and cow-slaughter- a pet agenda of the Hindu Right for mobilising people on communal lines- it was bound to instil a sense of deep fear among Muslims. Thus, Antulay's bill was opposed by several Muslim members including Z.B. Bukhari, G.H. Banatwala (both members of Muslim League) and Umar A.A. Kazi (Congress). [147] Z.B. Bukhari, in opposing the Bill, said such a bill was in contradiction to secularism. He further said that Muslims would never accept a ban on polygamy as marriage was "an integral part of Islam", and this ban amounted to interference in the MPL.

A few months later the Maharashtra Government wrote a letter to the central Government, seeking imposition of the UCC.[148] This was disclosed in the Maharashtra assembly by the state minister for urban development G.S. Sarnayak. This move by the Maharashtra Government was preceded by a resolution passed by the Dalwai-led Muslim Satya Shodhak

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[144] *The Times of India*, 'State for Central ban on Muslim polygamy', July 8, 1972, p. 6.

[145] Ibid

[146] Ibid..

[147] Ibid.

[148] *The Times of India*, 'Uniform civil code for Muslims sought', August 18, 1972, p. 7.

Mandal to ban polygamy. It also demanded the enactment of an anti-bigamous marriage act.[149]

Furthermore, the fear of Muslims was further intensified by the statement of Law Commission Chairman Dr. P. B. Gajendragadkar. Months after Antulay's statement in 1973, Gajendragadkar attacked the MPL, advocating the enactment of the UCC.[150] Gajendragadkar- the former Chief Justice of the Supreme Court— did not stop and went on to question the rights given to minority institutions. He asked the Maharashtra government to consider if it could give "absolute freedom" to minority to run its institution. In order to justify his stance, he argued that absolute freedom was a danger to nationalism. He expressed these views in a meeting in which he was presented with a felicitation volume, "Law, education and society" for his completing the 70th year. [151]

The issues of reforms in the MPL as well as the controversial issue of Vande Mataram cast their shadow on the 1973 Municipal Elections.[152] Besides, the liberal and modernist members of the civil society were also active in attacking the MPL. Hamid Dalwai— a liberal, modernist Muslim who led the protest at the first AIMPLB conference in Bombay- was always at the forefront of attacking the MPL.

Born in an extremely poor Muslim family in a village of Konkan coast, Dalwai (1932-1977) did not have any university degree. In spite of lacking formal education, he wrote a lot in Urdu and Marathi. One such article — which he wrote when he was preparing for S.S.C exam- invited an editorial comment. Soon, his writing skill was recognised and it helped him get a job as a journalist. Apart from being a journalist, he was also an "active" political worker. In his political and social life, he toured all across the country and lectured to Hindu and Muslim audiences. In 1946, he made his first formal association with the Rashtra Seva Dal, which was founded in 1941 by the socialist freedom fighters. As he claimed, he was the first Muslim from his village to join it, which was opposed by his father. As for his political journey, he began it with the Congress. Later, he left it to join the Socialist Party. Then he got associated with a number of other political organisations such as the Praja Socialist Party, the Socialist Party (Lohia's faction), Samyukta Socialist Party [the SSP]. He eventually parted

[149] Ibid.7.

[150] *The Times of India*, 'Gajendragadkar pleads for Muslims marriage law', Feb 4, 1973, p. 5

[151] Ibid.

[152] *The Times of India*, 'Vande Mataram' issue to the fore in Muslim areas', March 6, 1973, p.3.

with the SSP over the party's "line on communalism", which he "totally" disapproved of. He alleged that the SSP had "failed to take up a clear, hard line on Muslim communalism".

Seven years before his death, he also founded the Muslim Satya Shodhak Mandal, which was active in western India. The Mandal is still active in western India, which continues to spread his messages.[153]

During the 1960s and 1970s, Dalwai was at the forefront of a campaign for modernisation and spread of liberal modernist values among Muslims. On April 18, 1966, he led "the first ever *morcha* of Muslim women in Bombay to the Chief Minister, demanding modernisation of Muslim personal laws". Moreover, he spoke bitterly against cultural and minority rights of Muslims. The fallout of all this was that he could not create a mass following among the Muslim community and his influence and appeal was limited to a small section of liberal and modernising elites. His aggressive tone and stereotyped understanding about the Muslim community were to blame for all of these. For example, he spoke once in a public meeting at Sholapur that if he were in power, he would compel all Muslims to shave off their beards.[154] I wonder how shaving of beards is linked to modernisation and reforms of Muslims.

He went on to make several crude generalisations and stereotypes about the Muslim community. While his supporters might claim that his concern was "genuine" and he wanted to see Muslims become "liberal" and "modernised", his tone and analysis were too aggressive and blunt to leave any positive impact on them. Recently, the noted historian Ramachandra Guha praised Dalwai as one of the three Muslim leaders in post-Independent India with a "potential to take their community out of a medievalist ghetto into a full engagement with the modern world".[155] However, Guha does not realise that Dalwai made so many crude statements, which even he could not defend in public. On many occasions, Dalwai's approach to minority Muslims converged with that of the Hindu Right. For example, Dalwai blamed the Muslims for giving birth to majority Hindu communalism. Look at Dalwai's words, "I

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[153] *The Indian Express*, New Delhi, 'We are in crosshairs from all sides', September 20, 2015, p. 15. Accessed (online) May 18, 2018, URL, *http://indianexpress.com/article/india/india-others/we-are-in-crosshairs-from-all-sides/*

[154] 'An Angry Young Secularist: An interview by Dilip Chitre' printed in Hamid Dalwai, *Muslim Politics in Secular India*, Hind Pocket Books, New Delhi, 1972, p. 154.

[155] Ramachandra Guha, 'Liberals Sadly', *The Indian Express*, March 24, 2018. Accessed (online) June 17, 2018, URL, *https://indianexpress.com/article/opinion/columns/liberals-sadly-indias-liberals-must-take-on-both-hindu-and-muslim-communalists-5103729/* You may look at my critic of Guha published entitled 'Ramachandra Guha, Sadly', *The Milli Gazette*, March 24, 2018. Accessed (online) June 17, 2018, URL, http://www.milligazette.com/news/16197-ramachandra-guha-sadly

view extremist Hindu communalism as a reaction to Muslim communalism. Unless Muslim communalism is eliminated, Hindu communalism will not disappear."[156] He did not stop here. He said that the extremist Indian Muslims were Pakistanis who have a dream of converting India, a similar allegation was also made by the RSS Chief M.S. Golwalkar. The "extremist Muslim communalists", as Dalwai contended, "are so much obsessed by their grand dream of converting the whole of India to Islam".[157] Moreover, he held that Muslims, unlike Hindus, had failed to embrace modernity, a reason of their backwardness. "Muslims remained backward because they were religion-bound revivalists who refused to modernize themselves." [158] Note here how Dalwai's lamentation about Muslim regarding not becoming fully modern resembled orientalist stereotypes about Muslims. As I have discussed in the fifth chapter, the well-known orientalist scholar Bernard Lewis- considered the father of the discourse of war on terror as a disguised strategy to wage war on Muslims- had blamed the Muslims for their "failure" to become modernised.

Dalwai's baseless charges against Muslims continued. Muslim leaders hated Sardar Patel because he had united India. Even he called Indian Muslims as Pakistanis. A similar accusation was also made by Golwalkar. As he argued that Indian Muslims "still regard themselves Pakistani because "they believe that their emancipation has been ensured by the creation of Pakistan. They expected Pakistan to deliver them fully someday". [159] Moreover, Muslims in India opposed family planning because they aimed at increasing their population and becoming a majority. It should be noted that the discourse of Muslims' desire for increasing their population and changing the demography was an old trope of the Hindu Right. Such a discourse came into being in colonial period when Hindu communal leaders began to manipulate the colonial census in their own way. Later, they linked the "population explosion" of Muslims to the "unreformed" MPL. Another communal agenda which he articulated was the abolition of "special status" to Kashmir. Anybody would wonder as to how the scrapping of special status of Kashmir is linked to modernisation of Muslim society and the MPL.

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[156] Hamid Dalwai, *Muslim Politics in Secular India*, Hind Pocket Books, New Delhi, 1972, pp. 28-29.

[157] Ibid.

[158] Ibid. p. 31.

[159] Ibid. p. 51.

In my reading, the worst part of all these was his open threat to Muslims that if they did not accept the UCC, they should be deprived of their fundamental right of citizenship and the right to vote. Note his threatening language, "Those Muslims who oppose these reforms should not be entitled to full citizenship rights. For instance, they should have no right to vote.[160] Note that what the RSS ideologue M. G. Vaidya recently uttered is the same threat. In his article in *The Indian Express* in 2016, Vaidya threatened the opponents of UCC (read Muslims) to be ready to face withdrawal of the voting rights if they continued to oppose the UCC. "Those who do not want to be governed by Article 44 [the UCC] will forfeit their right to vote in the elections to the state legislature and Parliament".[161]

Not only protest, demonstration and *morcha*, Dalwai was also at the forefront in creating a public opinion against the MPL in the 1960s and 1970s. For example, his Muslim Satya Shodhak Mandal conducted conferences and surveys to mould public opinion for reforms and modernisation in the MPL. Around the time of formation of the AIMPLB, the Muslim Satya Shodhak Mandal did a survey of divorced women in the Muslim community and brought to the fore the plight of the Muslim divorced women.[162] The Mandal conducted the study on women coming from several parts of India such as Bangalore, Bombay, Bulandshahar, Calcutta, Cochin, Delhi, Hyderabad, Kanpur, Lucknow, Sholapur and other small towns[163]. Among these 500 women who were part of the survey, the oldest was 53 and the youngest was 17-years old. They were teachers, nurses, and housewives. Most of them were uneducated. Some of them, as claimed by the survey, were divorced after 40 years while some within a week. [164]

Month earlier, Dalwai's Muslim Satya Shodhak Mandal in association with Indian Secular Socialist Society held a Muslim Social Conference. It was held in Bombay amidst heavy security arrangement as a threat had been received to blow up the Maratha Mandir, the site of the venue. In the conference, 300 progressive Muslims participated. It is notable that the inauguration began in the morning with the playing of Vande Mataram. The singing of Vande Mataram has been a controversial issue. While the Hindu Right often advocated its

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[160] Dalwai, 1973, pp. 35, 49-51, 56, 108, 116.

[161] *The Indian Express*, November 1, 2016. Accessed (online) June 30, 2017, URL, *http://indianexpress.com/article/opinion/columns/uniform-civil-code-debate-indian-constitution-3731459/*

[162] Hamid Dalwai, 'Divorce among Moslims, *The Times of India*, June 24, 1973, p. 8.

[163] Ibid.

[164] Ibid.

imposition on all, Muslims opposed its singing because they believed that it conflicted with their religion. Monotheism, considered as one of central pillars of Islam, forbids worship of anything except God. The objection to Vande Mataram, Muslims argue, is due to some of its verses that compare motherland with a deity.

Dalwai's conference demanded sweeping reforms in the MPL and imposition of the UCC. It was the fourth time that such a conference was organised by the Muslim Satyashodhak Mandal. In his keynote address, reformist Muslim and noted scholar of Muslim law A.A.A. Fyzee said that retaining "outdated" personal laws for "political convenience (read vote bank politics) was "absurd" and it was defended in order to appease conservative Muslims.[165] In the business session, eventually, several resolutions were passed regarding "Muslims and National Integration", "Education", and "Uniform Civil Code." The conference observed that "the Muslim personal law had not undergone any reform. It called on the government to enact soon legislation for the adaptation of a uniform civil code." [166]

Around the same time in 1971, yet another important activity of reformist Muslims was the organisation of the All India Muslim Women Conference in Poona.[167] It was a two-day long Maharashtra Muslim Women's Conference[168]. An ad-hoc committee was also appointed by the conference. It was appointed to organise an all-India conference. Along with the demand for the UCC, the Conference sought the interference of state and central Government for the "immediately removal of the glaring inequalities in the MPL. The conference made several sweeping statements. One of them was that the Muslim Personal Law (Shariat) Application Act 1937, discriminated against Muslim women to an extent that it had reduced them to "the status of slaves". [169] Moreover, it attacked minority educational institutions and urged the government to set up an institution that could rigorously inspect schools run by Muslims.

Further, the conference demanded that the Government should "ensure that the schools conducted by Muslim institutions do not use public funds for giving an obscurantist slant to the instruction they impart. [170] A national committee of All India Muslim Women Conference

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[165] *The Times of India*, 'Muslim progressives urge sweeping reforms', March 26, 1973, p.6.

[166] Ibid.

[167] *The Times of India*, 'All-India Muslim women's talks planned', December 29, 1971, p.5.

[168] Ibid.

[169] Ibid.

[170] Ibid.

was also formed and social worker Sharifa Tayabji headed it. Faquar Begam (Delhi), Nazma Shaikh (Poona), Mariya Rafai (Poona), Talimunissa Saidani (Bhandara), Mumtaj Momin (Bombay), Nadir Banu (Amaravati) and Shamim Attar (Bombay) were other members of the committee. [171]

Around the same time in January 1972, a three-day long seminar on "Islamic Personal Law in modern India" was held in Aligarh in which the need to reform Muslim personal laws was emphasised.[172] Moreover, a cautious approach towards enacting the UCC was also underscored. As *The Time of India* reported, "The majority of delegates favoured a cautious approach to the legislation of a uniform civil code for the country. But almost all agreed that there was an urgent need for some reforms in Islamic personal law". [173]

Besides these, several liberal scholars also wrote articles in the press and advocated for reforms in MPL. One such article was written by Bombay-based Bohra Muslim Asghar Ali Engineer. He also batted for reforms in the MPL but his analysis- unlike Dalwai's- was much nuanced. Writing an article in 1972, Engineer talked about change in MPL by abolishing polygamy and the practice of triple talaq in one go. He critiqued polygamy on the ground that it was a repugnant practice, like slavery, and he favoured its abolition. "Now the institution of slavery", he argued, "has been finally and irrevocably abolished everywhere. Can any Muslim on the basis of this Koranic verse, claim the right to sexual consummation with any slave girl?" Note that in these lines he critiqued polygamy on the basis of morality and not on the basis of reinterpretation of the holy text. However, in his later writing, he underscored the need for reforms through a reinterpretation of the Quran. Re-reading of the Quran is a method adopted by several women Muslim scholars. One of them is Asma Barlas who does not blame the Quran but its "patriarchal" interpretation for the plight of Muslim women.[174]

Engineer also criticised the practice of divorce. "Though Koran", he said, "has given the right to divorce to women also, it was relegated to the secondary position because of the total subjugation of women in a feudal society." However, he too does not miss a chance to draw on the tradition of the Prophet and the holy text to reinforce his arguments. "Mohammad has

[171] *The Times of India*, 'All-India Muslim women's talks planned', December 29, 1971, p.5.

[172] *The Times of India*, 'Reform in Islamic personal law', January 17, 1972, p.7.

[173] Ibid.

[174] Asma Barlas, *Quran & Women's Liberation*, Critical Quest, New Delhi, 2011 This article was first published in *Communalism Combat*, October, 2009.

also expressed his aversion for divorce in the Koran and has stressed the concept of arbitration. It was the practice in a decadent feudal environment, rather than theory, which gave predominance to the concept of unilateral divorce. It would be upholding the spirit of the Koran, rather than injuring it, if the autocratic and whimsical practice of pronouncing unilateral divorce is put to an end." While he praises the Prophet for giving inheritance rights to women, even though it is half of the share of her brother, he finds fault with some aspects of inheritance law that are related to a child who loses his father. He clarifies it thus: a "child of the father who dies while his grandfather is alive is disinherited and forfeits his entire claim to the property of his grandfather. This is because of the Islamic principle of inheritance, viz. 'the nearer in kinship excludes the remoter' and also because Islam does not recognise the principle of coparcenary or the accrual of the right of inheritance of a child with his birth as recognised by the 'Mitakshara' school of Hindu Law." To argue his case he also referred to the reformed laws in Pakistan such as Muslim Family Laws Ordinance, an issue which is always glossed over by the AIMPLB.[175]

The debate around the MPL was so powerful that a large number of readers wrote several letters to the editor in the newspapers. Sudhir S. Trivedi from Ahmadabad was one such reader, who wrote a letter to *The Times of India* in 1971. His views were also influenced by the reformist discourse and he asked the state to do away with personal laws of Muslims. "There can", Trivedi said, "be no personal laws and non-personal laws. There can be only laws enacted by the State, applicable to all sections of society alike." Claiming that his arguments were based on science, he contended that the concept of personal laws was a myth. He did not think that the MPL had any relevance in an age when people had reached the moon. "Science has shattered many beliefs of religion. In fact man has progressed in spite of religion. Despite these great achievements is it rational to cling to old dogmas on the ground that they are revealed by divinity? No dogma of any relation is an eternal verity." [176]

Against Uniformity

All of these discourses in favour of reforming the MPL and uniformity created a deep sense of fear among Muslims. They, in turn, contributed to a huge mobilisation of Muslims. As a result, several organisations of Muslims became active to address the situation. Against this

[175] Asghar Ali Engineer, 'Muslim Personal Law: the case for change', *The Times of India*, July 2, 1972, p.6.

[176] *The Times of India* 'A Uniform Civil Code', April 23, 1972, p. 6.

backdrop , Maulana Minnatullah Rahmani- then the *amir* (president) of the Imarat-i-Sharia, a prominent Sunni-Deobandi organisation formed in 1921 which is still very active in Bihar, Jharkhand and Orissa- held a conference on the MPL in Patna's Anjuman-i-Islamia in 1968.[177] At that time two big organisations of Muslims Jamiat-i-Ulama-i-Hind and Jamaat-i-Islami Hind and their chiefs Mufti Atiqur Rahman Usmani and Maulana Abul Lais Islahi Nadwi participated. Others who participated were Qazi Mujahidul Islam Qasmi, Maulana Abdur Rauf, MLC, Nazim Jamiat-Ulema, U.P. and Manzur Ahsan Ayjazi. Maulana Usmani presided over and Maulana Abul Lais Islahi Nadwi inaugurated the conference. This was the first united (*mushtarikah awaz*) voice of Muslim community.

The next important conference in this series was held at Deoband on March 13-14, 1972. It was organised by Hazrat Maulana Qari Tayyib Sahib, the principal of Darul Uloom Deoband. The prominent participants in the Deoband meeting were Mufti Atiqur Rahman Usmani (then the president Muslim Majlis-i-Mushawarat), Maulana Syed Mohammad Asad Madani (nazim Jamiat Ulama-i-Hind) Maulana Mujahidul Islam Qasmi (qazi, Imarat-i-Shariah), Dr. Fazalur Rahman (AMU), Maulana Syeed Ahmad Akbarabadi, Dr. Tahir Mahmood, and Maulana Amir Usmani . In this meeting, it was decided that since the voices against the MPL were being raised in Bombay, the first conference would be held in Bombay itself.[178]

Meanwhile, Muslims were also getting mobilised under various platforms to oppose interference in the MPL. For example, the All-India Muslim Political Convention—which called itself to be a central body of Muslims- passed a resolution, calling for the protection of the MPL.[179] In the conference held in 1970, over 300 delegates from all across the country participated, representing 12 Muslim organizations.[180]

The Jamaat-e-Islami Hind, which was in touch with the ulama of Deoband—was also active in the civil society to express its opposition to the interference. The Jamaat-e-Islami Hind organised a protest meeting in Mumbai and held a conference in Ahmadabad in 1972. In opposition to the campaign of the Muslim Satya Shodhak Mandal and the Indian Secular Forum, Jamaat-e-Islami Hind mobilised around two thousand Muslim women from Bombay

[177] Maulana Khalid Saifullah Rahmani, 'Millat-e-Islamia', *Inquilab*, New Delhi, February 9, 2018, pp. 7, 12,

[178] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, pp. 22-23.

[179] *The Times of India*, 'Convention calls for central body of Muslims', December 21, 1970, p.9.

[180] Ibid.

and Thane to stand in solidarity with the MPL and held a protest meeting in Bombay. A resolution was passed unanimously in the meeting, dismissing the views that Muslims women wanted to end polygamy. The protesting women argued in favour of religious freedom guaranteed to them by the constitution of India. [181] The speakers of the meeting were mostly college girls and school teachers. They criticised the Muslim Satya Shodhak Mandal and the Indian Secular Forum for creating a "false" impression that Muslim women were in favour of scrapping of MPL. In order to highlight that they represented the "authentic" voice of Muslim women, they claimed that the number of Muslims- who attended the Poona meeting that demanded reforms in the MPL- was "negligible". [182] "We Muslim", said one of the speakers in the protest meeting, "women have all the freedom that we aspire for. There was a time when girls were buried alive at birth and when widows were not allowed to live. Women have right not the freedom to terminate their marriage and only those men who can support more wives than one are allowed to marry a number of times."[183] The conference warned the central Government that if Shariat is amended, the Islamic community would revolt.[184] Note here the struggles between the "reformist" Muslim women and the women belonging to the Jamaat-e-Islami Hind over who truly represented Indian Muslims.[185] Against the "reformist" Muslims, the protest meeting of the Jamaat-e-Islami Hind dismissed the demands of Poona conference. The "reformist" Muslims were, therefore, called "disastrous storm- in opposition to "a wind of change"- which would blow to "smithereens the Muslim society", if they were not averted. The conference of the Jamaat-e-Islami Hind was attended by a large number of women, who were clad in burqa. It also contended that the UCC was a violation of secularism, defending that "Muslims have a right to have their own law in India" [186].

Meanwhile, a new controversy came up in the form of Child Adoption Bill, 1972, which attempted to pave the way for adoption of children. The proposed Bill had the provision that if a Muslim couple adopted a child then it would have all the rights of a biological child. The

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[181] *The Times of India*, 'Muslim women oppose change in personal law', January 24, 1972, p.5.

[182] Ibid.

[183] Ibid.

[184] *The Times of India*, 'Revolt threatened on Shariat issue', March 24, 1972,p. 11.

[185] Ibid.

[186] Ibid.

Bill was seen as being in conflict with Shariat by the ulama. [187]They held that Islam- in spite of the fact that it encouraged all kinds of help to an orphan child— did not allow Muslims to adopt a child and give her/him all the rights which the biological child was entitled to get. The introduction of the Bill worked as an immediate spark for the ulama to initiate formation of an institution that would work as the protector of Muslim community, particularly in the field of their personal laws.

Formation

In a conference held in Bombay on December 27, 28, 1972, the AIMPLB was finally formed. However, the formal establishment of the AIMPLB came in 1973 in Hyderabad. Gripped by a deep sense of fear, Muslim organisations— belonging to several prominent sects and schools of thoughts- came together. Maulana Qari Mohammad Tayyib of Dar-ul Uloom, Deoband presided over the convention. While Dr Yusuf Najmuddin, then rector of the Dar-ul Uloom inaugurated the convention. The representatives of the Muslim Majlis, Lucknow, Jamaat-e-Tabligh, Delhi, Jamiat-e-Ulema-e-Hind, Jamaat-e-Islami Hind, Ittehad-ul Muslimeen, Hyderabad, the Islamic Research Institute, Lucknow, Sulemani Bohra Community and the Sunni Jamaat attended the convention. People from the Aligarh Muslim University, and some Congress leaders also attended the meeting. The AIMPLB also claimed that the convention was “representative gathering of the Muslims of India” representing “all the schools of thought and shades of opinion and all religious, political, social, and cultural institutions, organization and societies, unanimously and categorically”.[188]

The ulama of Sunni-Deoband played the role of leadership. Maulana Tayyib expressed concerns over the fact that an attempt was being made to create the impression that the Islamic Laws were “outdated” and “cruel”. The speakers in the convention- while calling the MPL “immutable”- expressed their opposition to attempts of “interference in the religion of Islam”. In their defence, they broadly argued that the MPL was “the law of God” and it, therefore, could not be amended by legislation. [189] The convention also condemned the

[187] *The Times of India*, 'Muslim women oppose changes in personal law', May 1, 1973, p.5.

[188] ‘Muslims Opposes Change in Personal Law’, *The Hindustan Times*, December 29, 1972 in A. G. Noorani, (ed.) *The Muslims of India: A Documentary Record*, Oxford University Press, 2005, p. 156.

[189] *The Times of India*, 'Shariat laws sacred, avow Muslims', December 29, 1972, p. 5.

attempt to impose UCC by some people, referring to Dalwai and his supporters and followers.[190]

Other issues facing the Muslim community also came up. For example, Hindu communal forces had for long demonised Indian Muslims and had accused the latter to have linkage with Pakistan. Not only the RSS ideologue M.S. Golwalkar but also the so-called liberal, humanist and rationalist Dalwai too hurled such accusations. Bashir Ahmed Syed, the retired judge of Madras High court condemned all these anti-Muslim activities in these words, "We are born here. We shall die here and our loyalties lie with India". [191] He also spoke in favour of the rightful place for Urdu. [192]

The convention also categorically refuted the allegation that the formation of the AIMPLB was an act of "communalism". Responding to its opponents, the convention said that the formation of the AIMPLB was neither an act of communalism (*firqa parasti*) nor that of opposing its own country (*watan dushmani*). Instead, it argued that its formation was made to oppose the UCC, which was, according to the AIMPLB, being imposed on Muslims in post-Independence India.

The first president of the AIMPLB was Mohammad Tayyib Qari and Minnatullah Rahmani, the first General Secretary of the AIMPLB, was elected. Ali Mian became the second president of the AIMPLB after the demise of Tayyib Sahib on December 28, 1983.[193] Qazi Mujahidul Islam Qasmi and Mohammad Rabey Hasani Nadvi, the current president, also rose to become the head of the AIMPLB. They all belonged to the Sunni-Deobandi group. That is one of the main reasons why the AIMPLB has been criticised for being a site of Sunni-Deobandi dominance. However, the AIMPLB did accommodate non-Sunni Deobandi Muslims to other posts. Since it claimed to be an "umbrella" organisation of the Indian Muslims, it offered the post of the vice president to other sects and schools of thought such as Barelvi, Shia, Ahle Hadees and Jamaat-i-Islam. For example, the vice presidents of the AIMBPLB were Maulana Mufti Burhanul Haq (Barelvi), Maulana Muzaffar Hussain Kachhkachhwi (Barelvi), Maulana Mohammad Mohammadul Hussaini, Sajada Nashin

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[190] *The Times of India*, 'Shariat laws sacred, avow Muslims', December 29, 1972, p. 5.

[191] Ibid.

[192] Ibid.

[193] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 24.

Gulbarka Sharif (both from Barelvi school), Maulana Kalbe-Aabid Mujtahid (Shia school), Dr Abdul Hafiz Salafi, Mukhtar Ahmad Nadwi (the Jamiat Ahle Hadees Hind) and Hazrat Abul Lais Islahi Nadwi, Maulana Yusuf Sahib, Maulana Serajul Hasan (Jamaat-i-Islami). [194]

In the convention, Maulana Minnatullah Rahmani, Amir-e-Imarat-e-Shariat, moved the resolution opposing any amendment of the MPL. The argument was given that the MPL was protected under article 25 of the Constitution. As a fundamental right, article 25 guarantees minority their religious freedoms. As article says, "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion". It is article 25 that the AIMPLB uses to oppose the UCC and interference as well.

Speaking in the convention, Ibrahim Suleman Sait, general secretary of the Muslim League, deemed it a conspiracy to end Muslim identity in the name of UCC. Thus, he said, that "The eighty million Muslims will not tolerate this and if it comes, it will be on our bodies".[195] K Abid of Shia Convention, however, said that article 44 [the UCC] was "subordinate" to article 25.

The speakers of the AIMPLB expressed their views- as summarised by *The Hindustan Times*— that if they were deprived of their right to follow the MPL, they would lose everything. "We have lost everything- the government, our honour, property, and the Urdu language— and if attempts are made to take away from us our religion and the personal law given by God himself, we shall be left with nothing to fall back upon".[196]

In the convention, several resolutions were also passed. In resolution no. 1, the AIMPLB expressed its anger over the attempts to impose the UCC. "The Muslims of India are greatly perturbed over the attempts being made through various legislative assemblies and enactment to abrogate their personal law and to prepare grounds for introducing a uniform civil code."[197] The AIMPLB also rejected any interference in the Shariat, adding that "the

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[194] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 24.

[195] Cited in 'Muslims Opposes Change in Personal Law', *The Hindustan Times*, December 29, 1972 in A. G. Noorani, (ed.) *The Muslims of India: A Documentary Record*, Oxford University Press, 2005, p. 156.

[196] Ibid.

[197] Ibid.

injunctions of the Islamic Shariat are not wanting in any addition nor do contain anything undesirable requiring to be removed".[198]

In its resolution, the AIMPLB also opposed the views that the MPL is not based on the Shariat. As it said, "the Muslim personal law is a part of their religion and it is not proper for a Muslim to disregard the injunctions of Shariat; nor can he accept any decision which prohibits what is lawful in Islam and sanctions what is unlawful." [199]

Moreover, it also rejected the stand that state can make interference in the MPL by enacting laws. As the resolution said, "Parliament or state legislative assemblies have no right to amend or abrogate Islamic Shariat and that it is only the recognized and trusted Ulema of respective Islamic sects and schools of thought who can decide finally which laws are or are not in accordance with or related to the Islamic Shariat." [200]

Without naming Hamid Dalwai and other reformist-liberal Muslims, the resolution expressed "resentment at the reprehensible attempt being made by certain persons, who are preparing ground for interference in the Islamic Shariat under the guise of reforming the Muslim personal law". One of the main arguments of liberal Muslims has been that the MPL should also be reformed because many Muslim/Islamic countries had already introduced several reforms. The resolution said that "some changes are effected in the Muslim personal law in Muslim countries; these instances cannot constitute justification for amendment or abrogation of the Shariat laws."[201]

The point of difference was also articulated. It has been a sustained position of the Deoband ulama that Muslims would be working in close cooperation with Hindus in the public/material domain. But in the cultural-religious domain, the Muslim community must be allowed to maintain its distinct cultural and religious identity and the "Hindu-majority" state should not interfere in it. The same logic of autonomous cultural domain was articulated here, which linked protection and preservation of the MPL with maintaining a distinct cultural identity. "This convention also believes that retention of personal law of a community is necessary for the preservation of the identity of a people and [to] ensure its distinctive entity

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[198] Ibid.

[199] Ibid. pp. 157-159.

[200] Ibid..

[201] Ibid.

and cultural characteristics, and no Muslim can give up his religious individuality and distinctiveness and his cultural characteristics at any cost." [202] Moreover, it also drew on the argument of cultural pluralism. "It is an acknowledged principle of the civilized world that every religious and cultural unit has a complete right to protect and preserve its own religion and culture. Further, if an attempt is made to destroy the religious and cultural identity of that people, it is considered equivalent to genocide. Therefore, the architects of free India, who have given full guarantee as to fundamental rights in the Constitution, believed that the Indian people would not let any attempt succeed calculated to destroy the spirit of the Constitution or to deprive a community of its constitutional rights." [203]

Thus, the convention opposed any "attempt to abrogate the Muslim personal law, which is an integral part of their religion". [204] It also opposed replacement of the MPL by the UCC, or its imposition, as "a negation of the international Charter of Human Rights, is equivalent to cultural genocide and is in contravention of the fundamental rights enshrined in the Constitution of India. Any such step would amount to compelling the Muslims to go against the Holy Koran and the Sunnat, which is absolutely intolerable for any Muslim under any condition." Further, it drew on Fundamental rights to criticise the UCC, "This convention also believes that Article 44 of the Constitution pertaining to directive principles of state policy is subservient to the article guaranteeing the fundamental rights and hence Muslim personal law is outside the purview of Article 44."[205]

Apart from protecting the personal laws, the convention also said that the AIMPLB would also be working for making Muslims aware of Shariat and the MPL so that they could lead a life as per the light of religion, "This convention also feels the need to educate Muslims in religious teachings, concerning the family life and social life, so that they may be obeying these injunctions and be able to build up the society on virtuous foundations." [206]

The resolution also spelt out the functions of the AIMPLB. The important functions of the AIMPLB were identified. It will take "all steps necessary and organize struggle for the

[202] 'Muslims Opposes Change in Personal Law', *The Hindustan Times*, December 29, 1972 in A. G. Noorani, (ed.) *The Muslims of India: A Documentary Record*, Oxford University Press, 2005, pp. 157-159.

[203] Ibid.

[204] Ibid.

[205] Ibid.

[206] Ibid.

retention and preservation of the Shariat laws". Besides this, it would "be responsible to constitute a permanent committee which shall scrutinize the existing enactments and also the different bills introduced in Parliament or state legislatures from time to time and circulars of Central and state governments with a view to finding out their effect on the Muslim personal law." It will also "prepare a comprehensive plan for the propagation and implementation of Islamic family laws. It shall also have power to form an Action Committee if needed, to organize a movement for the protection of the Muslim personal law and further implementation of the decisions of the AIMPLB."[207] As stated above, the AIMPLB also spends much of its energy in propagating its views through pamphlets, booklets and other materials on various issues from time to time. [208]

The resolution three of the AIMPLB talked about who could be its member. According to the resolution, the members of the AIMPLB would comprise Muslim scholars, experts, jurists, other eminent persons of the *Millat* (community). Moreover, it aimed at giving representation to "various sects and schools of thoughts". [209]

Apart from protection of the MPL from interference, the AIMPLB has been involved in various issues. It opposed the UCC, the Adoption Bill, and excesses of emergency. Moreover, it also issued "expressions of regrets" over Shia-Sunni riots at Lucknow and Kanpur. Then it opposed the "establishment of Tarkunde Commission to enquire into the internal affairs of Dawoodi Bohra community". It also took up the work of social reform among the Muslim community and worked for "popularization of Islamic Shariah". Besides, it took up the issue of "section 125 and 127 of the Code of Criminal Procedure Section, Section 13(5) of Income Tax act", the "registration of Nikah", Central Waqf Act (1984 Amendment), family court, and Darul Qaza. It also held "deliberation on the non-application of Shariah Act 1937". It later published a "compendium of Islamic Law". It took up the case of the Babri Masjid and got active during the Gujarat genocide and against the malicious campaign to demonise madrasas. It opposed the imposition of *suryanamaskar* and Vande Mataram.[210]

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[207] 'Muslims Opposes Change in Personal Law', *The Hindustan Times*, December 29, 1972 in A. G. Noorani, (ed.) *The Muslims of India: A Documentary Record*, Oxford University Press, 2005, pp. 157-159.

[208] Ibid.

[209] Ibid.

[210] 'All India Muslim Personal Law Board (Achievements & Activities): 1972-2009', published by All India Muslim Personal Board, New Delhi, 2009

Four decades have passed since the AIMPLB was founded in Bombay. Its success lies in the fact that it has been at the forefront of opposing interference in the MPL. Other boards—parallel to the AIMPLB—have been formed in the last 15 years. But no breakaway group has matched the activism and social support of the AIMPLB. Headquartered in Delhi, the AIMPLB- despite its dominance by the Sunni-Deobandi Muslims- has been largely successful in building coordination among different sects and organisations of Muslims. It has, however, not been spared from scathing criticism on the gender question, particulary during the Shah Bano controversy and recently with regard to the triple talaq issue. Since it is not possible to discuss all the activities of the AIMPLB in a single work, I decided to take up the question of gender. Gender and the AIMPLB is the theme of the next chapter.

CHAPTER – 3

GENDER AND ALL INDIA MUSLIM PERSONAL LAW BOARD

Nilofar, a Muslim woman, was again at risk of being divorced by her second husband, Haider, a poet and editor of an Urdu magazine. Nilofar and Haider knew each other since their college days when they fell in love with each other. But fate had something else in store for them. He didn't know that she was already engaged with Wasim, a rich business man. Eventually, Nilofar and Wasim got married. Nilofar- which literally means lotus— had a lot of expectations from her husband Wasim. She thought that he would fill her life with all happiness. But she soon felt disappointed and her life turned wilted. Busy with his business, Wasim failed to give time, care and attention to his wife. Their relations, thus, began to get strained. It was ironical that her husband divorced her on the first marriage anniversary. Angered by her inability to attend to guests who turned up in the party of their first marriage anniversary, Wasim snapped marital ties and banished her from home by uttering three times *"talaq, talaq, talaq"*.

Nilofar was not the first or the last woman to suffer at the hands of her husband. Her fate is shared by thousands of Muslim women who are unilaterally divorced by their husbands through the "wrong" yet "valid" practice of triple talaq. Triple talaq refers to a practice of unilateral divorce when husbands utter/text talaq, talaq, talaq three times at one go. This practice remains a controversial issue among Muslims as not all of them uphold it. While the Sunni Hanafi Muslims- who constitute the majority of Muslims in India--hold that triple talaq is "wrong", yet it is "valid" and, thus, binding. Contrary to them, the Sunni Ahle Hadees and Shias Muslims reject the triple talaq.

The All India Muslim Personal Law Board (the AIMPLB) is dominated by the Deobandi-Hanafi sect and in its interpretation, the triple talaq, though "wrong" and "sinful", is still acceptable and valid. For example, issuing a fatwa on December 25, 2016, the Darul Ifta of Deoband Seminary, said that "giving three talaqs at a time is *satanic* practice and *sinful* act. A

Muslim should never give three talaqs. But if someone gives three talaqs in a single meeting ignoring the ruling of Shariah, then all the three talaqs shall take place without a doubt, it is also a unanimous ruling of the Shariah". To justify triple talaq, the Deoband muftis drew on medieval jurists. [211] "It is the opinion of tabiyeen, tabe tabiyeen, Imam Abu Hanifah and his companions (may Allah have mercy upon them), Imam Malik and his companions (may Allah have mercy upon them), Imam Shafi'i and his companions (may Allah have mercy upon them), Imam Ahmad and his companions (may Allah have mercy upon them), the Fiqh scholars, Muhaddithin etc that if someone gives three talaqs to his wife, all the three talaqs shall take place. However, the person shall be sinful".[212]

Opposed to the medieval legal schools, the Sunni Ahle Hadees and the Shias reject the practice of triple talaq. On occasions, the issue of triple talaq generated controversy among Muslims. But the mainstream discourse often tends to paint Muslims as a "monolithic" group with no internal differences along caste, class and gender lines. One such controversy came up in 1993, involving the Ahle Hadees (*ghair muqallid*) and the Jamiat Ulema Hind, a prominent organisation of the Deobandi Hanafi Muslims. When the Ahle Hadees issued a fatwa[213] denouncing triple talaq, the Jamiat Ulema Hind protested it. The then President of the Jamiat Ulema Hind, Maulana Syed Asad Madani, said that the Ahle Hadees should desist from interfering in the matter. Moreover, Madani accused the Ahle Hadees of misinterpreting the Quran, and the fatwa issued by it was out of context and it put forth a "mischievous proposition". Responding to this, the Ahle Hadees President Hafiz Mohammad Zaki Bari accused the Jamiat Ulema Hind of misleading Muslims and putting the Ahle Hadees sect in the "dock". Further, Bari said that opposition to Ahle Hadees' fatwa by Madani on triple talaq amounted to making an effort to deprive Muslim women of their rights given in the Quran.[214]

The recent controversy around the Muslim Personal Law (the MPL) and the AIMPLB has also been around the triple talaq issue. The Supreme Court recently declared the practice of triple talaq unconstitutional. The judgment was welcomed by a large section of liberal and progressive sections. While the cases against triple talaq had been filed by half a dozen

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[211] Stress mine. Accessed (online) June 29, 2018. URL, *http://www.darulifta-deoband.com/home/en/Talaq-Divorce/146809*

[212] Ibid.

[213] Fatwa is an advisory legal opinion issued by the mufti (who is trained in jurisprudence). Note that it is not binding on anyone.

[214] *The Times of India*, 'Muslim sect flays "propaganda"', July 8, 1993, p.12.

divorced Muslim women in the Supreme Court (the SC), and some progressive Muslim women's organisations have been campaigning for its abolition, the Hindu nationalists took keen interest in it and used the occasion to attack Muslim community and called them "backward", who were oppressed "their" women.

After her divorce, Nilofar was bereft of all social security. The post-divorce life for Nilofar turned out to be very challenging. She ran from one office to another to get a job facing insult and humiliation. At times, attempts were made to sexually assault her. Meanwhile, Haider- her first lover, who still loved her- entered her life again. He not only offered her a job at his magazine office but also made a marriage proposal again, which she finally accepted. Unlike her earlier marital life, conjugality between Haider and Nilofar one turned out to be better. Haider, unlike Wasim, gave her sufficient time, attention and love. Meanwhile, Wasim, the first husband, had realised his mistake and was desperate to get Nilofar back. But how could he get back Nilofar whom he had scolded, divorced and threw out of home?

On consultation, an Imam told Wasim that Islam did not allow a divorcee to remarry the divorced spouse, unless the divorced spouse is re-married to another person and divorced again. This controversial practice is known as *halala* in Islamic Laws and the women activists are also campaigning for its abolition. Wasim kept persuading Nilofar for remarriage but she did not show any interest. As per the Islamic Laws of halala, if Haider divorced Nilofar, she would then be able to remarry Wasim. The continued persuasion by Wasim made Haider suspicious. He began to suspect that Nilofar still loved Wasim and she was just waiting for Haider to divorce her.

Again the fateful day in her life turned out to be the first marriage anniversary. On this occasion, Haider, in the presence of Wasim, told Nilofar that he [Haider] was willing to divorce her in order to facilitate her re-marriage with Wasim, her first husband. On hearing this, Nilofar's heart broke because Haider- whom she considered most virtuous after the Prophet-- now began to doubt her fidelity and love, and his male ego was prepared to give her divorce. Reacting to Haider's proposal of divorce, she burst in anger, "I am not your slave girl (*laundi*) that you will free (divorce) me. Nor am I your chattel you can give it away in charity (*khairat*)." Though she raged against Haider, her real target was the patriarchal society when she asked Haider, "I want to ask you if a marriage cannot be solemnised without my consent, why is then my consent not required when a marriage dissolves or it gets dissolved?"

This story of Nilofar, Wasim and Haider is taken from the plot of the Hindi/Urdu film *Nikaah* (marriage contract) produced by B.R. Chopra and released in 1982. [215] This, however, has less to do with the cinematic representation of the characters and issues involved in the plot, and more with the parties in the contract (*Nikaah*). It has to do in fact with the question with which the female character like Nilofar comes up with regard to the contract itself. The *Nikaah* which involves two parties- that is, the female and the male- founds itself on the basis of consent of both the parties. Paradoxically, the termination of the contract abruptly through the practice of *triple talaq* doesn't seek the consent of the female. The question which the female character raises indeed has to do with this contradiction of the contract which can stand dissolved if the male decides to terminate it through the practice of triple talaq. The question that she is raising as to how come a contract which is purportedly based on her consent, stands dissolved without her consent being anywhere in the *decision* of its termination.

The centrality of the question, however, resides elsewhere. It resides in the fact as to how the male can unilaterally and abruptly decide the fate of the contract. In other words, where does the male extract the power to do so? At least such exclaim will keep ever the female character like Nilofar to inquire about the source of the power of such unilateral decision about the fate of the contract. Let us stop here since to deal with this question in detail goes beyond the scope of the study which has been taken up.

However, the theme of the film tried to portray the plight of thousands of Muslim women who are victims of the whim and caprice of their husbands. It is often ignored that the Islamic Laws does give the woman a right to annul marriage but the patriarchal society comes in the way of its implementation. The Islamic Laws also give scope to women to initiate divorce and get rid of their husband. In this way we can say that even though Islam does not give unilateral power to husband to divorce her wife, such practices are in force. Through the fire of divorce, a woman's life, in no time, is reduced to ashes. Around the time when the film

[215] Note that the original name of the *Nikaah* film was 'Talaq, Talaq, Talaq', according to the film's lyricist Hasan Kamaal. In fact, he asked Chopra for changing the name of the film but Chopra did not pay any heed to him. Kamaal's argument was that viewers did not like negative names of films. Another fear disturbing Kamaal was that if a Muslim husband, having watched the film, came back home and if he was asked about which film he had watchd and if he replied, 'Talaq, Talaq Talaq'. It may be interpreted by any Maulvi as the dissolution of marriage. But eventually, the original name of the film had to be changed because a producer of film had already registered his/her film's name as 'Talaq'. Later the producer filed a case, compelling Chopra to change its name. See, Hasan Kamaal, 'Personal Law Board ki Ifadiyat par Swal', *Inquilab*, New Delhi, August 28, 2017, p. 9.

Nikaah was released, another Nilofar was struggling hard in her post-divorce life. The struggling woman was Shan Bano Begum, from Indore, Madhya Pradesh. At the age of 62, she was divorced by her husband and she filed a case in the court, seeking maintenance from him.

Shah Bano Case (1985)

In 1932, Shah Bano married Mohammad Ahmad Khan, an advocate by profession. Out of their marriage, three sons and two daughters were born. In 1975, Ahmed Khan (the appellant) "drove" Shah Bano (the respondent) out of his home. In April 1978, she filed a petition against the appellant, seeking maintenance under section 125 of the Code of Criminal Procedure in the Court of the Judicial Magistrate (First class) Indore. She asked for Rs 500 per month as maintenance in light of the fact that the professional income of her husband was estimated to be about Rs 60,000 in a year. Eventually, Khan divorced Shah Bano on November 6, 1978. Later Khan said that he was not liable to pay maintenance allowance because he had already paid Rs. 200 per month for about two years. He also said that he was not bound to pay Shah Bano any more allowance because he had already paid a sum of Rs. 3,000 by way of "dower" (*Mahr*) during the period of *iddat,* a period referring to three menstrual cycles after the divorce, or three lunar months since the date of divorce, or the period in-between. If she is pregnant, the period of iddat is extended to child's delivery or the termination of pregnancy. Contrary to wishes of Khan, the Magistrate asked him to pay "a princely sum" of Rs. 25 per month to the respondent by way of maintenance. The amount was later increased by the High Court of Madhya Pradesh to Rs. 179.20 per month. Finally, the dispute was brought to the Supreme Court (SC). The first two-three benches of the SC heard the matter and one bench held that Section 125 of Code of Criminal Procedure Code was applicable to Shah Bano as well. On the Contrary, another bench comprising Fazal Ali and J.J. Varadarajan doubted the previous ruling and called for reconsideration by a larger bench. The case, thus, was referred to a large bench, comprising Chief Justice Y Chandrachud, Justice D.A. Desai, Justice O. Chinnappa Reddy, Justice E.S. Venkataramiah and Justice Rangnath Misra.

On April 23, 1985, Chief Justice Y Chandrachud administered his judgment. In the ruling, he said that a divorced Muslim wife is also "entitled to apply for maintenance under section 125 of Criminal Procedure Code". Against the stand of Ahmed Khan, the Chief Justice held that

section 125 did not put any “limitation”. In short, the exemption of Muslim husbands to pay maintenance under the Muslim Personal Law was unjustified.

According to the SC ruling, section 125 is applicable to all “irrespective of the religion professed by her or by her Husband”. “Whether the spouses are Hindus or Muslims, Christians or Parsis, Pagans or Heathens”, the Chief Justice held, “is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that section125 is a part of the Code of Criminal Procedure not of the Civil Laws which define and govern the rights and obligations of the parties belonging to particular relations, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. It would make no difference as to what is the religion professed by the neglected wife, child or parent”.[216]

What angered the AIMPLB and the Muslim leaders was the interpretation by the Chief Justice of the concept *mta'a*. The Chief Justice, in his ruling, argued that paying *dower* at the time of divorce was not fulfilment of all the obligations on part of the husband. His argument was that the amount paid as dower was not a substitute for the maintenance allowance paid by husband to the divorced wife. As he said in the ruling, “If Mahr is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the marriage. Therefore no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce”.[217]

To the displeasure of the AIMPLB, the Chief Justice contended that his judgment was neither in conflict with the Quran nor with the MPL. “The true position”, the Chief Justice said, “is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. Thus there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself. Aiyat no. 241 and 242 of “the Holy Koran” fortify that the Holy Koran imposed an obligation on the Muslim husband to make provision for or to provide

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[216] *Mohd Ahmed Khan vs Shah Bano Begum.* The Supreme Court delivered its ruling on April 23, 1985. Accessed (online) June 28, 2018, URL, *https://indiankanoon.org/doc/823221/*

[217] Ibid.

maintenance to the divorced wife. The contrary argument does less than justice to the teachings of Koran."[218]

While the Chief Justice was hearing the case of maintenance, he went beyond the scope of the case and made a highly political comment about the necessity of the enactment of the Uniform Civil Code (the UCC) for "the national integration". In his observation, he said, "Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."[219]

The English and Hindi media largely welcomed the ruling. For example, the editorial of *The Times of India* welcomed the ruling and called it a "historic", "landmark", "revolutionary" judgment. This judgment upholds the constitutional values of "equality before the law" and "the dignity of individual" and "fundamental rights".[220] As discussed in the first chapter, both liberal-modernists as well as Hindu nationalists have been supporters of uniformity in civil laws. During Constituent Assembly debates and afterwards, they advocated the imposition of the UCC. The discourse of uniformity in laws has often been seen with suspicion by supporters of legal pluralism, who think that uniformity in laws is a rather bad option. Instead, they favoured legal pluralism. Facing the assault of majoritarianism and erosion of minority culture from the public sphere, minorities often doubt the talk of uniformity. That was one of the reasons why the Shah Bano judgment made a large number of Muslims come out on the street to and demand annulment of the judgment.

[218] *Mohd Ahmed Khan vs Shah Bano Begum.* The Supreme Court gave its ruling on April 23, 1985. Accessed (online) June 28, 2018, URL, *https://indiankanoon.org/doc/823221/*

[219] Ibid.

[220] *The Times of India,* 'A Historic Judgment', April 9, 1987, p. 8.

Another reason for such huge opposition from Muslims was the close connection between the question of gender and the MPL. It should be noted that the colonial modern state already chiseled several components out of Shariat and what was left was related mostly to the question of women. Historian of law, Robert D. Baird, said that "Most of issues related to personal law are really about issues of gender".[221] Similarly, Maulana Khalid Saifullah Rahmani, secretary of the AIMPLB, underscored the centrality of women question in the MPL in these words. "Most of the issues related to the Muslim personal law are connected (*marboot*) to women".[222]

As discussed in the previous chapters, the ulama-led Muslim community was at the forefront of enactment of the Shariat Act, 1937. Their campaign with respect to the MPL was mostly around the woman question. They opposed fixing of the age of marriage. They opposed customary laws, which went against the Shariat particularly those which deprived Muslim women of their right to inherit parents' property. They opposed uniformity in laws and stood for polygamy.

One plausible explanation for the strong opposition to any (external) interference on the women question has to do with the centrality of women in the construction of the identity of a community. Not only Islam but Hinduism too created the identity of their community and nation around the figure of woman. Eminent subaltern historian Partha Chatterjee showed the centrality of women in the discourse of colonial modernity. Through his model of inner/spiritual and outer/material domain, he argued that the natives created and sought to maintain an autonomy in the matter of culture, immune from the legislation of alien foreign rulers[223]. Similarly, the ulama in the colonial and postcolonial periods realized that they were no longer under the Islamic/Muslim Government. That is why they looked at any interference in the MPL- particularly those related to woman question— as a direct threat to their cultural and religious identity. Both in the colonial and post-colonial period, they sought an assurance from the Government to desist from its interference in the MPL, or the inner domain of their

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[221] Gerald James Larson, 'Introduction: The Secular State in a Religious Society' in Gerald James Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment*, Social Science Press, Delhi, 2001, p. 9.

[222] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 29.

[223] Partha Chatterjee, 'The Nationalist Resolution of the Women's Question' in Kumkum Sangari and Sudesh Vaid, eds., *Recasting Women: Essays in Colonial History*, Zubaan, New Delhi, 1989

community life. The judgment of the SC was seen as an attempt to make a breach in that trust.

Against the Judgment

The Supreme Court Judgment came two weeks after the Kolkata conference of AIMPLB. At that time the president of the AIMPLB was the eminent Arabic and Islamic scholar Ali Mian. The AIMPLB saw the ruling as "an open interference in Islam and Shariat" and described it shocking for the Muslim community. The main objection of the AIMPLB was on many grounds. One of them was the extension of the period of allowance beyond the period of *iddat*.

On May 14, 1985, the Working Committee of the AIMPLB held its meeting in Delhi to discuss the issue. The meeting was able to draw leaders of several prominent Muslim organisations, both religious and political. Apart from the officer-bearers of the AIMPLB such as Ali Mian (president), Minnatullah Rahmani (general secretary), Abdul Lais Nadvi (the Jamaat-e-Islami Hind), Ebrahim Sulaiman Sait (M.P. from the Muslim League), Maulana Asad Madani (the Jamiat-ul-Ulema), Sultan Salahuddin Owaisi (M.P. from the Ittehadul Muslimeen), Rahim Qureshi (the Tameer-e-Millat), Mujahidul Islam (the Imarat-e Sharia, Bihar), Maulana Kalbe Abid (the Shia Conference), Syed Shahabuddin (former M.P.), Shaikh Zulfiquarullah (the Muslim Majlis), Muzaffar Hussain Kachchochavi (former M.P.), Ahmed Ali Qasmi (the All India Majlis-e-Mushawarat), Mazoor Alam (advocate) and Mr. Zafaryab Jeelani (Advocate) were, among others, present in the meeting.

The first objection raised in the meeting was that the SC "wrongly interpreted" the Quran and the Shariat and, while giving the judgment, it overlooked authoritative "text" and unanimity of the ulama. The SC, in this way, flouted the established principles of interpretation of Islamic Laws. Moreover, the ruling did not take into the consideration the views of *fuqha* (Islamic jurists) and ulama, ignoring the "uninterrupted practice of the Muslims" which had been in place for as many as fourteen hundred years.[224] One of the standard methods of the AIMPLB has been to question the ability of its opponents—such as the judges of the court and the liberal and modernist intellectuals—to read the Islamic texts and then to correctly

[224] AIMPLB: Resolution on Supreme Court Judgement in Shah Bano Case', *The Muslim India*, June, 1985, pp. 259 & 276.

interpret them. One of the main qualifications to read and interpret these texts is one's knowledge of Arabic language. Since, the ulama are trained in Arabic language, they consider themselves to be the "authentic" voice to read and interpret the holy texts.

Furthermore, the AIMPLB stressed the primacy of the MPL. It said that the Muslim Personal Law (Shariat) Application Act 1937 governs Muslims in the matter of maintenance, and the Supreme Court was wrong to enunciate the "prevalence of secular laws of social significance over the provisions of the Muslim Personal Law (Shariat) Application Act". It expressed the apprehension that such a ruling had "opened up a way for the courts to interfere in the Muslim personal law".

Additionally, the Chief Justice's observation to get the UCC imposed in the country angered the AIMPLB. It criticised it for "unnecessarily and unwarrantedly raking up the issue of the Uniform Civil Code". Such a ruling, the AIMPLB expressed its apprehension, "encouraged the anti-Muslim elements who are bent upon undermining the religious identity and personality of Muslims, thus affecting national harmony". While the supporters of the UCC held that it is needed for national integrity, the AIMPLB had always opposed it, stressing instead plurality and diversity. This time also it favoured scrapping of the article 44 related to the UCC, or at least ensuring an exemption for Muslims.

Put differently, the AIMPLB termed the Supreme Court's ruling as "harmful and dangerous". The Working Committee of the AIMPLB, thus, expressed "grave concern over the far reaching, harmful and dangerous consequences of this judgment and considers it necessary to adopt effective measures for countering the consequences, otherwise it will become almost impossible for Muslims to apply the personal laws even to their family matters."[225] Moreover, the AIMPLB asked the government "to amend section 125 of the Cr. P.C. so as to render this judgment ineffective and protect the Muslim Personal Law in the matter of maintenance to a divorcee and to leave [no] room for such decisions in future".

In his biography *Karwan-e-Zindagi* (Caravan of Life) written later, Ali Mian gave a detailed account of the Shah Bano controversy and the subsequent demonstration. Ali Mian Nadvi opposed the judgment by saying that Islamic Laws did not approve of giving maintenance beyond the period of iddat and the SC's ruling asking the husband to give maintenance to the divorced wife till she was not married again or she till was alive, was based on "Hindu

[225] Ibid.

religion". He said it was the belief of Hindu religion that a woman after marriage had "no connection" with her parents' place and she belonged solely to her husband's family. Contrary to that, the Islamic position was that a woman even after her marriage did not snap her relation with mother, father, sister and brother.

In other words, a woman in Islamic Laws has the same relation with her parents and siblings before or after marriage, according to Ali Mian. That is why Islamic Laws ask the husband to pay maintenance to his divorced wife till the period of iddat and after that the responsibility of bearing the expenditure of the divorced wife falls on her parents. On this ground he opposed the Supreme Court's ruling on Shah Bano case.

Elaborating his point further, he said that the very logic of section 125 of Cr. PC did not apply to Muslims because Islam, unlike Hinduism, did not cut the relation of a woman from her parents after the marriage. Another important point of his contention was the interpretation of the term *mta'a*. The Quran (Al Baqara: 241) asks the husband to pay *mta'a* to the divorced woman.

وَلِلْمُطَلَّقَاتِ مَتَاعٌ بِالْمَعْرُوفِ ۖ حَقًّا عَلَى الْمُتَّقِينَ

Wa Lilmuţallaqāti Matā`un Bil-Ma`rūfi Ĥaqqāan `Alá Al-Muttaqīna
(For divorced women a provision in kindness: a duty for those who ward off (evil)[226].

As it is evident from the verse, the Quran makes a duty (*haqq*) on the pious (*muttaqin*) to pay *mta'a to* the divorced women *(mutallaqat)* in kindness (*bil maroof*). However, there were differences of opinion over the term *mta'a*. A husband, who divorces his wife, has to pay her *mta'a*. The common meaning of *mta'a* is "chattel", "something that belongs to you", "money", "slave", "equipment, clothing, etc needed", "[personal] property", "belongings" "goods", "possession", "wares" etc.[227] Among the scholars of the Quran there is a difference of opinion over interpretations.[228]

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[226]Accessed (online) July 27, 2018, URL, *https://www.sahih-bukhari.com/Pages/Quran/Quran_english_arabic_transliteration.php?id=2*

[227] Al Manaay.com. Accessed (online) June 27, 2018, URL, *https://www.almaany.com/en/dict/ar-en/%D9%85%D8%AA%D8%A7%D8%B9/*

[228] 'And for the divorce women also there should be a provision according to what is fair - an obligation on the God-fearing (Sherali)'. 'And for divorced women, maintenance (should be provided) on reasonable (scale).This is a duty on Al-Muttaqun (the pious) (Khan)'.' For divorced women a provision in kindness: a duty for those who ward off (evil) (Pickthal).' 'The divorcees also shall be provided for, equitably. This is a duty upon the

On the interpretation of the term *mta'a bil maroof*, Ali Mian raised serious objection to the SC's interpretation. He also objected to the Supreme Court's interpretation of *mta'a* bil maroof. According to him, it was wrongly interpreted as maintenance (*guzara*).

Besides, Ali Mian also questioned the authority of his opponents, including the SC judges, to interpret the holy text of Islam if they did not have knowledge of Arabic language. The knowledge of Arabic language, according to Ali Mian, was a must for reading religious texts of Islam including the Quran and the Hadees. He also raised a question over the ability of judges to have understanding of Quran and knowledge of Arabic. If these judges, Ali Mian would ask, were not able to read and understand the Quran, how would they be authorised to make comments on Islamic/personal laws?

While the SC extended the duration of allowance to the divorced woman till the end of her life or till she got married again, Ali Mian limited the duration to the period of iddat and then put the responsibility on the parents of the divorced woman to look after her. My own view does not agree with any of these two interpretations. Several questions arise in my mind. Why should a divorced woman have to be dependent on either husband or parents for survival? Why can't she herself earn her own living and be economically self-dependent? Why cannot she have access to decent employment and social security? Why was the court silent about the responsibility of the state to take care of woman? I will show in a while that the state- while bringing out the recent Muslim Women (Protection of Rights on Marriage) Bill, 2017-made a provision for sentencing a husband to three years jail for divorcing through triple talaq but nowhere did it take any responsibility of providing social security to the divorced woman.

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righteous (Rashad).' 'And for the divorced women, provision (must be made) in kindness. This is incumbent on those who have regard for duty (Maulana).' 'The divorced women have the right to receive reasonable provisions. It is an obligation for the pious. (Sarwar)'. 'And for the divorced women (too) provision (must be made) according to usage; (this is) a duty on those who guard (against evil) (Shakir)'. 'For divorced women Maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous (Yusufali).' 'And for the divorced women (also) a provision (should be made) in a fair and equitable manner. This is an obligation binding on those who guard against evil (and have regard for duty) (Omar).' 'Making a fair provision for women who are divorced is the duty of those who are God-fearing and pious (Ahmed);. 'And divorced women should have a maintenance in reason, - a duty this on those that fear (Aziz)'.'And for the divorced women shall be a reputable present: and duty on the God-fearing (Daryabadi)'. 'And for divorced women also, is a complete provision in reasonable manner; this is a duty upon the pious (Haque)'. 'Likewise, there should be a provision for the divorced women according to customary good and religiously approvable practice, as a duty upon the God-revering, pious (Unal).' 'And the divorced women, too, shall have [a right to] maintenance in a goodly manner this is a duty for all who are conscious of God (Asad).'Accessed (online) June 27, 2016, URL, *http://2pm.co/demo/2500/2/241/*

Muhammad Yunus Saleem, who represented the AIMPLB in the Supreme Court on Shah Bano issue criticised the positions of Danial Latifi and Arun Shourie for advocating maintenance to the divorced woman till she was remarried or alive. He said that nowhere in the Muslim world was there a single instance in which any jurist had asked the husband to pay maintenance allowance to the divorced till she was alive or remarried. As he argued it, "I challenge Mr. Latifi, Arun Shourie and others who are very enthusiastic in supporting the verdict of the Supreme Court to quote even a single instance in which any jurist or any court of any Muslim country may have granted maintenance to a Muslim divorces for life or till remarriage. If they cannot, they should stop misleading innocent Muslims by saying that granting maintenance to a divorced for life or remarriage is not against the Quran and Sunnah". [229]

Saleem was also critical of the progressive Muslims and he said that except for communist Yemen, nowhere did a divorced woman get maintenance till the end of her life or remarriage. "As regards Muslim countries where reforms are said to have been introduced (except perhaps communist Yemen) nowhere is maintenance awarded to a divorced till she remarries. As a matter of fact the communist lobby and the so-called progressive and radical Muslims, who are neither practising Muslims nor care to recite the Holy Quran and have had any access to Sunnah and textbooks on Muslim law, are very vocal and enthusiastic in destroying the tenets of Islam under the garb of supporting the cause of distressed women by raising slogans of violation of human rights and the rights of Muslim women".[230]

In order to show that its critics are not concerned for the welfare of Muslim women, the AIMPLB has pointed to their (critics) general neglect of material/social/educational issues. Such a strategy was adopted during Shah Bano issue, as well as during the triple talaq controversy (2017). "Most [of the] people who are now agitated over the plight of divorced Muslim women ignore far more serious problems faced by the community like economic and educational backwardness, unemployment, discrimination in housing, communal riots and other matters including the problem of poor widows whose husbands lose their lives in communal riots". [231]

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[229] Mohammed Yunus Saleem, 'This is a Non-Issue' *The Times of India*, March 30, 1986, p.IV.

[230] Ibid.

[231] Mohammed Yunus Saleem, 'This is a Non-Issue' *The Times of India*, March 30, 1986, p.IV.

Saleem also questioned if the majority community was justified to initiate a reform of the minority community. "An important issue is who determines whether or not a reform in Personal Law is needed by a community. As a corollary to this issue, should the majority community in the country appropriate for itself the right to decide what is good and what is bad for the minority community?" [232]

Sensing the gravity of the situation, the AIMPLB decided to mobilise Muslims against the ruling. It knew that unless Muslims came to streets, it would not be able to pressurise the Government to bring a law to undo the SC judgment. Given that the AIMPLB is a non-political organisation, lacking huge cadres, it had to rely on community's cultural, social and religious organisations. Apart from the support of Muslim organisations- both religious and secular- it brilliantly used other spaces such as the mosques.

As part of its mobilising techniques, it called upon Muslims "to celebrate the last Friday of Ramazan as "Shariat Protection Day". They were also asked to "organise protest meetings all over the country for acquainting others who were not yet aware about the problem. Apart from the north Indian states, the AIMPLB decided to pay special focus on the "least important states" and delegates of the AIMPLB were constituted to visit there. As it is clear from the representations of different sects and school of thoughts in the Working Committee meeting, the AIMPLB had always tried to present itself as a representative body of Muslims and it again made an "appeal" to "all Muslim organisations and association, papers and periodicals, ulama and leaders to utilise their resources for creating such atmosphere and for mobilising public opinion". Moreover, a proposal was also made to constitute an action committee **"**for organizing a country-wide movement for protection of the Personal Laws".[233]

Against the SC ruling, the AIMPLB and other Muslim organisations were able to mobilise thousands of Muslims on the streets. Protests were organised all across India. The AIMPLB also launched a campaign to send bulk telegrams to the Prime Minister, expressing opposition to the judgment. Mosques were used as a means to apprise Muslims of the ruling where speeches were delivered. According to Ali Mian, the mobilisation against the Shah Bano judgment was the biggest since the days of the Khilafat in the early 1920s. He also claimed that a gathering of 1 to 1.5 lakh Muslims was a common thing at that time. The mobilisation

[232] Ibid.

[233] AIMPLB: Resolution on Supreme Court Judgement in Shah Bano Case', *The Muslim India*, June, 1985, pp. 259 & 276.

was done under the banner of *Tahaffuz-e-Shariat* (protection of Shariat). One such big demonstration was held on February 9, 1986, in Rae Bareli, Ali Mian's home town, in which a large number of people participated.

Moreover, a signature campaign was launched against the decision. A large section of south India Muslims also protested against the judgment. To further mobilise the south Indian Muslims, Qazi Mujahidul Islam Qasmi (1936-2002), the future president of the Board, visited several places there and it ended up with a big conference in Mangalore, Karnataka in which the Chief of Muslim League Ebrahim Sulaiman Sait (1922–2005), along with Jamaat-e-Islami Hind's Kerala and Tamil Nadu units also participated in the meeting.

A huge mobilisation of Muslims was observed in Bombay and Kerala.[234] Observing the "Save Shariat Day", local members of the AIMPLB protested against the ruling. They called it "interference" in the MPL, which, according to them, was guaranteed to Muslims by the Indian Constitution. They also demanded amendment in section 125 of the Indian Penal Code to give protection to the MPL. The local units of the AIMPLB also sent the telegrams to the Prime Minister, the Home Minister and the Law Minister. The telegram read, "Interference in Muslim personal law by means of Supreme Court ruling is not tolerable to all Muslims. Kindly amend injustice done and oblige".[235]

The women members of the AIMPLB also came out against the judgment. A big conference of Muslim women presided over by Begham Aabida Ahmad, M.P, against the Supreme Court ruling, was held in Boat Club, Delhi on April 10, 1986. Women from Delhi, Muradabad, Aligarh and Meerut came to participate. The conference also decided that a women's delegation would hand over a memorandum to the Prime Minister opposing the Supreme Court's ruling.

In spite of his ill health and busy schedule, Syed Minnatullah Rahmani, general secretary of the AIMPLB, toured several states of India such as Andhra Pradesh and Kashmir. Meetings were also held in great numbers in Bihar and Orissa. The most important achievement of the AIMPLB was that it was able to bring on its platform leaders from different sects and schools such as the Muslim League, the Jamiat-e-Ulema Hind, the Jamaat-e-Islami Hind, Tamir-e-Millat, All India Majlis-e-Ittehadul Muslimeen, Majlis-e-Muslim Mushawarat, Ithna Ashri

[234] *The Times of India* '"Save Shariat Day"' observed', June 15, 1985, p.5.

[235] Ibid.

(of Janab Syed Kalbe Abadi), Bohra Jamaat (of Shabbir Bhai Nooruddin), and All India Shia Conference.[236]

In its defence, the AIMPLB also raised the issue of dowry and burning of brides. By bringing these issues, it tried to argue that the "real" problem of women lay outside the Muslim community. For example, Ali Main argued that the burning and murder of newly-wed women of Hindus was more serious. To substantiate his claim, he cited news published in national press in which a bride [belonging to Hindu community] was burnt to death after every 12 hours and he asked why such hue and cry was not being made about that. Similar arguments have often been given by the AIMPLB and its women leaders.

Apart from mobilising Muslims to the street, it also entered into a dialogue with the Rajiv Gandhi Government. Rajiv Government can be juxtaposed with that of Modi. As I would discuss in a while, the Modi Government—while taking up the issue of triple talaq—did not initiate a dialogue with the AIMPLB, nor did it ever consult the latter over the Muslim Women (Protection of Rights on Marriage) Bill, 2017.

But the Congress party- which had traditionally been supported by Muslims in postcolonial India— realised that the alienation of Muslims and the AIMPLB would cost it dear in the elections. Given this fact, Rajiv Gandhi Government showed interest in holding a dialogue with the officer-bearers of the AIMPLB. The AIMPLB, on its part, rose to the occasion and succeeded in convincing the Government to bring a Bill to undo the SC ruling.

Among the Congress leaders, Najma Heptulla- then the deputy president of the Rajya Sabha- who joined the BJP in 2004 and became the minority affairs Minister under Modi — was in touch with the AIMPLB. Ali Mian Nadwi praised her for supporting the AIMPLB's position. Zia-ur-Rahman Ansari- a minister under the Rajiv Gandhi Government— also defended the AIMPLB and worked for bringing the AIMPLB and the Government together.

While the Congress expressed its willingness to have a dialogue with the AIMPLB, it also anticipated that standing with the AIMPLB and defending its position on the Shah Bano issue would not be easy. It had to do contend with the fact that progressive sections as well as the Hindu Nationalist forces had also been able to mobilise considerable section of the public opinion in their favour. Realising this, it also tolerated its own minister to criticise the

[236] Syed Abul Hasan Ali Nadvi, *Karwan-e Zindagi*, Vol. 3. Maktaba Islami, Lucknow, n.d., p. 119-126.

Government. Young Arif Mohammad Khan-then minister of state for Home- rose to the occasion and strongly spoke against the Board. Such a policy of speaking in a multiple voices had also been the strategy of the Congress during the 1950s and 1960s when the top leadership of the Congress took the stance of non-interference while its lower rung leaders brazenly spoke in favour of intervention, reforms and modernisation of the MPL.

Negotiating with the State

As part of its strategy to negotiate with the state, a delegation of the AIMPLB called on Prime Minister Rajiv Gandhi on July 30, 1985. Again on February 3, 1986, Ali Mian received a call from the Prime Minister's Office for a meeting. He said that he made a request that Maulana Minnatullah Rahmani, whom he considered to be an expert on the matter, should also be allowed to accompany him. The Prime Minister's Office, however, told him that he should come to meet Rajiv Gandhi alone and the latter informed him that a Bill was being introduced in Parliament. Yet another meeting with the Prime Minister was held on February 17, 1986. As Ali Mian discussed it in his autobiography *Karwan-e-Zindagi*, Ashoke Kumar Sen, the then law minister, was also there with Prime Minister Rajiv Gandhi. Ali Mian recalled that the draft of the Bill was being read by Sen and Gandhi used to pay great attention to it. He raised questions about every article and told Sen as to how the Bill should be drafted. During the meeting, Gandhi also gave his suggestions. He also asked Ali Mian's opinion about the articles in the draft. This reading of three-page draft was completed in 90 minutes.

Around the same time, Rajiv Gandhi called a meeting of 17-18 Muslims comprising Muslim leaders, Muslim MPs at the Central Hall of Parliament. The meeting was held to discuss the issues of personal laws and the need to study reforms of the personal laws in other Islamic countries and see how far India could learn from them. Ali Mian was also present in the meeting and he was sitting next to Rajiv Gandhi. When the discussion began about what the proposed Bill could incorporate from the reformed Islamic laws in Muslims/Islamic countries, the AIMPLB found itself to be in a difficult position because of the rigid stance of the AIMPLB that the MPL was a divine law and there was no possibility of any human interference in it. Contrary to such a position, several Muslim/Islamic countries including the neighboring Pakistan and Bangladesh had brought several reforms in the MPL.

Sensing the gravity of the situation, Ali Mian acted smartly. While his main intention was to somehow convince Rajiv Gandhi that the Government should not bring about any reforms in

the MPL, he resorted to playing nationalist sentiments. He rightly anticipated that defending the case of the AIMPLB on the basis of nationalist sentiments would be easy. He then began convincing Rajiv Gandhi that India did not need to learn anything from other Islamic countries because India- from the point of views of knowledge and religion- was not behind any Muslim or Arab country and it had its own place in the world. To convince Gandhi, Ali Mian did not mind praising himself, saying that he was the lone member of the Jeddah-based International Islamic Fiqh Academy- considered to be the biggest academy of shariat. And on occasions, his views, as he claimed, were accepted over views of others. Moreover, he said that there were many ulama sitting in the meeting who were respected and well-known in the Arab World.

Note that he began his speech by praising India. Then he praised its distinct knowledge. Then he praised himself and said that his views, on occasions, prevailed over the ulama of the Arab world. The purpose behind this was to convince that India did not need to learn from other Muslim/Islamic countries because the country had already made a distinction in acquiring knowledge and producing internationally acknowledged ulama. This strategy of Ali Mian was successful and Rajiv Gandhi was convinced not to go for a comparative study of personal laws of other Muslim/Islamic countries before the introduction of the Bill.[237]

On May 5, 1986, the Muslim Women (Protection of Rights on Divorce) Act 1986 was finally presented in Parliament. The Government also issued a whip to its members. The then Law Minister Sen introduced the Bill. Speaking on the occasion, the law minister said that the Government cannot ignore the sentiments of the biggest minority community of the country.[238] The opposition party in Parliament, the Telugu Desam, opposed the Bill. H. A. Dora, Telegu Desam party member from Srikakulam (Andhra Pradesh) argued this was not a Bill but a bull which would crush Muslim women and children. He also gave reference to the laws prevalent in Muslim/Islamic counties like Pakistan and Indonesia and said that such a bill was not only in opposition to human rights of Muslim women but also Muslim personal laws.[239]

After 11 hours of debate, the bill was presented for voting and it was passed. Arif Mohammad Khan, minister of the Congress spoke against his own party as well as the Bill.

[237] Syed Abul Hasan Ali Nadvi, *Karwan-e Zindagi*, Vol. 3. Maktaba Islami, Lucknow, n.d., pp. 133-135.

[238] Ibid. p. 143.

[239] Ibid.

At midnight the voting took place in which 54 votes were cast in opposition and 372 votes in favour of the Bill.[240]

After the Bill was passed, Ali Mian Nadvi wrote a letter to PM Rajiv in June/July 1986. In his letter, Ali Mian drew Rajiv Gandhi's attention to the crisis and problems of India. These are [communal] violence, (*tashaddud*) that Gandhiji opposed, oppression, communal problems, caste-based discrimination, corruption and revivalism of communalism. It should be noted here that these issues were pointed out by him to draw the government's and press's attention from Muslim personal laws, and he praised Rajiv Gandhi a lot and called him a man of caliber for dealing with such a situation.[241]

Meanwhile, the ulama and the Muslim leadership were able to convince 75-year old Shah Bano that her fight for getting allowance was against Islam. After years of fighting, she changed her position and appealed that the verdict should be withdrawn as it amounted to interference in Muslim personal laws.[242] Issuing a statement in a press conference with the mark of her thumb on it, she was forced to reverse her earlier position. Moreover, she demanded exemption of Muslim women from the provisions of section 125 of the code of Criminal Procedure. This was in fact the completion of the restoration, initiated by the debate led by AIMPLB, which sought no-interference. On the issue of UCC, she said that amendment should be made to keep Muslims out of its ambit. Moreover, she sought guarantee from the Government that the MPL would not be interfered with. While she denied that the change in her position had anything to do with the AIMPLB or other ulama putting pressure on her, the change in her attitude was the result of counseling of several religious leaders. They visited Shah Bano's house and convinced her that her fight for seeking maintenance from her husband went against the personal law. It was the change in her position that suddenly made her a favourite among the AIMPLB and Muslims in Bhopal publically facilitated her.[243] Within a week of change in her stand, she was invited to Indore[244]. Shah Bano -75 year old woman- was suffering from high blood pressure and she

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[240] Syed Abul Hasan Ali Nadvi, *Karwan-e Zindagi*, Vol. 3. Maktaba Islami, Lucknow, n.d., pp. 133-135.

[241] Ibid. pp. 149-151.

[242] *The Times of India*, 'Annul verdict: Shah Bano', November 17, 1985, p.5.

[243] *The Times of India*, 'Annul verdict: Shah Bano', November 17, 1985, p.5.

[244] *The Times of India*, 'Shah Bano advised complete rest', November 24, 1985, p. 9.

was advised to take rest. Indore Muslim community had decided to facilitate her on November 26, 1986 on the occasion of the birth anniversary of the Prophet.[245]

The Critics of AIMPLB

One of the bitter critics of The Muslim Women (Protection of Rights on Divorce) Act 1986, and the stand of the AIMPLB, was Arif Mohammad Khan (1951). Having been elected from Bahraich parliamentary constituency (U.P.) in the eighth Lok Sabha Elections, he rose to become the Minister of State for Home and minister of State for Energy under the Rajiv Gandhi Ministry (1984-1989). His position was in conflict with the official position of the Congress and he opposed the Bill and the stand of the AIMPLB. Later, he resigned from the government and quit the Congress Party. [246] Afterwards he joined the Janata Party and then the Hindu nationalist BJP in 2004. Like Islamic feminist, Khan's method of critique has been to do a reinterpretation of the Quran and blamed his opponents such as the AIMPLB for misinterpretation. Earlier, speaking in Parliament, he said that the method of divorce practised by Muslims was not in consonance with Quran. That is why, he said, such a practice went against women. He said that Quran asked men to treat their wives with respect, generosity and kindness. [247]

Arun Shourie (b. 1941), journalist, author, right-wing economist and leader of the Hindu nationalist BJP, was at the forefront of criticising the Government and the AIMPLB on the Shah Bano issue. Arun Shourie said that under pressure of fundamentalist Muslims, the Government made an amendment to Section 125 of CR PC that exempted Muslim men to pay maintenance to their wives.[248] While the AIMPLB had defended no interference in the MPL on the ground of religious freedom provided by article 25 (Freedom of conscience and free profession, practice and propagation of religion) and article 26 (Freedom to manage religious affairs) of the Constitution, Arun Shourie argued that these articles did not stop intervention in personal laws on the ground of public order. As he argued, "Article 25 and 26 are the ones that guarantee freedom of religion. They specifically state that the freedom to practice religion is subject to public order, morality and health. In addition article 25 specifies *inter alia* that nothing in the article shall prevent the state from making any law regulating or

[245] Ibid.

[246] *The Times of India*, 'Arif quits over 'talaaq' bill', February 27, 1986, p. 1.

[247] *The Times of India*, 'Arif defends right to maintenance', August 24, 1985, p. 9.

[248] Arun Shourie, 'In the name of Muslim Personal Law', *The Times of India*, March 16, 1986.

restricting any secular activity, and from providing for social welfare and reform. In Islam marriage is a contract and not a sacrament." [249]

Danial Latifi, the advocate of Shah Bano called the practice of triple talaq as a "nightmare for every Muslim wife subject to it". On this issue he criticised the AIMPLB as well as the Government. "The Muslim law provides a number of procedures for divorce. Among these the most important are: *mubarraat* (divorce by mutual consent, *khula* (divorce at the wife's instance), *faskh* (divorce by court, now regulated by the Dissolution of Muslim Marriages Act 1939) and *talaq* (unilateral divorce by the husband).Of *talaq* there are three kinds , *Talaq ahsan* (least disapproved by the Prophet); *talaq hasan* (less disapproved by the Prophet) and *talaq-ul-bidaat* (forbidden by the prophet, but allowed by the present interpretation of the Hanafi school of law).

The last of these, the *talaq-ul bidaat* is the dire "triple talaq," pronounced in one breath that was a nightmare for every Muslim wife subject to it. It was illegally smuggled into the law by *fatwas* issued at the behest of the Umayyad monarchs and is today, alas, continued as the favourite practice of the elements sponsoring the present bill. *Talaq bidaat* is regarded as sinful by all schools of Muslim law and is held illegal". [250]

Realising the potential of the Shah Bano controversy as an occasion to attack the minority for mistreating its women and molding public opinion in favour of the UCC, the BJP was at the forefront of opposing those who opposed the Supreme Court judgment i.e. the AIMPLB-led Muslim leadership. The ruling Rajiv Gandhi led Congress Government did not want to annoy the ulama who had traditionally been the supporters of Congress. Sensing the anger of Muslims, Rajiv Gandhi made a statement that his Government had no plan to interfere in the MPL. He told the press in Bangalore that Government would not interfere in personal law of any community (read Muslim community). He also clarified that the government was not going to bring about UCC. "But we will not interfere in the personal law of any community". [251] The enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986— to undo the SC ruling- flew from similar concerns. The BJP said that it would oppose any amendment to section 125 of Criminal Procedure Code. As stated above, the party used the occasion to attack its opponents and the Congress government for planning to bring a bill to

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[249] Arun Shourie, 'Facts belie government's case', *The Times of India,* March 21, 1986, p. 1.

[250] Danial Latifi,'The Muslim Women Bill 9 (part I) ', *The Times of India*, March 12, 1986, p.8.

[251] *The Times of India*, 'Annul verdict: Shah Bano', November 17, 1985, p.5.

exempt Muslims from paying allowance to the divorced woman till she was alive or remarried. Speaking on the issue of common civil code in Bombay, BJP General Secretary L K Advani said that his party was in favour of UCC for all irrespective of religion and caste.[252]

In the years to come, the Hindu nationalist BJP was able to convince a large section of people, particularly the Hindu voters, that the Congress got the Muslim Women (Protection of Rights on Divorce) Act 1986 enacted and deprived Shah Bano of her legitimate rights because of its "vote bank politics". During the same time, it attacked the Congress for pursuing a policy of "Muslim appeasement" and "pseudo-secularism". Both these terms were given a communal connotation by the BJP and it presented the Congress to be working against the majority Hindus their culture. The Congress, fearing loss of its social base, now tried to brazenly present itself as a pro-Hindu party. For example, Rajiv Gandhi not only got the doors of the Ram Temple opened in Ayodhya but also began his electoral campaign from Ayodhya itself. This was a big trap for Rajiv Gandhi. His policy of "soft-Hindutva", instead of working in favour of Congress, facilitated the ascendency of the BJP in the India politics.

Within a decade of the Shah Bano case, the first BJP Government came to power in 1996 but could not survive beyond 13 days as it failed to get the support of non-BJP parties. But by that time it was clear that it was a matter of time when BJP would become a new ruling party in India. Finally, the BJP under A.B. Vajpayee came to power in a coalition Government in 1998 and ruled the country till 2004. During this period, the BJP did not have a full majority and it was unable to push through its agenda of reforms and modernisation of the MPL under the pretext of enactment of the UCC. But the coming of Modi Government in 2014 was an entirely different situation. It was the first Government of the BJP which secured its own majority and did not have any constraints to follow its agenda. Soon after coming to power, it realised that launching a campaign around triple talaq would pay dividends to the Hindu nationalist party. The success of BJP, I would argue, also owes a great deal to the failure of the AIMPLB to initiate internal reforms. It continues to remain adamant on its position that the MPL is based on "divine law", which is immune from human intervention. Similarly, its position on triple talaq—it is "wrong", "sinful", yet "valid"—was one of the reasons why the propaganda of BJP finds a large number of takers.

[252] *The Times of India*, 'Cr. P. C. amendment will be opposed: BJP', January 9, 1986, p.9.

Triple Talaq Case (2017)

In October 2015, a Hindu woman Phoolwati Devi, a resident of Karnataka, claimed her right in the ancestral property under the Hindu Succession Act and she knocked the door of the court. Hearing the case, the court made some remarks about Hindu Succession Act. The defendant's advocate, hearing the judge raising some discrepancy in the Hindu Succession Act, told the court that there were many such provisions in the MPL that were against the interests of women. Having heard this Justice Anil Dave and Justice A K Goel asked for filing a petition and the court sent a notice to the Government, asking it to present its position. Shayara Bano[253] from Uttarakhand filed a case in the SC in the matter of triple talaq given by her husband. Aafreen Rahman[254] of Jaipur, Ishrat Jahan[255] of West Bengal, Atiya of Saharanpur, Gulshan Parveen[256] of Rampur filed a case to scrap the practice of triple talaq. At that time, the Jamiat Ulema Hind filed a petition and demanded that any decision in the matter of MPL should not be taken before it was heard. In other words, Jamiat asked the court to hear its position before the latter took any decision regarding the MPL. The same thing was also said by the AIMPLB in the SC. Once Muslim religious organisations went to the SC, some women organisations reached the court in favour of Shayra Bano. Shayara Bano was divorced at the age of 36 and had multiple ailments as she had to undergo multiple abortions. She was divorced by her husband 15 years after marriage through a letter when she was staying with her parents in Uttarakhand.[257] Ishrat Jahan, 30-year old, was divorced when

[253] 36-year old Shayara Bano was the main petitioner in triple talaq case. An MBA student, Shayara Bano was divorced by her husband, who sent her a post with talaq, talaq, talaq written on this. See, *The Indian Express*, New Delhi, August 23, 2017, p. 12.

[254] 28-year old Aafreen Rahman is an MBA graduate. She received a speed post sent by her husband-lawyer in which he wrote that 'I am giving you triple talaq on the basis of the Sharia Law'. Her husband divorced her because she was not physically fit. Both married in 2017 and knew each other through matrimonial website. Her husband harassed and 'threw her out of their house'. At present, she lives with his brother in Jaipur. See, *The Indian Express*, New Delhi, August 23, 2017, p. 12.

[255] 30-year old Ishrat Jehan is from Howrah. At the age of 21, she was married. She settled with her husband in Bihar and then moved to Howrah. She was one of the petitioners in the Supreme Court against the practice of triple talaq. She has four children. After the divorce, her husband kept her children. Recently, she could get two of her children from the husband. The reason for the divorce was her failing to give birth to male child. Her first three children were girls and this made her husband become angry. When she gave birth to her fourth child, son, her husband gave her triplet talaq and left her. She is also seeking maintenance from her husband. See, *The Indian Express*, New Delhi, August 23, 2017, p. 12.

[256] A master in English literature, Gulshan Parveen is one of the petitioners in the triple talaq case. She lives in her rented house in East Delhi. Two years back, her husband from Rampur divorced her by sending a *talaqnama* on a stamp paper worth Rs. 10. It has been alleged that she was facing physical battering over dowry issue for last two years. See, *The Indian Express*, New Delhi, August 23, 2017, p. 12.

[257] *The Indian Express*, New Delhi, 'Triple talaq ruling', August 22, 2017, p. 1.

her husband uttered talaq three times on the phone.[258] The Bharatiya Muslim Mahila Andolan (BMMA)—an organisation working for the rights of women - took up the matter. The two-judge bench of the SC took up the case suo moto. [259] The BMMA filed a petition called "Muslim Women's Quest for Equality", which was turned into a PIL suo moto by two-judge bench of the SC.[260] On 16 February 2017, the SC accepted the petition of all the parties and asked everyone to file affidavits in the court by March 30, 2017.[261] On 30 March 2017, the court took a decision that from May 11, a constitutional bench of the Supreme Court would hear the matter every day.

Presenting the perspective of the AIMPLB in the Supreme Court in triple talaq case, eminent advocate and senior Congress leader Kapil Sibal said that triple talaq was "valid in law, bad in theology". Moreover, he also cited data taken from the Census report 2011 and argued the cases of divorce among Muslims were less compared to the Hindu community. As he argued, "among divorced Indian women, 68 per cent are Hindus whereas 23.3 per cent are Muslims", while "the census also puts the divorce rate among Muslims at 0.56 per cent as opposed to 0.76 per cent amongst Hindus". He expressed his disappointment that in the absence of any authentic survey about the exact figure of divorce, the whole issue was being debated. He questioned the very discourse of "women empowerment". While a "trivial" issue like triple talaq is so much talked about, the fact that women were not equal in marriage and half of their population (read all women) owned only 2 per cent of wealth. What about the issue of empowerment of women? Sibal also mentions the inability of the law to protect divorced women and thus, to address the issue of "gender justice". The state has no concern for the destitute women. As he argued, "For centuries, women have not been equal partners in a marriage. Even today in India, barring a very small percentage of empowered women, they are neither part of the mainstream of national life, nor are their genuine concerns addressed. At the heart of it is the iniquitous nature of a patriarchal society. The fact that 50 per cent of mankind owns less than 2 per cent of its assets demonstrates the stark reality".[262]

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[258] Ibid.

[259] *The Indian Express*, New Delhi, 'Triple talaq ruling', August 22, 2017, p. 1.

[260] *The Indian Express*, New Delhi, August 23, 2017, p. 12.

[261] *Dainik Jagran* (Rashtriya Sanskaran), Delhi, May 12, 2017, p. 5.

[262] Kapil Sibal, 'Beyond triple talaq', *The Indian Express*, May 26, 2017. Accessed (online) May 16, 2018, URL,*http://indianexpress.com/article/opinion/columns/triple-talaq-supreme-court-aimplb-muslim-personal-law-shariah-4673882/*

On August 22, 2017, the SC gave its ruling, calling the practice of triple talaq not only "invalid" but also "unconstitutional". The ruling of the Supreme Court on the triple talaq was divided. The Chief Justice of India J S Khehar wrote a minority ruling. His views were supportive of the AIMPLB stand that the practice of triple talaq is "a matter of personal law of Sunni Muslims, belonging to the Hanafi School" and "interference in matters of personal law is clearly beyond judicial examination."[263] Similarly, Justice S Abdul Nazeer argued that the practice has "the protection of Article 25 of the Constitution" and will "not be subjected to any challenge, even though they may seem to others (and even rationalists practising the same faith) unacceptable, in today's world and age". [264] Chief Justice Khehar and Justice Nazeer advised the judiciary to exercise "absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem".[265]

Following the SC ruling outlawing triple talaq, Zakia Soman said that gender justice was fundamental to Islam and she criticized its "guardians" [AIMPLB] for distorting Islam. Soman further said that her BMMA was against middle men and against those who distorted Islam such as AIMPLB, and not against Allah. "The BMMA believes that gender justice is fundamental to Islam. It has been distorted by self-appointed guardians of religion like the All India Muslim Personal Law (AIMPLB). Allah's message is for all Muslims, men and women, there is no room for middlemen". [266] While Bebaak Collective welcomed the verdict, it also said that talking about women's rights amid communalism and Islamophobic discourse was very difficult, but nevertheless welcomed the ruling.[267] Issuing a statement, it said that "triple talaq is both un-Quranic and unconstitutional, it is an important departure from earlier judgments on all women's rights, because it is based on the tenets of equality, dignity and secularism as enshrined in the Constitution."[268]

The RSS leader and patron of Muslim Rashtriya Manch Indresh Kumar- who was accused in the bomb blast in Ajmer in 2007 but later acquitted- addressed a press conference in Delhi and said that the day of the SC judgment on triple talaq was "the most significant day for

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[263] *The Indian Express*,' 'CJI in minority view: It is integral to Sunni Islam, consider a law'' August 23, 2017, p.1.

[264] Ibid

[265] Ibid.

[266] *The Indian Express*, New Delhi, August 23, 2017, p. 12.

[267] Ibid.

[268] Ibid.

women in Indian history". He also claimed that eight to nine crore Indian Muslim women had been freed from "torture and injustice". He further said that the "fundamentalists who wrongly interpreted Koran", had now been "silenced". [269]

Within four months of the ruling, on December 28, 2017, the BJP Government brought the Muslim Women (Protection of Rights on Marriage) Bill, 2017 to the Lok Sabha, the lower house of Parliament, and got it passed. The Bill, which stipulates three year imprisonment for Muslim husbands who give triple talaq, has generated a big controversy. So far, it remains stalled in the Rajya Sabha, the upper house of the Parliament due to the criticism from the opposition parties.

However, the AIMPLB mobilised its own women members to defend triple talaq. Women members of the AIMPLB held a press conference under the aegis of the organisation in Delhi and spoke against the UCC, RSS, and BJP and alleged that Media was demonising Muslims. They also said that if Prime Minister Modi wanted to give justice to Muslim women, he should deliver justice first to Zakia Jafri[270]. These women said that the PM should first work for addressing the issues of unemployment and poverty among Muslims[271] They also said that PM should be more concerned about the deprivation of Muslims at educational institutions. The press conference was held in Press Club of India led by AIMPLB Executive Member Dr. Asma Zehra.[272]

Moreover, the AIMPLB held a large number of processions of Muslim women to defend triple talaq. One such big protest was held in Patna. The march was held on February 18, 2018. [273] Burqa-clad Muslim women came out to demonstrate. They protested against the interference in Shariat. The organisations which took part in this march included Women Federation, Imarat-e-Shariat, and Jamiat Ulema Hind. They also said that the interference in the Shariat was being justified by the Government in the name of Muslim women's liberation. But the fact of the matter is, they argued, that such interference was in violation of

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[269] *The Indian Express*, New Delhi, August 23, 2017, p. 11.

[270] Zakia Jafri is wife of the veteran Congress leader and former Member of Parliament Ehsan Jafri (1929 – 2002). He, among 69 Muslim residents, was killed in the Gulbarg Society massacre during the Gujarat communal violence 2002.

[271] *Inquilab*, New Delhi, October 28, 2016, p. 1.

[272] *Inquilab*, New Delhi, October 28, 2016, p. 1.

[273] Ibid.

the constitutional principles of Article 14 and 15[274]. They said that the Bill was aimed at throwing Muslim men in jail and making Muslim women trapped in court's proceedings. They also reiterated that all Muslim women had faith in Shariat and for them the provision of triple talaq in Islam is not oppression (*zulm*) but blessing (*niyamat*)[275]. Girl students from schools and colleges also participated. They not only rejected the Bill but asked the government to take it back. Moreover, they also demanded apology from the President of India for his comments that the Bill would liberate Muslim women. President Ram Nath Kovind had addressed a joint sitting of both the Houses of Parliament and said that the Modi government would "do everything to empower minorities but not appease them". When he referred to appeasement, he was rearticulating the RSS position that Muslims have been appeased by the Congress and other secular parties. But his remarks that the proposed bill on triple talaq would liberate Muslim women left many hurt among the Muslim community. As he said, "My government tabled a bill on Triple Talaq in Parliament and I hope it will become a law soon. After the law comes into force, the Muslim daughter and sister can live a life free of fear and indignity."[276]

The AIMPLB Muslim women took out processions saying they were authentic voice of the community's women. Muslim women demonstrated in Mewat too - a Muslim-concentrated backward region of north-Western India (Haryana-Rajasthan)- against the triple talaq Bill[277].The demonstration took place in Mewat on April 2, 2018.[278] Alwar city of Mewat also saw the demonstration. Muslim women under the banner of AIMPLB took to streets. The silent procession covered a distance of two kilometre, starting from Jama Masjid Park near Meo Boarding to Company Bagh Park. A delegation led by AIMPLB member Yasmeen Farooqui handed over a memorandum to the district collector which was addressed to President of India. Speaking to journalists, Yasmeen Farooqui said that no law could match the 1400-year old Islamic shariat as far as giving rights to women was concerned. She also expressed her anger that the government, having heard the views of few Muslims, was trying to intervene in Shariat while at the same time trying to portray its act as favourable to Muslim

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274 Ibid.

275 Ibid.

276 *The Hindu*, 'Hope triple talaq Bill will be law soon, President tells Parliament', January 29, 2018. Accessed (online) April 17, 2018, URL, *http://www.thehindu.com/news/national/hope-triple-talaq-bill-will-be-law-soon-president-tells-parliament/article22549647.ece*

277 *Inquilab*, New Delhi, April 3, 2018.

278 Ibid.

women.[279] A similar demonstration was held in Ramlila Maidan, Delhi by the women members of the AIMPLB. It took place on April 4, 2018. It was the last such demonstration by Muslim women. Speaking on the eve of the demonstration in Delhi's Constitution Club, the convener of women wing of AIMPLB, Asma Zohra,[280] said that more than 100 such demonstrations of women had been held all across the country against the Bill on triple talaq. She also claimed that around more than one crore Muslim women have participated in these demonstrations. She also referred to a section of progressive women who were campaigning against the abolition of triple talaq and criticised them by saying that these handful of women were misleading the Muslim community. She said that Muslim women waited for four years and then they came out with the permission of ulama.[281] It should be noted here how she is saying that she came out with the permission of ulama, who are mostly male. The male ulama is controlling Muslim women and deciding their course of action. Zohra also said that work was being done and a reform (*islah*) committee was being formed that would work at the district level. [282]

The last demonstration of Muslim women was held in Ramlila Maidan, New Delhi on April 4, 2018. Amidst scorching heat, Muslim women clad in burqa reached there.[283] A journalist reported that compared to this demonstration the number of women who took to the streets in Malegon, Rajasthan and Maharashtra, was more. The conference was presided over by the convener of women wing of AIMPLB, Asma Zohra. Jamaat-e-Islami Hind President Jalaluddin Umri was invited as the special guest, Jamiat-e-Ahle Hadees Maulana Shish Taimi also spoke. They all asked the government to withdraw the "controversial" bill on triple talaq. Speaking on the occasion, Umri said that if the husband is sentenced to jail for practicing triple talaq for three years, how could he pay the allowance from jail or how could it be possible for him to live with his wife after spending three years in jail[284]

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[279] Ibid.

[280] *Inquilab*, Delhi, April 4, 2018, p. 5.

[281] Ibid.

[282] Ibid.

[283] Ibid.

[284] *Inquilab*, New Delhi, April 5, 2018.

Women and the AIMPLB

Despite all these criticisms, the AIMPLB remains largely unmoved. Despite the fact that it has been able to include a large number of Muslim women in its organisations and some of them have been vocal at pubic platforms, it sticks to its position that men and women are different and have different needs and requirements. For example, the spokesperson of the AIMPLB, Khalid Saifullah Rahmani, in a recent article, explained the difference between men and women. To substantiate his argument, he said that the responsibility and duties for men and women were fixed differently. "The distinguishing feature of Shariat", Rahmani contended, "is justice (*adl*) and itedal (*moderation*). Justice means each and every person should be given responsibility (*zimmedari*) as per her/his capacity (*salahiyat*) and her/his rights (*huquq*) should be fixed (*mutayyan*) as per her/his need (*zaroorat*)". [285] He then went on to clarify this concept with few examples. If a person could lift a five kg weight and another person can lift 10 kg weight, then justice required that both of them should be asked to lift the weight as per their capacity. Similarly if a person could eat four roti and another person could eat two, then justice required that both of them should be given rotis as per their needs. After saying that human beings' ability and needs were different and people should be asked to work as per their ability and that they should be given rights as per their requirements, Rahmani took the logic in a different direction. He argued that Islam has followed the principle of justice in distributing duties and rights to groups of different people. Similarly, duties and rights for men and women in social and family life were based on justice and they were in accordance with human nature. God has not made this world on the principal of equality (*musawat/ brabri*). Nature (*fitrat*) on many occasions has maintained difference/disparity (*tfawut*), keeping in view ability and need. And if human beings try to erase this difference/disparity, it will be an act of rebellion against nature.[286]

For Rahmani, different people and different social groups have different duties and needs. Apart from this, another important point is his assertion that rights are subordinate toduties. His line of argument had a similarity with Islamic scholar Syed Kutub, brother of Egyptian Islamic scholar and ideologue of Muslim Brotherhood, Sayyid Qutb, who has also talked about the difference between men and women. He argued that Islam, while giving equal

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[285] Khalid Saifullah Rahmani, 'Muslim Personal Law and Khwateen', *Inquilab*, New Delhi, November 25, 2016, p. 7.

[286] Khalid Saifullah Rahmani, 'Muslim Personal Law and Khwateen', *Inquilab*, New Delhi, November 25, 2016, p. 7.

rights to men and women, does recognize differences between them from "the physiological, biological and psychological standpoints". [287] Explaining this, Kutub said that woman was more emotional than man and, therefore, she was better adept at looking after home and children.[288]

While Rahmani created a difference between the duties of men and women, his own logic did not come in the way of the AIMPLB mobilising a huge number of Muslim women against any interference in the MPL and the triple talaq Bill and the aggressive campaign of the Hindutva forces against the MPL. See the irony that even though the AIMPLB was able to mobilise a large number of Muslim women against the triple talaq bill, the UCC and intervention of the MPL, it was not ready to accept that men and women were equal.

As noted scholar of gender studies Asma Barlas tried to explain, women were not recognised as legal and moral subjects and not treated equally in law. There is a restriction on their political and economic rights and claims over resources compared to men. She blamed a particular reading of holy text as the source of problems for Muslim women. According to her, the problem lies in the patriarchal reading of the text and recourse to conservative methods by male scholars during the middle ages with the backing of the state. In other words, she blamed "oppressive interpretations" of the text. Elaborating this, she said that every text had multiple and oppositional readings. Thus, the ideas of female inferiority, male privilege, veiling and segregating women, polygamy, wife-beating existed in ancient Greece and these ancient misogynistic beliefs and practices were borrowed by Jewish, Christian and Muslim religious traditions. Pre-existing misogyny, thus, came to Islam during the middle ages.

Thus, the supporters of abolition of triple talaq base their arguments on the Quran and call this practice un-Quranic. Moreover, they argue that the rigid position of the AIMPLB on triple talaq is based on medieval legal interpretations. But the AIMPLB denies these charges and argues that the Hanbali jurists' interpretations were indeed based on true interpretation of the Quran. It continues to follow the medieval Hanbali legal school, a point which has generated a lot of controversy among the Muslim sects.

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[287] Muhammed Kutub, *Islam the Misunderstood Religion*, Accessed (online) March 6, URL, *http://www.islambasics.com/view.php?authID=157*

[288] Ibid.

CHAPTER – 4

CONTESTATIONS, FISSURES AND ALL INDIA MUSLIM PERSONAL LAW BOARD

Hundreds of religious scholars, representatives of different sects and organisations of Muslims as well as community leaders gathered in Jaipur to participate in the two-day long 24th General Body Session of the All India Muslim Personal Law Board (the AIMPLB) held on March 21-22, 2015. The Jaipur session assumed much bigger significance than some of the earlier conventions as it was the first meeting of the General Body since the recent upsurge of Hindu communal forces in Indian politics epitomised by the rise of Narendra Modi as the Prime Minister. As expected, it expressed deep concerns about the policies of the BJP-led Governments and the hateful campaigns of other Hindu communal outfits against the minorities. For example, their agendas- such as conversion (*ghar wapsi*), attacks on religious places of minorities, introduction of *Surya Namaskar* and Yoga in Rajasthan schools as well as inclusion of the Hindu religious text *Gita* in school syllabus - were opposed and seen as violation of the Constitutionally-guaranteed religious freedom and rights to minorities. Besides, the AIMPLB expressed strong opposition to any attempt to amend the Indian Constitution or to abrogate its "core" principle of secularism. Besides, the AIMPLB deliberated that a nation-wide campaign would be lunched to awaken Muslims about the dangers of these policies. It, in this campaign, would not go alone but would reach out to the "secular" Hindus for their support, according to the Secretary of the AIMPLB Muhammad Abdur Raheem Qureshi.

Amid all this, a furore broke out in the meeting of the AIMPLB. On the morning of the second day of the session, Zafar Sareshwala--a Gujarati Muslim businessman and supporter of Prime Minister Narendra Modi--reached the venue. No sooner had he arrived than he was asked to leave the place, following a fierce protest by some of the AIMPLB members. Among the protestors was Asaduddin Owaisi, Member of Parliament and, president of the All India Majlis-e-Ittehadul Muslimeen (AIMIM). The AIMIM has been a long ally of the AIMPLB. Owaisi raised the objection that Sareshwala could not attend the meet as he was not a member of the AIMPLB. Owaisi alleged that since Sareshwala had earlier "abused" the

member of the AIMPLB and dismissed the body as "dead" in the past, he should not come to attend it. While Sareshwala's proximity to the Hindu communal forces was well-known and his presence was likely to create inconvenience for Owaisi (as well as the AIMPLB), there was another factor that propelled Owaisi to attack Sareshwala. This had to do with a clash of interests between these two Muslim leaders. For a long time, Sareshwala has been persuading Muslims to give up the strategy of hostility to Modi and embrace the path of dialogue and reconciliation with him. Owaisi saw Sareshwala's move as an attempt to woo Muslim voters for the BJP, which clashed directly with the interests of Owaisi and his party AIMIM. Note that in recognition of his support to Modi, Sareshwala was appointed as the Chancellor of Maulana Azad National Urdu University, a central university, in Hyderabad, a constituency which Owaisi represents in Parliament.

Three years after this incident, another controversy plagued the AIMPLB and this time the person attacking the AIMPLB was an insider. Syed Salman Al Husaini Al Nadwi (b.1954), a professor of Hadees at the historic Nadwatul Uloom, Lucknow, was a member of the AIMPLB. He criticised the AIMPLB as an institution limited to the matter of husband and wife. Nadwi alleged that the AIMPLB, since its inception in 1972, had only taken up family matter. After dismissing the AIMPLB, he said that he was going to float a new board that would work for humanity and welfare of people from all religions. On this occasion, he also targeted his opponents such as Owaisi. Maulana Salman Nadwi's revolt surprised many and embarrassed the Darul Uloom Nadwatul Ulama (henceforth Nadwa formed in late nineteenth century in Lucknow) as it has been a key constituent of the AIMPLB. The former President of the AIMPLB Ali Mina and the present President Mohammad Rabey Hasani Nadwi belonged to the Nadwa. As a result, Salman Nadwi was expelled from the membership of the AIMPLB. On being expelled, he gave assurance that he would not go back to AIMPLB.[289]Note that the expulsion of Nadwi came after his meeting with the founder of Art of Living Sri Sri Ravi Shankar--seen "close" to the Modi Government.[290]In the meeting with Ravi Shankar, Salman Nadwi expressed his views that Muslims (read the AIMPLB) should settle the Babri Masjid issue outside the court but what irked the AIMPLB most when Salman Nadwi advocated that the site of the Babri Masjid should be shifted and the land of the mosque should be handed over to the Hindus. His statement contradicted the AIMPLB's position. This was the background of his expulsion. The AIMPLB member Qasim, speaking

[289] *Dainik Jagran*, Rashtriya Sanskaran, March 9, 2018.

[290] Ibid.

to the press, justified the expulsion, "The AIMPLB will continue with its old stand that a Mosque cannot be gifted to anyone, neither could it be sold nor shifted to some other place. As Maulana Salman Nadwi had gone against this unanimous stand, he has been expelled from the AIMPLB".[291] On December 6, 1992, the Hindu communal leaders mobilised thousands of people to Ayodhya in eastern Uttar Pradesh and played a key role in the destruction of the 16th century Babri Masjid in broad day-light. The Hindu communal forces contended that the Babri Masjid was built after the destruction of a Ram Temple at the very birth site of Lord Rama during the "Muslim" rule in the medieval period. After the 1980s the Vishva Hindu Parishad--an RSS organisation working to unite Hindus across the globe--and the BJP held several political rallies and carried out a march in support of building the Ram Temple at the site of the mosque. Now the Ram Temple and Babri Masjid controversy is sub-judice in the Supreme Court with the AIMPLB being a party in the case.

These two recent incidents reflect the deep contestation within and around the institution of the AIMPLB. It has always claimed that it is a "representative body of the Indian Muslims, working to "protect" Muslim Personal Law (MPL) from interference. Among other key objectives-- the AIMPLB claims to pursue--is to "promote" Islam and Shariah (Islamic Laws) and act as the "mouthpiece of intellect and consciousness of Indian Muslims". While it is true that it has been able to mobilise thousands of Muslims to the streets on cultural and religious issues of the community, it is also difficult to deny that the AIMPLB is facing continuous challenges from its opponents both from within the community and outside. As discussed in the second chapter, the very formation of the AIMPLB in Bombay saw clashes between the supporters and the opponents of it. On December 28, 1972 when the first convection of AIMPLB was underway, a group of liberal-modernist Muslims under the leadership of Hamid Dalwai came up and began raising slogans against its agendas. While the AIMPLB opposed any interference in the MPL, the Dalwai-led group spoke in favour of reforms and modernisation of the MPL. Since then, a large number of powerful individuals and groups--internal and external as well as both communal and secular--have vigorously opposed the AIMPLB and went to an extent of advocating its abolition.

This chapter is a discussion of the critics and criticisms of the AIMPLB. But let me first discuss what the AIMPLB claimed about itself. How does the AIMPLB construct its

[291] 'Maulana Salman Nadwi, Muslim cleric who suggested shifting of Babri Site, expelled from AIMPLB', *India.Com*, February 11, 2018. Accessed (online) June 30, 2018, URL,*http://www.india.com/news/india/aimplb-sacks-maulana-salman-nadvi-for-suggesting-shifting-of-babri-mosque-from-ayodhya-2889206/*

narrative to get legitimacy among the community? In other words, what are the tropes the AIMPLB uses to justify its existence and relevance?

The AIMPLB& Its Claims

The ulama as a "formal and constituted class" emerged "only in the modern period".[292] They were "an eventual product of the transitional movement" of the seventeenth and eighteenth centuries. In other words, ulama as a social group "crystallized out" after the Mughal Empire was shattered" in the nineteenth century.[293] With the decline of Muslim power, the ulama entrusted themselves with the responsibility of guiding the community. It was within this context that the Dar ul-Ulum, Deoband in Saharanpur District was established in 1866 and Nadwa, Lucknow, was founded in 1894. The stated goals of the Deoband Seminary were to preserve "Muslim culture" by producing an army of the ulama who would be guiding the society in the light of the Quran.[294] Similarly, Nadwa's stated objectives were "to produce preachers and interpreters of Islam who could present the faith to the present day world in a striking manner and in a form and language it could understand." [295] However, Nadwa lodged its differences with the Deoband Seminary. While Nadwa shared much of the narrative of the ulama of Deoband, yet the ulama of Nadwa indirectly criticised the Deoband Seminary for being averse to change. Instead, Nadwa from the very beginning claimed to be in favour of pursuing "balanced and moderate course."[296] With the passing of the time, the Deoband Seminary became so prominent that its interpretation of Islam was regarded as a new school of thought. Nadwa belonged to the same Deobandi sect.

Though the AIMPLB claims to be the representative of all Muslims and it has offered its post to ulama from other sects but it is not to negate the fact that it is dominated by Hanafi-

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[292] I have discussed elsewhere the emergence of the ulama as a social class in the modern period. See, Abhay Kumar, 'Perceptions of Muslim Backwardness: Bengal and the North-Western Provinces & Oudh (1871-1900)', unpublished M.Phil. Dissertation, Centre for Historical Studies, Jawaharlal Nehru University, New Delhi, 2013.

[293] Wilfred Cantwell Smith, 'The *Ulama* in Indian Politics' in Mushirul Hasan, ed., *Islam in South Asia: The Realm of the Tradition*, Vol. III, Manohar, New Delhi, 2008, pp. 38-42.

[294] Barbara Daly Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* in *India's Muslim: An Omnibus*, Oxford University Press, New Delhi, 2007, p. 86.

[295] Abhay Kumar, 'Perceptions of Muslim Backwardness: Bengal and the North-Western Provinces & Oudh (1871-1900)', unpublished M.Phil. Dissertation, Centre for Historical Studies, Jawaharlal Nehru University, New Delhi, 2013.

[296] Ibid.

Deobandi- Sunni school of thoughts. All the four presidents of the AIMPLB so far have belonged to the Deobandi school.

The Shias and the Barelvis Muslims were represented but their ulama and leaders have not reached the top positions. For example, the current Vice-president of the AIMPLB is Kalbe-Jawad, a Shia Muslim. Making Jawad the vice-president is an important gesture by the AIMPLB to send out the message that despite differences among Shias and Sunnis, the Muslims of India are united. In spite of that, the AIMPLB has been criticised for imposing Hanafi jurisprudence, followed by the majority of Indian Muslims such as Sunni-Deobandi and Barelvi Muslims also known as *ahnaf.* However, Shias have their own schools of jurisprudence and they do not follow Hanafi school. The Sunni-Ahle Hadees Muslims, unlike them, do not follow any jurisprudence school in totality and they are, thus, known as *ghair muqallid*.

As the critics argue the AIMPLB, despite calling itself as a representative body, has often failed to represent all schools. For example, when it was formed in 1972, Maulana Qari Muhammad Tayyib Qasmi--its first president and grandson of Maulana Muhammad Qasim Nanotvi (1897-1983), the founder and ideologue of Darul Uloom Deoband and its eighth Mohtamim (Principal)--gave the presidential speech in which he only talked about the merits of four Sunni schools of jurisprudence without any reference to the Shia school of Ithna Ashari or Ismaili schools despite the fact that its followers were also present in the convention. Similarly when the AIMPLB prepared the new compendium of Islamic Laws in 2001, it relied "exclusively on Hanafi law", ignoring other three schools of Sunni and three schools of Shias. Tahir Mahmood took objection to this, "The new Compendium of Islamic Laws published by the All India Muslims Personal Law in 2001 is based exclusively on the Sunni Hanafi law. In view of the lack of general knowledge about Shia Law, the newly established Shia Personal Law Board would do well to prepare for the benefit of all concerned a compendium of Jafari law".[297]

Notwithstanding these limitations, the AIMPLB has always claimed to represent the *ummat-e-wahidah* (the united community).[298]In an article, Khalid Saifullah Rahmani, the

[297] Tahir Mahmood, 'Reform Friendly: Parts of Shia', *The Times of India*, December 11, 2006, p.16.

[298] According to noted scholar of the Muslim Laws Professor Tahir Mahmood, *Ummat-e-Wahidah* is a 'traditional" Islamic concept which means "one community". This concept is a normative one. The Muslim community, in practice, remains divided among several committees, sub-committees, groups and sub-groups

spokesperson of the AIMPLB, underscored the fact that the biggest achievement of the AIMPLB had been creating the unity among Muslims.[299] The most important activity of it, as he argued, was to inculcate the temperament (*mizaj*) towards unity and consensus among Muslims, cooperation (*ishteraq*) for a common cause. It has also developed among Muslims the spirit of religious (*mazhabi*) and cultural (*tahzibi*) identity (*tasakhkhus*), giving them the wealth of collectively (*ijtemaiyat*). This is the most important achievement of the AIMPLB and may Allah preserve this quality in them.[300]The AIMPLB exhorts the Indian Muslims to rise above their individuality (*infradiyat*), sectarian differences, and groupism (*jamayati halqa bandi*) and to work for the religion (*din*) and Islamic community (*Islamic ummat*).[301]

In order to make the Muslims believe that the AIMPLB is their real representative, Rahmani interpreted Islam in such a way that the ulama were presented as the "successor" (*waris*) of the Prophets. He argued that since the Prophet was not among us, the ulama (-led AIMPLB) were His "successors" and thus true guide of the *ummat*.

Further, Rahmani said that the rules of Islam (*ahkam-e-deen*) reached to us through these sources: the Prophet (*Rasul*), his Companions (*Saḥabah*) and the ulama.[302]That is why the Muslim community should try to get closer to the ulama in order to be closer (*marboot*) to Islam. Thus, the implied meaning suggested that the Muslim community, in the absence of the Prophet and the Companions, should look to the ulama to guide them in this world.

Elaborating this point, he said that the Prophet of every period carried out the task of explanation (*tashreeh*), clarification (*tauzeeh*), preaching (*dawat*), guidance (*irshad*) and protection (*himayat*) of people, since the Prophet was not among us, it was now the responsibility of the ulama to carry out these tasks. While the ulama were religiously bound to preach, explain and protect the community, the common Muslims, on their part, should have respect (*tauqeer*) for the ulama. Moreover, they should also have confidence (*aetemad*)

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etc. For details, see Tahir Mahmood, 'Divisions in Muslim Society and the Indian Public Law', *The Milli Gazette*. Accessed (online) July 14, 2017, URL, *http://www.milligazette.com/Archives/01072001/28.htm*

[299] Khalid Saifullah Rahmani, 'All India Muslim Personal Law Board: Taarruf aur Khidmat' in Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 29.

[300]Ibid.

[301] Maulana Syed Wali Rahmani, 'Muslim Personal Law ki Tarikh Iman-o-Yaqin ke Mutwallion ki Tarikh hai', Mohammad Umrain Mahfooz Rahmani, ed., *Gulshan e Noomani*, Monthly, Malegaon, special issue on the All India Muslim Personal Law (AIMPLB), June-July 2014, p. 17.

[302]Maulana Khalid Saifullah Rahmani, 'Millat-e-Islamia', *Inquilab*, New Delhi, February 9, 2018, pp. 7-12,

in them. Besides these, people should avoid speaking anything that leads to showing disrespect to the ulama and avoid doing anything that hurt people's faith about them.[303]

With the interpretation --the ulama being the successors of the Prophet and charged with the responsibility to carry out the work which the Prophet what He did in his lifetime-- the discourse is constructed to put the ulama immune from the criticism. However, not all Muslims have believed and followed these interpretations blindly and they have sometimes criticised the AIMPLB for its limitations and failures. These sections of Muslims, in turn, have drawn the ire of the AIMPLB.

Rahmani too addressed them indirectly and called them to be unaware about reality. He, thus, blamed them for strengthening anti-Islamic forces. He contended that there was a section that did not have the courage to open their mouth against the Prophet and the Companions. It may be due to the spark of faith which was hidden in their hearts that did not allow them to go to that extent or the fear of society that held their tongue. Such people often attacked the ulama and religious leadership and passed unfair comments on them. And they considered them "unaware", "passive", "oblivious"(to reality), and lazy. By such an act, they, in fact, strengthened anti-Islamic forces and tried to please them, argued Rahmani.[304]

Note that the author attempted to blur the boundary between Islam and the ulama. Islam is a religion while ulama are a class of Muslim and both, therefore, could not be equated. As a social class, its interests cannot represent the interests of all. There are examples in history, when the religious leaderships were hand in glove with the state and its institutions, while there are other examples when the ulama tried to maintain a distance from the state. Given that, the ulama as a social class cannot put itself exempted from criticism.

Opposing the closure of the possibility of criticism does not mean that all criticisms against the ulama are valid. In the second chapter, the liberal-modernist Hamid Dalwai has been criticised for his irresponsible and sweeping comments about the ulama and the AIMPLB. At the same time, the AIMPLB and its ulama are also not justified to hurl a similar criticism on its opponents. For example, not all critics of the AIMPLB are working against the interest of the Muslim community. Not all progressive and feminist scholars--who have criticised the AIMPLB and the ulama associated with it--are strengthening anti-Islamic forces.

[303]Maulana Khalid Saifullah Rahmani, 'Millat-e-Islamia', *Inquilab*, New Delhi, February 9, 2018, pp. 7, 12,

[304]Ibid.

Unfortunately, Rahmani failed to engage with the critics and easily dismissed them as those working under the influence of the communists and Western media. He said that earlier the Communists tried to keep Muslims away from the ulama and religious personalities, now the same thing was being done by the western media. For him, those who are critical of the AIMPLB were "the innocent Muslims" misguided by anti-Islamic propaganda.[305]

Earlier similar trope was also used by Maulana Minnatullah Rahmani, the former general secretary of the AIMPLB and the Ameer-e-Imarat-e-Shariat. On the basis of its relation with the ulama, he divided Muslims into four groups. The first group consisted of the ulama and scholars who were aware of MPL and Shariah. He put them at the highest pedestal because they were supposed to have a huge responsibility to make aware those who were unaware about the MPL. With this group of people, according to Minnatullah Rahmani, the AIMPLB could have cooperative and friendly relation. The second group belonged to those who were trained in western education. They, according to him, thought that there was a problem in the MPL and it should be corrected. This group of Muslims, who were raising questions, could be persuaded and their confusion (read criticism) can be removed through literature, symposium, seminars, and study team. The reason why the AIMPLB did not completely dismiss them was the fact that they were faithful to Islam. The fourth group was common Muslims who do not want to see any amendment in Muslim personal law but such section was not fully aware of the Muslim personal laws. They are ignorant about the MPL and Shariah. As a result, some Muslims would take recourse to triple talaq. Thus it was the work of the AIMPLB to educate them about the proper way to give talaq. However, it was the third group that invited his ire the most. They were the "progressive" and Westernized Muslims, who followed "western values". They stood for changing/amending the MPL. For them, progressive ideas were most loved one (*mahboob*). Instead of engaging with them, Rahmani took an easy path and called them ones being in minority who could be counted on fingers all across the country. He alleged that the third section of Muslims did not want to hear anyone and they wanted change in the MPL. The Government got strengthened from this section that supported amending or interfering with MPL.[306]

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[305]Maulana Khalid Saifullah Rahmani, 'Millat-e-Islamia', *Inquilab*, New Delhi, February 9, 2018, pp. 7, 12,

[306]Maulana Syed Shah Minnatullah Rahmani, *Muslim Personal Law Board ka Masalah: Naye Marhale men*, Markazi Daftar All India Muslim Personal Law Board, New Delhi, 2011, pp. 17-18.

Another way of the AIMPLB to deal with the dissenting voices was to lament the disunity among the community and then talk of the need to forge it. In another piece, Khalid Rahmani lamented the lack of unity among Muslims[307]as he contended, "construction (*tamer*) is difficult but destruction (*tashreeh*) is easy".[308] He also quoted the Prophet Mohammad as saying that "the help of Allah is with collective (*ijtamayiat*)".[309] The history of Muslims says that the open enemies of Islam, he argued, did not harm so much as those [wolves] who disguised themselves as sheep. Such an act was a part of a conspiracy. Some people deliberately became the instruments of the enemies to get their interests served while many others became part of this conspiracy due to the lack of understanding and their stupidity. However, such people were sincere but they got misguided as their religious feelings had been exploited on. These innocent people were convinced that whatever they were doing was right.[310]

Another critical issue the AIMPLB often underscores is the disposition of Muslims from the power, particularly after the establishment of the colonial state. That is why the AIMPLB had often argued for protection of the religious and cultural boundary from any interference from the external forces. That is why Minnatullah Rahmani argued that Muslim community cannot rely completely on the Government for the protection of the MPL. He, therefore, justified the existence of the AIMPLB.

آل انڈیا مسلم پرسنل لاء بورڈ "یہ سمجھتا ہے کہ مسلم پرسنل لاء کا تحفظ صرف حکومت کے ذریعہ نہیں ہو سکتا۔ اسے یقین ہے کہ پرسنل لا کے تحفظ کی ذمہ داری مسلمانوں پر عائدہوتی ہے۔[311]

(The All India Personal Law Board (AIMPLB) thinks that the Muslim Personal Law can never be protected by the Government only. It is confident that the responsibility of the protection of the personal law falls upon the Muslims.[312])

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[307] Khalid Saifullah Rahmani, 'Dini Idaron', *Inquilab*, New Delhi, September 30, 2016, pp. 7-8.

[308]Ibid.

[309]Ibid.

[310]Ibid.

[311]Maulana Syed Shah Minnatullah Rahmani, *Muslim Personal Law Board ka Masalah: Naye Marhale men*, Markazi Daftar All India Muslim Personal Law Board, New Delhi, 2011, p. 16.

[312]Translation is mine.

After arguing the case for following the leadership of the ulama and desisting from criticising them, Khalid Saifullah Rahmani counted the contribution of the ulama-led AIMPLB to the protection and preservation of the religious and cultural identity of Muslims. According to him, in the colonial period, the ulama played a great role in the protection of faith and Shariat and they fought the Christian Missionary and the Arya Samaj. In the post-colonial period, the AIMPLB sought to protect the Shariat[313].Similarly, Syed Qasim Rasool Ilyas, the convener and spokesperson of the AIMPLB, claimed that it had "managed to protect the Muslim personal law from being overwritten by the uniform civil code". On the Ayodhya dispute, he said the AIMPLB "fends off all attempts to make us agree to an unfair settlement". He also reiterated that it was an "umbrella" body of the Indian Muslims. The "Major achievement [of the AIMPLB]", he argued, "has been to reduce the tensions between various Muslim sects and bring them together under one umbrella". Moreover, he claimed that the AIMPLB has "helped to reduce the gulf between the Ulema and the Muslim intellectuals".[314]

Contrary to the claims of the AIMPLB, its critics pointed out its limitations and failures. The critics did not belong to one group, nor do they argue in one language. Their criticisms, similarly, flow from different concerns.

The AIMPLB and its Critics

The Hindu communal groups have often targeted the AIMPLB for denying the rights of Muslim women who are victims at the hands of Muslim men. However, not all critics belonging to the Hindu communal groups speak in the same manner. Some of them speak sophisticatedly, while others use crude language. For long, the Hindu communal groups have criticised the MPL and called for reforms. In the Constituent Assembly, K.M. Munshi spoke for the enactment of the UCC. When the Hindu Code Bill was being debated, several members of the Hindu right-wing inclination brought the issue of the "unreformed" MPL. They used this occasion to attack the Nehru Government for imposing reforms on the Hindu community, while sparing the MPL. They expressed fear that the "unreformed" MPL legally permitted the Muslims to marry as many as four women, resulting in the sharp increase in the population of Muslims. The Jana Sangh--the political wing of the Hindu communal RSS formed in 1951 and was merged in the Janata Party in the late 1970s-- similarly criticised

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[313]Maulana Khalid Saifullah Rahmani, 'Millat-e-Islamia', *Inquilab*, New Delhi, February 9, 2018, pp. 7, 12,

[314]*The Times of India*, 'Nothing Personal: Q&A', February 4, 2005, p. 18.

Nehru Government for failing to enact the UCC. In the 1980s when the Shah Bano controversy came up, the BJP, the new avatar of the Jana Sangh was at the forefront of attacking the MPL and the AIMPLB. Apart from the BJP leader L.K. Advani, Arun Shourie--the right-wing journalist, economist and later minister in the BJP Government—was one of the leading critics of the AIMPLB. The coming of the Narendra Modi Government saw an intensified attack on the MPL and the AIMPLB. From Prime Minister Modi to the senior BJP leader and now the Vice-President Venkaiah Naidu all critiqued the AIMPLB and presented their arguments in such a way as if once the reforms in the MPL were done, all the problems of the minority community as well as the nation would be done away with forever. Even the RSS was not far behind and it in fact threatened the Muslims to either accept the UCC or face the withdrawal of their political rights including the right to vote, an issue to be discussed in detail in the fifth chapter.

Unlike them, some members of the Hindu Communal groups were very blunt in their criticism of the AIMPLB. For example, the BJP Member of Parliament Sachchidanand Hari Sakshi better known as Sakshi Maharaj--a Sadhu-cum-politician and notorious for his anti-Muslim tirades--called that AIMPLB was a "terrorist" organisation dominated by the extremist minds. His statement came after the triple talaq judgment (2017).[315]

Similarly, the U.P. Shia Central Waqf Board Chairman Wasim Rizvi called the AIMPLB to be a "terrorist" organisation and went on to demand a ban on it.He alleged that AIMPLB was a branch of terrorist organisation backed up by Pakistan and Saudi Arabia for influencing decision related to the Indian Muslims.[316] This statement came in the wake of the Salman Nadwi controversy. When Nadwi was expelled by the AIMPLB for his remarks in support of shifting of the Babri Masjid, he used the occasion to attack the AIMPLB. He further said that the AIMPLB did not expel Salman Nadwi when he allegedly wrote a letter to the ISIS chief Baghdadi congratulating him on his Caliphate nor did it expel the "terrorist" Zakir Naik. "India has declared Zakir Naik a terrorist. He has been declared an absconder. But he is still a member of the All India Muslim Personal Law Board. Why the AIMPLB has not expelled him", asked Rizvi. Moreover, he demanded for increasing the duration of the imprisonment from three years to ten years, instead of the proposed three years, for the Muslim husbands

[315]*Inquilab*, New Delhi, February 14, 2018, p. 4.

[316]*The Hindustan Times*, February 12, 2018. Accessed (online) April 25, 2018, URL, *https://www.hindustantimes.com/lucknow/aimplb-a-terror-organisation-ban-it-wasim-rizvi/story-uQiSCqfdY8gsUkkEw7CVYI.html*

who gave triple talaq, as is proposed in the Muslim Women (Protection of Rights on Marriage) Bill 2017.[317]

A. Rahman--a columnist in Hindi and Urdu newspapers who claimed to be an advocate of the Supreme Court--held a press conference in the Press Club of India, New Delhi and alleged the AIMPLB of receiving money from Pakistan for its campaigns related to the protection of Shariat, triple talaq and rehabilitation of the Babri Masjid. He also told the journalists that he had filed a Public Interest Litigation (PIL) in the Delhi High Court. In it, he levelled serious allegations against the AIMPLB that its office-bearers had received money from Pakistan through *hawala* (transfer of money thorough illegal means) for leading the rehabilitation of the Babri Masjid and triple talaq campaigns. He also disclosed in the press conference that for the last six years he had been working for the intelligence agencies of India and since it was now known, he would no longer work for the same. He said that during this period he came to know that the AIMPLB took money from the Pakistani Government for fighting the legal case of Shariat and through hawala it was delivered in the month of February and March from Dubai. It was received by Kamaal Farooqui, an executive member of the AIMPLB and Wali Rahmani, its general secretary. He claimed that he had already informed the Government of India about it.

Another wild allegation he made was that some Maulvis (Muslim religious scholars) of the AIMPLB are spreading the rumour that the present government was trying to deprive Muslims of their personal laws. It was also being propagated that the Governments was making attacks on Shariat but it could be saved, if five lakh Muslims became ready for sacrificing their lives. According to Rahmani, such rumours might become very dangerous because they might lead to riots in the country and people, particularly innocent, would be killed. He also said that these rumours were being spread through some mosques and madrasas. He appealed to the court that it should get the matter probed by the CBI or NIA (National Investigation Agency). He also levelled charges on the AIMPLB secretary and spokesperson Zafaryab Jilani and Secretary Fazlur Raheem Mujaddedi[318]. Zafaryab Jilani, reacting to these allegation, said that such allegations were hundred per cent baseless and he

[317]*The Hindustan Times*, February 12, 2018. Accessed (online) April 25, 2018, URL, *https://www.hindustantimes.com/lucknow/aimplb-a-terror-organisation-ban-it-wasim-rizvi/story-uQiSCqfdY8gsUkkEw7CVYI.html*

[318]Mumtaz Alam Rizvi, 'Muslim Personal Law Board ke', *Inquilab*, New Delhi, December 5, 2017, p. 15.

would file a defamation case against him.[319] Since the press conference, nothing more was heard about these allegations later. As things appeared, these allegations might have been part of the attempts to defame the AIMPLB.

The lone BJP Minister in Uttar Pradesh Government Mohsin Raza dismissed the AIMPLB as an "NGO".As he put it, the AIMPLB is "a social sector organisation...an NGO...which should be working for the welfare of Muslim women, for education of Muslim women...but they would not do so as educated people would not believe them".[320] On the issue of triple talaq which the AIMPLB termed as "wrong" but""valid", he came down heavily on it. "Triple talaq is not part of Sharia... it has been accepted as an evil by the Supreme Court as well. Even Islamic countries across the world have not accepted it....AIMPLB, in the garb of welfare, talks about exploitation even today. Triple talaq is nothing but exploitation of helpless women."[321] Note that the BJP did not give a single ticket to Muslims in the 2017 assembly elections of UP, the largest state with four crore Muslim population constituting 19% of total population. Raza, a Shia Muslim, does not have much base among Muslims and his elevation to the rank of the cabinet minister is seen as a reward for his loyalty to the party.

Sadhvi Prachi, Vishwa Hindu Parishad leader and the founding chairperson of Durga Vahini (or Army of Durga, the women's wing of Vishwa Hindu Parishad), held the Muslim religious leaders (read the ulama-led AIMPLB) responsible for the plight of the Muslim women. In her views, the Muslim women should convert to Hinduism to get rid of triple talaq. She gave this statement after recently visiting Alakhnath Temple (Bareilly).[322]

As it is evident now, these criticisms against the AIMPLB are largely based on propagandas and aimed at demonising the AIMPLB. The allegations--the AIMPLB is a "terrorist" organisation backed up by the Muslim majority country like Pakistan and Saudi Arabia and its leaders are receiving illegal money from Pakistan--emanate from the old communal and Islamophobic stereotypes. The association of the Indian Muslims with Pakistan and Saudi Arabia was deliberately done to destroy its credibility and image. Sakshi Maharaj, Raza, Rahman and Sadhvi Prachi were deliberately using communal languages to tarnish the AIMPLB's image. Note that similar criticism was also levelled against the AIMPLB in its

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[319]Ibid.

[320]*The Indian Express*, New Delhi, 'AIMPLB an NGO', December 12, 2017, p. 7

[321]Ibid.

[322]*Dainik Jagran*, Rashtriya Sanskaran, April 30, 2017, p. 6.

formative days when the critics dismissed it as a "communal" organisation. Dalwai, among the reformist Muslims, did not refer to the AIMPLB but he did accuse the Indian Muslims of being supporters of Pakistan.

Another plank on which the AIMPLB was criticised is the question of women. It is here that the AIMPLB finds itself in a difficult position. Its position on the triple talaq, particularly, has come in for a lot of criticism from several quarters. For example, the Islamic scholar Zafarul Islam Khan was also critical of the AIMPLB's position that triple talaq was wrong yet valid. He called triplet talaq as "wrong" and "in fact, *biddat*, that is an innovation in a religious matter". He also gave the reference to the Prophet's wife Hazrat Aisha's *Hadees,* according to which "*talaq* is invalid if pronounced in a condition of "*ighlaq*" (when a person is not in control of himself like extreme rage, sleep, intoxication or insanity)". After giving his criticism, he also suggested that it was within the ambit of the religion if "any reasonable consideration "was inserted in the marriage contract (nikahnama) including such as "talaq-e tafwid (i.e., transferring the right of divorce to the would-be wife). Likewise, a would-be wife can impose the condition that she will not cook or that she will take up a job, or she will live in separate quarters, etc."[323]

Leading campaigners against the triple talaq, Zakia Soman and Noorjehan Niaz criticised the AIMPLB for being a sort of a fountainhead for the preservation of the anti-women order: "To begin with, there is the personal law board which is sort of a fountainhead for the preservation of the anti-women order. Their worldview is amply elaborated in their affidavit calling for upholding triple talaq, *nikah halala* and polygamy. They don't feel the need to camouflage anything and have clearly stated in their affidavit that men have more intelligence than women; that triple talaq is better than a man murdering his wife and that polygamy is some kind of social service done by men. Unlike other apologists for triple talaq, the personal law board's views are straightforward and unabashedly put forth", they argued.[324]

[323] Zafarul-Islam Khan, 'Muslim Personal Law and Uniform Civil Code', *Milli Gazette* (online), November 09, 2016. Accessed (online) May 18, 2018, URL, *http://www.milligazette.com/news/15084-india-muslim-personal-law-and-uniform-civil-code*

[324] Zakia Soman and Noorjehan Niaz 'Triple Talaq Debate is Bringing out Multiple Shades of Patriarchy', *The Wire*, November 09, 2016. Accessed (online) May 6, 2018, URL, *https://thewire.in/rights/triple-talaq-debate-bringing-multiple-shades-patriarchy*

Akhtarul Wasey, professor of Islamic studies and Barelvi leader on triple talaq, agreed that triple talaq in one sitting was not as per the Quranic injunction. When the Prophet came to know that a person has given triple talaq, He let it get in force but he expressed his severe anger about it, this showed that it was not liked by the Prophet.[325] He said that if the triple talaq is *talaq-i biddat* then it should be abandoned to save the lives of divorced women because *biddat* is a road to hell.[326] In a recent article, Wasey raised the question: if triple talaq in one sitting angered the Prophet, how could the AIMPLB justified to uphold it?

Arif Mohammad Khan spoke with an alternative interpretation to critique the AIMPLB. He disputed the interpretation of AIMPLB and said the present MPL had become distorted from Islam. Moreover, he also claimed that Islam supported monogamy, and polygamy was allowed in extra-ordinary situation. This is in conflict with the AIMPLB's position.[327]

Scholar Razia Patel criticised the MPL for failing to protect the interests of women. "The present form of MPL in India has some provisions, which are not seen as in accordance with the values of gender equality and are constantly opposed by many groups and individuals. The provisions regarding oral divorce, polygamy and maintenance after divorce are found to be used frequently by Muslim men". [328]

Moreover, the AIMPLB was criticised for imposing Deobandi version of Hanafi interpretation on Muslims and Deobandi Muslims are presenting its own version of Islam as the version of Islam. Critics have pointed out that "the AIMPLB remains frozen in a time-warp and that the Hanafi school of Shariat followed by Deoband Darul-Uloom and the Sunni Muslims is being touted as the only real interpretation of Islamic Laws".[329]

Patel said that the colonial government through "unified" personal laws "ignored" differences among the Muslim community. "Within the Muslim community, for instance, unified Muslim personal law ignores all differences between Shia, Sunni, Ahmadi, Wahabi sects, and also

[325]Akhtarul Wasey, 'Masla ek Majlis', *Roznama Rashtriya Sahara*, New Delhi, November 26, 2016, p. 7.

[326]Ibid.

[327] Arif Mohammed Khan, 'For a Common Cause', *The Times of India*, August 19, 2009, p. 20.

[328] Razia Patel, 'Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice,'*Economic and Political Weekly*, Vol. xliv no 44, October 31, 2009, p. 48.

[329]Muslim Personal Law: Rights for Shia Women', *Economic and Political Weekly*, December 2, 2006

ignores the fact that certain groups like Khojas, Menons and Mapillas are customarily governed by the personal laws of Hindu inspiration.[330]

Hasina Khan of *Aawaaz-e-Niswan* was critical of AIMPLB and said that it was a big hurdle in reforms[331]. Aawaaz-e-Niswan was formed in 1987 when a small group of Muslim women came together. Hasina Khan, an activist of Aawaz-e-Niswan, supported the issue of Shah Bano. Now the organization, as she claimed, has 5000 members both educated and uneducated.[332] She was critical of AIMPLB on its stand of triple talaq: "In fact, one of the main reasons for the backwardness of Muslim women is the personal law. When a Muslim woman is divorced unilaterally, she is left to fend for herself."[333] Unlike the views of AIMPLB about unilateral talaq as "social" problem and not legal one, she wanted legislative interference in the matter. "My contention is that let the law be amended first. We can come to the question of implementation later. Let us get our priorities correct."[334] However she also said that if the problem could be solved within the Shariat she had no problem and she also said that it was possible to solve the problem within Shariat. "We will be very happy if the problem is resolved within the framework of the "Shariat". In fact, it should be possible to solve the problem within the ambit of the "Shariat".[335]Giving the example of Muslim/Islamic countries, she said that triple talaq had no sanction in the Quran: "We are now networked with like-minded organisations in India, Pakistan, Bangladesh and other countries."[336]"In Pakistan, which is an Islamic country, triple "talaq" is banned. If a husband wants to remarry or divorce his first wife, he has to apply to the court and as long as the court does not complete its investigation the husband cannot divorce. Bangladesh also has a similar law. There are such progressive laws in other Islamic countries but in secular nation like India we do not have such laws".[337]

Around two-hundred prominent Muslim men from across the country also came up against the triple talaq. They supported the fight for the abolition of the triple talaq. This group of

[330] Patel, 2009, p. 47.

[331]*The Times of India*, 'Personal law is major hurdle to Muslim women's progress', April 17, 2001, p.5.

[332]Ibid.

[333]Ibid.

[334]Ibid.

[335]Ibid.

[336]Ibid.

[337]*The Times of India*, 'Personal law is major hurdle to Muslim women's progress', April 17, 2001, p.5

Muslim men had come together under the platform "Muslim Men for Gender Justice" which consisted of members of civil society such as lawyers, filmmakers, businessmen, doctors, students and expressed their views by releasing a statement. This statement was in support of the campaign against the abolition of triple talaq led by the Bharatiya Muslim Mahila Andolan (BMMA) and other groups. These groups not only opposed triple talaq but also *nakah halala*, a practice which requires that "a couple divorced through triple talaq cannot remarry unless the woman marries again and gets separated from her second husband".[338] These progressive Muslim men criticised the practice of triple talaq which "violates constitutional principles and gender parity and non-discrimination". Irfan Engineer, who heads Institute of Islamic Studies, signed the statement and said that the patriarchal norms in religions could only go if an intervention is made, "Religious and patriarchal institutions, across religions, are not going to change, and they have to be compelled to change".[339] Famous lyricist and columnist Hasan Kamaal hinted at how the progressive voices in the AIMPLB got silenced by the majority. "When we spoke to some scholars in the All-India Muslim Personal Law Board, to our astonishment we found that they agreed with us but did not have a majority in the board", said Kamaal.[340]

Pasmanda Awaz, an organ of Pasmanda movement in Bihar, made a strong critique of the AIMPLB and went on to say that the AIMPLB is a body of upper caste Muslims. Thus the organ accuses the AIMPLB of "maintaining criminal silence on the problems of poverty and hunger among the artisanal lower caste Muslims" and on frequently reported incidents of upper-caste Muslims disallowing the burial of *maiyyat* (dead-bodies) in the graveyards."[341] Pasmanda movements or the backward class/Dalit Muslim movements for dignity and share in power have been in its new incarnation since the 1990s when the Mandal politics was at its peak. The term *pasmanda* means "[those who are] left behind". The criticism of Pasmanda leaders that the AIMPLB has not only been insensitive to the issues of lower castes but it has also not given proper representation to the lower castes in its institution.

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[338] *The Hindustan Times*, New Delhi, 'Muslim men lend support to campaign against triple talaq', June 9, 2015, p. 9.

[339] Ibid.

[340] Ibid.

[341] Mohammad Sajjad, 'Muslim Communities and the Politics of Social Justice, Bihar, 1990-2010' in Manish K Jha and Pushpendra eds., *Traversing Bihar: The Politics of Development and Social Justice*, Orient BlackSwan, New Delhi, 2014, p. 253.

Similarly, the head of Law School at Glocal University, Ayaz Ahmad criticised the AIMPLB. He claimed that he was using an Ambedkarite perspective. In an article written soon after the introduction of the India Muslim Women (Protection of Rights on Marriage) Bill, 2017, he criticised the AIMPLB for opposing reforms in the MPL, particularly in triple talaq, halala, polygamy, and Muslim inheritance laws.[342] He again called these practices to be against constitution that envisions an egalitarian society. However, he said that the lower castes and Pasmanda Muslims have opposed such politics of the MPL based on religion. He blamed the upper caste Ashraf for this, adding that the politics of personal law and its related controversies had been used by the upper castes of every religion to harden the religious identity and ignore the caste question. As he argued that Personal Law contributed to keeping the communal politics alive and maintaining the patriarchal structure, harming egalitarian principles of constitution. As a result, the issue of gender justice had been silenced and it articulated on communal issue. He went on to support the UCC. He also called for rising above religion and caste.[343]

Journalist Syed Aijaz Zaka blamed the AIMPLB and the Muslim leadership for failing to tackle the threat from the BJP: "Even when it has been apparent that the current regime in Delhi is out to exploit the issue, the Muslim leadership and wise men of the AIMPLB took no steps to counter the mischievous government narrative."[344]

Professor Tahir Mahmood says that Muslims did not act in time to do away with talaq-i-*biddat*.[345] The triple talaq was criticised by the court judgment and it said that it should be abolished and considered one talaq but the Muslim community did not take action. What it did was to just oppose the ruling. He also said that triple talaq has been misused by Muslim men. He gave the reference of Masroor Ahmad judgment of Delhi High court that said that triple talaq should have been considered one but we did not act on this and demanded instead to revoke the decision and we kept harping on the age-old tune that triple talaq was wrong as

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[342] Ayaz Ahmad, 'Mahila aur purush brabri ki pahal', *Dainik Jagaran* (Rashtriya Sanskaran), December 30, 2017, p. 9.

[343]Ibid.

[344] Aijaz Zaka Syed, 'Divorced from reality', *The News*, January 5, 2018. Accessed (online) April 17, 2018, URL, *https://www.thenews.com.pk/print/264621-divorced-from-reality*

[345] Tahir Mahmood. 'Sharyi Masail par', *Roznama Rashtriya Sahara*, New Delhi, January 1, 2018, p. 3.

per sharia but it would nevertheless be accepted. He also said that the judgment of the SC on triple talaq was right.[346]

Hasan Kamal went on to argue for the abolition of the AIMPLB. He--a popular Indian lyricist and songwriter—criticised it and raised question over its utility (*ifadiyat*).[347] He welcomed the SC's ruling on triple talaq and called it "historical". He said that this decision of SC put India in the league of those Muslim countries which banned years back this unfortunate practice (*manhoosrasm*). He said that if the BJP was taking credit for the SC's ruling, it was because of the AIMPLB which did not ban this unfortunate (*manhoos*) practice. The Muslim community would never forgive the AIMPLB for this. He said that triple talaq, which he called *talaq-i mughallaza* (foul divorce) was not practised by all Muslims. It was found among Ahnaf Sunni Muslims. Then he said that it was also not correct to say that all Hanafi Muslims practised the triple talaq. He said it was more found among uneducated and the lower classes. The educated Hanafi Muslim tried to avoid this non-Quranic practice of triple talaq. But if so much misunderstanding was found among Muslims that it was practised among all Muslims it was due to some ulama of the AIMPLB that presented it as the issue of all Muslims. Hasan Kamaal asked the AIMPLB to voluntarily dissolve itself as it had lost its utility and importance and a new organisation should come which would take up much wider issues including social, economic because this body has failed to address the issue of women.[348]

Sectarian Differences

The contestation over the AIMPLB has also to do with sectarian differences. They are one of the main grounds for the emergence of different boards. As it was discussed in the previous chapters, most of the Indian Muslims are followers of Sunni-Hanafi school. Among Hanafi, there are two major Sunni sects i.e. Deobandis and Barelvis. Deobandis and Barelvis do not have difference over the jurisprudence (*fiqh*) but other differences—both religious and political—cause discord sometimes. Deobandis get themselves associated with Deoband seminary known for its puritan and textual interpretation. Barelvi Muslims are affiliated with the nineteenth and twentieth century Islamic movement led by the Sufi Ahmad Raza Khan Barelvi, who is, in reverence, called Ala Hazrat. The Sunni-Barelvi sect is named after the

[346] Ibid.

[347] Hasan Kamaal, 'Personal Law Board ki Ifadiyat par Swal', *Inquilab*, New Delhi, August 28, 2017, p. 9.

[348] Hasan Kamaal, 'Personal Law Board ki Ifadiyat par Swal', *Inquilab*, New Delhi, August 28, 2017, p. 9.

place Barelvi in Uttar Pradesh which was among its places of origin. The Barelvis and Deobandis differ with each other over the issue of mysticism, tomb.

Among Sunnis, there is another group known as Ahl-e-Hadees which has a large following in India. It emerged in Delhi and spread to other parts of India. The members of Ahl-e-Hadees are those Sunni-Muslims who do not follow any of jurisprudence school in toto. In other words, they do not do *taqlid*. According to the noted historian of Islam Barbara Daly Metcalf, Ahle-e-Hadees, like Deobandis, "deny the validity of the medieval law schools". They instead favour "the direct use of the textual sources of the faith, the Qur'an and the hadis". Moreover, Ahl-e-Hadees "eschewed Sufi institutions and techniques of mediation and discipline". The Deobandis criticised the call of Ahl-e Hadees to consult the Quran and the Hadees directly. For Deobandi, asking for not following any school of jurisprudence is to make individual responsibility "far too great". That is why the Deobandis say that *ghair-taqlid* is "possible only for the elite and not for ordinary people". As regards social class, the members of the Ahl-i-Hadis were relatively more educated and the well-born.[349]

The issue of triple talaq is a point of disagreement among the different sects of the Muslims.[350] However, the Sunni-Deobandi dominated AIMPLB has been able to bring the Ahl-e-Hadees leaders on its platform in the name of the community; there was an occasion when both the Deobandi and Ahl-e-Hadees groups had movement of conflicts. One such occasion came up in 1993. The Ahl-e-Hadees issued a fatwa denouncing triple talaq, the Jamiat Ulema Hind came up to protest it. The then President of the Jamiat Ulema Hind Maulana Syed Asad Madani said that the Ahl-e-Hadees should desist from interfering in the matter. Moreover, Madani accused the Ahl-e-Hadees of misinterpreting the Quran and the fatwa issued by Ahl-e-Hadees was out of the contest and it put forth a "mischievous proposition". Responding to this, the Ahl-e-Hadees President Hafiz Mohammad Zaki Bari accused the Jamiat Ulema Hind of misleading Muslims and putting the Ahl-e Hadees sect in the "dock". Further, Bari said that opposition to Ahl-e Hadees fatwa by Madani on triple

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[349]Barbara Daly Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* in *India's Muslim: An Omnibus*, Oxford University Press, New Delhi, 2007, p. 265.

[350] Yoginder Sikand, 'Stoking the Flames: Intra-Muslim Rivalries in India and the Saudi Connection' in Knut A. Jacobsen, ed., *Modern Indian Culture and Society*, Routledge, London, 2009, pp. 293-294. The article was first published in *Comparative Studies of South Asia, Africa and the Middle East*, 27(1), (2007): 95-108.

talaq amounts to making an effort to depriving Muslim women of their rights given in the Quran.[351]

Note that the relation between the Deobandis and the Ahl-e Hadees Muslims were always not been the same. For example, the Ahl-e-Hadees ulama were involved in the formation of the Jamiat Ulema Hind in the early decade of the twentieth century. Maulana Sanaullah, Syed Dawood Ghaznavi and Maulana Ibrahim Siyalkoti, as claimed by the Ahl-e-Hadees, made an important contribution to the formation of the Jamiat Ulema Hind. Interestingly, Maulana Abdul Wahab Arvi, the president of Ahle Hadith, was simultaneously president of Jamiat Ulema Hind for many years till his death in 1983.[352] As far as the issues of differences are concerned, they are triple talaq and conflicting interpretations about the history of Muslim world including the Ottoman Empire, the emergence of Saudi Arabia, and the Egypt-based Muslim Brotherhood.

The sectarian differences over Shias and Sunnis are also one of grounds. Difference among Muslims arose soon after the demise of the Prophet in 732 AD. It was over the caliphate. Who was the legitimate successor of the Prophet, who would lead the community in his absence? The majority of the Muslims were for election to decide the successor, while a small group wanted Ali, the Prophet's cousin and his son-in-law, to take over the reign. The majority group came to be known as Sunni while the minority group Shia. Abu Bakr, the Prophet's father-in-law, took over as the first caliph of the Muslim community and Ali could only become the Caliph much later. Though Ali eventually became the fourth caliph but his supporter's (Shias) believe that Ali alone deserved to succeed the Prophet. One can see here the difference between Sunnis and Shias are more of a political nature but as time passed on theological differences also came up. While both Sunnis and Shias share fundamentals of Islam with complete faith in the Quran and the Prophet, they both diverged later and developed their own schools of jurisprudence. Unlike Sunnis, Shias recognised Ali's descendants as Imams. Split among Shias also occurred later and they were divided into three groups, i.e. Ithna Asharis (or Twelvers; also known as the Jafaris), Zaidis and Ismailis. Each of them developed their own separate laws.[353] Meanwhile, several schools of Sunni jurisprudence came up but only the four Sunni schools of jurisprudence survived. They are

[351] *The Times of India*, 'Muslim sect flays "propaganda"', July 8, 1993, p.12.

[352] Ibid.

[353] Tahir Mahmood, 'Reform Friendly: Parts of Shia', *The Times of India*, December 11, 2006, p.16.

Hanafi school, the Hanbali School, the Maliki school and Shafi'i school. While the AIMPLB has been criticised for its stand on triple talaq, some scholars believe that the Shia laws, compared to Hanafi law, are at some places more favourable for gender rights and reforms; for example, the laws from the point of view of its "social utility" and "reform potential". Moreover, Shia law does not recognise triple talaq. The Shia Law, unlike Hanafi law, requires a husband to pronounce talaq in the presence of two trustworthy witnesses and he has to utter particular lines in Arabic. Given that, the Shia law has a better chance of reconciliation, according to Tahir Mahmood. Moreover, Shia-Jafari law is more progressive in the matters of inheritance. Despite these differences, when the AIMPLB compiled its Compendium in 2001, it drew heavily on the Sunni-Hanafi law. As Mahmood puts it, "The new Compendium of Islamic Laws published by the All India Muslims Personal Law Board in 2001 is based exclusively on the Sunni Hanafi law. In view of the lack of general knowledge about Shia Law, the newly established Shia Personal Law Board would do well to prepare for the benefit of all concerned a compendium of Jafari law".[354]

A section of progressive Muslims criticized the AIMPLB for failing to come out with its model *nikahnama*. One of the reasons for this was the lack of consensus among the Muslims on the subject. The question is how to prepare a *nikahnama* that will be acceptable to all. As far as the organization of the AIMPLB is concerned it is largely controlled by the Deobandi-Hanafi-Sunni Muslims.

Fissures

Since 2005, several new boards were formed in opposition to the AIMPLB. All India Shia Personal Law Board and the All India Muslim Women Personal Law came up.[355] All-India Shia Personal Law Board was floated in a meeting held at the famous Hussainabad ground in Lucknow. Shia clerics and intellectuals, who came from 17 states, attended the meeting. On this occasion, the president Athar said that, "The Board is not formed as a parallel body to the All India Muslim Personal Law Board. Our community has its own religious, social,

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[354]Ibid.

[355] Seema Chishti, 'Behind tussle between Muslim law boards, a political context', *The Indian Express*, New Delhi, April 7, 2017. Accessed (online) May 16, 2018, URL, *http://indianexpress*.com/article/explained/in-fact-behind-tussle-between-muslim-law-boards-a-political-context-4602740/

educational, political and cultural problems and this board would strive to solve them”[356]. The president also criticised the AIMPLB for failing to take interests in Shia’s issues.[357]

The Shia Board came into being after a split from the Board. The Shia Board had 69 members, while the Board had 204 members. Moreover, the Shia board claimed to be supported by the former ruling Shia family of Lucknow.[358]

However, the AIMPLB always dismissed such formation and claimed that the Shia community is with the Board. Further, the Board also presents the figure of Kalbe Jawad as the Vice-President of the Board to show that the Shias are with the Board. Note that the formation of the Shia board came up in Lucknow, where the Shias have considerable population and the place has a bitter history of Shia-Sunni conflicts.[359]

Asked about the formation of separate boards by Shias and Barelvis, Maulana Fazlur Rahim Mujaddadi, member of AIMPLB, says, “The new personal law boards are not formed in opposition to the existing AIMPLB. Two of the most prominent Indian Shia leaders, Maulana Kalbe Sadiq and Maulana Kalbe Jawad, are still part of the earlier board formed in 1972.”[360]When asked that Shia board’s Maulana Mohd Athar’s charge that AIMPLB ignored the interests of Shia community, he said, “I can’t say why Maulana Mohd Athar has felt that way since the truth, on the contrary, is that the AIMPLB has worked for all the Muslims in accordance with the Shariat Application Act. The division in the community is quite unfortunate, as in the eyes of Allah, all Muslims are equal and divisions based on sectarian loyalties are just man-made”.[361]

Reacting to the formation of Shias and Barelvi boards, the Board spokesperson said that the representation had never been an issue because the Board had given due representation to the various sects of the community. As he argued, “Representation was never an issue. Had it been, it could have been sorted out as in the case of women whose representation was

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[356] Seema Chishti, ‘Behind tussle between Muslim law boards, a political context’, *The Indian Express*, New Delhi, April 7, 2017. Accessed (online) May 16, 2018, URL, *http://indianexpress*.com/article/explained/in-fact-behind-tussle-between-muslim-law-boards-a-political-context-4602740/

[357]Ibid.

[358]Ibid.

[359]Ibid.

[360]*The Times of India*, ‘Among Believers’, March 25, 2005, p. 18.

[361]Ibid.

increased from 15 to 25. Accommodating so many groups and interests—Shia, Sunni, Bohra, Mahdavi, Barelvi, Deobandis, Ahle-Hadis, Hanafi, Shafi'i, in addition to political outfits, religious organisations and schools of learning—in a board of 201 members is a tough balancing act but we've managed it successfully and there's never been a problem".[362] He also said that these parallel boards are being formed by those who are close to the BJP and the RSS, "If you look at the list of people on the two newly set-up boards you will find that many of them have been close to the BJP and the RSS", alleged the Board's spokesperson Ilyas.[363]

The All-India Shia Personal Law Board held a meeting on November 26, 2005 and took a **"**unanimous" decision regarding the rights of the Muslim women. The AISPLB claimed that such an announcement would have "significant and positive implications for the rights of Shia women in the country". The Shia Women Board also announced "a new model" *nikahnama* in which the wife has been given right to "seek a divorce if she is cheated, if she is prevented from exercising her right to education, if the husband has provided false information at the time of marriage, if the groom disappears for two years, if he does not inquire about the wife for months together, if he does not provide for her essential needs, or if he forces her to have sexual relations with other men. The wife, in turn, cannot indulge in "wasteful expenditure" that lands her husband in debt; she must approach arbitrators mentioned in the document for seeking divorce and not directly approach a court". Unlike the previous model *nikahnama* prepared by the AIMPLB, the Shia Women Board said that its *nikahnama* was able to address women's problem in a better way. The new *nikahnama* of the Shia Board made a mandatory provision for signing of an agreement at the time of wedding. This agreement also contained detailed information about the professions of both husband and wife. Information about their salaries, dependants and earlier marriages, if any has to be recorded. Singing of the agreement is important part of the new *nikahnama* and in the absence of that agreement the marriage will not be considered legal.[364]

In 2005, a section of Muslim women also came up to form a separate board. Soon after its formation of the All India Muslim Women Personal Law Board, its president Shaista Amber claimed that it was turning out to be a "big draw" among Muslim women, claimed a report in

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[362] *The Times of India*, 'Nothing Personal: Q&A', February 4, 2005, p. 18.

[363] Ibid.

[364] 'Muslim Personal Law: Rights for Shia Women', *Economic and Political Weekly*, December 2, 2006

The Times of India. They claimed that the All India Muslim Women Personal Law Board had three branches in Muzaffarnagar, Aligarh and Allahabad. President is Shaista Amber, wife of a PCS officer, Amber was associated with the CPI and she was its member but she left CPI to join the Nationalist Communist Party as its president three years ago. She said that she faced opposition from AIMPLB and the Ulema Council.

Maulana Tauqeer Raza formed Personal Law Board (Jadeed) of Barelvis.[365] It was formed in a meeting held in Delhi on December 10, 2004, when over 100 sajjada nashin participated. Raza, the grandson of the Barelvi sect founder Maulana Ahmad Raza Khan, was elected as its interim president. Speaking on this occasion, Raza accused the AIMPLB for its failure. "In the last 35 years, AIMPLB has done nothing. It has become redundant. The board was set up to protect the interests of Muslims by ensuring that the government or judiciary doesn't take decision which violates the spirit of Shariat. But instead of concentrating on its primary role, the Board was now talking about making amendments in the Personal Law."[366]

However, with the passing of time these boards, formed parallel to the AIMPLB, became less and less active and they have become almost defunct. Some of them became deviated from their agendas and got easily manipulated by the power. For example, the All India Shia Personal Law Board supported the ban on cow slaughter. Moreover, it also supported the settlement of Ayodhya issue outside the court. Besides, the All India Shia Personal Law Board's chief spokesperson Abbas backed up the BJP in recent elections and is seen close to Home Minister and BJP leader Rajnath Singh.[367] The chief of Barelvi Board Tauqeer Raza Khan could not carry the Barelvi Board forward and he drew much criticism for its unpredictable political stand. Similarly, the All India Muslim Personal Law Board has not been much active for quite a long time. All of these indicate that the AIMPLB, despite divisions and contestations, remains a powerful body.

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[365] *The Times of India*, 'Barelvis announce parallel personal law board', December 17, 2004. Accessed on July 15, 2018, URL, *https://timesofindia.indiatimes.com/city/lucknow/Barelvis-announce-parallel-personal-law-board/articleshow/961589.cms*

[366] Ibid.

[367] Seema Chishti, 'Behind tussle between Muslim law boards, a political context', *The Indian Express*, New Delhi, April 7, 2017. Accessed (online) May 16, 2018, URL, *http://indianexpress*.com/article/explained/in-fact-behind-tussle-between-muslim-law-boards-a-political-context-4602740/

CHAPTER – 5

POLITICS OF THE MUSLIM PERSONAL LAW

An author of several cited books on Islam and the West Asia, Bernard Lewis (1916 –2018), a British American scholar, influenced both generations of scholars and the foreign policy makers of the USA. For example, the famous Samuel P. Huntington (1927-2008), known for his work *Clash of Civilizations* (1997), too, owed an intellectual debt to Lewis. Among his books *The Crisis of Islam: Holy War and Unholy Terror* was of recent origin, published post-9/11. In this work, Lewis reflected a gist of his life-long scholarship. In this work, he again blamed the failure of the Muslim world to embrace modernity and secularism and seemed to suggest them as the causes of their "poverty" and "tyranny". Judging the Muslim world on the parameters of modernity and secularism, he regretted that the Arab countries slipped far behind the late-comer countries such as Korea and Taiwan. "By all indicators", he argued "from the United Nations, the World Bank, and other authorities, the Arab countries—in matters such as job creation, education, technology, and productivity—lag ever further behind the West. Even worse, the Arab nations also lag behind the more recent recruits to Western-style modernity, such as Korea, Taiwan and Singapore".[368]

Ironically, colonialism, neo-colonialism, political economy, unequal economic global order, the foreign policies of the USA did not find any reference in his analysis. Ignoring all these factors, he mainly focused on the cultural explanation and seemed to present Islam as an "exceptional" religion. He created a binary between Islam and Christianity, "Islam is not only a matter of faith and practice; it is also an identity and a loyalty—for many, an identity and a loyalty that transcend all others……most Muslim countries are still profoundly Muslim, in a way and in a sense that most Christian countries are no longer Christian".[369] Contrary to his formulation, the historical facts state that Islam and Christianity not only shared many creeds but also had a long history of cooperation.

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[368] Bernard Lewis, *The Crisis of Islam: Holy War and Unholy Terror*, Weidenfeld & Nicolson, London, 2003, p. 87. See also his earlier article, Bernard Lewis, 'The Roots of Muslim Rage', *The Atlantic*, September 1, 1990. Accessed online October 22, 2013, URL, *http://www.theatlantic.com/magazine/archive/1990/09/the-roots-of-muslim-rage/304643/*

[369] Ibid.

Further, Lewis contended that Islam was different from other religions. So were Muslims different from peoples of other faiths. He was not ready to accept that the Muslim society--like other religious communities—remains fissured along class, sect, race and gender lines. As it is evident here, Lewis' construction of Islam tried to present it as a "totalizing" religion, not open to modern ideas and secularism.

He explained why Islam failed to embrace modernity and secularism. The Islamic world, unlike Christendom, did not have a history of the division between the political versus the religious. Islamic system, he contended, does not recognise the division between the political and the religious. To substantiate this argument, he gave the example of Prophet Muhammad, who is considered both as political and religious head. The Prophet was not only a prophet and teacher, unlike the prophets of other religions; he was also a soldier and a ruler. Islam mixes up religion and politics like no religion does and thus, posing a danger. Secular is alien to Islamic thought. "The very notion", he argued, "of something that is separate or even separable from religious authority, expressed in Christian languages by terms such as *lay*, *temporal*, or *secular*, is totally alien to Islamic thought and practice".[370]

He also gave the example of the "continuation" of Shariat law to argue that Muslim society continues to mix religion with politics. Similar to arguments of Lewis, Weber—as discussed in first chapter— argued the same thing almost a century ago. According to him, Shariat (Islamic Laws), as practised by *Qazi*, was "ad-hoc", "irrational", "substantive", "arbitrary" and "personal", lacking "generality" and "stability". Since Shariat-- Weber contended, which was summarised by the noted socialist Bryan Turner-- is based on "prophecy" and revelations", it is incompatible with capitalism.[371]

One may note here similarity between Lewis's views and those of Weber. Earlier, Weber created a sharp dichotomy between Christianity and Eastern religions as well between the West versus and the East. Weber's formulation is so powerful that not only the orientalist Lewis but also a large number of liberal and progressive sections operate within the similar framework and lament that Islam, unlike Christianity, remains "unreformed", failing to embrace modernity.

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[370] Lewis, 2003, p. 8.

[371] Bryan S. Turner, 'Islam, Capitalism and the Weber Theses', *The British Journal of Sociology*, Vol. 25, No. 2, June, 1974, pp. 230-243.

The reason why Lewis' criticism of Islam and the Muslim world is discussed in the pages above is to show its influence on the Hindu Right in India. Drawing on Lewis' formulations, the Hindu Right uses the discourse of "modernity" as a "stick to beat" the Muslim community in the case of the Muslim Personal Law (the MPL). Moreover, they rearticulate the colonial category, which was used against the colonized subjects earlier,to demonise the minority community. The Muslim community is accused of being trapped in deep "religiosity", "fanaticism" and of oppressing their women.

Modernity

For long, the Hindu Right has been strong supporters of the reforms, modernisation of the MPL and imposition of the uniformity in laws. Contrary to the general views of the Muslim members, K.M. Munshi, a member from Bombay and a Hindu right-winger, spoke in favour of Uniform Civil Code (the UCC). His arguments were based on relegating the religion to the private domain in order to achieve uniformity in laws for consolidating national unity, "Religion must be restricted to spheres which legitimately pertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible a strong and consolidated nation".[372] But if one pays close attention to his arguments, it would be clear that his reference points of advanced and modern societies are Turkey and Europe. He, thus, draws the attention of the members of the Constituent Assembly to Europe. "If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority, has to submit to the Civil Code. It is not felt to be tyrannical to the minority. The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession".[373]

Mark the overlap between Lewis' allegation of the Muslim world failing to become modern and Munshi's advocacy for reforming [Muslim] personal law. While Lewis argued that the Muslim world was mired in poverty and tyranny because it failed to embrace modernity and create and maintain the separate domains of the secular and religious, Munshi argued that the

[372] *Constituent Assembly of India debates (proceedings),* ol. VII.

[373] Ibid.

UCC advocated reforms in personal laws, advocating uniformity, which, in turn, would consolidate national unity and secularism. The languages and articulations of both Munshi and Lewis might appear different but the characterization of Islam and the Muslim society is largely identical.

The unanimity with respect to the UCC could not be achieved in the Constituent Assembly as the Muslim members, particularly, opposed it. Given that a compromise was reached and the issue of UCC was put on hold. Since no agreement was reached, the matter was put under the Directive Principle of State of the Indian Constitution. Unlike the Fundamental Rights of the Constitution, the Directive Principles of State Policy are simply the guidelines or principles given to the governments. They are not enforceable in the court until they are made a law. The Article 44 of the Directive Principles of State Policy, thus, asked the State "to endeavour to secure for citizens a Uniform Civil Code throughout the territory of India".[374]

The next big controversy was the Hindu Code Bill. The Chairman of the Drafting committee and the first law minister Dr B. R. Ambedkar took special interests in the Bill and he made a "last" attempt to reform the Hindu society but enacting laws that would put an end to a large number of regressive practices affecting the Hindu women. As it is discussed in the first chapter, the Hindu Code Bill was vehemently opposed by the Hindu Right, which criticised "unreformed" Muslim personal laws and supported the enactment of the UCC. Opposing the Hindu Code Bill, the Hindu Right called it an atom bomb on the Hindu community. In the year of 1949, the RSS held as many as 79 meetings to mobilise the people against the Hindu Code Bill. As the noted scholar of law Faizan Mustafa showed, "The RSS, Hindu Mahasabha, Dharma Mahamandal, Akhil Bharatiya Dharma Sangh and several other organisations fiercely opposed the Hindu code Bill. The most vociferous critics of reforms in Hindu law in the 1940s and 1950s are now arguing for the UCC. The RSS itself was leading the opposition. As many as 79 public meetings were organised in 1949 by the RSS in Delhi to oppose the Hindu Code Bill which was termed as an atom bomb on Hindus".[375]

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[374] Abhay Kumar, 'BJP aur Eksa Civil Code ki Siyasat', *Inquilab*, December 14, 2016, p. 9. See also, 'BJP and the Politics of Uniform Civil Code', *Muslim Mirror*, December 14, 2016. Accessed (online) July 2, 2018, URL, *http://muslimmirror.com/eng/bjp-and-the-politics-of-uniform-civil-code/*

[375] Faizan Mustafa, 'Look Who's Talking', *The Indian Express*, New Delhi, November 11, 2016. Accessed (online) May 5, 2018, URL, http://indianexpress.com/article/opinion/columns/uniform-civil-code-triple-talaq-muslim-personal-law-board-ucc-4368783/

Golwalkar, the second Sarsanghachalak of Rashtriya Swayamsevak Sangh (RSS), from 1940-1973, also opposed the Hindu Code Bill. He spoke in March 1950 that the Government should not be path-pointers. The path-pointers should be those who are away from the mundane life. In other words, Nehru government has no business to enact the Hindu Code Bill. As Golwalkar said, "In the course of the natural progress of society it so happens that laws are naturally formed and confirmed, and are afterwards recognized by the ruling party. This is the way of progress. The governments' action should only be one of recognition, not path-pointing. Path-pointers must be personally aloof from mundane matters. They must be men who think, without prejudice, only of the good of the people. In our country in ancient times, men who guided the society were sages and hermits living in the jungles. The kings only enforced their guidance. Today various parties try to foist their views on the society to mould it according to their own political preconceptions."

Here comes the paradox. While the Hindu communal leaders supported the reforms and modernization of the Muslim personal law, they opposed the same in the Hindu personal laws. The Bharatiya Jana Sangh-- which was founded by S.P. Mukherji -- was the political-wing of the RSS and it favoured reforms and modernizations of the MPL and imposition of the UCC. Writing a pamphlet in the 1960s, Balraj Madhok, its president in 1966, similarly argued for the UCC and attacked the Congress for not doing the reforms in the Muslim personal laws due to the vote bank politics.[376] He said that it is the "failure" of the Congress party "to extend the common civil code [the UCC] to the muslims, whose women need its protection most, is a clear proof of the communal thinking of the Congress party".[377] Note that how the issue of the uniform civil code, reforms in the Muslim personal laws has been linked to the "plight" of the Muslim women. The same trope is also used by the Right during the triple talaq issue under the Modi regime, a point to be elaborated later.

The Hindu Right has been supporters of the reforms and modernisation of the Muslim personal laws and the enactment of the UCC. The only exception was a statement given by the RSS Chief Golwalkar in 1972. In an interview published in the RSS mouthpiece *Organiser* he-- when asked if the UCC was "necessary for promoting the feeling of Nationalism"-- replied in negative, "I don't. This might surprise you or many others. But this is my opinion. I must speak the truth as I see it". When asked again if "uniformity within the

[376] Balraj Madhok, *Why Jana Sangh*, New Delhi, 196, p. 3.

[377] Madhok wrote Muslim as 'muslim' with 'm' written in small letter. Ibid. p. 26.

nation would promote national unity", he replied in negative, "Not necessarily. India has always had infinite variety. And yet, for long stretches of time, we were a very strong and united nation. For unity, we need harmony, not uniformity".[378]

Golwalkar's views against the UCC contradicted with the Jana Sangh, its political wing. On occasions, the Jana Sangh criticised the Nehru Government for failing to enact the UCC as part of its Muslim appeasement politics. Similarly, in the 1980s the Shah Bano controversy came up, the Hindu communal BJP also followed the same line. As discussed in the third chapter, Shah Bano married Mohammad Ahmad Khan, an advocate by profession, in 1932 but she was divorced in 1978. Afterwards, she knocked the door of the court for maintenance allowance and the Supreme Court, in its 1985 judgment, gave a ruling, asking the husband to pay maintenance allowance. The ruling was strongly opposed by the ulama-led All India Muslim Personal Law Board (the AIMPLB), arguing that a husband was only bound to pay maintenance allowance for the period of *iddat*. The BJP, the new avatar of the Jana Sangh, took up the issue of Shah Bano and used this occasion to criticise the Muslim leaders, the AIMPLB and the Congress party for failing to stand with the victim woman. Later, after Shah Bano, the BJP brought the issue of the UCC in its manifesto as one of its prominent agendas. For example, the 1989 Manifesto of the BJP called for appointing "a Commission to examine the various personal laws in vogue in the country– Hindu Law, Muslim Law, Christian Law, Parsi Law, Civil Law etc. and to identify the fair and equitable ingredients in these laws, in order to prepare a draft with a view to evolve a consensus for a uniform Civil Code". The BJP Manifesto of the previous General Elections held in 2014, similarly, stressed the same concern. "Article 44 of the constitution of India lists Uniform Civil Code as one of the Directive Principles of state policy. BJP believes that there cannot be gender equality until India adopts a Uniform Civil Code, which protects the rights of all women, and the BJP reiterates its stand to draft a Uniform Civil Code, drawing upon the best traditions and harmonizing them with the modern times".

If the arguments and narratives of the Hindu Right against the MPL are analysed, it may become clear that the Hindu Right build up their tropes at least on the basis of three grounds i.e. modernity, constitutionalism and gender justice. For example, the former BJP President and the current Vice-President of India M Venkaiah Naidu argued that the practice of triple

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[378] Golwalkar said this in an interview with RSS mouthpiece *Organiser*, August 26, 1972. Cited in Moosa Raza, 'Uniform Civil Code', *The Milli Gazette*, October 31, 2015. Accessed (online) June 30, 2018, URL, *http://www.milligazette.com/news/13252-uniform-civil-code*

talaq was against modernity, “It goes without saying that all social, cultural and religious practices [read the MPL] that do not stand the scrutiny of the law of equality should change. That is the only way India could transform into a modern, prosperous nation”.[379] Similarly, BJP National General Secretary Bhupender Yadav criticised the “ossified” [Muslim] personal law, and triple talaq and called them impediment to “a New India”.[380]Mark the selection of the word “ossified” by Yadav to characterise the MPL. The term ossified was used in the colonial era to demonise non-Western societies. They were pejoratively called “backward”, “uncivilised” and of course pre-modern.

It is within this framework that Arif Mohammad Khan operated. Khan was the minister in the Rajiv Gandhi Government but he resigned from the Government as well as from the party over its stand on the Shah Bano issue and joined the Janata Dal. Later, he joined the communal forces and unsuccessfully contested the 2004 Lok Sabha elections as a BJP candidate, just two years after the Gujarat pogrom. Moreover, he also praised Narendra Modi as “man of the movement” and “need of the hour” but never questioned his silence as the Chief Minister or the Prime Minister over continuous attacks on Muslims.[381] In his critique of the AIMPLB, Khan said the people in the AIMPLB were opposed to modern reforms and technology. They were responsible for the backwardness of Muslims. The AIMPLB’s opposition to triple talaq bill was their opposition to modernisation and reforms.[382] The people of the AIMPLB-- who were spending their whole energy on defending triple talaq-- were fundamentally supporters of the tradition which for the last one thousand years had created obstacles for every step of progress and development including modern education and social reforms. Khan blamed the same class of the people responsible for opposing scientific and technological education, “The Personal Law Board is a body of clerics, and history shows that they take longer than normal to move ahead with the times”.[383]He said that the

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[379] M Venkaiah Naidu, ‘A practice against modernity’, *The Indian Express*, New Delhi, October 18, 2016. Accessed (online) May 6, 2018, URL, *http://indianexpress.com/article/opinion/columns/islam-triple-talaq-all-india-muslim-personal-law-board-aimplb-muslim-quran-a-practice-against-modernity-3088439/*

[380] Bhupender Yadav, Vikramjit Banerjee, ‘Divorcing The Past’, *The Indian Express*, New Delhi, June 3, 2017, p. 14. Accessed (online) May 5, 2017, URL, *http://indianexpress.com/article/opinion/columns/triple-talaq-divorcing-the-past-4686503/*

[381] Abhay Kumar, 'Ramachandra Guha, Sadly', *The Milli Gazette*, March 24, 2018. Accessed (online) July 4, 2018, URL, *http://www.milligazette.com/news/16197-ramachandra-guha-sadly*

[382] Arif Mohammad Khan, ‘Apne hi bane pichhe rahne ki wajah’, *Dainik Jagran*, Rashtriya Sanskaran, August 27, 2017, p. 7.

[383] Arif Mohammad Khan, *The Indian Express*, New Delhi, ‘When the aanchal became a parcham’ August 23, 2017, pp. 3-4.

clergy class created problems for not only the Muslims in India but also in the whole world. He said that Ataturk Kamal, the leader of Turkey, had held this class of people responsible for the backwardness of Muslims. For example, Shaikh-ul Turkey opposed the printing press , which were held responsible for bringing the Muslim backward for three hundred years. [384] He also referred to "the famous speech of Mustafa Kamal Pasha, the leader of Turkey who blamed the Muslim clergy for the social and educational backwardness of the community. He said that in 1450, we stood up against world opinion and annexed Constantinople into Turkey as historically, it belonged to us — the capture of the Byzantine capital by the Ottomans in May 1453. But around the same time, we could not stand up to the opinion of one man —the Sheikh-ul Islam of Turkey who had declared that the printing press is prohibited in Islam. This ban on the printing press remained in operation for almost the next two hundred years, resulting in a vast gap in the educational status of Muslim and non-Muslim societies".[385] Like Lewis, Khan did not ever use the factors of colonialism, capitalism and political economy of extraction responsible for the backwardness of Muslims.

An article in the RSS mouthpiece *Panchjanya*[386] attacked the Muslim members of Parliament for being rooted in conservatism (*jadta*). Asaduddin Owaisi (the AIMIM), E T Mohammad Bashir (the Muslim League), Anwar (the AIDMK) and K B Mahtab (the BJD) were attacked for opposing the Muslim Women (Protection of Rights on Marriage) Bill, 2017. Their opposition, according the *Panchjanya* piece, showed that they were giving more importance to the deep-rooted conservatism (*jadta*) in Islam than Islam.[387] The Muslim leaders, the piece implied, are conservative, defending the stagnation of the society, while the Hindu communal forces are working for taking them forward towards modernity.[388]

Earlier, the BJP Rajya Sabha MP Balbir K Punj and convener of BJP's Think Tank used the trope of "modernity" versus "orthodoxy" to argue in favour of the UCC. He was giving his comments after the SC Judge V.N. Khare's observation in favour of UCC[389] "The issue here is not that of Hindu versus Muslim but modernity versus orthodoxy.... Should not every

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[384] Arif Mohammad Khan, 'Apne hi bane pichhe rahne ki wajah', *Dainik Jagran*, Rashtriya Sanskaran, August 27, 2017, p. 7.

[385] Arif Mohammad Khan, 'When the aanchal became a parcham', *The Indian Express*, New Delhi, August 23, 2017, pp. 3-4.

[386] Pramod Bhargva, 'Burqe men Muskan', *Panchjanya*, January 14, 2018, pp. 12-13.

[387] Ibid.

[388] Ibid.

[389] Balbir K Punj, 'Common Cord', *The Times of India*, August 15, 2003, p. 14.

citizen learn science, technology, history, civics etc? Should there not be a uniform educational syllabus in schools? No, the minorities will be affected. So the *madrasas* go on teaching children with outmoded orthodox curricula." [390] Moreover, he said, "There have been vigorous internal reforms in several minority communities including among Christians... But not a single reform has taken place in the Muslim community because of the consistent opposition of its leaders". [391]

The power of the orientalist discourse also influenced others as well. For example, the President of India Fakhruddin Ali Ahmed-- who approved the Emergency in the country -- called for "modernising Islam". Speaking in erstwhile Madras, he said that "Muslims should not be rigid and static. By being so, we will neither serve Islam nor India". He also referred to Pakistan discourse and cautioned Muslims that they should shun their "separatist tendency".[392] The prescription of Ahmad showed that not only the orientalist and Hindu Right but the Head of State also thought in a similar trope.

As the above-mentioned discussion shows, the Hindu Right largely operated in the trope of Lewis, criticising the Muslim society for being "not modern" and identifying the lack of reforms as the root cause of their backwardness. Like Lewis, the Hindu communal forces were reluctant to go beyond the cultural logic. Their roots in "cultural explanation" blinded them and made them reluctant to consider colonialism, neo-colonialism and capitalism as factors in contributing or generating problems in the Muslims society.

How far is the charge that Islam is against modernity, science and technology--valid? Contrary to the orientalist construction and the Hindu communal forces' re-articulation thereof, Historical evidence suggested that no society could take an exclusive credit for bringing about changes. If Lewis's understanding of modernity refers to technological advancement that the West had achieved, then one may argue that Islamic and Muslim world did contribute on its part as far as the development of science and technology is concerned.

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[390] Ibid.

[391] Ibid.

[392] *The Times of India*, 'Modernise Islam, says Ahmed', April 17, 1976, p.10.

Contrary to the charges against Islam for being “anti-modern” and technologically backward, the historical reality is that the western renaissance owes a lot to Islam.[393]

To learn about the role of Islam in development of science and technology, the work of Maulvi Abdul Karim (1863-1943) is important. Karim was born in Sylhet (now in Bangladesh). He was a school teacher, educationist and writer and a friend of the poet Rabindranath Tagore.[394] In 1935, he wrote a booklet entitled *A Simple Guide to Islam's Contribution to Science and Civilisation*—whose “Foreword” was written by Tagore in appreciation. Contrary to the charges labeled against Islam, Karim, in the booklet, said that for Islam, acquiring of knowledge and pursuing critical enquiry were not contradictory. He said the Prophet Muhammad enjoined us to look at Nature and asked for enquiring and exploring about the world. Contrary to the claims that Islam was opposed to modern sciences, he said modern science owed its origin to Islam. “It is now”, he argued, “being realised that modern science owes its origin to Islam and modern progress is the outcome of the freedom of thought and spirit of enquiry proscribed for the Muslims by the Holy Quran, and not a product of Christianity which for a long time relentlessly proscribed all free thinking and liberal reasoning and even scientific researches on original lines, and horribly persecuted all those who indulged in these. The impression that it was Christianity that advanced science and civilisation is, therefore, as erroneous as the idea that Islam hampered their progress. In fact, there can be no comparison between Islam and Christianity as civilizing forces. While the Muslims rose to a pinnacle of learning within a few centuries of the promulgation of Islam, the Christians remained steeped in ignorance for more than a thousand years”.[395]

While I agree with the arguments of Karim that Islam contributed to the rise of modern sciences, I express my disagreement with him when he compared Islam with Christianity and credited one religion over another. This exercise of crediting one religion and discrediting another was what Lewis earlier resorted to. My views are that the development of science and knowledge cannot be owned by one particular religion/region/culture/civilisation. Innovation,

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[393] Abhay Kumar, 'The Danger of “Islamic Terrorism” Course in JNU – An Open Letter to the President of India', *Kafila*, May 23, 2018.Accessed (online) May 24, 2018,URL, *https://kafila.online/2018/05/23/the-danger-of-islamic-terrorism-course-in-jnu-an-open-letter-to-the-president-of-india-abhay-kumar/*

[394] National Encyclopedia of Bangladesh. Accessed (online) July 5, 2018, URL, *http://en.banglapedia.org/index.php?title=Karim,_Maulvi_Abdul*

[395] Maulvi Abdul Karim, *A Simple Guide to Islam's Contribution to Science and Civilisation*, Goodword Books, New Delhi, 2002, pp. 13-14.

development and progress are the result of the collective efforts and participation of people across the community.

In spite of this difference, Karim's arguments were valid and relevant in the context of the colonial accusation of the Muslim world being backward. As Karim showed, it was the Muslims who first built observatories in Europe and invented the telescope, compass, the pendulum and many other useful astronomical instruments. In mathematics, the Arabic numerals, the decimal system and the art of figures, which Europe got from the Muslims, gave a great impetus to learning. In medicine, he referred to the contributions of Avicenna (Ibn-i-Sina), Aven Zoor (Ibn-i-Zoar), Al-Bucasis, and Al-Hazan. "The father of the present-day European medicine", argued Karim, "was Avicenna (Ibn-i-Sina), whose Material Medica is still in vogue. Aven Zoor (Ibn-i-Zoar) was a great authority on pharmacy, which was an institution of Muslim invention. He and others carefully studied the effect on the body of drugs obtained from various parts of the world and discovered many remedies. The Muslim doctors were the first to use anesthetics. Al-Bucasis of Cordova was an expert surgeon of world-wide reputation. There were renowned surgeons, opticians, dentists and specialists of female diseases. The science of optics owes much to Muslim research. Al-Hazan, who understood the weight of air, corrected the misconceptions of the Greeks as to the nature of vision and demonstrated, for the first time in history, that the rays of light came from the external object to the eye, and not from the eye itself, impinging on external things, He showed that the retina is the seat of vision, and proved the impressions made upon it were conveyed along the nerves to the brain. He discovered that the refraction of light varied with the density of the atmosphere and *vice versa*."[396]

In the light of Karim's works, it is quite evident that the charge against the Muslim/Islamic world being unwilling to accept modernity and science is untenable. Apart from Karim if one goes through the Islamic intellectual history, one would find how this tradition had multiple strands. Many of them were in conflict with one another, a subject which requires another occasion for discussion.

While the charges against the Muslim/Islamic world being opposed to modern values are not tenable, similarly the claim of the Hindu communal forces as the "champion" of the modern values is contradictory. Note the irony that the same Hindu communal forces-- which present

[396] Maulvi Abdul Karim, *A Simple Guide to Islam's Contribution to Science and Civilisation*, Goodword Books, New Delhi, 2002, pp. 58-59.

themselves as big champions of the reform and modernisation of the MPL and the imposition of the UCC throughout the country—not only opposed progressive reforms in the Hindu Code Bill but also targeted the liberal-progressive forces as alien and not rooted in the Indian culture. In their praise for the Indian culture, they went on to the extent to dismiss the "modern" European society. In the 1950s and the 1960s, Golwalkar, the chief of the RSS, expressed similar sentiments. When asked if there was a "basic defect" in "various modern "ism", Golwalkar replied in affirmative. "Yes. They all stem from materialism."[397] On the modern societies, he said that they were like demons (*asuras*) depicted in the Gita. "If one were to dispassionately observe the characteristics of the present-day so-called civilized modern societies, they appear to tally, almost word to word, with the attributes of the asuras as detailed in Bhagawad-Gita! And thus we find that the two prominent features of the modem Western society, i.e. "permissiveness" and "competition", have led human society away from peace and happiness. We shall now go a bit deeper into the problem in order to find out the basic cause for this failure."[398]

Gender

Another key aspect of the MPL is gender. The Hindu nationalist forces blame the MPL and the AIMPLB for subjugating the Muslim women. The Hindu nationalists then present themselves as their "saviour". For example, when the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced in the Lok Sabha on December 28, 2017 the Union Law minister Ravi Shankar Prasad called the Prime Minister Narendra Modi as the "saviour of Muslim women", while the BJP MP Meenakshi Lekhi tried to assure the Muslim women that they should no longer fear and worry as they had got "brother like Narendra Modi".[399] Recently the Prime Minister Narendra Modi also raised the same thing when he called the Congress a party of "the Muslim men" and this had implication that his own party the BJP became a party of the Muslim women.[400]

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[397] Golwalkar said this in an interview conducted in May 1952. Accessed (online) July 3, 2018, URL, *http://www.golwalkarguruji.org//Encyc/2017/10/18/Communismandotherisms.html*

[398] Golwalkar said. Accessed (online) July 3, 2018, URL, *http://www.golwalkarguruji.org//Encyc/2017/10/18/FinalRefugeforMankind.html*

[399] *The Telegraph*, December 29, 2017. Accessed (online) July 5, 2018, URL, *https://www.telegraphindia.com/india/brother-modi-s-talaq-deterrent-197123*

[400] *The Economic Times*, 'Congress is a party for Muslim men: Narendra Modi', Jul 14, 2018. Accessed (online) July 16, 2018, URL, *https://economictimes.indiatimes.com/news/politics-and-nation/will-congress-support-issues-like-triple-talaq-narendra-modi/articleshow/64988334.cms*

Well-known anthropologist Lila Abu-Lughod engages with the similar question--the construction of the image of the Muslim women as the oppressed in their own society, who are desperately waiting for external saviors. Though she worked in the context of Afghanistan, her insight is also relevant in our context. She contended that the US attack on Afghanistan was justified on the very pretext that the Afghanistan's Muslim women were oppressed by their men and the USA intervention in 2001 was an act of "defending" them from their oppressive males. She argued that "after the attacks of September 11, 2001, the images of oppressed Muslim women became connected to a mission to rescue them from their cultures".[401] To illustrate her point, she gave the example of a beautiful young woman, Bibi Aysha, whose nose was cut off by her Talibani husband and in-laws. *The Time* magazine published Ayasha's picture to lay justification of the US intervention in Afghanistan for saving her and other Muslim women there. "The controversy over Bibi Aysha", she argued, "indicates how central the question of Afghan women's rights remains to the politics of the War on Terror that, almost from its first days in 2001, has been justified in terms of saving Afghan women".[402]

The main point the author raised was why the image of Muslim women was constructed as an "oppressed" one, urgently requiring a savior from the outside, why the same question might not be asked about the women from Christian or Judaic community. Further, she said that the question about Muslim women was raised in Afghanistan but the repressive regimes in Afghanistan and role of US was not questioned. Similarly the question about the international struggles within Afghanistan was also ignored. Nor was the power dynamics among the Afghanistan and other nation-states discussed. Instead, the imperialist narrative divided the world on the West versus the East and the Muslims versus non-Muslims. Further, the image of American women was contrasted with that of burqa-clad Muslim women. Other causes of Afghan women's suffering such as malnutrition, ill heath, class politics, and poverty were deliberately excluded and religious factor--such as Taliban and Islam-- were solely held responsible for all the ills. Such a binary, the author argued, had a similarity with how the colonial construction projected the native women and their sufferings.

It was this western imperial construction of the Muslim women which created several stereotypes. Firstly, Muslim women were oppressed and they urgently needed external

[401] Lila Abu-Lughod, *Do Muslim Women Need Savings?*, Harvard University Press, Cambridge, 2013, pp. 6-7.
[402] Ibid.

interference. Secondly, the "burqa-clad" Muslim women were projected as subjugated, while western white women were shown to be "free" and "liberated". Thirdly, religious explanation— rather than historical or political economy-- was adopted as the best suited to study the Muslim society. Fourthly, the issues of malnutrition, ill heath, class politics and the international struggles within Afghanistan were not held relevant factors.

These imperial narratives of the "oppressed" Muslim women at the hands of their "fundamentalist" and "fanatic" men, who urgently require a savior, find their resonance in the case of the whole debate about the triple talaq and the MPL. Despite the difference in context between Afghanistan and India, the image of the oppressed remains the same i.e. the Muslim women. Similarly, the "oppressors" are also the same, i.e., "the fundamentalist" Muslim men. The image of saviors, however, changes. In Afghanistan it was the USA and in India it is the Hindu nationalists and their Government. Operating within the same framework, the BJP MP Meenakshi Lekhi gave the Muslim women an assurance in the Lok Sabha that they should not worry about their men because they had got a brother in the Prime Minister Modi. On several occasions, Modi, too, articulated the same narrative. He claimed that his Government had put an end to discrimination meted out to the Muslim women for over 70 years.[403]

Articulating the Modi-Government's position, the Minister of External Affairs (State) M J Akbar--who was earlier a Congress M.P. and spokesperson of the Prime Minister Rajiv Gandhi-- criticised the Congress and the ulama of Muslims for betraying the question of Muslim women. "Indian Muslim leaders, more self-righteous than righteous, have distorted their own faith to institutionalise male oppression in the name of religion. Previous governments have never dared to challenge this vice-like grip".[404]

Bhupender Yadav, a Member of Parliament and national general secretary of BJP—attacked the MPL for protecting "discriminatory practices". In a co-authored article published in *The Indian Express,* he argued that "ossified" MPL relating to triple talaq and other "discriminatory customs" were opposed to the spirit of "a new India". Further, he said that

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[403] *The Times of India*, 'Muslim women can now travel for Haj without male guardian: PM Modi', December 31, 2017. Accessed (online) April 22, 2018, URL, *https://timesofindia.indiatimes.com/india/muslim-women-can-travel-for-haj-without-male-guardian-pm-modi/articleshow/62314694.cms*

[404] M J Akbar, 'Narrative of the forked tongue', *The Indian Express*, January 10, 2018. Accessed (online) May 2, 2018, URL, *http://indianexpress.com/article/opinion/columns/triple-talaq-bill-muslim-womrn-rights-aimplb-supreme-court-narrative-of-the-forked-tonguethe-most-intrepid-of-the-famous-begums-of-bhopal-the-only-feminine-dynasty-in-princely-india-was-surely-her-501/*

his party considered that the question of personal laws was not about religion but about "women's rights".[405]

This explains why the issue of triple talaq figures prominently in the electoral campaigns of the BJP in Uttar Pradesh assembly elections, 2017. On the eve of the beginning of the electoral campaign in UP, the president (BJP) Amit Shah addressed a rally in the eastern Uttar Pradesh and slammed the secular parties over the triple talaq. He asked them a question: "Are you with or against the triple talaq?" Like Prime Minister Narendra Modi, "justice" for Muslim women prominently figured in the speeches of Amit Shah.

Similarly, the BJP U.P. Chief Minister Yogi Adityanath, speaking in Lucknow on the occasion of the birth anniversary of the former Prime Minister Chandra Shekhar, used the issue of triple talaq to attack its opponents. He said that those who were silent on triple talaq were like those who remained silent when Draupadi—a character in the ancient epic *the Mahabharata*-- was disrobed.[406] "There are people who are silent", he contended, "Over a burning issue of the country...This reminds me of when Draupadi was forcibly disrobed. She asked the gathering who was responsible for the sin. Nobody was able to say anything. Then Vidur said one-third of the blame was to be put on the offenders, one-third on their associates, and one-third on those who remained silent".[407] Yogi Adityanath also reiterated the issue of the UCC and called for uniformity in laws.[408]

Much before Yogi Adityanath, L.K. Advani, then the president of the BJP, invoked the gender justice to argue for reforms in Muslim personal laws.[409] Advani was speaking at BJP's plenary session held in Bombay in the presence of senior leaders Atal Bihari Vajpayee, Murli Manohar Joshi, Vijayaraje Scindia and Maharashtra chief minister Manohar Joshi. He argued that gender inequality was perpetuated by separate personal laws. "While every political party", Advani argued, "opposed to the BJP does not tire of mouthing platitudes and playing

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405 Bhupender Yadav and Vikramjit Banerjee, 'Divorcing The Past', *The Indian Express*, Delhi, June 3, 2017, p. 14.

406 'Silence on Triple Talaq like silence on Draupadi's "cheer haran"', *The Indian Express*, Delhi, April 18, 2017, p. 6.

407 Ibid.

408 Ibid.

409 *The Times of India*, 'BJP calls for review of the Constitution', November 11, 1995, p.1.

lip-service to the cause of women, they have done precious little to remove the greatest inequality of all that is forced on women by personal laws". [410]

When he referred to separate personal laws, he was perceived as attacking mainly the MPL. His narrative of gender justice to attack the MPL is now articulated by Modi, Yogi and others. As it is evident here, talking about the reforms of Muslim personal laws, the BJP serves at least two aims. First, it carries forward its anti-Muslim agendas and keeps wooing their hardcore supporters that the BJP, unlike any other political party, is only capable of "teaching" Muslims a lesson. Second, the BJP uses this as a "tool" to embarrass its rival parties particularly the Congress.

A piece in the RSS mouth piece *Panchjanya* criticised the AIMPLB for not taking any effort to remove the ill of triple talaq given in one sitting, keeping Muslim women in fear for whole of their life. It called the triple talaq practice as "inhuman" (*amines*) practice. The article also referred to the practice of *halala* and criticised it too. It welcomed the government's decision to make a law to declare such a "cruel" (*knur*) practice an offence. Another piece in *Panchjanya* contended that the way the BJP brought triple talaq Bill within three months of the Supreme Court judgment showed that it was committed to giving Muslim women their human rights.[411]

The former President of the BJP and Vice-President of India Venkaiah Naidu also attacked the MPL on question of women. "Why should Indian Muslim women be denied their fundamental rights in a secular country like India when several Islamic countries have abolished triple talaq and polygamy? How could such draconian practices be allowed in India when matrimonial laws in Islamic countries were regulated and not considered to be contrary to Sharia?" [412]

As discussed in the above pages, the arguments of the Hindu nationalists were politically motivated. If the Hindu nationalists were serious about the rights of the Muslim women, how could they reduce the whole debate to polemics and electoral gimmicks? No doubt the Muslim women face several handicaps and discrimination but so do the Hindu women. But

[410] Ibid.

[411] Arun Kumar Singh, 'Kupratha par kada Prahar', *Panchjanya*, January 14, 2018, pp. 14-15.

[412] M Venkaiah Naidu, 'A practice against modernity', *The Indian Express*, New Delhi, October 18, 2016. Accessed (online) May 6, 2018, URL, *http://indianexpress.com/article/opinion/columns/islam-triple-talaq-all-india-muslim-personal-law-board-aimplb-muslim-quran-a-practice-against-modernity-3088439/*

why is the BJP only interested in raising the issuing of the Muslim women and their oppression? Even in the case of the Muslim women, they are reluctant to touch their social, educational and economic backwardness.

The legal scholar and activist Flavia Agnes brilliantly drew our attention to the communal turn in the whole debate around the MPL. While a perception is created that the reforms of the Hindu Code Bill is a settled matter, the MPL is demonised as "unreformed" and "anti-women". Anges not only critiques such a myth of "reformed" Hindu laws and "anti-women" MPL but also found the latter better for the economic rights of women than the former. "But in terms of economic rights", she argued, "the Muslim marriage as contract works out better for women, in terms of dower and traditional maintenance. Even with polygamy, the multiple wives have legal and social rights."[413] Thus, she criticized the whole debate on triple talaq around the issue of women versus community.[414]

Anges questioned the perception which believed that the Muslim laws were against women whereas the Hindu laws were egalitarian towards Hindu women The "concern" is often "expressed" that the Muslim personal laws falls short of the parameters of "gender justice", while Hindu laws are "egalitarian, uniform and gender-just."[415] She said that discrimination within Hindu Laws flows from domestic violence, in "the continuation of the Hindu undivided family property" "several discriminatory aspects of Hindu cultural practices, which govern the laws of marriage, divorce and matrimonial life, are seldom held up to scrutiny."[416] Even "the ritual of *kanyadaan* (sacrificial offering of the bride to the groom), an essential condition of a Hindu marriage, the notion of girls as *parayadhan* (a property which belongs to the other), the pious obligation of a Hindu father to marry off his daughter, which then

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[413] Amulya Gopalakrishnan, 'Is a common civil code a good idea?' *The Times of India*, New Delhi, November 2, 2015, p. 16. Accessed (online) May 16, 2018, URL, *https://timesofindia.indiatimes.com/india/Is-a-common-civil-code-a-good-idea/articleshow/49623419.cms*

[414] Flavia Agnes, 'Whose fight is it anyway?', *The Indian Express*, June 12, 2017. Accessed (online) May 16, 2018, URL,http://indianexpress.com/article/opinion/columns/triple-talaq-hearing-supreme-court-nri-couple-muslim-divorce-4699316/

[415] Flavia Anges, 'Gender justice, in fact', *The Indian Express*, New Delhi, November 14, 2016, p. 15. Accessed (online) May 25, 2018, URL, *http://indianexpress.com/article/opinion/columns/gender-justice-uniform-civil-code-hindu-muslim-marriage-discrimination-patriarchal-society-4379411/*

[416] Ibid.

gives boost to dowry, and the view that Hindu marriages are sacramental, still dominate Hindu social ethos and judicial discourse".[417]

Another well-know legal scholar criticised the Bill over its provision of three years jail for the Muslim husbands who would administer triple talaq. He called it a "legal excess".[418] This Bill with its stipulated provisions has been widely perceived among a large section of Muslims as an instrument which will pave the way for further harassment of Muslims. In an article, the senior Congress leader Salman Khurshid expressed this apprehension and argued that the BJP was using the gender issue to inflict injustice on Muslims. He said that BJP used "gender justice to inflict injustice on Muslims", or kill a bird twice with the same stone". [419]

Another important point was raised during the triple talaq controversy that while the Government became so active to launch a campaign against the practice, it did not have authentic figures about the number of cases of triplet talaq. The critics of the Government did not deny the practice of the triple talaq, but they questioned the way the Government projected it the biggest problem of Muslims. Some scholars went on to the extent to argue that the triple talaq was an unimportant issue, which was blown out of proportion by the Government. Writing a piece in *The Indian Express*, scholars Abusaleh Shariff and Syed Khalid Shariff argued that the cases of triple talaq were numerically insignificant.[420]

The Muslims women also came up to critique the Government. Holding a press conference under the aegis of AIMPLB in Delhi, they spoke against the UCC, the RSSand the BJP, alleging that the media was demonising the Muslims. They also attacked Modi and said that if he wanted to do justice to the Muslim women, he should first give justice to Zakia Jafri, wife of the veteran Congress leader and former Member of Parliament Ehsan Jafri (1929-2002). A mob of Hindus killed 69 Muslims, among them was Ehsan Jafri too, in the Gulbarg

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[417] Flavia Anges, 'Gender justice, in fact', *The Indian Express*, New Delhi, November 14, 2016, p. 15. Accessed (online) May 25, 2018, URL, *http://indianexpress.com/article/opinion/columns/gender-justice-uniform-civil-code-hindu-muslim-marriage-discrimination-patriarchal-society-4379411/*

[418] Faizan Mustafa, 'Legal Excess', *The Indian Express*, New Delhi, December 29, 2017, p. 14. Accessed (online) May 16, 2018, URL, *http://indianexpress.com/article/opinion/columns/triple-talaq-bill-passed-parliament-lok-sabha-legal-excess-5002913/*

[419] Salman Khurshid, 'Double jeopardy on triple talaq: Why the triple talaq bill is not about empowerment of women at all', *The Times of India*, January 23, 2018. Accessed on April 24, 2018, URL, *https://blogs.timesofindia.indiatimes.com/toi-edit-page/double-jeopardy-on-triple-talaq-why-the-triple-talaq-bill-is-not-about-empowerment-of-women-at-all/*

[420] Abusaleh Shariff and Syed Khalid, 'Unimportance of triple talaq', *The Indian Express*, New Delhi, Published: May 29, 2017, p. 13.

Society massacre during the Gujarat communal violence 2002. Zakia filed a petition and accused 63 persons, including the Prime Minister, who was then the chief minister of the state. She alleged that state machinery was deliberately inactive in controlling the violence.

They also raised the material deprivation of the Muslim women and asked the Prime Minister to first address such issues as unemployment and poverty among Muslims.[421] The Prime Minister should, they argued, be more concerned about the deprivation of Muslims from the educational institutes.[422] The AIMPLB Executive Member Dr. Asma Zehra also put a question mark on the whole discourse of gender justice and said that those who talked about the rights of women should also answer these questions: Why is there no system of 50 per cent reservation for women in a parliamentary system? Why do the famous educational institutes, research centres deprive women of their representation in them? Why is there no presence of the Muslim women in the judiciary? What is the level of representation of the Muslim women in the army? Apart from AIMPLB Executive Member Dr. Asma Zehra, Atiya Siddiqui, Zeenat Mahtab, Bushra Rahman, Aliya Khilji, Khurshida Khatoon, Yasmin Farooqui also spoke in the press conference. The AIMPLB also claimed that these women belonged to different organisations.[423]

These arguments put up a lot of question marks over the sincerity of the "savior" of the Muslim women. While the Hindu communal forces were at the forefront of attacking its opponents for failing to stand with the "oppressed" Muslim women, when it comes to their social, educational and economic issues they do not show much interests. Moreover, by reducing the question of the oppressed women to a minority community, it is not only contributing to the hardening of religious identity among Muslims but also making the community become more closed about reforms. This kind of communal politics over the MPL is one of the reasons why reforms in the MPL have been so difficult to initiate.

Anti-Constitutional

Another trope of the BJP has been to call the MPL as "anti-Constitutional". In 1995, the BJP leader Madhu Deolekar-- speaking in a panel discussion held in Bombay on the issue of the UCC organised by YMCA (Young men's Christian Association)—argued that all personal

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[421] *Inquilab*, New Delhi, October 28, 2016, p. 1.

[422] Ibid.

[423] Ibid.

laws were heavily loaded against women. However, the BJP, instead of saying that all personal laws were against women, it mainly targeted the MPL.[424] Similarly, BJP Rajya Sabha Member of Parliament Balbir K Punj seemed to contrast between the Constitution and the MPL. While the Constitution, according to Punj, gave women the right to liberty and equality, the MPL violated them. As he contended, "The Constitution is based on the principles of liberalism like equality of all citizens before the law, non-discrimination on any ground, equality of opportunity for all, individual liberty and freedom of expression subject only to certain specified restrictions. If any community [read Muslims and the MPL] claims that it has a right to discriminate against, say women, on the ground that it is its religious belief, should this be allowed?"[425]

Similarly, the former President of the BJP and the current Vice-President of India Venkaiah Naidu argued that personal laws have to be in conformity of constitution and gender justice. The BJP leader and the former Finance Minister Arun Jaitley also argued that "personal laws should be constitutionally compliant and in conformity with norms of gender equality". [426] He also articulated the Government's view. "Personal laws [read the MPL] have to be constitutionally compliant and the institution of Triple Talaq, therefore, will have to be judged on the yardstick of equality and the Right to Live with Dignity"[427]

Interestingly, the AIMPLB also defends the MPL on the fundamental rights given in the Constitution. While the Hindu Communal forces argue that the several parts of the MPL work against the rights of women and they violate the fundamental rights of liberty and equality, the AIMPLB defends the MPL on the ground of the fundamental right of religious freedom.

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[424] *The Times of India*, 'Common law does not assure harmony', Aug 21, 1995, p. 5.

[425] Balbir K Punj, 'Common Cord', *The Times of India*, August 15, 2003, p. 14.

[426] *The Indian Express*, New Delhi, 'Triple talaq: Personal laws should comply with Constitution, says Arun Jaitley', October 17, 2016, p. 9. Accessed (online) May 5, 2018, URL, *http://indianexpress.com/article/india/india-news-india/triple-talaq-personal-laws-should-comply-with-constitution-says-arun-jaitley-3086719/*

[427] *The Indian Express*, New Delhi, 'Triple talaq: Personal laws should comply with Constitution, says Arun Jaitley', October 17, 2016, p. 9. Accessed (online) May 5, 2018, URL, *http://indianexpress.com/article/india/india-news-india/triple-talaq-personal-laws-should-comply-with-constitution-says-arun-jaitley-3086719/*

It should be noted that the BJP has recently started using the plank of the Indian Constitution to attack its opponents. However, the same Hindutva forces were historically critical of the Constitution.

Legal scholar A.G. Noorani found that Hindu communal ideologue V.D. Savarkar's *Hindutva* is opposed to the Consitution. Written in 1923, the pamphlet *Hindutva* propounded "two-nation theory" in which Savarkar differentiated Hindutva from Hinduism. Savarkar argued that 'Hindutva is not identical with what is vaguely indicated by the term Hinduism". Similarly, the original RSS pledge scripted in the handwriting of Dr Hedgewar, its founder, selected 99 RSS volunteers in Nagpur in March 1928. The pledge asked the volunteers "to protect the sacred Hindu dharma, Hindu Sanskritic and Hindus society, and to make this Hindu Rashtra Independent." [428] Unlike the Constitutional principle, this pledge (*pratigya*) has an imagination of India that is not secular and multi-cultural but Hindu Rashtra.

In his *Bunch of Thoughts*, M.S. Golwalkar identified three "internal threats" to India. One of these three groups was Muslims, who are living "within" the country as "the hostile elements", and are posing "far greater menace to national security" than "aggressors from outside".[429] Is not calling a minority "an internal threat" a violation of the Constitutional principles?

In his booklet *Rashtra Chintan*, the former Jana Sangh President Deendayal Upadhyay (1916-1968), raised question about the Constitution in an essay entitled "What to do with Constitution?"[430] The title of the essay suggests that he had a problem with it. He begins his essay with an example of a Kabuli (a native of Kabul) who by mistake bought soap instead of *kalakand* (sweet) which he actually wanted to buy. The Kabuli then started eating the soap. And when a man saw him, he got surprised and could not help asking him why he was eating soap. To this the Kabuli replies, "I am eating my own money". By giving the example of the Kabuli and his soap, he said that this was how a common Indian should think about the Constitution.

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[428] A.G. Noorani, *The RSS and the BJP: A Division of Labour*, LeftWord Books, New Delhi, 2004, pp. 2-8.

[429] M. S. Golwalkar, *Bunch of Thoughts* (complete and unabridged), Vikrama Prakashan, Bangalore, 1966, p. 166.

[430] The book is available on the BJP website. Accessed on July 16, 2018, URL, *http://library.bjp.org/jspui/bitstream/123456789/439/1/rashtra-chintan.pdf*

With this example, he wanted to say that the Constitution of India had a lot of lacuna and it had become the compulsion of people to accept it the way the Kabuli accepted soap instead of *kalakand*. "After spending around one crore rupees within three years, the Constitution was made. Therefore, the Constitution, like the money [soap] of the Kabuli had to be swallowed below our throat."[431] He also identified some lacunas in the Constitution. He said that the Constitution was framed after copying the Government of India Act 1935. Moreover, it was based on the Western knowledge; it was a bizarre combination of the presidential system of the USA and the parliamentary system of the UK; the lack of feeling of Indian-ness (*Bhartiyata*) in the Constitution. He also criticised the provision in the Constitution regarding the name of the country and national language.[432]

Balraj Madhok, the contemporary of Upadhyay and the president of the Jana Sangh, identified the Jana Sangh's problems with the Constitution. One of them was Jana Sangh's support for making India a unitary state, and not India being a union of states. "Jana Sangh considers India to be one country and jot just a "Unions of States". We would therefore like to amend Article 1 of the Constitution and give it a unitary structure at the centre."[433]

In 2000, RSS Chief K.S, Sudarshan also raised a question mark over the Constitution. "We do not accept the concept of minorities at all" and he also added that minority should accept the "culture" of majority. Earlier on August 14, 2000 Sudarshan—speaking to journalist Karan Thapar on BBC's *Hard Talk India* said that "We do not accept the concept of minorities at all." And he also said that minority should accept the "culture" of majority community. Sudarshan also says that Constitution of India does not reflect the ethos of the people and we should evolve our constitution. Moreover, he said "The Constitution does not reflect the ethos of the people" and "we should evolve our own Constitution".[434]

Even when the Atal Bihari Vajpayee Government came to power, it called a review of the Constitution. At that time, it had to face a lot of criticism and the Hindu communal forces seemed to have changed their strategy. With the current Hindu communal regime, now the debate is shifted on the plank of national versus anti-national and those who have faith in the

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[431] Translation mine. Deendayal Upadhyay, *Rashtra Chintan,* n.d. Available at BJP's website, *http://library.bjp.org*

[432] Ibid.

[433] Balraj Madhok, *Why Jana Sangh*, New Delhi, 1961, p. 32.

[434] A.G. Noorani, *The RSS and the BJP: A Division of Labour*, LeftWord Books, New Delhi, 2004, p. 2.

Constitution versus those who do not. The Hindu communal forces now call themselves as the champions of the Constitution, while their opponents are alleged of not following the Constitution. The Hindu nationalists attack on the AIMPLB for protecting several “anti-Constitutional” practices in the MPL should be placed in these contexts.

CONCLUSION

The issue of Muslim Personal Law (the MPL) has been a site of struggle. While the ulama-led All India Muslim Personal Law Board (the AIMPLB) has maintained a strict position that the MPL is based on the divine Shariat laws and, therefore, it cannot be changed by such human interventions as legislation; on the other hand, reformists have shown several aspects of personal laws which work against the rights of Muslim women and called for their removal. The Government, which has the power to make laws, has also reacted to this controversy in more than one way. At times, it intervened and at other times it talked of maintaining a distance from religious practices of the people. The current controversy around the MPL, particularly after Hindu communal forces came to power in 2014, is interesting because the ruling party has promised to reform/scrape a part of the MPL during the election campaigns. By such an act, it tried to mobilize Hindu voters on it. Such an exercise, in turn, is also providing fuel for consolidation of communitarian and religious identity of Muslims as they perceive such attempts as a threat to their cultural and religious identity from the Hindu-majority Government. In this whole exercise, the biggest victims are women. All the stakeholders have often referred to their questions, yet very few of them are really concerned about them. Moreover, this controversy also brings to the forefront a conflict between secular laws and personal laws, the impulse to impose uniformity and the reality of plurality and differences.

Before the establishment of modern colonial state, Hindus and Muslims were governed by their own personal laws. The Shariat Laws, on the other hand, governed all other aspects of the polity during the Mughal reign. Needless to say, Muslims were governed by the Shariat Laws. Two things need to be clarified here. Firstly, given the large presence of non-Muslim subjects under the Muslim rulers, application of Shariat Laws in toto was difficult from the point of view of state craft and some sort of compromises were made, an issue which requires a much detailed discussion elsewhere. Secondly, the Islamic polity often treated its non-Muslim subjects according to their own customary and religious laws to avoid confrontation. But with the emergence of the colonial state, the process of unification went underway. It should be noted that the early phase of colonialism saw the hold of orientalist thinking which believed that the interests of the Empire could best be served if the state tried to govern the natives within the framework of their culture and idioms. Thus, early colonial administrators such as Lord Hastings and William Jones began the process of compiling and codifying

"authentic" laws of Hindus and Muslims. Note that the very process of compilation and codification--even if it is done to make it coherent and intelligible to law officers—is within the framework of unification. For instance, any law, when codified and enacted by the State, involves a process of selection and rejection. In this process of standardization of religious laws, some sort of uniformity is achieved.

Uniformity is one of the key techniques of the modern state. For penetration of capital and integration of regions with the capitalist structure, uniformity in laws is considered desirable. Even the social theorist of modern state and capitalism, Max Weber held that uniform, legal and rational laws to be a prerequisite for the rise of capitalism. Seeing laws from this paradigm, Weber was critical of Shariat laws and he considered them as a hurdle to the rise of capitalism. As eminent anthropologist Talal Asad argued, the separation of the state and the church, the relegation of religion to the private sphere, and reforms in Shariat Laws were imposed on the non-Western world. These acts were done in order to reach conformity with Western social practices. It was within the same paradigm that reforms in the Shariat were undertaken by the colonial state.

As discussed above, earlier colonial administrators tried to govern Hindus and Muslims according to the Shastras and the Quran respectively, but they also ushered in an era of reforms, secularisation and unification of laws. Gradually the scope of the Shariat was limited and more and more of the public sphere began to be governed by secular laws, applicable to all.

In contrast to early Orientalist administrators, there were others who were influenced by utilitarian philosophy of Jeremy Bentham and John Stuart Mill. These rational and positivist administrators were anxious to see further imposition of uniformity. Ideologically, they did not have a very high opinion about tradition. Instead they wanted imposition of secular and uniform laws in all walks of life. Under the influence of utilitarianism and rational thoughts, more and more reforms were carried out and the scope of Shariat was further limited. Islamic criminal laws were abolished and all were brought under uniform criminal laws. Furthermore, the British abolished the post of Qazi in the court and new rules were made by which the judges did not require to rely on Qazi for interpreting religious matters, so that, they could interpret and give verdict without the mediation of the Qazi. The laws related to family matters such as marriage, divorce, inheritance etc. were spared and the religious communities, both Hindus and Muslims, were not forced to be governed by a uniformed law

in this sphere. The family laws of Muslims-- those parts of the Shariat which were not abolished—later came to be known as the Muslim Personal Law (MPL).

There is a long standing and intractable controversy around the MPL. The ulama class strongly argues that the MPL is based on divine laws and if Muslims do not follow it they will commit sin because these laws are the decrees of God and an inseparable part of Islam. According to orthodox Islamic interpretation, laws are made by God and even the Prophet has no power to change them. If the Prophet has no power to change or amend divine laws known as Shariat, how could a sovereign or a law-making body- be it Parliament or state assembly- be justified to change/amend the Shariat? This is the typical justification of the ulama in favour of non-intervention in the MPL. After Independence, the Indian Constitution guarantees religious freedom and minority rights as part of the Fundamental Rights under Article 25 and the ulama have often argued that the Muslim Personal Laws are part of their fundamental rights to religious freedom.

Contrary to them, there are those who find several provisions of the MPL unacceptable because they work against women and it is also considered opposed to the principles of gender justice and equality. This group of people can be called reformists, who argue that practices such as triple talaq-- i.e. the practice of divorcing wife unilaterally by husband when he utters talaq, talaq, talaq three times in one go— polygamy, and *halala* should be abolished because they are responsible for the sufferings of a large number of Muslim women. The critics' arguments are articulated on different lines. For some, the practices of triple talaq, polygamy and *halala* should end because they grossly violate the principles of equality and gender justice. For others, these practices are criticized within the framework of religion. The arguments of the critics are that religious texts as interpreted by the ulama are biased against women and the clergy's defence of triple talaq, polygamy and *halala* is based on misinterpretation, and they are, thus, contradictory to the Quran and the true spirit of Islam. The methodology used here to criticize the ulama and some aspects of Muslim personal law is based on a re-reading of the Quran from the feminist perspectives. Apart from this group of critics, there is another group. This group is best represented by the reformist Hamid Dalwai who was in favour of reforms and modernization of the MPL as well as the imposition of the Uniform Civil Code. However, Dalwai and his group's arguments in favour of the MPL seemed to misfire because he failed to attract mainstream Muslim support. His failure had to do with the kinds of sweeping generalizations and stereotypes he had created about Indian

Muslims. One of his crude generalizations includes the charge that Indian Muslims are loyal to Pakistan and they want India to be converted to Islam. He even advocated that voting rights should be denied to Muslims if they did not accept the Uniform Civil Code (the UCC), a condition which was reiterated by a RSS ideologue recently.

The issue of UCC also generated a lot of controversy in the Constituent Assembly. While the supporters of the UCC like the Hindu communalist K.M. Munshi favoured it on the ground that it would promote national unity and relegate religiosity in the background, on the other hand, its opponents, particularly the Muslim members of the Constituent Assembly, broadly argued against state intervention in personal laws on the ground that if people were not ready to accept a particular law, it couldn't be imposed on them. Ambedkar-- the chairman of the drafting committee, though, favoured uniformity in law and recognised the role of the state in enacting laws including those related to the personal laws. Yet, he spoke against imposition of any law which people were not ready to accept. Finally, the matter was deferred for future consideration and the issue of the UCC was put under the Directive Principle of State.

Another key moment related to the personal law was the debate around the Hindu Code Bill in the late 1940s and the early 1950s. Ambedkar, then the law minister of India, took great interest in reforming Hindu personal laws because he believed that the progress of a society should be judged by the condition of its women. Moreover, he also argued that if equality between sexes was not achieved, it would amount to making "a farce of our Constitution" and building "a palace on dung heap". But Ambedkar's mission of carrying out radical reforms was thwarted by Hindu communal forces and he, having felt frustrated, resigned and gave up his final attempt to reform Hindu society. Hindu communal forces, which were projecting themselves as great champions of reforms in Muslim Personal Law and saviours of the "oppressed" Muslim women, opposed the Hindu Code Bill tooth and nail. At that occasion, they even raised the point that the Nehru Government was trying to reform Hindu laws but they had no courage to touch Muslim personal laws that permitted Muslim males to keep as many as four wives at a time, threatening the demography of the country by increasing their population. Finally, the Hindu Code Bill was passed after much of its radical contents had been removed. While the Hindu Code Bill was projected by the Government and state-intellectuals as a great step towards women empowerment, the fact that was often ignored is that through this process much of Brahminical practices were imposed as universal laws on all Hindus. Many progressive practices were removed in the name of uniformity. This

process is also linked to the forced incorporation of Sikhs, Buddhists and Jains within the fold of the great Hindu (Indic) religion in opposition to the non-Indic Islam, Christianity and Zoroastrianism.

Though the postcolonial governments avoided direct interference and reforms in the Muslim personal laws, the discourse of reforms and modernization of Muslim personal laws never stopped, creating fear among Muslims. During the decades of 1950s and 1960s, the Government and its institutions spoke in multiple voices. While the top leadership of the Congress often maintained a position that Muslim personal laws would not be interfered with by the state unless the community itself desired it, several ministers of the government and the Law Commission gave indications on several occasions that they were going to reform Muslim personal laws, and the implementation of the UCC was being considered. Besides, the state government of Maharashtra was quite active in this regard and spoke in favour of reforms and modernization of Muslims personal laws. Apart from them, there were also several (Muslim) reformists who were active in supporting change in Muslim Personal laws and imposition of the UCC. Prominent among them was Hamid Dalwai, Konkani Muslim and leader of the Pune-based Muslim Satya Shodhak Samaj.

By early 1970s the talk of reform and modernization of the Muslim Personal Laws became quite loud. It was around the same time that the Government brought the Child Adoption Bill that created fear among a section of Muslims. As per orthodox Islamic Laws, Muslims are encouraged to help an orphan in all possible manners. But Islamic laws do not allow parents to adopt a child and pass their property rights to him/her. Put differently, Islam only recognises blood relation and an adopted child cannot have the same rights as one's own biological one. Moreover, Muslims, by the end of 1960s, were disappointed as the claims of the postcolonial state that minorities would be treated equally in post-Independence India in a secular setup, increasingly became a hollow promise. By that time, communal violence had already taken a toll on Muslims lives. Besides, they were also lagging behind in all social and economic indices. Their representation declined in legislative assemblies and Parliament as well as in bureaucracy and state institutions. Their deprivation in material domain and assault on their cultural domain intensified a sense of insecurity among Muslims and they began to look for a platform to express their discomfort.

In the 1960s, several Muslim organisations were floated. For example, the All India Majlis-e-Mushawarat, an umbrella body of Muslim communitarian leaders, was floated in 1964. As

the name Mushawarat suggested, it claimed to provide a body where different Muslims organisations could come together for "consultation" (*Mushawarat* in Arabic) and put forth unanimous agendas. This organisation has its own limitation and it is marred by factionalism.

Amidst all the Minnatullah Rahmani led Amir-e-Imarat-e-Shariat, took note of the issue of possible state interference in Muslim Personal Laws. It may be noted that Imarat-e-Shariat was established in 1921 by the Deobandi ulama. Deobandi are the Sunni-Hanafi Muslims, who follow the interpretation of Islam done by the ulama of Deoband Seminary established in 1864 at Deoband, Uttar Pradesh. It may be noted that the same Deobandi ulama were at the forefront of enactment of the Muslim Personal (Shariat) Application Act 1937. This act, which was passed by the central assembly of the colonial government, brought about uniformity in laws for all Muslims across India. The motive behind such a law, in the perspective of ulama, was the concern that Muslims in several regions were not following proper Islamic laws; instead, they were following customary laws. These customary laws were seen by the ulama as contradictory to Shariat Laws, and in their view not following Shariat Laws amounted to committing sin.

Like Hindu Code Bill, the Shariat Application Act, 1937 also involved a process of standardization and imposition of uniformity. It is also ironical that the ulama who opposed uniformity of laws in the postcolonial state launched a campaign successfully in the past to standardize their own personal laws.

The Deobandi ulama under the leadership of Minnatullah Rahmani began to mobilize Muslims and held several meetings to discuss how to protect Muslim personal laws from government's intervention. It was through their efforts which finally culminated in the formation of AIMPLB in 1972.

It was in Mumbai that the AIMPLB was formed after a two-day long convention held on December 27-28, 1972. It was a successful attempt by the Deobandi ulama because Muslims from other schools of thoughts and sects also came to participate. Along with them, Muslim intellectuals and community leaders were also present. From the same platform, the AIMPLB gave a strong message that Muslims of India would not bear interference in the Muslim Personal Laws. Other prominent organisations which were present in the convention were the Jamiat Ulema Hind, the Jamaat-e-Islami Hindi, and organisations belonging to the Shia Muslims.

Since the birth of the AIMPLB, it was dogged by controversy. On the second and the last day of the convention, a group of reformist Muslims came to the venue. It was led by Hamid Dalwai. The reformists, contrary to the ulama-led AIMPLB, were in favour of reforms and modernization of the Muslim Personal Laws. The reformists were opposed by the supporters of the AIMPLB and in the ensuing scuffle several people were injured and the police had to resort to lathi-charge. The reporting in *The Times of India* next day alleged that supporters of the AIMPLB hurled stones at the Dalwai-led protestors in which several protestors got injured. Contrary to that, the literature of the AIMPLB did not concede anywhere that they pelted stones at the Dalwai group. Instead, it blamed the Dalwai group of creating ruckus at the venue and trying to disrupt the convention.

Not much time had passed since the inception of the AIMPLB, when the real crisis arrived. The crisis was the Shah Bano controversy. Shah Bano Begum and Mohammad Ahmad Khan got married in 1932 and they lived in Indore, Madhya Pradesh. Shah Bano, a mother of five children, was divorced by her husband in 1978 and she filed a case in the Indore court demanding maintenance allowance. The dispute finally reached the Supreme Court and in 1988 a bench comprising the Chief Justice of India gave a ruling and ordered the husband to give maintenance to Shah Bano till she stay alive or she gets remarried. This angered the ulama-led AIMPLB and they argued that as per the Shariat laws maintenance is only prescribed till the period of *iddat*.

The argument of the AIMPLB's president Abul Hasan Nadwi, better known as Ali Mian Nadwi, was that the Chief Justice wrongly interpreted the term *mta'a* as *guzara* (maintenance allowance) beyond the *iddat* period. He said that nowhere in the world there was an instance where maintenance allowance to the divorced wife had been extended till her life ended or till she remarried. He said that Islamic laws are clear that a divorced wife is entitled to seek maintenance from her husband till the period of iddat and after that the responsibility to look after her would fall on her parents. He said that Islamic laws, unlike the laws and customs prevalent in the Hindu community, did not believe that once a girl had been married, her connection dissolved with her parents. The critics of the AIMPLB on the other hand argue that the AIMPLB was a patriarchal and fundamentalist organisation and it was depriving divorced women of their rights by misinterpreting the holy text.

In opposition to the judgment of the Supreme Court, the ulama took to streets and demonstrated against the ruling all across the country. These demonstrations and protests

brought the AIMPLB in the news and it also gave a clear signal that the AIMPLB did have a hold over the Muslim community and it was difficult to deny the fact that the AIMPLB was one of the most prominent organizations of Muslims. Sensing the anger of the Muslim community, the Congress Government led by Rajiv Gandhi decided to bring a Bill to annul the ruling of the Supreme Court. But he knew that if such a Bill was brought in, the Hindutva forces and its supporters and sympathizers in the press and civil society were waiting to corner the Government on the issue. It was a catch 22 position for Rajiv Gandhi-led Congress Government. Finally, the Government decided to bring the Bill to pacify the angry ulama and the Muslim community, but it also adopted a strategy of speaking in more than one way to cater to both the sides. For example, while the Government's official position was in favour of the Bill and its own minister Z Rahman spoke in favour of the Bill, another minister Arif Mohammad Khan spoke against his own Government's Bill. The Congress thought such a strategy is best suited for the situation. Another interesting thing is the role Najma Hebatullah, who was a prominent Muslim face of the Congress. She was active in working as a bridge between the ulama and the Government at that time but now she is part of the BJP which not only criticizes the Congress government for appeasing Muslims but also brought in a Bill to criminalize the act of triple divorce, a Bill that is opposed by a large section of the Muslim community.

The Congress brought the Bill and got it passed but in the process, it invited a lot of criticism from the opposition parties. The Hindu communal forces took up the issue and argued that by annulling the ruling of the Supreme Court, the Congress had pleased the ulama for vote banks and appeased Muslims. It should be noted that Hindu communal forces have for a long time criticized the Congress for appeasing Muslims. In order to compensate for its actions the Congress opened up doors of the Ram Temple at Ayodhya, hoping that it would bring them close to the Hindu voters.

No doubt, the AIMPLB showed its strength during the Shah Bano agitation and sent out a strong message to its opponents that it was one of the most powerful organisations of Muslims in India. The critics of the AIMPLB have often accused it to be a sectarian organisation, where a particular sect among the Indian Islam has dominance, though it claims to represent all Muslims. While it is true that the AIMPLB has representation from all the other major sects of Muslims and since the days of its inception different sects of Muslims have shared platform of the AIMPLB, it can also not be denied that it is dominated by the

Deobandi-Hanafi Muslims. The key influence in the AIMPLB comes from the Imarat-e-Shariat, the Darul Uloom Deoband, Jamiat Ulema Hind and Nadwatul Uloom. The Barelvis, the Sunni-Ahle Hadees and Shias are represented but the top position was always held by the Deobandi Muslims. For example, all the presidents of the AIMPLB belonged to Deobandi-Hanafi Muslims. The Barelvis, followers of the Sunni-Ahle Hadees and the Shia Muslims have never become the presidents of the AIMPLB.

The AIMPLB has also been accused of presenting its own version (Hanafi School of jurisprudence) as the stand of all Muslims. For example, the whole controversy around triple talaq is also linked to it. While Sunni-Hanafi Muslims consider triple talaq as "wrong" but "valid", the Sunni-Ahle Hadees and Shias do not accept triple talaq. These are some of the reasons for internal factionalism and infighting because of which several boards were floated in the last 15 years parallel to the AIMPLB. Some of the breakaway groups are women personal law board, Shia personal law board and Barelvi personal law board. The AIMPLB, instead of engaging with the breakaway groups, often takes an easy path and accuses them of working under the influence of the Hindu communal forces. The predicaments of the newly formed boards are that they could not remain active as time passed and their criticism against the AIMPLB seemed to lose its force. Worse still, the Shia board recently supported the BJP in the 2017 assembly elections and lost much of its credibility among its followers.

The BJP-- which has taken up the issue of reforms and modernization of the Muslim personal laws as well as the imposition of the Uniform Civil Code for a long time—became quite active over the triple talaq issue after Narendra Modi took over as Prime Minister in 2014. The BJP sensed that the issue of Muslim personal laws had a potential to divide the voters along religious lines which could reap rich electoral dividends. Following Orientalists and colonial stereotypes about Muslims/Islamic world the party began to argue that the unreformed Muslim personal laws are opposed to modern values of gender justice and the Constitution. The trope used by the BJP is that the Muslims/Islamic societies urgently need reforms and their women urgently need to be saved. As the USA projected itself as the savior of Afghani women, Narendra Modi, similarly, is being projected as the brother of the oppressed Indian Muslim women to be saved from their husbands and "fanatic", "patriarchal" ulama.

The Supreme Court gave its judgment on the triple talaq and called it "unconstitutional". Now the Government is bringing a Bill to criminalize the act of giving triple talaq and it has

proposed three years jail for husbands, but it is silent on how the divorced woman would maintain herself if the husband goes to jail since the Bill does not promise to provide any financial assistance by the state. All the parties, be it the Hindu communal forces-led Government or the AIMPLB, are swearing in the name of gender rights but as things stand the biggest sufferers are Muslim woman. The AIMPLB continues to remain adamant about retaining the provision of triple talaq, while Hindu communal forces are selective in highlighting the victims of triple talaq. Such a tussle does not seem to end at any time soon and the conflict between the modern state, secular laws and the minorities, as a result, is not expected to get resolved in the near future.

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