REPRESENTATION AND INTERPRETATION OF MUSLIM PERSONAL LAWS IN INDIA: A STUDY OF THE ALL INDIA MUSLIM PERSONAL LAW BOARD

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DOCTOR OF PHILOSOPHY

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DECLARATION

I declare that the thesis titled "Representation and Interpretation Of Muslim Personal Laws In India: A Study of the All India Muslim Personal Law Board" submitted by me in fulfillment of the requirements for the award of the degree of Doctorate of Philosophy is an original work and has not been submitted so far, in part or full for any other degree or diploma of any university or institution.

(Ayesha Rahman)

We recommend that this thesis be placed before the examiners for evaluation for the award of Ph.D. of this university.

(Chairperson)
Prof. Narender Kumar

(Supervisor)
Prof. Pralay Kanungo

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INTRODUCTION

The Imagination of India is imbued with the colours of diverse religions coherently defining the sacred and the profane sphere of an individual's life. The Indian model of liberal State drawn, at the time of independence, by Nehru was to document a Constitution protecting differences of groups and graduating later towards uniformity in the public sphere. The nation was divided in 'watertight compartment' by giving supremacy to personal laws based on religion in different arenas of political life (Austin, Religion, Personal Law and Identity in India, 2001, p. 16). A multicultural framework offered the marginalized groups in India an accommodative and plural set-up to celebrate the principle of difference in protecting the cultural rights of their communities, as manifested in the autonomy of Muslim Personal Laws (henceforth MPL). It opened the possibility for conservative interpretation of ascriptive identity by groups causing internal inequality of intra-groups. The supremacy accorded to the status of personal laws was further guarded by placing them in the Fundamental Rights[1](henceforth FR) of the Indian Constitution. It established two rules that of sanctifying religion in public life and primacy of community rights over the individual (Kapur & Crossman, 1996) (Rajan, 2003).

It has been argued that the modern secular government exacerbated religious conflict by polarising religious differences through the flourishing of communal identities hard lined by their personal laws (Mahmood S. , 2015). Indian State's handling of the project of political secularism shows signs of incomplete secularization intensifying hierarchies in a plural system of religion-based family laws. Asad offered to deal with this impasse by creating a democratic state of multiple minorities cooperating to act in accordance with the general ethos of forbearance and receptivity (Asad, Formations of the Secular: Christianity, Islam and Modernity, 2003, p. 177). Asad proffered that the State can be benign in its persuasion with different actors in a plural set up as witnessed in Canada or be coercive as found with the Muslims in Europe.

The distinctiveness of Indian Secularism lay in creating a democratic life of religiosity among diverse groups by appealing to Rawl's 'overlapping consensus' on issues concerning the minorities (March, 2009). Thus, the political dialogue of the Muslim group with the State implied making concessions on illiberal practices of the minority for accommodation and legitimacy. The issue of demanding autonomy of MPL frames doctrinal discourse within the meaning of Indian Secularism to judge the compatibility of the Islamic law with core liberal values of democracy,

[1] Article 25 gave individual equal liberty to 'profess, propagate and practice' their religion .,thereby, protecting the personal laws of the communities, See P.M. Bakshi. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis

human rights, and gender equality. To what extent does the State allow the celebration of illiberal policies within a group to adapt to new leanings of a tolerant polity, in this study, has been a worthwhile exercise. It can be argued conclusively that the conflict that emerges in a plural State in the form of asymmetrical power relations between religious groups, women, ethnicities cannot be settled by the universal liberal claim. The culturally plural claim paves way for the multicultural path establishing contesting forms of differential treatment within various group experiences to guarantee what Chandhoke called '*dharm nirpekshta*' (.equality of all religions) (Chandhoke, 1999). However, Chandoke cautioned against the subjection of individual rights to group rights.

Majority of the scholarship dealing with the challenges on multiculturalism premised their concerns on this aspect especially the feminists, subalterns, and the liberals alike. One of the ruing tensions explored in this work is between the multiculturalist and the feminist perspective on matters of the MPL in India. The perceived threat to group's identity led, to what Shachar calls, 'reactive culturalism' wherein a strong adherence to traditional laws, norms act as a resistance to forces of cultural essentialism (Shachar, 2001, p.35). The tension is mostly reflected in preservation of cultural distinctiveness by refraining from intruding into the religious affairs of the community especially in matters of personal law. However, the special recognition accorded to group rights created vulnerable sites of debasing of the rights of the women especially while interpreting laws guiding their familial space (Shachar, 2001) (Eisenberg & Halev, 2005).

Any solution offered in reconciling the difference between the two positions calls for limiting the permissible level of espousing diversity by the state, generation of more autonomous arenas to opt out of the group identity and a deliberative model for egalitarian and just positions available to different actors vis-a-vis State and the society (Parekh, 2000) (Kukathas, 2001) (Okin, Cohen , Howard, & Nussbaum, 1999) (Menon, 2000). These models have been conceptualised in the Indian society by curtailment of the exercise of the rights of religious freedom to maintain order, morality, and goodwill by the State, option for women to choose for more liberal norms promised under the Special Marriage Act and positive enforcement of a Uniform Civil Code (henceforth UCC) prescribed in Article 44 of the Indian Constitution (Eisenberg & Halev, 2005). Austin offers that modernization, economic progress and education for women will eventually reduce the women's dependence on these personal laws as marker of their identity (Austin, 2001, pp. 22-23).

The issues concerning Indian Muslims revolves around the twin concepts of religious liberty and minority rights. The shaping of the MPL in India is guided by the dynamics of elite politics, institutional structures and gendered interests shaping legal outcomes. The contemporary concerns

about the continuation of autonomy of personal laws, the prospects for reform and politics of legal change make an understanding on the temporal-spatial location of the Indian Muslims even more critical.

Partha Chatterjee advocated the need for the internal reforms of the personal laws arguing for preserving the group's access to their culture. However, both believed that this right should be exercised by institutionalizing mechanisms of internal democracy within the members of the community. The groups will function freely without outside interference and operationalise internal restrictions to reconcile with the claims of gender justice. Partha Chatterjee offered setting up of representative forums of internal democracy within the Muslims, whose decisions on matters of internal affairs of the community would be respected by the State. However, Chatterjee argues that this forum should function on the principle of consensus building between different groups, respecting difference of opinions by accommodating every voice of the internal minority (Chatterjee, 1994).

Rajeev Bhargava's understanding of Secularism was also compatible with the group-differentiated rights of the community. Bhargava cautioned on the tenability of a UCC accommodating the personal laws fairly. However, Bhargava's position for allowing toleration of celebration of personal laws comes with a caveat that the rudimentary rights of women on matters governed by the family law be legally enforced by the State, irrespective of the group to the which the women may belong (Bhargava, 1998, p. 91).

Imtiaz Ahmed takes a legalist stance arguing for rationalization of the personal laws conflicting with the constitutional principles of equity and justice. Ahmed's argument comes closer to the gradual transition to civil codes premised on the support and consent of the members of the minority group participating in the process of drawing the blueprint of the code (Ahmed, 1995).

The dianoetic identity of Muslim women is imagined on tropes of personal laws, veiling *(purdah*) and arbitrary forms of divorce. The rhetorical issues have created a homogenous category of victimhood as reified in episodes of Shah Bano, Imrana, Gudiya, Shayara Bano and many more pleading a case for reform of MPL. The dominant discourse manufactured by the clerical establishment within Islam, on the women force, has dominated the economic, social, and political spectrum of diverse societies (Ali, 1998) (Codd, 1999). The dominant knowledge produced negated the necessity that was required to apply the method of *Ijtihad* (independent reasoning) to pressing issues concerning women in the contemporary times. The parochial reading of laws, indiscriminate and illogical use of *fatwas* (decree) by few uneducated elites have created 'distorted

traditions' which are a clear deviation from true Islam. Therefore, the discourse analysis of Muslim's lived experiences of Islam is incomplete and misconstrued between tradition and orthodoxy.

Given the recent political and legal controversies around the interpretation of MPL in India has called for a deeper and more nuanced reading of the Islamic law by different agencies of the State and the society. The experiences of the Muslim women encounter double discrimination, one as a marginalized member of the minority group and the other as the silent subject of the State. The subaltern framework clashes with these structures of hierarchy perpetrated both at the level of society and the State to draw attention to individual suffering vis-à-vis regressive practices of the community and aided by the State. To locate the Muslim women's concerns on equality and justice is to pitch it within the larger political debate of Hindutva manifested in the rise of a rightist party, the Bharatiya Janata Party (henceforth BJP) to the political mainstream in the 1990s. The churning of events like the demolition of the *Babri Masjid* in the year 1992 by right wing fringe elements, the subsequent Bombay riots of 1993 and the Godhra Violence of 2002 unchecked by, the then Chief Minister of Gujarat, Narendra Modi has distanced the Muslim minority from trusting the State for any form of reform or development of the community (Ansari, 2020)

The ethos of tolerance stands further compromised in the face of the rising incidents of lynching by self-proclaimed '*gaurakshas*'(cow-protectors) , hate-speeches, riots and violence unleashed on the Muslim by fringe elements (Trivedi, 2021) (Dabhade, Engineer, Nair, & Pendke, 2019). Though the government discourages these acts of vandalism, yet it has rarely made a substantial move to check on the abuse of a secular and tolerant culture. Thus, the resultant fear of assimilation at the hands of the majoritarian forces has forced the minorities to stay in a cocoon, critical to any agenda of reform of personal laws to be initiated by the State or the call for a UCC (Jaiswal & Jain, 2018).

THE CONTEXT:

Hermeneutics and Islamic Law:

Any construction on the changes in the family law in the West has been premised on the foundation of principles of legal modernity, process of secularization and universalizing common rules to realize individual liberty and social equality (Friedman, 2004). The Islamic legal scholarship tends to synonymously use the term Islamic law with *Shari'a* law to define a system of rules guiding an institution and its personnel that is the belief of a Muslim on the path of God (Anderson, 1999). An authentic reading of the *Shari 'a* as a normative ordering of norms comprising discursive

discourse of the *Usul-al-fiqh* (roots of Jurisprudence) helps in constructing meta-rules for valid juristic decisions. These rules are derived directly from the *Qur'an* and the verbalized recording of practices and pronouncement of the Prophet and indirectly from the non-textual sources like interpretation (*ijtihad)*, consensus (*ijma*) of expert jurist, analogical deduction (*qiyas*), eclectic choice *(takhayyur*) etcetera.

The direct sources are coined to be *Shari 'a* proper while the extrapolation of the derived sources has actually caused differentiation among Schools (*madhabs*) of Jurisprudence. It further guarantees plurality of laws which most scholars have come to attribute traditional *Shari 'a* with (Jackson, 2006, p. 159). The key idea is to exercise rationality in interpretation of laws without collapsing to the Orientalist bait of treating *Shari 'a* as static and non-pragmatic. This research, at the outset, proposes that Islamism cannot be dismissed as a mutation of modernity.

One needs to study the growth of the Islamic law in periods of continuity where different strategies, interest and imaginations caused variations in the understanding of Islam and dispelled the misconception of Islamic law as anything 'monolithic'. Scholars like Hallaq have criticised the western project on Islamic law as not just coercing the colonial state to manipulate its subject but also effectuating the degradation of the entire Islamic law system. The collapse of the '*Shari 'a episteme*' (Hallaq W. , 2009, p. 15) deeply impacted the systemic pluralism of the Muslim law functioning at different levels, from teachings and debates at the mosque, to learning at the Madrasah training the religious experts on the teachings of Islamic text and tradition, to religious endowments (*Awqaf*) supporting these institutions. All these agencies were severely marginalized by the Colonial imposition of process of secularization of the religious laws.

The renewed commitment in achieving a symbiosis between intellectual and institutional articulation of the utility of *Shari 'a* became part of the formations of scholarship of writers like James Scott (Scott, 1998), Lucas Scott (Lucas, 2004), Wael Hallaq (Hallaq W. B., Authority, Continuity and Change in Islamic Law, 2001) and Talal Asad (Asad, Genealogies of Religion: Discipline and Reason of Power in Christianity and Islam, 1993). James Scott addressing the phase of modernism of the state argued that social and physical terrains of governance were created by an order that had replaced the internal processes of reform in the face of fear of unpredictability. The colonial state across the globe has been status quoist and shying away from indulging in the rich traditions of the Islamic law to maintain administrative efficiency. Their interaction with the local elites was merely symbolic to consolidate their power inorder to co-opt any sign of protest infusing from the realm of the civil society (Scott, 1998).

Hallaq points to the nineteenth century 'structural death' of *Shari 'a* owing to colonization of state-building and juristic dispensation (Hallaq W. , 2009, p. 358). The attempt to demolish and root out the *Shari 'a* actors and institutions from the process of newly translated codes of courts has led to the death of the legal system. The separation of *Shari 'a* from the content of codified religious law has reified Islamic law as devoid of rich interpretive and institutional dynamics of *Usul-al-Fiqh* (methods of scientific reasoning applied to Islamic text and traditions).Thus, Hallaq argued that,

> "the political, legal and cultural struggles of the Muslims stemmed from dissonance between moral and cultural aspirations, defining the moral realities in which they lived as not of their own making" (Hallaq W. B., 2013, p. 3).

Talal Asad delineated the term 'Islamic discursive tradition' to argue for is historical situatedness to power relations in the society. The institutionalization of knowledge through traditions tends to guide the followers regarding the correct form, thereby, upholding dominance over the mainstream discourse (Asad, Genealogies of Religion: Discipline and Reason of Power in Christianity and Islam, 1993, p. 57). Asad talks about the reformist link between the family and the disciplinary regimes of the State while discussing the unfolding the process of secularization in Egypt. The family has always been viewed as the basic unit of the private realm where an individual's moral attributes are reproduced. The *Shari 'a* was purposively relegated to the private preparing self-governing subjects to acknowledge the frontiers of state as a secular domain. The real achievement of the colonial state was not thus the accommodation of the masses but the transformation of sites of accommodation and protest in conditioning social action of citizens as self-governing subjects. Asad offers insights later to study the inter-playing of processes of colonialism, modernity, and Islam in developing Muslim strategies to face the secular power in India. The need for codification of laws, despite its incongruence with Islamic legal principles, was necessary to remark their identities as irreconcilable with the Hindu law (Asad, Formations of the Secular: Christianity, Islam and Modernity, 2003). Asad's hermeneutical model guides in re-locating women's rights in reading of the *Qur'an* in three ways, namely, as locating the text in the given context and the way the women's issues were addressed, as a well-formed composition of the text and the worldview of the whole text. Thus, any question dealing with the rights of women in Islam should be exercised by an exegete by interpreting the *Qur'an* in favour of women equality (Wadud, 1993, p. 9).

Colonial Antiquity framing the MPL:

Laws in India, prior to the advent of British rule, was a free-flowing body of knowledge based on scriptures.it was open to modification and influence both at the hands of the jurists and the ruler (J.D.M.Derrett, 1968, p. 35). The courts were guided by the Islamic law as interpreted by the class of law officers (*Qadi*) drawn from the circle of *Ulemas* (clerics). The lack of a written and authentic treatise on Muslim law especially about Inheritance pushed the Britishers to assume the task of translation of religious treatises. It helped in reducing the dependence on these native law officers by 1860's.

The historical project on Islamic law is drawn on its inextricable relation with the forces of colonialism and the modernization of local norms and practices. The essential questions explored by the scholars working on the historical narrativity of Islamic law delved on the meaning, translation, and application of religious laws by the jurists of the colonial state. New forms of religious mobilization emerged under the colonists wherein the British culture and practices were posed as of superior leaning and local religion and culture as dogmatic. Any British policy of dispensing rewards to the subjects was ascertained on their religious identity. Many religious communities attempted to reform their religious practices like offering widow re-marriages, banning child marriage and education for women to meet standards of colonial modernity and garner official recognition for their revived religious norms. The adoption of accommodation of religious norms by the clerics led to the equation of MPL with the *Shari 'a* (Subramanian, 2014, p. 202).

The narratives of past two centuries witnessed the struggle between piety and polity that is the divine commands of God and contingent space of artificially derived laws from the science of *Fiqh*. The colonial encounters across the world saw negotiation between the local subjects and the colonial elites on the scope, content, and applications of Muslim laws to their mutual interest. In the process, these elites participated in reshaping of the contours of Islamic law defining family as the direct sites of engagement of personal law. The redefined ascriptive identity based on religious leanings led to the complete regulation of private lives of the individual. Mamdani and Comaroffs accurately argued that the institutional impact of colonialism was not just evident in the destruction of local institutions and customs but their selective reification for strategic redeployment to the state coming into being (Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, 1996), (Comaroff & Comaroff, 1991).

The impact of translation of textual laws through the anglicized process of codification and ossification of religious laws led to the institutionalization of colonial rules and defined the

authority of Muslim clerical establishment over the community. Black, Mindie and Hirsh reading this transition as a 'paradox of Islamic law' highlights on the dual role of law as an organised force to enforce order and as an arena for actors to fight their struggle for resistance and interest (Lazarus-Black & Hirsch, 1994, p. 89). With the passage of time, the clerics got disillusioned with the British government and under the aegis of the Deoband School, the Muslims established their religious courts (Zaman, 2002). The regular courts had on the other hand not just ended the process of deliberation and consultation with the guardians of the faith but also diminished the role of *fiqh* in interpreting the personal laws. In the light of neglect of their religious traditions, the Muslim clerics revived the method of ijtihad to wrest their authority as the interpreters of Islam. Both the Muslim secularists and traditional clerics participated in codifying the MPL popularly known as the Muslim Personal Law (Shariat) Application Act, 1937(henceforth Shariat Act) and Dissolution of Muslim Marriages Act, 1939 (henceforth DMMA) (Narain, 2001). It helped in prioritising religious norms of Islam and replaced all the erstwhile local customary laws that held closer affiliation with the Hindu customary practices. These laws offered enhanced rights to women to claim for the divorce on account of adultery, abandonment, or cruelty on the part of the husband ,thereby, liberally applying the Maliki law on the largely Hanafi Sunni population. The adoption of empowering laws for women in matter of family and continuation of inheritance of agricultural land by the landholders offered administrative efficiency motivating the colonial state to frame laws to increase the minimum age of marriage of boys and girls (Williams, 2006) (Agarwal, 1995).

The colonial reading of the MPL is both limited and reductionist as it tends to define religious law in the periphery of colonial politics. The underlying Islamic legal scholarship has tended to keep politics out of the domain of Jurisprudence by limiting the interaction between the personal law as realm of the 'private' and secular laws of public policy. While early legal pluralists (Hooker, 1975) treated colonial hierarchies as preserving local law intact, the recent trends point to the new contestations of power in plural legal system (Joel Migdal, Kohli, & Shue, 1994) (Midgal, 2004). The exponent of early legal pluralist held on to the autonomy of legal traditions as a tool to bargain with the power-wielders in the State. Neo-pluralists participated in the colonial project as part of a system of culture and complex array of power resources on which to premise the modern nation state (Galanter, 1974), (Merry, 1988).

The enforcement of the Islamic law today in a Muslim nation or a secularised polity has traversed a monumental path from an uncodified and locally administered rules to a statutory and state-centred legal codes of personal law. Most of the study of Muslim states have categorically argued

that *Shari 'a* as divine providence has never been universally applied by any state and the key negotiation primarily lay between the state and *fiqh* of Islamic law (Yilmaz, 2005) (Wickham, 2002). Therefore, in most of the countries taking the bus of reforms of the personal laws have subordinated Islamic law to the state machinery. Talal Asad explored the relationship between the sacred and the temporal affecting the modern state, arguing that,

> ***"****it is not enough to show that what appears to be necessary is really contingent . . . it is a matter of showing how contingences relate to changes in the grammar of concepts— that is, how the changes in concepts articulate changes in practices"* (Asad, 1993).

Curiously, Islamic law in India continues to be a powerful component of the politics of Muslims and the modern state caught in the struggles over authority and autonomy of personal laws. This view of Islamic law as a site for political contestation sets this study apart from study of *Shari 'a* laws as divinely ordained ad repository of unchanging traditions and culture. This study, thus, should neither be read as a for or against argument in Islamic law. Though most of the scholars have liberally invoked the political connotation of Islamic law as rules that are man-made but are benignly naïve to diminish the meaning of *Shari 'a*. As Hallaq has rightly pointed out, that,

> "the understanding of the modern nation-state and Islamic governance should clearly distinguish the term ' *Shari 'a'* from 'Islamic law' and both from the Muslim law" (Hallaq, 2013, pp. 23-33).

The formation of personal law under the colonial reign had laid the foundation of the idea of nationalism, secularism, multiculturalism in post-colonial India (Diwan, 1977). The colonial state offered a uniform framework of legal system to the exception of certain religious norms, like the Mapillas Succession Act, 1918, Cutchi Memon Act, 1938 etcetera, enjoying autonomy in practice subject to its compatibility to the principles of justice, fairness, and morality. One notices clear semblance of religio-juristic laws and the English laws. However, the state-courts gave primacy to certain local customs and norms if they stood undisputed in the practices of the litigants. The space assigned to Islamic law constrained the space of *Shari 'a* that could have offered far reaching emancipatory positions for women. The colonial dispensation on personal laws strove at creating patterns of legal uniformity for administrative consolidation. Sadly, the nascent liberal state caricatured the outlines of the imperial state especially on matters of personal law. However, the Indian state at the time of independence favoured a pluralistic legal system wherein the sovereign patronised existence of different bodies of law for its diverse population (Griffiths, 1986, p. 3).

The literature on the legal pluralism focused on the dialectic relationship between the state law and non-state norms. An internally plural order works on the complex combination of transplanted indigenous system (Galanter, Justice in many Rooms: Courts, Private Ordering and Indigenous Law, 1981). India favoured 'strong plural legal realities' wherein claims of uniformity are put at abeyance to maintain communal harmony. Thus, different personal laws of heterogeneous religious and ethnic groups continued to guide their religious and personal affairs (Subramanian, 2014, p. 51). They are neither ordered nor harmonised into a common civil code by the state. The MPL functioned as community-specific norms which were debated and contested in the jursitic discourse.

Being Muslim in a Liberal-Democratic State:

The post-colonial state inherited the institutional logic and bureaucratic system of the colonists and developed some indigenous system of governing laws and society. The Indian State conditioned itself into being offering expansive spaces for claims of individual and groups to appeal, protest and seek change. The non-interventionist approach of the State in matters of personal law, despite the demand to introduce personal-law reforms for both the Hindus and the Muslims, governed by the motive of smooth transition to a new liberal-democratic regime answers the logic of blind imitation of colonial practices. The religious elites taking advantage of their positions mobilized the cultural rights of the community by controlling the agenda for reform of the laws.

Nehruvian state initially acknowledged the attachment of the Indian Muslims with their religious laws as a sign of their backwardness necessitating temporary recognition. However, Nehru believed that the Muslims will eventually become receptive to welcoming UCC after the rise in their socio-economic status. The State kept silent on interfering with the affairs of the Muslims except few episodic moments of testing the waters of introducing the UCC which met with strong resistance from the community.

The main organisation that mobilized personal law initiatives since its inception in 1972 was the AIMPLB (henceforth AIMPLB) legitimizing its status as an umbrella organisation voicing the demands of the Muslims. The rise of the AIMPLB is instrumental in shaping the erstwhile silent discourse on MPL in India. The organisation enjoyed the support and patronage from, the then, Prime Minister Indira Gandhi as witnessed from her pro-minority stance in the early 1970's.

Prime Minister Indira Gandhi promised to compromise on the Indian State's liberal pursuit of guaranteeing individual liberty by introducing 'secularism' as an essential tenet of the Indian

Constitution, spelt out in its 42nd Amendment Act (*S.R.Bommai vs Union of India*, 1994). It was a watershed moment in the history of India's Constitutional development as officially recognising a plural and a tolerant multicultural polity. Till date, the State had mostly upheld the position of non-intrusion of state in religion but with the inclusion of the term, it redefined the jurisdiction of the State to protect differentiated claims of the minorities, especially the Muslims, on matters of religious freedom exercised in spheres like autonomy of personal laws, administration of educational and religious intuitions like the *Madrasahs* and the management of the *Wakf* Board.

Similar policy of allowing the toleration of community rights by Rajiv Gandhi's government was noticed with the enforcement of the Muslim Women's (Protection on the Rights of Divorce) Act, 1986 (henceforth MWPRDA) . The legislation acknowledged the demands of the Muslim leadership to de-recognise the Shah Bano's judgment offering enabling rights of alimony to divorced women beyond the *Iddat* period (Engineer, 1987) (Engineer, AIMPLB and Shah Bano, 2011). The hands off stance of the State in religious affairs over the decades has, thus, caused internal tensions and compromised with the values of gender equality of individual vis-a-vis cultural autonomy.

The role of the Judiciary, in the absence of State's intervention, has been of a reformative institution producing an appropriate climate to initiate reforms of the personal laws. Justice Baharul Islam pioneered the progressive interpretation of MPL in India by revoking the unilateral form of repudiation of marriage by the husband (*Jiauddin Ahmed v Anwara Begum*, 1978). Justice Krishna Iyer in *Sowramma* (1971), *Bai Tahira* (1979) and *Fuzlunbi* (1980)case contributed to the reformist interpretation of the authoritative text of Islamic law. There are stark contrasts evident in the judicial dispensation between High Courts and the Supreme Court (henceforth SC), in interpreting the MPL, also dealt in the fourth chapter. The SC has been a forerunner of talking for emancipatory positions for the women across the spectrum of different religions. It has, time and again, cautioned the Indian State to draw a design for the adoption of a UCC for the country in a bid to promote gender equality and justice.

The juristic discourses formulated on the MPL in India by scholars like Archana Parashar and Crossman claimed that the court's positive intervention in interpreting the personal laws by enhancing the rights of the Muslim women, especially in the *Shah Bano* case, met with fierce opposition by the Muslim organisations like the AIMPLB. The scholastic interpretation defining these modes of protest as an attempt to saviour their religious identity, leading to the abandonment of the project of reform of law by the State, is misplaced. Many studies and the field--observation

revealed that some Muslim conservatives had welcomed the positive reformist judgement of the court by agreeing to interpret the Islamic tradition in a more liberal fashion. Majority section within the *Ulama* had not protested the SC judgment on the alimony decrees wherein *Mata* was made compulsory(read closer in line to the position of the Ithna Ashari School than the Hanafi position who treat *Mata* as voluntary). However, most of the clerics believed in paying a hefty sum rather than a regular payment burdening the husband till the wife's death or remarriage[2] (Mujaddiddi, 2016). Their main grievance lies in the erroneous reading of the religious text and tradition by the inept judges, making claims to Un-Islamic interpretations of the law (Agnes, 1999) (Vatuk, 2005). Justice Chandrachud's arguments that,

> "the Quranic verses are self-explanatory, and any alternative Hanafi interpretation does not hold much merit in the light of provisions of Section 125(3) of the Criminal law was not taken in a good spirit" *(Mohd. Ahmed Khan v Shah Bano Begum and Ors*, 1985).

The position of the Court favouring the adoption of UCC, citing Tahir Mahmood, degrading Islam as unequal towards women, caused deep resentment in the minds of the AIMPLB and other Muslim organisations like the *Jami 'at-e-Ulema-Hind* etcetera. It led to mass scale mobilization of the Muslims by the AIMPLB against the ruling judgement in the *Shah Bano* case. In the subsequent judgements, the SC has adopted a more rational and moralistic stance in interpreting the MPL on the principles of equality and constitutional morality as witnessed in the *Danial Latifi* and the *Shayara Bano* case, respectively. Any attempt by the SC today on matters of religion is interpreted in the light of direct reference to the meaning of the *Qur'an* and the application of *Fiqh* (e.g., the principle of eclectic choice) in interpreting the *Traditions of the Prophet* available in the writings of Muslim legal scholars.

The churning of the political events since the passing of the MWPRDA catapulted AIMPLB's position as the legitimate sole representative of the community in the mainstream politics. The Board declared to fight against any interference in matters of MPL as their key mission inorder to protect their religious faith. It managed to earn the support of the community especially with the rise of new Right-wing politics of the 1990's. The subsequent years saw active participation of the AIMPLB in vehemently opposing the communal turn of politics like the destruction of the

[2] Prominent clerics and scholars like Maulana Mujahidul Islam Qasmi of Islamic Fiqh Academy, Maulana Khalid Saifullah Rehmani, current Secretary of the AIMPB, late Maulana Kalbe Sadiq, former Vice-President of the AIMPLB were critical of the court's position of treatment of Mata in grant of alimony to Shah Bano.) Today, it's a unanimous position of the AIMPLB to oppose the judgement of the Shah Bano case in totality.

Babri Masjid, communal riots across the country, Godhra violence and the queer silence of the Indian State on it.

The dilemma that emerged due to the recognition of the AIMPLB as the representative body of the Muslims eventually exposed certain members of the community to in-group rights violations and the politics of exclusion. This paradox best defines the destiny of the Muslim women caught in the tumultuous situation of a hostile inter-communal conflict threatening their FR of equality and non-discrimination. It has often been argued that the assimilation of women's identity into the folds of personal law is problematic because of the essentializing nature of cultural practices built on a non-representational notion of communal identity.

The approach of the advocates of the *'reforms from within'* process highlighted the intricacies of intra-group inequality manifesting beyond the class lines, causing sectarian profiling of the issue of interpretation of MPL by small section of self-proclaimed elites. This dominant control over the interpretation of scriptural traditions by a handful of class of elites (parochially called the *Ashraf* or of noble descent) widened the gap with the masses or lower class (called the *Ajlafs*). The latter in the contemporary times started a movement named *Momin Tehreek* to share the experiences of caste-based exclusion from representation within the community like their Dalit Hindu and Christian fellowmen. The movement demanded renewed interpretation of Muslim law, which do not impinge on to the rigid norms and inegalitarian practices not sanctioned by the *Qur'an.*

The debate on the reforms of the MPL in India has recently ushered in a new era of Muslim women's mobilization as key and significant actors pressurising the State to privilege values of gender equality and justice. Umpteen Muslim organisations like the *Anjuman -i- Khavatini* Islam, *Awas-i-Niswan*, All India Muslim Women Personal Law Board (henceforth AIMWPLB), *Bharatiya Muslim Mahila Andolan* (henceforth BMMA) have taken revolutionary strides in organising Muslim women's movement to demand abolition of polygamy, Triple *Talaq* (henceforth TT) and *Nikah Halala* and increase awareness on the practice of *talaq-e-tafwid* (delegated forms of divorce) available with the women in different circumstances, equal rights of women in agricultural property[3] that was purportedly left out of the purview of the Shariat Act. Though these networks of women groups have overlapping consensus on setting their ideologies

[3] The right to equally acquire an agricultural property by the Muslim woman is separately made applicable in few developed states of Bengal, Kerala, Tamil Nadu, Andhra Pradesh, Gujarat, and parts of Karnataka. See Narender Subramanian, *Nation and Family: Personal Law, Cultural pluralism, and Gendered Citizenship in India*, 2014, California, Stanford University Press.

and priorities, yet they differ and challenge the dominant conception of women's movement as a form of uni-directional and homogenous struggle to achieve gender justice. Many within the group are supportive of a UCC formalised outside the purview of any religion and identity (Kirmani, 2011). While others like India International Women's Alliance (henceforth IIWA) founded by Uzma Naheed are strongly critical of the Muslim women's deplorable condition due to the uneducated men , yet the founder agreed to operate within the community fold to bring piece-meal reform through deliberation and association with the internal religious organisations like the AIMPLB(Naheed, Muslim Women's Rights and the AIMPLB, 2016).

In juxtaposition to the position of the supporters of internal reforms were the narratives of nationalist proposing the adoption of a UCC to achieve long-awaited goal of national integration. The Right-wing culturalist wished to naturalise their dominant religious laws to satisfy their hideous agenda to annihilate minority identity (Kapur & Crossman, 1996, p. 90).

Many liberal scholars and women group, however, were displeased with the hijacking of the project of demanding UCC that would guarantee gender justice. For the progressivist, state was the architect of social reform and should intervene in structuring social relations as to provide universal equal treatment of both individual and groups. The Committee's report on the status of women published in 1974 by a handful section of female activist argued that,

> *"The absence of the UCC (uniform civil code) in the last quarter of the twentieth century, twenty seven years after independence, is an incongruity that cannot be justified with all the emphasis that is placed on secularism, science and modernism. The continuance of various personal laws which accept discrimination between men and women violate the FR"* (Hasan, et al., 1974, p. 142).

Most feminist writers felt that the state-made law would offer emancipation of women and a UCC would be a harbinger of genuine democracy (Dhagamwar, 1989), (Mahmood, On Securing a Uniform Civil Code, 1975), (Menski, 2012), (Parashar, Religious Personal laws as Non-State Laws: Implications for Gender Justice, 2013). One of the key advocators since independence supporting the demand for gender equality was the All India Women Congress (henceforth AIWC) group campaigning for women's economic rights like no discrimination between a son and a daughter, women as absolute owners of property even if opting for inter-faith marriages (Minault, 1997). The organisation favoured the codification of MPL by the Britishers and pleaded the Courts to curtails the male's right to unilateral divorce. The AIWC at a conference in 1933 floated the view that,

> "the arbitrary power of divorce by the husband, at mere caprice, was not in consonance with the true interpretation of Islamic law. One of the Muslim Congress member justified the demand for a UCC on lines of precedence in countries like Turkey and Iraq" (Basu & Ray, 1990, p. 160).

The crucial debates concerning Muslim women in India have posed hard-hitting questions that are probed throughout the study. It needs to be reiterated that the practice of TT has been invalidated by the judiciary as witnessed in the (*Shamim Ara v State of U.P*., 2002) cases. On the issue of polygamy, the SC in case upheld that,

> "the Rule 29(1) of the U.P. Government Servant Conduct Rules, 1956, that prohibited bigamy, in this case for a Muslim employee marrying the second time without taking the permission from the State government" (*Khursheed Ahmed Khan v State of U.P*., 2015).

The recent debate laid the political mapping for changes in MPL to introduce long-due social reforms and gender equality as illustrated in the (*Shayara Bano v Union of India & Ors*., 2017) case. The enactment of the Muslim Women (Protection of the Rights on Marriage) Bill in 2019 opened a pandora's box of inequality and deepened the despondency of the women due to the sentencing of the husband to three years term in prison. The Sachar Committee Report of 2006 had pre-warned against the under-representation of the Muslim, primarily men, in the salaried job sector (8%), in central administrative services (5%)or in Public Sector Undertakings(5%) as compared to their brethren from other religious groups. The Census report of 2001 showed glaring indices of inequality and non-educated status of Muslims in India. Finally, the skewed representation in the Parliament of the country to 5% of total Lok Sabha seats by 2019 (Sachar, 2006). All these indices are telling tales of absence of economic sufficiency and empowerment, social awareness, educational backwardness of the Muslim community that impacts the familial relations between spouses. The manipulation of the provisions of the MPL to suit their economic and social conditions has inevitably caused discrimination and marginalization of both women and lower class cum caste groups within the minority fold (Ansari, 2020).

Emergent Themes: Muslim Personal Laws, Minority Rights, Gender Equality, Secularism.

This thesis attempts to explore the terrains of MPL in India clamouring for its legitimate space in larger debates on contestations on principles of secularism, minority rights and gender justice. The envious relationship shared between the values of political recognition, gender equality, and religious liberty stands pronounced in the domain of personal law.

> "Personal-law systems govern practices like marriage, divorce, marital separation, alimony, property division on separation and divorce, adoption, guardianship, and inheritance" (Ali A. , 1986).

Majority of the narrative shared the teleological framework of the western import of codification of the laws to relegate religious norms to spheres of family and kinship system. Parashar applied this position on the Indian case of personal laws as restricting the rights of women subjecting them, to what she called 'rigorous control of the high culture Islamic law' (Parashar, 1992). However, this position overlooks the emancipatory provisions on inheritance and divorce rights for the women of different personal-law systems adopted by the judiciary from the 1980's (Parashar, 1992) (Rajan, 2003).

In juxtaposition to their approach are trajectories that frame family laws in culturally specific discourses. Most of the studies on personal laws across the globe have initiated the agenda for reforms of religious norms for a culturally encumbered individual. The countries have been classified into different systems based on the level of reforms introduced, that is, extensive modernist reforms in Tunisia and Morocco to modernist reforms in Indonesia, Malaysia, Bangladesh, Pakistan and finally those with status quoist/ conservative position like Afghanistan, and Saudi Arabia. Highly secularized family system in countries like Indonesia and Morocco introduced revolutionary changes in MPL by granting women an equal share in matters of matrimonial property, way ahead of the situation in the 1970's. The pattern of nuclear family got greater support and legitimacy in Tunisia around the 1950's. However, literature is also aware of the limitations on reform of religious laws in Islamic countries like Indonesia, Malaysia that ex-communicated individuals professing transgender identity or alternative sexual behaviour (Mahmood, 2016) (Subramanian, 2014) (Hussin, 2014).

India State constructed a native trajectory on reinforcement of personal laws at two mutual levels of interaction, one between the state and society and the other being the discourses of the community defined by the ruling elites. At the former level, the state's elites engage with the predecessor, regime, and the other coalition groups to build relations with the social structure of the society. On matters of personal law, they tilt towards legal uniformity in their interpretation by professional jurists (Adam & Charrad, 2011).

In case of the latter, communities come to exert supreme influence on the nation and its cultural group to legitimise its traditions and practices. The nationalist discourses framed cultural distinctiveness in processes of religious mobilization by the minorities in private aspects of faith

and generated public categories of a citizen conforming to the universal notions of nationhood and common law. However, these discourses are troubled by full resistance on part of the minorities to adapt to the shaping of a progressive public sphere(Appadorai, 1996), (Cohn, 1996), (Dirks, 2001), (Chatterjee, Nation and its Fragments: Colonial and Postcolonial Histories, 1993).

Liberal discourses on minority rights that positioned marginalized groups at the edge of accommodation wherein the states recognize only the dominant culture of the traditional elites tends to reify the patriarchal structures inimical to the idea of reform. Therefore, the formation of post-colonial laws has caused tension between aspects of national integration and cultural distinctiveness, between chasing modernity and cultural autonomy, claims of group recognition and individual freedom and between striving for gender egality and universal norms of human rights. The liberal secularist state is entrusted with the responsibility to reconcile claims of personal liberties of an individual with those of religious freedom of the groups.

Mapping Indian Secularism and MPL:

An inevitable and established fact initiating the discourse on Secularism in India is its incommensurability with the western conception of the idea. Although the meaning did not emerge in negation of the unfolding of patterns of modernization attempted by the Britishers, yet the Indian experience has created a conceptually acrimonious world of its own where the concept plays against different ideological positions. It was further established by the political and intellectual elites in India that the key focus of debate on secularism was the conducive application of the term in the different socio-political context.

Partha Chatterjee located historicity of Secularism in nationalist question where imagination of a new nation state was premised on, what Skinner talked about 'new meanings' wherein the arguments applied to circumstances does not rely on its success, rather on its failure to materialize (Skinner, 1989, p. 7). Chatterjee argued that the shifting position of non-interference in matters of religion by the Britishers in the initial phase of 19th century, to systematic reforms of practices like abolition of *Sati, Devadasi* system, remarking an arena of reform in the moral authority of the community has been followed in toto by the Indian State (Chatterjee, Secularism and Toleration, 1994). It helped initiate the spate of reforms supported by the newly emerged nationalist middle class for nation-building after independence, for example the enactment of the Hindu Code Bill in

1955, Madras Animal and Bird Sacrifices Abolition Act, 1950, Madras Hindu Religious and Charitable Endowment Act, 1951 etcetera (Chatterjee P. , Nation and its Fragments: Colonial and Postcolonial Histories, 1993). All these laws knitted the sectarian variation to constitute a common code of personal law for the Hindus. Chatterjee's final argument played on the application of concepts of liberty and equality within diverse groups proposing non-interference of the State in religion to control incongruities simmering in the wake of events of a painful partition and resultant communal violence. Any celebration of a culturally distinct rights of the community would be dependent on the rationale of it being different and respecting the internal members of the community. Extending his discourse on Secularism to toleration in India, Chatterjee supported a 'reform from within' approach premised on creating forums of deliberative models within the community to obtain consent of their religious practices from the state. In the face of challenges to the representative forum of collective rights impacting on the sovereignty of the State, Chatterjee was overly optimistic of the idea of autonomy of institutions to deal with the impasse of a liberal democracy (Chatterjee, Secularism and Toleration, 1994).

D.E. Smith carried forward Chatterjee's position while talking about the recusation of Indian secular state in the absence of principle of separation of religion and politics (Smith, 2015). While offering a comparative study of Indian and Western model of secularism, Smith favoured non-recognition of religious function in the public life of an individual. Both Madan (Madan, 1987) and Nandy (Nandy, 1998) were also critical of the feasibility of secularism in Indian context imagining it as a western imposition on traditional religious society. For Nandy, India's secularism did not engage deeply with the culturally rich norms of society drawing support from the narrow religious elites that caused failure of successful take-off of the Indian system.

Gary Jacobson's insight helped in understanding comparative model of secularism unveiling in different countries. While proposing three model of assimilative secularism (America), visionary secularism (Israel) and ameliorative secularism (India), Jacobson made crucial insights on the debate of family law reforms with the study of practice of polygyny.[4] The study promised that India's model had greater scope than the Israeli and American counterpart in bringing reforms of Muslim law and transition smoothly to a uniform civil law after accommodating the opinions of

[4] Assimilative secularism stood for preservation of religious liberty in private sphere and political assimilation of citizens to America's republican state model. Visionary secularism involved peaceful co-existence and harmonization of a Jewish state preserving religious liberty and cultural autonomy and India's Ameliorative secularism stood for transforming social inequalities in religious practices alongside preserving cultural autonomy. See Gary Jacobson, 'Three Models of Secular Constitutional Development: India, Israel and the United States' in *Studies in American Political Development,* Vol.10, No.1, 1996, pp1-68, https://doi.org/10.1017/S0898588X00001413 accessed on 4 July, 2020

the minority support groups. This position led to abolition of polygamy for the religious majorities with its continuation among the Muslims in India and Israel. The line of difference between the Indian and Israeli case was the legitimate support garnered from the minority in the case of latter. Herein the political elite and the courts banned the practice of polygyny prevalent among the majority Jews except its continuation in the pre-existing polygynous union among minority Mizrahi group of Jews from the Arab world, western Asia, and Ethiopia (Jacobson, 1996). Jacobson concludes on the vehemency of the Indian debate on preservation of distinct personal laws instead of investigating the postponement of change in minority laws or specific changes brought only in Hindu law (Subramanian, 2014).

Jacobson's line of argument found similarities in arguments of Paul Brass, Subrata Mitra and Fischer's writing on the politics of the Congress party to refrain from reforming the minority laws inorder to reconcile the wishes of the Muslim political elites in the Constituent Assembly Debate (henceforth CAD. Brass argued that the westernised educated Muslims preferred a universal law framework complying to contemporary interpretations in contrast to traditional clerics supporting legal innovations in religious traditions. The former called for codification of *Shari'a* laws mostly in matters of marriage and divorce, enhancing the rights of Muslim women. These landed elites, however, restricted the rights of women to uphold equal shares of property vis-à-vis men in agricultural land which was a non-Islamic position. Contrastingly, the clerics guided by the forerunner of Islamic revivalism, Shah Waliullah Dehlawi, followed his ideas to argue for extending the right of women in property in conformance to the Quranic principles. The position of the modern elites like those of Badruddin Tyabji, Sir Syed Ahmed Khan and Muhammad Iqbal changed in the later years favouring interpretation of laws invoking the tradition of innovation (*ijtihad*) and eclectic choice (*takhayyur*) (Brass, 1991) (Mitra & Fischer, 2002). The Indian constitution moved succession to agricultural land under concurrent' s control.

Rajeev Bhargava took on the ameliorative project of secularism to argue for 'principled distance' defined in terms of equality of respect for every religion. The State was to function as a neutral arbiter in affairs of the religion protecting the cultural rights of the Muslim minorities. Bhargava positioned his idea of secularism between two extremes of religious neutrality and good- will towards all religion (Bhargava, What is Indian Secularism and what it is for?, 2002). The distinctive feature of Indian secularism should try to reconcile difference within culturally autonomous groups by reducing gender inequalities in the practices of personal laws.

Gurpreet Mahajan contributed to developing another distinctive perspective on meaning of Indian secularism as a distinctive pursuit of non-discrimination as an ideal with equal religious liberty for all. It gave primacy to religion as a distinct marker of individual's identity deeply knitting religion with politics. The Indian State, on matters of personal law of the minorities, maintained an ancillary position guiding the religious affairs of the community through legislations like the Protection of Muslim Women Divorce's Act of 1986 (Mahajan, 1998).

The ongoing discussion on settling of Indian secularism in its distinctive form operates on close knit relation between State and religious belief. Indian Constitution has accorded religion a pivotal place in collective consciousness of both the individual and the community. It enjoined the State to draw semblance between protecting the religious minorities and larger public agenda of welfare. The available literature on MPL and its relationship with Indian Secularism witnessed a unique trajectory of the state from a position of 'non-interference' in religious affairs to a pro-active regulatory mechanism guarding values of gender equality and justice. However, a redefinition of secularism in the localized form of religious harmony cannot truly end the misery of the marginalized groups. It relegates the debate on the limits of cultural accommodation to the realm of family and civil society (Verma, 2016).

Galanter highlights the crucial role played by the Judiciary in actively defining the contours of religion, starting with the Hindus, and moving on to the Muslims in its foray. However, the Judiciary started with a reactionary reformist advocacy of secularism, as witnessed in Justice P.B. Gajendragadkar' s position which was critical of obscurantist interpretation of religious faith and practices. It oscillated its position to offer more of a conciliatory model favouring state's involvement in addressing concerns of social reform as witnessed in many cases like *Shah Bano, Shayara Bano* and others. Therefore, Galanter argued for extending the transformative role of the Judiciary in the hands of the State to restrain illiberal practices of religion through ' mode of limitation' defined as larger secular public interest (Galanter, Secularism East and West, 1998).

The real test of Secularism was evident from the mid-1980s. Many anti-Secularists challenged the benign neglect approach of the liberal State as contributing to communal and religious turmoil of early 90s. Hindu Religion invoked as an ideology based on the prism of cultural essentialism imagined the creation of a new post-secular State working towards uniformity and national integration (Nandy, 'The Politics of Secularism and the Recovery of Religious Toleration, 1998, p. 322). The contestations between cultural rights of the group vis-à-vis a Uniform model of law has only silenced the voices of the women. The identity of an individual is dangerously caught in

collective conscience of the community settled through negotiation between state and male patriarchal section of groups (Das, 1994).

The essentialization of culture as an embedded identity of an individual than the historically contingent being has caused over-privileging dominant group over another within the minorities. Mahajan called for an interaction between the prism of culture in which one lives as a product of interpretation and the universal horizon to guide their world- spirit (Mahajan, India: Political ideas and the Making of a Democratic Discourse, 2013). To pursue gender equality would require a compromise between religious accommodation and women's right to choose from the personal laws. One such way is to introduce modifications in the model *Nikahnama* to make enabling condition for women both in the pre-nuptial and post-nuptial agreement to address concerns of economic and social rights of the women (Agnes, 1999).The others argued that there are many issues that confront women like domestic violence, economic rights that could be addressed without communalising the discourse on personal laws (Menon, Women and Citizisenship, 1998).

Outline of Study:

The existing literature on the MPL in India are majorly scholarly narratives on the codification of Muslim law by the Colonialist and its imitation by the newly independent liberal state. The subject has, otherwise, been a forte of legalists involved in the task of interpreting the laws for answering larger constitutional questions of equality, public morality, and justice. A more contemporary attempt by the post-structuralist subaltern groups who revisited the sites of subversion of the Muslim women's rights in the domain of family law formed an insightful area of inquiry.

This thesis intends to contribute and challenge the theoretical underpinnings on the interpretation of MPL in India that holds profound bearings on the larger question of the minority rights within a secular democratic polity. The initial impetus to study the discourse on MPL was governed by the inclination to enrich the knowledge on the study of Islamic texts and traditions unfolded in contending literature of the Occidentals and the Orientalist. However, the anti-thesis manufactured by the socio-political churnings among diverse identity groups within the Indian Muslims motivated this ethnographic study of different religious actors vying for a political platform for voicing the interest of their respective affiliations. Numerous studies have been conducted on the growth of religious organisations like the *Jamaat e Islami Hind* (JIH), the Deoband School, the *Tablighi Jama'at* contributing to the political struggles for Indian independence.

The curious absence of literature on the study of the AIMPLB (henceforth AIMPLB), since its inception in the 1970's, claiming its identity as the 'homogenous' and the 'dominant' collective voice of the Muslim community on the agenda of interpreting the MPL in India is what guided the empirical research design. With the AIMPLB's constant reification of its political canon in the face of diverse identity assertions and the alternate discourse of 'subaltern voices' among the internally marginalized, this organisation is caught in larger problematic issues and conjectures requiring an elaborate analysis. It has helped to contribute to study the pandora's box of static and rigid MPL caught in the seamless web of parochial reading of Islamic law and the resultant absence of reforms of these laws in India.

Research Questions:

1) Can legal eclecticism be a solution to the parochial reading of the Islamic law in contemporary times? If yes, what are the methods to be adopted in interpreting the MPL in India?
2) Are the claims of the AIMPLB to be 'unified face' of the Muslim community legitimate?
3) How has the AIMPLB accommodated the demands of the internal members of the community in its role as interpreters of personal laws? Does it show any sign of overreach of its jurisdiction in other spheres?
4) How has the Indian judiciary performed in balancing the celebration of group rights vis-a- vis individual claims of equality and freedom of religion?
5) How far has the functioning of the Darul Qaza as mechanisms of Alternate Dispute Resolution been effective in guaranteeing speedy and fair justice to the community? In what other ways has the community mobilized the functioning of the parallel courts of justice system?
6) In what way does one deal with the issue of intra-group inequality under a secular framework? How has the AIMPLB negotiated with the Indian state in claiming autonomy of religious affairs of the Muslim minority?
7) Can a Uniform Civil Code model offer solutions to the concerns of gender equality?
8) Alternately, can the question of gender inequality be redressed by initializing internal processes of reforms of the personal laws in isolation?

Research Methodological Design:

The initial part of this research focuses on development of critical theories on the tools of methodology developed on Islamic Jurisprudence. By analysing the available and upcoming

literature on Islamic Jurisprudence, this study weaved the nuances and uniqueness of the study on the evolution of MPL in India. The hermeneutical exegesis employed in understanding Islamic rich discursive tradition dispels the parochial interpretation of texts framed both by the colonialist and liberal democratic regime in India. The archival materials obtained from the Nehru Memorial Museum and Library, Delhi and *Abhilekh Patal*, an online Portal managed by the National Archives of India provided valuable records on the Mughal and Colonial administration.

Religious Texts have ideational and interpersonal relations whose reading requires the unfolding of the injunctions on the aspects of the sacred and the secular world interacting with social actors. Foucault defined discourse as ,

> *"[...] treating it sometimes as the general domain of all statements, sometimes as an individualizable group of statements, and sometimes as a regulated practice that accounts for a number of statements"* (Foucault, 1982, p. 25).

Foucauldian discourse organises knowledge that structures the constitution of social relations through the collective understanding of discursive logic and acceptance of discourse as social fact (Foucault, 1982). Foucault's method is primarily employed in the colonial construction of the language of Anglo-Mohammadan Law in India. The attempt of codification of texts and practices by the Britishers, according to discourse analysis, has produced rules which operationalise beneath the consciousness of the subject determining the domains of boundaries of language in the study of the civilizational history. Therefore, discourses contributed by outlining the archaeology of knowledge drawn from the historical analysis.

The latter part of this research work implores how a critical discourse analysis, when cautiously applied, locates the reading of texts to social interactions in society. It helped study the text inter-dianoetically producing new genres, discourses and analyses draws from general principles to be applied to affiliations (Fairclough, 2003, p. 132). What then emerged was a multi-varied interpretation of texts applied to describing the state of social affairs. Therefore, texts acts as elements of social events, situated representative of social structures in relation to other external events, herein this study, multiple religious identities manipulating changing social relations of power and domination (Foucault, 1982).

The key section of the research work is premised on the usage of tools of qualitative research methodology namely interpretive theory that focuses on field- based objective study of the organisation of AIMPLB in a holistic fashion. Interviews based on open-ended interaction with 03 executive members of the AIMPLB namely, Late Maulana Wali Rahmani, Maulana Fazlur

Rahim Mujaddidi , Advocate Qasim Rasool Ilyas, the lone Shia member and the former Vice-President of the Board, Late Kalbe Sadiq, the Founder of the AIMWPLB, Shaista Amber, and erudite scholars on study of Muslims in India namely Late Asghar Ali Engineer, Irfan Engineer, Faizan Mustafa, Zoya Hasan, Uzma Naheed and Flavia Agnes contributed in empirical analysis of the propositions of this research study. The observational results and interview-based findings opened critical debates and nuanced perceptions on contemporary concerns of the Muslim community on the idea of democratization, representation, legitimacy, discrimination, exclusion, and empowerment in the Indian context.

The work faced some larger limitations on field. Firstly, though my religious identity helped in providing easy access to the internal dynamics involved in the functioning of the Board, yet the Board's cautious and tight-lipped style of decision making at the top echelon limited the answers to some hard theoretical questions. Secondly, there are clear ambiguities in the understanding of MPL operating at level of functioning of *Qaza* courts in different states. Each court follows its distinct style of interpretation and understanding of School of law. Thirdly, there is a sad and complete dearth of knowledge in the socially, educationally, and economically backward Muslim masses who blindly follow the clerics on understanding their Islamic rights and duties. This limited the research inquiry to conduct objective and rational interpretation among the Muslim households who hold uniform opinion of blindly imitating the *Shari 'a* as professed by their local clerics in different states of U.P. (henceforth U.P., Bihar, Rajasthan etcetera. Thus, for future research, it would be significant to open the closed interaction spaces both at the level of the functioning of the AIMPLB and other organisation and the Muslim ghettos.

The study has translated and consolidated the primary sources of literature published in the form of reports of the resolutions of meetings and proceedings of the Board in Urdu, publication of magazine '*Khabarnama*' issued by the AIMPLB, and the primary findings of the Committees of the Board on issues like *TT*, Polygamy and functioning of the *Darul Qaza*.

A significant finding and contribution to my work is the attempt to collect unpublished classified case judgments of the *Darul Qaza* obtained from the *Imarat e Sharia* in Bihar and Rajasthan and female (*Mahila* Courts) in Delhi. The employment of techniques of discourse analysis aided in building an in-depth study of the community-based courts , operationalising grass-root mechanism of Alternative Dispute Resolution. The study is contrasted with the trajectory of the Indian Judiciary in interpreting the personal laws of the Muslims. The study on the Indian judiciary is pitched in the secular framework of religious freedom vis-a-vis individual liberty. The collection

of original sources like the detailed judgements of the High Courts and the SC adjudicating cases affecting Muslim women's quest for equality, justice, and freedom of religion helped build a cross-comparative analysis of discourses on constitutionalism and Islamic law. The interplay of general laws, constitutional and stautotry interventions by the State are challenged by alternative discourses of successful functioning of the *Qaza* courts (local Adalats/ *Muslim Mahila* Adalat).

The last section primarily reviews original data obtained from the CAD, proceedings of the Parliament and the judgement of the SC available on its official website and legal sources compiled alongside the secondary sources of literature like books, journals, and newspaper articles to develop on the larger debates of national importance like the UCC, rights of the minorities and the challenges to Indian Secularism as analysed in the *Babri Masjid-Ram Janmabhoomi* legal dispute. The clash of interest between the AIMPLB and the Indian State forms hard-case study for practical accommodation of values enshrined in the Indian Constitution. The political reactions to the Court's judgments and legislations of the Indian State configures the latest trends on the study of Muslim Politics in India.

Summary of the Chapters:

Chapter One lays the ground for exploring the lexical meaning of the concept of Islamic law, its origin and genesis in Jurisprudence and the hermeneutic methodology applied in developing different Schools of personal laws. The exegetical exploration of Islamic texts and traditions in the works of legal scholars has offered a wide gamut of rational methods of *fiqh* applied in interpreting religious laws to contemporary concerns of the Muslims. It entails a theoretical construction of debates around understanding the meaning and sources of the Muslim Personal Laws that can help understand the science of Islamic Jurisprudence. The study of Islamic Jurisprudence in writings of scholars like Wael Hallaq, Joseph Schact, George Makdisi, Ignaz Goldziher, Mohammad Hashim Kamali, Fazlur Rahman, Scott Kugle etcetera contributed to constructing nuanced arguments on the rationale of debate caught in the binaries of legal pluralism and legal universalism. The idea was to rescue the construction of personal laws caught in the reification of static codified laws at the hands of the colonised powers. An attempt has been made to resurrect the lost methods of *Usul-al-Fiqh* to initiate reforms of the personal laws to adapt to the vicissitudes of the contemporary times. The key finding is that by exploring the principles of 'Moderation' in understanding the *Shari'a* by different Schools of Jurisprudence, one can harmonize the fluidity of laws as floated by the method of legal eclecticism.

The comparative study of the countries either governing or accommodating the principles of Islamic law helped in developing nuanced study on the forces of modernization impacting the shaping of the personal laws owing to demands of internal reform. Each country undertaken for the study has passed through its indigenous and distinct phase of colonization or hierocracy to bring transition in the meaning of Islamic law as distinct from the *Shari 'a.* The countries have been typologically divided based on the system of governance adapting to the forces of Islamism. The section broadly offers lessons on how Islamic laws of countries have transitioned from colonial control to the adoption of a secularized polity speaking the language of modernization, westernised notion of secularism and state building. While other states under a religious dispensation have tried to accommodate the liberal philosophy of ruling elites with those of the traditional clerical establishment. However, the key argument that stands out is that despite making inroads in re-interpretation of religious canons for developing a secularised modern system, one notices clear limitations of blind imitation of western ideas due to the failing agenda of promising gender equality and justice.

Chapter Two examines the unique though rhetorical equation of *Shari 'a* with law while discussing the genealogy of MPL in a comparative historical setting. In the scholarly renaissance of history of Indian Empires, the *Shari 'a* based nomocracy guided the socio-political order of governance. However, these narratives constructed *Shari 'a* as an ossified system due to its divine providence and stereotyped Muslims as a 'homogenised monolithic' community governed by a uniform set of codified laws. The academic study is further limited and biased in stigmatizing the personal laws as essentially 'barbaric and repressive' towards the marginalized sections within the community. The key finding of this study of the historical moorings of the MPL in India is that the liberal State has shirked its responsibility to bring reforms of anglicized laws, thereby, compromising on the values of gender equality, justice, and pluralism.

The second section of this chapter attempts to lay out the theoretical background in terms of classification of Muslim Personal laws in India. The key focus is to familiarise with the nature and forms of laws to best understand the process of interpretation and implementation of personal laws in the Indian context. It lays out a backdrop to the complexities of issues surrounding the aspect of interpretation of MPL in India.

Chapter Three investigates the position of autonomy and non-meddling in the personal spaces of community, at the behest of Indian State that allowed free play of different religious and political organisations to negotiate claims of group rights of the community. Any attempt by the State to

deliver the larger promise of creation of a UCC has been challenged by different minority sections of the society. The chapter focuses on the rationale behind the setting up of the AIMPLB as the representative body of the Muslims negotiating with State and drawing on its primary responsibility to thwart the agenda of reforms of the personal laws to be initiated by the agencies of the State.

A detailed analysis of the findings of the field work on the organisational structure of the Board challenges the claims of legitimacy and authority which is exercised by the institution. It is caught in narrow politics of exclusion on caste, class, and sectoral lines. The key finding of my field study of the AIMPLB is that its claim to be a democratic organisation is nullified in its process of nomination election of the members of the Board. The silencing of the voices of minorities within the minority especially the weak number of women members proves that there is absence of real representation of the marginalized group in the process of deliberations and decisions of the Board. A similar stance of treatment to other minority groups like the Shias, Barelwi, Dawoodi Bohra sect has not only exposed the internal dissensions in the group but marred the real agenda of reforms of the community caught in political vendetta from within. The absence of an organised and unified leadership among Muslims due to its internal factionalism has led to usurpation of the agendas of growth of the community by vested interest across party lines.

The AIMPLB was created with the primary agenda to interpret the personal laws of the community inorder to help its members follow the true injunctions of the Shari'a. The Board has set up various committees that promises social reform of the community from within. Over the years, the organisation has garnered legitimacy in the eyes of the state and its agencies like the Judiciary to intervene as the voice of the Muslim minority. Thus, it expanded its spheres of jurisdiction as interpreters of law to mobilise the demands of the community on issues of minority at the mainstream forum like reforms of the Madrasah system, Ayodhya Dispute, fight against the UCC, management of the *Wakf* property and the legal redressal through the establishment of the *Darul Qaza*.

Chapter Four attempts to draw parallels of comparison of the interpretation of the personal laws by the Indian Judiciary vis- a- vis *Qaza* Courts set up by the AIMPLB in different regions of the country. The distinct positions on drawing on the methodologies in Islamic law has mostly compromised on authentic interpretation of personal laws.

The Indian Judiciary has shown its willingness to reform the personal laws by celebrating the principles of individual liberty and equality. It has, at times, vacillated between the position of

compromising gender equality and upholding of cultural rights of the community and vice-versa. However, the SC has mostly aimed at achieving '*Judicial Equilibrium'* in reforming the personal laws to imbibe principles of gender equality and religious freedom of the individual. But it passed the buck on questions of creation of a UCC to the legislative functions of the State. However, it is significant to point out that the State High Courts have always maintained diverging opinions on questions of personal laws suiting it to the regional politics of the State.

The contextualisation of the judicial pronouncement impacted the political context of the country in a very surcharged atmosphere of fear of Hindu majoritarianism and minority fear of assimilation or losing of one's identity. Whereas at one end the Shah Bano affair promised strengthening the voices within the community to reform the laws about the women, the Shayara Bano case marked the shifting of the responsibility of reform of the personal laws to the State. The Court took a position to deal with claims of infringements of FR of the individual only on principles of constitutional morality and ethics.

On the political front, the BJP which has been vocal and assertive about demand of abolition of TT. The judgement gave a morale boost to the political objective of the government which eventually banned TT, making it a punishable offence. The prevalent norm of community consultation and consensus among stakeholders was abandoned with such an overture shift of legislating on the issue despite opposition inside the Parliament and from the community. It turned out to be an eyewash appropriating the judgement of the Court for political good signalling a departure of negotiation with the members of the community, thereby, stifling the deliberative mechanisms of the Indian democracy.

The study of the non-recognized yet legitimate functioning of the parallel Court of *Darul Qaza* managed by the AIMPLB is a prima facie example of an Alternative Mechanism of Dispute Resolution at the grassroots level. The high expenses incurred at the doors of the Indian judiciary has determined the rationale of setting up parallel courts to deal with the economically and socially disempowered minority. However, the paradox lies in the process of implementation of personal laws as the Courts have premised their judgement on the immutability of the sacred laws from reforms to dispense gender justice. They have fettered the wings of the minority women as to become symbolic markers of communal laws that are parochial and unjust to the true Islamic rights of the women. The key findings of my case study of the judgments of the Court are to reform the ADR's on lines of other countries and increase the role and participation of women as judges of the *Qaza* Courts.

Chapter Five opens the debates of clash of interest between the AIMPLB and the Indian State while guiding the debates on minority rights. In the chapter, a construction of issues of Muslims in India focusses on the contemporary debates on the TT, Polygamy, *Nikah Halala* that has defined the contours of debate between the UCC and the autonomy of personal laws. Further, the analysis of the *Babri Masjid-Ram Janmabhoomi* case goes into knitting the intricacies of position of rights of the minority in the wake of the rise of Hindutva politics of late 1980's.

The contextualisation of the issues in the recent political context highlights the perils of democracy wherein a clear threat comes in the form of dilution of principles of secularism and gender equality. The way the newly emerged idea of a nation premised on communal lines and cultural specificity has created an atmosphere of fear of assimilation of the minorities who are too fearful of negotiating and trusting the agencies of the State to build reforms within the minority group, especially the Muslims.

Conclusion of the thesis summarises the major findings of the study and indicates directions of change on the debate of MPL. It offers certain lessons drawn from the revisiting the site of multiculturalism and secularism in India and other developing countries on the path ahead to actualise the reforms of the personal laws. The study also cautions against the unequivocal celebration of cultural distinctiveness as a public good in the face of internal rights of the minority and larger interest of public morality and order. The state should promote only those aspect of cultural autonomy of groups that tend to respect the positions of their internal minorities.

Chapter 1

Understanding the Muslim Personal Laws and its Application in Select Countries

The chapter explores the theoretical underpinnings developed on the meaning of the term Muslim Personal Law (henceforth MPL). While tracing the genealogy of MPL, the chapter delves deeper into the debates on the science of methodology of Islamic law that created different Schools of Jurisprudence both within the Sunni and Shia sections. The study of methods applied in developing the Islamic law has contributed richly to the thriving debate between legal pluralism and legal universalism. The objective was to reconstruct a more rational and nuanced reading of the MPL in lieu of the reified and static codified personal laws handed over by the colonial regime uniformly in many countries across the world. The chapter argues that any attempt to reform the approach adopted in the interpretation of MPL requires a reorientation in the invoking of science of methodology of Islamic law. The chapter aims to rescue the ossified colonial MPL by infusing fluidity in its practice with the help of method of legal eclecticism.

The first section of this chapter explores the epistemological connotations of the term '*Shari'a',* popularly known as the Muslim/Muhammadan/Islamic Law, tracing its sources in the historical antecedents of the Islamic past. The second section outlines the methodology applied in pioneering the growth of Islamic theology and laws of Jurisprudence that defines internal diversification in the form of different branches of the Muslim law. The final section outlines the application of the MPL in select countries classified based on diverse political typology of the State.

1.1. Understanding the Shari'a or the Muslim Personal Laws

The study of the Muslim Law encompasses a vast array of legal and moral traditions, distinguishing the public and private role of an individual. It has premised itself on the doctrine of 'certitude' in matters of 'good' and 'evil' defined in terms of morality (*Shari'a)*. There are textbooks on *Shari'a* which deals with the rules of worship and the worldly affairs. The term ***Shari'a*** means the way forward or the path to be followed to the source of life. Herein, it hints at the totality of Allah's commandments outlined in five different forms of religious injunctions, namely, a) the *Farz* meaning those that are strictly enjoined or binding, b) *Haram* i.e. those that are strictly forbidden, c) *Mandub* which is a category between things advised, d) *Makruh* which are advised to refrain from, and e) *Jai'z* that to which the religion is indifferent (Ali A. , 1986, p. 40). These religious

injunctions are strictly applied on matters relating to crime, politics, and family law (*Gobind Dayal v Inayatullah,* 1885) (D.F.Mulla, 1905).

The genesis of the MPL is laid in irrevocable and divine preaching of the *Qur'an*, the *Traditions of the Prophet* known as the *Hadith* and in the absence of these commands, on the science of Jurisprudence namely *Fiqh (*interpretive law) compiled in the light of *Ijma* (consensual opinion), *Ijtihad (*applied reasoning) and *Qiyas* (analogy). This reliance on the omniscience of God has blurred the distinction between *Shari'a* (that is moral ethics or codes of conduct) and *Fiqh* (that is positive law). This theorization has opened gates of critical study[5] about the authenticity of tradition especially the *Sunnah (*direct practices introduced by the Prophet Muhammad himself) vis a vis the *Traditions of the Prophet* as primarily entailing the practices and customs of the Umayyads of the Damascus.

The theological tradition of Islamic history is conspicuously silent on the study of *Shari'a* till the 7th Century A.H(1203CE-1299 C.E.). Al-Tahawi (Lucas, 2004, p. 93) was the first to study the three successive generations of Sunni Muslims, namely, the *Atharis* those who believed in textual narration of texts and practices of the Prophet., the *Asharis* in the works of Abu-al-Hasan-al Ashari believed only in the divine revelation of the God than on pure reasoning of the human mind to interpret their way of life and the *Maturidi* in the works of Abu Mansur al Maturidi who stressed on the derivation of the existence of God and his principles on pure reason. The Hanbali belonged to the *Athari* tradition, the Maliki and Shafi followed the *Asharis,* and the Hanafi had a more accommodative and liberal translation in the followings of *Maturidi*. Hence, the *Shari'a* developed as a congealed body of ethics and customs which were made to be morally incumbent on the members of the community.

1.2. Studying the Sources of Muslim Law, Qur'an, Sunnah, Ijma, Qiyas, Ijtihad, Takhayyur

The scholarly compendium on Islamic Law has been classified into distinct phases of growth of the Islamic traditions, namely, the pre-Islamic Arabic system, the period of Quranic revelation and the post-Prophetic Age.

A) The kinship system of the pre-Arabic society was a tribal set-up wherein the Bedouin nomads and the town dwellers relied on communion system to lead their lives. They prided upon their

[5] The pioneer in this study was Joseph Schacht, *Origin of Muhammadan Jurisprudence,* Oxford University Press, 1950, Delhi, p.3; Jerome N.D Anderson and Norman Coulson, Islamic Law in Contemporary Cultural Change, *Saeculum* (Munich), Vol. XVIII ,1967, pp.13-80 https://doi.org/10.7788/saeculum.1967.18.jg.13, accessed on 20th January 2020

patriarchal genealogies[6] which celebrated female infanticide, slavery, and warfare to justify blood money and barbarity. Women were treated as 'chattel' or 'inferior goods' exposed to the perils of forced prostitution (Robertson, 1885, p. 281). It unleashed an era of wildness and intrepidity, popularly known as the period of *Jahiliya.*

Kashf al-Ghummah (Rahim, 1911), briefs us about four types of Arab marriages that could be defined as bride price (R.Levy, 1957, p. 105)[7], multiple sexual relations of a woman to choose whosoever among them for the legitimacy of child, prostitution, wife co-habiting a person of higher noble birth for superior posterity and *Mu'tah* or temporary marriage. One of the striking examples of a continuing tradition of the Pre-Arabia was the principle of Agnacy (*Tasib)* or paternal line of Inheritance which was adopted later in the Sunni law of Inheritance (Tyabji, 1940, p. 22). The Arab law of property allowed disposition of the entire property by will. In laws of Inheritance, females and cognates were bereft of any property rights. The adopted sons had similar rights like the natural ones and by contract, heirs could be given shares of property out of mutual affection.

B) The period of Quranic Revelation spanning twenty three years (610-632A.D.) earmarked a defiant opposition to these pre- Arabic practices by the Prophet Muhammad especially in relation to the handling of women and local customs. He spelt out the commands of the Almighty as *revelations seriatim* based on his life in Mecca and Medina. The ***Qur'an*** was a compilation of 114 chapters arranged in 30 parts explicating the key tenets of a civilized lifestyle. The *Meccan Suras* dealt with announcing of the doctrines of the God in the form of Oneness (Tawhid) and to summon humanity to his worship. The *Medinese Suras* contained in one-third of the *Qur'an* deals with legislative matters of civil and criminal law (Ramadan, 1961, p. 13). The key objective to introduce the family laws by revelation was to enhance the status of women as opposed to their oppression during pre- Arabic traditions[8] (Ali A. Y.,

[6] *Baa*l institution of marriage allowed a man to be a master of several wives. Divorce was frequent and the responsibility of child lay on the woman's family. *Muta* marriage *or* temporary contractual marriage was legalized that allowed men to enjoy a woman for a limited duration of time. *Muta* marriage was prevalent among Jews, Christians, Sabians and Zoroastrians as well. Women were traded for sexual reproduction for noble lineage, popularly known as *Nikah-ul-Istibada.* Further, the woman can be inherited by the heirs of her deceased husband, like her own son.

[7] Inorder to do away with the practice of Dower, the people performed cross marriages called *Shighar* wherein a man would give his daughter or sister in marriage in consideration of the latter doing the same to the former.

[8] '*And give women on marriage their dower as free gift', (4:4) ; 'Ye are forbidden to inherit women against their will', (4:19); ' Marry not women your fathers married', (4:22)* , See Ali A. Y., *The QURAN: The Meaning of the Glorious Quran Text, Translation and Commentry,* Lahore, Khalil al Rawal, 1934

1998). Its importance is both religious and spiritual yet at the same time legal and binding. In interpreting the *Quranic* principles, the jurists are cautious in invoking the principles in a sacrosanct manner, void of repeal or amendments. The verses of the *Qur'an* are viewed as the abrogating verse (*Nasikh)* and as one that are abrogated *(Mansukh*). The former is repealed by the latter while dealing with the questions on rule of law.

The *Sunnah* defines the sayings[9] and the practices[10] of the Prophet, though the term was used in pre-Arabic times for signifying the customs followed by the community inherited from their predecessors (*Sunnah-al- Umma*). It is pertinent to distinguish the usage of the term '*Hadith*' which is the reiteration of occurrence conveyed by a man either through hearing or revelation from *Sunnah* which is the rule of law derived from the actions of the Prophet (Fyzee, 2008, p. 12). *Hadith Qudsi* is considered of binding ordinance while there are other forms of *Hadith* categorised as *Sahih* (genuine), *Hasan* (strong), and *Zaif* (weak) (A.J.Wensinck, 1932, p. 5). Both the *Qur'an* and the *Sunnah* entail the sacred dictates of moral laws that are to be followed in arriving at legal decisions. Laws are, thus, to be framed as growing organisms of ethical, religious, and moral ethos of the people.

C) The post-Prophetic phase dealt with the works of Islamic scholars developing a new method of science *(Usul-al-Fiqh*) to study the sources of law. It is a phase when due to demographic expansion of Islam, the community was faced with new questions of social order that asked for answers from the Companions of the Prophet. *Sunnah al-Bukhari* speaks on subject of sacred and profane dealt in the form of *fatwas* by Mu'adh bin Jabal during the 7th century A.D (Khan, 1971, p. 270). Among the Companions, Ibn Abbas enjoyed commanding respect and authority in issuing fatwas to the public. After a prolonged period of guidance under the Companions, the community was again caught in the vacuum of translation which led to the transmission of knowledge from one generation (the *Isnad* practice) to the next premised on the *Qur'an* and *Sunnah* by leading *Ulema* and religious scholars. They employed the methods of *Fiqh* to impart legal material to develop Islamic law.

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[9] *Sunnah is defined as a clear path to be taken.* However, in Islamic Jurisprudence, it is used to refer to the narrations form the Prophet *on the religious questions, known as, Sunnat al-Qawliyah* in M. H. Kamali (2015). *The Middle Path of Moderation in Islam.* Delhi: Oxford University Press.

[10] *Sunnat al- Fi'liyah-* deals with the deeds of the Prophet; *and Sunnat al- Taqririyah-* his tacit approval to actions that occurred with his knowledge. See M.M.Khan (1971). *The Translation of the Meanings of Sahih Al Bukhari Arabic-English:9 Volumes.* Dar-Us-Salam: Al-Saadawi Publications.

Usul al Fiqh is a theoretical discipline that addressed social issues by resorting to methods of elaborations, annotations, abridgement, and summaries of the works of predecessors. They have been categorised as *Ijma, Qiyas, Ijtihad* and *Takhayyur*.

Ijma stands for the consensual opinion developed by the learned and qualified clerics and religious scholars of the community. A tradition of the Prophet has summarized it as 'My community will never agree on an error' (Schacht, 1950, p. 13). The exercise of independent judgements, within certain limits, is praiseworthy for the welfare of the community. These rules of sacred law are the foundational movable elements of law that offer fluidity to the growth of laws. In some countries like Indonesia, Africa and Egypt, certain forms of custom are allowed, under the guise of *Ijma* called *Adat or Urf,* as laws made by the state following the principle of justice, equity, and good conscience (Anderson, 1963, pp. 114-153). Kamali highlighted that these customs were primarily recurring practices that were acceptable as social behaviour when in conformity with the *Sharia.* The Commentaries on the *Qur'an* have referred to *Urf* as

> **"** determining the precise amount of maintenance that a husband must provide for his wife. Verse 65:7 of *Surah al-Talaq* which provides*, 'Let those who possess means pay according to their means"* (Ali A. Y., 1998).

In the above verse, the *Qur'an* does not detail the specified amount of alimony but that is to be determined by reference to custom or the value in the contingent time of living. This method has primarily help create *madhab (*Schools) of law that define fixed body of rules securing a continuity of legal tradition. This principle defines the rationality behind the following of four Schools of Jurisprudence namely Hanafi, Maliki, Shafi and Hanbali by its followers within the Sunni order.

Qiyas is a method of analogical deduction, derived from the Jewish word *Haqqish*, meaning to beat together. In Arabic usage, *Qiyas* measures the definite reasoning of the lawyers to know the exact significance of the fact. The relevance of a ruling is established based on the rationality or causality upon which the ruling was based on a similar scale. These deductions can be individually arrived at in the form of opinion (*ra'y*) of the learned jurist or systematically guided by parallel decisions based on juristic preference (*Istihsan*). The origin of *Istihsan* is primarily traced to the decision of the Companion of the Prophet, namely Caliph Umar ibn al-Khattab, who suspended the prescribed punishment of theft during the times of famine than applying the normal rules inorder to be fair (Ibrahim, 1732, p. 30).

Thus, *Istihsan* as a doctrine of fairness and conscience has been pitted on lines of similarity with the western notion of Equity. However, it may be pointed out that the latter premises its substance and form on the *Shari'a* and is akin to the principles of natural law than the western idea of equity which is based on superior law (Makdisi, 1985). While the Maliki School employs the method of *Istihsan* to choose between the stronger two evidence available, the Hanafi define it as a departure from the ruling *Qiyas* to a preferable solution that can bring about equity and fairness and the Hanbali rely on *Ijma* or proximity to textual sources (Kamali, 2004). Contrastingly, all forms of *Qiyas* are entirely rejected by the Ithna Ashari and the Fatimid School of Shia laws who prefer *Aql (*applied reasoning) to address complex questions.

Ijtihad denotes applying independent reasoning or exercising oneself to the utmost or to the best of one's ability in interpretation of law (Ramadan, 1961, p. 33). It holds its origin in the sayings of the *Qur'an* (Ali A. Y., 1998). [11] Recognition of revelation is duly acknowledged alongside appeals to reasoning. The notion of exercising one's judgement inorder to adapt to the vicissitudes of the time came in vogue in the opinions of Prophet's Companions Abu Bakr and Umar but explored with caution. Hallaq (Hallaq W. B., Authority, Continuity and Change in Islamic Law, 2001, pp. 22-23)talked about five layers of juristic activity wherein *Ijtihad* being the most method is employed in alternative forms like *Takhhrij* (creative act involving limited independent reasoning as the jurist interprets texts based on other jurist's attempt at ijtihad), *Tarjih* (choosing one decision over another for determining authoritativeness of a School of thought), *Tasnif* (classifying *ijtihad* of all high ranks of jurists by a jurist author) (Hallaq 2001, pp. 22-23). These methodologies were contrasted with *Taqlid* or sheer imitation of laws by resorting to the opinion of one person without the knowledge of authority of such opinion called as '*closure of gate of interpretation'* by Schacht in 4th/5th century (Schacht, 1950, p. 116). The dynamism of the principle of *Ijtihad* has been stifled by the Hanafi who have closed the gates of new interpretation of texts in lieu of *Taqlid* (imitation of established doctrines of Hanafi School). It's only the Shafi'i and the Hanbali jurists who support the continuity of *Ijtihad* in interpreting personal laws of the community. Thus, the contemporary debates of reforms of the Islamic Laws have sought refuge in the method of *Ijtihad*, to what

[11] *"And to those who strive in ((Our Cause), We will certainly guide them to our Paths*", The Holy *Qur'an* (29:69), See Ali A. Y., *The QURAN: The Meaning of the Glorious Quran Text, Translation and Commentry,* Lahore, Khalil al Rawal, 1934.

they call *Neo-Ijtihad*, to celebrate the vitality and dynamism of Islamic principles adaptable to changing conditions and contexts.

The science of *Fiqh* has been divided into *Usul (*Roots, the foundations of law) and *Furu (*branches, the application of law). While the former deals with the first principle of interpretation that is the sources of law, the latter relies on the study of injunctions or the substantive law that is laws of marriage, inheritance or *wakf*. These principles of legal interpretations are effected at the practical level in the form of *Fatwas*[12] issued as advisory opinion by the *Muftis* in response to concerns of human affairs posed by the individual. This method is considered an alternative response of development of *Shari'a from below* popularised at the grassroot level among the Muslims. The authority of Mufti exhibits commanding institutional diversity at the internal level by controlling the pulse of the larger uneducated and unempowered minority (Mohammad Khalid Masud, 1996, p. 439). *Shari'a* came to define all embracive commands of God and his Prophet while *Fiqh* is the human endeavour to define the legality of action as permissible or impermissible. The method of *Usul al Fiqh* that was employed to derive legal theory was revisiting the old methods which discouraged finding new solutions and the scholars were restricted to rely only on a single School of thought.

For ensuring *fiqh* to thrive as a living, vibrant entity, it is essential to practise a balance between exercise of intelligence in following the primary sources of the *Shari 'a* and in the absence of a commanding principle the use of analogy and reasoning. Although the *Quran* and the *Sunnah* are the eternal sources yet any recourse to analogy and reasoning should be taken with utmost care and caution. Many scholars have touched upon *Maslahah* that is God's purpose in the *Shari'a* as (*al-maqasid-al-Shari'a*) as a source of law that can provide both universal principle in public interest and specific evidence of text. Imam Malik had patronized the use of this method to arrive at essential tenets of religion on questions of life, reason, off-spring, and property (Esposito, 1999, p. 9). Kamali proffered that *Usul-al-Fiqh* should be improvised to integrate the Quranic principle of Consultation between the religious clerics/scholars and the government to bring about realistic reforms in society (Kamali, 2004, p. 569).

[12] *Fatwas* holds its epistemological origin in the revelation of the *Qur'an* which speaks of reference to words like *futya* (legal consultation), I*fta* (fatwa giving) and *istafta* (request for a fatwa).

Takhayyur meaning eclectic choice was employed to saviour the dying traditions of re-interpretation of laws on rationalistic grounds. Today, these boundaries are shifting and diluting with the growth of alternative Schools of Islamic law in these regions, signifying the rise of reform of Islamism as "*neo-Ijtihadist movements*" vis-a-vis modern secularized law. The pragmatic re-interpretation of legal concepts, by invoking the use of *Maslahah* and necessity as a principle, has opened vistas for fluidity of text and tradition of Shari'a which has helped contemporary Islamic societies to brace and arrest the expanding waves of colonization and secularization of Islamic laws. The use of *Takhayyur* or eclectic choice created *Majalla* as the first official codified Hanafi Law which consolidates the opinion of eminent Hanafi jurists and different Schools. Many countries like Turkey and Pakistan have followed this principle to usher an era of reform of Islamic Laws under the aegis of the State.

1.3. Development of the Muslim Law: Schools of Jurisprudence

The distinct Schools of Islamic Jurisprudence which developed as the formative canons of law can be illustratively found in the monumental work *Al-Risala* written by a renowned jurist Muhammad ibn Idris ash-Shafi (767-820 A.D), developed during the political rule of the Umayyads between 7th to 13th Century (Schacht, 1950, p. 2). He relied on the authenticity of the *Traditions* of the actions of the Prophet in contrast to the 'living tradition' of the Companions. He invoked the study of *Isnads* which helped date traditions and showed a tendency to move backward to the time of Prophet to claim higher authority (Schacht, 1950, p. 5). However, he trusted the authentic works on the corpus of Muhammadan tradition of *Sahih* by Bukhari(194-256A.H.), *Sahih* by Muslim (206-261 A.H.), Al-Tirmidhi (275/279 A.H.), Ibn Maja (273 A.H.); Abu Da'ud (275 A.H.) and Nasai (302/303 A.H.). Thus, the works of recording of the *Traditions of the Prophet* are documents not of his time but developed in subsequent stages of doctrines in the first centuries of Islam.

The debate on the 'complexity of Traditions' started by scholars like Joseph Schacht and Ignaz Goldziher which led to the questioning of the authenticity of *Hadiths* could be resolved by revisiting the *Al-Risala* by Shafi. Hallaq, who cautiously dived into works of Shafi, concluded that any *Sunnah* of the Prophet had a binding force like the verses of the *Qur'an* and found no apparent contradiction in the primary sources. However, a legal ruling derived from an unambiguous, yet widely transmitted texts is to be verified if it is not inferred by means of *Ijtihad* or *Qiyas* (Hallaq, 2009, p. 42). Thus, the clear *Traditions of the Prophet* as outlined by Shafi overrules the prevalent usages of the community (called 'living tradition' based in individual

reasoning by Schacht) and were put under the aegis of the Companions to become the established doctrine of Islamic law.

The Muslim Law was divided into diverse branches, namely a) *ibadah* (ritual worship*),* b*) mu'amalat* (transactions and contracts), c) *adab* (morals and manners*), d) i'tiqadat* (beliefs) and e) '*uqubat* (punishments) (D.F.Mulla, 1905). Apart from the above five, some other sources of law included *Istihsan* (preference of one aspect over another); *Masalih Mursalah* (public welfare as per the needs of the day) and *Urf* (customary practices) (Fyzee, 2008, p. 40).

The Shia resorted to the compilation of Traditions like *Al-Kafi* by Abu Ja'far Muhammad ibn Ya'qub al- Kulayni (329 A.H.), *Tahdid* by Shaikh Abu Ja'far Muhammad ibn Ali ibn Hussain (466 A.H.) and *Nahj al-Balagha* by Sayyid al-Razi (406 A.H.) (Ali M. , 1998, pp. i-646). Modern jurists have come to define the importance of such laws as reflecting,

"*the soul of the people more clearly than any other organisms; the distilled essence of the civilization of the people*" (Allen, 1927, p. 54).

Scholars of both the Sunni and Shia School of Muhammadan law have interpreted verses of texts in the wake of the historicity of the tradition and their places of revelation, Mecca, and Medina to mark an ideological variation in their practices (Rahman, 1970).[13] The classification of temporal and spatial factor is relevant to witness changing dynamics of the adoption of these traditions in legal setting. The Meccan verses were legislative in nature based on theological foundations, while the Medinan verses constituted rules of worship and social regulation. The law studied in three centres of Iraq, Hijaz and Syria developed the ancient School of law based on geographical distribution.

Schacht's understanding of legal scholarship in Muslim world was primarily a demographic difference between developments of 'ancient Schools', negating the role of any allegiance to the master or doctrines (Schacht, 1950, p. 7). The transformation if any that happened of these centres into Schools of thought did not happen till the middle of the ninth century when Shafi proposed his thesis in *Kitab Ikhtilaf al-Iraqiyyin* for Muslim Law. Schacht's presumption on non-allegiance to Hanafi and Maliki School in Muslim society has been contended by scholars like Christopher Melchert who held that the Hanafi did belong to the *ahl-al ra'y* School (Melchert, 1997, pp. 32-47).

[13] The Sunnis followed the *Riwaya Tafsir*(Interpretive Tradition), Muhammad ibn Jarir al-Tabari, *Tafsir al-Tabari*, Dar al-Marifa, 1983, pg. 3000, Ibn Kathir, *Tafsir ibn Kathir* Darussalam, 2003, pg. 6500*,* Allamah Pīr Muhammad Karam Shāh al-Azharī, *Tafsir Zia' ul-Qur'ān*, Zia ul Quran Publishing House, 2019,pg. 3632.
The Shias follow works of Ali ibn Ibrahim Qummi, *Tafsir al- Qummi,* Muhammad b Hasan al Tusi, *Maktab al-Aʿlām al-Islāmī* www.tashayyu.org/tafsir/qummi accessed on 10th December 2019

Melchert's work stressed on the legitimacy of opinion of Abu Hanifa that commanded respect than the 'vague' teachings of other Jurisprudence in the Baghdad region.

The position taken by Schacht and Melchert has been criticised by Hallaq who held that there was no dearth of scholarship in line of transmission of learning by Companions and Successors of the Prophet as can be witnessed in the works of Shaybani. Hallaq pointed out that Abu Hanifa held limited authority in the eyes of rationalists. Further, he opposed the reading of rise of regional Schools as transformative, as Schacht believed, invoking the very defence of Shafi which Schacht took, to prove that a rich variety of personal doctrines existed in Kufa and Medina. Hallaq rested his defence on the rise of the tri-partite doctrinal division wherein Abu Hanifa's principles applied in matters of ritual, his disciple Abu Yusuf in concerns of pecuniary transaction and Shaybani's in the sphere of personal status. These madhhabs developed as legal doctrines alongside individual jurists, generated by the *Ijtihadi* spirit which continues to remain the soul of Islamic law.

1.3.1. The Sunni Schools of Jurisprudence: Hanafi, Malaki, Shafi, Hanbali

The study of texts and traditions in Muslim law have unfolded a gamut of norms and mores of behaviour adapting to the historical developments of change of regimes commencing from the abolition of the Caliphate in the 5th century A.D. They have been recorded in multi-fold classification in works of scholars like Abdur Rahim in his magnum opus, *The Principles of Muhamadan Jurisprudence* (1911) and Muhammad Al-Khudari's *Tarikh at-Tasyri'al Islami* (1930).

a) **Guidance from the *Qur'an* and the *Sunnah***: The initial point of classification dates to, AH 1-10 (Julian 622-632), the latter half of the Prophet's life. It's the most pivotal phase of Islamic law as it draws its source from the *Qur'an* and the *Hadith*. The Prophet Mohammad conquered Mecca along with control over Medina to shoulder the responsibility of legislation. Most of the legal verses of *Qur'an* are believed to be released at this time. The verses of the *Qur'an* are a direct revelation to the mankind and the practices of the Prophet considered being indirect inspiration to govern the actions of the surrounding circumstances. The institution of *Qazis* evolved when appointed by the Prophet himself and later by the early Umayyads. The authentic six books compiled by the six scholars who studied Sunni theology, namely *Sahih Bukhari, Sahih Muslim, Sahih Abu Da'ud, Sahih Tirmidhi, Sahih Nasa'i and Sahih Ibn Maja*, became the key authoritative texts on *Traditions of the Prophet* (Diwan, 1977, p. 10).

b) **Guidance from the Caliphs**: This phase commenced from, AH 10 to 40 (632-661), the thirty years rule of the Caliphate system of the initial four caliphs of the Prophet, namely, Abu Bakr, Umar, Usman, and Ali. There was strict following of the ancient practice of adherence to *Sunnah* and the text of *Qur'an* during the rule of Caliph, Usman. It has been assumed by Imam Shafi and Ahmad Ibn Hanbal that *Hadith* comprised the saying of the Prophet on the reformed practices to be followed in contrast to the prevalent usage and the practices put forth by certain jurists to support the prevalent usage of a particular community. It helped develop the parallel tradition of doctrine of consensus.

c) **Guidance of the Jurists**: The phase between AH 40 to 900 (661-1495) relied on the collections of tradition of Bukhari and Muslim as authoritative texts. The pioneering effort for developing a novel and distinct Jurisprudence of Islamic law, to be followed by the Sunnis later, was made by Imam Abu Hanifa and Imam Malik**.** Each relied on different methodology of science (*Usul-al-Fiqh*) to provide a rational treatise on law. **Abu Hanifa al- Nu 'man** (699 A.D.-766A.D.) of the Kufa School followed a liberal reading of science of Jurisprudence with reliance on the principles of *Qiyas* or analogical deductions to develop Sunni law. The primary reliance on *Qiyas* was due to the absence of science of *Hadith* at that time but later developed by his disciples *Qazi* Abu Yusuf and Imam Muhammad al-Shaybani (Nomani, 1979, p. 31).

The Madinah School of **Malik ibn Anas** (713 A.D. to 795 A.D.) represents more of the *Ijma* tradition. His chief work, *Muwatta* is the oldest authentic treatise on the *Fiqh* scholarship and the collection on *Hadith* compiled later. Schacht held that Malik's insistence on the tradition of reasoning is secondary to his dependence on prevalent usage of the tradition (Schacht, 1950).

Shafi*,* the third founder, was a pupil of Malik but differed with him on the authenticity of the Sunnah. Imam Shafi (767 A.D. to 820 A.D.) was a jurist of high calibre. He founded the School of *Usul* and perfected the doctrine of *Ijma*. He is known for his independent investigation of the methods of Jurisprudence. He defined *Sunnah* as the,

> " *model behaviour of the Prophet', which if conflicted with the prevalent usage was to be accepted without reserve*" (Fyzee A. A., 1963, p. 27).

Shafi gave secondary status to the tradition of the Successors of the Prophet.

Imam Ahmad ibn Hanbal (780 A.D. TO 855 A.D) represents the most extreme reaction from the School that was called the *ahl al- ra'i*, (people of the opinion) adhering to the principles of *Hadith* only. Hanbal was more of traditionalist than a progressive lawyer. Apart from him, others recognized as Traditionist or *Muhaddith* in law are Daud ibn Ali al- Zahiri, al-Azwai, Sufiyan al-Thauri and Abu Tharur.

d) **New Political Transformation towards Secularization of Law:** The abolition of the Caliphate system was signified by three political events like the assassination of the Abbasids of Baghdad by the Mongols in 1258 A.D, appointment of Abdul Kasim Ahmed as the titular caliph of the Sunni sect in Cairo in 1261 A.D. and the establishment of the Ottoman rule under Selim I around 16th century A.D. The second decade of the 20th century witnessed the political transformation in Turkey with the appointment of King Mustafa Kemal who completely obliterated the Caliphate system in 1924. The period is earmarked for making great inroads into cultivation of the secular law in all Muslim countries. After the formalization of four Schools of law, later scholars developed the doctrine of *Taqlid* meaning imitation and *Ijtihad* i.e., power of independent interpretation of the law (Codd, 1999, p. 115). However, greater stress was laid on the former with restricted access to the latter. The earlier jurist had greater powers of interpretation with later jurist being considered of the lower rank and defining this period as closing the pathway to rational interpretation of personal laws by the tenth century.

The striking moment of this transformation was the legal friction in the interpretation of *Shari'a* in the absence of the Sultan. It became a moral code, thereby, losing its legal sanction. During this time, consideration was paid on the doctrine of *Ijtihad* meaning exerting oneself to the utmost degree to attain an object, herein to form an opinion of the law. In the early days of Islam, there are many references of jurists who exercised independent judgement but were curtailed with the doctrine of *Taqlid.* Thus, the Muslim followed the law ignorant of the opinions of the learned. This blind imitation led to the fossilization of the *Shari'a* as outlined by Iqbal (Iqbal, 1934, p. 41). Iqbal suggested that the principle of *Ijma* be exercised more often and the power of *Ijtihad* should guide the learned Muslim scholars to interpret the law in line of prevalent social ideas. Fyzee differing from Iqbal's view believed in the separation of law and religion as a solution (Fyzee A. A., 1963, p. 30).

While these four Schools of the Sunni Law formalised in the 2nd Century held its control for another hundred odd years. The demographic growth of different School of Jurisprudence highlights the distinctive pattern of acceptance and legalization of a juristic order wherein the majority of Muslims in South Asia namely India, Pakistan, and Bangladesh; parts of eastern and Central Asia like Syria, Egypt, Turkey, Afghanistan and Southern Russia, western Asian inhabitants of Iraq and Lebanon are followers of Hanafi doctrine. The coastline of Arabia especially place like Yemen, lower Egypt, Sudan, Palestinian territory, Malaysia, Maldives, Singapore, Indonesia, and India (Konkani's of Bombay, the Mappilas of Malabar), Sri Lanka, East Africa and South Africa comprise the Shafi followers. North Africa, the Maghribs of Europe known as the United Arab Emirates and West Africa like Tunisia, Mali, Morocco, Algeria, Libya and official state of Kuwait, Bahrain are all of Maliki persuasion. The Wahabis, followers of Ibn Saud in Saudi Arabia, Sultan of Najd and the Baghdadi are the Hanbali.

1.3.2. The Shia Schools of Jurisprudence: Zaidi, Ithna Ashari, Jafari, Ismailis

The term Shia means faction and as an abbreviation form of *Shi'at Ali*, applies specifically on those, who after the death of the Prophet, believed in Successorship of Prophet's son-in-law Hazrat Ali to guide them in their temporal and sacred affairs. They, further, deny the claims of the first three Caliphs as Prophet's rightful successor (Fyzee A. A., A Shiite Creed, 1942, p. 22). The Shias came to believe that Almighty (Allah) has chosen Ali as the first caliph or *Imam*. The Shias follow the *Hadith* of *Ahl-al- Bayt,* a designation used for the family members of the Prophet Muhammad relying on *Aql* (divine wisdom) to bestow infallibility (*Ismah*) on the commands of the Sovereign (Patni, 1984). The esoteric knowledge derived by *Hikmah* (divine laws) can only be obtained by the Muslims by seeking nearness to god as witnessed in the practices of Twelver Shias or the Barelwis in the Sunnis.

The Shias are sub-divided into sub-Schools like the Zaidis, the Ismailis and the Ithna Asharis. The Zaidis are represented in the Saudi Arabia, mostly Yemen, remaking a curious mix of both Shia and Sunni principles. This group of Shia followers oppose any form of electoral representation in the matters of *Imamat*. The initial signs of dispute on this line were noticed when differences arose among the Shias after the fourth Imam, Zain-al-Abidin's son Zaid was accepted the Imam by some, in contrast to the general recognition

of non-acceptance of the principle of *Imamat*. A true Imam for them should fight the corrupt rulers than just be a descendant of his father in religious lineage. Zaid's *Majmu'a al Fiqh* is the earliest known reference on Shia's Islamic law, while Malik's *Muwatta* was developed subsequently for the Sunnis. However due to the prevalent controversy over the authenticity of Traditions, the text is not available in the authentic form.

However, most Shias followed the exegetical authority of *Qur'an* in works of Imam Muhammad-al-Baqir and Imam Jafar-al-Sadiq (Ali M. , 1998). After them, the Shias followed Imam Musa al-Kazim and nine successive Imams, thereby comprising the Twelve Imams known as the Twelvers (in Arabic known as Ithna Ashari). They follow five principles of *Usul -al Din* namely monotheism, justice building on concept of moral rightness, last judgement, prophethood and leadership that is authority of the Imam. There are three branches of Ja'fari Jurisprudence: *Usuli, Akhbari*, and *Shaykhi.* The *Usuli* School has the largest follower among all three Schools. Twelver groups that follow first Imam Ibn Nusayr are the Alawi, descendants of Sufi Balim Sultan are called the Bektashi and the Khurramites group of Qizibash positions themselves outside the Ja'fari Jurisprudence (Esposito, 1999, p. 384). As the Shias believe that the twelfth Imam is in occultation, it is the duty of the clerics or the *Imam* to interpret the laws of the *Qur'an* and practices of *Hadith* by consensus- building to be free from error.

The minority group, after Imam Jafar's death, refused to acknowledge Imamate of Musa Kazim but followed his elder brother Ismail as their Caliph are known as the Ismailis, popularly known as the Seveners. The Ismailis believed in the mystical path of God, relying on exoteric knowledge, which has found its manifestation in the "Imam of the Time". Thus, the rule of the *Mujtahid* can be followed in understanding the words of God. In India, they form the two groups of the Eastern Ismailis i.e., the Khojas, locally known as the Nizaris, representing the followers of the Aga Khan IV, believed to be the 49th Imam in the line of Prophet (*Haji Bibi v Aga Khan,* 1908) and the Western Ismailis known as the Bohoras further sub-divided into the Daudis and the Suleiman. The Eastern Ismailis are settled in East Africa, Central Asia, Persia, Syria etcetera. The western Ismailis are in Southern Arabia i.e., Yemen, Syria and round the Persian Gulf in Jordan, Uzbekistan, Tajikistan, Afghanistan, East Africa, and South Africa, and have in recent years emigrated to Europe, Australia, New Zealand, and North America (Mahmood T. , Family Law Reforms in the Muslim World, 1972).

1.4. Differences between the Sunni and Shia on Thought and Practice

The fundamental cause of conflict witnessed between Sunni and Shia sects is on the doctrine of *Imamat* (A.J.Wensinck, 1932, p. 50). In case of the Sunnis, the leader of the Muslim, known as the *Khalifa (*Caliph), are considered the rightful Successor of the Prophet. The appointed Caliph is a secular leader than just a spiritual head. There is an attachment of certain qualifying condition to his office and remains a Caliph to discharge his duties as a legal person. However, it is interesting to note that with the abolition of the institution of the Caliphate, in the wake of the Turkish revolution in 1923, divested the Sunnis of the advantages of the office of a responsible and accountable theologian.

As far as the Shias are concerned, the concept of *Imam* is evoked more as an interpreter of the law of the earth than a temporal person. The Imam is anointed by divine rights of direct descendance from the Prophet or of Hazrat Ali. In Zaidis, he is a mere human being while in Ithna Ashari, the twelfth Imam partakes a divine presence. Coming to the Indian case, the Ismailis worship dictates of Imam, for all practical reasons, believing that Caliph Ali was more of a God than a man (Fyzee, 1942. However, the western Ismailis identify their Imam as 'master' hidden but not immortal in some respects, like the *Insan al- Kamil* of the Sufis and *ghauth* of the *Dervishes* (Fyzee A. A., A Shiite Creed, 1942, p. 28).

No great differences between the Sunni and Shia School of thought exists, as Goldziher opined that

> "there are no sects in Islam but only Schools(*madhabs*) of Muslim Law" (Goldziher, 1981, p. 30).

The schism had been deepened by the political interest of the Caliphate during the time of Umayyads, who after the death of the fourth Caliph Ali murdered the Prophet's grandson Hussain. At the jurisprudential level, the differences cater to the rejection of the method of *Qiyas* or the doctrine of *Ijma* by the Shia groups to the exception of Zaidis.

However, a significant point of distinction has been made between the term *Iman* and *Islam* as it is applied about the validity of the rules of marriage between the two sects. The Shias unlike the Sunnis do not believe in the synonymity of these two terms. They divide the Muslims into sub-categories like Believers and Non-believers and sub-categorised as *Mu'mins* i.e., the possessors of Iman or true believers and Muslims as a category for generality of believers (*Narantakath v Parakkal*, 1922). *Iman* consists of Islam and the knowledge of the divine faith and the selection

by him of the sinless *Imam* and theory of *Imamat* and action according to his beliefs. *Iman*, as per the Fatimid law, is a nobler form and the essence of the religion of the Prophet. He can formulate new laws and abrogate old ones as a *mujtahid*. The role of the *Mujtahids* in Sunnis was unheard of till the fourth century of the *Hijra* (A.J.Wensinck, 1932, p. 34).

A point in reference is the famous (*Aziz Bano v Md Ibrahim Husain,* 1925) case, wherein a wife, who believed in laws of the Ithna Ashari School, moves the court against her husband, a followed of the Hanafi School, in matter of restitution of the conjugal rights. The Court accepting the laws governing the defendant relying on Baillie's *Digest on Muhammadan law*, Vol 4 spelling out the Shia text *Sharia-al-Islam* decreed that the marriage was void as the Shia (*mu'min*) woman cannot marry anyone but a *mu'min* man (Baillie, 1865). Thus, even if Islam allows marriage between people of the books and herein of people of same religion under different Schools or *madhabs*, the court gave primacy to the law of the defendant on ground of equity, justice, and right conscience.

It is interesting to point out at this juncture that none of the Schools of law were established during the lifetime of the jurists. They only intended to reveal the means of knowledge, whether in historical authentication or linguistic implication, to bridge the relation between the Muslims and their *Shari'a.*

The Sunnis in India maintain the principle of egalitarianism in invoking the doctrines from Hanafi, Maliki, Shafi and Hanbali School of Jurisprudence, recognizing diversity in the practices of the members of the community. In (*Abdul Karim v Aminabai,* 1935), it was held that a Hanafi woman on attaining majority can choose her husband, even against the wishes of her father and guardian. But a Shafi and Fatimi virgin girl, cannot, whether before puberty or after it, marry without the consent of her father. The general position about the application of Sunni law is that it is applicable to both the parties who are Sunni, except if either of the parties to a suit differs in religion or School, and then the laws of the defendant may apply.

In case of the Shias, they are primarily divided into Ithna Ashari and Ismaili, as there are no Zaidis in India. The former follows the *Sharia'al Islam* of Najm al Hilli, while the latter follows *Da'aim al-Islam* of Qadi Numan written in time of Imam al-Muizz before the split between the Khojas (*Nizaris)* and Bohoras (*Mustalis).* In all, the judicial discretion vested in the Court can only be exercised where the authorities of the same School differ amongst themselves, then the court will follow the course of what the legislature decides.

1.5. Muslim Personal Laws in Select Countries: Turkey, Nigeria, Egypt, Pakistan, Saudi Arabia, Iran, Sri Lanka, Israel

The ethnographic study of evolution of Muslim Personal laws around the world heightens the complex relation of cultural background and the actors involved in heightening the role of *Shari'a* in governance. The studies have proved that barring exceptions of countries like Saudi Arabia, Libya and some Gulf states, most Muslim nations have considered democracy as a legitimate form of government to be introduced in their own country than the prevailing system of theocracy (Norris, Inglehart, 2006, p. 87). The adjustment of *Shari'a* to the realities of pluralism, participatory citizenship and a positive gender role has been a work in progress in many Muslim countries in contemporary times (Ramadan T. , 2012, p. 13). The attempt to modernize personal laws is pitched in the light of resurgence of religious observances to help them redefine their politics and public ethics. The way Shari'a has come to instrumentalize itself in these societies has made it more porous and flexible in its public meanings than the ossified and rigid codification in scholarly discourse. Hallaq's concept of '*Ijtihadic plurality''* best explains the process of embeddedness of these laws that impart new rational meaning to the understanding of *Shari'a* (Hallaq, Origin and Evolution of Islamic Law, 2009, p. 95).

The legal system of the Muslim and Non-Muslim countries, premised on the application of Islamic methodology to their agenda of reform of personal laws, are classified as:

a) *Sharia in secular Muslim States*: Muslim countries like Turkey, Nigeria and Kazakhstan have adopted a secular framework in their interpretation of personal laws.
b) *Muslim states with blended sources of law* like Pakistan, Indonesia, Egypt, Sudan, Morocco, and Malaysia have coalesced the Sharia law and with the Rule of Law. They have modernised their personal laws with the help of methodology of *Ijtihad* and *Ijma.*
c) *Muslim States using classical Sharia* laws like the Saudi Arabia and Iran are inimical to change in religious ordained Sharia laws due to their totalitarian and dictatorial set-up.
d) *Non-Muslim countries with sizeable Muslim population* like Sri Lanka and Israel have followed a policy of limited reform in the personal affairs of the Muslims owing to their agenda to assimilate the minority in the majoritarian culture to best popularise national integration.

It has been a common and persistent assumption that any reform of the legal schema of personal law is a technical, managerial, and financial matter, thereby, overriding the socio-political realities in which they operate. Moreover, the systemic negative stereotyping of meaning of Sharia as

parochial is owed much to the chagrins to the policies of Saudi Arabia and Iran and wilful attack of the West in the wake of the 9/11 attacks and bombings in Bali, Madrid, and London and so on (Otto, 2008, p. 28).

A) ***Shari'a* laws in secular Muslim States** have modelled their personal laws on the parallel of Swiss or European legal system. Thus, it's a unique blend of secularist principles in an Islamic system. Nonetheless, Islam defines the social morphology of the Turkish society facilitating public conversation for a larger public good. Thus, Islamic activism has in a way what Charles Taylor argued "*destabilized early forms of religion and recomposed and reformed it to modern developments*" (Taylor, 2007). The society nurtures values of a moral society than ritualistic norms. The Turkish Muslims have narrowed the meaning of *Shari'a* to "set of enforceable laws" and placed greater emphasis on following of Islamic ethics and economic development. For instance, the Qizibash communities, also known as the Alevi, have rejected the Sunni-Hanafi Jurisprudence to formulate their own indigenous version of *Shari'a* that stressed on communitarian rules and inner aspects of Islam (Hussin, 2014).

i) **Turkey** was the first country to have witnessed modernization and import of western values and institutions. These modernization attempts impacted to rule of the Ottoman State in the 17th Century who were struggling to catch up to European powers. The Ottomans eventually undermined the stronghold of the *Ulema* by introducing the *Tanzimat* Reforms of 1839 which proposed a new administrative system premised on French model (Yilmaz, 2005). It was the primary initiative to promote secular education and establish a non-religious state. The *Shari'a* was codified as *Majalla* in 1877 relying on the application of technique of *Takhayyur* (Eclectic choice) to Hanafi law.

Turkey which was controlled by the Muslim rule witnessed a political revolution under the aegis of Mustafa Kemal in 1924. He replaced the Ottoman's *Mecelle* system with the westernised *Turkish Civil Code* in 1926. The political system under Kemal abolished the Caliphate System and established the Department of Religious Affairs in 1924 which banned the Sufi orders in 1925, adopted the *Swiss Civil Code* 1926, replaced the Arabic text with the Latin code in 1928, abrogated the legal mandate, which, defined Islam as the state religion in 1928, granted full political rights to women in 1934 and protected western notion of secularism (distinction of spheres of religion and politics) as a constitutional tenet. Kemal's rule, henceforth, brought an end to the age-old theocratic institution of *Shari'a* courts and codification of Islamic Laws as secular legal system based on Belgian model. The contemporary system is free of *Shari'a* discourses.

The Young Ottomans like Namik Kemal who were influenced by western elites affirmed to establish liberal democratic government premised on value of Nationalism, popularised as the *Millet system* in the world. The *Dhimmis* (non-believers) namely the Alevis, Kurds, Christians and Nurcu were made part of the religious syncretic culture of the society who had earned autonomy in the management of affairs of their community. They maintained a semblance of their system with Islam by raising consciousness between reason and revelation. In return, they had to pay the Capitation tax but could not serve the military and were excluded from positions of executive authority. Islamic law was restricted only to affairs of the Muslims except in cases of conflict, wherein matters were settled on basis of Islamic law in case the non-Muslim religious laws were insufficient.

In matters of marriage and divorce, the Turkish Code abolished the practice of *TT,* a unilateral form of divorce in front of two witnesses. The law allowed the women an enabling condition that she could dissolve the second marriage of her husband on ground of being the first wife and setting up the age limit on the marriage for the first time. The secular court system functioned under the *Qazis* who could manage cases of both Muslims and *Dhimmis* in matters of personal law.

In the 1980's Turgut Ozal privatized and suppressed Islamic ideology as these radical groups accommodated themselves to modern democracy. These new Republican elites, following the ideological doctrine of Ziya Gokalp who had translated Durkheim's idea of religion in Turkish language to create a symphony between Islamic principles and western values (Yilmaz, 2005, p. 84). He believed in Durkheim's idea that religion was the uniting force of the society that creates a "collective effervescence" for the groups (Bahm Cigdem, 1995, pp. 90-96).

The formulation of Turkish Constitutional Court in 1998 espoused the idea of western Secularism that posited religion and politics as opposing entities, stripped *Shari'a* all its the moral dimension and fluidity and relegated Islamic laws to the private sphere. The Islamic rules operate more as *fatwas*(decrees) than binding norms. The new constitutional laws have solemnized the registration of marriage and any claim for divorce by either party can only be settled in the Court. It has abolished polygamy in legal form and the country is witness to fewer cases of polygamy in rural areas (Abadan-Unat, Nermin, 1981, p. 30).

Even though Islam was pushed to the private sphere, the religious functionaries and successive governments continued to attract masses on religious sentiments. The inability of the Kemalist ideology to connect with the masses failed to fill the vacuum created by the abandoning of Islamic system. Thus, the study of Turkey showed that neither Islam is a replacement nor an alternative to secular life. At best, both should complement each other in a modern set-up in the form of harmonization of a common civil code and unofficial local customary laws of the Muslims.

Turkey is thus a curious mix of multicultural system with its own indigenous pattern of secular system that offers accommodative space to diverse voices to live in peaceful coexistence. The country has gradually combined the rules of different normative order by successfully meeting the demands of secular law and religious law. It runs on the principle of legal pluralism wherein transplanted secular laws and unofficial Muslim laws have not jettisoned the idea of a westernized Muslim Republic.

ii) **Nigeria** is a federal republic comprising 36 states which faced the onslaught of British Colonization in the 19th century. Its population is multi-ethnic divided between Muslims living in North and Christians in South. The Colonizers continued slave trade and controlled the agricultural produce for economic benefits.

The attention of the Britishers on the rule of the Sokoto Caliphate led them to follow the policy of divide and rule among emirs which helped them to control the northern part of Nigeria by 1902 but they yielded to the stiff resistance by 1906. They had ruled on native lines allowing freedom of religion to the Muslims in their personal laws and prohibited Christian's proselytization mission among the Muslims. Contrastingly, it had expanded the use of Islamic laws by creating the Anglo-Muhammadan Code, like the Indian case, in areas that were Christian controlled. Sani Umar argued that the process of modernizing the *Shari'a* only distorted the integrity of practice of *Shari'a* in the eyes of the Muslims (Umar, 2006) .The Britishers had abolished the punishment of stoning, death and amputation and the judicial reform of 1933 brought complete subordination of *Shari'a* Courts to British Court of Appeals. The Muslims compromised with the Britishers by elimination of their *Shari'a* criminal law in lieu of political autonomy in the northern regions. Thus, the new Nigerian Penal Code of 1960 promised a secular model of criminal law and relegation of personal laws in the hands of the *Shari'a* courts until 2000.

The most transformative change in Nigeria was that Sufism gained grounds in the country and provided spiritual solidarity and networking for consolidation of new social unit. These Islamic scholars eventually became traders situating themselves in a patron-client relationship. They reached out to the allies from Saudi Arabia creating an Islamic organization called *Jama 'at al-Islam* in 1962 under the guidance of religious advisor named Abubakar Gumi. His ascendancy to political rule led to patronization of neo-Salafi practices popularly pilgrimage to Mecca for *Hajj* (Umar S. , 1993, pp. 154-178). Gumi was a strong critic of Sufism who formulated policies to suppress Sufi practices.

The dissenting groups of Sufis challenged his authority but were controlled by neo-Salafi group of Yan Izala that promised quashing of method of innovation brought in to restore the Tradition. However, they lost their control by the 1990s. The year 1990 witnessed a political shift from an authoritarian system to a civilian democracy after a long haul of 16 years. This power-shifting arrangement created a new political landscape where power transfer from the Muslims to Christians required acceptance of the new Confederation (Paul M Lubeck, 2011, pp. 244-270).

The Politics of *Shari'a* movement in northern Muslim states of Nigeria can be configured in the light of factors of political and economic agenesis under the aegis of military rule. The incipient polity of 400 odd ethno-linguistic groups competed aggressively for gaining control on resources of oil and natural gas rents. However, none could muster the strength of a majority to exercise hegemony over its competing rivals. Nigeria eventually coalesced into the rule of a federal government to satiate the demand of a fragmented population. This heightened level of political strife produced illiberal form of diversity that required consensus among the elites to maintain monopolistic state power. Even in case of *Shari'a,* the elites failed to arrest popular movement for the restoration of full *Shari'a.*

The *Shari'a Courts* were created in these states to adjudicate on issues beyond the personal law and imposed harsher punishments like flogging, amputation, capital punishment for crimes like theft, unlawful sexual intercourse, drinking alcohol etcetera. The criminal law system was applied only on the Muslims with the promise of grant of regional autonomy to the non-Muslims to create a conducive atmosphere of mutual compromise for federalism. The 1999 Constitution posed obstacles on full imposition of *Shari'a* laws by promoting usage of customary laws and legitimization of state's role

as a neutral arbiter in matters of religion. Thus, the decisions of local *Shari'a* courts and State's Court of Appeal premised on religious customs and usages could be overruled by the secular Federal Court System (Allan, 2002).

Zamfara State's governor reintroduced two bills on *Shari'a* criminal law (*hudud)* that had faced long standing opposition from northern side. A popular movement was spearheaded by the *Ulemas*, professionals, students and civil society groups made zealous demand for implementation of new *Shari'a* laws. These neo-Islamic reformers drew upon eclectic method to draw Salafi norms that privilege the *Qur'an* and the *Sunnah*, the commentaries by the Companions of the Prophet. However, they reject the invoking of the method of *Ijtihad* for the public good. Thus, the Nigerian reform movements introduced the Hanbali doctrine in the society, erstwhile premised on the Maliki legal system.

The agenda of reform (*tajdid*) of the personal laws in Nigeria was surrounded around the waves of global Islamization patterned in Saudi Arabia. The failure of the oligarchic rule of 1980's created a stir in the mind of young Muslims to popularise the institutionalisation of *Shari'a* against secular laws of the federation. The path to Islamic law was viewed as an alternative to the corrupt westernised rule of the British colonisers. The Boko Haram reformist movement tried to infuse the Salafist ideology in the political system to unite the splinter groups into a cohesive order.

The gendered relation amidst the shifting sectarian politics within the Muslims in Nigeria has followed a conservative pattern of access of women to traditional Islamic learning and restricted access to university education to chosen elitist women. The educated women, female *Ulama* and judges engaged in debates on personal laws status and negotiation with the political leaders but still do not hold egalitarian status of formulating laws on *Shari'a.* A gender bias is evident in the functioning of the Nigerian judicial system and the debate on rights of gender equality is still in its nascent stage. The question remains whether full restoration *of Shari'a* by the federal government will help improve the life chances of northern Muslim population.

B) **Muslim States with blended sources of Law** like Egypt and Pakistan have interpreted their family laws premised on a modern understanding of the *Shari'a* that holds distinction between roots of Islamic laws (divine rules) and branches of Islamic Law (methodology of laws open to changes and contemporary adaptation). The constitutional State of these

countries took the bus of reform of the personal laws in the larger public interest of Necessity (*zarura*) invoking the *Traditions of the Prophet* Muhammad[14] and Caliph Umar who held the belief that their companions are more knowledgeable in the mundane affairs (al-Nowaihi, 1975).

i) Egypt is the citadel of modern secularization of Islamic laws. In the late 19th and early 20th century, the government introduced partial etatization of *Shari'a law*s with the establishment of state advisory office of *Dar-ul Ifta* to deal with personal matters. The mosque university Al-Azhar and the Court of Law tried to control the religious-judicial affairs of the state. With the passing of political power in the hands of the British in 1883, Egypt too witnessed a similar process of colonisation of its laws with the transfer of legal powers in the hands of state courts acting on French legal code. In 1926, laws of personal status lost the element of 'autonomy' of interpretation by religious institutions.

With the rise of nationalism under the Muslim Brotherhood (henceforth MB) in 1940's, a call was made to go back to Islamic laws with the help of public support. However, the colonial style of reforms continued to flourish under socialist regime of Gamal Abdul Nassir in the form of 'secularization of laws' in 1956, by doing away with Islamic edifice (Nathan Brown, 2011). He abolished the separate courts for different members of the society namely the Muslims, Christians and Jews and established National Courts to adjudicate uniformly issues of family laws.

The struggle between the MB and the Nassir regime started on the political note but went on to take social and religious overtones in 1970's and 1980's as Islamist movement under the MB. A new Constitution was proclaimed in 1971 wherein under Article 2, the principles of Islamic *Shari'a* defined the chief doctrine guiding legislations, as a sign of support to the political motives of the Muslim Brotherhood. A new consensus emerged in Egypt wherein *Shari'a* would not be abrogated by the State and provide the sole guidance to the laws as a path of moderation for its believers (Nathan Brown, 2011, pp. 94-120). The state has eventually created several centres for *Shari'a*-based authority within its bureaucratic apparatus.

The year 1980, following Anwar Sadat's assassination, witnessed the rise of popular power of his favourite confidante Hosni Mubarak who ruled Egypt till 2011 (Denis

[14] 'Fructification of Date Tree' analogy was invoked by the Prophet to support the wisdom of his Companion to guide the community from error.

Sullivan, 1994, pp. 211-231). His policy in support of the secular laws did not enjoy support from the people due to lack of educational, nutritional and employment opportunities. This resulted in resurgence of Islamist movement creating mass-mobilization against the militant policies and economic crisis of the State.

Islam was the answer to this political conundrum in a reforming state. The theme of *Wasatiya* (moderation), popularised by Fazlur Rahman, was employed in this contemporary Egyptian society to build up positive laws of *Shari'a* (Rahman, 1970, p. 316). In the ideological spectrum of the society, the process of moderation is invoked to build up dialogue against violent imposition of rules and norms. Even the Egyptian Judiciary had become an active party in the task of adjudication of disputes wherein a case is often decided by turning to customary texts and practices than principles of *Shari'a.* Thus, the methodology of *Ijtihad* guided the society to interpret and reform laws to suit public interest. The debate in *Shari'a* shifted from interpreting specific rules to broader understandings on general principles based on analogical deductions and reasoning.

It is interesting to note that countries like Egypt and Pakistan have curiously invoked the use of *Shari'a* to overthrow Muslim governments in respective phases of 1990's and 2000. They marked a departure from other Muslim countries by not using *Shari'a* as the only normative corpus to define their local affairs. The Egyptian Parliament has been critical in its legislative decisions on debates ensuing on personal laws but have never transgressed their authority beyond consultative status.

The agenda for Reform of personal law status centred on the Islamic theme of *Khula* which a process of divorce initiated by the wife wherein she forfeits her rights for maintenance and reimburses the dowry paid by husband when contracting the annulment of marriage. The pre-requisite of taking the husband's consent was a major constraint for women to access *Khula*. Therefore, the agenda on reform in 2000 laid emphasis on the removal of the principle of 'consent' required to annul the marriage. It also brought into its foray demands of *Nikahnama* contract which gave women enabling right to stipulate conditions of marriage like right to divorce husband in case of latter entering polygamous relationship. Further, the reforms in 2005 talked about establishment of a dedicated family court, creation of Family Fund for court ordered alimony and maintenance and new child custody laws (Yilmaz, 2005).

The Detractors of these reform agenda defined them as "*Suzanne's law"*[15] echoing on similar criticism of erstwhile "*Jehan's Law*"[16] wherein the measures contradict the principles of Islamic law owing to the fallacies of a corrupt and tyrannical regime. What was presented to the citizenry through the opposition of these reform measures was the revolutionary struggle against corrupt and repressive political regime of their times. thus, the agenda herein is also caught between the goals of gender equality put forth by women activist and vested political interest of transitional Islamist regimes. Thus, the status of personal laws in Egypt lags on dimension of gender equality as compared to Morocco and Tunisia.

In the 'wide environment' of Egypt's political history, personal laws have rarely acquired top priority on issues of women's rights, but even contemporary political trend point to moving a step backward to resurgence of *Shari'a* laws to save disintegrated Egyptian families. Even transitional rule of Essam Sharaf opposed erstwhile reforms relating to enhanced custody rights of the mother, ceasing of alimony payments and repeal of rights of *Khula* (Maurits Berger, Nadia Sonneveld, 2008, p. 76).

The practice and complex realities of society and lived 'marriage and gender relation' in Egypt have transcended political agendas. The country is still mid-way on its path of development based on oscillating positions of reform of laws and revival of 'Islamization of laws'.

ii) The creation of the **state of Pakistan** is a by-product of Colonisation by Britishers. It shares the historical antecedents with India in terms of administrative transfer of political rule in 1947. The Pakistani State, though established as a Muslim Republic, continued to function on the Anglo-Mohammadan pattern of codification of personal laws as borrowed from the Shariat Act. The Muslim Modernists tried to blend the western liberal values with the spirit of Islam. It led to the construction of new set of laws that stood in distinction to the Classical understanding of the *Shari'a* as proposed by the clerics and religious leaders.

Muslim homeland under Jinnah was initially put under scanner by the Islamists like Sayyid Abu A'la Maududi who founded the *Jama'at-i-Islami* in 1941 sceptical of his policy to subvert Islamic norms to western secularization. Deoband Ulama like

[15] The legislation was supported by Suzanne Mubarak of the National Council for Women.
[16] The reforms were enacted by Anwar Sadat on the demand by his First lady Jehan Sadat.

Ubaydullah Sindhi and Abd'al-Rahim Popalzai have supported Iqbal's modernist discourse on Islamic law that provides for Islamic application of economic laws for subsistence (Singh D. E., 2012). But successive Pakistani governments have reconciled the teachings of Islam with collective conscience. The Muslim Family Laws Ordinance of 1961 enacted by former President, General Ayub Khan, rendered severe restrictions on exercise of practice of polygyny and introduced positive changes to the Inheritance laws ,remarking a trend towards the secularization of the personal laws (Mahmood T., 2016)

The country has witnessed a brief episode of wave of Islamisation introduced by General Zia-ul-Haq between 1977-88 who drew members from judiciary, ranks of *Ulama* and intellectuals to ascertain Islamic norms to existing legislations. He tried to Islamize the legal system by inducting *Ulemas* to federal *Shari'a* courts and *Shari 'at* appellate bench of the SC. In 1979 he promulgated the *Hudood Ordinance* that supported punishment for drinking, theft, fornication, and adultery. Benazir Bhutto who succeeded Zia-ul-Haq was strongly critical to the *Hudood Ordinances* but yielded to the intense pressures from religious leaders. The laws continued to remain part of the criminal system of the country till the overtaking of political power of Nawaz Sharif by military coup under the leadership of Musharraf (Zaman, 2002, p. 110).

Much of the political control over the State stayed under the military and semi-military regimes patronising the idea of modernization of secular laws of *Shari'a*. Invoking the principle of "*Ijtihad*", the executive and the judiciary guided the matters of Islamic laws based on liberal reading of the religious text and traditions. President Musharraf even tried to negotiate with the clerics to replace stringent criminal laws under the Hudood Ordinance with ameliorative Pakistani Penal Code (Jahangir, 2006). The backing of the Protection of Women (Criminal Laws Amendment) Act of 2006 by the Musharraf military regime was a landmark move to reform the personal laws to promote gender equality in conformity with the international standards of non-discrimination and life of dignity and respect. The punishment for adultery (*Zina*) was abolished and the role of the madrasas regulated to control the outreach of clerical authority on society. Rape was no longer crime to be subjected to stoning by death, and victims of sexual assault could not be harassed on grounds of sexual immorality and misconduct (Zaman, 2002, p. 143).

His efforts met strong resistance from Maulana Taqi Uthmani and Fazlur Rahman of *Muttahida Majlis-i 'Amal* (MMA) declaring 'Pakistan to be a free sex zone' (Uthmani, 2006, p. 45). They opposed the move of the State to make rape a less punishable offence that hurts the dignity of women. Taqi Uthmani commanded greater reverence and relevance in controlling the religious coterie of contemporary Pakistan.

The site of contestations on *Shari'a* and ambiguities brought in the understanding of Islam in the public sphere is a result of the colonial interference than the making of the respective communities in Pakistan. The key focus has never been on how to best understand the *Shari'a* but on those exercising authority to interpret and administer these laws. Contemporary concerns on understanding *Shari'a* in Pakistan are often guided by concerns of goals (*maqasid*) of *Shari'a* in lives of individual on matters of religion, property, and progeny. Pakistani's predominant Hanafi followers have re-evaluated the goals of Islamic laws as generalist principles to govern their moral lives.

The country is recently caught in political turmoil within religious sects making demand for acceptance of their doctrinal ideas within the larger Sunni frame (Qureshi, 1975, p. 90). The rise of alternative voices within the Muslim society namely the Deobandi, Barelwi, Salafi, Wahhabi and Ahmadiyya have all sought to anchor their ritualistic ideas and practices in the prevalent legal norms. The rise of sectarian differences within the community have reopened the debates on application of personal laws on methodology of Islamic law, to seek rescue in flexible method of '*Ijtihad*' and consensus building based on eclectic choice (*Takhayyur*).

Judicial *Khula* is the mechanism by which the Pakistani courts dispenses justice to the women by offering them the exercise of right to dissolve the marriage of her own free will. The innovation or the eclectic choice exercised by the jurists was that despite the provisions of Article 2 (ix) of Dissolution of Muslim Marriage Act, 1939 allowing Khula only after the consent of the husband, the women have got reprieve from unjust marriage system from the judiciary at will. It is a classic case where the Judiciary has championed the individual rights of the women vis-a- vis group rights of the community. In cases like (Mst Khurshid Bibi v Mohd Amin, 1967), (Sardar Hussain v Mst Parveen Umar, 2004), it has been highlighted that the courts adorn sensitivity in their approach while dealing on the rights of women and children, while granting *Khula* without consent and custody of minor sons to the mother even after her contracting

another marriage (Shahid, 2018, p. 58). A landmark judgement of the Court in (Muhammad Aslam v Muhamamd Usman and 4 others, 2004) allowed a breast-feeding woman to claim maintenance even after divorce for two years as per the interpretation of Surah *Al-Baqarah* Verse 233 and 241 of the *Qur'an.* However, the dearth of research and the reluctance to paint the egalitarian picture of the Judiciary in Pakistan has kept the veil intact on the issues of gender equality and freedom across South Asia.

C) The study of Personal Laws, commonly celebrated as ***Shari'a Laws*****, in Muslim countries** like Saudi Arabia, Iran is premised on an ossified and conflictual understanding of civil laws that violate the international charter of human rights. *Shari'a* is primarily defined as the eternal will of the Almighty which is immutable and divinely ordained. The political actors involved in Muslim countries vary from moderate secularists to traditional conservatives to radical Islamists, each defining its distinct positions on *Shari'a,* thereby, flourishing new sectarian beliefs and practices. The orthodox clerics (Ulemas) play a decisive role in interpretation and application of the community laws. Thus, their approach is inimical to winds of change and wave of modernisation.

i) **Saudi Arabia** is controlled by a totalitarian and absolute monarch, who in consultation with, the senior princes of the Al-Saud royal family acts as the king and the head of the government. The basis of their legitimate control is invoked from the Islamic law premised on the rigid reading of the Quranic principles and *Sunnah* practices. The country established an Allegiance Council in 2007 that comprised King Abdulaziz's only heir and orphaned grandson to decide the successorship to the throne (Vogel, 2011). The King has dictatorial powers in all areas of governance but has created a consultative body of an Assembly to help him propose legislations for smooth governance of political affairs. Thus, the system best functions on the principle of what Weber called '*charismatic authority*' as each reigning monarch dispenses his powers in his own style and capability.

Both Saudi Arabia and Iran share similar features of a classical *Shari'a* but is a mixed bag in its parliamentary functions. Their understanding of law is premised on primordial reading of the texts and the traditions for routine guidance of the citizens. Herein, *Shari'a* without being codified is the law of the state commanding the lives of men and women in totality. The law is pervasive and functioning at two level; one, as etatized form of classical Jurisprudence (*fiqh*) applied by the courts and public commentators

exercising *Ijtihad* and second, the dictates of the ruler prescribed under governance as (*Siyasa Shar 'iyya*) (Vogel, 2011, p. 60). Thus, a compromise and balancing has been contrived between the agencies of the state wherein the Judiciary deals with private aspects of the law and the state primarily focuses on public law.

The works of religious scholars of dominant legal School is concretely premised on the prevailing consensus *(Ijma*) among the scholars of the community. However, the dogma of classical reading of *Shari'a* is challenged by the radical Islamists who have questioned the recent wave of modernisation in these countries, owing to western influence in the late 20th century. The spread of Wahhabism as a *Grundnorm* is owed to the rising influence, of the Ulema's Al ash Sheikh's family, in religious affairs that forms the crux of societal behaviour and mores. However, with the coming of successive rule of King Abdullah and his descendants, the role of the *Ulemas* have been curtailed in the judicial sphere with the setting up of the SC in 2007. By reforming the judicial system, diluting religious control over education, entry of women in *Majlis* Council and inculcating religious tolerance towards the Sufi and Shia groups, King Abdullah has steered reforms in the religious and cultural affairs of the country.

It is pertinent and peculiar to the Saudi experience that despite commanding pervasiveness of the laws, the government has not monopolized it but offered autonomy to the citizens to mould and enforce intimate understanding of the *sharia* laws in their personal lives. This paves the way for reforms and hope in future to build empowering laws at the hands of moderate reformists known as *Sahwi* in local parlance.

On practices concerning women, the country bent its stranglehold on lives of women by opening private women's colleges for superior education and job opportunities. What has defined the agenda of gender equality in the women's discourses in this theocratic state is not the level of formal equality vis a vis man but the larger enjoyment of personal freedom to conduct themselves freely in terms of movement without the permission of men. The laws of 'guardianship' over child and women, easy divorce for men, polygyny have suffocated the lives of females in a subjugated system of family laws (Mahmood, 2005, p. 233).

The country in the 1990's witnessed a splurge in the legalisation of *Misyar* marriage wherein the wife consensually waives her legal rights of maintenance, allowing co-habitation of husband with other wives on ground of exercising her own personal

freedom to move freely, which is otherwise restricted to a single woman and divorcee at the hands of father, brother and sons (Ali K. , 2008, pp. 11-45). Further, prevalence of practices closer to *Mut'ah* or temporary forms of marriage have only diluted the norms of the Islamic society without requiring sanction from the State. The courts, following Hanbali rules, have disdained the stipulations of the *Misyar* marriage, favouring the rights of the women at the time of settlement by divorce.

The rule of contemporary Prince Salman is welcomed as a major reformist era towards economic liberalization and secularization of religious affairs. By drawing on spate of reform measures, envisioned as "National Transform Programme 2020 and Kingdom's Vision 2030', outlined in 2018, the King has allowed improved the scale of gender parity for women by allowing them to drive, play sports outdoor, greater participation in workplace (Boghani, 2019). They also allowed women to be guardians for their children and travel abroad without male guardian's permission. This has radicalized and transformed the conservative face of the Kingdom, once viewed as the religious font of Islam.

ii) **Iran** is the only country that is ruled by the clergy justifying the use of religious symbols, Islamic discourses, and distribution of powers on religiously ordained laws. The principle enshrined to govern the country is '*vilayet-i-faqih'* meaning rule of the jurists. Any attempt to challenge the authority of the Monarch who ruled with the help of the clerics was meted with strong force by the conservatives as witnessed in the suppression of the Constitutional Revolution of 1906-11. All the bills of the Parliament are passed by the Council of Guardians (Baktiari, 2011).

Later between 1921-1979, Military leader Reza Shah Pahlavi initiated programmes which curtailed the powers of the ruler. Pahlavi made the first attempt to introduce western codes in Iranian criminal and commercial laws. The policies conflicted with the *Ulama* by downplaying the role of *Shari'a* in the political landscape of the country. Their policies met stiff resistance from the Mujtahids namely Ayatollah Khomeini referring to them as "black reactionaries" (Baktiari, 2011, p. 123). Following the February Revolution of 1979 led to the establishment of the New Islamic Republic of Iran. The Constitution combined the principles of democracy with theocracy and declared clerics as the true guardian of the state. Thus, the Council of Guardians along with the Expediency Discernment Council controlled the legislative powers of the Parliament (*Majles*) (Osanloo, 2015).

Iran's own Islamic experience is unique to its system wherein the traditional reading of Islamic law guides the approach of the dignified jurists *(Mujtahids*). The existential leadership lays with the Prophets and the Imam and the relative duty with the *Faqih* to control the rule of the state (Seifzadeh, 1994, p. 199). Khomeini upheld the political leadership of *Faqih* over promoting justice among the people. A paradox ensues wherein the deliberations called upon the reading of the primary sources of *Shari' a* became a catalyst for changing the terms of Islamic discourses which they very much wanted to preserve in the first place. Nowadays, women are demanding re-interpretation of MPL beyond the classical formulations (Hosseini, The Conservative Reformist Conflict over Women's Rights in Iran, 2002, p. 38).

The process of Islamisation in Iran in 1979 has led to broad decline of fundamental human rights in countries like legalising stoning and amputation for adultery. The amendments brought in the Civil Code of Islamic Republic of Iran in 1983 have fettered the basic rights of living, as Article 1117of the Act allowed the husband to restrict his wife from taking a job which was deemed incompatible to the family's interest (Osanloo, 2015). The Islamic Punishment Act of 1983 limited the rights of Abortion to the ensoulment period of 120 days, after which it could not be terminated even on grounds of risk to the life of mother. It was late as in 2003 that the Legal Medicine Organization, as per the *Therapeutic Abortion Act*, granted abortion on grounds of maternal and foetal condition (Afshar, 2011). These countries have, thus, patronised a classical understanding of Sharia to promote cultural authenticity among members by appealing to values of justice, integrity, and obedience in these laws.

The conductive atmosphere to initiate a process of reforms of family law was first initiated in 1989 with a Bill transferring the husband's power to divorce a woman in the hands of the Civil Court. The *Majles* approved the Bill in 1992 as Amendment to Divorce Regulation along with the introduction of the rights to claim wages for housework by women called *Ujrat-ul-Misl*. These rights were available to women in addition to the rights of maintenance at the time of divorce. However, the women could only claim these rights if they had not initiated any proceeding of divorce nor caused the breakdown of marriage. In 1996, the amount of *Mahr* was also fixed to the rate of inflation, thereby curtailing end of marriages due to higher maintenance cost (Shahid, 2018).

At the face of it, these laws seemed liberating for women in terms of limiting the capacity of the husband to initiate divorce and adequate compensation to be availed at time of divorce. But the very principle of *Ujrat-ul-Misl* was contradictory and stifling to the enabling provision of the Article 226 of the Indian Civil Code that promised maintenance without resorting to abiding the strict limitation provided by *Ujrat-ul-Misl* under the Divorce Act. However, by the enactment of Family Protection Act of 2013 (FPA 2013), the claim to *Ujrat-ul-Misl* was to be adjudicated under Article 336 of the Iranian Civil Code (Shahid, 2018). Overall, these provisions are enabling promising compensation to women for the work done by her in building the household but is silent on the future needs of women and her children (Osanloo, 2015).

Interestingly, most of the administration in these countries have passed the responsibility of interpretation of *Shari'a* under the guidance of the traditional scholars to the jurists trained in secular faculties. Although, an attempt is being made to gradually move towards a professional rule of law yet Classical *Shari'a* has maintained its stronghold on three areas namely constitutional law, family law and inheritance laws and criminal law.

The role of the machinery of the State is to make a tightrope walk in balancing the national laws to Sharia principles. The job of Judiciary especially the State courts is to uphold the duties of 'religious courts' and dispense justice in a conservative form. But due to pressures generated by social and political media, the higher courts have adopted a more progressive stance in the application of laws. Laws have been framed with modernist position best summed in Coulson's position of '*Neo-Ijtihad'* (Coulson, 1978, p. 35). The real politic of conservative Muslim societies continues to patronise the radical puritan Islamists by nationalising Islam through State policy.

In 2007, the Legal and Judicial Committee under President Ahmadinejad introduced a bill on Family Protection. It repealed the previous Divorce Act of 2002 providing for replacement of Maintenance Payments wherein a wife is paid for expenses incurred during marriage on the demand of the husband (Yassari, 2016, p. 135). The process of Reform in Iran underwent a piecemeal change by providing women with some form of financial support but did not delve on the deeper issues of hierarchy and inequality by providing them self-independence and economic empowerment.

The classic case of Saudi Arabia and Iran are perfect examples of clash of *Shari'a* with international norms of rule of law primarily defined as human rights. Mayer has outlined their relationship of incompatibility on four grounds namely gender discrimination, discrimination of non-muslims based on freedom of access to public property, missionary proselytization and tax burden, cruel corporal punishments for transgression of prohibitions and rules and freedom of expression of religion like conversion is a crime and blasphemous (Mayers, 1995, p. 70). It is vexing to point out whether the large-scale violation of human rights is owed to the influence of Sharia or by traditional or repressive local customs of these countries.

A policy analysis pattern in these countries should try to focus then on overall trends in legislation, administration, and adjudication of rules of Sharia in actual contradistinction to the rule of law and provide space for justice seekers in the legal system to fight violations of customary laws. The practical implementation of the outlined policy can operate in the atmosphere of '*inclusive universality'* that requires a process of dialogue and deliberation between institutions of human rights and state regimes (Nasir, 2007, p. 80). If the agencies cooperate and frame policies in conformity to larger ethics of Islam, the governments would be soft in yielding results to the benefit of people writ large. On a macroscopic level, the western governments should not view Muslim countries as monolithic entity as in reality they operate on differentiated policies, for example the inclusion of reforms in countries like Qatar and Kuwait towards other religion is more than in Saudi Arabia.

The stereotyping of the image of the Islam in the garb of 'terrorism' and 'the Othering' of the community as an enemy should be nipped in the bud as it distances the level of trust between Muslim world and the West.

D) Non-Muslim countries with sizeable Muslim population like **Sri Lanka and Israel** are distinct examples of application of personal laws in which Muslim act like a minority assimilating its laws in the cultures of the majority. Muslims in Sri Lanka, popularly known as the *Moors*, are a Tamil-speaking minority population of 9% residing in agricultural easternmost region (Akkaraipattu in Ampara district) sharing distinct matrilineal and matrilocal system with Tamil Hindu neighbours (McGilvray, 2008, p. 58). Their pattern of familial systems in matters of marriage, property rights are like those of Muslims in coastal areas of Kerala and Tamil Nadu.

i) The marriage and family patters of Muslims in **Sri Lanka** is based on feudalistic ties wherein the practice of gifting a 'dowry-house' defines matrilineal clan hierarchy and inheritance of family property. The cultural assumption requires daughters will be married to their husbands who in turn will join the natal household of wives initially. Man must devote his responsibilities towards the members of his wife's family. Thus, the system in logical corollary rules out the prevalence of polygyny as permitted by Islamic law.

Sri Lankan Muslims follow the Shafi'i legal codes along ritualistic indigenous customary laws. The share of inheritance for the sons is two-fold and for daughters one-fold. However, in a Moorish family with married daughters, much less wealth would be left to transfer as dowry and the son will also not be able to inherit the set ratio of wealth from his parents. The records of registered marriages clearly outline the amount of dowry and bride wealth (*mahr*) taken by the concerned parties. Inorder to differentiate themselves from Hindu customs, the recent trend remarks non- maintenance of records of dowry. They follow the practice of Islamic system of *Hiba* (gift) given by bride's parents to their daughters in the form of property. It stands in stark contrast to the inheritance system in India and Pakistan wherein two-third of person's estate is transferred compulsorily under Islamic inheritance system (Mcgilvray, 2014, p. 93).

The distinct cultural practices of Muslims in Sri Lanka remark continuation of symbolic practices of the Prophet to charge nominal sum as *Mahr* (maintenance) to mark their austere style of living. Further, the reduction and elimination of formal food exchanges and ritual visitations between two families during the wedding and adoption of ritual of *Walima* (reception sponsored by the groom's family) is part of the trend of *Tawhid* (purification)movement.

The prevalence of cross-cousin marriage was part of the exogamous alliance that boasts of maintaining the matrilineal descent of groups. But by 1970's, a reversal of trend is noticed wherein parallel cousins (father's brother's children or mother sister's children) and cross cousin intermingle and marry each other. However, unlike the Muslims of Tamil Nadu, Sri Lankan case does not allow marriage between a man and his elder sister's daughter. Again, recent trends of 2011 have seen a marked decline in marriages of cross-cousins and very few marrying outside the matrilineal exogamy rule (Hasbullah, 2011).

The right of possession to dowry- house and inflated amount of maintenance in contemporary times has empowered the status of upper and middle class-women exposing the system of poverty wherein it works to a drastic disadvantage for poor families. The practice also affects the lifestyle of female-headed households where there is no income producing husband or father (Good, 1980, p. 37).

The movement for Reform took the form of revival of Islamism in which under the doctrine of *Tawhid,* a woman is expected to stay with the husband and not pay dowry or bride price to the groom's family. Thus, to review the matrilineal pattern of Sri Lankan system in case of Muslims, it does offer greater advantages to upper- and middle-class women but to the chagrin of the plight of poor and destitute female sisters.

ii) The study of the functioning of the Islamic legal system in **Israel** since 1948 is another curious example of blending of the practices of a Muslim minority in a non-Muslim Jewish state that have tend to arrive at a mutual reconciliation of aspects of disagreement (Ramadan M. A., 2003), (Nohad, 2004). Both sides have played a tricky role in getting their demands accommodated. The Jewish state has always challenged the credibility of Islamic jurists by pressuring them to adhere to modern civil law while the latter have played smartly in protecting the autonomy of personal laws for the Muslim minority.

The historical landscape of Israel can be traced to its affiliation with the Ottoman empire wherein each non-muslim religious group functioned autonomously in a *Millet* system. The *Shari'a* laws were applicable only on the Muslims in the domain of public affairs. With the reform of the legal system, the jurisdiction of the *Shari'a* Courts was restricted to matters of family law. The *Tanzimat* Reforms established separate Civil Courts (*Nizamiye*) and the Ottoman Family Rights (1917) was the first attempt to modernise the family laws around the world (Mahmood T. , 1972, pp. 36,39). Even the Britishers preserved the structure of Ottoman system maintaining clear distinction of jurisdiction of civil and family courts with respective parties. Later, under the garb of consolidating its power, on similar lines of Indian fate, the Britishers established the Supreme Muslim Council (SMC) to dismiss the authority of religious judges (Kupferschmidt, 1987, p. 87).

The Qazi in response to the attack on their power organised the struggle for a separate Arab state in Palestine under the leadership of Hajj Muhammad Amin al-Husayni. Though the Britishers derecognised their demand but they met with fierce resistance

during the 1948 war leading to the abolition of SMC. Israel was now cautious not to use the religious services of the Council for nationalist activities. The Christians earned favourable treatment in terms of autonomy of their personal affairs with perks like religious instruction in state Schools, autonomy of charitable endowments etcetera.

After the end of war in 1949, Israel had to settle with 1,50,000 Palestinian population by establishing own Muslim legal institutions (H.Z.Hirshberg, 1950, p. 213). A Ministry of Minority Affairs was established to enforce the rights of the minorities as per the spirit of Equality under Declaration of Independence. Behor Shalom Shitrit was instrumental in outlining the public policy based on communal harmony with the minorities. Equally invested was Rabbi Hayyim Hirshberg to win the Muslim mandate especially the *waqf* revenue and eventually earned the powers to control them except religious education (Peled, 2001, p. 40).

Hirshberg appointed the first *Qazi* to administer matters of *waqf* and *Shari'a*. A new *Shari'a C*ourt was opened in Nazareth on request of the Muslim minority. Though the Muslim clerics were critical of appointment of jurists at the hands of a non-Muslim state, yet the government maintained its stranglehold in matters of appointment of judges in sharp contrast to the accommodative policy of communal harmony as proposed by Shitrit (Peled, The Other Side of 1948: the Forgotten Benevolence of Bechor Salom Shitrit and the minsitry of minority affairs, 2002, p. 85).

The role of the *Qazis* (Muslim court jurists) has been instrumental in the functioning of *Shari'a* in a non-Muslim state. They asserted their voice in 1960's to challenge the compromised understanding between the Islamic jurists with the Jewish state. The 1950 *Qadi* Draft Law essentially transferred the powers of appointments (including retroactive ones), matters concerning the *Shari 'a* court system to an independent Ministry of Religious Affairs. The *Qadis* would be considered public servants and receive state salaries. The purview of the *Shari'a* court would include personal status, support and maintenance of minors, guardianship, authorization of wills, inheritance, *waqf,* adoption, illegitimate children, and religious conversions. But they played with the sentiments of the population as none of these courts had real legal recognition in the eyes of the State. Thus, the Supreme *Shari'a* Appeals Court has developed a new tacit relation with the Israeli SC to help the judiciary in applying Muslim personal laws to its

minorities (Peled, Towards Auotnomy? The Islamist Movement's Quest for control of Islamic Institutions in Israel, Summer, 2001, p. 378).

The status of Women in *Shari'a* Courts was the biggest concern for reforms of the personal laws. The Court recognizes all four Schools of Jurisprudence and accorded egalitarian position to women. The government introduced a series of reforms concerning marriage and divorce. The state outlawed polygamy and raised the minimum female marriageable age to 17. The Equal Rights law gave equal status to both parties in matters of guardianship. Surprisingly in the case law the Israeli Court took position supporting the *Shari'a* decision by adopting unprecedented punishment on flouting *of Shari'a* norms (Peled, The Islamist movement in Israel, 1994, p. 281).

Israeli Muslim population reorganised itself into a movement inspired by the Iran's Islamic Revolution of 1979. During 1980's, the country witnessed a revival of Islamist Movement by mobilising 700000 Muslims with demands like access to holy sites in Jerusalem, an established West Bank Islamic system and religious co-existence. It was intensified with the liberal policy of allowing Muslims to pilgrimage to Mecca in 1978. The Muslims believed that

> "*though the war of 1967 was a holocaust but also a spiritual revival of Islam that can help them from assimilation into Israeli system*" (Haddad, Spring,1992, p. 267).

They questioned the totalitarian role of the state in controlling their religious affairs in terms of appointment of incompetent Qazis and religious heads of the mosques. Between 1980's to 1990's, the movement helped establish more mosques to be privately financed by the Islamist and supporters from around the world. Yet they too soon dissipated into tacit forms of understanding with the government especially in the field of education. They earned some success in getting state's recognition of Muslim cemeteries as *waqf* lands in 1989. But the murder of three Israeli soldiers at the hands of 4 Israeli Jihadi (*Hamas*) members was the turning point in the state's policy towards the Muslims in 1992 (Peled, The Islamist movement in Israel, 1994, p. 293). They had put Islamist activists under police surveillance and blocked the entry into Gaza strip and censored religious sermons. The religious appointments were once again put under state control. The Islamic Movement continued to challenge the legitimacy of Israeli courts despite meeting stiff resistance from the repressive state apparatus.

The Israeli SC of Appeals, despite all kinds of opposition, continues to enjoy real powers in the adjudication of disputes in family matters. They have passed judgements in favour of women in matters of divorce and maintenance. Thus, the legal system can best be operating between the fluid and shifting religious *Shari'a* and secular civil laws. It's a subtle yet engrained way of co-opting dissent among minorities. The Israeli system is the best illustration of assimilation of minorities in an atmosphere of mutual distrust, without any danger to the preservation of status-quo (Welchman, 2000, p. 113).

Conclusion:

The *Shari'a* has in the contemporary times been stripped off its juristic status to become statutory law that can help the formal political and religious establishments to translate secular laws as religiously binding due to its derivation from independent legal reasoning and science of Islamic law. Most of the countries legislating on Muslim Laws have argued that though the *Shari'a* is an eternal law imposed on the State from above, yet it is a rational law open to scrutiny of human reason that is derived from plurality of opinions of jurists-consult and scholars to changing circumstances (Hallaq W. B., Authority, Continuity and Change in Islamic Law, 2001, p. xii). The doctrine of *Siyasa Shar 'iyya* is the modern embodiment of interpretation of Theocratic state laws based on codification of criminal and civil laws by legislative bodies. The Ottoman *Qanun* (law) is the magnum opus introducing eclectic choice (*Takhayyur*) as a method to codify Islamic laws in conformity to the liberal modernist movement of the West. It provided impetus to countries like in Egypt (1875,1883), Syria (1949), Libya (1954), Iraq (1953), Kuwait (1961), Sudan (1984) etcetera to initiate reforms of the personal laws (Layish, 2004).

The countries like Egypt, Pakistan, Nigeria are perceived centres of Arabic culture and intricately connected to the Islamic texts and traditions. However, the sheer breadth of change in matters of personal law cannot be passed off as an unintended consequence of colonialism but holds deeper ramifications on the construction of power matrices among the local Muslim networks of associations. The study of these countries significantly answers the debate on unfolding of the Islam law neither as an Arabic import nor as a vernacular culture. In other countries like Turkey, Iran, Iraq, Sri Lanka, the ruling elites significantly curtailed the role of religion in secular affairs and regulated personal laws under the control of the state. The resultant reforms of personal laws

empowered the nuclear family and enhanced the rights of women. Thus, the modern urban elites coalesced with the traditional religionist to broaden their support.

The application of Family Laws across the world follows a myriad trajectory from guaranteeing piece-meal protection to women and children within families like financial compensation known as *Ujrat ul Misl* to divorced women in Iran to blatant negation of maintenance rights to women in Pakistan (Shahid, 2018, p. 60).

The steep rise in number of divorce rates to 50% in Pakistan has put women in a tight spot facing poverty in the face of absence of laws of considerable maintenance to sustain them beyond the *Iddat* period. The *Rashid Commission Report of 1956* had made recommendations for women to enjoy the right to sue the husband for non-payment of maintenance. However, it met with criticism and was shelved by the orthodox clergy and incorporated later in the Ordinance on Family Laws. Both countries are classic example of a Muslim State but are far from articulating laws as per the tenets of the Islamic Law. In the absence of a sustained atmosphere of a Welfare State model in majority of the countries across the world, the women are left lurching in a deplorable condition owing to their social, economic, and educational backwardness.

In majority of the South Asian countries with a fairer Muslim population, the debate on process of reforms of the Personal laws has primarily focused on the issue of maintenance after divorce, which as per the *Qur'an* is stipulated for a time of three month, also known as *Iddat*. However, the same book provides for ample compensation for the divorced women for a prolonged period to ward off conditions of destitution and despondency for her and her children.

The interpretation and application of Muslim Laws in majority of the countries either by the State or the scholars and hardliners of the community are silent on tackling the real concerns of inequality and inferiority of women vis a vis male counterpart. The systemic injustice prevails at different levels of the society. First and foremost, the traditional male gatekeepers reinforce patriarchal norms and attitudes that relegate women to marginalization and subordinate position. Secondly, the State dawns a 'veil of ignorance', to use the Rawlsian term to shun its responsibility towards the half of the section of population it governs. Thirdly, women are also responsible for the on-going exploitation due to lack of awareness of legal aid or the fear to access them to save from being ostracized or outcast. Lastly, the laws dealing with the issue of maintenance to

divorced wife is interpreted in poor light by narrowing the meaning of the term '*Mata 'a*, wherein the *Qur'an* provides for a consolatory gift that must be paid in addition to the Dower/*Mahr*. This consolatory or parting gift can take care of the adequate compensation that can be given to women after divorce, but the State has been oblivious to the enabling condition and restricting maintenance to meagre amount up to the *Iddat* period only. Barring few nations like Qatar, Egypt, Malaysia and Morocco, the right to access *Mata 'a* is not available to women (Shahid, 2018, p. 35) (Lama, 2004) (Hussein, 2012).

The task of Codification of *Shari'a* across the world has far reaching repercussion than a simplistic reading of interpretation of laws as per the need of the hour. The application of Muslim Laws by the secular civil courts controlled by judges with secular training have applied rationalistic principles that went beyond the religious or textual sources of Shari'a. In their attempt to balance religious laws with secular interpretation, the Courts and the Legislature has ossified *Shari'a* to permit unequal practice of polygamy with the permission of the Court alongwith penal sanctions in individual cases.

The process of Secularization has eventually caused a deviation from the Islamic understanding of the Law, which has obliterated the attempt to invoke the gender just interpretation of the verses of the *Qur'an*. This has led to a reductionist and narrow understanding of the sources of Islamic Law, much to the chagrin of the scholars and legal experts of Muslim Law. In countries like Egypt and Arabia, studies by Anderson and Coulson, have cautioned against the 'juristic opportunism' invoked by the legislatures who tended to mix up doctrines of different Schools to suit their narrow reformist and secularist agenda, eventually leading to adoption of non-Sunni/ Shia laws that has diluted the vibrancy and fluidity of the *Shari'a*/ Islamic law (Jerome D Anderson, 1967, p. 45). Thus, some countries like Syria and Iraq have permitted Polygamy if ordered by the Court and the financial status of men to co-habit more than one wife. It completely negates the principle of equity and justice to be ensured while managing rights and physical and mental requirements of the women.

The study of application of MPL across the globe calls for a tectonic shift in lexical and revealed interpretation of texts to the revival of Islamic Law by the State in consultation with the Muslim intelligentsia, scholars, and jurist-consult inorder to restore the *Shari'a* to its generic meaning and application.

Chapter 2

Evolution and Classification of the MPL in India

The preceding chapter traversed through the narrative of the Muslim and non-Muslim countries who have chartered their independent struggle either from a theocratic or a colonised political order to unravel distinct processes of 'domestication of *Shari 'a*'. Most of these newly independent Muslim states have accommodated *Shari 'a* in their constitutional order setting new agendas for Islamic modernism. However, several secular countries, for example, Turkey, Egypt etcetera which systematically ousted a theocratic regime to establish a modernized secular legal life were caught in the perils of translation of Islamic law. These countries are witness to the Islamic-reformist movements mobilised by figures like Rashid Rida and Sayyid Qutb in Egypt, Abu Ala Maududi in Pakistan and Mustafa Kemal Ataturk in Turkey challenging the imperialist construction of MPL.[17] The processes of modernization of *Shari 'a* whether applied to judicial traditions in Islamic world or the colonies of Asia and Africa have curtailed the progressive norms of Islam offered in its vibrant hermeneutical methods.

After broaching these trends across the globe, this chapter in continuum explores the resituating of the Asian juridical tradition in a country like India under the glorified age of Imperialism. The aim of the Colonisers to taxonomize the laws across its colonies by attempting to domesticate/codify *Shari 'a* paving the way for a modern law as, to borrow Ian Hacking's phase 'historically ontological' (Hacking, 2002). This process of Ontologizing had caused marginalization of Islamic juridical tradition resulting in similar constraints of translation of Islamic discursive tradition.[18] More Specifically, the genealogy of the MPL in India was internalized to the cultural-specific setting of a non-Muslim political order to usher in legal uniformity but produced new sites of contestation for the newly emergent order. The key argument that this chapter proposes is that the attempt to impose anglicized legal system, replacing the norms of the tradition of its subjects, has caused ruptures in contesting binaries of dialogical process during Independence. However, the post-colonial scholarship on the study of MPL in India

[17] See, for example, Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashīd Rid˙ ā*, Berkeley, University of California Press, 1966; Iqbal Singh Sevea, *The Political Philosophy of Muhammad Iqbal: Islam and Nationalism in Late Colonial India*, New York, Cambridge University Press, 2012.
[18] Faisal Chaudhry, ''Rethinking the Nineteenth-Century Domestication of the *Sharīʿa*: Marriage and Family in the Imaginary of Classical Legal Thought and the Genealogy of (Muslim) Personal law in Late Colonial India'' in *Law and History Review*, Vol 35, No.4, November 2017, pp.841-879, https://doi.org/10.1017/S0738248017000384 ,accessed on 2 August 2020.

is revisiting the colonial attempt at 'fossilising *Shari 'a'* as offering newer insights into process of negotiation on personal law system (Chatterjee N. , Law, Culture and History: Amir Ali's Interpretation of Islamic Tradition, 2014, p. 47).

The first section of the chapter details the piece-meal evolution of the Muslim laws in India as coursing through three phases. The first phase outlines the institutional edifice laid down by the Mughals that provided political and judicial mechanisms in which these MPL were to be governed by the state apparatus, namely the King's regulations/canonical law. The second phase saw a healthy transition of the English rule which required a partial patronisation and continuity of religious laws and administrative system to win political support from the states. Subsequently, the British rule co-opted the Mughal system into an anglicized codified rule of Courts and western secularised laws to consolidate its hold among the masses. Finally, the rise of the post-colonial Republican State that adopted, in toto, the Anglo-Muhammadan laws inorder to pacify the minorities by positing a 'non-interfering stance' in the religious affairs of the community in lieu of grounding a liberal secular state.

It is imperative to point out that this historical narrative has been popularised by the scholarship to highlight the "indigenous roots of secularism" by tracing its genealogy to Mughal policies of toleration and its replication in the British stance of, what Nandini Chatterjee called, "permissive inclusion" in which state gave primacy to customary laws than religious dictates to pacify the Muslims but in a way rupturing the very soul of Islamic law (Chatterjee, 2014, p. 396). This genealogy has, however, blurred the critical role that personal laws could have played as a conceptual category. The binary logic of religious and secular laws that was celebrated as a point of cultural disjunction between the Mughals and the English has been the pivotal cause of volatile sectarian conflicts and communal flare at the time of Independence.

The second section of the chapter deals with the detailed nuances of the ways in which the MPL have been classified in India, highlighting the differential positions of the jurisprudential Schools that have helped in interpretation of laws by the state and the community writ large.

2.1. Evolution of the Muslim Personal Laws in India:

2.1.1. Mughal Domination (1206-1857 A.D.)

Islam made inroads on the Indian landscape through incursion by Arabs through coastal trade routes of western peninsula around 643 A.D. They contributed by setting up of the Islamic structure of worship known as Mosques in Gujarat, Kerala, and Tamil Nadu. The invasion and conquest of Sindh by Muhammad Bin Qasim in 712 A.D earmarked the

establishment of the Sultanate period in India. This arrangement, unlike the erstwhile trade expedition, was a political and administrative one with the aim of establishing foreign rule of Umayyads on Indian soil.

The Sultanate period functioned in a perfunctory manner governed by five respective dynasties in a state of flux, namely, the Mamluk (Slave), Khaljis, Tughlaq, Sayyid and the Lodi. They gained political control through military prowess and tribal loyalty. The regular enforcement of *Shari'a* law was witnessed during Sultan Qutubuddin Aibak's reign in 1206 AD (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 40). The practice of the Muslim rulers ever since has been of restraint in the affairs of change in *Shari 'a* laws, though they were recognized and enforced as legal commands responding to the vicissitudes of time. The biggest contributions of the Sultanate period, spanning two Centuries, were that the slaves were treated at par with the Sultans, as witnessed in historical accounts, of rise of Qutubuddin Aibak, a slave of Muhammad Ghori as his Successor to kingship and Razia Begum became the lone Muslim woman to adorn the mantle of reign at Delhi.

The Mughals established their political suzerainty in Indian sub-continent between 1526-1857. This lengthy timeline of history falls into two distinct phases of the ear of "Great Mughals" (1526-1707) and the Lesser Mughals" (1707-1858) (J.N.Sarkar, 1920). A Mongol leader, Babur, defeated Ibrahim Lodi at Battle of Panipat using gunpowder. His rule extended from Kabul to Bengal. His Successor Humayun was caught in frequent political strife and intrigue by local rivals. He was succeeded by Akbar who is credited with consolidating the whole of India into a single centralised rule expanding from Qandahar and Baluchistan in west to Kashmir in North, Bengal in east to Gujarat in South.

The Muslim Rule under Akbar saw a tectonic shift in the cultural, religious, and linguistic landscape on India. He patronized the Persian and Arabic language and harmonised it with the vernacular leading to the promotion of Urdu and Hindi as the official court languages. The period is also credited with pioneering an accommodative culture of pluralism and religious diversity wherein the birth of Hindustani music, Qawwali and Kathak. His tolerant approach led to a fusion of Hindu-Muslim religious tradition, popularly known as the *Din-e-Ilahi*. He abolished the taxation system on the non-Muslims and maintained an eclectic mix of religions to accommodate, laying the foundation of a composite Indian culture. He even reduced the role of the *Qazi*s as pleaders for Muslim law and harsher

forms of punishment like nose or ear cutting and death penalty. Akbar's legacy was continued by Jahangir and his grandson Shah Jahan (J.N.Sarkar, 1920).

These actions were carefully dissuaded by Aurangzeb who was known for his zealotry. He re-introduced the *Jizya* and brought in *Shari 'a* law to control the population and even denounced any form of music. The *Shari'a* Laws were premised on the customs and the dominant *Nass (binding* ordinance based on *Qur'an* and *Sunnah*) prevailed. In a country like India where large-scale conversion happened from Hinduism to Islam, it was beneficial to retain the customary laws for the members of the community to enjoy a sense of propriety in society. In this context, *Fatwa-e-Alamgiri* translated by Neil B.E. Baillie in two volumes became the authority on Personal laws relating to class of Hanafi in Sunni and Ithna Ashari in Shias, respectively. (Baillie, 1865). It was composed around the modern city of Delhi by Muftis selected by the reigning emperor. It is a collection of *fatwas* (opinions of jurisconsults) drawn up by Shaykh Nizam Burhanpuri implementing the orders of Emperor Aurangzeb Alamgir during the I7th century A.D. It helped legitimised the acculturation of South Asian majority within the Islamic model that was premised more on the Iraqi model than the Central; Asian counterpart like *Al-Hedaya* (Pirbhai, 2018).

The establishment of numerous *Madrasahs* had strengthened the indigenous languages like Hindi, Urdu, and Persian in drawing a long honourable tradition of theology across India based on study of Grammar in Punjab, Hadith at Delhi, logic and philosophy at Rampur and theology at Lucknow (Nadwi, 1936, p. 15). The death of Aurangzeb in 1707 marked the end of Greater Mughals and rule of independent rulers who eventually were controlled by their wazirs or ministers.

The Mughal King functioned as the "highest court of appeal" advised by his jurist-consults of the Hanafi School. He commanded the sub-structure of the Court system headed by *Qadi-al-Qudat* and a *Sadr-al-Sudur* wherein the former presided and settled cases and the latter managed affairs of endowments and Madrasahs and non-Muslim establishment (M.L.Bhatia, 1992). The Mughals, thus, strengthened this differential process and upheld the social virtues to be cultivated by the Judges to act with objectivity and fair mindedness (J.N.Sarkar, 1920, p. 22).

The Indian subcontinent has, since the I5th century A.D. and even earlier, been the home of famous Schools of Hanafi law. There are, till date, flourishing madrasahs of the Hanafi School at Deoband, *Firangi Mahal* (Lucknow), *Nadwat al-'Ulama'* (Lucknow),

Saharanpur, Jaunpur, and other places. The Ithna 'Ashari Shi'i have Schools, such as the *Madrasah al-Wa'izin* at Lucknow, from which, after preliminary training in India, they proceed to Iraq for further studies and come back full-fledged mujtahids. There were no *Madrasahs* of the Shafis, Malikis, or Hanbalis. The Da'udi and the Sulaymani Bohoras have small groups studying their own theology (called *haqa'iq*) at Surat, Baroda, Hyderabad, and Bombay. Of all the Schools of Hanafi theology, the most renowned and aptly called the "Azhar of the East" is the *Dar-ul-Uloom* of Deoband. It is supported by *Nadwat al-Ulama* of Lucknow, established by Shibli Numani, who has written masterpieces on Islamic theology and philosophy.

During the rule of Mughals, four-fold classification was made to mark the difference between *Shari 'a* (sacred laws) and *Qanun* (secular laws):

a) CANON Law (*Ahkam-i- Shari 'a):* dealt primarily with the religious matters relating to practices of apostasy, conversion, and heresy.

b) CRIMINAL LAW (*Ahkam-i jinayat, Qanun-i Fawjdari)* detailing punishment for crime e.g., theft, negligence, adultery, and intoxication and the law of torts.

c) The KING'S COMMANDS (*Qanun-i Shahi*). It entailed the *farmans* (decree) and *dasturu'l-'amal* (commands) on land under feudal tenures. They may be compared with the edicts of the Romans, the Orders in Council of British Kings, and the *Qanun* of Turkish Sultans, and,

d) CUSTOM, USAGE (Qanun-*i'-Urf*): The dharma held that the custom would override the written text of law (Choudhury, 1947).

The judicial system under the Mughals primarily settled matters on lines of Hanafi thought of Islamic law though at times the Maliki Jurisprudence was also referred to during Akbar's reign. There evolved a specific set of laws called "*Ains/Ahkams*" which were eclecticized laws dealing with different branches of administration like law, finance, revenue etcetera as available from the reading of scholars of texts like *Ain I Akbari, Dastur-ul-Amal -i-Akbari.*

The application of Muslim laws of marriage, divorce and inheritance was extended uniformly on both the Muslims and the Hindus. Yet, they did not interfere in the customary and tribal laws like the practice of Sati, Devadasi, and customary laws of the Khojas or

Memons. It was only in cases of matters concerning Hindus solely was it settled by the "Caste Panchayats" (Choudhury, 1947, p. 369).

The Mughals lost its vitality and vigour to the conditions of law and order and economic boost that created a new class of capital owning groups like the petty landlords, tribal head, and merchants. This new mercantile class contrived and allied with the European trading companies to overthrow the centralised Mughal rule in favour of a 'successor- state' status that worked on financial suzerainty (Pirbhai, 2018). There has been a growing sense of unrest and dissatisfaction among the indigenous population owing to the drain of the treasury of state to pursue military ambitions. There was absence of inducement for revenue officials whose self-interest were ignored by the Mughals. Their gun powder technology had given them an edge but not enough dexterity to face advanced technology of the Britishers. By the middle of 19th century, the British almost took over tracts of Mughal empire through treaties and alliances.

2.1.2. Colonial Encounter (1661-1950 A.D.)

The process of legitimization of the English reign in India commenced with the adoption of the Charter of 1600 and 1609 that equivocally spelt the authority of English Laws as,

> "*.....so always that the said laws, orders, constitutions, ordinances, imprisonments, and fines be reasonable and not contrary or repugnant to the law's statutes, customs of this our realm*" (M.C.Setalvad, 1960, p. 26).

The transfer of power to the East India Company in the evolutionary stage saw the acceptance of policy of principled distance from meddling with the native laws of the communities, as spelt out in the Charter of George II, 1753 (Morley, 1858, p. 241).

The necessity and effectiveness of **the process of codification of the laws** was dealt by Lord Macaulay who advocated for "*codification of law on the principle of uniformity when you can have it, diversity when you must have it, but in all cases certainty*" (B.K.Acharya, 1914, p. 14).

The First Law commission composed of T.B. Macaulay and four other members namely C.H. Cameron, J.H. Macleod, G.W. Anderson, and F. Millede. It initiated its work on drafting the codes in 1835 and worked up to 1843. The first step was to separate judicial punishments from religious sanctions covering all sections of population uniformly. The government enacted laws outlining the Code of Civil Procedure (VIII of 1859) by Second

Law Commission under John Romilly and seven other members, the Penal Code drafted earlier by Macaulay was passed in 1860 and the subsequent Code of Criminal Procedure (henceforth Cr.P.C.) (1861) came in. Second Law Commission at that time was categorical in opposing the codification of personal laws of the communities. However, Third Law Commission set up on 2nd December 1861 drew the preparation for draft of laws on Inheritance and Succession applicable to all except Hindus and Muslims (Williams, 2006).

The reforms introduced by the British in the erstwhile existing laws of the Mughals started with the abolition of the outdated Islamic criminal law system and its substitution with the Indian Penal Code, 1860. It settled the general age of majority at 18 under the Majority Act, 1875. A High Court was established in three Presidencies in 1851, originally, and later extended to other promuslim women inces, under the Indian High Courts Act (Pirbhai, 2018, p. 103).

The formative period of Anglo-Muhammadan Jurisprudence (1771-1832) saw the trading of political needs for continuance of Islamic language of laws to woo the rulers. The nomenclature of "*Muhammadan"* was drawn on the analogy of name of followers of Islam like the name Christian derived from Christ. The concept was misconstrued to deal with religious-based laws that were in contradiction to Muslim religious norms and injunctions. The later scholars and jurists were cautious to, hence, imply the term "Muslim laws" to Muslims anywhere in the world (Mahmood T. , Family Law Reforms in the Muslim World, 1972, p. 12).

The *Shari 'a* was reified to allow the British jurists to frame laws in consonance with Colonial administration invoking the 'indigenous' Mughal practice of '*Siyasa*' that meant the political right of rulers to deal with the irregularities by overstepping the formal procedures. Hastings has been discredited by scholars to misread and manoeuvre the procedural ethos of *Siyasa*[19] to define the "British sense of justice and right", thereby slowly obliterating the real essence of *Siyasa* of Islamic law (Kugle, 2001, p. 258). It paved the way for the creation of the "Anglo-Muhammadan' model of system of laws which eventually became a hybridized attempt to impose Occidental limitation on Islamic law.

[19] *Siyasa* is a method of negotiation for finding resolution by manipulating or mobilizing relationship between people or groups, See Aziz al-Azmeh, *Islam and Modernism*, New York, Verso Press, 1993, p.91.

The passing of the Mufassil Regulation of Warren Hastings, 1772, provided,

> "*That in all suits regarding inheritance, marriage and caste, and other religious usages or institutions, the laws of the Koran with respect to the Mohammedans, and those of the Shastra with respect to the Gentoos, and where only one of the parties shall be a Mohammedan or Gentoo, the laws and usages of the defendant shall be invariably adhered to*" (Rankin, 1946, p. 50).

It was expropriated as a statutory law in the Settlement Act of 1781 that on the face of it imparted sovereignty in governance of private affairs of both communities but held a hidden motive of political consolidation of the Empire. These *Shari 'a* laws were not applied in totality but divided into policies of convenience, like:

A) Rules that are expressly implied like laws of property

B) Rules that are applied to standards of justice, fairness, and good will, and

C) Rules which are not applicable on private affairs like the Criminal law or Law of Evidence (Fyzee A. A., Muhammadan law in India, 1963, p. 413).

Monumental works on Islamic laws like *Fatwa i Barahaniyya* of Akbar's reign and *Fatwa-i-Alamgiri* of Aurangzeb's period were substituted by translation of *Al-Hidaya* of Burhan-al Din al-Marghinani. The logic of codifying the religious laws entered the British lexicography owing to the Utilitarian influence of Bentham who wished to reduce a complex system of process of interpretation of laws into a uniform process and systematise it in such a fashion to close the internal process of reforms. There were inadequacies and question of authenticity posed on the reading of principles of religious laws that led to William Jones's *Compilation of Digest of Hindu and Mohammaden Laws* on the model of Justinian's inestimable pandect (Teignmouth, 1807, p. 306). Jones had published the *Al-Sirajiya* on Inheritance in 1792 researched on the Hanafi law of Jurisprudence. Act XI of 1864 brought an end to the institution of native law officers and new draft codes were to be prepared for both Hindus and MPL. In 1825 William Macnaghten published his '*Principles and Precedents of Muhammadan law'* that remained a standard text of reference till the coming of Neil Baillie's' *Digest of Mohammaden Law* in 1865. Baillie was the first to come out with a separate digest on Shia Laws (*Imameea*) in India. Subsequently, Syed Amir Ali published his monumental work in 1912 that led to the organisation of Islamic laws in English catering to the needs of the Bench and the Bar. This

attempt at creating uniformity in authoritative text could facilitate the crystallisation of case-laws that could help the jurists in future to override the authority of the *Qazi* and pass it in the hands of company's office (Hallaq, 1995, p. 85).

The *Shari 'a* was essentially rationalized to create a formal schema of rules that could suit the Western idea of economic and political expansion. This defaming of Orientalist Islamic society by Weber as "irrational and caught in tyrannical web" was the rationale for the reductionist reading of *Shari'a* laws as outdated and unscientific (Turner, 1978, p. 57). As illustrated in the case of following the translation of *Hedaya*, Hamilton resorted to the opinions of the student of Abu Hanifa, namely Abu Yusuf and Imam Muhammad to suit the requirement of the system, without divulging in the necessity of understanding the Islamic legal practice. Thus, Hamilton outsmarted the Mughal's multi-layered application of religious texts to distinguish between ordinary and extraordinary justice by collapsing textual *Shari 'a* as a monolithic decree. It remarks their level of ignorance of the *Fiqh* to create a Utilitarian, secular, and individualist legal tradition to boast of their superiority of bureaucratic system. The *Qazis* were co-opted in the system to fetter their powers to interpret the texts and were used as stooges of the Imperial administration (Kugle, 2001, p. 264).

The Britishers completely distorted the structure of Mughal system of civil and criminal courts known as the *Diwani* and *Fawjdari* Adalat working at *mufassil* (lower) and *sadar* (higher) level. The Company's judiciary was bifurcated into dual system of Crown's court in the Presidencies and *Mofussil* courts in the countryside. They filled these courts with inept Englishmen in assistance of naïve and corrupt "native law officers" who adopted a caricatured understanding of Muslim law (Parker, 2001, p. 185).These courts started ascertaining Islamic law on secular codified rules that eschewed allowance of customs, juristic preference, and principles of equity (Kozlowski, 1997, p. 222).

Legal Fallacy of the British Courts in the Interpretation of MPL:

The application of personal laws guaranteed that respective religious codes will be invoked in settling disputes between the concerned parties, whether a Hindu or a Muslim. The Britishers used the tactic of cunningness and conceit to apply the preferred provisions of English Law in matters of contract and property.

In (*Doolubdas Pettamberdass v Ramloll Thackoorseydass and ors*, 1850) case, the Bombay SC applied the English common law to decide whether a time bargain in a wager

on the future price of opium at one of the government public sales was a valid contract. Herein both the parties were Hindus. The Court overriding the application of personal laws of Hindus based on the religious status of the concerned parties settled the matter based on evidence and facts put forth by the parties. Similarly, the Muslim law of pre-emption came to be enforced in U.P. and Bengal on the ground of equity. In *(Ibrahim Saib v. Muni-mi-ud-din*, 1870) case, it was settled that the pre-emptive right can be exercised under the Muslim law , both by the vendor and vendee, when pre-emption is not related to customs or statutes. However, the High Court of the Madras Presidency refused to apply the law of pre-emption on the ground that it was inconsistent with the principle of perfect freedom of contract administered in Madras. Thus, a sense of anomaly prevailed in the interpretation of the laws left to the limited understanding of the English judges primarily due to the advent of High Courts and the activism of the Privy Council as the ultimate courts of Appeal (M.C.Setalvad, 1960, pp. 32-33).

In the famous *Wakf* case of (*Abul Fata Mohomed Ishak v Russomoy Dhur Chowdhry*, 1894) while taking cognisance of the Common law, the trusteeship of the *Wakf* land, legitimate as per the MPL, was declared as unlawful. Thus, it can be concluded that the procedure applied in handling of civil matters of the country pointed to a trichotomous scheme with varying order of preference between religious laws, customs, and legislations as 'Supreme Rules of Decision' (Mahmood T. , Muslim Personal Laws: Role of State in the Indian Sub-Continent, 1983, p. 31). In most cases of interpretation of Hindu law, the customs took primacy over religious laws. But the Britishers were cautious in applying religious dictates spelt out by Muslim jurists and scholars while handing civil affairs of the community. The method adopted was the principle of eclectic choice that signified choice of opting the interpretation of any School of Jurisprudence in lieu of the alternate School to which the party might belong to, depending upon the prevailing condition. Thus, the judges exercised autonomy of mind and reason in applying the principle of religious laws and injunctions based on their reading of the indigenous law

The term *Wakf* according to Hanafi authorities meant,

"*tying up of the corpus of a thing under the rule of God's property so that the owner's proprietary rights are extinguished and is transferred to God for any purpose under which its usufruct may be applied for the benefit of mankind*" (Hamilton, 2014, p. 231).

The Ithna Ashari authorities look upon *Wakf* as a "*contract the effect of which is to tie up the original of a thing and lift its usufruct free*". Under the Muslim law, *Wakf* may be created by a dedication inter vivo and by means of a Will. The *Wakf* may also be created during the death illness (*Maraz-ul-Mout*). According to both Shafi and Hanafi law, in a valid *Wakf* there must be an intention to create a *Wakf* and a declaration to the effect that a *Wakf* is being created. A *Wakf* made orally is equally valid. In British India, the Courts failed to keep the institution of *Wakf* away from the influence of western Jurisprudence which required that the object of every trust must be specified with certainty. Many courts applied the provisions of Trust Act to *Wakf* that resulted into the emergence of a conflicting rulings.

Islamic law recognised family settlement (*Wakf- alal- Aulad*) as valid because there is a saying that "a charitable offering to one's family is more pious than alms - to beggar." The High Court of Calcutta in *Abul Fata v Russomoy Dhur Chowdhury* case derecognising family *Wakf* held that,

"a dedication must not depend upon an uncertain contingency such as possible extinction of the family"(Fyzee A. A., Cases in the Muhammadan Law of India, Pakistan and Bangladesh, 2005).

The judgement was affirmed by the Privy Council leading to resentment by jurist like Syed Ameer Ali, Maulvi Muhammad Yusuf and Nawab Imad-ul- Mulk. Mohammed Ali Jinnah moved a *Wakf* Bill in the Legislature to remove the hardships caused due to the decisions of the Privy Council. This was enacted as the *Wakf Act* of 1913 restoring the validity of legality of (*Wakf al-Aulad*) created in accordance with the various Schools of Islamic law. Section 4 of the Act categorically states that,

"no such *Wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious or charitable purposes of a permanent nature is postponed until after the extinction of the family, children or descendants of the persons creating the *Wakf"* (A.J.Wensinck, 1932).

Though it was decided that the *Wakf* Act of 1913 would not be enforced from retrospective effect but again to the opposition of the community, it was validated to retrospective effect in the Muslim *muslim ordinancne* Validating Act, 1930.

Another striking case of conflict of customary laws with the Islamic personal laws of the community was witnessed in the provincial legislatures of Punjab, North West Frontier provinces and Kashmir. The Nawabs and Talukdars of these provinces would Will away their entire property, against one-third permissible under Islamic law, to their heirs. The Nawabs also with the help of a legal fiction resorted to the practice of adoption which was not recognised by the Quran. These customs and usages sanctioning exclusion of woman from inheritance, unfettered right to testamentary disposition of property and adoption were enforced by the court in preference to Islamic law in accordance with the laws enforced in northern and central India, for example the Punjab Laws Act 1872, the Central Provinces Law Act 1875 and the NWFP Law and Justice Regulation, 1901 (Mahmood T. , Muslim Personal Laws: Role of State in the Indian Sub-Continent, 1983, p. 38).

The Succession Act of the Mappilas of 1918 outlined the departure of adherence to Islamic laws of inheritance and property with respect to their local customs and traditions. The Mappilas shared with the local Hindu communities of South Kanara and North Malabar, the Mappila Marumakkathayam in Madras a customary law of female matrilineal system of inheritance prevalent in the practices of *tarvad* and *tavazahi*. The Act abrogated the customs spelt out in Section 2 and 3[20] of the Central Provinces Law Act 1875, to the exception of State of Hyderabad wherein no custom in derogation to the Shari 'at Act holds any validity. Another illustrative case was that a Khoja could, by custom, 'Will away' the entire property under the Cutchi Memons Act of 1920 but this was later repealed by the act of 1938 that abrogated the customs of the community on principle of uniformity of Islamic law of inheritance and Succession on all irrespective of difference of class, sect or caste (D.F.Mulla, 1905, p. 25).

The Britishers took a revolutionary step in introducing uniformity in the Muslim law with the announcement of the annulment of the erstwhile legal orders and the subsequent passing of the Kazis Act, 1880, Mussalman Wakf Validating Act, 1913, Mussalman Wakf Act, 1923, Mussalman Wakf Validating Act, 1930, the Shari 'at Act, The Cutch Memons Act, 1938 and the DMMA.

The **introduction of a *Shariat* bill** on 28 September 1935 aimed at codifying a uniform system of Muslim laws that were not overridden by the customary laws of different principalities or communities. The provincial Jami' at-al-Ulama of the NWFP launched a

[20] Section 3 deals with adoption, wills, and legacies.

movement in the early 1930s demanding enactment of a law making it compulsory for all the Muslims of that province to follow the *Shari 'a* law. Under the supervision of Mufti Kifayatullah, the then president of the Jami' at al-Ulama Hind, the proposed law was drafted. The Bill met with fierce criticism from Mohammad Ali Jinnah as he belonged to the Khoja Ismaili community, demanding continuation of religious laws of legitimizing Adoption of the child and bequeathing property at will. His demand was met along with a caveat that rest of the matters of Muslim law will be governed by this General Shariat Act. This Bill was passed as the *(Shari 'at)Application Act,* 1937. The Act provided that

> *"any question regarding succession, special properties of family betrothal, marriage, divorce, dower, guardianship, minority bastardy family relation, will legacy, gifts or any religious usage or institution including Wakf the rule of MPL (Shari 'a) shall be applied in cases where the parties are Muslims"* (Mahmood, Muslim Law in India and Abroad, 2016, p. 30).

The *Shari 'at* Act of 1937 repealed all the erstwhile local laws applicable in the provinces of Punjab, Central provinces, Oudh, Ajmer, Mewar, Madras, NWFP, Bengal-Bihar-Orissa, Agra and Assam which had the effect of placing MPL above customary usages. The Act is applicable to all kinds of property to the exception of agricultural lands, testamentary succession, and charities other than the *Wakfs*. Thus, it applied to all the suits, proceedings and suits that are pending in prospective effect (*Robaba Khanum V Khodadad Boman Irani,* 1946). The effect of the Act was to take away from the legislature the power to bring necessary modification, alteration, and amendment in Muslim laws according to the need of the hour.

Curiously, the term 'Muslim' is not defined, and the Act is also silent about different Schools of Jurisprudence. Although the law and the courts have treated all religions with equality and non-discrimination in India, yet it applied the Muslim law to all the Muslims who by birth or conversion professed the religion of Islam, without acknowledging the heterogeneity of their practices. Secondly, if one of the parents to the child, predominantly the father, is a Muslim then based on the paternity of the child, he/she will be considered a Muslim (Skinner v Orde, 1875). Thirdly, a court is not concerned about the peculiarities of beliefs so long as the minimum belief exists and hence, despite the non-recognition of Ahmadis as Muslims by society or the Shias by the Sunnis, the court has favourably granted them the status of being a Muslim (*Narantakath v Parakkal,* 1922). Finally, in

matters of conversion of the Muslims, the court has held a uniform opinion that any conversion that is not colourable will be acceptable without going into the test of sincerity of beliefs (Abdoor Razack v Aga Mahomed Jaffer Bindaneem, 1894).

Similar enactments were adopted for other members of the community like the Native Convert Dissolution Act, 1866, Indian Divorce Act, 1869 and the Indian Christian Marriage Act, 1872, Indian Majority Act 1875, Parsi Marriage and Divorce Act, 1937 along with the autonomy of will to be covered under Hindu Acts in cases of adoption (A.J.Wensinck, 1932).

The backdrop of the **passing of a Divorce Act** was owed to the partial and conservative role of the *Qazi*s in their role to dissolve a marriage based on specified Muslim legal treatise. Ubiquitously, the Indian *Qazi*s would govern and settle all the cases based on the strict Hanafi law despite precedents from religious tradition to exercise eclectic choice that can help the marginalized women to get rid of marriages liberally. They followed the procedural process of applying only those rules of the School to which the party belonged. Some of the liberal Muslim jurist took note of this inequality and proposed a new Muslim law on *Faskh e Nikah* (that is dissolution of marriage that can be settled based on applying more liberal practices of the Maliki School in judicial decisions). It was a landmark step allowing Muslim women to seek divorce with the help of the intervention by the Court. Surprisingly, the Bill earned the support of traditional scholar like Maulana Ashraf Thanwi (Mahmood, Muslim Law in India and Abroad, 2016, p. 67).

Mohammad Ali Kazmi sent this bill for consideration to the government which was eventually passed as the DMMA that relied on the fundamental principles of *Qur'an* in cases of divorce based on necessity. It is written "if a woman be prejudiced by marriage, let it be broken off" (Thanwi, 2005, p. 35) . This fundamental principle is acceptable to all the Schools which were divergent in their opinion as to the circumstances which should be held prejudicial to a married woman necessitating the application of the principles and about the procedure through which a woman's marriage could be dissolved. At one extreme there was a Maliki School which allowed the *Qazi*s to dissolve a woman's marriage on a wider variety of ground. At the other end was the Hanafi School which restricted a Qazi to dissolve a marriage at the behest of a woman. In India, the Hanafi law is followed by most of the Muslim. The DMMA removes the difficulty confronted by Muslim woman in getting divorce more readily and with lesser harassment in courts.

Scholars like Ameer Ali and Seymour Vesey-Fitzgerald argued that the Mohammadan marriage is a civil contract and conditions causing physical cruelty, desertion, persistent contraction of a loathsome disease, insanity, misrepresentation, and lack of *consensus ad idem* on a vital matter would be sufficient ground for dissolution of marriage at the instance of the wife (Ali A. , 1986), (Vesey-Fitzgerald, 1931). They advocated that Section 2 of the DMMA promised wide usage of the practice of delegated divorce by wife in court. Section 4 of DMMA provides that the renunciation of Islam by a Muslim wife or her conversion to another faith was by itself to operate as ground to dissolve her marriage. Section 5 makes a provision safeguarding all rights which the married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage. This was modified under the Repealing and Amending Act, 1942 (25 of 1942) (Ali A. , 1986).

The biggest controversy of the marriage of minor on attaining the age of puberty as young as 09 years for girls and 12 years for boys *(Attiqua Begum v Mohamamd Ibrahim,* 1916), with the help of the guardians and the consent to be availed at the later age was challenged and abolished by the passing of the Child Marriage Restraint Act of 1929 applicable on all the communities. The Act also known as the *Sarda* Act after the name of its chief Architect Haribilas Sarda prohibits marriage of males below 18 years and females less than 14 years. Subsequently, in 1949 by an amendment to the Sarda Act, the minimum age for marriage of the girls was raised to 15 years. The *Sarda* Act aimed at restraining a child marriage and punishing those who are responsible for it. But it does not say anything about the validity of such marriages. It met with fierce resentment at the hands of the orthodox section of Muslims who continued a civil disobedience movement under *Jamiat-Ulema-e-Hind* but soon lost ground due to the passing of similar provision in personal laws of other Muslim countries like Turkey, Egypt, Jordan, Syria etcetera (Mahmood, Marriages:Age in India and Abroad: a Comparative Conspectus, 1980).

A larger debate ensued about the codification of MPL in India which was attempted in partial form with the passing of the DMMA following examples of Turkey, Egypt, Iran, and Palestine. In totality, the Colonial encounter with the adjudication of personal laws saw a balancing of act of enacted laws, personal laws, and customs. They attached supremacy to customs and usage over religious dictates established by legislation in different parts of the country (*Neelkisto Deb Burmon v Beerchand Thakoor & Others*, 1869) *(Azim Unnissa Begum V Clement Dale*, 1871). Most of religious laws are inimical to the idea of conversion to other religion, as evident from the provisions of the Native

Converts Marriage Dissolution Act, 1866 allowing for a special circumstance in which a native Christian could seek dissolution of his/her marriage which had taken place before conversion. However, under the Mohammedan Law, if a Muslim spouse converts to any other religion, his/her marriage stands dissolved immediately. That is why the Mohammedan who converts to Christianity cannot take resort to sections 4 and 5 of the Native Converts Marriage Dissolution Act 1866.

The position of Muslim wives who convert to Christianity is slightly different after the enactment of the DMMA which gives Muslim women a statutory right-, that the marriage of a Muslim, woman would not be dissolved by reason of her conversion to another religion. Thus, she finds herself in an odd position as according to the DMMA which governs her as an ex-Muslim, she is not free of her marriage under the Native Converts Marriage Dissolution Act which applies to her as a neo- Christian, she cannot sue for her husband's company. Thus, she suffers in both ways.

The entire gamut of Personal laws became religious oriented to the exception to the passing of the Special Marriage Act of 1872 that faced fierce opposition at the hands of both Hindus and the Muslims. Many scholars have argued in favour of more liberal notions of gender justice in Personal laws at the hands of Britishers (Parashar, 2000, p. 141). But the question remains as to how far can we allow the western imposition of legal reforms in the pre-defined role set of our socio-cultural customs and mores? Moreover, in the wake of the conspicuous absence of the idea of common Civil Law, the issues of inequality and denial of entitlements to the marginalized section cannot be obliterated without sovereign censure.

The Britishers have primarily through the process of codification marred the fluidity and flexibility of diverse cultural practices of the communities and adopted a more inimical and status-quoist stance to the interpretation of laws considering vicissitudes of the contemporary times. The State actively contributes to identity politics by recognising people in terms of their communal identities and downplaying the divide and rule tactics against another. Francis Robinson aptly argues that the British colonial administration understood Indian society primarily in terms of the Hindu-Muslim differences.

Critics of Ossification of *Shari'a:*

The methodology of *Taqlid* adopted by the Britishers met with fierce criticism from all quarters of Islamic scholars. The process of Codification had stifled the fluidity of

divergent opinion or reading of texts for a more adaptive and conciliatory adjudication. The scholars have defined this process as the 'real closing of the gates of *Ijtihad*' to sheer imitation (*Taqlid*) of secondary texts as authoritative side-lining the authenticity of original text and tradition.

The doctrine was held responsible for the political decline of the Islamic Jurisprudence. It exhausted the dynamism of a rational method of *Fiqh* which was new rule searching to extend authoritative text to deal with present conflicts. In the famous case of *Baqar Ali Khan*, the Privy Councillor Arthur Wilson rejected the position of the Muslim jurist, Sayyid Mahmud, who had upheld the legitimacy of private *Awqaf*. (*Baqar Ali khan v Anjuman Ara Begum,* 1902) (Kugle, 2001). The Britishers presumed the Shari's to be a static entity wherein formal rules of behaviour were unchangeable inorder to justify their application of Utilitarian principle of 'justice. fair play and right conscience' (Kozlowski, 1997, p. 225).

A point of concern was that the prevailing Muslim scholars in South Asia like Fyzee, Syed Amir Ali, David Pearl and many more were blinded by the British system of learning and their translation of religious texts despite quoting original sources from Arabic text were nonetheless an imitation of 'common law doctrine of precedent' spelt out in the Anglicized law. They further justified the closure of method of I*jtihad* to justify the needs of Indian Muslims.

The first systematic attempt at critiquing the naïve understanding of the Islamic law was initiated by Faiz Badruddin Tyabji who was a renowned lawyer exposing the limitation of the Colonial project due to the latter's ineptness over the language of Islamic text and traditions. He was sceptical of the adeptness of the jurists who took decisions in isolation and ignorant of the dynamism of religious text and practices.

Another profound critique of the Anglo-Muhammadan Law came from a rationalist named Muhammad Iqbal who tried to draw semblance between 'self-worth of the tradition' within the modernity project. While opposing the '*ossification of Shari 'a'*, he wished to rescue the Islamic Modernity project in India by offering the principle of collective Ijtihad established by the legislature. Iqbal believed in the class of Organic Intellectuals of lawyers to spearhead the bandwagon of revolutionising the laws through the process of Ijma. Thus, he reposed trust in the European Legislature/Assemblies to undertake the modernising project that could subsume regional dialects, sects and local authority (Iqbal, 1934, pp.

131-156). In the wake of debate on closing the gates of *Ijtihad* owed to the crystallisation four Schools of Jurisprudence, rise of other worldly Sufi mysticism (*Tasawwuf)* and political sacking of Baghdad by Mongols, he invoked the concept of *Shura* that is government collaboration between political power and social authorities (Kugle, 2001). One can witness a profound impact of colonial intervention in his writings in chartering the domain of Modernity in Islamic law in South Asia.

Finally, the disruption of older structures of legal authority led to the rise of vernacular religious seats of learning like the Deoband School which played a critical role as non-state mechanisms of adjudication contesting every day the centralized code of Muslim law through its *fatwa* (opinion/decree) department (Metcalf, 1982, p. 35). These *Fatwas* contributed to the rich historiography as a site of contestation in which traditional subjects like the *Ulemas* or the Clerics actively shaped legal outcomes at the level of society. Though both the Britishers and the Clerics benefitted from the malleable state structure in maintaining dominance, the real victims of the statist order were the women on whom the laws were applied to strangle their right to freedom and equality, much in contradiction to the favourable Quranic position for women on personal laws.

2.1.3. Post-Colonial India (1950 A.D. onwards)

The response of the post-Colonial Indian State, to the demands of its citizens deeply embedded in the ascriptive identities of gender and religious identity, was caught in the ties of power structures of the two-binary position of the Hindu and the Muslim community. The recognition of the FR of the citizens explained the vision promised to the individual citizen-subject overpowering the concerns of caste, religion, and gender (Austin, 1999, p. 25). Although it promised to secure a secular and egalitarian state-society relation but eventually appealed to the rights of the men and the dominant caste and class of the social order.

The focus of Muslim politics in India lay in negotiating with the assimilationist State in furthering the demand for celebration of autonomy in personal affairs, recognition of cultural and religious practices of the community and demand for proportionate representation. The Indian State acknowledged only the demand for autonomy of personal affairs by maintaining the position of non-interference vis a vis the demand for reforms of the personal laws of the Muslim community. The structure of the Anglo-Indian legal system continued to hold long-term implication on the growth of Personal laws of Muslim

in India post-independence. The way in which liberal State responded to the issue of reform of laws of the minority communities tends to 'rigidify' the customary practices, much to the chagrin of the victimised minorities within minorities. The trajectory of the growth of MPL in India is internalized in the cultural-specific and historical setting of a non-Muslim political order.

The provisions governing the MPL in post-Independence period has been adopted per se from the British India with the continuation of the Shariat Act, subject to legislative changes under the federal design. The Muslim Personal Law *(*Shari 'at) Application (Madras Amendment) Act 1949 extended the law to agricultural land and non-*Wakf* charities and applicable to other states like Andhra Pradesh, Tamil Nadu and Karnataka. In Kerala, the act was amended in 1963 to extend it to the agricultural property. Exemptions of Will, Legacies and Adoption has been made in the Shari 'at Application Act to function as a temporary measure. So, the government of India continued with the anglicised-codified laws of Shari 'at Act and the DMMA (Mahmood, Muslim Law in India and Abroad, 2016, p. 39).

Religious freedom encapsulated in Articles 25 to 29 of the Constitution offered a secular and liberal promise of celebration of group differentiated rights of the community as spelt out in personal laws. However, the Parliament and State Legislature can under Article 246 (read with List III, Entry 5 in the Seventh Schedule) make laws on the matters of personal law since the commencement of the Indian Constitution. Article 372 provides legitimacy to the pre-constitutional legislations as valid unless lawfully altered, repealed, or amended by a competent authority (Austin, The Indian Constitution:Cornerstone of a Nation, 1999). Article 44 which promises the adoption of a UCC should bring uniformity in the personal laws of different communities. Thus, MPL operate in a queer atmosphere of the examination of community rights in a liberal State.

The State had since its inception maintained principled distance from religion in politics to comply on the principles of secularism. The FR of the Constitution testify this position in terms of celebration of group-differentiated rights of the minority, subject to reasonable restriction in the name of public health, order, and morality. However, the politics of accommodative diversity is juxtaposed to the State's objective of a UCC as enumerated in the Directive Principles of the State Policy (henceforth DPSP). Different governments have oscillated between these conflicting positions in the wake of larger vote bank

politics. Till date, minorities enjoy a sense of autonomy in the handling of the personal affairs of the community.

The Indian legal system in context of the MPL continues to apply the doctrine of Hanafi *Fiqh* for the predominant Sunnis, with a sizeable population adhering to Shafi and Isma'ili ideology. However, both the Sunnis and the Shias have drawn a distinct contour of Personal laws embedded in the cultural specificity of the Indian society. At the outset, it was pertinent to define the term "Muslim" in a heterogeneous and diverse population of country like India.

Application of MPL on Converts to Islam and their Customs: Study of Khojas, Bohoras and Memons:

The MPL are applied to all the Mohammedans of the country, whether by birth or conversion. As regards conversion, the judiciary decides whether the profession of Islam is coloured in the hue of coercion or choice. There are two such classes of Muslim convert in India on whom the law applies in partial fulfilment of their community rights. For example, in case of the Khojas and the Bohoras of Bombay and Moselman of Bharuch in Gujarat, the application of MPL works with the caveat of celebration of their customary laws in certain matter like testamentary succession. While amphibious communities which can neither be completely Hindu or Muslim like the Meos of Rajasthan and the Satpanthis of Madhya Pradesh had the autonomy to decide whether to be governed by the customary laws or the general Muslim law (Mujeeb, 1967, p. 10) .The test of reasonableness of the customs was laid out in (Bhau Ram v Baij Nath, 1962) *case* wherein any interpretation of the law would have to stand the test of general evidence and principle of reasonableness as enumerated in the FR of the Indian Constitution.

Khojas are Ismaili Shia of the *Nizari* branch, and the term is used to define respect for a person. Their historical antecedents are detailed in *(Advocate General v Muhammad Husen Huseni*, 1866) called the *Agha Khan* case, wherein Judge Sir Joseph Arnold believed that the Khojas are Hindu of the trading community from Sind and Cutch. These people came into the fold of forceful conversion by Pir Sadruddin, popularly known as the Hazar Imam, in Sind. Their chief religious' book is the *Dasavatar* (Hooda, 1948, p. 52) in Sindhi and Cutchi language. Thus, they were neither considered to be Sunnis nor Shias till 1909 *(Haji Bibi v Aga Khan*, 1908). Thus, the original faith is the syncretic culture of Hindus and

Muslims and later under the influence of Islam, they converted into larger factions of Ismailis of Ithna Ashari and smaller group of Hanafis in Sunni. Therefore, prior to 1937, Khojas followed the Hindu laws on right to Property in matters of testamentary succession, as retained by their custom and after the *Shari 'at Act* 1937 to the exception of testamentary succession, they are governed by Muslim laws (D.F.Mulla, 1905, p. 15).

The 'Dastur-ul Amal' prescribes the rules of ceremonies of solemnization of marriage by a cleric of the *Ahl-e- Sunnat wal Jam'at*. Any Khoja acting in contravention to the group's tradition can be punished by the Khoja Council. After the publication of *Da'a'im of Islam* of Qari Numan under the Fatimi law, the Khojas are to be considered part of the Ismaili community and to be governed only by Shia laws (Abu Hanifah Numan Ibn Muhammad, 2002, p. 1162).

Bohoras are also Ismailis and consider themselves to be Merchants divided into Da'udis Sulaimanis of Yemeni branch and western Ismailis in contrast to Eastern Ismaili group of Khojas. The evolution of the community's tenets is discussed in (Advocate General of Bombay v Yusuf Alli Ebrahim, 1921) case. The Bohora community has established the highest authority *of Da'i e Mutlaq* who is to interpret the religion for his followers. The Head holds the power to excommunicate a member of the community on grounds of violation of principles and beliefs of their tradition, as was famously discussed in *(Syedna Taher Saifuddin v State of Bombay,* 1958) case. Bohoras following the Ismaili Shia School of Jurisprudence holds closer affiliation to the Maliki School than the Ithna Ashari of Shia School. This sect is contrasted with Sunni Bohoras of Gujarat who were earlier governed by Hindu laws of Inheritance but later brought under the Shari 'at Act.

Memons are derived from the term Mu'min primarily meaning a believer divided into Cutchi Memons and Halai Memons, following the Hanafi law in all respects. Memons are also converts from Hindus like the Lohanas from Kathiawar and governed by the Shari 'at Act including laws on intestate and testamentary Succession.

Indian Muslims are predominantly followers of Hanafi faith, introduced by the Mughals who came from Central Asia. However, it is also a verified fact that a sizeable number of populations are followers of the Ithna Ashari of the Shia School and are to be governed by their respective laws as celebrated in the (*Rajah Deedar Hossein v Ranee Zuhooroon Nissa*, 1841) case. Muslim law in India extolling the principle of egalitarianism as

espoused by the *Qur'an* allows every Muslim to choose the School they wish to be governed by in matters of law. Similar powers have been given to the local courts under the *Qazi* to choose a rule of law according to their independent reasoning and judgement.

The textual guidance for interpretation of Muslim laws in case of Sunnis are Abdur Rahim and Tyabji's work on Islamic law, Hamilton's *Hedaya*, Baillie's *Digest of Muhammadan Law* Vol. I *and Imameea* Vol II, Shaikh Nizam Burhanpuri's *Fatwa e Alamgiri a*nd Najm al-Din al-Hilli's *Sharai' al Islam* for the Ithna Ashari and *Da' aim al Islam* for the Ismaili's among the Shias (Rahim, 1911), (Tyabji, Muhammadan Law: The Personal Laws of the Muslims, 1940) .The Indian judge is to decide the case on the application of doctrine of precedence while invoking the principles of social justice, leaving room for reform of laws in the hands of the Legislature (Coulson, 1968, p. 12).

The process of internalization of Personal laws in India needs to be looked in the specific interpretation and application of sources of *Shari 'a* by Muslim Intellectuals, legal experts and religious scholars in India. The institutionalization of Muslim Personal Legal System in India has followed a distinct predominant trajectory of applying the Hanafi Jurisprudence to the governance of the familial affairs of the community. Any agenda to formulate the reforms of the Personal laws of the Muslims require a nuanced and deeper understanding of the methods of science of Jurisprudence applied to specific cultural condition of the Indian society.

2.2. Classification of Muslim Personal Laws in India can be divided into seven broad categories, namely,

2.2.1) Marriage and Divorce
2.2.2) Dower and Maintenance
2.2.3) Guardianship and Legitimacy of the Child
2.2.4) Inheritance and Succession of Property
2.2.5) Gifts, Wills and Death-bed Gifts
2.2.6) Laws of *Waqf*s

2.2.1. Marriage and the Dissolution of Marriage

Before the advent of Islam, history is witness to the prevalence of immoral practices like loose union, slavery, marriage by purchase, polygamy, promiscuity, female infanticide,

and complete subjugation of woman. The males defined the choices of their girls in family and the paternity of the child. Women had no right of inheritance and their domestic work was also unpaid and derogated.

With the spread of Islam by the Prophet, most of these practices were forbidden and abolished to the exception of polygamy defined under reasonable restriction and *Muta* Marriages legalised by the Ithna Ashari section of Muslims. Syed Ameer Ali defines it as

> " a marriage contracted for a fixed period of time, as for a day, a month, a year, or for any other specified period" the man had no right to maintenance of the woman or paternal obligation towards the offspring" (Ali, 1986, p. 368).

The institution of marriage was introduced in Islam to protect the status of woman and encourage chastity, morality and establish lineage in society. It has been defined in the *Qur'an* (4:21) as a covenant, a solemn union between two consenting parties, male and female, to lead a good life and procreate children.

Marriage or *Nikah* in Muslims is sacred because the *Qur'an* and the Prophet uphold the institution of marriage in high esteem and a contract because no marriage can materialize without consent and none can breach the terms of the contract. Muslim Marriages can be classified into Valid (*Sahih*), Void (*Batil)* and Irregular (*Fasid)*. In case of Void Marriages, no Dower is required unless consummation has taken place. The latter category includes marriage between people professing different religion, in case of a fifth wife and marriage without witness. However, Shias do not make a distinction between Void and Irregular marriages. The other distinct form of Muslim Marriage is *Muta*- it means enjoyment/ marriage for pleasure. It is permitted only in Ithna Ashari wherein temporary marriages can take place. A husband cannot terminate it without consent of wife (*Hib*a-*e Muta*). Thus, Dower becomes a necessary condition though not entitled to Maintenance.

The pre-requisites or essentials of a *Nikah* or marriage are an Offer (*Ijaab*) and Acceptance (*Qubool*) of both the parties concerned before witnesses (*Gawah)* (two in Hanafi law and no witnesses required under Shia) and Nuptial Gift (*Maher)*. A clearly spelt out contract of marriage (*Nikahnama*) should be formalised and signed at one meeting to validate the acceptance of the conjugal relation in front of witnesses. Mere betrothal does not grant any rights conferred on a couple as per the law.

The religious text, *Qur'an,* has given preference to **presence of witnesses** of good character in transactions involving future obligations. The presence of witnesses varies from different Schools to testify the contract as two in number in case of the Hanafis and Shafi to none in case of Maliki and Ithna Ashari Shia. This nature of sine qua non for Hanafis has been highlighted in *Fatawa e Alamgiri* in Baillie's translation as "*Shuhadat*, or the presence of witness which all the learned agreed is requisite to the legality of marriage...." (Baillie, 1865, p. 5). But it is interesting to note that among the Hanafis, a marriage that happen without a witness is considered invalid but not void. Then the *Qazi* is authorised to decree separation on the application of either party but if consummated then it becomes a legitimate contract.

A sense of ambiguity prevails on acceptance of female witnesses as testimony to the marriage; while the Hanafi concede for two male witnesses and in absence of one male, then two female witnesses; the Shafi'i insist on both the witnesses to be male. The Hanafis also define the competency of the witnesses in the form of freedom, sanity, puberty and profession of Muslim faith. For example, a Muslim male marries a *Dhimm*i (non-Muslim of an Islamic state), their marriage then must be contracted with two *Dhimmi* for witnesses. Paradoxically, the Hanafis unlike the Shafis accepts the testimony of a witness of a reprehensible character. In case of the Shia Schools of law, Fatimid, Imam Ismailis and Ithna Ashari hold the presence of the witness to be essential at the time of marriage. The Fatimids hold women and slaves to be competent witnesses to marriage but not on conditions of divorce (Fyzee A. A., 1969, p. 16).

The other essentials required for completing the *Nikahnama* are the **mutual promise with the intention** to marry and the capacity as in the **age of puberty**.[21] Clause (vii) of Section 2 of the DMMA sets the age of attaining puberty at 15 (fifteen) and marriage at the age of 21 and 18 for male and females under the Sarda Act as amended in 1978. In other countries like Egypt and Pakistan, it is 18 and 16 years for male and female; Jordan and Syria legalize it at 18 and 17 years respectively; Iran at 18 and 15 years and Iraq at 18 for both. However, a marriage solemnised in contravention to the defined age continues to be held valid in all the above-mentioned countries till date (Mahmood T. , Marriages:Age in India and Abroad: a Comparative Conspectus, 1980).

[21] *Hedaya* settles on 12 years for male and 09 years for female.

Under the laws of the Ithna Ashari, Fatimid, Shafi'i and Imam Ismaili, the office of *Wali (*Guardian) is restricted to the father and father's father; while the Malikis accept only the father to be the sole guardian to contract the marriage of the child. The Hanafis "extend this right to other relatives, "lest the opportunity to marry them may be lost". No School of law extends the right of the mother to be a guardian of her child in contracting the marriage except the Hanafis. All Schools of law have agreed upon non-annulment of the contract of the marriage of a Minor on attaining puberty, on the ground that the contract has been finalised by the father or the grandfather, provided they have not acted fraudulently or negligently like marrying their child to a lunatic or to her/his disadvantage. In India, under the DMMA, all such restrictions have been removed and the woman can exercise her choice to repudiate her marriage on attaining puberty provided she has not consummated it and nullified the contract prior to 18 years of age (Nizamuddin v Huseni, 1960).

Consent, thus, forms an essential and vital part of the marriage contract to ensure that the union is free of fear, misrepresentation, coercion, and force. However, the Hanafi law in certain circumstances validates the marriage under duress or jest. Contrastingly a progressive stance of the Hanafi and Ithna Ashari law is that they allow an adult and sane woman to marry out of her choice without the involvement of a guardian. Thus, among the Shafis, Malikis, Hanbalis, Imam Ismailis and Fatimid Shia, the approval of the guardian is essential to the validity of the contract and a woman cannot of her own accord marry someone out of her will. This rule does not apply to widowed and divorced woman who can dispose of herself to marriage without a guardian. The position of different Schools of Jurisprudence should be looked in the light of the preaching of the *Qur'an* that mentions in Verse 2:262,

> "do not prevent them from marrying their husbands, if they mutually agree on equitable terms" (Khan, 2014, p. 25).

Many countries like Jordan, Algeria, Iran, and Syria have in their respective family laws incorporated the principle of consent to be essential for both the parties concerned.

The MPL in India puts conditions on both male and female in tying the union on grounds of religion and kinship. For example, a Muslim male can marry a *Kitabiya* (that is a female of Jewish, Christian or Zoroastrian descent sharing common ancestry with Islam), but a

female can marry a *Kitabiya* only under the Special Marriage Act of 1954. A nuanced reading of the practices of the Mughal rulers by Ameer Ali show that marriages with idolaters have been considered as irregular but not void as in case of Akbar. Further, polygamy is permitted in Islam for males on the ground that he can act in equity and justice while treating four wives at a time. Otherwise, he should marry only one. In case he has married the fifth time, then also his marriage is considered as void but irregular.

In (Itwari v Asghari, 1959) , it was decided that the restitution of conjugal rights by a Muslim husband with the first wife, after he has married a second time will not hold ground if the former refuses to stay with him. The court believed that MPL allows polygamy with a caveat as mentioned in the *Qur'an*ic verse (IV:3).[22] The condition of relaxation on ground of religion and polygamous marriages has not been extended to woman under any School. Both the male and female are forbidden to marry in relation based on fosterage, consanguinity or uterine and can also not have consummation with two sisters, aunts, or nieces at the same time and *Iddat* (waiting period) and the doctrine of equality (*Kafa'at)*[23].

Laws on Divorce:

Though marriage in Islam necessitates drawing of a civil contract, yet it is a sacred institution that forbids the practice of marital dissolution or divorce. The option of dissolution of marriage should only be exercised in the absence of any form of mediation or compromise left between the two partners. The Arabic term that is ***Tallaqa*** meaning freeing or undoing of a knot, herein a release from marital tie. The Hanafi law does not specify any special procedure to initiate a divorce and can be given by a husband in the absence of the wife. However, the Ithna Asharis lay out specific formula for a divorce which is the oral announcement in front of two male witnesses who are of Muslim probity. Marriages in Muslims can be dissolved by the parties or by courts or by *Qadis*. There are different forms of divorce that can be classified as:

A. By the Husband:

i) *Talaq* (repudiations) *Talaq-al-Sunnah* (according to Holy Prophet's advice)

a) *Talaq-al-Ahsan* (Best form)

[22] The rationale behind the Verse is that the perfect principle of equality of treatment, on part of the husband, is for all practical purpose not possible to achieve. So, it is in interest of the husband to maintain and act justly with one. (Ali A. Y., The QURAN: The Meaning of the Glorious Quran Text, Translation and Commentry, 1934)

[23] The principle of equality is based on family, Islam, profession, freedom, good character and means.

b) *Talaq-al-Hasan* (Good form)

c) *Talaq-al-bid 'a* (innovation) (Bad form)

ii) *Ila* (Oath of Continence between the spouse)

iii) *Zihar* (Wife compared to the likes of Mother).

B. By the Wife

i) *Talaq-e-Tafwiz (Delegated Divorce)*

ii) *Khula (separation by wife in return for a payment)*

C. By Common Consent.

i) *Mubara 'at (Mutual Understanding to dissolve the marriage)*

D. By Judicial Process

i) *Lian (Mutual Imprecation)*

ii) *Faskh (Judicial Rescission) (Ali S. A., 1986).*

Though the *Qur'an* deals with different causes or conditions to initiate a divorce, yet it depends a lot on particularity of cases to define the limits to evoke a call for a divorce. In case of divorce or the death of her husband, the woman must practice celibacy, throughout the *Iddat (* three successive cycles of menstruation or 04 months and 10 days) to settle the issue of maintenance of the unborn child if any. This condition leaves room for reconciliation of marriage by an Arbitration Council involving both parties in contrast to unilateral repudiation of marriage by the male at his own will. Thus, the Islamic tradition permits an equality of status of both parties in matters of divorce. Intention is a necessary condition to validate a *Talaq*. An oral divorce pronounced under the state of jest, anger, slip of tongue, uttering of word *Talaq* in one go or mistaken belief that has been held valid by courts should be looked under the guidance of authentic treatises of Muslim law like *Sahih Bukhari* and *Fath al Qadeer* as was witnessed in (Ibrahim Fatima v Mohmmad Saleem, 1980) case.

The Muslim law on divorce is put under scrutiny primarily on two consideration: one on the methods of divorce i.e., TT, and on the resultant inequality of two sexes in respect of rights of divorce, prevalent in the form of *Nikah Halala*. It has been established that the practices in Muslim society have permitted the invocation of unilateral divorce/ TT, due to its recognition by the Sunni Schools of Jurisprudence, thereby, allowing a man to exercise his power to divorce the wife without her consent., or without consulting the Arbitration Council or the members of the family. Hence, with the influx of time, a pre-

Islamic custom was made part of Muhammadan Jurisprudence.

> As Anderson rightly puts it, that, "*it is the Islamic law of divorce (commonly misunderstood) not polygamy which is the major cause of suffering to the Muslim women…. the Muslim wife has always lived, so far as the law in concerned, under the ever-present shadow of divorce, a shadow mitigated only in comparatively rare cases by certain precautionary devices*" (Anderson, 1976, p. 42).

A more nuanced reading of practice of Divorce in India, looking from the prism of historical antiquity, supports the unilateral position of divorce which dilutes the rights of women. Several cases under the supervision of judges at British Indian courts have misinterpreted the *Qur'an*ic laws on divorce to support arbitrary divorce initiated by the husband as 'good in law' but 'bad in theology' (*Sarabai v Rabiabai,* 1905). Justice Krishna Iyer opposing this stance in (*Yousuf v Sowramma*, 1971) *c*ase held that it's a misnomer that the Muslim man enjoys unbridled authority to invoke liquidation of marriage under the aegis of Islamic injunctions. The reasons for distortions on laws of divorce are chiefly owed to factors like judicial ignorance, misinterpretation of laws by certain academic writers like Mulla who held that "any Mohammaden of sound mind, who has attained puberty, may divorce his wife whenever he so desires without assigning any cause" (D.F.Mulla, 1905, p. 102) and MacNaghten who opined that "there is no occasion or any particular cause for divorce; mere whim is sufficient", (MacNaghten, 1973, p. 82). It facilitated the case of a husband's unilateral power to divorce wife without any cause and the supportive factors like lack of education, economic empowerment among members of the community and ill-educated and manipulative *Qazi*s or Maulvis of mosques who tend to transmit their own limited and faulty understanding of law have all contributed to marginalised and victimised condition of women in society.

Divorce given by the Husband (*Talaq)*: the laws regarding divorce about the capacity, form and procedure, category and legal aftereffects are crucial to be interpreted under the guidance of the authentic sources of the *Shari 'a.* It can comfortably be argued that while adapting to the vicissitudes of time, these laws have deviated from their original source. Comparative review of several Muslim nations that have upheld the arbitrary power of one-sided divorce at the behest of the husband as invalid and some rights to the woman on her own to exercise repudiation opens critical debates in the larger interest of the humanity.

There are different forms of divorce that can be invoked by the husband, namely, *Talaq-al- Sunnah* in *Ahsan or Hasan* forms and *Talaq-al- Bid 'a (*innovated, not approved*), Ila* (Vow of Continence) and *Zihar* (Injurious Assimilation) The former form of divorce, namely, the *Ahsan form* of *Talaq-al- Sunnah,* a repudiation takes place with a single pronouncement on a wife in the state of purity and subsequent no intercourse takes place between them. In case of situation after the menstrual flows, they wait for the *Iddat* period to complete to terminate their marriage. But the pronouncement of divorce is nullified if they establish conjugal relations with each other during this period. Such option can be exercised three times during a person's lifetime. For the women who is living under the condition of menopause, the condition to wait to acquire the state of purity (*Tuhr*) is unnecessary.

In the *Hasan* form of divorce, if the husband orally pronounces the term '*talaq*/I divorce thee' three times during successive periods of purity, then, the marriage gets dissolved. In case, he wishes to remarry her, then she must first undergo through another marriage which is consummated and consequently dissolved (*Nikah Halala)*. Sura 230 (i e. Verse 230) of the *Qur'an s*tates that,

> "*And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorces her, it is no sin for both ,and, they come together again if they consider that they can observe the limits of Allah. These are the limits of Allah. He manifesteth them for people who have knowledge"* (Ali A. Y., The Holy Qur'an: Transliteration and Commentary in English, 1998).

Maulana Ashraf Ali Thanwi has elucidated this condition, as,

> *" a person pronounces a revocable Talaq. He then reconciles and resumes cohabitation. Two or four years later, under provocation, he once again pronounces a revocable Talaq. On recovering from provocation, he again resumes cohabitation. Now two Talaqs are over. Hereafter, when he pronounces a Talaq, it will be counted as the third time and lead to dissolution of marriage, thereby necessitating Halala"* (Thanwi, 2005, p. 205).

The legal effects of this form of divorce are that a Hanafi husband can make it irrevocable by his words, but an Ithna Ashari husband cannot do so. *Nikah Halala* was offered as a

prohibitive remedy to a husband who had divorced his wife in three sittings. Over a period, this conciliatory measure has been misappropriated to force *Halala* on women as a form of reproachment with former husband. In a case, the High Court gave relief to the wife, who was being forced to perform *Halala,* to remarry her former husband despite attaining a divorce lawfully by the *Ahsan* form (*Sabah Adnan Sami Khan v Adnan Sami Khan*, 2010) (Jain, 2010).

Talaq –al- Bid 'a is an irregular form of divorce, not acceptable to Shias and Malikis. The most common practice of such form of divorce is the triple pronouncement of divorce in one single sitting during a period of purity of the wife. Irrevocability with immediate effect is the essential feature of this form of divorce and can only be nullified after a woman performs *Halala*. This customary practice is pre-Arabic and neither the religious text nor traditions have recognized or sanctioned it. One relevant hadith:

> *"A person named Rukanah pronounced three divorces against his wife but later he was very sorry for it. When the Prophet asked him, how did you divorce your wife? Rukanah replied that he had pronounced three divorces. The Prophet asked. Did you pronounce it in one sitting? When he said, Yes, the Noble Prophet said, treat it as one divorce only and if you want you can take your wife back. And Rukanah took his wife back*."*Another Hadith held that, "Hazrat Abdullah ibn Abbas reported that the (pronouncement) of three divorces during the lifetime of holy Prophet (Allah's Messenger) and that of Caliph (1) Hazrat Abu Bakr and two years of the caliphate of Caliph (2) Hazrat Umar (was treated) as one. But later , Caliph (2) Hazrat Umar said: Verily the people have begun to hasten in the matter in which they are required to observe respite. So, if we had imposed this upon them, [it would have deterred them from doing so!] and he imposed it upon them"* (al-Nawawi, 2019, p. 45)

It seems to have crept into Muslim Jurisprudence at the instance of the Umayyads monarch for vested interest. Nawawi in his *Sharh Sahih Muslim* held that,

> "Imam Shafi'i, Imam Malik, Imam Abu Hanifa and Imam Ahmad and the entire *Ulema* from the past have established triple divorce (*Talaq-al- Bid 'a*) as three divorces (means irrevocable)" (al-Nawawi, 2019, p. 98).

The Shia do not accept the Caliphate of Umar thus, shun the practice of TT. The misuse of this practice has opened a new debate as regards the rights of woman vis-a vis capricious behaviour of husband to invoke *Talaq* for satisfying his ulterior motive. Many countries have challenged the permissibility of such law and adopted a reform procedure wherein any application proclaiming pronouncement of TT will be settled by judicial intervention, for e.g., Turkey, Cyprus, Tunisia, Algeria, Sri Lanka, Singapore, and Malaysia. While other countries, following Hanbali laws, while restricting the practice of *Bid 'a* have replaced it with *Talaq-al- Hasan* .

The Hanafi School of law allows the husband to repudiate his marriage on possessing capacity of a sound mind and has attained maturity, even on ground of duress.[24] The other Sunni and the Shia Schools of thought hold a similar position to the exception that the man should act on free will and carry clear intention to break the marital tie. Following the principle of reasonableness exercised by the latter Schools of thoughts, many Muslim countries have nullified the effect of divorce under duress, like Lebanon, Jordan, Egypt, Syria, Morocco, Sudan, and Iraq. However, they continue to uphold the validity of unilateral divorce.

Another aspect of concern is that the Hanafis and Shafis, unlike the Shias, Hanbalis and the Maliki, allow pronouncement of divorce under intoxication as valid (Mahmood T. , Family Law Reforms in the Muslim World, 1972, p. 280). They justify it on ground of deterrence that a man should know the evil consequences of drinking and would hence, deter from it to avoid dissolution of marriage. But this principle is misused to the benefit of the male who seek refuge to these grounds to easily break a marital tie.

In Sunni law, the choice of *Talaq* may be pronounced orally as well by means of a written *Talaqnama*. The customary writing which follows the defined procedures and rules of the form will count for a valid pronouncement of divorce despite ambiguity on the intention of the person claiming it. However, in case of non-customary writings, if a person can comprehend or read the document, and the requisite intention proved, would count for a valid pronouncement. Moreover, any pronouncement of divorce should not be initiated on

[24] A *Talaq* pronounced by the husband who is " of a mature age (*baligh)* and possessed by understanding (*akil)* is effective, whether he be a slave or free, willing, or acting under compulsion, and even though it were uttered in sport or jest or inadvertently by a mere slip of tongue."

ground of coercion or force.

The Shias consider oral declaration as necessary, holding a declaration of divorce in writing to be void, except under exceptional circumstances. Certain exceptional circumstances include like declaration of divorce by a sick person in death-bed would be considered valid if after giving three repudiations dies, then his wife performing the *Iddat* period or one year after, provided she is not remarried, is entitled to inherit his property. But such is not the case in Sunnis as the wife is not entitled to any property if he recovers from illness during the *Iddat* or dies again due to some other illness or accident.

Neither of the Sunni Schools requires a *Talaq* to be pronounced orally in the presence of his wife. However, a husband cannot effect a valid divorce in writing and should only pronounce so in the presence of witnesses which is recorded and intimated to her wife. But if is done in her knowledge, she is entitled to the maintenance. *(Ful Chand v Nasih Ali Chowdhury*, 1908) To both Sunnis and Fatimid Shias and Imam Ismailis, the repudiation of marriage is conditional that is requires a specification of a time period in future to be effected or the violation of the circumstances to be adhered to bring it in effect. Most Islamic countries like Egypt, Syria, Jordan, and Iraq accept this principle of divorce as valid, provided it is not invoked as an inducement or a threat to abstain someone from doing (Mahmood T. , Family Law Reforms in the Muslim World, 1972, p. 289)

In cases of *Ila*, if an oath to abstain from having sexual relations by a man has been maintained for 4 months continuously, then the marriage with his wife would stand dissolved. In the Hanafi law, *Ila* can be invoked without undergoing any legal procedure, but not recognised as per the Ithna Ashari and Shafi laws. In *Zihar*, if the husband swears to his wife that she is like the '*back of his mother'*, then, the wife becomes unlawful to him. (Ali S. A., 1986, p. 298) However, If the man intends to revoke this declaration, then an expiation sum is to be given or the man holds fast for a time. Ironically, both practices have not caught the attention of the public eye in India yet (Ali, 1986, p. 300).

The Muslim jurists have divided the powers of the husband to delegate his right to divorce in three categories, namely, *Tafwiz (delegation); Tawkil* (agency) and *Risalah* (Messengership) (Ali S. A., 1986, p. 305). In *Talaq-e-Tafwiz*, his wife has been delegated with the power to divorce herself if she so desires. The forms in which it can be exercised are *Ikhtiyar* (free choice); *amr-bi-yad* (affair is in your hands) and *mashiat* (at your

pleasure).

In other cases, the husband either appoints an agent like a lawyer or member of the family or a messenger to convey his message to his wife for delegation of authority to divorce to the concerned person (Mangila Bibi v Noor Hussain, 1992) The power given under *Tafwiz* cannot be revoked but other powers are revocable by the husband. (Buffatan v Salim, 1950) The MPL in India, predominantly adhering to the Hanafi School, heavily favours the husband can repudiate his marriage without the consent of his wife, in condition of menstruation or purity (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 156). The Shafi'i and Shia allow a woman to repudiate her marriage, without the intervention of the Court, on her own on three grounds of non-consummation of marriage, insanity of husband and inability to provide maintenance (*K.C.Moyin v Nafeesa*, 1973).

Divorce by a Woman (*Khula*[25]): the right of a woman to claim her right to dissolve her marriage was given by the *Qur'an* which states,

> *"If ye (judges) do indeed fear that they would be unable to keep the limits ordained by the God, there is no blame on either of them if she gives up something for her freedom*" (2:229) (Khan, 2014, p. 80)

Both men and women have been enjoined with egalitarian rights to seek dissolution of marriage without compulsion. However, legally speaking, it has been misconstrued to mean the right of a woman to call for separation with husband based on the consent of the latter and the condition of *Iwaz* (return a consideration). If the divorce happens based on mutual aversion (consent), it is called *Mubara' at.* The Qur'an in Verse II:229 offers that *"If they fear that limits set God (i.e., matrimonial discipline ordained by Quranic precepts), there is no harm if they together make a settlement*" (Khan, 2014, p. 80).While in case of a disagreement, the woman can approach a Kazi to help her to persuade the husband to grant divorce in a conciliatory manner.

Some scholars maintain that while the right of a husband is to call for *Talaq* by forfeiting the *Maher*, the woman can do the same in lieu of a compensation for release of a marriage tie. Also, *Khula* is irrevocable while *Talaq* can be used in both forms. One of the landmark

[25] It means 'to take off clothes' and thence to lay down one's authority over wife, while *Mubara'at* means the act of freeing one another mutually.

cases on *Khula* in India is (Moonshee Buzl-un- Raheem v Luteefutoon Nissa, 1861). The ground of divorce was allowed on consideration of payment of the amount of Dower. The Egyptian Code of Hanafi law(Article 275) has upheld the validity of divorce without payment of any consideration.[26]

Divorce by judicial decree:

a) ***Faskh***[27]: this form of dissolution, meaning annulment or abrogation, can be sought by either the husband or the wife, but in practice, it is sought by the woman with the help of the Court. The marriage can be dissolved by the *Qazi* on the request of the woman, by a judicial decree. This option can be considered in three forms: *Lian* or charging the wife with adultery; *Ila* or taking a vow of abstinence from the wife for four months; and *Zihar* or comparing the wife to any of the husband's female relations within the prohibitive degrees. Further, a marriage can also be dissolved if the husband fails to carry out the stipulations entered at the time of the marriage, e.g., means of subsistence, not to contract a second union, physical and mental security of the wife. It then allows a woman to claim divorce along with full Dower.

b) ***Li'a****n* that is mutual imprecation finds reference in the *Qur'an* in Verse 24:6-9. In this case, the husband charges the wife on grounds of Adultery. If he fails to probe his case, the procedure of *Li'an* can be adopted by wife to call for dissolution of marriage by a *Qazi* (Tufail Ahmad v Jamila Khatun, 1962).The four oaths in front of four witnesses is tantamount as proof as adultery in Islam.

With the codification of DMMA of 1939, Section 2 lays down certain condition for a woman on which she can claim a divorce, that are, missing husband for 4 years; failure to maintain for 2 years; imprisonment of the husband for 7 years; failure to perform marital obligation for 3 years; Impotence; Insanity or venereal diseases; Options of Puberty and Cruelty; Conversion (Fyzee A. A., 1964)

2.2.2. Dower (*Maher*) and Maintenance (*Nafaqa*):

Maher is a pre- condition of the matrimonial law of Islam, when an ante-nuptial agreement

[26]The Pupils of Abu Hanifa namely Abu Yusuf, Imam Muhammad have modified the Hanafi position to view that dower need not be relinquished by *Khula.* It can be, however, in case of *Mubara'at* for Abu Yusuf.
[27] Also called *Tahkim* in Fatimid Law.

was made in favour of the woman, that entitles her, to a sum or any property in marriage. It has been misunderstood as the practice of bride-price or dowry but, it is a form of an absolute gift given to a woman as a token of respect by the husband, without any condition. It is a consideration payable before the consummation of marriage, but the law allows it to be paid in parts that is either in a 'prompt or deferred' form (Hamira Bibi v Zubaida Bibi, 1916).

The Arabic term *Maher* like the Hebrew term *Mohar* which was an amount paid to the bride's father was a pre- Arabic custom defending the institution of slavery of woman. An interesting distinction is made between *Sadaq* and *Maher* by Smith wherein he notes that,

> "while *Sadaq* denotes a gift by the husband to his wife, *Maher* constitutes a gift given to the parents" (Robertson, 1885, p. 70).

It was only under Islam that this distinction was abolished, and both were synonymous and an exclusive right of the woman on the gift of her husband. Anything that is property or *Mal* and has value, may be given to wife as *Maher*.

This constitution of Dower has become an essential feature of Muslim law, though the specification of Dower is not essential. If the amount of Dower is not specified, then the wife can claim a reasonable Dower based on the financial status of her husband. (*Maher-e-Mithl)*. The question of Dower is left to the consent of the parties who can settle the matter before or after the marriage. The amount varies according to the social condition of the families. The Shia Schools consider even service to wife by husband as a form of Dower (Mahmood, Muslim Law in India and Abroad, 2016, p. 105).

Legal minimums formulated by early jurists form an interesting component of *Maher.* The early Hanafis fixed the minimum amount at ten dirhams, while Maliki fixed it at a lower amount of a quarter of a dinar. The Shias have not settled the minimum amount of Dower. But they follow what was defined as the practice of the Prophet to pay his wives about 500 dirhams known as *Maher-e-Sunnat* and in most cases they do not exceed the amount. It is interesting to note that the fixing of the minimum amount of Dower is linked to the amount fixed by the Prophet for his wives which was of far greater value. These minimums are now obsolete, and the amount is settled based on status of the concerned parties. Sometimes large amounts are stipulated for the prevention of dissolution of marriage. Some also declare a large sum of money in public to boast their status, while fixing a lower amount in private (*Maher-e-Talji'i)* (Baillie, 1865, pp. 112-113).

The Hanafi law allows the payment of dower both in the prompt or deferred form. Some jurists hold the position that in cases of a specified Dower *(al-Maher-al-Musamma*), it is to be paid promptly on demand giving the wife sanction to refuse or enter conjugal domicile until that part of the Dower is paid off. It is known as *Maher-i- Mua'jjal.* The second for is deferred Dower or *Maher-i Muwajjal* wherein the due sum is given on divorce or the death of the party. In cases, where the Dower is prompt, the wife may refuse to cohabit with the husband or go on a journey until she receives the Dower. Even after consummation, she may refuse to submit to his authority unless the consummation was done without her consent or she was a minor (Mahmood T. , Muslim Law in India and Abroad, 2016, p. 107).

In the Ithna Ashari law, the condition is that the whole amount of the Dower be paid at once or promptly. A new category has caught up recent public attention in Pakistan primarily considering threat of divorce or polygamous marriage, called '*Inda-t-talab'* that is *Maher* payable on demand (*Muhammad Azam v ADJ*, 2006).

It is ironic that despite the scientific advancement of the Indian society, there is a queer absence of gender just laws aiding the process of divorce at the instance of wife, on ground of non-payment of dower or that part of it which is prompt. Moreover, the dower is reduced to half if the husband repudiates the marriage before consummation for no fault of the woman. However, if the wife takes the initiative to seek divorce, then the *Maher* is cancelled. This principle is misused by the husband to force their wives to seek *Khula* to cancel payment of *Maher,* but they are still entitled to the maintenance. The woman also has the power of grating remittance to the husband on the gift to be given by him. She can either relinquish the whole Dower or part of it. The *Qur'an* supports the principle of prompt dower as obligatory to finalize the marriage along with the spirit of love and affection that gives equal respect to both husband and wife to decide their relationship as per reasonableness and bonding. It is defined as the doctrine of *Aka* or equality between a man and a woman in terms of their social background.

The laws specifies that the widow can continue to hold entitlement over deceased husband's property, till her dower is paid. However, the woman cannot mortgage, sell or lien the said property (*Zaibunnisa v Nazim Hasan,* 1961). The Court had initially held that her right to property would not hold of priority as against the unsecured creditors of her deceased husband (*Kapore Chand v Kadar Unnissa Begum*, 1950). However, in (*Fazlunbi v Khader Vali*, 1980) *Case,* the Apex Court re-examined its position and ruled that the Dower is the

bi-lateral transaction between the husband and the wife and is an absolute property of the latter. Thus, any unsecured debt cannot be equated with unpaid Dower and should be called 'legal security' for this purpose.

A lot of judicial cases[28] have been taken up for review on the question of heritability and transferability of the right to transfer the Dower debt or retain the property until the Maher was paid. The Apex Court in *Kapore Chand* case settled that this power of the widow is a non-transferrable entitlement. However, the High Court changed its position in (Janadul Haq v Zubair Haider, 1981) to rule that the claim to unpaid dower of a predeceased wife can be realized from the husband by her legal heirs.

Maintenance (*NAFAQA):*

All Schools of Law hold that it is incumbent on the husband to provide for the maintenance of his wife (D.F.Mulla, 1905). However, difference of opinion exists on the effect of the husband's inability to pay, failure or refusal to maintain his wife and the consequent steps taken in that matter.

Under the Hanafi law, marriage cannot be dissolved on grounds of the husband's inability to sustain the economic expenses of his wife but only in condition when even after possessing the ability to maintain her, he wilfully neglects her. The *Qazi* can ask the wife to raise a loan in credit of her husband and he shall be liable for the payment of the loan. However, under the Shafi'i law, a marriage can be dissolved on ground of financial inability. It is contended that if the husband cannot maintain his wife then he is not acting on kindness. The Maliki law states that if the husband is too poor to maintain his wife, then the marriage can be dissolved, provided the wife was unaware of his financial condition at the time of the marriage. The *Qazi* can give the husband few months' time to arrange for wife's maintenance and on failure to do so, entitle her to claim divorce (Ali S. A., 1986, p. 184).

The Shia law states that if the husband is unable to pay for maintenance, then the *Qazi* can exert pressure on him like fear of imprisonment. But no marriage can be dissolved on his refusal or inability to maintain his wife (Ali, 1986, p. 189).

[28] See *Hussain v Rahim Khan* AIR 1954 Mys 24*; Zaibunnissa v Nazim Hasan* AIR 1962 All167 ; *Zobair Ahmad v Jainandan Prasad* AIR 1960 Pat 147

2.2.3. Guardianship and Legitimacy and of the Child

The Muslim law acknowledged paternity as a rule to treat the father as the legitimate parent. For example, a child born within six months of the marriage is illegitimate unless the father acknowledges it and will remain legitimate unless the father disclaims it. A child born after the termination of marriage is legitimate, if born within 10 lunar months under the Shia laws, within 2 lunar years in Hanafi law and 4 lunar years in Shafi'i and Maliki laws (Ali, 1986, pp. 192-193). This rule gets relaxed in case of Adoption, which is disapproved by the *Qur'an*. Thus, the Muslim law deals with the principle of legitimacy and not the process of legitimation *per subsequens matrimonium (Habibur Rahman Chowdhury v Altaf Ali Chowdhury*, 1921). However, the Muslim parties are, like other religion, governed by Section 112 of the Indian Evidence Act that,

> " settles the case of the legitimacy of the child till the continuation of marriage or the birth of the child within 280 days of effectiveness of divorce of an unmarried mother" (Muhammad Allahdad Khan v Muhammad Ismail, 1888).[29]

Guardianship (*Wilayat)* may be of the person, of property (an executor of it is called a *Wasi)* and in marriage (he is called the *Wali).*

In India, the **guardian of a person** is in case of a minor who is under 15 years of age in Muslim law, though under 18 years as per the Indian Majority Act.[30] The courts decide on the case of guardianship on the following conditions of:

a) What is in conformance to the statutes governing the Minor or in his/her welfare,
b) The Minor's age, sex, faith, the character and a capacity of the proposed guardian and the wishes of the deceased parent, and,
c) Preferences of the minor, if sufficiently mature, to make a choice (D.F.Mulla, 1905, p. 89).

As per the MPL, the guardianship of the infant child belongs to the mother (*Hidanat).* The Hanafi law entitles the women with the keeping of her male child till the age of 7 years and of the female child till she reaches the condition of puberty. Under the Ithna Ashari Shias,

[29] Islam Law provides for longer periods of gestation to save infants from the stigma of Illegitimacy and thus, children of irregular marriages are legitimate.
[30] Section 3, Guardians and Wards Act 1890, Sec 4(i)

the mother is allowed the custody right till 2 years for male child and 7 years for the female child, respectively. Hence the laws do not entitle her to be the natural guardian, the father alone, or if he is dead, his executor (under Sunni Law) is the legal guardian (Imambandi v Sheikh Haji Mutsaddi, 1918). Thus, the duty of raising the child rests with the father and of custody with the mother (D.F.Mulla, 1905, p. 90).

The mother marrying a person unrelated to the child but within the prohibited degree, is a ground for limitation to claim the guardianship. The other grounds include acts of immorality, adultery, or negligence of the child. However, a mother will not lose custody of her infant child merely because she is divorce. However, in event of her marriage with another person will take away her right of guardianship (Mir Muhammad Bahauddin v Mujee Bunnissa Begum, 1951).

In the absence of the mother or her disqualification thereof, the following female relations of the child can take care him/her, in order of priority, namely, maternal grandmother, paternal grandmother, full sisters and aunts. Failing them, the following male relations can take care of the child like the father; nearest paternal grandfather; full brother; consanguine brother and other paternal relations (Ali A. , 1986). The general principle is that no male is entitled to the custody of the female minor unless related to her by consanguinity within the prohibited degrees. Further, extravagance on the property of the minor is a disqualification *(Gohar Begum v Suggi alias Nazma Begum,* 1960) Ali A. , 1986).

The **Guardianship of property** is given in the hands of the father, under the Sunni Law, in case of the property of the minor. After him, the following are entitled to a similar right, namely, father's executor, paternal grandfather, or paternal grandfather's executor. However, Courts can consider the female relatives of the child like the mother or the uncle as his/her legal guardians, in the absence of the male counterparts (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 156).

The minor can be the legitimate heir to a movable or an immovable property. In such cases, the legal guardian does not have the power to sell the immovable property except to enhance its value, or to maintain the minor, and to cover any undue expense. However, he cannot act without the consent of the court if appointed as a guardian by the same. Such *de facto* guardians can neither sell nor purchase property in the name of the minor.

An immensely popular case came up on wherein the mother being the *De facto g*uardian, the minor's father alongwith co-sharers mortgaged the properties in suit. Later after the death of minor's father, the mother as the guardian executed a sale-deed. The court held that,

> "this sale deed was void under the Muslim law. Where a Muslim minor seeks to recover property sold by his unauthorized guardians acting on his behalf, can do so, only after adjudication that the sale is deemed void and on declaration of the document to obtain the property. The courts under section 41 of the Special Relief Act can give compensation based on the facts of the case. Although other courts have held difference of opinion stating that the principle of compensation is not to be paid by the minor as invoked under the Special Relief Act" (V Venkama Naidu v Sayed Vilijan Chisty, 1951).

The **guardianship in marriage** is also committed to the paternal kindred where the father has the right to guide the terms of marriage of his minor children. This power is called *Jabr,* wherein guardian acts as the *wali.* However, the only condition applied is till the age of attaining puberty (*Bulugh).* The following person are eligible to be the guardian in order of priority, namely, the father, grandfather, the brother and other collaterals, the mother and maternal relations and lastly the *Qazi* of the court. In Fatimid Law, where the father and grandfather of a virgin coexist then the latter has an a priori right. The other Schools like the Maliki, Shafi or Daudi Bohoras do not allow a virgin, attaining majority, to marry without a guardian. Hence, the principle of *Jabr* continues in case of females till married (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 163).

2.2.4. Inheritance and Succession of Property:

The term Inheritance means,

> " the devolution of property on an heir or heirs upon the death of the prepositus. The law of Inheritance is a body of principles and regulations governing how assets and liabilities are transferred after the death, to the legal heirs depending on the common acceptance of notion of private property and goods" (Fyzee A. A., 2008).

The rules of succession primarily depend on the view of the deceased and kinship system. The Muslim law considers wealth as a form of a trust. The first and foremost point about inheritance is that it be used for repaying the deceased's loan and his other financial liabilities. For the rest his will, one third of the total, will come into force, if he left his will

for anyone. Will cannot be of more than one-third of his total inheritance.

The Islamic law is silent on the rights of the heir on the self-acquired or ancestral properties, rights by birth in coparcenary property as dealt in the Hindu law. Favourably, under Islamic law, no woman is excluded from the right to inheritance . They have equal rights to inherit property independently both in the property of her father and her husband. Each woman inheritor is an absolute owner like a man (Mahmood, Muslim Law in India and Abroad, 2016, p. 222).

The Muslim law dealing with the rights of Succession, makes no distinction between a property of deceased male or female, is influenced by the local customs and usages (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 316).

As per the Islamic law, if the newly created heirs were mostly females, they enjoyed full right of the property of their father. In some cases,

> "a female was equal to the customary heir, in terms of closeness to the deceased, the Islamic law gave her half the share of the male. For example, if a daughter coexisted with the son, or a sister with a brother, the female obtained one share and the male two shares" (Mahmood T. , Muslim Law in India and Abroad, 2016, p. 225).

Both male and females do not enjoy equal share over the property. In situation of two heirs of opposite sex as siblings, the male heir takes twice the shares of the female.

Hanafi Law of Inheritance: Under the Hanafi law, the legal heirs of a deceased, male or female, entitled to inherit property, fall under the following classes:

A) The Sharers[31] (Quranic Heirs like the husband, wife, and all extended blood relations,
B) The Residuaries also called Asabat (Agnatic Heirs like son, father, brother, paternal uncle, and niece),
C) The Distant Kindred (Uterine Heirs like cognates and female agnates),

[31] The term *Sharers* gets reference after the translation of the Sunni law of Inheritance called *the Sirajiya* by William Jones in 1792. The term is to be derived from *Sahm* that is exact fractional shares like 1/2, 1/4,1/8, 2/3, 1/3 and 1/6.

D) Subsidiary Heirs that is Successor by Contract, either out of emancipation or friendship. The testator can Will away whole of his property to a stranger in the absence of heirs, and
E) The State, by escheat (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 330).

Though there are twelve forms of relation that can become sharers in property, but some can be completely outcasted from it. Some Sharers are excluded from taking their specified sharer, if a residuary of equal rank co-exists becoming the next class of the Residuaries. These Residuaries can inherit if there are no Sharers. Therefore, the whole inheritance or the residue thence evolves upon Residuaries, in the order as prescribed by the *Qur'an* (Mahmood T. , Muslim Law in India and Abroad, 2016, p. 312).

These Residuaries are categorised as:

A) Descendant of the deceased person viz (1) Son (2) Son's Son how so ever,
B) Ascendants like the (3) Father (4) True Grandfather.
C) Descendants of the deceased Father viz. (5) Full Brother (6) Full Sister (7) Consanguine Brothers (8) Consanguine Sisters (9) Full Brother's Son (10) Consanguine Brother's Son (11) Full Brother's Son's Son (12) Consanguine Brother's Son's Son.
D) Descendants of True Grandfather like (13) Full Paternal uncle, (14) Consanguine Paternal uncle, (15) Full Paternal uncle's Son, (16) Consanguine Paternal uncle's son, (17) Full Paternal uncle's son's son, (18) Consanguine Paternal uncle's son's son, (19) Male Descendants of more Remote True Grand Father (Mahmood, Muslim Law in India and Abroad, 2016, p. 313).

In all,

> "only four females are included among the residuary in the form of full sister, consanguine sister, the daughter, and the son's daughter. Of the five heirs that are always entitled to some share of the inheritance and who are not liable to exclusion in any case include the deceased's children, father, mother, wife. In the absence of Sharers and Residuary, the inheritance is divided among 'distant kindred" (D.F.Mulla, 1905, pp. 55-56).

The Shias divide the heirs in property into two categories, namely, (i) heirs by consanguinity i.e., blood relations and (ii) heirs by marriage i.e., husband and wife. Among the blood relations, the mother, the daughter, sister, grandmother, paternal aunt, and maternal aunt are the females who are entitled to inherit the property of the deceased. They are called Sharers entitled to different shares depending on the existence of other sharers and relatives. However, it may be noted that wife takes normally one-eighth share in the property of the husband, but the husband takes one-fourth share in the property of the wives i.e., double the share of the wife in similar circumstances. However, among the Shias, there is no separate class of heirs corresponding to the distant kindred of Sunni law (Mahmood, Muslim Law in India and Abroad, 2016, p. 320).

The Muslim law claims that there is absolute equality among the women and men in the matter of succession. However, there are certain provisions which are loaded in favour of the male inheritors as they take more shares, compared to their female counter parts. For example, among the Shias, a childless widow takes no share in her husband's land, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property (Mahmood, Muslim Law in India and Abroad, 2016,p. 321).

In constructing a viable set of Islamic laws in contemporary times, one should focus on two-fold manifestation of the treatments of the *Qur'an.* Firstly, one must borrow the necessary social conditions to be applied as the general principles of convergence, known as *Nass.* Secondly, there must be a movement back to specific legislation to the relevant social condition now obtaining, through *Qiyas* (Rahman, 1980, p. 20).

There are significant departures in the Sunni and Shia Laws on Inheritance which can be summarised in four-fold categories, namely:

a) The principle of Agnacy that gave right of pre-eminence to male heirs, a following of the ancient tribal custom continues in the Hanafi scheme but destroyed by the Shias. In the latter, the status of cognates and agnates are footed uniformly on the principle of equality,
b) The categorisation of heirs cannot be outrightly claimed as the Quranic heirs, but due consideration was given to the verses of the *Qu 'ran* which primarily talks about two classes that is Quranic heirs and all other blood relations. The Fatimid Law does not

recognize Agnacy. Moreover, the usage of categories like Residuaries, Sharers and Distant Kindred are confusing and collapsing into another that tends to misinterpret the Hanafi laws,

c) The Sunni law stating that the males have twice the shares of females has been interpreted by the Shia scholars as affecting the equal scheme of distribution. The Shias have put the daughter's children in the same category of daughters and the sister's children inherit in the rights of the sister,
d) For the Shias, other females inherit on the analogy of daughter/ sister are entitled to succeed equally with the son. The rights of women are like all female heirs (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 370).

2.2.5. Gifts (*Hiba*), Wills and Death-Bed Gifts:

Islamic law allows a man to gift his property, during his lifetime or after his death, by will. This disposition of property during the lifetime of the person can be done on the whole quantum known as *inter vivo*; but only a third of his net estate could be disposed in a testamentary disposition. The Islamic term '*Hiba*' is used to distinguish from the English connotation of the word 'Gift' as '*Hiba*' is,

> "a prompt and unqualified transfer of the corpus of the property, in the substance (*tamlik al-ain*) by one person to another without any warrant of return (*iwad*)" (Mahmood, Muslim Law in India and Abroad, 2016, p. 289).

There are three essential conditions of a gift namely,

> " the declaration by the donor (*Ijab*); acceptance of the gift accepted by the donee *(qabul*) and the delivery/possession of the gift (*qabza*)" (Mahmood, Muslim Law in India and Abroad, 2016, p. 289).

Any form of *Hiba* or gifting is valid if done by words of mouth and writing is not necessary. If the consideration of *Hiba* is only on the profits gained out of the property without consideration, it is called *Ariya*.

> "Section 129 of the Transfer of the Property Act 1882 allows valid gifts made under Muslim law as to be solely guided by their respective laws as per Chapter VII of the Act" (Ali, 1986, p. 42).

Registration is compulsory in case of gifting of an immovable property situated in area where Acts relating to Registration are in force. (Bibi Sharifan v Sheikh Salahuddin, 1960)

Fatimid School, following Maliki law and to the exception of other Sunni Schools accept *Hiba* to be valid on grounds of offer and acceptance by the party without delivery of possession at the time. None of transfer of *Hiba* or gifting can be based on any kind of consideration. The general rule of contingent gifts or gifts in future are invalid as per Muslim law, except for the Fatimid law. Gifts can also be made to mosques and charitable institutions and are treated as *Sadaqa*. It is mostly understood as a pious or charitable act and done to please the Almighty. The derivation of the term *Hiba* is secular while of *Sadaqa* is sacred. However, delivery of possession is necessary in S*adaqa*, unlike the position of the Fatimid Law (Fyzee A. A., 1969, p. 89). A *Sadaqa* can be done on both *Waqf* (permanent foundations) and on ordinary gifts which are in use. The difference between *Waqf* and *Sadaqa* is that the former deals with the permanent foundations as a trust belongs to the God and unlike the latter cannot be consumed by the people.

The law does not distinguish between different forms of property to be transferred as part of *Hiba*. The principle of '*Musha*' is applied to *Hiba* which means that a common building or land can be transferred as gift. If one tries to transfer a property, that is capable of division or partition, then such transfers are invalid. However, this rule of *Musha* cannot be applied in cases of Gift to two or more persons under joint ownership, provided the donor as handed over specific shares to the donee; gifts to co-heirs; co- sharers in zamindari land or shares in land companies (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 289).

The concept of Trust (*amanat)* is also known in Muslim law wherein gifts can be made to a trust or in the name of the Trustee, but delivery of possession is necessary to make a valid transfer (Moosabhai M Sajan v Yacoobbhai M Sajan, 1904). Further, there is a provision of *Hiba bil Iwaz* and *Bi Shart il Iwaz* wherein in the former, a gift has been made from the donor to the donee, without any anticipation of a gesture of return, and in the latter, an Iwaz or return gift must be made by the donee. These are two separate acts of transaction and donation as a matter of consideration. A transfer by the husband to the wife, as a substitute to *Maher,* is considered a valid form of *Hiba bil-Iwaz known* as *bai-e-muqasa* but is matter of sale as per the Indian law. However, if a gift is passed on with an expectation for its return, such transaction is called *hiba bi Shartil iwaz* (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 289).

A document outlining the Will of the executor is called a *Wasiyat-nama*. A man can by will, either orally or in written can share one third of his net estate with relatives excluded from inheritance, to a stranger for his services rendered or the devotion in his last moments. However, the right should not infringe the rights of the lawful heirs. The law allows gifts to be transferred while on death-bed, but it should meet the criteria of a *Hiba* or gift inter vivos. Herein, a gift can be rendered only on one-third of the property. However, the legal bar on bequest to heirs in Sunni Law is adversely low in terms of inheritance for wife at $1/8^{th}$ of the share if she has children, otherwise $1/4^{th}$. This can be increased if adopting the principle of eclectic choice like in case of Ithna Ashari law or by resorting to the application of Section 3 of the Shari 'at Application *Act* 1937 that allows for not applying for all the laws of Wills under Muslim Jurisprudence (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 294).

2.2.6. Laws of Waqfs:

The Law of *Waqf*s is interwoven in the religious and economic fabric of the Muslim society. The diversity of socio-political culture of countries practicing Islamic law have resulted in divergences in the laws of the *Waqf*. The word means 'detention' but in Islamic law it connotates,

> "state lands which are inalienable, used for charitable purposes and pious endowments" (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 305).

The earliest known commentary on *Waqf* is found in the reigns of the Second Caliph Umar whose reference is given in the *Sahih Bukhari* (al-Nawawi, 2019, pp. 551-552:Vol 2)[32] The *Da 'aim al-Islam* on Fatimid Law gives details of *Waqf* made by the Prophet, Hazrat Ali and Bibi Fatima. Ali had made an endowment of *Waqf* property in Medina and his sons were made the *Mutawallis* that is had the right to manage themselves from the income of the said property (Fyzee A. A., 1969, p. 17).

The earliest known canon on *Waqf* is of Abu Hanifa who defined it as the,

> "*tying up of the substance of a property in the ownership of the waqif*[33] *and the devotion of its usufruct amounting to Ariya or accommodate loan for some charitable purposes*" (Hamilton, 2014, p. 214).

[32] Caliph Umar on the advice of the Prophet converted a piece of land in Khaybar into a property to be used for charity, not to be gifted or inherited but to be used for the poor and freeing the slaves and for traveller and guests.
[33] Waqif means the founder of Waqf

His disciples Abu Yusuf and Imam Muhammad marking a departure from the views of their master held the Waqf property to be the property of the Almighty and not the *waqif* and the profits of which could be used for the benefit of His creatures. Thus, it extinguishes the founder's right on the property.

The codification of *Waqf* Laws in India occurred in the year 1913 according to which,

> "*permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious and charitable*" (Fyzee A. A., Outlines of Muhammadan Law, 2008, p. 228).

Thus, to qualify for any property as a *Waqf*, there should be a clear religious motive with a permanent endowment in perpetuity and the fruits of which will be utilized for the good of the humanity. A *Mutawalli* could become the manager or procurator of the said property but cannot become a 'trustee' in technical sense *(Muhammad Rustam Ali v Mushtaq Hussain*, 1920) (Fyzee A.A., 2008).

The Laws of the *Wakf* in India has been best dealt in two landmark cases of *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdh*ry case and *(Shuk Lal Poddar v Bikani Mia* , 1892) (Abbasi, 2014). In the former case, the Privy Council held that if the gifts/ charity were substantial, the *Wakf*s of those gifts were considered valid provided it was not used for self-aggrandisement. The Court applied the principle of *Ijma* (interpretation) to mark a departure from Islamic law based on the reading of the *Traditions of the Prophet* that have held the *Waqf* for the family and personal use of relatives to be the biggest act of charity (Ali, 1986, pp. 330-333) .

In the *Bikani Mia* case, citing *the Hedaya*, it was held that even in the absence of assignment of object of *Wakf* for the poor, the latter will continue to take the benefits of the object named. Thus, scholars like Ameer Ali held clarity of condition for the enjoyment of *Wakf* as legitimate for the family, one's kindred and neighbours. The difference is primarily over the ways of affecting it in terms of the party, nature of property to be divided, whether consignment is necessary or not. However, all authorities hold in unison the bestowing of usufruct of the *Waqf* property upon whosoever the *waqif* decided upon. Interestingly, in Egypt, the family *waqf* have been abolished or subjected to restrictions while in Pakistan and Bangladesh, the *Waqf* Validating Act of 1913 continues to remain in force (Ali, 1986, p. 334).

The *Wakf* Act of 1913 restored the Islamic position by overruling the Privy Council position. Section 2 (1) deals with the definition of Waqf; Section 3 (a) outlining *Waqf* for the maintenance of family, children, and descendants as lawful; Section 3 (b) dealt with reservation for Settlor in which, as per Hanafi law, the settlor was entitled during his lifetime to 'eat out' of the *waqf* property that is for his management and support. Section 4 dealt with Remoteness and Section 5 on Customs accepted but limited in light of the Shari 'at Act. It was also established that this Act will not be retrospectively established and did not apply to *waqfs* before 7 March 1913 (*Khajeh Solehman v Salimullah Bahadur*, 1922). However, this position was changed to retrospective effect by the passing of the Mussalman Wakf Validating Act, 1930(Ali, 1986,p.336).

Newly amended ***Waqf* Act of 1995** has repealed the earlier amended versions of 1954 and 1984 by earmarking a shift in the management of Waqf properties under the aegis of the State and a trend of reduction in *Waqf* properties particularly of family and personal set-up. The Act lays down the blueprint of setting up *Waqf* Boards and Councils at state level to manage the property of the *Waqf* endowments except for Dargah Khawaja Moinuddin Chishti in Ajmer *(Saulat Hussain v Syed Ilmuddin*, 1987).

Administration of *Waqf:*

A *Mutawalli* is a manger or superintendent of the *Waqf* property. He is not to be treated as a trustee as the real trusteeship of the Waqf property lies in the God as per Muslim law. He does not hold the power to sell off the property without the permission from the courts. However, at local levels, the *Qazi* has the powers to administer the actions of the *Mutawallis*. Any person of same mind who is the founder himself (*Auqaf*), his children, women and even non-Muslims can be a *Mutawalli.* In Pakistan, a minor is also allowed to be a M*utawalli,* if the office is declared to be hereditary. However, in case of performance of spiritual functions by the Mutawalli, the bar is on grounds of gender and of non-Muslim faith, who cannot become the *Imam* of the mosque, *Sajjada-nashin* or *Mujawar* of a *dargah (Muhammad Bakhtiar Khan v Qari Bashir Ahmad*, 1957)

CONCLUSION:

The reading of the process of 'domestication' or 'codification of *Shari 'a*' by both the indigenous settlers and alien imposters points to the marginalization of family law to the imagination of a colonising project. The insistence on ontologizing of a classical common law of civil and criminal

Jurisprudence may have contributed to administrative convenience but dangerously fettered the fluidity of *Shari 'a* into a tautology of legal positivism. The ossified understanding of the *Shari 'a* trapped in the translation problem was rendered incommensurable with the richness of the Islamic discursive tradition.

The construction of the historical narrative on the mapping of the indigenisation of Islamic law in India started with the differentiation in orientation of the Two Empires, each with its agenda to consolidate political power. The line of departure in imparting justice under Mughal Jurisprudence in contrast to the Anglo system was that the former applied the principles of Islamic law based on affairs between the inter-dependent parties wherein a crime would only be registered by the concerned parties and punishment could only be pardoned by the victimised family to impart personal retributive justice. The *Qazi*s under the Mughals while interpreting the texts and imparting decisions laid more emphasis on reconciliation than punishment.

The latter, herein the Britishers, applied the rationale of 'natural law' wherein people functioned as individuals and the punishment meted out was to deter crime in future and any deterrence like public hanging was preferred to mutilation to give a public message of non-acceptance of revolt. The imperialist believed that the penalization by cutting the hand of a thief and stoning was too harsh and inhumane. Their twin goal of regulating theft and dacoity and managing *Awqaf* grants created a clear public/private dichotomy in the system of Islamic law. The state laid its focus on the utilitarian principle of protecting property and was concerned more with the interest of the individual than the society writ large (Fisch, 1983, p. 53) .

The effects of the Anglo- Muhammadan law was not confined to the legal realm alone but impacted the defining of Muslims as a monolithic community vis a vis the group struggle in the nationalist project. It held strong cultural orientation in creating religious institutions which were not premised on regional identity or familial association but on participation in the profession of law based on sectarian identity. Muslims in India, in the writings of the scholars, were organised around affiliation to these regional Madhabs which were static and rigid in their dispensation. The British administration achieved its great changes in the setting of a South Asian society built on the foundation of an impersonal government, equal rights before law, public welfare and thriving economic status. However, it disrupted the secular fabric of the country wherein groups were caught in seamless struggle for religious identity at the cost of real equality and liberty in framing just laws of a communal society. The post-Colonial State continues to pay the debts of the burden of the imperialist past.

Chapter 3

The AIMPLB: Organization, Functions and Leadership

The domain of personal laws is a sanctum sanctorum for the majority of the Muslims, treated as infallible and beyond questioning by the logic of mankind. These laws tracing its genesis to the *Qur'an* and the Prophetic traditions govern every sphere of life, behaviour and conduct of a believer of Islam. The preceding chapter explored the process of transition of the personal laws under the aegis of three successive reigns of the Mughals, the Britishers and the Indian Republic, respectively. However, the treatment of the personal laws as customary laws of the Muslims instilled a sense of autonomy and freedom from outside interference. This form of patronization both by the Mughals and the Britishers was short-lived owing to the pain of the partition and the resultant communal violence across the newly independent country.

The pensive mood of the nation was exploited by some of the hardliners of the dominant Congress party who got entangled in the divisive politics of the colonisers. They fanned an insecure and communal hate politics towards the Muslims as witnessed in the proceedings of the Constituent Assembly (henceforth C.A.) The drafting of the Indian Constitution became a herculean task in the wake of clash between the rights of the minority vis a vis the reform agenda of an interventionist State.

The existing scholarship on colonial and post-colonial settings has primarily examined MPL as the integral factor on which the identity claims of the community is constructed. However, the new discourse delves into contestation of power struggle between myriad groups demanding own rights of self-determination within the community (Williams, 2006) (Larson, 2001). This study holds relevance in the light of scant attention paid by historians and political scientist on the working of the AIMPLB.

The journalistic and academic understanding of the organisation is cursory in dismissing it as a 'conservative force' or 'phalanx of orthodoxy' (Singh, 1994, p. 96), (Jones, 2010). They fail to rightly articulate the expanse and control of the Board over the uneducated and disempowered Muslim population. The Board has been able to legitimize its authority for last 40 odd years negotiating with the government on claims of autonomy of affairs of the minority especially regarding the personal laws. However, the contemporary dialogues on the Muslim personal laws are entwined in diverse *maslaks* (sectarian) groups causing deeper ramifications on claims of a uniform and monolithic representation of the community by the AIMPLB. The factional groups

within the community are charging the Board with divisiveness and parochialism in its mind-set, since the inception.

This chapters examines the debate over MPL as a site of contestation for power and legitimacy among a wide array of Muslim organisation, sects, women groups, and civil society forums that have sought to assert their distinctiveness from a stereotypical understanding of representation of Muslim as a monolithic community. The study of the evolution of the AIMPLB as prima facie the representative face of the Muslims at the mainstream level and the final authority entrusted with the task of interpretation of the Muslim personal laws is unfounded.

The AIMPLB has been criticised for its alleged role in narrow and parochial reading of the text and traditions of the Islam, dominance of the Deobandi clerics at the top echelons and its orthodox stance inimical to the idea of reform on gender-just lines. The research findings have, thus, opened unexplored domains of sectoral dominance within the organisational structure of the Board. In recent years, the Muslim community has, thus, witnessed a rise of sectarian heterogeneity owing to complex array of ideological, political, and social competitions thwarting the very attempt at consensus-building amongst its members.

The first section of the chapter traces the historical moorings leading to the creation of the AIMPLB in the 1970's. The organisation performs a pivotal role in negotiating the demands of the minority with the government in areas like seeking autonomy in interpretation of MPL, administration of *Wakf* property, management of *Madrasahs*, mosques, and cemetery. The second section has investigated the claim of the AIMPLB as a unified 'sole voice' of the community and found it to be an eyewash as it fails to address the marginalized voice of caste, class, and gender discrimination. The third section of the chapter studied the social composition of the AIMPLB caught in the politics of exclusion of marginalized groups causing the creation of several alternative organisations. This section also highlights the dangers of misrepresentation of the minority community that has caused a rift within the AIMPLB. The fourth section of the chapter critically engages with the functioning of the organisation in religious and political domains proving signs of overreach in legal affairs like the Ayodhya dispute. The final section deals with process of internal fragmentation of groups within the Muslim community that have eventually carved out alternate forums to deliberate on the rights of its internal members and negotiate directly with the government on issues of reforms of personal laws.

3.1. Rise and Growth of the AIMPLB: Major Phases

The historical ethnography of the Indian landscape speaks of Muslims as an alien invaders and traders who have eventually absorbed themselves in the heartland to rule the country. After the smooth long reign of Mughals for 600 odd years, the Muslim rulers were politically uprooted by the Britishers. The Britishers governed the country by following a policy of alienation harbouring communal rift between the Hindus and the Muslims. The divide and rule policy of the Colonialist tarnished the image of Muslims as 'traitors' caught in the everlasting struggle to prove their loyalty to the newly emerging nation-state.

During the last phase of the freedom movement, the Muslims were divided into two ideological blocs namely the Jinnah bloc and the Muslim-Nationalist bloc. The former bloc had accepted the fate of Muslims as foreigners and unacceptable to the Hindu majority, hence, causing the partition of the country with the creation of a new Muslim nation of Pakistan. The latter group under the leadership of loyalists like Abul Kalam Azad, Ali Brothers, Ali Brothers, Zakir Hussain etcetera continued to owe their allegiance to the national movement of the country. However, the pain of the partition dealt a direct blow to the sacrifices and loyalties of the Muslim who were now reduced to a status of a numeric minority by trimming their rights of reservation in jobs and proportional representation in legislative bodies as per the final draft of the Indian Constitution. Nonetheless, the Muslims participated enthusiastically in the electoral process in 1952. The All India Jamiat Ulema-e-Hind (henceforth JEH) gave up politics in 1955 to contribute to the nation-building project and the vanguard of political leadership passed on in the hands of the All India Majlis-e-Ittehadul Muslimeen (henceforth AIMIM) under Abdul Wahid Owaisi in 1958 (Kugle, 2001, p. 302). They were cautious in constructing their Muslim identity around a distinct legal status crystallised in the form of an Anglo-Muhammadan law.

The JEH along with AIMIM established a coalitional organisation in 1964 to operate as pressure-group consultative body negotiating the demands of the Muslims with the government. They outlined a three- pronged agenda of demanding rights of the Muslims in terms of autonomy in exercise of religious freedom, restoration of Urdu as an official language and the protection of minority character of Aligarh Muslim University (Williams, 2006). Thus, post-independence up till 1970, the Muslim political organisations had mostly played an accommodative role in building a strong post-colonial state. In return, the Congress government has been maintaining its status by refraining to meddle in the affairs of the minority until the vision of a UCC is realized in future.

Thus, the ghost of the UCC coming out from the pages of the debates of CA continue to haunt the Muslims till date.

While at one end of the spectrum were the status quoist who continued with the colonial laws in personal affairs of the community, yet at the other end rose a strong opposition to archaic laws on TT and polygamy by an atheist and rationalist leader Hamid Dalwai. Dalwai was instrumental in raising public awareness on demanding abolition of TT and introduction of a more secular and rational UCC in the 1960's. Dalwai inspired by Socialists like Ram Prakash Lohia, J.P.Narayan and Phule established the Muslim Satyashodhak Samaj in Pune on March 22, 1970 to carry on a political struggle to reform the personal laws. Dalwai' s movement could not gain recognition in the eyes of any of the mainstream parties, be it the Congress or the early avatar of the BJP that is the Janta Party. However, Dalwai managed to apprise the masses about the need for reform of the personal laws but was outcasted by the AIMPLB as an 'enemy of Islam' (Jadhav, 2018) .

The imminent factor that led to the rise of the AIMPLB was initiation of debate on the Adoption of the Children Bill in 1972 in the Upper House of the Parliament by the then Law Minster U.R. Gokhale. The Bill stated that,

> "*in the place of Hindu law of adoption and maintenance, this new law will be enforced on all citizens of the country, as a uniform civil code. This draft is the first step towards the Uniform Civil Code*" (Rao, 1975, p. 287).

The Bill intended to welcome a uniform secular law on adoption of the children across religions that complies with the directive of drawing a UCC. The move faced severe backlash from the Muslims, who viewed it as a threat to their religious autonomy causing nationwide stir organised by the clerics of the Deoband School at Bombay in December 1972. This movement enjoyed the support of other intra-religious organizations like the *Majlis-e-Mashawarat*, *Jamaat-e-Ulema-e-Hind*, Aligarh Muslim University, eminent personalities of the community like Tahir Mahmood, Muslim media fraternity etcetera. They particularly chose Mumbai as their site for struggle due to simmering tensions coming from within.

An emergency meeting was convened at Deoband, at the behest of Maulana Minnatullah Rahmani, (*Ameer e Sharia*, Bihar and Orissa) (Rehmani, 1984). Hakeem Islam Hazrat and Maulana Qari Mohammad Taiyyab, (Director, *Dar-ul Uloom*, Deoband) to discuss the impact of the political events at the national level. The Convention, hence, unanimously decided to form the

AIMPLB as the face of the Muslims to represent the collective voice of its distinct members (Rehmani, 1984, p. 4).

The Board looked at the Adoption Bill as a frontal attack in the affairs of the MPL. The Board explicitly quoting the *Qur'an* viewed that,

> *" the laws of Inheritance have fixed the share of the heirs and granting of equal rights of inheritance to the adopted child would be inimical to the rights of the real heirs"* (Ali, 1934, pp. Verse 33:4-5) .

Islamic law allows the person to adopt a child or preferably an orphan to rear, educate and fulfil their needs. Once they become mature adults, it is the responsibility of the parents to free them from bonds of dependency by building up on their educational attributes and talents for future survival. Their efforts led to the withdrawal of the Bill. The second attempt was made on 16th December 1980 with the Adoption of the Children Bill 1980 in the Lok Sabha, which exempted the Muslim Community. However, this time the Bill was opposed by the Bombay Zoroastrian Jashan Committee demanding the exemption of Parsees. The bill eventually lapsed due to the dissolution of the Parliament in 1984 (Rahmani S. S., 2013).

The success of the Board in causing the dissolution of the Bill earned the organisation widespread respect and considerable public support from within. The message was clear that majority of the Muslims would not allow any interference in the divinely ordained *Shari'a* laws as part of their religious faith. Any attempt by the government to interfere in their cultural and religious domain would hallmark to a form of genocide as per the International Covenant of Human Rights. The Board reaffirmed its primary responsibility to salvage the MPL from external interference and be treated as part of their FR holding primacy over the DPSP.

During 1970's, Indira Gandhi raised the slogan of '*garibi hatao'* (end poverty) signalling her plan to mobilize the poor and the marginalized for a new Congress with a leftist tilt in its orientation. Her attempt to woo the lower castes by offering reservation in educational institutions faced agitations across the country leading to sporadic riots on streets between 1971-1985. It gave impetus to the Hindu activists to turn their violence against the Muslims as part of their long-term strategy to uproot the Congress (Kohli, 1991, p. 50) .

In its early stages of growth, the AIMPLB showed strong opposition to the sterilisation campaign and family planning programme of Indira Gandhi during the Emergency period. The censorship of Press thwarted the attempts of the Muslim community to raise public opinion against this stance of the government. In these critical moments of unwarranted detention and arrest, the Board passed a resolution against force*d Nasbandi* (vasectomy) in which the Islamic perspective was explained to all. In the booklet "*Family Planning*", the first General Secretary Syed Minnatullah Rahmani highlighted the Islamic, scientific, and rational views on opposing forced sterilisation (Rahmani M. , 1978).

Lessons from the Shah Bano episode: Codification of Law by the AIMPLB

Its real evolution from a small coterie to a prominent pressure group came with the infamous *Shah Bano* case of 1985. The amended provisions of the Cr.P.C 1973 has been a cause of concern for the AIMPLB due to the right of divorced women to claim maintenance from her ex-husband till life or her re-marriage. The organization raised serious objections on incorrect interpretation of the *Qur'an* by the SC and overlooking the authority of the *Ulama*. Secondly, they were sceptical of the move of the Court to demand introduction of UCC terming it as 'harmful and dangerous (Qureshi A. R., 2013). Ali Mian, the President of the AIMPLB, talked about the Islamic principles wherein the responsibility of the divorced woman lies with her parents or her near relatives beyond the *Iddat* period. Mian questioned the Court's expertise in misinterpreting *Mata* as maintenance(*guzara*) due to their lack of knowledge of the Arabic language (Rahmani S. S., 2012).

A large movement was mobilized against the judgement involving signature campaigns, comparing it on lines of Khilafat on February 9, 1986 in Rae Bareli, U.P. It involved people from across the world observing the day as 'Save Shariat Day' in Bombay and Kerala. The biggest achievement was to mobilise umpteen Muslim organisations like JIH, JEH, AIMIM, Ithna Ashari (Kalbe Abadi), Bohra Jamaat (Shabbir Bhai Nooruddin), in its fray to protest the interference of the Judiciary in MPL of the community (Nadvi S. A., n.d., pp. Vol.IV:113-126).

This judicial ruling held far wider political ramifications for the Muslims regarding the matters of the personal law. The AIMPLB under the aegis of Syed Abul Hasan Ali Nadvi and Minnatullah Rahmani pressurised then, Prime Minister Rajiv Gandhi, to overturn the ruling of the judiciary in the personal law. Hence, due to the concerted action of the AIMPLB, the government appended a proviso to the proposed article 125 of Cr.P.C, namely Article 127 which stated that if the divorced husband has paid all the *Shari'a* dues or the divorced women forsakes her maintenance

then the said order stands cancelled. However, the Judiciary took a bold step in vindicating the rights of maintenance of a divorced Muslim woman ,till life or remarriage, as per the settlement of claims under the criminal code (Engineer, 1987, p. 25).

This left the Muslim community unsatisfied and furious, thereby, compelling Rajiv government to pass the MWPRDA, 1986 that exempted the Muslim women from claiming alimony as per the provisions enshrined in the Cr. P.C. (Patricia Jeffrey, Jeffrey, & Jeffrey, 2008, p. 520). Therefore, the ascendancy of the AIMPLB as an influential pressure group has reinforced the centrality of Muslim personal laws as a distinct identity marker for the community. The Board has eventually come to exercise controlling powers over the lives of women in matters of marital, financial, and custodial rights. Even Shah Bano withdrew her fight for getting allowance following fear of exclusion from the community.

To fulfil its objective of interpreting and implementing the MPL, the AIMPLB decided to set up Action Committees to promote awareness among the Muslims through popularisation and publication of personal laws. It also aimed at forging unity among different sects of the community by setting up delegation teams to study and analyse the sources of the *Shari'a* law. The Board followed the practices of the Caliphs of the Islam namely Abu Bakr Siddiq and Umar ibn al-Khattab who drew upon the religious texts and traditions and method of *Ijtihad* to resolve the issue of that time. In 1989, a *Fiqh* Academy was set up under the aegis of Mujahid al-Islam Qasmi, who later became the president of the AIMPLB, to formulate Islamic law based on consensus between the *Ulemas* of different sects. The Academy worked for the standardization of *Nikahnama* by 1999-2000, ushering in uniformity in terms of the marital contract between both parties (Rahmani M. W., 2015).

In its initial years, the AIMPLB campaigned about the sacrosanctity of MPL and attempted at codifying personal laws on strict reading of the *Shari'a.* The organisation wanted to insulate the domain of personal laws from the State's interference especially, in the wake of the *Shah Bano* episode and the rising fear of the right-wing organisation's agenda of implementing a UCC. The result of this codification project was the publication of a Compendium of Islamic Law (*Majmu'a i Qawaneen-i-Islami*) in 2001 that offered complete guide on matters of family law. It included scriptures from the *Qur'an* and Prophetic traditions and interpretative legal works contributed by scholars like Abdul Hai Firangi Mahali, Aziz ul-Rehman Usmani and Ashraf Ali Thanwi (Jones, 2010. This Compendium was the key guidebook to scholars, clerics, and jurists from across the country to rule based on this sourcebook while adjudicating in family courts. It was a combative

response on need for codification of laws and the allaying of fear of encroachment through UCC (Rahmani S. S., 2012).

Another controversial issue which the Board had to grapple with around its initial years of expansion was the income tax on *waqf* property. According to the law, income tax was imposed on those properties whose income had risen after 1973. The only way to avoid imposition of tax was through sale of all such properties and deposition of the money in the nationalized banks. The AIMPLB through its representative Yusuf Najmuddeen met the Prime Minister Indira Gandhi and submitted a memorandum to explain the adverse effects of it on the community. The Board demanded amendment in the *waqf* laws to provide legal protection to it to avoid future attack on these properties. In 1984, a Wakf (Amendment) Bill was presented in the Rajya Sabha demanding the annulment of the secular status of *waqf* laws and non- recognition of legal protection to the properties.

The AIMPLB met the law minister Jagannath Koshal who shared the concerns of dissatisfaction of the Muslims in the Parliament. Nonetheless, the *Wakf* (Amendment) Bill was passed without any consultation with the minority . In April 1988, the AIMPLB reiterated its demand to bring amendments to the Act over the agreed portion of property to stay as it is and open for discussion the disputed portion of the property. A five-member delegation[34] met Union Minister Sita Ram Kesri proposing the changes and that led to the passing of the *Waqf* Act, 1995 that included all the demands of the Board. But the Act was open to scrutiny by the committee of the Parliament and on 4 June 2010, *Waqf* Amendment Act was passed which ended the independence of the Boards and brought them under the purview of the State governments (*Syed Shah Muhammad Al Hussaini vs Union of India & Ors*, 1998).

3.2. Social Composition of the AIMPLB:

The general members of the Board are mostly elected from different states based on the proportionate population of Muslims in the respective State. However, the composition of the Executive Committee that performs the pivotal role of consultation and decision making on issues of national importance is premised on the qualification of expertise in areas of religion, theology, law, academic and media influence.

[34] Maulana Qazi Mujahidul Islam Qasmi, Abdul Rahim Quraishi, Yusuf Hatim Machhala, C.K.Jafar Shareef and Gulam Nabi Azad.

The educational background of the members can be traced to religious educational institutions like the Deoband Madrasah, *Darul Uloom Nadwa* and *Firangi Mahal* of Lucknow, *Imarat e Sharia* of Bihar, Orissa and Bengal and major centres of Madrasahs located in different states. Most of the members are clerics or religious scholars who are adept in translating and interpreting the inunctions of the *Qur'an* and the *Hadith*. They also are trained in field of Islamic methodology and have contributed to the field of knowledge through publications in native language.

The first President was Mohammad Tayyab Qari and Minnatullah Rahmani became the first general secretary. A special mention can be made as an example about Maulana Ali Miyan, the 2nd President of the AIMPLB, who had established closer ties with the Arab world and authored several books on Islam. He was a key figure in uniting the Muslim community globally through his eloquent speech and the *Dawah* (proselytization of Islam) mission. The current President Maulana Rabey Hasani Nadvi also belong to the Deoband school. A peculiar pattern is noticeable in their educational status as majority of them are followers of the Hanafi law and their mindset are trained to follow a strict reading of the religious text like the position of Imam Hanafi and his preachers. Thus, there have been raising concerns of neglect of positions of other Schools of Jurisprudence causing internal dissension both within and outside the Board. The major criticism levelled at the style of functioning of the Board is that it tends to promote the ideology of a particular Deobandi sect with members mostly belonging to affluent upper caste educated elites section of the society. However, the organisation responding to these criticisms argued that the key executive positions are open to people from diverse backgrounds like Maulana Mufti Burhanul Haq (Barelvi), Maulana Muzaffar Hussain Kachhkachhwi (Barelvi), Late Maulana Kalbe Sadiq(Shia) and other members of the *Jamaat-I Islami* (Rahmani K. S., 2014).

The expansion of the general membership of the Board in the far eastern corners of the country is praiseworthy but inadequate as the outreach is yet restricted to 24 out of 29 states and non-representation in the Union Territories. The gendered index is also skewed with women holding only 11.2% of the total representation of the members. The membership of women in the Executive Committee of the AIMPLB is steeply low at 04 members. Moreover, the women members swear allegiance to traditional ideologies and support status-quoist position for the sisters of the community. Even if a minority within them held a difference of opinion, it would not impact the larger mindset of the male members.

3.3. Organisational Structure of the AIMPLB:

The political steerage of the Muslims at the time of Independence was caught in binary position between the liberal Muslim nationalist of the Congress and the religious coterie of organisations like the JEH and the Deoband School. However, neither positions have been able to produce a charismatic leader that could represent the community with the likes of Ambedkar. This pressing need was first felt by Maulana Minnatullah Rahmani who decided to sow the seeds of a religious organisation namely the AIMPLB to negotiate with the government on the rights of the Muslims. The organisation was entrusted with the prime responsibility to articulate the religious rights of the Muslims and protect it from any form of infringement both within and without.

The AIMPLB started with the initial membership of 101 founding members from across the country. Later, the number was expanded to include 149 general body members who were to be elected for a period of 03 years, barring the founding members whose seats can only be filled by a process of nomination. In the total tally of 250, 28 seats were reserved for the women. However, the organisation allows re-nomination/election of the ex-members.

STATE-WISE NUMBER OF MEMBERS OF THE AIMPLB

Sl No.	States	Founder Members	General Members	Total	Women Members
1.	Delhi	17	16	32	6
2.	U.P.	22	28	48	5
3.	Maharashtra	13	12	25	3
4.	Andhra Pradesh	05	06	10	3
5.	Bihar	10	10	20	0
6.	West Bengal	1	13	14	3
7.	Karnataka	6	8	14	1
8.	Gujarat	2	9	11	0
9.	Tamil Nadu	6	9	15	3
10.	Assam	3	4	7	0
11.	Rajasthan	2	3	5	1

12.	Kerala	2	7	9	1
13.	Jammu & Kashmir	3	2	5	0
14.	Punjab	1	0	1	0
15.	Madhya Pradesh	1	8	9	0
16.	Jharkhand	2	4	6	0
17.	Odisha	1	1	2	0
18.	Chhattisgarh	0	1	1	0
19.	Manipur	0	1	1	0
20.	Haryana	0	1	1	0
21.	Uttarakhand	0	1	1	0
22.	Meghalaya	0	1	1	0
23.	Telangana	4	3	6	2
24.	Tripura	0	1	1	0
	Total	**101**	**149**	**250**	**28**

Source: AIMPLB, Activities and Achievements, New Delhi, 2021 accessed from http://www.aimplboard.in/index.php on 20 July 2021.

The executive membership of the Board is settled at 50 members of the total membership. In this, there are twelve office bearers at the helm of the organisation. The Board elects a President, 5 Vice-Presidents, 1 General Secretary, 4 Secretaries and 1 Treasurer. The post of the President is an elected one, while other Executive members are nominated by the President from amongst Executive Committee. However, in case the office of the President falls vacant, for any reason whatsoever, and the remaining term is less than 9 months, then the newly elected shall finish the remaining term and continue office for next 03 years as well (Nadwi R. A., 2015, p. 65).

This Executive Committee should meet twice a year to discuss issues concerning the members of the community and implement Resolutions passed by the Board. The Quorum for such meetings is set at 41 for special meeting and 11 for Executive meetings. It is mandatory for the President to call for special meeting of the Board within a period of one month from the date of receipt of such

a request by 30 or more members of the Board. As the think tank of the organisation, they wield supreme powers to steer the activities of the Board (Nadwi R. A., 2015, p. 66).

Decisions are taken by a unanimous vote, while in case of a tie, the President shall have a casting vote. However, if any representative of a particular sect felt that any decision is against their School of Jurisprudence, then an exception can be drawn by exempting them from that decision. Any amendment or annulment in the Constitution of the Board can be effected by two-third majority of the members present in a meeting of the general body provided further that such proposed amendment or annulment shall be entered into the agenda of the meeting. Quorum for such a meeting shall be 50 (Qureshi A. R., 2015).

3.4. Functions of the AIMPLB:

A cursory glance at the resolutions of the meetings, since the inception of the Board, highlight the diverse issues taken up by the organisation to respond to the vicissitudes of the time. At its General Body and Executive Committee meetings, the Board had mobilized the masses to protest and oppose government's move to introduce the Adoption Bill of 1972, program of forced vasectomy, family planning, amendment to Cr.P.C (Sec. 125, 127) and the compulsory registration of the *Nikahnama.* These policies were looked upon as a modus operandi to camouflage the larger interest of bringing in the UCC which would silence the rights of the minorities forever. It has in its stride earned the support of the community and the State with the drawing of the MWPRDA of 1986, protection of mosques and tombs, adoption of the *Waqf Act*, 1984 and the setting up of the Central Madrasa Board in 2009 and the establishment of *Darul Qaza* courts across the country (Nadwi R. A., 2015, p.70).

a) Board's Agenda for Social Reform:

The Social Reforms Committee is entrusted with the responsibility of creating awareness among the community on social evils like female genocide and dowry. It guides the women on the rights guaranteed to it by Islam and how to adhere to the social customs of the community. In the light of the guidance from the *Qur'an* and the *Sunnah* of the Prophet, the members deemed it to be their prime role to guide the society on lines of *Shari 'a*. The Committee under the aegis of Maulana Fuzailur Rahman Hilal Usmani[35] convened the 17th

[35] Mr. Usmani was the Rector, Islamic Centre, Malerkotla, Punjab and Convenor of the AIMPLB Social Reform Committee.

annual meeting of the AIMPLB at Monghyr, Bihar in March 2003 to lay out a blueprint of the agenda of social reform to be undertaken by the organisation. It discussed the evils of female infanticide, drinking of wine and gambling and persuaded the Muslims to abstain from it (Usmani, 2010).

The committee has come out with series of booklets on the issues of reform like on marriage, divorce, drinking etcetera.[36] They highlighted that family planning is the key cause of rise in spate of cases of female foeticide. To implement the programmes of reform, the Board on April 5-6, 2003 at its Lucknow general body meeting appointed a National Convenor under the aegis of Wali Rahmani. He created the office of State convenors to apprise the committee with affairs at grassroot level (Rahmani M. W., Female Infancticide, 2008).

The attempt to initiate social reform primarily catered to the concern of *Talaq* (divorce). Several booklets have been published by the members of the Board namely, "*Talaq ke Istemal ka Tariqa*" (how to claim a divorce); "*Talaq ke Masai*l" (Issues in *Talaq*); "*Taqreebat ke len-den aur uske Mafasid*" (Detrimental effects of dowry or give and take in marriage); "*Islam ke Nizam e Miras*" (System of Inheritance in Islam). Over a period, the Board expanded its understanding of social reform to rope in issues of inequality and untouchability in Indian society and its effects of Muslims, family problems in muslim society, women's exploitation in society and equality in Islam. The Board recently under the guidance of Maulana Rabey Hasan Nadwi organised a three-day workshop on social reform in Delhi, Haryana, Himachal Pradesh, Punjab, U.P., Rajasthan, and Gujarat. The agenda was to deal with the menace of Casteism in Muslims and other challenges confronting the society (Rahmani M. S., How to Divorce, 2010).

The AIMPLB has also set up a ***Tafheem e Shariah Committee***[37] to explain the Islamic positions on court judgements that did not support the divinely ordained *Shari'a* laws. The first meeting was held in New Delhi on 23 June 2005 in Delhi under the supervision of Syed Jalaluddeen Umri and Abdur Rahim Quraishi. The only partial credit which the Board has earned since the inception of this Committee is the constitution of a woman's wing located at Hyderabad to connect them with the *Qaza* courts on perspective of women regarding the domestic issues. This committee has played an instrumental role in drawing on a standardised

[36] Rabey Hasan Nadvi's booklet, "*Ummat-i Muslima ki Do Imtiazi Khusosiyat: Dawah ila Al-Haq* and *Shahadah ala Al-Nas* and Maulana Mufti Fuzailur Rahman Hilal Usmani's booklet *Shaadi Mubarak*.

[37] Maulana Syed Jalaluddeen Umri (Convener); Late Mr.Muhammad Abdul Rahim Quraishi; Maulana Khalid Saifullah Rahmani; Maulana Khaleelur Rahman Sajjad Nomani; Maualana Syed Aqeel Al Gharvi.

model of a *Nikahnama* which elucidates the directions for both husband and wife to draw their terms of marital contract like rights and duties of both the spouses, their physical residence as proofs and details of witnesses to the contract of marriage to testify the solemnization of marriage (Correspondent T. , 2012).

The National Commission of Women (henceforth NCW) had proposed a Bill on compulsory registration of marriages in 2007 to deal with the problems of gender violence, rights of women and child born out of wedlock, child marriage and fraudulent marriages. Similar stance was maintained by the judiciary who in (*Seema v Ashwani Kumar & Ors*, 2007) case called for compulsory registration of marriages in each state. Several reports of the Law Commission of India (henceforth LCI) have proposed registration of marriages irrespective of religious denominations. It was viewed as a positive step to check bigamous relationship and protect women's right to maintenance under the Criminal Code. The ongoing pressure on different vigilant groups and the State had led to the passing of the Criminal Law (Amendment) Bill of 2012 in the Rajya Sabha but lapsed in the Lok Sabha due to the dissolution of the House in 2014. In the wake of the rule of mandatory registration of marriages set forth by the government, the Board had initially remarked disagreement with the move on grounds of interference in personal affairs, ineligibility of poor and uneducated people to afford the cost of registration and procedural constraints.

They offered their alternative process of registration of a *Nikahnama* by the community *Qazi* (cleric). The Board challenged the provisions of the Bill that prohibited polygamy, restrained child marriage, and accepted only legal age limit as the only valid ground of marriage to be acting in contravention to the Islamic position. It further demanded the Board should take into consideration the provision of Dower and testimony of witnesses to justify the contract of marriage as valid. In the light of these recommendations and criticisms, several state governments have moved on and passed the Compulsory Marriage Registration Act in their respective States. The final position of the AIMPLB was that while accepting the provision of registration of marriages, it made a demand of acknowledging the status of marriage Registrar for *Qazis* who solemnise *nikah* among Muslims (Fareed, 2012) .

b) Establishment of the Darul Qaza:

In the backdrop of the *Shah Bano* episode and other judicial pronouncements on the interpretation of personal laws, the AIMPLB decided to promote the establishment of

alternative courts of settlement namely the *Darul Qaza.* The task of sowing the seeds of the *Darul Qaza* was undertaken by Maulana Abdul Hasan Ali Nadwi and Minnatullah Rahmani. The aim was to create alternative dispute redressal mechanisms wherein the members get their issues and concerns relating to marriage and divorce solved on the guidelines of Islamic laws and principles.

The AIMPLB attempted to apprise the Muslim community about the rationale for expanding the model of *Qaza* courts, with the help of workshops conducted in different cities like Hyderabad (1985), Jaipur (1993), and Munger (2003). The Board's President helped established the ***Darul Qaza* Committee** wherein the job of the *Maulvis* and its members was to enforce the injunction of the Islam. These *Shari'a* injunctions was considered as 'the will of Allah' called "*Qaza*" and the mechanisms to implement it would be agency of alternative dispute resolution called "*Darul Qaza/ Courts*" (Rahmani M. K., 2015, p. 12).

A five-member committee[38] was formed to expand the formation of Qaza Courts in different parts of the country. The first *Qaza* courts were set up in Bihar and Orissa. Several other branches were opened in different states raising the number to 61 across India till date. At present, there are eight *Darul Qaza* committees established in Centres at Patna, Darbhanga, Lucknow, Hyderabad, Banda, Delhi, and Akola (Nadvi, 2015).

As per the resolution adopted at Monghyr, the former President, Late Minnatullah Rahmani, delegated the responsibility of management of *Qaza* Courts to *Imarat-e Shariah,* Bihar (state level body of the Board). They had to train the *Muftis* of their states to be entrusted with the responsibility of adjudication of disputes between the concerned parties. Today, there are several training camps established in Orissa, Bihar, Jharkhand, and Rajasthan. A noteworthy step, undertaken recently towards gender inclusiveness, is the establishment of female Madrasahs in Malegaon in Maharashtra to train women to become *Qazis* of the Court.

Islam has attached an esteemed position to the institution of marriage (*Nikah*). The AIMPLB to spread the message of the sanctity of marriage established a ***Nikahnama* Committee** in October 1999 at its General Body Meeting in Mumbai. A five-member committee under the

[38] Maulana Ateeq Ahmad Bastavi of Darul Uloom, Lucknow was the Convenor; Syed Jalaluddin Ansari Umari of Delhi; Ubaidullah Asadi of Banda; Khalid Saifullah Rahmani of Hyderabad and Aneesur Rahman Qasmi of Patna were the other members.

guidance of Maulana Qazi Mujahidul Islam Qasmi was set up to draft a model *Nikahnama* to help men and women to follow the true Islamic practices in performing a contractual marriage.

The model of *Nikahnama* formulated by the committee was debated at the General Body Meeting held at Bangalore on October 28-29, 2000. However, the final draft was adopted at the Lucknow session on 22nd September 2002 under the convenorship of Maulana Khalid Saifullah Rahmani. The model *Nikahnama* comprised three parts: *Nikahnama* (the marriage contract), the *Hidayatnama* (guidelines for marriage under the *Shari'a* law) and the *Qarar* (declaration to abide by the law). The emphasis is laid on the role of arbitrators and mediators to resolve the discord. If it fails then, the couple should approach the *Qaza* courts which is mostly discouraged by the members of the family. The contract allows prompt payment of dower in tangible form though the husband can pay it in parts. It further lays out guidelines to refrain from certain relationship to get into marriage and the necessity of wife to be 'obedient' to her husband. However, the provisions of the contract and absence of provisions to control TT, promote *Khula* and doubling of dower based on Maliki law has led to pressures on the Board from within to reform the model *Nikahnama*. One of the members of the Board, namely, Syed Qasim Rasool Ilyas, refused to acknowledge these reform measures calling them as radical and non-preparedness of the community to adopt them (Suneetha, 2012, p. 41) (Ilyas, 2012).

However, the strong opposition from different agencies of the society made the AIMPLB rectify their status-quoist position and a reform measure was adopted at its Bhopal three day conclave in 2004, wherein the AIMPLB Secretary, Abdul Rahim Qureshi, announced about acceptance of the Board on incorporating a provision to ban *TT*. (Correspondent, 2005) The model *Nikahnama,* was formally modified only by 2019, to include a section to opt for a clause stating that "I will not give TT" (PTI, 2018).

The Board had set up a Legal Committee on Islamic laws to be managed by Maulana Ateeq Ahmad Bastawi to accommodate opinions of different Schools of Jurisprudence that can aid the *Qazis* (jurists) to adjudicate issues on family law. However, the AIMPLB has been tilting its position on the Hanafi law while settling matters of marital discord.

c) Babri Masjid Action Committee:

The AIMPLB decided to establish a committee to deal with the legalities associated with the *Babri Masjid*-Ram Janmabhoomi case. Post the destruction of the *Babri* mosque, a committee was set up on 15th May 1993 at Lucknow with 07 members to plead for a criminal case against the culprits at the demolished site. Over the years, the membership of the committee was expanded to 21, inorder to, aid the legal team in matters of judicial proceedings. Zafaryab Jilani was appointed as the advocate of the Land Title case at Lucknow bench of the Allahabad High court. He later helped Senior Advocate Rajeev Dhawan at the SC.

In January 2001, the *Vishwa Hindu Parishad* (henceforth VHP) vitiated the political atmosphere by announcing the construction of the *Ram* Temple at the site of Ayodhya. The then President of the AIMPLB, Maulana Qazi Mujahidul Islam Qasmi convened an emergency Executive Meeting on 21st January 2001 at Lucknow to formulate an eleven-member committee under the aegis of Dr. Syed Qasim Rasool Ilyas. The delegates of the committee met different leaders of the national parties to discuss the viewpoint of the Muslims by restoration of the *Babri Masjid* at the disputed site inorder to correct the wrongs and injustice meted out at them.

This committee has from time to time convened seminars and conferences to apprise the community about the legal course of action in the concerned matter. The members along with the General secretary Maulana Nizamuddin met the Shankaracharya Jayendra Saraswati on March 5, 2002 to work out an out of court amicable settlement of the dispute by proposing a mutual understanding for the construction of the mosque.

Swami Shankaracharya Saraswati's formula offered to the current President of the Board, namely, Rabey Hasan Nadvi proposing the setting up of a wall between the disputed and undisputed land and issuance of a No-Objection Certificate by the Board to set up a temple on the undisputed acquired land. The AIMPLB was not in favour of compromise on the Shankaracharya model and went on to rely on the judgement of the SC on the issue. The judgement on the dispute came out in August 2020, handing over the title suit to the Hindu parties and separate land measuring 5 acres elsewhere in the Ayodhya district to the Muslim parties (*M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors*, 2019).

On the issue of criminal conspiracy involved in demolishing the mosque, the AIMPLB's pressure on the then Narasimha government led to setting up of the Liberhan Commission to study the cause behind the demolition and the individuals involved in criminal conspiracy. However, the findings of the Report remained silent on paper and irrelevant, especially, in the wake of the release of all 32 names involved in the criminal conspiracy of demolition of *Babri Masjid* by the CBI Court at Lucknow (Desk, 2020).

The stalwarts of the BJP like L.K.Advani and Murli Manohar Joshi who were accused in the case hailed the verdict as a positive step post the SC judgement on the Ayodhya dispute on 5th August 2020 handing over the piece of land to Ram Mandir Trust. Uma Bharti had gone on board to celebrate her participation in the event but was acquitted due to lack of evidence. The Board's member Maulana Khalid Rasheed Firangi Mahal had stated that they will appeal against the verdict at the Apex Court as the CBI court has acted in a partisan manner by acquitting all despite the acknowledgement of the SC in the *Babri* case of destruction of mosque by deviants (Aishwarya Iyer, 2020).

d) The ***Tafheem -e-Shariat*** **Committee** (Understanding the *Shari 'a)* was set up on 1st of May 2005 to seek the help of the Muslim lawyers and advocates as the true representative of Islamic law in the eyes of external agencies. These professionals were given the responsibility to interpret the Muslim law in the light of Islamic perspective in front of the Indian Judiciary. The key idea was to help dispel the stereotypes surrounding Muslim men and women and prepare comprehensive literature on Islamic laws in different languages. Through this committee, the AIMPLB intends to codify laws as a standard set of principles. In November 2008, they set up a committee for eastern U.P. to expand their activities and help members to understand the issues better (Rahmani M. , 2012).

The Board inorder to formulate a compendium on Islamic laws established a **LEGAL CELL** at its executive body meeting in Lucknow on 25th December 2004. It managed to publish the Compendium on Islamic law in different languages guiding on matters relating to marriage, divorce, guardianship, custody, inheritance etcetera. This committee has also published books on the issue of family planning, female foeticide, UCC, veil in Islam, and other relevant matters (Rahmani M. , Uniform Civil Code, 1976) (Usmani F. R., 2007).

The Executive Committee of the Board in its style of functioning, over a period, felt a pressing need to publish a Newsletter to apprise the community about its activities, resolutions and functioning of the Board. At its 19th General Body Meeting in Chennai, the first issue of the

Newsletter '*Khabarnama*' was released in April 2007. It was meant to be a quarterly magazine containing articles relating to the issues confronting the Muslim society by imminent personalities of their area. Since then, the Board has been industrious in timely releasing its newsletter to build up its networking with the community.

e) AIMPLB considers *Madaris* (Institute of Islamic Learning) as basic institution to impart Islamic knowledge to the society. The misconceptions arising in society targeting these *Madrasahs* as hub of terrorism and places conflagrating communal mindset was dealt strongly by the Board by creation of a "***Rabita Madaris Islamia* Committee**". This committee under the supervision of Maulana Syed Salman Hussaini Nadwi deliberated on framework for protection of *Madrasah.* They outlined a reformed progressive educational curriculum of semblance of religious knowledge with scientific temper. On 5-6 April 2003, at its Munger meeting, a message to consolidate all the *Madrasahs* of the country under the Board was sent to help these institutions to adapt to the needs of education and employment in contemporary times and to work in unison to break the stereotypes regarding the condition of Madrasahs.

f) The Board has also set up a **Women's Wing** which is headed by Dr. Asma Zehra Tayyaba. It delves on the questions of women's rights in Islam and has come out in support of the Board on the debate of TT and the UCC. The task of this Wing is to counsel the fellow sisters on the issues relating to the *Shari'a.* However, they work as titular members of the community and are governed by the dictates of top echelons controlled by male clerics. Asma Zehera is vocal in criticising the Modi government for its queer neglect towards educational backwardness of Muslim women and unemployment in men (Zahed, 2016).

3.5. AIMPLB and the Rise of Alternate Voices

The growth of any organisation, especially the one claiming to have a pan-Indian character, can be chartered with the extent of support and legitimacy it has garnered from the community in governing its internal affairs and acting as a nexus with the State. Muslims in India are a heterogeneous group, despite the celebrated understanding of a global homogenous *Ummah.* The community is diverse not just theologically on sectoral lines but also in social stratification along caste, class, and spatial lines.

The community has witnessed a dilemma of forging political unity in the wake of rise of an alien de-colonised state that is inimical to the idea of Islamic lifestyle. Grappled by the sense of fear

and exclusion of cultural practices of religion, the Muslims have clamoured for autonomy in the personal lives of its brethren. The AIMPLB, for past five decades and more, has been the torchbearer of the campaign for group right of the Muslim vis-a-vis the Indian government. However, the style of functioning of the organization has got caught in the web of sectarianism and nepotism

The nominative style of representation by the Board fetters the deliberative process of functioning of the party wherein support on issues are given on partisan lines. A nuanced understanding of their style of functioning reveals a closed and covert deliberative process of decision making that fails to address the concerns of the community from diverse backgrounds. Moreover, the top echelons of the Board are under the tutelage of the clerics from the Deoband School and the *Dar-ul-Uloom*, Lucknow. The organisation is controlled by the Sunni *Ashraf* (upper caste and class) sections of northern India from the states of U.P. and Bihar, except for a nominal post set aside for the Shia sect. The style of functioning of the AIMPLB has entrenched the (non-Islamic) caste hierarchy in the system causing exclusion and discrimination between castes, exposing the false consciousness created of a 'unified' body.

This irreconcilable dispute on sectoral and gendered lines has led to splitting of ranks and setting up pf parallel organisations like the Shia, Women and Barelwi Board. The traditionalist *Ulemas* have denounced their legitimacy by reacting on them as enemies/ aberrant of Islam, while the dissenting section of population look upon them as an alternate voice that demands a separate public space to foot a more progressive and liberal understanding of the teaching of Islam. It is a case of crisis of legitimacy among the religious leaders manifested by the rise of sectarian politics. A profound dent is ubiquitous to the idea of a 'hegemonic consensuses of the voice of the community shows larger fault lines and cracks within the structure of the Board.

1) One of the foremost and frontal attack on the AIMPLB came from the oppressed quarters of **Muslim women**. The bandwagon for the Muslim women's struggle was steered by feminist groups like ***Awaaz-e-Niswaan*** (henceforth AeN) and Women's Research Action Group (WRAG), both located in Mumbai (Vatuk, The Women's Court in India: an Alternative dispute resolution body for women in distress, 2013). AeN was started by group of feminist activists headed by Shehnaaz Sheikh in 1985 who along with other groups like Forum against Oppression of Women (managed by Indira Jaising), National Federation of Indian Women and *Stree Kruti* continue to function as self-sustaining collective agencies fighting for gender just personal laws.

AeN has been instrumental in imparting literary classes and work skills to poor women along with marital counselling. They help provide psychological help to distressed women and arbitrate in matters of marital discord by counselling both the husband and the wife. Their legal centre ***Majlis*** under the leadership of renowned feminist Flavia Agnes provides legal aid in court cases to help women earn maintenance from her divorced husband, cases of domestic violence and rape laws. As a registered Public Trust and Society, *Majlis* has been providing litigation support to Muslim women and have cautious in their opposition to the government's move to bring a UCC, particularly in the wake of *Babri Masjid* demolition and Bombay riots of 1992-93. The organisation has fought for reforms of laws of divorce for Christian women on ground of cruelty and highlighted the need to help Muslim women with maintenance based on positive ruling of the *Shah Bano* case. Agnes was of the view that those who are supporting the position of UCC are not speaking for women's empowerment but are part of communal segments of the society (Agnes F. , 2011) (JILS, 2015).

The *Majlis* organisation has collaborated with the government between 1991-2011 by setting up forums like RAHAT and MOHIM to monitor successful implementation of Domestic Violence Act. Agnes claimed it to be an autonomous funding effort to help women and children against crime of sexual violence by providing police training to become more gender sensitised. This NGO has tried to reform the tarnished and stereotyped image of personal laws as inherently barbaric and orthodox. Agnes collectively highlights the sad affairs of women across religion caught in the evils of practices of polygamy, whether recognised or unrecognised by law. Agnes voices for gender-neutral position of laws that would shelve the patriarchal context of crimes that take place in the name of practice of freedom of religion. There is growing concern to provide for better access to justice to poor marginalized women and support mechanism to re-habilitate victims of societal violence (Agnes, 2003, p. 23).

Agnes has also been categorical in making a position against the banning of practice of TT arguing that the SC has already achieved landmarks in cases like *Danial Latifi* and *Shamim Ara* by invalidating the practice of TT. A detailed process for arbitration was laid out in *Shamim Ara* case wherein no divorce could take place without mediation and attempt at reconciliation. Agnes believed that the attempt to ban TT will give AIMPLB an opportunity to claim status of being a martyr and talk about Islam being in danger. Agnes was critical of the provision of criminalisation of the offence as unjust to both men and women (Agnes, Gender Rights lawyer Flavia Agnes on why Triple Talaq shoul not be banned, 2016).

By 2003, several other organisations like Muslim Women's Forum of Delhi headed by Dr Syeda Hameed and Saeeda Khurshid, Muslim Women's Youth of India and *Majlis* have established a visible public role (Jones, 2010). These advocacy groups sowed the seeds of nascent form of Islamic feminism in India relying on a more egalitarian and liberal reading of texts and traditions to rescue women from the clutches of patriarchy, dogmatism, and gendered form of violence.

There has been a sudden rise of organisations like the MWRN , born in the wake of *Gudia* and *Imrana* case challenging the misogynistic *fatwas* issued by the traditional Schools impacting the lives of poor women both in rural areas and urban slums (Vatuk, 2008, p. 490). These coalitional groups have tried to strike a dialogue with clerical establishment within the community by raising awareness and opinions of individuals on larger women's issues.

The most successful coalition has been the MWRN started in 1999 and provided membership to 250 odd women members of different religious affiliation to help develop a combined struggle on women's issues of child custody, divorce, maintenance, and a ban on TT. The class and sectarian affiliation are diverse and demographically spread out to members holding professional English-medium college education to lower middle class domestic helpers (Vatuk, 2008, p. 491).

Sharifa Khanum is founder of an NGO called STEPS in Pudukottai in Tamil Nadu that helps on matters of domestic violence. Her own struggle of being the 10^{th} member of poor family and lack of financial resources to get her married has led to her position to remain single till date and fight against the evils of dowry in marriage. Such leaders have mostly belonged to a class of Islamic modernist set-up where female education was given utmost importance to fight their odds and fight against the practice of *parda* (veil) (Minault, 1997, p. 3).

The BMMA was formed in 2005 under Zakia soman and Safia Naz with initial of 20,000 odd members. Initially, it dealt with the issues of divorce and the reform of personal laws but later expanded jurisdiction to talk about wholesome social and economic development of Muslim women. The BMMA has earned limelight for its effort to delve on tropes of issue of polygamy and TT calling for its complete eradication from the Indian society (Kirmani, 2011).

It invokes the religious tool to campaign for rights of Muslim women arguing that the problem of oppression of women is not inherent in Islam per se but in misinterpretation of texts by religious organisations especially the AIMPLB. Invoking the example of Malaysian Sisters in Islam, they too believe in reconciling religion with feminism. BMMA is critical of upper caste biases of other women's movement like the MWRN or IIWA and felt the need to establish an autonomous movement with people from the marginalized order. However, the organisation has been criticised for restricting its space only for Muslim women that would limit the global outreach of the organisation (Kirmani, 2011). Undoubtedly, they are instrumental in diversifying the expanse of the Muslim women's struggles reformulating new equations of power, in a constrained and a polarised political context. The SC and the government have acknowledged the pivotal survey conducted by BMMA on the opinion of Muslim household on the issue of TT.

Another prominent leader in Muslim women circles was the daughter of the founder of the Deoband *Madrasah*, Uzma Naheed who has earned advanced Islamic knowledge. In an interview with her, she adorned a get-up of a headscarf clad traditional suit outfit talking about the details of her education and work of her organisation named International Women's Alliance (IIWA) which provides financial help to Muslim women scholars to undertake advanced research on issues concerning the community.

Naheed also spoke about her close ties with the AIMPLB leadership to negotiate for rights of women and cautioned to not consider her as feminist but women activist. It was quite understandable that these activists disagreed to bracket them in the category of 'feminist' as the term enjoys negative connotation in the Indian set-up and is considered a western import of women who are considered aggressive, antagonistic towards men and careless of domestic responsibilities. Naheed believed to make her case as part of the community to deliberate with the AIMPLB thereby acknowledging the meaningful role that the organisation plays for the Muslim in India (Naheed, 2016).

Borrowing from the new movement of women activism across the world with the help of technological revolution and mobile labour force, these women activists and their social organisations have taken up a new task of critically studying the foundational text of their religion. It has challenged the canonical and orthodox interpretation of the texts and traditions by clerical establishment across religions. (Cooke, 2001, p. 62) However, in India, they are

facing new challenges of renewed patriarchal unity in the face of increasing attack on the authority of *Ulemas* (Nair, 2005).

The sign of nascent Islamic feminist activism growing in India is organised by the young and small cohort of middle aged women who hold distinct college education campaigning for a renewed look to the task of interpretation of Muslim personal law arguing for better legal reform mechanisms for women. Muslim Women on a microscopic level are becoming new actors of the 'new Muslim public sphere' that are working at grassroots for female empowerment and educational development (Eickelman & Anderson, 2003, pp. 10-11).

The signs of internal fissure evident due to the functioning of the AIMPLB led to the establishment of the **AIMWPLB** in February 2005 who at the outset formed *Mahila Adalats* (extra-judicial courts) in Lucknow to register 166 cases of marital disputes. It instantly drew international and national media attention being conceived by a small group of 35 women at a wedding. (Manjul, 2005) The Board reserved 15 seats (10%) for women which was later increased to 25.

The AIWPLB charged the AIMPLB for skewed representation to women and absolute non-involvement in decision making process of the Executive committee. None of the deliberation of the Board considered the opinions of 18% of minority voices of women members. They only paid heed to those women whose ideology matched the traditional lie of thinking of the organisation. When the new *Nikahnama* was being drafted by the AIMPLB, the sole executive member Begum Naseem Intedar Ali demanded the insertion of provision of Khula but was deliberately neglected (Vatuk, 2008, p. 489).

The growing number of practices of TT hints at the excesses of implementation of *Shari'a* in post-independent India. Much of the cause of this unruly practice has been assigned on the erratic and obstinate functioning of the clerics who are supported by the AIMPLB in fostering an anti-Islamic position on women.

A considerable gap exists between Muslim women activist and the advocators of Islamic feminism in India and around the world, yet many female wings of the traditional organisation like the Jama'iat-e-Islami(henceforth JeI) have moved towards a significant pro-women direction on matters of marriage, divorce, girl's education, right to worship in mosques (TNN, Jamaat-e Islami women's wing to launch a drive supporting Shar'ia law, 2017).

At a February 2006 meeting of the JeI in Hyderabad, the chief of women's wing, Nasira Khanum vociferously demand for protection of rights of Muslim women from a public forum (TNN, 2006). Recently, the head of the women wing Shakera Khanum talked about collaborating with the women forces of the AIMPLB and other organisations to spread awareness of protecting the *Shari'a* law from the clutches of the government, especially on the BJP government's move to ban TT. Khanum argued that the State is portraying the Muslim law in bad light and the women folks need to be enlightened about the danger to the free practice of religion and affairs of the Muslims in a Hindu majoritarian political order. (TNN, Jamaat-e Islami women's wing to launch a drive supporting Shar'ia law, 2017) Despite the drive to enforce a gender sensitive laws for the Muslim community, women activism managed through these organisations are afraid to act outside the fence, in the face of a threat of communalised order unleashed by the BJP government.

2) The unrivalled dominant position of the AIMPLB was challenged by an attempted splitting of several religious sects within Islam seeking for independence in interpretation of MPL. In February 2005, Tauqeer Raza Khan resigned from the membership of the AIMPLB to establish the Barelvi School called AIMPLB *(Jadeed*) . The formation of the AIMPLB *(Jadeed*) undoubtedly granted political recognition to the clerics of the sect and deeply fostered the leanings with organisation i.e., the Mumbai's Raza Academy.

This internal sectarian strife led to another split, two months later ,with the creation of a new All India Shia Personal Law Board in 2005 under the stewardship of populist leader Mirza Muhammad Athar. The AISPLB was organised by new orders of clerical establishment challenging the traditional ascendancy of a renowned family of clerics in Lucknow. The latter group is the family lineage established by the *mujtahid* Sayyid Ali Naqi and carried forward by successor Kalbe Sadiq. Sadiq went on to become the Vice-President of the AIMPLB till his demise recently. The AISPLB was, thus, used as an effective alternative to challenge both the authority of the familial establishment and the Sunni Board (Service, 2005).

In an interview with the founder President of the AISPLB, Late Mirza Muhammad Athar at the 3rd Annual convention in New Delhi, it was pointed out that his logic to draw out a new parallel Board was the demand for a separate Shia identity due to distinct Shia Jurisprudence and demand for reservation of Shia in government services and legislature. Athar believed that the lack of adequate representation and voice in the AIMPLB has led to the negation of rights of Shia population. Athar further believed 'the AIMPLB was born with the blessings

of Indira Gandhi' who wished to use it for her Muslim vote bank (Sikand, 2009). Thus, Athar wanted to give a platform to different bodies of Shia namely the Imami, Khojas and Bohoras who could voice their demands directly with the government.

Athar criticised the ideological position of the AIMPLB to be anti-Shia as some of the members like Qari Tayyab and Ali Miyan Nadwi were accused of treating them as heretics. Further, the Compendium of Islamic Law that was drawn out by the AIMPLB failed to incorporate the principles of Shia Jafari Jurisprudence and relied heavily on Hanafi Sunni School (Sikand, 2009). The AISPLB was thus categorical in remarking its distinct position from the AIMPLB, on the debate of TT, a practice that was not recognised by the Shias and held an anti-women approach in dispensation.

In November 2006, the AISPLB came up with the new *Nikahnama* that included emancipatory provisions for women by offering the rights of *Khula* to women without losing their right to dower or maintenance, to provide for maintenance beyond the *Idda*t period till a woman secures her means of survival and a system of arbitration to factualize a divorce (News, 2006). The AIMPLB's spokesperson Zafaryab Jilani criticised the move of offering *Khula* to women to become a factor that will give rise to a greater number of divorce cases (Ahmed, 2006).

In a personal interview with the Shia representative and the Vice-President of the AIMPLB, Late Kalbe Sadiq, conducted in May 2015, the ideological position of the AISPLB was discussed and he believed 'the setting up of the Board was a political vendetta of few leaders to divide the Shia community against the renowned lineage of his ancestry in Lucknow. He passionately believed in the ethical position of the AIMPLB in acknowledging the concerns of Shia Muslims, which factually was a minority as compared to the majority Hanafi population. Thus, according to him, any split of parallel organisations is only a political move to woo the current Rightist BJP party for personal vested interest (Sadiq, 2015).

The AIMPLB was challenged for its ideological tilt towards the Hanafi reading of the text by the scholars and clerics of the Deoband School. Their attempt at standardisation of personal laws failed to modernise it to the tunes of contemporary legal machinery unlike the past endeavour of Thanwi to modernise *Shari'a* laws on Maliki lines that eradicated oppressive practices relating to divorce for women (Zaman, 2007, p. 72). Thus, the characterisation of the AIMPLB as a conservative and status-quoist entity has led to its loosening of support

from different quarters from within the community. However, the Board's dual agenda to gain public respect and standing firm on its opposition to the UCC has collapsed its efforts into a rhetorical position caught in binaries of civil and Islamic law.

The Board is facing considerable strain due to its fragile polarised position between negotiating exclusively with the State and defining *Shari'a* as timeless and immutable has placed the organisation under the radar of critical scrutiny from different sects like the Barelwi, Dawoodi, Shia and women groups. They have challenged the notional claim of the Board as the unified Muslim face of the community, displacing it as 'Deobandisation of Indian Islam' (Alam, 2007, p. 190).

The AIMPLB's foundational vision entailed a setting up of an organisational structure of 101 odd members from aal the sects and organisations of the Muslim society. Over the years, it has tried to balance the power equation cautiously between the executive and general membership to maintain egalitarian positions of seniority between members of different sects and formations and tacitly reserving few seats for women, Shia, Khojas and other Sunni Schools as well. The organisation in the initial few decades of its existence did reap the fruits of a collective heterogeneous entity with the senior Shia cleric Sayyid Ali Naqvi offering support to the Board at the public sermon during the Muharram procession acknowledging the accommodative space to different dialogues within the community (Jones, 2010, p. 177). However, in recent years, the AIMPLB has transitioned its role in proposing a narrow and parochial dispensation on the provisions of *Shari'a* marring its inclusiveness and heterogeneity. The contemporary detractors like the Barelwi and the Shias have accused the organisation to be heavily controlled by the intellectuals and personal coterie of the Deoband School (Alam, 2007, pp. 178-190).

It can, however, be convincingly argued that the Board does borrow indirectly from the Maliki pursuits on verdicts relating to rights of women to exercise divorce as found in references of the Board's *Compendium of Islamic Law* and from some of its judgements issued by the *Qaza* courts. Further, its decision to get tied to the Deobandi position is owed more to its personal and institutional allegiance at the time of the formation of the Board at Deoband.

The socio-economic profiling of the President and Secretaries of the Board revealed that they were members of class of landed gentry. In their style of functioning, they have eventually consolidated the Deobandi norm and ideology to suit modern lifestyles. The fear of growing

roots of a singular School within the Muslims is heightened by its expanding base in the nearby borders of Pakistan and Afghanistan as witnessed from the efforts of the *Jama'iat-ul-Ulama-i-Hind* (henceforth JIH) (Faruqi, 1963, p. 40).

The result is that despite the Board's striding effort to muster an inclusive and consensual outlook, the organisation who have turned hostile to the AIMPLB complain about the malignancy caused due to the Deobandi influence. The creation of several parallel law boards within a span of three months has come to contradict the hegemonic position of the AIMPLB. These organisations have joined hands in casting the Board as a puritanic Deobandi organisation that is inimical to the rights of women in matters of marriage and dispute and extremist when it comes to interpreting the tenets of Islam.

The criticism has come out sharply on the model *Nikahnama* introduced by the Board. The biggest accomplishment shared by the AIMWPLB was the creation of an alternative model of *Nikahnama* and the female courts to help women in matters of marital disputes. The interview with the women President, Shaista Amber, highlighted that the credit to manage her organisation successfully in the face of attacks from the AIMPLB lay in the political and administrative support received from her Indian Administrative Service officer cum husband (Amber, 2012).

Eventually, the other clerical groups cited similar constraints on anti-women's position of the AIMPLB as the cause of their disagreement with the functioning of the Board especially in the wake of rising debate on the practice of TT. The Shia *Nikahnama* was lauded for its effort to illegalize TT in the face of traditionalist position of the AIMPLB that claimed that though the practice was disdainful, yet it was legal as per the Hanafi law. This declaration pushed the Barelwi clerics later to form a separate entity who outrightly supported legal validity of TT in all its form (Khan, 2016).Thus, this appropriation of liberal rhetoric of human rights for women by different clerics have contradicted the scholarship that argue about the clerics disinterest in the gender issues.

Since the last decade, the AIMPLB's effort to retain its all-inclusive support from the Indian Muslims is caught in the crisis of legitimacy in the wake of alleged Deobandi dominance, clerical representation of executive positions and anti-women position of the Board. The desertion of its noble objectives has stoked in-built tension within the organisation with the final embarrassment witnessed in the Board's position on the *Imrana* episode. It exposed the

faction between the supporters of the Deobandi fatwa on the Imrana case and those voicing disagreement asking the Board to refrain from taking any position on it.

The evident rift in the Board has no doubt been usurped by the Hindu Right organisations like the BJP and the RSS for their political agenda to garner support for the UCC. However, many amorphous Islamic groups like clerical councils and Islamic feminist organisations along with secular liberal advocacy groups like the BMMA under Soman and Naz have damaged the image of the Board to be a unified collective Muslim entity. The volatile politics in U.P. and Bihar where the AIMPLB's enjoys legitimacy has further impacted the internal tendencies of divisiveness.

The new power arrangement has shifted its matrix to the base wherein religious and legal authority is in a state of flux in an uneasy atmosphere of mutual antagonism between factionalised groups. The AIMPLB has nonetheless tried to respond to the internal and external pressures by modifying its position on banning the practice of TT and including a provision to restrict its exercise in the new *Nikahnama* (Ahmad, 2003). However, the damage to the organisational fragmentation is almost permanent with no signs of reversal of trend.

The media attention on the statements by the Chairman of the Shia Wakf Board, Waseem Rizvi due to his closeness with the BJP is often viewed as a 'saffron conspiracy' (Christophe Jafferlot & Rizvi, 2018). The BJP's involvement in the *Imrana* episode inflating the local issues to national prominence is another attempt to blemish the face of Muslim personal laws as inherently misogynistic and patriarchal. The contemporary curious friendship of the BJP's government in U.P. with the Shia board is an attempt to keep the community divided from within. Thus, Indian Islam is grappling with these innumerable anxieties and factionalism in the face of a Rightist external threat.

In the face of internal fissures and absence of strong leadership within the Muslim community, the debates around personal laws are caught in false narratives of a homogenous Muslim community and singular *Shari'a* uniting them. This narrative constructed by the State reduces the larger concerns of educational and economic backwardness of a minority to the categorisation of minority problem as queerly related only to the personal laws (Jones, 2010, p. 195).

The fragmentation of religious authority within the Muslims have also opened new avenues of positive role for diverse alternative voices of the society to work on changes in personal laws with the help of wider technological communication and expansion of avenues of modern education. This new deliberative mechanism of internal groups in a democratic community has helped redefine the politics of reforms in public sphere that has helped shape strong individualist and autonomous voices negotiating independently with the State.

Conclusion:

The AIMPLB emerged as the dominant force of the Muslim on the matter of MPL. Since the last fifty years of its existence, it has spread its wings in many parts of the country claiming the title of the 'unified representative voice' of the Muslims at the mainstream level. Though it has earned and legitimized its role as the key mediator on matters of Muslim law, this journey has been tumultuous in the backdrop of concerns of gender equality, deliberative democracy, and internal rights of minorities within minorities. The AIMPLB curiously acts blindfolded in their agenda to oppose any intervention from the government in matters of religion and culture, even at the cost of stifling internal dissent by forcing their narrow outlook in reading of MPL.

The AIMPLB is controlled by the Deobandi- Hanafi clerics occupying the post of President since its inception. However, the Shia and Barelvi Muslims have got general membership but none have managed to reach the top echelons except, late Kalbe Sadiq, who is the lone Shia Vice-President of the AIMPLB. The Ahl-e-Hadees Muslim do not follow any jurisprudence in totality and stay outside the ambit of politics. While drawing the Compendium of Islamic Law, it relied primarily on the Hanafi school, to complete obliteration of jurisprudence of other schools (Rahman A. F., 2017). It led to formation of alternate Boards to draw religious laws based on their *madhab* (school of Islamic law).

The relative detachment of parallel organisations and women advocacy groups vis-à-vis the AIMPLB has effectively led to the creation of an atmosphere of more liberal reading of religious text, subjugation of the clerical authority and open defiance to the inflexible interpretation of the Hadith scholarship. Most of the conservative clerics of the Barelvi, Shia and Sunni *Ahl-e- Hadith* Boards that share an acrimonious relation among themselves agreed to unite against the AIMPLB on certain principles of Islamic law and practice (Eickelman & Piscatori, 1996, p. 75). The debate on personal laws is no longer restricted to the courtrooms, public forum or newspaper columns but invokes real societal lived experiences between fragmentary groups of the neighbourhood. The

localised experiences on the workings of personal laws through the *Qaza* courts and *Mahila Adalats* deepened the local clerical influence in (mis) interpreting the MPL.

Pasmanda Mahaz, a movement in Bihar have also been vocal in their criticism of AIMPLB as representing the upper caste *Ashrafi* muslims. The movement mobilizing the rights of Dalit Muslims are critical of insensitivity adorned by the AIMPLB in voicing their concerns of discrimination and exclusion in the society (Anwar, 2001).

There are imminent signs of hostility within the community, as witnessed at the 24th General Body Meeting of AIMPLB at Jaipur in March 2015. The organisation remarked deep concerns against the BJP led government in compulsory introduction of Surya Namaskar and Yoga in Rajasthan schools, inclusion of Hindu Text Gita in schools syllabus and attacks on minorities in the name of *ghar wapasi*. The proceedings of the meeting were stalled after the coming of Zafar Sareshwala, Guajarati businessman and supporter of Prime Minster Modi. There was verbal opposition raised by Asaduddin Owaisi of AIMIM on Sareshwala' s presence in the organisational meeting whom he had declared 'dead' in the past. The meeting continued later with the exit of Sareshwala (PTI, 2015).

Another controversy that plagued the working of AIMPLB was the attack by Syed Salman Husain Nadvi challenging the limited role of the organisation as dealing only with family law. Nadvi cited reasons of disillusionment and promised to float an alternative Board to undertake social reform measures. It led to his expulsion from the membership of the Board, resulting, in his attachment with the social work of Sri Sri Ravi Shankar's organisation. Nadvi changed his stance to ask the AIMPLB to settle for outside court mediation by handing over the land to the Hindus in the Ayodhya dispute (Staff, 2018). These cases of deep contestations both from within and without have challenged its claim of a unified face of the Muslims.

On the issue of gender, the AIMPLB continues to be guided by differentiation of work roles for both men and women. Khalid Saifullah Rahmani talks of this differentiation as a distinguishing feature of the *Shari 'at*, as,

> *"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……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" (Rahmani K. S., Muslim Personal Law and Khwateen, 2016).

Other members of the Board share similar position on treating women not as moral or legal subjects but as a weaker sex to be guided by the male counterpart. This best explains the basis of their parochial reading of texts of law in justifying the heinous acts like TT.

The AIMPLB has responded to the criticisms of fragmentation and internal strife by dividing the Muslims into groups based on their understanding of reforms of MPL. Wali Rehmani talked about these four categories of Muslims, namely,

> "the top/most revered class of *Ulemas* and clerics who have authentic knowledge of the *Shari 'a* and MPL. Second in line was the class of trained western educationist who might be persuaded by reason to shelve their confusion on MPL by accessing their literature and attending symposiums conducted by the AIMPLB. These two could together withstand the frontal attacks on MPL. The most dangerous were the progressive and 'westernized' Muslims who want to change/amend the MPL in toto. They are a skewed minority whose opinion can be discounted as no one wants to change the MPL" (Rahmani M. W., Muslim Personal law Board ka Masalah, 2015).

The Board boasts of its contribution in salvaging the Muslim community from external attacks from imposing UCC and its fight in the Ayodhya dispute till last. Nonetheless, the organisation is facing a ' legitimation crisis' due to non-recognition and non-mediation of the current Modi government on issues concerning the Indian Muslims. On the contrary, the Modi government has

been pro-active in adopting a model on UCC contributing much to the AIMPLB's chagrin. The BJP Minster in U.P. government, Mohsin Raza, dismissed the AIMPLB,

> "as an NGO to focus on working on welfare of Muslim women but would not do so as after getting educated, no one would believe in them. He further charged them as the Maulvi Personal law Board concerned only about their vested interest" (PTI, AIMPLB should be called Maulawi Personal Law Board: Minority Affairs Minister Mohsin Raza, 2017)

Most of the criticisms on the AIMPLB, coming from the Media and supporter of the Modi government, are communal and divisive. However, the dissension brewing within the community cannot be neglected by the Board who continues to thrive on the support of its members to work as a collective Muslim body vis-à-vis the external majority. The AIMPLB needs to act on immediate basis to become more deliberative and participatory, both in its decision making process and appointment in executive posts.

CHAPTER 4

The Indian Judiciary and the Muslim Personal Laws

Religion and politics share a queer relationship in the larger discourse on Indian secularism. The primordial entities based on religion and caste have pitted themselves against the forces of institutional nationalism. The customary laws of the religious communities have come to acquire political legitimacy as just rule for the realization of God's will (Hallaq, 2009, p. 30) (Ludden, 1996, p. 4). The process of secularization which heralds the phenomenon of modernization of religion has missed the Indian bus. The decline thesis of religion, proposed by Pippa Norris and Inglehart, for the advancement of a newly modernized State fails to apply to the Indian case due to the resurgence of religious conflict that asserted its identity in the formulation of a new secular and democratic republic (Pippa Norris, 2006, p. 21). The post-colonial history is a witness to this antagonistic relationship between religious liberty and the rule of law. It was rightly pointed out that secularization was a phenomenon that would unfold itself in its due course (Chandhoke, 2010, p. 334), while in India, secularism is an imposition constructed to espouse pre-defined social good based on religious sensibilities (Madan, 1998, p. 318).

The Indian project of secularism was fundamentally juxtaposed to western secularism that maintained a clear dichotomy between the sacred and the secular arena of law. It was best described as 'contextual secularism' wherein a differentiated notion of rights and equality was applied that could not be straightjacketed into categories like neutrality, non-interference, or equidistance. The Indian State, under the aegis of Nehru, opted for the position of neutrality towards all religion (*dharma nirpekshata*) yet chose to determine policies towards the welfare of the minorities as spelt out in the FR and the corresponding DPSP. The agenda of social reform was initiated regarding the majority by bringing in codified laws governing the personal affairs and doing away with the vicious practices of Untouchability, *Sati* and *Devadasi* system. A struggle for setting up a liberal democratic State would not have been possible in the wake of inter-religious conflict and hierarchical conceptions of the community. However, the same path was not trodden in the case of the minorities due to the pressures of accommodation vis a vis the pain of partition and the aftermath of communal tension.

The liberal State, in its constitutional scheme, has guardedly adopted a protective and equal stance towards religious practice of all faiths. India is, thus, a composite mix of a heterogeneous cultures and rich discursive religious traditions of Hinduism, Islam, Sikhism, Jainism, Christianity, and

Buddhism. Both the indigenous religions and imported traditions of the West have syncretised their beliefs and practices, following a strategy of 'pluralism based on equal respect to all' (Brass, 1974, p. 43).

The dynamics which religious assertions come to play in a democratic set-up has led to the changing stance of the State from non-interference to limited intervention in religious domains. It is admitted that the State has intervened in reforming the religious aspects of the Hindus more than the other, in the larger interest of welfare of the community. This selective interference on part of the State in the affairs of the religions has discomforted the Right-wing, who came to oppose the celebration of any form of minority rights (Bhargava, What is Indian Secularism and what it is for?, 2002, p. 26).

The modern family law was caught in the struggle between an oppressive patriarchal system, engineered both by the State and religious heads of the community. The rationale guiding the interpretation of laws in the minds of lawmakers, in India and abroad, has been to draw a parity between the edicts of moral law and Islamic law in practice. In this endeavour, law eventually emerges as a primeval textual entity struggling to negotiate with the changes of processes of history. The *Shari'a* laws play a pivotal role in guiding the Islamic way of life. The Muslim Law was codified more on socio-political considerations than religious underpinnings (Hussin, 2014, p. 13). Nonetheless, it has been exposed to both blatant and subtle misinterpretations and distortions in the pages of history.

The preceding chapter has explored the role played by the AIMPLB as the religious gatekeeper of the Muslims in interpreting the personal laws of the community. The AIMPLB is the key negotiator with the State commanding non-interference of the government and its auxiliaries in the sphere of religious freedom. This religious organisation has enjoyed legitimacy and support from the Muslims, for 50 years since its existence, to represent the community in the mainstream politics. However, there has been staunch criticisms thrown at its style of functioning as a status quoist conservative element that has closed the doors of reform of personal laws from within. The main victims of their hardliner position are the Muslim women, who have decided to knock the gates of the State, especially the secular and independent judiciary, to rescue them from AIMPLB's obscurantist stance stifling the basic rights of equality and dignity of life. Despite the richness of Islamic text and tradition that have promised an egalitarian and just system, through the scriptural text and traditions, one is sadly a witness to the distorted and misinterpreted version of the religion by the self-proclaimed custodians of the community.

In the wake of this glaring disparity, this chapter will examine the clash of roles between the Indian Judiciary and the AIMPLB as the interpreter of Muslim personal laws in India. The study raises some pertinent questions like how the Indian judiciary juggles with the conflict of claims of individual equality vis a vis the claims of autonomy and freedom of religion by the Muslim community under the aegis of FR of the Constitution.? Secondly, what is the constitutional position taken by the judiciary while settling the claims of public morality, religious freedom, and equality within a framework of a secularised polity? Thirdly, to what extent has the AIMPLB gone in challenging the role of the judiciary as the interpreter of Muslim Law? and Finally, has the adorning of a 'reformist position' by both agencies brought any substantive and positive changes in the lives of the members of the Muslims community in India?

The chapter will be answering these larger questions in three sections. The first section will analyse the shift from a 'non-conformist' to a 'conciliatory' position of the judiciary in settling disputes on personal laws of the Muslims by re-visiting landmark cases adjudged by the SC and some cases of the High courts in a chronological fashion. The second section explores response of the AIMPLB on the judicial interventions and its rebuttal in the form of patronizing the role of the *Darul-Qaza* as an alternative sphere of justice. The last section draws out a stage on clash of claims, both by the judiciary and the AIMPLB, in legitimising their role as final arbitrators of Muslim Law.

4.1. Role of the Indian Judiciary in adjudication of disputes: re-visiting landmark cases

The Indian Constitution mandates the SC to protect the basic structure and ethos from unwarranted breach by the State and the individual. Acknowledging its role as the legal custodian, the SC has been pro-active in dispensing its role as an arbitrator in cases of clash of FR of citizen either with the State or the community.

The study of the role of judiciary in dealing with the question related to religious minorities in India, especially the Muslims, has raised larger debates on the constitutionality of the State and the Courts to interpret religious laws and practices of the community under the veil of 'social reform'. Secondly, how has the SC come to interpret the term "religion", which was cautiously and resolutely, left undefined by the CA, while drafting the Indian Constitution? Thirdly, how has the SC dealt with the question of constitutionality of MPL that demand exemption as per the

criteria prescribed under Article 13(3)[39] and 372? Fourthly, how have the courts juggled when confronted with the twin challenge of judging the extension of the right to religious freedom as non-impediment to enjoy cultural rights of the community vis- a- vis right to equality demand by Muslim women?

Judicial Response on State Intervention in Religious freedom: Test of Legal Plurality

The Constitution has made explicit provisions, defining the legislative powers of the State, under 248, 372 and Entry 5 of the Concurrent List as spelt out in Schedule VII, to frame laws for the welfare of all as per the objectives spelt out in the Indian Constitution.[40]

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[39]Article 13 (1) reads as under: " Laws inconsistent with or in derogation of the fundamental rights.- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void,
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void,
(3) In this article, unless the context otherwise requires,- (a) "law" includes any Ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas,
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368." See P.M.Bakshi. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis.

[40] 248. Residuary powers of legislation
(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List
(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Article 372 (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority,
The **Concurrent List** or **List-III** (Seventh Schedule) is a list of 52 items (though the last subjects is numbered 47) given in the Seventh Schedule to the Constitution of India. It includes the power to be considered by both the union and state government. If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
There is an exception to this in cases "where a law is made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying, or repealing the law so made by the Legislature of the State.

In a parallel manner, the Constitution provides for the right to religious freedom, defined under Article 25(1), 26 and 29(1) of the FR, for both individual and religious denomination to manage the sacred doctrine of faith without any compulsion[41] (P.M.Bakshi, 2020, p. 433). However, there is a permissible limit to the enjoyment of these rights as enjoined with a caveat of 'reasonable restriction or regulation' by the State to restore order, morality, and health. Additionally, the State can also take a commanding position to regulate secular affairs related with religious practice under [Article 25(2) (a)] and reform these laws for social welfare of Hindus including the Sikhs and the Jains. [Article 25(2)(b)] (P.M.Bakshi, 2020, p. 433).

Curiously since independence, the State has been oddly maintaining a position of 'principled distance' meddling with religious affairs of minorities, despite the call for social reform. Any step for furtherance of reforms has primarily been extended to the Hindus as per the provision of Article 25 (2(a) and 2(b). The State for the first time justified its interference in the affairs of the Muslim community by passing an amendment to the Cr.P.C. which governed the terms of 'maintenance meted out to the women in case of refusal by the husband after divorce'.

The State ventured to introduce modifications in the provisions concerning divorce, under the MPL, by bringing an amendment to the Cr.P.C in August 1973, supervening upon the archaic

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Entry5. Marriage and divorce; infants and minors; adoption; wills, intestate andsuccession; jointfamily and partitio n; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law". See P.M.Bakshi. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis.

[41] Article 25: Freedom of conscience and free profession, practice and propagation of religion
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
Article 26. Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right
(a) to establish and maintain institutions for religious and charitable purposes.
(b) to manage its own affairs in matters of religion.
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law
Article 29. Protection of interests of minorities, (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. See P.M.Bakshi. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis.

colonial model of 1898. Under the Cr.P.C.,1898 (Sec.488), a wife could obtain maintenance from her husband in summary proceedings, but due to the meaning of the word 'wife' the proceedings were dropped when a husband divorced his wife. (Nasir, 2021)The stated provision of law was hindering the rights of Muslim woman who could not claim maintenance from their divorced husbands beyond the waiting period of the *Iddat*. The government providing an explanation to Section 125(1)(b) opined that

> " the maintenance provision defining the word 'wife' should include 'divorced wife, provided she is not re-married' in its purview" (India, 1973).

The amendment of Cr.P.C. met with sharp criticism from the Muslim quarters wherein Members of Parliament like Ibrahim Sulaiman Sait, C.H. Koya and G.M. Banatwala pressured Prime Minister Indira Gandhi to rescind the bill in December 1973. The Minister of State, Home Affairs, Ram Niwas Mirdha, commenting on the non-enactment of Section 125 and 127 of the Code, highlighted the fear of the government from initiating reform of Muslim personal laws because it wanted to allow the Muslims to define their own laws (equating that with the autonomy of the community. Further, Indira Gandhi wanted to co-opt the consent of the minority groups like AIMPLB who acted as the representative faces of the Muslims in the upcoming elections. Eventually, the government gave in to the pressures of the representatives of the Muslims by adding another proviso of Cr.P.C (Sec 127(3)(b), which, stated that,

> *"Under the customary or personal law of certain communities, certain sums are due to a divorced woman. Once such a sum was paid, the magistrate's order giving maintenance (under Section 125) could be cancelled."* (Code of Criminal Procedure, 1974, p. Para 127).

As per the custom, the wife receives dower or *Mahr* from her prospective husband either before the consummation of marriage or in a deferred form, paid at the time of divorce. The government held that when the courts dealt with matters of maintenance or post-divorce entitlements, they should keep in mind the sum already paid by the husband as a dower. The fall out of the *Shah Bano* case in the form of MWPRDA passed under the aegis of Prime Minister Rajiv Gandhi was a clarion call to legitimize the "politics of accommodation of minorities" by the State. Hence, the legislature stuck to a status-quoist stance of adhering to the voices of traditional Muslim groups vis- a-vis right of Muslim women.

The resurgence of the new phase of 'Hindu nationalism on mainstream politics', has shifted the position of the Indian State from 'benign negligence' into an 'interventionist one' by meddling in the religious affairs of the Muslims. This was evident in the arbitrary transfer of the administration

of *Wakf* from the state to the Centre's control under the Central *Wakf* Act*, 1995* and abolishing TT in Muslim Women (Protection of Rights on Marriage) Act, 2019 (henceforth MWPRMA)(Ind.). These moves have been challenged in the courts by religious gatekeepers like the AIMPLB and Sunni *Wakf* Board arguing for autonomy in managing personal affairs of the community under Article 13, 25, 26 and 29 of the Indian Constitution.

The response of the judiciary on the State's intervention in matters of religious affairs of the Muslims, on grounds of restoring public order, social welfare, and gender equality, can be best construed as a carrot and stick policy. In this regard, it chided the liberal State for its silence on initiating reforms in the personal laws of the community. Whatever piece-meal reforms that were initiated was liberally adopted for the Hindus on lines of social welfare and public morality but the larger agenda of enacting a UCC remains a dead letter.

SC has adopted a non-linear path to interpret the varied disputes on group differentiated rights of the community vis-à-vis the welfarist agenda of the State. The Apex Court undertook on itself the task of defining religion to draw a clear dichotomy between the sacred and the secular. It tried to introduce legal uniformity by proposing a pre-colonial credo of 'justice, equity and conscience' in the form of an "*essential doctrine test*" to decide the categories of religious practices justifying constitutional protection (Sen, 2018, p. 46). This test was used to judge the limit of state's intervention in administering religious institutions and essential practices of faith.

The notion of "essentiality" was drawn by a seven-judge Bench of the SC in the (*The Commissioner, Hindu Religuous Endowment , Madras vs Sri Lakshmindra Thirtha Swamiar of Shirur Mutt,* 1954) case**.** The SC ruled that ,

> "the term "religion" will cover all rituals and practices "integral" to a religion to differentiate between the essential and non-essential tenets of faith" (Sen, 2018).

This principle which was initially adopted to legitimize the reform of Hindu laws by the State was extended to cases determining essential practices of Muslims as well.

The popular cases dealing with the 'permissible limits on religious freedom' are those dealing with the ban of cow slaughter (*Mohd Hanif Quareshi v State of Bihar*, 1958), power of ex-communication by Head Priest of Dawoodi Bohra community *(Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962), female genital mutilation in Dawoodi Bohra community (*Sunita Tiwari v Union of India*, 2018), legitimacy of ritualistic practices around marriage and divorce (*Shayara Bano v Union of India & Ors*., 2017), refusal of entry to women into places of worship

(Dr. Noorjehan Safia Niaz And 1 Anr vs State Of Maharashtra & Ors, 2016), and the recent Ram Janmabhoomi-Babri Masjid case *(M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors*, 2019) respectively.

In all the above-mentioned cases, the SC was incremental in introducing changes in the reading of the laws related to the community balancing the constitutional values of equality and freedom with public morale and good. The interventionist role of the court as self-proclaimed authority on religious matters, styling itself on pattern of its colonial counterpart, has earned both appraisal and criticism from different quarters. Those acknowledging the reformist role of the judiciary argue that it has been benign and fair in protecting the autonomy of religious organisations from any form of undue interference and discrimination, in the larger interest of upholding the plural and secular ethos of the Constitution (Mahajan, 1998, p. 69) .Contrary to popular perception, the Courts have limited the 'modernising intervention' of the State, giving primacy to religious practices of the community.

At the other end of the spectrum are critics who argued that the judiciary has been arbitrary in discarding any religious norm that did not prove to their satisfaction as non-essential. They have posited the role of the courts, as an extended burden of the colonial past, lacking the requisite qualification and competency to interpret religious laws of the minority community (J.D.M.Derrett, 1968, p. 51). Another scathing criticism comes from the legal pluralist positions who held that the uncanny intervention by the State and the judiciary has only dented the pluralistic legal ethos of the Indian Constitution (Nariman, 2000, p. 60). The assumption of a theological status by the courts to interpret religious laws of the minorities, has heightened the fear of majoritarianism in Court rulings. AIMPLB used it as a political tool to legitimize their position of 'non-interference in personal affairs' of the community (Mehta, 2008, p. 67).

To sum up, the recent trends have up opened fresh debates on the shift in the judicial standpoint from 'legal pluralism 'to 'legal universalism' to propose a rationalist interpretation of religious laws (Rudolph, 2002, p. 22). Earlier, the courts have mostly trodden on a cautious path to provide narrow interpretation of personal laws as a distinct set of individual rights and identity. They have functioned as barriers to legislative enactments promising autonomy to communitarian rights of the groups as many judgements of the Court relating to Muslim women were guided by the rationale of the *Shah Bano* case. In contemporary times, giving in to the pressures of a majoritarian State, the judiciary is constantly pressuring the Indian State to formulate a UCC to homogenise personal laws under a single rubric. The imposition of the principle of legal

uniformity in religious laws has questioned the trust that minorities have in the institution of judiciary to protect the secular nature of the Indian Constitution. Many have warned about the biased position of judiciary as the apparent 'crisis and fallibility of the institution' on test of fairness and independence.

A) Judiciary on the Constitutionality of MPL:

To secure the enforcement of the FR, the Constitution has entrusted the Judiciary with wide powers of judicial review to act independently against the arbitrariness and the inordinateness of the State. The doors of the judiciary were first knocked in 1951 in the famous *Narasu Appa Mali* case. A Hindu man convicted under Bombay Prevention of Hindu Bigamous Marriage Act, 1946 complained of violation of his rights guaranteed under Article 14[42], 15[43] and 25 of the Constitution. The case is pertinent about its invocation by Muslim religious organisations while advocating autonomy in the governance of the personal laws of the community. The case adjudicated by Justice Chagla and Justice P.B. Gajendragadkar ruled that,

> "while the issue of polygamous marriage is invalid under Hindu law but permissible for the Muslims"(*State of Bombay v Narasu Appa Mali*, 1951), (Para29).

The prayer that personal laws as holding the efficacy of 'law' or 'laws in force' under Article 13 (1) and (2) was quashed by the High Court stating,

> "These personal laws cannot be invalidated by courts even if they infringed his FR as they fall out of the purview of the "laws in force" as defined by Article 13 and Article 372 of the Indian Constitution. Firstly, Article 13 and its sub-sections apply to all laws, customs and usages made by the legislature in prospective effect" (para31)

Justice Chagla held that there is a distinction between personal laws and customs and usages as recognised by the legislature as per the Government of India Act,(1915) (GOI) s.113. This allowed the parties to deal with personal affairs of the party as per their laws and customs

[42] Article 14, which provides that, "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The language of this Article promises both procedural and substantive equality.

[43] Article 15 provides that, "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

having the force of law or in the case of different parties as per the law of the defendant. However, the Concurrent List, under the VII Schedule, endows the legislature with the power to deal with laws relating to marriage and divorce. By this logic and reason, the Court did not consider personal laws as law in themselves and., therefore, outside the purview of grounds of infringement of FR (Sen, 2018, p. 212).

Another rationale put forth by the SC was that the basis of personal laws is not legislative action but matters of religion. Thus, Justice P.B. Gajendragadkar, wrote:

> "*It is well-known that the personal laws do not derive their validity on the ground that they have been passed or made by a Legislature or other competent authority in the territory of India. The foundational sources of both the Hindu and the Mahomedan laws are their respective scriptural texts"* (*The State of Bombay v Narasu Appa Mali* 1951: para 20).

The initial stance of granting immunity to MPL from question of constitutionality was adopted by the SC in many cases like *(Sri Krishna Singh v Mathura Ahir*, 1980), *(Maharishi Avdhesh v Union of India*, 1993) and *(Ahmedabad Women Action Group &Ors v Union of India*, 1997). The judiciary passed the baton of introducing reform to the State especially in matters of personal law. Another striking stance of the judiciary in these cases has been with reference to the adoption of a UCC wherein the judiciary maintains that the uniformity of laws be realised in a phased manner, without diluting the pluralistic contours of the society (*Reynold Rajamani v Union of India,* 1982).

The response of the High Courts has been contrasting to the Narasu Appa Mali case. While some have faithfully adhered to its rationale, others have called for its reconsideration *(Assam Rawther v Ammu Umma,* 1971), (*Re Smt Amina v Unknown*, 1992) *(Kunhimohammed v Ayishakutty*, 2010). Justice Krishna Iyer disagreeing with the rationale adopted in *Narasu's* case, noted that,

> *"Personal law so called is law by virtue of the sanction of the sovereign behind it and is, for the very reason, enforceable through Court. Not Manu or Muhammad but the Monarch for the time makes 'Personal law' enforceable" (Assan Rawther v Ammu Umma).*

The rise of the neo-liberal state brought a tectonic shift in the approach of the Judiciary on matters testing the constitutionality of personal laws. It decided to interpret religion in the

light of the 'basic structure' doctrine of secularism, thereby, outlining 'essentialities' of religious practices vis-à-vis the liberal-secular ethos of the Constitution. In some landmark cases like (*Anil Kumar Mhasi v Union of India*, 1994), (*Madhu Kishwar v State of Bihar,* 1996)*, (Githa Hariharan v Reserve Bank of India*, 1999), the Court examined the constitutionality of personal laws of communities, even in forms of customs. It held that any such stated law that has not been repealed or abrogated by a subsequent law, post the commencement of the Constitution, will be deemed to held as a valid law. However, if it acts in contravention to the FR, it shall be treated as void.

In the (*C Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil*, 1996) case, the SC argued that the personal laws are inimical to the idea of freedom of equality and dignity of women. In its three-judge bench observation, it stated that,

> *"The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate FR…… But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the Constitutional goal……"* (Mudaliar case, para 6).

In the wake of international pressure, drawn from the United Nations Development Report on Equality known as CEDAW, the court settled that any dispute arising due to the clash of personal laws with the FR of the individual will be dealt with on principles of constitutional morality and secular public order.

B) Locus Standi of the Indian Judiciary as interpreter of MPL:

The doors of Indian Judiciary have been knocked time and again on questions of principles of gender equality vis- a-vis group rights. It is an ongoing tussle of 'minorities within minorities' that raises debates on the limits of permissible diversity in a multi-cultural liberal set-up like India. The real danger is the compromise meted out by the legislature for the appeasement of pseudo claims of autonomy and legitimacy of traditional heads of the Muslim community. It was popularly held that whatever piece-meal change has happened is

owed to the efforts of the Judiciary to take a strong liberating position for Muslim wife vis-a- vis the unjust husband.

In (*Shahulameedu vs Subaida Beevi*, 1969) case, while interpreting the laws on rights of maintenance of the divorced wife ,contained under Cr.P.C.,1898, s.488(3), the Kerala High court promised maintenance to the divorced wife from his former Muslim husband. In this case, a reference was made to draw a UCC in words of Justice Krishna Iyer,

> "*The Indian Constitution directs that the state should endeavour to have a Uniform Civil Code applicable to the entire Indian Community, and indeed, when motivated by a high public policy section 488 has made such a law, it would be improper for an Indian Court to exclude any Section of the community born and bred upon earth from the benefit of that law....* " (Shahulameedu vs Subaida Beevi, para 9).

In (*Khurshid Khan Amin Khan v Husnabanu Mahimood Shaikh,* 1976), it was contended that the Muslim wife could get maintenance from her ex-husband during the period of *Iddat* and that provision under Cr.P.C 1973 s.125 could not be applied on parties governed by the MPL. However, rejecting this contention, the Bombay High court observed that a provision spelt out in the Criminal Code has been enacted by the Parliament, applying equally on all women across the religious spectrum, if she so demands.

In contrast to the liberal and empowering position of the High Courts on cases of Maintenance, the SC took a naïve stand of including Dower as part of Section 127 (3)(b) and a sum payable at divorce under personal law. This equation turned out to be an erroneous understanding of the laws by the Court and the same cannot be read as the language of 'payment' made under Cr.P.C. s.127(3)(b)

The Court subsequently through series of judgement remedied its mistaken judgements to protect rule of law. A landmark case about the maintenance lawsuit was of *(Bai Tahira v Ali Hussain Fissalli Chothia and Ors***,** 1979) case raised the concern of right to maintenance to former wife under the Cr.P.C. s.125 ,to be read along Section 127(3)(b), considering reformistic measures of Chapter IX of the Code and the spirit of Article 15(3) (Diwan, 1977, p. 219). The husband had paid his divorced wife in 1962 a sum of Rs 5000 and *Iddat* money of Rs 180/- and a flat allotted to his wife with a consensual declaration that she would no further have claim to properties of the husband. The quondam wife continued to stay at peace for some time and later moved a petition for maintenance due to her inability to maintain self and her child. The Session Court had granted her a maintenance amount, which was

challenged by her husband under special appeal in the Apex Court. The Court considered her case as a wife as per Cr.P.C (Sec. 125(1)(b) and settled the alimony, separate from dower or whatever was agreed upon earlier (Diwan, 1977, p. 219). This ruling was a 'liberal reading of the Islamic law', dealt primarily on questions of criminality of the case, without any claims made to drawing up a UCC or re-interpretation of Islamic law

In (*Fazlunbi v Kader Vali*, 1980) the SC again reiterated that under Cr.P.C(Sec125-127) have been deliberately designed to protect destitute women who are victims of neglect during marriage and divorce. Secondly, Justice Iyer acknowledged the principle of 'equality promised in Muslim Law by highlighting the significance of institution of '*Mahr'* or dower. Thirdly, the judgement rooted for state's responsibility towards the welfare of the weaker sections of women and children and not to be confined to the members of one religion or region. Justice Iyer observed that customary payments had to be adequate to be covered by Cr.P.C(Sec. 127(3)(b). Judge Iyer, for the first time then, proposed the imposition of legal uniformity in all matters of Maintenance under the Code (*Fazlunbi v Kader Vali*, 1980)(Para6 (i-vi).

The Shah Bano Conundrum:

A lesson learnt from the wisdom of Judges on cases of MPL, the Apex Court decided to consolidate its decision on question of Maintenance of Muslim women vis- a- vis secular code of Criminal Law. A judicial appeal was filed in 1978 under the Cr.P.C, 1973 (s.125), in the presence of the Magistrate of Indore, Madhya Pradesh on ground of infringement of her right to maintenance, due as per Islamic law. The magistrate allowed her to claim a meagre maintenance of Rs. 25 per month, which was again challenged at the High court of Madhya Pradesh, the court increased the amount to Rs 179 per month.

In the backdrop of this decision, the husband[44] pleaded to the SC, by grant of Special leave, challenging the judgement on grounds of being Un-Islamic and non-applicability of Section 125 to be read along with Section 127 (3) (b) vis a vis *Shariat Act* s XXVI of 1937. The matter was then heard by a five-judge bench composed of Chief Justice D.Y. Chandrachud, Ranganath Misra, D. A. Desai, O. Chinnappa Reddy, and E. S. Venkataramiah in (Mohd. Ahmed Khan v Shah Bano Begum and Ors, 1985) (Sen, 2018, p. 222).

[44] The Appellant was represented by P. Govindan Nair, Ashok Mahajan, Mrs. Kriplani, Ms. Sangeeta and S. K Gambhir and the Respondent by Danial Latifi, Nafess Ahmad Siddiqui, S.N. Singh and T.N.Singh

The Court dealt with crucial issues of divorce under *Shariat Act*, s.2 and right of maintenance under the Cr.P.C. in the light of earlier judgements of *Fazlunbi* and *Bai Tahira* and contrasting position in (*Zohara Khatoon v Mohd Ibrahim*, 1981) case. The Judiciary opened the debate on a Common Civil Code inviting the legislature to frame laws, long due, on 'social reform' of the community. This initiative caught the attention of Muslim religious organisation who pleaded to join the case as an intervenor. Eventually, the AIMPLB was represented by Mohd. Yunus Salim and Shakeel Ahmed, and Jamaat Ulema-e-Hind was represented by S.T. Desai and S.A. Syed. (*Mohd. Ahmed Khan v Shah Bano Begum and Ors*, 1985).

On 23 April 1985, SC in a unanimous decision, dismissed the appeal by special leave and confirmed the judgment of the High Court of Madhya Pradesh. Distancing itself from a teleological position of Justice Krishna Iyer in both the cases, the Bench observed that the right of maintenance to a divorced wife, available under Section 125(1), is a statutory right and is quick remedy to destitute women unable to maintain themselves.

The court concluded that

> " on ground of applicability of the statutory Code, there is no conflict between the provisions of Section 125 and the rules of Muslim law. James Fitzjames Stephen who piloted the Criminal Code had described the precursor of Chapter IX of Code in which Section 125 occurs as intending to serve social purpose and helping in avoiding the vagrancies of the consequences" (*Mohd. Ahmed Khan v Shah Bano Begum and Ors*, 1985, p. Para 268).

Secondly, refuting the claims of the AIMPLB that under Section 127(3)(b) it is not acceptable for the divorced wife to claim maintenance if she had received the whole sum due to her, at the time of divorce, SC held that,

> "*Mahr* is not the amount payable by husband to wife 'on divorce' but is a consideration of marriage" (Mohd. Ahmed Khan v Shah Bano Begum and Ors, 1985, p. 270).

Justice Chandrachud carrying forwards the vision of Justice V.K. Iyer of 'accepting *Mahr* as customary discharge within the cognisance of the provision' under Section 127 (3)(b) in *Fuzlunbi* case. Herein, the moral edict of law is distanced from religion to provide for support of lives of destitute women in society. Quoting the Verses 241 and 242 of *Surah* II of the *Qur'an* which states that *"And for divorced women is a provision according to what is acceptable - a duty upon the*

righteous"; And "Thus does Allah make clear to you His verses that you might use reason.", (Ali, 1934) the Judge Chandrachud observed that,

> "these Verses leave not an iota of doubt that the *Qur'an* imposes an obligation on a Muslim husband to make provisions for the divorced wife" (*Mohd. Ahmed Khan v Shah Bano Begum and Ors*, 1985, p. 948).

Hence, interpreting the principle of *Mata* as quoted in Chapter II of the *Qur'an*, it decided to grant her a maintenance of reasonable amount beyond the *Iddat* period, due to destituteness of wife even after years of divorce and the inability of the *Wakf* or the parents and relatives to maintain her and her children.

The Judgement opened a pandora box by taking s favourable position on the desirability of implementation of Article 44 arguing that a UCC can help consolidate national integration and subsume in its dynamism any form of conflicting loyalty to factionalism. It reprimanded the State for the political reluctance to implement a UCC, despite its legislative prerogative to do so. Inevitably, such role is performed by the Court which has decided to lend a common lens on personal laws of all religion.

The political backlash which the judgement drew from the Muslim quarters led to the passing of the MWPRDA in 1986 which overturned the Court ruling, thereby, stifling individual right to equality in lieu of autonomy for groups to manage their affairs, under the guise of freedom of religion.

The passing of the Act had dire repercussions on the functioning of the Judiciary as well wherein the High Courts followed the 'Laws of the State', overriding the authority and wisdom of the *Shah Bano* judgment. In *(Md Yunus v Bibi Phenkani alias Tasrun Nisa,* 1986) case, a year later, the Patna High Court dealt with the question of applicability of Cr.P.C. section 125 and 127, in the wake of passing of the 1986 Act. The judge cut down the rights of the divorced Muslim woman inorder to uphold the sanctity of the law passed by the legislature. Similarly, in (*Usman Khan Bahamani v Fathimunnisa Begum* & Ors, 1990) case, the Andhra Pradesh bench overruled the *Shah Bano* position and by 2-1 majority decided that

> "reasonable provision' as mentioned in the said Act to which a divorced woman is entitled would be provided only up to the period of *Iddat"* (Fyzee, 2005).

However, in another case, a judge ruled in favour of the divorced Muslim woman to entitle her for maintenance for future needs by a liberal reading of Section3(1)(a) of the Act to opine that,

> "*the phrase used in* Section 3 *(1)(a) of the MWPRDA of 1986 is "reasonable and fair provision and maintenance to be made and paid to her", indicates that the Parliament intended to see that the divorced woman gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the streets without a roof over her head and without any means of sustaining herself and her children…… Further, it is also held that the word "within" under* S. 3(1)(a) *cannot be read as "for" or "during". Therefore, the husband was held to be liable for making reasonable and fair provision and maintenance to the wife even after the period of Iddat"* (*A.A. Abdulla v A.B. Mohmuna Saiyadbhai,* 1988).

The Apex Court refused to kowtow to the criticisms and pressures of the State and passed similar judgements to set precedents on interpreting personal laws under a secular reading as witnessed in cases like *(All India Muslim Advocates Forum v Osman Khan Brahamaini*, 1990), (Danial Latifi & Anr v Union of India, 2001) and *(Shabana Bano v Imran Khan*, 2009). Invoking the opinion of Sir George Jessel M.R. in the case of *Holme v. Guy (1877) 5 Ch. D 901,* it held that,

> *"The Court is not to be oblivious of the history of law and litigation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, what the object of Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended" (All India Muslim Advocates Forum v Osman Khan Brahamaini*, 1990, p. Para 6).

It was decided that the *Divorce Act* of 1986 was applying the personal laws of the Muslim community and any further extension of rights of maintenance must be viewed considering secular codes defined under the *Cr.P.C*. The interpretation of latter part of the provision of the Code as per the decision in the *Shah Bano* case was a newly crystallized Right leaving the option of its exercise to the concerned parties under Section 5 of the said MWPRDA.

Rectifying Legislative Fallacy- the Danial Latifi Case

The historic remedy was to be brought about by the Apex court, who had to judge on the constitutionality of the MWPRDA, 1986, in (Danial Latifi & Anr v Union of India, 2001)case. The matter was referred again to a five-judge bench namely Justice G.B. Pattanaik, Justice S. Rajendra Babu, Justice D.P. Mohapatra, Justice Doraiswamy Raju and Shivaraj V Patil (Sen, 2018) . The parties to this case were the advocate of the *Shah Bano* case, Danial Latifi; the representative of the government namely the Solicitor General; the Muslim body represented by the AIMPLB, female lawyers on behalf of the women's collective namely Kapila Hingorani and Indira Jaisingh, AM. Singhvi on behalf on National Commission for Women (NCW).

The supporters of petitioner Latifi, barring the Solicitor General and the AIMPLB, raised a plea to judge the case as matter of public policy than matters of faith. Latifi submitted that,

> "Section 125 Cr.P.C is part of the criminal law and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the *Hindu Adoptions and Maintenance Ac*t, the *Shari'at*, or *the Parsi Matrimonial Act*" (Danial Latifi & Anr v Union of India, 2001, p. Para 4)

Herein, is a question of neglect at the behest of the husband of his destitute wife to maintain themselves and cannot obliterate the principle of justice, as embodied in Article 21 of the Indian Constitution. A larger quest for gender justice hangs on the neck of the judiciary to protect not just equality before law but equal protection of law (Sen, 2018). Further, the Act is also un-Islamic as it suffocates the muslim woman who have been granted larger rights in the *Qur'an* and mars the secular fabric of the constitution.

Singhvi, representing the NCW, placed the interpretation of the decisions of the different High courts like Gujarat, Bombay, Kerala, and the minority view of the Andhra Pradesh, to be made cognisance of while interpreting the case. The larger opinion believed that the MWPRDA, 1986 was an illusory form of remedy and that the *Wakf* were inept to provide for economic support to destitute women. A plea was made to take a more realistic interpretation of the case considering Article 14, 15 and 21 of the Indian constitution.

The counterarguments put forth by the Solicitor General was when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Reiterating the legislative position of Section 3 of the said Act, it was undue interference in the affairs of the State and the community. Personal law is a legitimate

basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. Solicitor General made a plea to leave the job of change in laws and policy to the State who are the rightful authority to decide about the public affairs of the communities (Danial Latifi & Anr v Union of India, 2001, p. Para 241(5)).

Y.H. Muchhala, representative of the AIMPLB, submitted that the modus operandi behind the passing of the Act was to undo the mistakes of the *Shah Bano* case. Citing previous judgement of (*Aga Mohammad Jaffer Bindaneem v Koolsoom Bee Bee and Ors*, 1897), particularly considering Verse 241 and 242 of Chapter II of the *Qur'an,* Muchhala submitted that the judge citing the passage of the Quran from Ameer Ali's translation held that

> "a wife has a right to be maintained out of her husband's estate for a year independent of her share of property left by him. Later, in *Hedaya* (Book IV Ch XV Sec III), it is expressed that Maintenance in not due to a woman "after her husband's decease" even in case of her being pregnant." (Para 9).

The AIMPLB viewed that the interpretation placed on the Arabic word *Mata* by this Court in *Shah Bano* case is incorrect and that the maintenance includes provision for residence during the *Iddat* period is the obligation of the husband, but such provision should be construed synonymously with religious tenet, as held in different translation of *Qur'an*.

It is contended that,

> *" this Court wrongly relied upon Verse 241 of Chapter II of the Holy Qur'an and the decree in this regard is to be referred to Verse 236 of Chapter II which makes paying Mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated"* (para 5).

Thus, the obligation for *Mata* has been imposed which is a one-time transaction related to the capacity of the former husband or case where a divorce has been effected before the consummation and the *Mahr* not stipulated.

Judicial Ruling: In the wake of both positions, the Court was asked to decide on issue of the retrospective effect of the Act, the jurisdiction of the Family Court to decide on issues of the Act and the extent of liability of the *Wakf Board*. The SC decided to stick to the constitutional position of the impugned legislation. It held that the application of MWPRDA, 1986, Section 3 provides two forms of obligations for the husband, namely, to make reasonable and fair provisions for divorced wife, and, to provide maintenance for her. The emphasis of this section is not on the

nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the *Iddat* period (Para 241).

Reading Section 3(1)(a) of the Act which incorporates,

> " *Mata* as a right of the divorced Muslim woman distinct from and in addition to *Mahr* and maintenance for the *Iddat* period, also enables a reasonable and fair provision under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and should be extended as regular payment of alimony to the divorced woman" (para 241).

It commented that all other rulings, in favour of grant of maintenance made up to the period of *Iddat*, stood overruled from the day of the judgement. In a crux, the Court upheld the constitutionality of the Act basing its judgements in the historical antiquities of the *Shah Bano* verdict. (Danial Latifi & Anr v Union of India, 2001, p. Para 241).

Continuing Constitutional Quagmire: the Shayara Bano Imbroglio

Indian judicial discourse is familiar with the backdrop of the *Shah Bano* case wherein umpteen attempts by Muslim women to file P.I.L. for the enforcement of their rights to equality was throttled by the threat to ex-communication and social pressure from within the community. The *Danial Latifi* case of 2001 upheld the validity of the MWPRDA, 1986, cautiously balancing the legislative position with its judicial decision of extending the words "fair and reasonable provision and maintenance" to be paid within the three months after divorce. The court was not ignorant of the sporadic demands from the Muslim women to ban *TT*, polygamy and halala but decided to wait for legislative action (Shukla, 2002).

A key paradigmatic shift was noticed post the 2000 A.D. period, wherein a spurt of self-aware women groups and collective agencies of civil society initiated legal proceedings on infringement of rights of minorities within minorities. In (*Shamim Ara v State of U.P*., 2002), (*Dagdu Latur v Rahimbi Dagdu Pathan, Ashabi*, 2002), *(Masroor Ahmed v State (NCT of Delhi) Anr*, 2007), the Judiciary faced fresh renewed challenge in *Ahsan* form of dissolution of marriages of Muslims namely *Talaq e Biddat* or TT.

The national debate which engaged the minds of the society, that witnessed a similar stride as in the aftermath of *Shah Bano* case, was a P.I.L. filed by the lawyer Ashwini Upadhyay in October 2015 seeking directives for the Parliament to legislate on a UCC to end the alleged discrimination

faced by Muslim women in matters of personal law. The three-judge bench headed by Chief Justice T.S. Thakur, A.K. Sikri and R Banumathi rejected the plea on ground of non-interference in the affairs of the government. Further, the judges ruled that,

> "the issue of arbitrary divorce and polygamy among Muslim women will be entertained only when challenged by the members of the concerned party" (Mahapatra, 2015).

The SC, finally, decided to crystallize a legal mandate on TT, offering it to constitutional bench of five[45] in (*Shayara Bano v Union of India,* 2017) case. Shayara Bano approached the court to challenge the dissolution of marriage by her husband Rizwan Ahmad invoking the practice of TT as violative of FR under Article 14, 15 and 21 of the Constitution. Shayara was not a lone victim of the dreaded practice of unequivocal utterance of TT communicated by post, phone, or social media platforms. The practice of TT had put a blanket cover on practice of Halala and polygamy which accompanies it, thereby, completely mortifying the basic rights of human dignity and quality of life of Muslim women (*Shayara Bano v Union of India,* 2017)(Para 1-10).

The case also challenged the constitutional validity of Section 2 of the Shariat Act, *1937* which legalizes unilateral and irrevocable form of divorce called *Talaq -e-Biddat*. This practice was not to be protected under FR on religious freedom . Several *suo moto* writ petitions were applied like *Muslim Women's Quest for Equality v Jamiat Ulema-I-Hind*, 2015; *Aafreen Rehman v Union of India*, 2016; *Gulshan Parveen v Union of India*, 2016; *Ishrat Jahan v Union of India*, 2016 and *Atiya Sabri v Union of India*, 2017 which extended the debate to issue of polygamy and *Nikah Halala*. At the outset, the SC made it categorically clear to settle only on question of validity of *TT* and leave the dispute on polygamy and *halala* on the wisdom of legislative process.

The Petitioners of the case citing judgements of (*John Vallamattom v Union of India,* 2003) and (*Khursheed Ahmad Khan v State of Uttar Pradesh,* 2015)case requested to decide the matter on TT often invoked independently under freedom of religion to be subjected to the constitutional principles of morality as spelt out in claims of equality and dignity under Part III of the Indian Constitution. It was highlighted that,

> *" the practice of TT was not an essential practice of Islam, an aberration and should be banned in similar fashion as witnessed from study of other Muslim countries"(*Part 3, para 17-20, Part 5, para 28 respectively).

[45] The Bench comprised Justice J.S. Khehar, Justice Joseph Kurian, Justice Rohinton Fali Nariman, Justice Uday U. Lalit and Justice S. Abdul Nazeer.

It was the essential responsibility of the court under Article 32[46] to settle the disputes on infringement of FR of an individual as promised on grounds of equality and right to life. Citing the fear of an "indifferent hands-off" approach of the judiciary in *(Shabnam Hashmi v Union of India*, 2014) case wherein the SC had refused to examine the constitutional validity of 'personal laws', when the issue could have been plainly decided on the constitutionality of the statute (Sen, 2018, p. 219). It was therefore contended, that through a purely interpretative exercise, this Court should declare '*talaq-e-Biddat'* as illegal and having no force in law.

The Intervenors, supporting the petitioner, namely, Advocate Amit Singh Chadha, BMMA, Bebaak Collective represented by Indira Jaising, AIMWPLB represented by Rajan Chandra and Arif Mohd. Khan. In their separate final submission of calling the practice of TT as patriarchal and an anathema to equality for women, it pleaded that the SC needs to promise and protect secularism as the 'basic structure' and any regressive act of religion that challenges gender equality should be done away with.

Those who raised their voice against TT relied heavily on the interventions by Justice V.R. Krishna Iyer in famous (*Yousuf Rawther v Sowramma*, 1970) case. It was read out that,

> "*The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so, we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute. (para 6) "Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. He views that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not*

[46] Article 32 Remedies for enforcement of rights conferred by this Part
(1) The right to move the SC by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
(2) The SC shall have power to issue directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
(3) Without prejudice to the powers conferred on the SC by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the SC under clause (2)
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution, See P.M.Bakshi. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis.

accord with Islamic injunctions." (para 7) "It is a popular fallacy that a Muslim male enjoys, under the Qur'anic Law, unbridled authority to liquidate the marriage….. Further, he held that the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters __ one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. (Para 13)" (Yousuf Rawther v Sowramma, 1970, p. Part VI).

The Intervenors, further, argued that the obiter dictum that was issued in (*C. Masilamani Mudaliar and Others vs. The Idol of Sri Swaminathaswami Thirukoli and Others*, 1996) and *Danial Latifi v Union of India* case wherein the ambit of personal laws was brought under Article 13 and to that extent could be held void if infringing the FR of the Constitution. (*Shayara Bano v Union of India & Ors*., 2017, p. Part 7).

Salman Khurshid appearing as an intervener pleaded to decide the case in the light of interpretation of the verses of *Qur'an* to avoid ambiguity in its judgement. If there is absence of clear guidance from the *Qur'an*, then cautiously refer to the *Traditions of the Prophet*. If no further guidance available from therein, then, decide the matter based on method of *Ijma* which stands for consensual opinion (Para 50). He attempted to expose the distortion of *Hadith* invoked by the representative of the AIMPLB to cite the exact authentic *Hadith* from *Sunna Muslim*, mentioned in number (3652), (3673-75) to support his prayer for abolition of TT.[47] Therefore, he cautioned the Court to refrain from delving into the issue of authenticity of *Hadith* to interpret personal laws,

[47] "i. [3652] 1 – (1471) *It was narrated from Ibn 'Umar that he divorced his wife while she was menstruating, at the time of the Messenger of Allah 'Umar bin Al-Khattâb asked the Messenger of Allah about that and the Messenger of Allah said to him: "Tell him to take her back, then wait until she has become pure, then menstruated again, then become pure again. Then if he wishes he may keep her, or if he wishes he may divorce her before he has intercourse with her. That is the 'Iddah (prescribed periods) for which Allah has enjoined the divorce of women."*
ii. [3673] 15 – (1472) It was narrated that Ibn 'Abbâs said: "During the time of the Messenger of Allah it, Abü Bakr and the first two years of 'Umar's Khjlâfah, a threefold divorce (giving divorce thrice in one sitting) was counted as one. Then 'Umar bin Al-Khattâb said : 'People have become hasty in a matter in which they should take their time. I am thinking of holding them to it.' So he made it binding upon them."
iii. [3674] 16 – (...) Ibn Tawüs narrated from his father that AbüAs-Sahbâ' said to Ibn 'Abbâs: "Do you know that the threefold divorce was regarded as one at the time of the Messenger of Allah iW and Abü Bakr, and for three years of 'Umar's leadership? "He said: "Yes".
iv. [3675] 17 – (...) It was narrated from Tawüs that AN As-Sahbâ' said to Ibn 'Abbâs: "Tell us of something interesting that you know. Wasn't the threefold divorce counted as one at the time of the Messenger of Allah and Abü Bakr?" He said: "That was so, then at the time of 'Umar the people began to issue divorces frequently, so he made it binding upon them(*Shayara Bano v Union of India & Ors*., 2017, Part7&9). See Shayara Bano v Union of India, 118(2016) (Supreme Court August 22, 2017). Retrieved from https://indiankanoon.org/doc/115701246/

which is the domain of religious (*Imam*) clerics of the Muslim community and to focus on questions of morality and principles of gender justice.

The counter-affidavit was filed by the AIMPLB represented by Kapil Sibal who opened his plea with a prayer to assign all matters of personal law as matters intrinsic to faith and religion, hence, unamenable to change. Sibal argued that the absence of any legislation on matters of personal law is a testimony to its non-conflictual position vis-a -vis Part III of the Constitution. The Board referred to the judgement of the *Narasu Appa Mali* case, wherein the Bombay High Court had held that

> "the (uncodified) '*personal laws*' were not to be included in the expression *'laws in force'* used in Article 13(1)" (para 13)[48] to be invoked in this case as well. This judgement was re-iterated by the court in other cases of (*Shri Krishna Singh v Mathura Ahir,* 1979) and (*Ahmedabad Women Action Group v Union of India*, 1997)" (Para 8).

Sibal also pleaded that the practice of TT was valid in the eyes of Hanafi and Shafi'i School of Sunni Jurisprudence, though, classified as an inappropriate one. Citing earlier rulings in *(Rashid Ahmad v Anisa Khatun*, 1932), *(Amiruddin v Musammat Khatun Bibi*, 1917), *(Zohra Khatoon v Mohd Ibrahim,* 1981), they argued that the earlier Judges had drawn on the Wilsonian interpretation of Anglo-Mahomedan Law or the *Hedaya Commentary* by Shaikh Burhanuddin Marghinan , to opine,

[48] In this case, the claimant challenged the *Bombay Prevention of Bigamous Marriages Act,* 1946, which imposed monogamy on Hindus, whereas Muslim personal law allowed Muslim men to practise polygamy. The Court did engage with the question of whether or not the Act violated Article 25, 14 and 15. With regard to Article 25 it denied a violation with the argument that "even assuming that polygamy is a recognized institution according to Hindu religious practice, the right of the State to legislate on questions relating to marriage [under Article 25(2)] cannot be disputed"(para 7). Regarding Articles 14 and 15 (discrimination on grounds of religion) the court also denied a violation, arguing that the State "may rightly decide to bring about social reform by stages" along the lines of religious communities (para 10). Interestingly, the court then engaged with the question of whether with the introduction of the Indian constitution uncodified Muslim personal law that permits polygamy had become void as a violation of Article 14 and 15 (discrimination on the grounds of sex) and whether therefore the *Bombay Prevention of Bigamous Marriages Act,*1946 was discriminatory as it only applied to Hindus (para 13). It is about this test of constitutionality of uncodified Muslim personal law, that the court stated that "personal laws" were no "laws in force" within the purview of Article 13. The court held that it was the constitution making body's intention to exclude personal law from the purview of Article 13. This opinion draws on the understanding that the explicit regulations in Article 17 (abolishment of untouchability) and Article 35(3) (the opening of Hindu religious institutions to Hindus of all casts) would have been unnecessary, had these practices been unconstitutional and void under Article 13already (para 13). Furthermore, the judgement held that Article 44 itself recognises and therefore acknowledges the existence of personal laws (para 13).see State of Bombay v Narasu Appa Mali, (53) 779 (Bombay High Court July 24, 1951). Retrieved June 5, 2018, from https://indiankanoon.org/doc/54613/

" that this form of divorce is "*good in law but bad in theology*" (*Sarabai v Rabiabai,* 1905) (Para 9).

Thus, Respondents asked the Court to refrain from readings of textual laws of any other School except the Hanafi sect that validates TT to satisfy the predominant Hanafi Muslims in India.

The Learned Counsel placed the *Traditions of the Prophet* as points of reference to prove his case citing narrations that stated,

> "*I heard the Prophet (Pbuh) saying: O Muadh, whoever resorts to bidaa divorce, be it one, two or three. We will make his divorce effective*. (*Daraqutni, 5/81. Kitab al-Talaq wa Al-Khula wa aI-Aiyla, Hadith number: 4020) (Shayara Bano v Union of India & Ors.,* 2017, Para 86).
>
> "*When Abdullah Ibn Umar divorced his wife once while she was having menses. The Prophet (Pbuh) asked him to retain his wife saying, O Ibn e Umar, Allah didn't command like this: "You acted against Sunnah. And sunnah is that you wait for Tuhr then divorce at every purity period. He said so Prophet (Pbuh) Ordered me, so I retained her. Then he said to me: When she becomes pure divorce at that time or keep (her) So Abdullah ibn Umar asked: "Had I resorted to TT then, could I retain her?" The Prophet (Pbuh) replied: "No, she would be separated from you and such an act on your part would have been a sin"* (*Sunan Bayhaqi, 7/547, Hadith number: 14955)" (Shayara Bano v Union of India & Ors.*, 2017, (para 86,p.193).

In line with the Quranic command, the Prophet initiated a proceeding for the couple. Upon the completion of the process, Caliph Umar said:

> *"If I retain her, I Will be taken as a liar. So, in the Prophet's presence, and without the Prophet's command, he pronounced TT*." (*Sahih al-Bukhari*, Hadith number: 5259) (Para 86).

Thus, it submitted that the complexity of religious tradition is beyond the judicial scope and expertise of the judges, hence, the matters of faith and its interpretation be left to the prerogative of the Muslims. The respondent held that all the arguments and interpretations put forth by the petitioners do not conform to the Hanafi School and contain in-built contradictions.

The Secretary of the AIMPLB also stated that,

> "it has agreed to issue an advisory on model '*Nikahnama*' hat would apprise the concerned parties about the favourable conditions of marriage and divorce and discourage the practice of *Talaq-e Biddat* on its official website and social media platforms" (Mujaddiddi, 2016).

The AIMPLB has also passed a resolution on the same on 15th April 2017 and based on the submitted affidavit requested the court to refrain from undue intervention in the affairs of the community, except of grounds of reasonable limitations (Para 97(3)). Hazrat Mujaddidi made a plea to dismiss the case and leave it to the wisdom of the legislature to address the concerns of social welfare of the minority community.

Another Respondent on behalf of *Jamiat Ulema-i-Hind*, Raju Ramachandran submitted his petition that the prayer of the petitioner is frivolous as the model *Nikahnama* and *Shariat Law* gives ample space and opportunity to define the terms of contract of marriage and divorce, if required, as per the convenience of the concerned party. Further, the Special Marriage Act, 1954 gives additional support to the concerned disputing party to be governed by the provisions of this law, irrespective of religion or creed of the concerned party. So, if the party has made a conscious choice to be governed by the 'personal law' in lieu of the secular law, then, should adhere to the laws and traditions of the community per se. Ramachandran supported the stance of the AIMPLB in inviting legislative competence to deal on these matters under the Concurrent List by citing judicial ruling in case of *(Maharishi Avdhesh v Union of India,* 1993). The respondent also pleaded that the abolition of practice of TT cannot be done on the pretext of comparison with other countries and cannot be juxtaposed to FR as they cannot be treated as 'law' within the meaning of Article 13 of the Constitution. The practice of TT has been an intrinsic part of the followers of the Hanafi School even if branded as sinful in the High Court judgement of *(Masroor Ahmed v State (NCT of Delhi) Anr*, 2007). *Shayara Bano v Union of India & Ors.,* 2017, (Para 99, p.170).

The Attorney General of India (henceforth AGI) Mukul Rohatgi representing the Union of India submitted his plea as to what extent the court can allow the free play of forces of religion to deny equal dignity to a woman in a secular democracy. He opined that equality of status was of intrinsic value under Article 14 of the Constitution and any form of gender justice to be meted out should entwine itself with the principle of equality. The recognition of social status based on patriarchal values of society lowered the dignity and self-esteem of Muslim women under Article 21 of the Constitution. Thus, gender justice being the constitutional goal should be guaranteed to promote harmony and spirit of fraternity across diverse population as envisaged under Article 51-A of the

Constitution.[49] Rohatgi supported his stance from case judgements like (*S.R.Bommai vs Union of India,* 1994) *(Githa Hariharan v Reserve Bank of India,* 1999),

> " wherein FR to quality and dignified life of both men and women was considered to be the 'basic structure ' of the constitution and to be protected by the court in its judicial dispensations" (Para 65).

The AGI pleaded to separate religion from politics and citing examples of reforms of personal laws in other Muslim countries made a case to ensure gender equality in this case premised on larger principle of constitutional morality and social welfare.

Observations of the Supreme Court:

In the backdrop to the arguments put forth by both parties, the Court decided to review the facts and submissions of the case considering a more nuanced reading of the original text of the *Qur'an* (English version written by Abdullah Yusuf Ali), the *Traditions of Prophet* (Sahih Bukhari), past observations of jurists in cases before the High Court and the reform measures adopted in many countries on TT as presented in Tahir Mahmood's book on *Muslim Law in India and Abroad*. It took on itself the task to decide whether the practice of *Talaq-e- Biddat* under the Shariat Act, 1937 enjoyed legislative sanctity or should be deemed to be treated as a matter of faith enjoying protection under the Right to Freedom of Religion of the Constitution. Being either, it had to further ascertain whether its exercise allows limitation to be imposed by the State, under the acceptable norms of 'public order, morality and health' guaranteed by the same Right.

a) The Court reflected on the submissions related to the *Qur'an* and *Traditions of the Prophet* to find any citation on the practice of TT. The court concluded that the *Qur'an* does not hold any reference to TT, but the practice lay its antiquity in the traditions of Caliph Umar and stressed on the aspect of 'sinfulness and detestability of this form of divorce' in the eyes of the Prophet Muhammad. It acknowledged the reference of *Sahih Muslim* wherein during the time of Prophet, his first Caliph Abu Bakr and second Caliph Umar considered the pronouncement of three consecutive utterances of *talaq* as one. Additionally, the Court attached greater veracity to the authenticity of the *Sahih Bukhari* quoted by the petitioners and the interveners due to its invocation closer to the time of the Prophet Muhammad than

[49] Article 51-A of the Constitution, which is extracted below: "(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women See P.M.Bakshi. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis

the references of the later period submitted by the AIMPLB (Para 121). They closed their final argument on affirmation of 'sinfulness and the forbidden nature of *TT*' by referring to the statement of Abu Hanifa himself, in work of a prominent Hanafi scholar Allamah Shibli Nu'mani (Para 133). The Court also delved into the details of the legislative enactments on abolishing *Sati* and the *Devadasi* system among the Hindus and thought of asking the State to do the same for the practice of TT among the Muslims. However, the court smartly refrained from adducing *ratio-decendi* of the case on text and traditions but premised it on the lack of factum of pronouncement of *talaq* by the husband in a written form to annul the validity of divorce between the contending parties.

b) The Court made its opening remarks of settling the question of legal sanctity of *TT* by revisiting and rectifying some of the position of the judgements of the past. It was accepted that the case of *Rashid Ahmed v Anisa Khatun* made an erroneous reading of the personal laws of the Muslims relying on Anglo-Mahomedan reading of the Islamic Law *(Rashid Ahmad v Anisa Khatun,* 1932). It was a case of ascertaining the legitimacy of the children in father's property as the couple continued to co-habit even after the pronunciation of TT by the husband. The Privy Council had legalised the practice of TT and disentitled the children born after divorce to inherit father's property. Contrary to this position, the SC in this case decided to rest its observations on the strength of the judgements passed in cases like the *Yousuf v Sowramma* and *(Fuzlunbi v K Khader Vali,* 1980) wherein the practice of *talaq-e-Biddat* was held to be invalid in the absence of proof of reconciliation by either party and upholding the legal status of marriage and payment of maintenance to the wife.

c) On de-recognition of the practice of TT altogether, the Court did not have sufficient considerations to rely on to approve of the same. However, it agreed to decide on the essentiality of *talaq-e-Biddat* as a matter of faith for Sunni Muslims. It was an undisputable fact that the practice has been prevalent in several the Islamic and non-Islamic countries as evident from the abrogation of the practice through statutes in various countries like Algeria, Egypt, Jordan., Turkey, Pakistan, Sudan, Malaysia etcetera. Basing its argument on the evidence of practice of *TT* among Sunni Hanafi Muslims, it concluded that the practice is integral to the 'personal law' of the religious denomination.

d) On the statutory status of 'personal law' under the Shariat Act, 1937, the Court accepting the argument of respondents, in the detailed proceedings of the C.A.D, ruled that the

personal law does not enjoy the same in terms of Article 13 and 372 of the Constitution and cannot be required to satisfy the provisions contained in Part III of the Constitution. It is to be treated as an independent matter to be legislated upon by the State under Entry 5 of the Concurrent List-III as decided in the *Narasu Appa* case. Therefore, the practice of TT cannot be tested on the constitutional mandate of morality as prescribed under the FR of the Constitution. The court contended that the matter of personal law will be treated under the larger frame of social reform and welfare that should eventually evolve into a common civil code.

e) The constitutionality of personal law was juxtaposed on equal pedestal like any other FR of the Constitution and hence, the practice of TT could not be set aside on grounds of breach of constitutional morality by judicial intervention. Any reform or changes to be introduced therein should be initiated by legislative enactment by the State permissible under Article 25(2), 44 to be read with entry 5 of the Concurrent List contained in Seventh Schedule of the Constitution. Even the progressive and egalitarian international convention and declarations of domestic law cannot abrogate the components of personal law due to its implied constitutional protection under Article 25 of the Constitution.
f) The minority view held by Justice Khehar and Justice Abdul Nazeer argued that,

> " the practice of TT is a lawful part of Hanafi School of law but remarked that what has been considered bad in the *Qur'an* cannot be good in *Shari'a*. Thus, what is bad in theology is bad in law as well "(Para 282(26).

Both dissented with the majority opinion that 'personal law' should enjoy constitutional protection when it has been forbidden under the religious text of the Qur'an nor finds any place in the Shariat Act of 1937. They, further, held that the matters of the faith are beyond the purview of 'constitutional morality' of the judiciary and the issue in question should be decided by legislative enactment.

In the final declaration, the SC Bench divided in a 2:1:2 majority judgement derived from combined reading of Justice R. Nariman and Justice U.U. Lalit, with a concurring observation made by Justice Kurian, declared that

> " the practice of TT is both unconstitutional and void. Judge Nariman and Judge Lalit went overboard to declare the practice further as 'Sinful and un-Islamic'. According to them,

Islam provides appropriate and proper forms of dissolution of marriage to both men and women based on reading of the *Qur'an* and the practice of *talaq-e- biddat* has find no support in the religious text"(Para 284)

However, an independent opinion floated by Justice Kurian to decide on matter of conflict between freedom of equality and religion through legislative policy than the order of the court was duly acknowledged. The court exercised judicial self- constraint on abrogating this practice of TT despite its arbitrary, abhorrent, and detestable nature. Therefore, The SC, exercising its discretionary powers under Article 142 of the Constitution, unequivocally held that the practice is both arbitrary and gender discriminatory. The court issued an injunction that would refrain the Muslim husband from pronouncing *talaq-e-biddat* operative for six months. It commanded the State to legislate an act to abolish this detestable practice in the above-mentioned interregnum.

4.2. Role of the *Dar-ul- Qaza* (Shari'a Courts) in the adjudication of disputes: Select Case Studies.

Both the *Qur'an*[50] and the *Traditions of the Prophet*[51] have unanimously established the importance of the position of '*Ameer*' that is a religious cleric to dispense matters of justice between the members of the community. Many Islamic countries have witnessed the continuation of the Caliphate system to guide the population on leading an Islamic way of life. India under Mughals also traded their political control with the British on the mutual understanding that the latter will continue with the judicial system under the guidance of the '*Qazi*'.

The establishment of *Imarat-e- Sharia* was a thoughtful response to institutionalize an Islamic Judicial system as an alternate body of dispute resolution in 1827. A *fatwa* or a religious decree of Shah Abdul Aziz Dehlawi, the Islamic Scholar of *Hadith* in India, best defines the rationale behind establishing the same,

> *'When the governance of an area falls in the hands of non-Muslims, the Muslims, became under obligation to elect anybody as an Ameer amongst themselves; If there is any nominee made by the non-Muslim King, he will be incharge of the tasks assigned to the Ameer.*

[50] *The Holy Qur'an says, "Follow Allah and His Prophet, and those Charged with authority amongst you.".* See Ali, A. Y. (1998). *The Holy Qur'an: Transliteration and Commentary in English.* Delhi: Kitab Bhavan.

[51] "*One who follows Ameer follows me (the Prophet) and one who disobeys the Ameer, defies my order (of the prophet…", "Muslims are under duty to hear and follow the Ameer unless he orders for sin*"; *Sunnah Bukhari* 1375 A.H. Vol II, 1057 See Mohammad Ibn-e Abdullah Bukhari 'Sahih Bukhari Sharif, Kitab Bhavan, 1984, Vol. I to VII, Trans. Dr. Mohd. Muhsin Khan.

> *When there is no nominee, Muslims have to elect anybody who is the most righteous, who will be the incharge Juma prayer, nikah of teenagers having no guardians, protection of the property of orphans, distribution of shares of inheritors who are fitting for their shares and all of this will be made without making any interference in the political affairs of the country"* (Rahmani, 1999, p. 31).

The renowned *Ulemas* namely Rasheed Ahmad Gangohi, Qasim Nanotvi and Husain Ahmad Madani appointed Haji Imdadullah, Mahajir Makki as the *Ameerul Mumenin* (jurist for settling litigation) and Gangohi as the Chief Qazi to fight the Britishers. Despite the promise of non-interference in the governance of religious laws, the Britishers as a punishment to the participation of Muslims in the Revolt of 1857, abolished the *Qaza* system. W.W. Hunter commenting on the situation held that,

> "*One charge yet remains. The Mohammedans complain that not only has our system extruded them from the legal profession but also that by an act of the legislature, we have deprived them of the one essential functionary for the fulfilment of their domestic and religious law. Under Mohammaden Government, the Qazi unites many of the functions of a criminal, a civil and an ecclesiastical judge. It was to him that we chiefly rusted to carry on the administration of justice when we first took charge of the country. Indeed, so indispensable is the Qazi to the Mohammaden domestic and religious code, that the law decided that India would continue a Country of Islam so long as the Qazis were maintained and become a country of the Enemy the moment they were abolished*" (Hunter, 1876, pp. 183-184).

This move alarmed the religious heads who, anxious of the future of the *Imara*t in Bihar, united the jurisdiction of Bihar, Orissa and parts of Bengal under the aegis of Maulana Abul Kalam Azad. Hence, the inception of *Anjuman Ulema-e-Bihar* in June 1918 holds significance as it was formed prior to the Jamaat-e-Ulema-e-Hind and the Khilafat Committee to formally establish the *Imarat-e Sharia* on June 26th, 1921 as a socio religious organisation of the Muslims. Abdul Mahasin Sajjad was appointed the *Ameer* in 1921. The key task of the organisation was to unite the collective life of Indian Muslims based on *Shari'a* duties. Both A.M. Sajjad and Mohammad Abdul Bari of Farangi Mahal became instrumental in laying the foundation of Jamaat-e-Ulema-e-Hind in Delhi, appointing Shah Badruddin as the *Provincial Ameer* to guide the Muslim Clerics (Sajjad, 1981, p. 52).

The appointed *Ameer* should be an erudite scholar with in-depth knowledge of the religious texts of Islam and proficiency of language of Arabic and Urdu to interpret the *Qur'an*. He should be a rational and sensitive being of sound faculty of mind, undeterred by the worldly pursuits. The *Qazis* were trained under a Central *Darul Qaza* to best arbitrate the disputes in the light of knowledge gained from *Shari'at* principles spelt out in *Kitab al-Faskh wa al-Tafriq*.

The *Imarat e Shariat* continues to guide the Islamic affairs of the community in matters of law and education, employment, humanitarian aid and social service. There are 12 departments under the *Imarat e Sharia* dealing with Jurisprudence, religious and modern education. The Organisation has set up 50 *Qaza Courts* in three states under its jurisdiction (Sharia, 2006). The Constitution of *Imarat -e- Sharia* of Bihar and Orissa was adopted in 1940 but its final enactment took place only by 1996.[52] The hiatus is due to the clash of interest of authority between the local chiefs and the Ameer of Bihar. The trajectory of the organisation in last 90 odd years has been tumultuous witnessing a volatile clash of politics with religion. The most controversial threat has been the rift between two blocs namely the Madani bloc and Rahmani bloc.

Maulana Asad Madani, the head of *Jamiat-e-Ulema-e- Hind* formalised the establishment of an *Imarat-e-Sharia-e-Hind*, with the support of 3000 Muslim supporters and *Ulemas*, as a parallel organisation to *Imarat e- Sharia* under the control of Minnatullah Rahmani. The mouthpiece of Imarat-e-Sharia, *Naqueeb*, controlled by Rahmani, published articles accusing Madani of harbouring vested political interest of dividing the community to satisfy the religious propaganda of Jeddah based organisation, namely*, Rabta-i-Aalam-e- Islami*. The counter position of Madani was that the organisation was used by Minnatullah Rahmani to map the political career of his son Wali Rahmani and thus, used for furthering personal interests. He opposed the issuance of f*atwas* to vote for the Congress (I) and imposition of dynastic rule on the *Imarat*.

The larger argument was that the move of Madani was criticised as an attempt to thwart the efforts of the AIMPLB to launch an attack on the government for a UCC. Many felt that the rift of political legitimacy should be left in the hands of the AIMPLB who could merge all the *Imarats* and govern the organisations smoothly. This temporal divide hindered the smooth functioning of the organisation in the decades of 1970's to 1990's, finally, getting settled with the transfer of power by the enactment of the Constitution of the Imarat in 1996. The efforts of Syed Abul Hasan Ali Nadwi, former head of AIMPLB, laid fruit in giving an All-India character to the *Imarat* in the form of establishment of the *Darul Qaza* Courts (Ghosh, 1997, p. 5). The speedy decisions taken

[52] It was adopted by the Constituent Committee (Majlise Shura) on 22'*' September 1996. It contains 46 Sections.

by the *Qaza* courts on cases and interpretation of legal proceedings especially governed on lines of Islamic injunctions and principles was admired by the internal members.

The rationale behind popularity of these *Qaza* Courts lay in the weakness of the Indian Judiciary, as manifested in numerous ways, like:

a) The Indian legal system follows the procedure of following the common law model wherein the courts rely upon knowledgeable parties on both sides of the controversy to form, develop and present all relevant facts and legal arguments to the courts. The parties are not only assured the opportunity, but also bear the burden of doing so (Kim, 1987, p. 1643). This was not the case with *Qaza* Courts as they followed a personalised interaction with the parties to arbitrate on disputes considering the dictates of Islamic Laws.
b) The delay in the legal system to dispense justice due to the burden of litigation on the judiciary and expensive cost to be borne due to delay lead to a shift of focus on the working of these parallel courts like *Darul Qaza*.
c) The Indian Executive further aggravated the pain of the Judiciary in the appointment of judges due to tussle between the recommendations of the Chief Justice and the partisan politics of the government. This has led to major loss in the faith of judiciary accused of partiality and nepotism due to the control of the executive post their-retirement.
d) The Mis-management of cases, as highlighted by the *Shah Commission Report of High Court Arrears,* 1972, has increased the judicial work-load as several writs petition and review pleas are filed that eat the time of the judiciary. The poor class of society cannot afford to seek justice considering inordinate delays of the system.
e) The fees of the lawyers and the Courts are beyond the capacity of an average Muslim population who would prefer to take the matter to the *Qazi* than the Court.

Thus, arbitration by an alternative system of settlement of disputes (ADR) became the need of the day and led to the growing patronage of *Imarat-e- Sharia* run *Qaza* Courts. The Constitution of India offers legal aid under Article 39 and organisation of village panchayats under Article 40 that offers a blueprint to establish Lok Adalats or redressal courts like the *Qaza* Courts to dispense speedy and effective justice. The *Arbitration and Conciliation Act of India*, 1996 says,

> "*Notwithstanding anything contained in any other law for the time being in-force in matters governed by this part, no judicial authority shall intervene except where so provided in this Part"*[53]

The Judiciary has also ruled in favour of accessing ADR's due to excessive judicial workload and absence of judges to impart speedy justice. The AIMPLB, on the model of Lok Adalats and Panchayat, established *Shari'a* Courts to deal with disputes on personal laws.

The expanse of *Darul Qaza* has increased manifold in states like Delhi. Lucknow, Mumbai, Indore, apart from its traditional bases, under the aegis of the AIMPLB. Statistics revealed that since 1973,

> "only 6,433 cases have been disposed of and negligible number of 461 cases are under trial. The Bihar unit of *Darul Qaza* has so far dispensed 31,755 cases since 1917" (Ghosh, 1997).

The Jamaat-e- Islami coordinates functioning of Shariat Panchayats in Jaffarabad in Delhi. However, the Barelwis in contrast to these Deoband controlled judicial system, operate their *Edara-e Sharia* (Redding J. , 2020). In an interview with the *Qazi*, part of *Imarat-e- Shari*a, Patna revealed that ,

> "between 1990-2016, approximately 25 cases are filed every year of which 80% are concerns of women, and the *Qaza* court could settle 11 cases out of 25 every year by amicable restitution of conjugal status between husband and wife. The jurist offers a chart of filed cases with respect to different types known as '*Chart Mutada'irah muqadamat balahaz nau 'ya*t' which contained data of 15,210 cases filed at *Imarat-e- Sharia* between 1972-2016). Majority of the disputes relate to women asking for *Faskh* on ground of physical violence by husband or husband's impotence" (Hasan Q. M., 2017).

These records showed that the *Qaza* courts have established deep roots in the Muslim society as the redressal mechanisms to solve marital disputes without eternal interference. Moreover, the

[53] Act NO 26 of 1996., Sec.5. The above section is in accordance with the UNCITRAL Model Law on International Commercial Arbitration.

sanctity which these jurists enjoy, in the light of religious invocation of personal laws, has imparted a queer sense of supremacy and domination in private lives of the individuals.

Dar-ul-Qaza and Muslim Personal Laws: interpreting judicial intervention through case studies

It's a settled fact that the *Qaza* courts have been functioning on the lines of doctrine of the Hanafi sect as the majority members follow the said School of thought. As a logical corollary, the *Qaza* Court which is administered by the AIMPLB follows the religious laws of Imam Abu Hanifa and his disciples in settling disputes relating to personal affairs.

a) Position on Disputes in Marriage:

One of the concerns that has caught the eye of the clerics of the Court was the issue of **guardianship of marriage**. The Hanafi, Shafi and Hanbali School have stipulated a condition of reaching of puberty as the ground of marriageable age under the guidance of a Guardian. Borrowing from the *Traditions of the Prophet*, the Court has solemnized marriage of girls who were of sound mind and reached the age of puberty (Hamilton, 2013, p. 112) However, after reaching the age of maturity, set at 18 years for girls by law, the girl can dissolve her marriage, solemnised by the guardian, on her own will if not consummated. But the Maliki School does not offer any such right to the girl under any circumstance. A girl can only marry on the permission of the Guardian but does not need his presence to validate it.

The *Qaza Court*, despite the clarified position of different Schools, have misinterpreted this law to rule that a minor's marriage cannot be solemnised without a Guardian, Mere co-habitation or silence of the Guardian can be considered as consent, and hence, legalize the marriage but not in case of silence of non-guardians (*Shama Parveen v Anwar Hasan*, 1988 (1409 A.H.)).

The age of puberty in Muslim Law, as per the *Hedaya*, has been set at 09 years for girl and 12 years for boys (*Sadiq Ali Khan v Jai kishore*, 1928). Citing Tyabji, *Qaza Court* held that,

> " in the absence of evidence of attainment of puberty, the age of competence is 15 years for the girl" *(Atkia Begum v Md ibrahim,* 1916).

A slew of legislations across the Islamic countries like Turkey, Cyprus, Egypt, Jordan etcetera have increased the age of marriage on an average to 16 years for the girl and 18 years for the boy (Mahmood, 1972) These modern legislations in Islamic countries relating to marriageable age has nearly abolished the right of marriage by the guardian to contract a valid marriage by consent. However, under MPL in India, the system of '*offer and acceptance'* continues to give an important position to the guardian to contract a marriage (Ali S. A., 1986).

Dower is the consideration made for marriage as a mark of respect to the bride. It was practiced in the times of Prophet to abolish the practice of sale of bride by the father. The *Qur'an* prescribes a gift or dower made to his wife as per his capacity (Surah IV: 4:25). Unlike the stance of Judiciary which considers Dower as an unsettled debt in the sale of property of the deceased husband, the *Qaza* Court refused to consider it as a sale price.

In another case, the *Qaza* Court held that,

> "an off-spring of the deceased mother has the right to inherit the property secured by dower debt from his step-father. However, the widow cannot transfer the property but will only be entitled to that amount which was fixed at the time of marriage" (*Noor Mohd v Amanat Hussain,* 1413 (A.H.) 1992).

The *Shari'a Court's* position is to support prompt dower than a deferred one.

b) Position on Divorce or Dissolution of Marriage:

The term '*Talaq*' is the Arabic usage of the English term 'divorce' that is breakdown of marital life. Islam discourages the practice of divorce as something abhorred by Allah the most. Yet, it is a necessary evil in cases where one is unable to treat his wife with fairness and kindness and against her will (Surah IV:19, II:229,231). The manner of dissolution of marriage or seeking divorce is through a process of arbitration and reconciliation at the hands of both parties before it becomes inevitable to take separate ways.

On cases of **requirement of witnesses during giving of Divorce**, the MPL requires the presence of two male witnesses. Additionally, the process of pronouncement of divorce should be in three consecutive months and cannot be pronounced in her menses. This principle has been followed in many cases, (*Rasolan v Abdus Subhan*, (1384 A.H.) 1964),

(Mahrun Nisa v Akhtar, (1410 A.H.) 1989), (*Mohd Parvez v Zubaida,* (1417 A.H.) 1996). However, in *(Zarina Khatoon v Mohd. Siddique,* (1406 A.H.) 1985). The *Qazi* acknowledged that

"even in the absence of proof of pronunciation of TT, the lady believed that three pronouncements of divorce have been made. Hence, he declared that she was not allowed to marry him after the completion of *Iddat* period" *Zarina Khatoon v Mohd. Siddique,* (1406 A.H.) 1985).

This judgement, hence, went against the injunction of the *Qur'an*. In other cases of divorce under inference, undue influence/coercion, indirect communication, or state of intoxication, the Court has held the validity of pronouncement of three *Talaq* in one sitting (*Sibun Nisa v Mohd. Shahadat Husain,* (1399 A.H.) 1978).

On cases of Untraceability of Husband or Missing husband, the *Imarat e Sharia* follows Maulana Ashraf Thanwi' s position who had settled the waiting period to be for a year, after which the woman could dissolve her marriage after the observation of the *Iddat* period. The period is dependent on the woman's ability to maintain her, failing which the Qazi can use his discretion to reduce the period. The Hanafis had set the period of wait to be till the information of death of husband, while the Maliki had set it for 04 years. The AIMPLB has decided to reduce the period of wait to the maximum of 02 years.

Countries like Egypt, Morocco, Jordan, have prescribed a minimum of one year, to a maximum, of two years in places like Iraq and Syria, for news on non-traceability of the husband, following its expiration, the divorce shall be held valid by the Qazi. In India, the DMMA, S.2(1) says that,

> *"A woman married under the Muslim law shall be entitled to obtain a decree for the dissolution of her marriage in the event of her husband's whereabouts being unknown for four years.".*

In wake of the limiting position of the Indian Statute on longer period of wait, the position of Islamic Court is beneficial for the Muslim women.

The Indian Judiciary has been whimsical in extending the period of wait to be 07 long years as per the *Evidence Act,* 1871,s.108, superseding the position of the Muslim Law of Evidence (*Mazher Ali v Budh Singh*, 1885).

The question of **inability of the husband to provide for sustenance to his wife** is linked to the aspect of providing for maintenance to the wife. As per the Hanafi Law, unlike the other three Schools, a *Qazi* cannot legalize the divorce suit merely on the pretext of the husband's inability to provide sustenance to his wife. In the meantime, the wife shall arrange for maintenance either from her own property or by borrowing from relatives or friends.

Islamic countries like Iraq, Egypt and Syria provide a stipulated time-period of 2 months, 1 month and 03 months respectively to the husband to provide for support. Countries like Morocco, Sudan and Iran allow the *Qazis* to dissolve the marriage forthwith on inability to provide for maintenance by the husband (Mahmood T. , Muslim Law in India and Abroad, 2016, p. 75). The *Imarat e Sharia* adopts the rules of the Maliki School which provides for immediate termination of marriage in case of inability to provide for maintenance or non-fulfilment of marital obligation like providing for provision of food and lodge and protecting modesty of his wife (*Mst. Zahira Khatoon v. Md. Shibli,* (1396 A.H.) 1976).

The Indian Court provides for a watch period of two years before dissolving the marriage in case of non-maintenance of his wife. It further clarified that this period of wait should be in continuum and not in part *(Ittoochalil Meethal Moossa vs Pachiparambath Meethal Fathimas,* 1983).

In case of the **impotence of the husband**, though the Hanafi law allows a year's time for the husband to undergo treatment and ameliorate his condition. However, the *Qaza* Courts in (*Khairun Nisa v Asghar Ali,* (1412 A.H.) 1991) case, drawing upon the Maliki view, decided to dissolve the marriage forthwith although the husband has been asking for a last chance.

In case of **insanity of the husband**, the Hanafis, unlike the other three Schools among the Sunni, do not allow to seek dissolution of marriage. In case of insanity of the husband, the *Qazi* shall divorce the couple with immediate effect. However, in case of periodic madness, time for a year may be given (*Rabeya Khatoon v Mohd Tasleem*, (1416 A.H.)1995). Further, the condition of impotency of the husband will be a valid ground for divorce, in event of the defect present during the drawing of the marriage contract.

Similarly, **in cases of contraction of venereal diseases and physical ailments l**ike leprosy or leucocythemia, the *Shaybani* branch of Imam Hanifa and Imam Yusuf (a'al-Anhurfi, 1998, p. 463), unlike other School, do not allow dissolution in case of the leprosy and leucocythemia, as marriage for them is a contract to procreate children and dissolution should be allowed only on grounds sexual/ venereal diseases.

It is to be noted here, that several Islamic countries like Lebanon, Jordan, Morocco, Iraq and Syria have allowed the dissolution of marriage on grounds of presence of venereal disease or physical defects or ailments (Mahmood T. , Muslim Law in India and Abroad, 2016, p. 90). The *Qaza Court* has allowed divorce in case of leprosy of the husband. *(Raisa Khatoon v Mohd. Mumtaz*, (1406 A.H.) 1985), (*Sayeeda Bano V Mohd. Nizamuddin,* (1391A.H.) 1971).

In case of *Hurmat e Musahira*, that is unlawful relation or desire towards prohibited degree of relation in marriage for Muslims, the Court citing references from (Daqaiq, 1994, p. 107)and (Haskafi, 1992, pp. 279,283), held that in such cases, the woman has been able to prove with the help of witnesses of forceful relation by her husband's father. Hence the marriage with her husband and her relationship with her own son, stood dissolved *(Jameela v Jalaluddin*, (1391 A.H.) 1971). The judgement compromised with a woman's right to dignified life, as she faced inequalities borne due to her rape by her husband's father.

The backwash of this judgement were the **two landmark cases of Gudiya and Imrana**, though appropriated by the Media, that raised serious issues like misinterpretation of Islamic laws by uneducated Clerics, ill-informed individual *Fatwas,* and false reporting to undertake 'trial by media' at the cost of independence of the judiciary. Both cases became classic examples of manufactured investigative journalism that have used the female victims for tarnishing the image of the community to make gains from political parties.

Gudiya who hailed from a village in U.P. became a popular face on electronic media as a victim of redundant attitude of *Shari'a* Courts, like their counterparts i.e., *Khap Panchayats*. Gudiya's husband Arif, a 'war hero' returned home after a gap of 05 years after serving as the Prisoner of war in Pakistan prison. Meanwhile, Gudiya was happily re-married and pregnant from her second husband Taufiq. The returned officer claimed his rights as Gudiya's husband in front of local clerics of the village (T.K.Rajalakshmi, 2004).

The media quipped in by inviting Gudiya and her family to their Zee News studio in Delhi to hold a 'live session' of Panchayat to settle the collective fate of all. The Programme hosted as "Kiski Gudiya?" (Whose Gudiya?) began on a dramatic note to settle the issue as per Muslim Law (T.K.Rajalakshmi, 2004).

The Panchayat comprising Muslim Clerics of the village ruled that despite ignorance of the whereabout of her first husband for 05 years, she still held the legal status of being his wife, and hence, her remarriage stood invalidated. Through this ruling, the Media tampered the understanding of Muslim Law, by inviting non-trained and inexperienced local Cleric, to decide

the case. Their attempt to show Muslim laws as 'regressive and barbaric' brought them high TRP but due to societal pressure and reluctance of Gudiya to return to her first husband, she eventually died due to childbirth complications. Ironically, this time very few media reports talked about her real cause of death.

Few Years later, another case of *Imrana* sparked national outrage when a story of sexual assault of a woman by her husband's father was mishandled by the panchayat. On 6th June 2005, a case of local Ansari Muslim Panchayat in Charthawal village in Muzaffarnagar district of U.P. caught limelight when the local heads decided to dissolve the marriage of woman, Imrana, with her husband, Noor Ilahi on ground of adultery due to her forced sexual relation by father of the spouse (Reddy, 2005).

The Deoband School instantly passed a *Fatwa*, an advisory judicial opinion based on Hanafi *fiqh*, which stated that

> "the decision of local Muslim Panchayat that declared Imrana as the mother of her husband due to relation with her father-in-law as valid under Muslim law. This distorted interpretation of Muslim Law forced Imrana to desert her husband for his father's crime" (Habibur Rahman, 2005) .

This issue was brought to international fame when an article published by Salman Rushdie in New York Times had criticised the opinion of Deobandi clerics (Rushdie, 2005). Citing similar fate of *Mukhtar Mai* forced to gang-rape by rival group, these women are subjected to "Honour Killing" by local Panchayats who have reduced the identity of women as subject of sexual probity based on 'honour and shame' for men.

The judgement and media coverage were appropriated by different political parties. L. K. Advani, the former home minister and Deputy Prime Minister under the BJP central government (1998-2004), held,

> *"sympathy for Imrana as a helpless victim, emphasizing the need to change Muslim laws, and identified Muslim religious practices as "obnoxious" and the fatwa as a decisive proof of the need to end the separate code of Muslim Personal law in favour of the common Uniform Civil Code"* (Zafarul-Islam-Khan, 2005).

The AIMPLB current President, Rabey Hasani Nadwi, criticised the stand of the Deoband seminary on the issuance of fatwa and interfering in the affairs of the courts and panchayats. Later, the Deoband seminary withdrew the issued *fatwa* claiming it to be only a hypothetical viewpoint.

Imminent fissures were noticed in the opinions of the members of the Board as it was divided between the Hanafi and the Shafi sect. The head of the AIMPLB was categorical in treating the case as prima facie a serious criminal act than any other matter. Nadwi further commented that,

> "those issuing *fatwas* lack basic information such as the sequence of events, statements, cross-examination, necessary to impart justice" (Kidwai, 2005).

Other members like Kamal Farooqui looked at this case from a criminal perspective and called for the most stringent punishment for the culprit. The Deoband mufti's order was supported by the lone women member of the Board, Begum Naseem Iqtidar Ali Khan. Thus, difference of opinion became visible both within and without in the wake of the parallel setting up of the Shia, Barelwi and Women board barely few months before this controversy (Kidwai, 2005).

The AIMWPLB President, Shaista Amber rejected the *fatwa* blaming Deobandi dominated and guided AIMPLB of not bringing reforms in the divorce laws which are stooges in the hands of men. The unity of the Board was visibly shaken in the eyes of the public (Sikand, 2005, p. 150).

Syeda Hameed, founder of the *Muslim Women's Forum*, in the backdrop of the case talked of models of Islamic reform by Maulana Ashraf Ali Thanwi as being more inclusive than positions of different Schools. Hameed also talked about Altaf Hussain Hali, an Aligarh modernist, who has adopted a more humane ground on women's marital life (Hameed, 2005). Maulana Tauqeer Raza Khan Barelvi of parallel AIMPLB(jaded) held that the Imrana case is a controversial move by vested political groups to change the MPL and Muslim should not fall into the political trap (Burney, 2005).

The All-India Democratic Women's Association (AIDWA) led by Subhashini Ali, CPI leader Brinda Karat staged a demonstration in the town of Muzaffarnagar to protest the *fatwa*, demanding non-legal status of *fatwa* in the eyes of the law (Kumari, 2005). It was only when the NCW intervened in the case that the father-in-law was tried and punished on attempt to rape (Section 376) and criminal intimidation (Section 506).

The court of Muzaffarnagar sessions and District Judge R.D. Nimesh based on the evidence produced before the Court sentenced Mohammed to 10 years in prison for raping Imrana. He also received a three-year term for a separate charge of criminal intimidation (Bureau, 2006) .The choice of residence and continuation of family life was left to Imrana who opted for living with her husband in the same village (Correspondent, 2006).

This episode has come to expose the dilemma of Indian Muslims, wherein anti-Muslim hate speeches or stereotypes generated by the Media and the majoritarian fear created in the backdrop of the post-Godhra riots of 2002, the 9/11 war on Terror, and the politics of Hindutva of the RSS and the BJP, have come to thwart the atmosphere of growth of the MPL as progressive and liberating for the women. Rushdie too erroneously conflated this issue with the problem of the Islamic law while the fatwa was nowhere remotely close to the subject of muslim personal law (Metcalf, 2006 (Autumn), p. 390).

It is pertinent to point out that these *fatwas* are just advisory opinions and cannot assign an authoritarian control to the Ulemas, against the wishes of the concerned parties. There is a need to understand that these Ulemas are autonomous individuals who seek support through popular opinion. Even though Deoband as a School commands authority in the issuance of *fatwa* (since the creation of the office from 1893), yet these voices cannot be labelled as a call of institutional hierarchy but are individual opinion of the same (Muhammad Khalid Masud, 1996, p. 210).

Moreover, in the face of apparent heterogeneity (in the form of Hanafi and Shafi followers, the Barelwi and Ahl e Hadeeth, the Shias vis a vis the Sunnis) within the Muslim community, these Deobandi *fatwas* have faced intense criticism and lacked authority at every turn. They have, moreover, no validity in the courts (Metcalf, Traditionalist Islamic Activism: Deoband, tablighi and Taliban, 2001).What is paradoxical about the *Imrana* situation is that no issue of MPL was invoked at all nor any precedents were cited about the court's handling of the personal laws. This case is also laudable as striking at the roots of the clerical establishments, opening gates for what Sylvia Vatuk would observe as, rise of Islamic Feminism in India (Vatuk, 2008).

Islamic scholars like Tahir Mahmood and Mustafa Kamal Sherwani made a point in reference that the application of *fatwa* should be in the contextual understanding of the *Shari'a* dependent on the larger society where it is invoked (Sherwani, 2005). For example, the f*atwa* that argued for severing of the ties on ground of sexual indignity committed by 'ascendants or descendants' of husband can be used a valid ground for places like Arabia where the women customarily can invoke this ruling to routinely remarry another person. India is an example of application of norm of respectability applied, out of custom and not Islamic, on divorced women who do not exercise this option of severing their marital tie. Similarly, in Pakistan,

> " an issue familiar from the cases where the "hudud" laws dating from the Islamizing policies of General Ziaul Haq (1977-88) have proven draconian in turning rape victims

into criminals (Mahmood, 1972). A. M Ahmadi, former chief justice of India, for example, said that "a forced rape could not annul a marriage" (Kidwai R. , 2005).

Moreover, the MPL are normative uncodified laws that have been mediated by the colonial state to adapt it the geographical proximity and historical locatedness while settling disputes in the English courts. Thus, Asaf A. Fyzee aptly prescribes on them the category of "Anglo-Muhammadan law' than Islamic Shari'a as these *Shari'a* case laws are premised on the English principle of "justice, equity and good conscience" (Fyzee, 1963, p. 404). The codification of laws was attempted by the State in the interest of communal unity and identity, first by the Britishers in late 1930's and later in post-independence phase of 1980 (Zoya Hasan, 2004, p. 43).

Coming to the core of the case, the key concern is the role of the caste panchayats, who like *Khap* Panchayats, act against the Islamic principles and are manifestations of malaise of violence against women across caste, class, and religious lines. Their rulings backed by social pressure are loud examples of celebration of patriarchy invoking religious legitimacy. The commentaries and decisions undertaken by these parallel courts are easy scorning of Islamic law as 'ossified and draconian'. The lesson learnt from the *Imrana* case is that the demand for changes in Muslim personal laws considering practice of TT and polygamy are symbolic.

The real danger lies at the rock bottom concern of poverty and discrimination that engulfs the Muslims in India. One also must be cautious of the distorted Orientalist discourse who tend to show the oppression of Muslim women by men as a common phenomenon and sign of inferiority of Muslims in general. The problems of TT and Polygamy are concerns of primarily lower class and uneducated Muslim women who are exposed to the perils of poverty and despondency. Nonetheless, any form of injustice should be struck at its roots for which an engaging dialogue should be the initial point between the government and agencies of the civil society.

Future of Dar-ul Qaza:

The functioning of the *Dar-ul Qaza* Courts as ADR's is fraught with challenges of incompetence of the *Qazis* to rightly interpret the Muslim Law, in the light of primary sources of Islamic Law based on the dynamic *Fiqh* of *Ijtihad* and *Takhayyur*. The *Qazis* have mostly erred in judgements by resorting to weak *Hadith* or f*atwas* that allowed distortions in Muslim Law on TT and payment of Dower, based on personal interest *(Syed Hyder Rizvi v Shahid Nikhat,* (1420 A.H)1999), (*Bibi Mahjabur v Ehsan Ahmad,* 1418(A.H.) 1997).

The Courts refused to offer an ameliorating or enabling condition to Muslim Women to seek *Khula* easily as they are caught in their own patriarchal chains (*Saleemun v Shaikh Shafar,* (1348 A.H.)

1929). A precedent as per the *Tradition of Caliph Umar* could have been followed who had annulled the forced return of the woman to first husband, missing for four years, despite first husband's demand of resolution of marriage based on the choice of women. The Qazi, herein this case not only ignored this tradition of Islamic practice but also acted against the principle of equity and fair conscience.

What continues to baffle the minds of the scholars writing on Muslim issues in India, is how the *Dar-ul Qaza* continues to enjoy support and respect in the eyes of the Muslim community. While analysing the functions of the *Qaza Courts*, in totality, especially on matters of implementation of Islamic principles in handling disputes, these Courts have been successful and just in handling cases of granting divorce to woman in matters like in absence of maintenance on part of the husband for up to 2 months than the four-year waiting period; the inability of the husband to maintain his wife has led to grant of divorce and the impotence of the husband (*Bibi Ruqaiyya v Mujib Alam,* (1414 A.H.) 1993); *(Shahina Parveen v Javed Nehal*, (1415 A.H.)1994) (*Bibi Maryam v Mohd. Shah Alam,* 2012).

The most scathing attack on the institution of the *Imarat e Shari'a* is that the predominance given to doctrines of Hanafi School, negating the good aspects of other Schools of law, the institution is at best called *Neyabat e Hanafia.* This institution is caught in the internal politics of factionalism of different sects and its control by AIMPLB has also exposed the overarching control of the Deobandi School of the Hanafi sect. The trained *Qazi* kowtows to the religious interpretation of these religious scholars thereby closing the gates of *Ijtihad* and *Takhayyur* that could help the community to deal with their issues in a more rationalistic and pragmatic way.

Response of the AIMPLB on the criticism of the Qaza Courts:

The AIMPB has streamlined the functioning of the *Dar-ul-Qaza* under the *Mujtahids* (learned of the *Qur'an* and the *Hadith*) to draw inferences from the following pupils of the Hanafi School while interpreting the Islamic laws. They are outlined in chronological order of importance as:

a) Imam Abu Hanifa
b) Imam Abu Yusuf
c) Imam Mohammad
d) Imam Zafar
e) Imam Hasan Ibn e Ziad

The study of history of Islamic Jurisprudence sheds light on the precedents of consultative juristic bodies for issuing new rulings in the classical period. These are the best guide, suggesting that this crucial job is not to be entrusted to an individual but to a set of experts on law (Kathir, 1340, pp. Vol 1,172). The *Qazis* were asked to exercise eclectic choice in formulating opinion to arrive at consensual decision. This involved their religious training which was undertaken by Khanqah Rahmani in Monghyr and Imarat e Sharia office at Patna in Bihar.

To counter the criticism of gender injustice, the AIMPLB decided to appoint women jurists to the Qaza Courts after the completion of their training at Madrasah for girls, in theology and Jurisprudence. They have successfully trained and hired female jurists from Madrasah at Malegaon in Maharashtra to adjudicate cases of *Qaza courts* in Rajasthan (Winkelmann, 2005, p. 16) .

The AIMPLB has been making strident efforts to rescue the Courts from limitations but remains unfazed by the attack on factionalism and internal sectarian strife. The Board continues to legitimize the Hanafi doctrine through adjudication of disputes by *Shari'a* Courts. This has caused internal dissent within the community wherein people are vociferously critical about the Board's 'self-proclaimed' representative status of the Muslim community.

4.3. Clash of Interpretation of Muslim Personal Laws between the Indian Judiciary and the AIMPLB:

The AIMPLB has established itself as a final authority on interpretation and adjudication of Muslim Personal laws through the *Imarat e Sharia*. Cautioned by the interference of the Judiciary in the interpretation of Muslim Personal laws, the Board has been pro-active, since early 1990's, in outlining its agenda to establish *Darul Qaza* in nook and corner of the country to save the community from external interference. '*Islami Adalat'* is a seminal work published by Maulana Qazi Mujahidul Islam Qasimi in 1988 that aid the blueprint for the establishment of an Islamic judicial system in the entire country. Nonetheless, their style of functioning continues to be challenged by different quarters both within and outside the community.

The existence of the *Darul Qaza* has, recently witnessed, a struggle for its legitimacy and survival as parallel courts vis a vis the Indian Judiciary. The first instance of such an attack was brought to limelight in a Public Interest Litigation (P.I.L.) filed by Vishwa Lochan Madan in the Apex Court. A writ case was filed in 2005, as a backlash of the *Imrana, Asoobi* and *Jatsonara'*s episode, wherein the obscurantist *fatwa* issued by the Deoband school forced the Muslim women to

dissolve their marriage on grounds of rape by their father-in-law (*Vishwa Lochan Madan v Union of India*, 2014).

The petitioner challenging the legality of the *fatwas* issued by these religious organisations and pleaded to declare them as *void ab initio*. A logical corollary to the petition was the plea challenging the status of *Dar-ul Qaza,* controlled by the AIMPLB, functioning as parallel system of justice as illegitimate and unconstitutional. It pleaded that only the Sovereign State has the authority to adjudicate in legal disputes through the instrument of Judiciary. A prayer was made to diffuse all the erstwhile established Qaza Courts and issue direction to the AIMPLB, Dar-ul-Uloom Deoband to stop its activity of training Qazis and opening new *Shari'ah* Courts. The plea put forth by the State of U.P. and Madhya Pradesh was in tandem with the prayer of the petitioner, to declare these *fatwas* as non-binding and devoid of any legal significance.

The Response of the AIMPLB to the petition filed premised upon the rationale of providing alternative mechanism of dispute resolution, in the form of *Qaza* Courts, to allay the pressure of expensive and tedious litigation for the marginalized and economically weaker section of Muslims. It accepted the charge of training the *Qazis* and *Mufti* for the Courts so that they could dispense justice in the light of correct interpretation of religious texts and tradition. However, it acknowledged that these *Qaza* Courts are informal justice delivery system that aims to settle disputes amicably after re-conciliation. It negated the misconception of the petitioner that *Qaza* Courts issue *fatwa* and held that these Courts mediate on disputes related to matrimonial matters, only on the will of the concerned parties.

Dar-ul-Uloom of Deoband stood firm on its position of issuing *fatwa* as an advisory opinion, in the *Imrana* case, considering the Hanafi *fiqh*. However, it asserted that they have never exercised the status of legality of enforcing fatwas by coercion on the concerned parties.

The position of Union of India was that these fatwas are advisory in nature and hence, non-binding on any Muslim. It argued further that the institution of *Dar-ul-Qaza* does not administer criminal justice but functions primarily as an arbitrator/ mediator in family disputes of Muslims, and hence, beyond the purview of Civil Law. It believed that these Courts, at best, function as alternative dispute mechanism and act expeditiously in dispensing justice and hold no comparison with the Judiciary.

In the wake of these arguments, the SC governed by a two judge Bench comprising Chandramauli K Prasad and Pinaki Chandra Ghose passed a unanimous judgement, ordering that,

> "none of the verdicts issued by the *Darul Qaza* will hold any legal status and the latter should refrain from interfering in matters already *sub-judice* in the Indian Courts. It premised its judgement on the rationale that the power of adjudicate flows from the validly made law. The person who derives benefit from adjudication should also have the right to enforce it. Herein, these Courts enjoy no such sanctity from the Acts of the competent legislature and are thus, outside the corpus juris of the State" (para5).

However, the Court acknowledged the complementary position of these Courts in aiding to dispense speedy justice in matters of matrimonial disputes of the Muslim community. Judge Chandramauli applauded the functioning of these Courts, not as parallel Courts, but as requisite instrument of ADR's.it dismissed the petitioner's plea of abolishing the system of Qaza Courts.

On the issue of legality of *Fatwa*, the Court held that

> *"any issuance of an advisory opinion is acceptable so long as it does not infringe the rights of the individual guaranteed by law."* (*Vishwa Lochan Madan v Union of India*, 2014)

The organisations could issue fatwas that had a bearing on the larger community but not on the individual. The Court, however, cautioned on issuing *fatwas* at the pretext of a stranger, and whenever a *fatwa* is being issues, it should be mindful of the repercussions it holds on the psyche of the society.

The SC's ruling was appraised for balancing the religious sensitivity of the groups vis-a- vis the individual rights of equality and justice. It was a judicious semblance of all three positions of the involved parties. Nonetheless, the critics doubted the tenacity of the judgement to curtail the self-ignorant Clerics from issuing outlandish fatwas*,* that compromises with the principle of equality before law (Mahmood S. , 2017). Some experts on law like Rajeev Dhavan and Irfan engineer have even questioned the wisdom of the Court in not challenging the standing of the petitioner interfering in religious affairs of the minorities (Agnes, 2014).

The AIMPLB, while compromising with the decision of the Court, mobilised the community to refrain from knocking the doors of the Indian Courts and settle matters internally through these *Qaza* judicial system.

It is true that the uneducated and ill-informed community trusts the Board to dispense justice in the light of religious tradition. Moreover, a sizeable growing number of the Muslim population, in recent years especially after the formation of the Modi government, have moved away from support of a UCC in favour of extra-judicial reform for personal law within communities, both on

the grounds of realism and of reluctance to join forces with anti-minority Hindutva organizations (Plys, 2020).

The real solution, which has sadly not formed part of an academic discourse nor policy matters, is to alleviate the educational and economic backwardness of women across board so that they are self-reliant in fighting for their rights guaranteed both by the law and religion. Many Non-Governmental agencies are fighting for their legal rights, but their efforts cannot hold fruition, considering continual discrimination and ignorance of the State. What is required are realistic laws and policy initiatives to ameliorate the condition of dependency of women on their male counterpart.

Conclusion:

The Judiciary has over-reached its role as an interpreter of the values and ethos of the Constitution since its inception. In the aftermath of the debates on personal laws of the Muslims, the Court undertook a key responsibility to interpret 'freedom of religion' in the absence of definition of term 'religion' in the Constitution.

The guarantee of religious freedom in Article 25-30 of Indian Constitution has mostly been read, under the principle of basic structure doctrine of 'Secularism', understood in Indian context, as equal treatment of all religions by the State, restricted to ensure public order, morality and health (*Kesavananda Bharti v State of Kerala,* 1973) (Austin, Religion, Personal Law and Identity in India, 2001). However, if the Courts have to test the constitutional status of different forms of religious beliefs and practices, then, it is required to have a definition of a religion so that it can assess when religious freedom is being violated (Mehta, 2008, p. 319).

The Court has outlined the "essentialities of religious" practices in various cases to satisfy the public objective of the State. This has, eventually, caused obliteration of essential customary practices and rituals of the community. the Jurists have engaged in extensive scriptural exegesis, placing them at the pedestal of primary source of law. As evident from the *(Ratilal Panachand Gandhi v State of Bombay & Ors*, 1954), *Shirur Mutt* and *S.P. Mittal,* 1982 case, the SC defined freedom of practice of religion as,

> "*a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being. A religion may also lay down a code of ethical rules for its followers to accept which might prescribe rituals and observances, ceremonies and modes of worship which are regarded as an integral part of religion and those forms and observances might extend even to matters of food and dress*" *(S.P. Mittal Etc v Union of India & Ors*, 1982).

It helped the State to understand the prevailing mood of the public through the judgment on social life conforming to constitutional responsibility of secular functions of the State. Thus, for the first time the Court not just defined what constitutes religious belief but also any acts done in pursuance of that belief (Mahajan G. , 1998, p. 52).

Applying this rationale on dealing with cases of religious rights of the Muslim, the SC made a landmark intervention in the 'essential practice of Muslims to slaughter cows on the festival of *Bakr-Eid'* (*Mohd Hanif Quareshi v State of Bihar*, 1958). In this case, the Court upheld the constitutionality of *Bihar Preservation and Improvement of Animals Act, 1955, the U.P. Prevention of Cow Slaughter Act, 1955, C.P. and Berar Animal Preservation Act, 1949* that called for total ban on cow and cattle slaughter, if they are milching and productive, on grounds of reasonable restriction of upholding public order. Any such cattle that are no longer productive and able to milch will be allowed for slaughtering under guarantee of Article 14 and 19(1)(g) of the Constitution.

These limitations on ground of public order are inevitable for a flourishing pluralistic society as argued by Justice Felix Frankfurter,

> "*the freedom to follow conscience has itself no limits in the life of society, would deny that very plurality of principles which as a matter of history underline protection of religious toleration"* (*Minersville School District v Gobitis*, 1940).

The SC proved that religious freedom is not an absolute Right, as there is reasonable restriction outlined for its enjoyment without infringing the rights of others. An uncontrolled celebration of freedom of religion can run into the perils of compromising on the Rule of Law. According to Joseph Raz,

> *"the limit of this right is the individual autonomy of others*" (Shetreet, 2002, p. 26).

A continuity exists between the Colonial Courts and the Indian courts as both inquire into and try to identify the 'essential practices' of religious groups on lines of '*justice, equity and fair conscience'* (Austin, Religion, Personal Law and Identity in India, 2001). In the long run, such 'judicial essentialising' results in reshaping the identity of communities on lines of uniformity of Brahmanical/ Sacral law and marginalization of customs and popular practices. The fundamental critique of the *essential practices' test/doctrine* rests on the fact that ambiguous history is invoked to disentitle even the claims that are legitimate, and that, there is over-reliance on intuitionism.

The agenda of the Judiciary to nurture an atmosphere of social justice, across the board, is inimical to the political furore, as witnessed from the *Shah Bano* case, which is created that stifles the

liberating position of the institution. In matters of personal law, the judge should invoke 'tradition' to ascertain its essential value based on the method of Ijtihad and Eclectic Choice. The real question, which looms large, is whether providing religious justification enhances the effect of judicial decisions aimed at reforming religious practices?

At the level of community, the demand of AIMPLB for accommodation of group rights, making claims of autonomy of personal laws, has often undermined the claim of individual autonomy. The test for protection of rights to religious freedom are often conflated against the liberal commitment of non-discrimination and gender equality. This yardstick of 'Autonomy' used both by the State and the community respectively to test the application of MPL is problematic as it fails to balance other values like culture, gender, and reason (Dworkin, 1988, pp. 21-33).

Scholars who have argued for '*exit theses'* based on choice of individual to choose between personal law, as guaranteed under Article 25-29, or secular law (Section125-129 of Cr.P.C) give free exercise of value of autonomy in their lives (Spinner, 2004) (Redding, 2006, p. 470). Contrastingly, others argue for an 'option thesis' which allows individual to choose from different option as part of their respective personal laws to exercise their right of autonomy, like in case of different Schools of Jurisprudence within the Muslim Law. It, further, satisfies their commitment to faith vis a vis exercise of personal reason in leading their life. The individual is saved from ostracization and ex-communication by its own members to which he is part of a lesson learnt from *Shah Bano* and many other such cases (Shaheed, 1994, p. 997).

The choice of women, however, in exercise of either of these options is unrealistic and limited as the faith-based communities restrict the rights of women to act freely even in a liberalised polity (Ahmed, 2010, p. 233). The high level of economic dependence of women in the community mars the very choice, which the community boasts of in the name of, autonomy of personal affairs. The pressure which religious bodies like AIMPLB exercises on creating social bonds of personal needs fetters the ideal of autonomy (Raz, 1986, p. 32). Thus, the individual can neither exit out nor choose from different options, as the AIMPLB continues to dictate the application of laws in arbitration through the *Qaza* Courts. Thus, India is a peculiar case model wherein religious organisations like *Jamiat-ul-Ulema Hind* and AIMPLB have politicized religion to construct their cultural symbols and identity and trammelled the agenda of reforms of personal laws in any form both from within and without (Hasan, 2005, p. 204) (Mahajan G. , 1998, pp. 107-8). The need of the hour is to mobilize women's voice to speak actively on reform of religious laws.

Chapter 5

The AIMPLB vs the Indian State

The Indian Minorities have celebrated the space of accommodative diversity, made permissible by the State, upholding the ethos of Secularism. The Indian dispensation on Secularism celebrates absence of state's intervention in religious affairs of the public. However, the same Constitution also provided the provisions of 'alteration, repeal, amendment or adaptation' of personal laws as a statutory lease in Article 372 (2) by a competent authority, in this case the Parliament or State Legislature. Amendments to statute law were effected, to secularize' the legal system like the Special Marriage Act , 1954 (SMA) and later in the Hindu Marriage Act, 1955,(HMA), Hindu Succession Act, 1956,(HAS) etcetera. In the atmosphere surcharged with demands for uniformity in Civil Laws and receptivity to reforms of personal laws, by the Judiciary and citizens alike, the Minority communities have walked a tight-rope in ensuring 'non-interference in the personal affair of the community'(Mahmood, 1986, p. 12). Thus, the domain of interpreting and adjudicating religious laws are caught in contesting entitlements to demands of cultural autonomy, gender justice and equality and dignity of an individual.

The preceding chapter has analysed the pivotal roles played by the Indian Judiciary in defining the contours of what constitutes 'freedom of religion' that extends its frontier to protect personal laws of the community from encroachment either by the State or the individual. While defining the 'secular activity associated with religion', the SC acknowledged the intervention of the State to limit the sacred and sacrilegious practices of the religion to act in larger public interest. The Indian Court has orchestrated the reforms in the personal laws of the Muslim, admonishing the State to initiate social reforms of laws by enacting a Common Civil Code on secular lines. These interventions by the Judiciary have met strong rebuttals from the Muslim community, wherein the AIMPLB has adorned a sentinel role to pressurize both the Court and government to keep at bay from their religious affairs. While attempting discourse analysis of judicial rulings, the chapter has explored the struggle between legal pluralism and legal uniformity and concluded that the Court has sought to decide cases on principle of legal centralism, especially with the rise of a Hindu-majoritarian state under the BJP.

In the backdrop of this clash of intervention between the Judiciary and AIMPLB on legal/constitutional lines, this chapter aims to explore the transitioning political climate of the

Indian democracy wherein the State and the AIMPLB are at loggerheads on key issues concerning the Muslim minority.

The chapter shall provide a gendered analysis about multicultural legal system wherein the choice of empowering cultural and religious practices of a group, at the internal cost of disempowering women's right to equality has been challenged by the analysts of conflict resolution theory (Eisenberg & Halev, 2005). The failure to involve women as actors in conflict resolution harms the very agenda of the state to talk about reforms of personal laws, in the name of social reforms premised on goals of gender equality and justice (Shachar, 2001, p. 45). This cultural distinctiveness in a multicultural set-up inflicts internal costs that compromise rights of individual citizen, often due to rigid reading of group's traditions.

The vision of a state-led centralist legislation stressed on formulating "the laws of the state, unified for all persons, exclusive of all other law, and unified by a single set of institutions" (Griffiths, 1986, p. 3). Subsequent decades were caught in the pit-fall of this vision due to their negation of cultural and social norms of the majority community, wherein the reforms of the Hindu law was at best partial and caused further diminution of rights of women (Agnes, 1999). Attacking the desirability of uniformity of civil laws to introduce reforms, the pluralists made a case for culturally situated law that acknowledged the rights of the individual in an embedded society.

5.1. Parliamentary Debates on the issue of Minority Rights: The Muslim Women (Protection of Rights on Marriage) Bill, 2019.

Among all the legal statutes of nations, the power of divorce is considered as a natural corollary to the rights of marriage. Islam with all its realistic approach to human affairs looks upon divorce as a necessary evil that becomes inevitable in certain circumstances. As Cheshire observing the practice commented that,

> *"Divorce, since it distinguishes the family unity, is of course, a social evil in itself, but it is a necessary evil, it is better to wreck the unity of family than to wreck the future happiness of the parties by binding them to companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children……"* (Cheshire, 1945, p. 358).

Position of the Islamic Text and Traditions on Triple *Talaq*:

Islam is based on natural principles of justice with verses supporting egalitarian status for both men and women in spheres of marriage and divorce. The position of the *Qur 'an* on the practice of Divorce is of manifesting it at three different occasions during the state of purity. It defines a period of *Iddat* that is three consecutive forces of menstrual course wherein the contending parties have the option to reconcile and reconstitute their conjugal rights.

> "*Divorce may be pronounced twice and then a (woman) may be retained in honour or released in kindness. And it is not lawful for you that ye take from women out of that which ye have given them…..These are limits (imposed) by Allah and transgress them not…..and if he hath divorce her the third time then she is not lawful thereafter until she has wedded another husband"* (Ali, 1934, p. Verse IV:34).

In this verse, there occurs the word *marrataan*[54] *(two* times) which is to be regarded as not mere repetition of the word twice but giving divorce on two different separate occasions. The *Quran* has explicitly spelt out the period of *Iddah* to mar clarity of maintaining periods of gap between the pronunciation of divorce on three different periods. Thus, the *Qur'an* has come to grant greater privileges to women to claim maintenance and sustenance of life in the form of *Mahr* (dower) and claims of inheritance in the property. The *Qur 'an* does not specifies any matrimonial offence for breakdown of marital ties.

The *Traditions of the Prophet* holds some inferences in the *Hadith*[55], on the validity of three divorces together at one time, invoked by different jurists and clerics to justify the practice as per their limited understanding. As narrated from Aisha, according to *Sahih Bukhari*,

> The wife of Rafaah Qarzee came to the Prophet and said, "*O prophet of Allah, Rafaah gave me a conclusive divorce and after that I married Abdur Rahman Zubar Qarzi but he did not prove to be fit for matrimonial relationship. The Prophet said that "perhaps you want to go back to Rafaah. But you cannot do so until you have been together in privacy, that is you can only go back after the fulfilment of nikah- al-Halalaah*" (al-Bukhari, p. Hadith 5231).

[54] The Arabic meaning of the term "*marrataan*" is 'one after another, not mere repetition of the word twice. Quran XXIV:58

[55] A *Hadith* consists of two parts*: Isnad and Matin*. *Isnad* is the link, the source, or the chain of narrators of the Hadith. *Matin* contains the substance of Prophet's sayings, deeds, and actions. See J. Rehman. "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq" , *International Journal of Law Policy and the Family,* 2008, Vol.21, Issue 1, pp.108-127

In this tradition, *talaq-al-battah* has been mentioned but not expressed those three divorces are pronounced together but have been invoked to support the practice of TT.

One of the popularly cited case to validate the practice of *TT* by the clerics and *Qazis* is that of Abdullah ibn Umar as reported in *Sahih Bukhari,*

> "*wherein Umar had divorced his wife during menses in the days of the Prophet. The Prophet advised him to retain her in same state until she is in the state of purity up to three consecutive periods and then divorce her before sexual intercourse*" (al-Bukhari, p. Hadith 5252).

In the above tradition, *talaq-al-Thlaath* (three divorcing) has not been reported as claimed by different scholars but one finds mention of *talaq-al-Haaiz* (that is prohibition of divorcing during her menses) which reasonable proves that a person should wait for three months to decide over the final repudiation of his conjugal rights. However, Umar on the grounds of disciplinary action to confer punishment on all considered the divorce, thrice at a time, to be effective (Thanwi, 2010, p. 359). Thus, unequivocally declaring divorce was admonished by the Prophet who called it as *abghad al-mubaahaat* (i.e., most detestable of all legally permissible things).

Schools of Jurisprudence on the validity of Triple Talaq:

The classical School of Sunni Jurisprudence holds difference of procedure in acceptance of laws of three pronouncement of *Talaq.* **The Hanafi School** accepts the practice of *TT* as final *talaq* or *mughallazah*. It is viewed as an innovation to be curbed but legitimate. Thus, the Hanafi School has permitted an 'unencumbered' right to divorce to a husband without reasonable ground, thereby, throttling the egalitarian and liberal position of Islam on women.

The Maliki School makes differentiation between various expressions applied in the pronouncement of *TT*. If a husband uses the term "*I divorce thee thrice*" then it is considered as final *Talaq*. However, if he uses these words without intention then it cannot be effected nor in the case of using the words to lay emphasis on the threat of giving *Talaq*. **The Hanbali School** also follow the rule of intention and emphasis.

The Salafi School that is the *Ahl-e-Hadith* a consider three *Talaq* in one sitting as only one. Both the Shia School that is Ithna Ashari and the Fatimid consider the practice of *TT* as void and illegitimate (Fyzee, 1964, p. 127).

Maulana Thanwi seconding the methodology of *Takhayyur* (Eclectic choice) tried to respond to the criticism levelled at the parochial Hanafi School, arguing that,

> "*It is likely that Hanafi School may be questioned on the ground of adequacy. The answer to this criticism would be that this School does also allow, with certain conditions subscription to the views of other Mujtahid in event of some dire need*" (Thanwi, 2010, p. 200).

Thus, this decree became a classic example of the application of the methodology of eclectic choice adopted by Ashraf Ali Thanwi who tried to rescue Muslim women from converting to other faith by seeking to adopt the practices of dissolution of marriages as per the Maliki law.

A nuanced understanding of the Muslim *Nikahnama* breaks the popular misconception that the male enjoys unbridled authority to liquidate their marriages as the parties to the civil contract can settle on non-acceptance of the practice of *Talaq-e- Bidat*, the right of opting for prompt dower (*Maher*) before consummation of marriage and choice of the female to be governed by any four School of Jurisprudence in matters of marriage and related affairs. The *Qur'an* explicitly forbids a man to seek pretext for divorcing his wife as long as she remains faithful to him, as stated in,

> *"if they namely women obey you, then do not seek a way against them*" (Ali, 1934, p. Verse IV:34).

The *Holy Qur'an*, thus, stressing on the sanctity of marriage, allows it to be dissolved, not according to whimsical or arbitrary will of the husband but as per objective ruminations. To summarise, the divine declaration in *chapter 2 of the Qur'an states,*

> *"O Prophet! when ye do divorce women, divorce them at their prescribed periods and count (accurately) their prescribed periods. And fear God, your Lord and turn them not out of their houses, nor shall they (themselves) leave, except in cases [where] they are guilty of some open lewdness. Those are the limits set by God and any who transgresses the limits of God, does verily wrong to his (own) soul. Thou knowest not if per chance, God will bring about thereafter some new situation"* (Ali, 1934, pp. Verse II:228-9).

The abhorred practice of *TT* gained legitimacy in the Muslim world due to the invocation of practice through *Ijtihad* (consensus building) during Caliph Umar's rule. The rules of irrevocability of *TT* were to create deterrence of the practice in the face of fear of public flogging as punishment. These rules of punishment have been abolished but the practice of divorce continues to exist in contemporary times (Haykal, 2010, pp. 225-58).

Background to the formulation of the Act on banning Triple Talaq, 2019: A Roadmap to UCC

The postcolonial State in India had the ambition for uniformity. It, however, faced difficulties in erasing difference and pluralism outrightly, despite the strong demands from the Hindu Right. It was finally the Indian Judiciary who laid the plot to formalise a political action plan to protect right to liberty and equality of Muslim women vis- a- vis group autonomy in matters of personal law. The State was witnessing signs of seething attack on its evasive role to delay the project of codifying the Common Civil Law in the face of glaring gender injustice and inequality on women.

What caught the national attention of the public eye, thereby, pressurizing the State to initiate prompt action on matters of gender injustice was the clarion call of the Judiciary to protect right to equality especially in matrimonial disputes. The infamous practice of *'*TT*'* in one sitting was enjoying unequivocal validity in the eyes of Sunni-MPL of the community.

A petition was filed by a Muslim woman named Shayara Bano challenging the pernicious practice of TT as both Un-Islamic and Sinful (*Shayara Bano v Union of India,* 2017). This case slowly engulfed the whole country turning into a political debate on reforms of Personal Laws wherein different agents of civil society represented themselves as either petitioners or respondents. It had challenged the constitutional validity of Shariat Act*,* 1937*, s.2* that validates unilateral and irrevocable form of *Talaq -e-Bidat*. This practice was also held to be violative of Article 14, 15 and 21 and not to be protected under Article 25(1), 26 (b) and 29 of the Indian Constitution (Sen, 2018). The petitioner pleaded that TT has been forbidden in other theocratic countries as part of their statutes, and hence, should not be considered as an '*essential tenet'* of Islam.

The Judiciary acknowledging the overtone of the debate decided to pass a landmark ruling to follow as precedents for future action. It struck down the validity of the TT as unconstitutional. A five-judge bench with 2:1:2 with the concurring judge tilting towards the majority passed the decree that TT was both Un-Islamic and Sinful and is to be considered void in the eyes of law (*Shayara Bano v Union of India & Ors*., 2017). The Court extended its jurisdiction, under Article 142 of Indian Constitution, to decide on the question of constitutional morality and public order vis- a- vis free gliding of personal laws. It issued a directive to the State to legislate on the abolishment of TT. In the meanwhile, an injunction order was passed for a period of six months that refrained the husband from effecting divorce on this ground. The Injunction would continue

to hold its validity till the Act was enacted by the Legislature banning the evil practice of '*Talaq e Biddat'*.

The judgement aided the political agenda of the BJP whose electoral promise to bring a UCC saw the light of the day. The political climate was ripe to initiate the long-drawn legislation on unifying the Civil Code relating to personal affairs of all communities. The government enjoyed absolute majority in both the Houses of Parliament and managed to garner support from the Muslim women and liberal intelligentsia circle. Many women's agencies of the civil society like the BMMA, *Rashtrawadi* Muslim *Mahila Sangha*, Lucknow (RMMS), an offshoot of the *Rashtriya Swayamsevak Sangha* (RSS) supported the BJP to lay the ground for State's intervention in reforming the personal laws of the Muslims by passing a law on censoring TT (Agnes, Triple Talaq-Muslim Women's Rights and Media Coverage, 2016).

The Government first introduced a Bill titled "The Muslim Women (Protection of Rights on Marriage) Bill" in the Lok Sabha in 2017 (Sinha, 2018). Members of the Parliament from political parties like the Rashtriya Janata Dal, All India Majlis-e-Ittehadul Muslimeen, Biju Janata Dal, All India Anna Dravida Munnetra Kazhagam, Indian National Congress and All India Muslim League opposed the introduction of the Bill. Several Opposition lawmakers called for it to be sent to a Select Committee for scrutiny. Further, the Opposition also raised questions on the criminalisation of the practice to attract a jail term of three years for the husband as legally untenable and unreasonable. However, the bill got passed in the Lok Sabha on 28 December 2017 as the ruling Bharatiya Janta Party held most seats. The Rajya Sabha also approved the bill after intense debate. But it could not become an Act due to the elections and an Ordinance was passed on it in September 2018.

The defining features of the Ordinance that puts the resolution under critical scrutiny is

> "the cognisability of the offence made punishable with 03 years of imprisonment and fine, a non-bailable complaint to be filed by the wife or her blood relative, only to be settled by the magistrate, transfer of custody of minor children to the mother and the maintenance allowance of the wife and her children to be paid by the husband be settled by the Magistrate" (Sinha, 2018)

As the above-mentioned Ordinance were about to expire in January 2019, the government was confident this time to pass it in both the house and hence, introduced a fresh bill on 17th December 2018. The additional provisions appended to the existing provisions of the Ordinance were declaring instant TT, either in electronic or written form, as void and a non-compoundable offence

to be decided by the Magistrate only at the behest of the wife. The new Ordinance allowed conditional bail for the accused before the trial in front of the Magistrate as the bail could not be granted by the police personnel.

Combined discussion of Statutory Resolution regarding Disapproval of Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 and Muslim Women (Protection of Rights on Marriage) Bill, 2019 (Resolution Negative and Bill Passed).

Ravi Shankar Prasad, then Law Minister of Union, re-introduced the Muslim Women (Protection of Rights on Marriage) Bill, 2019 to protect Muslim women's rights vis-a vis the unequivocal pronunciation of *talaq-e-biddat* by her husband. (Prasad, 2018) In the statement of objects and reasons attached to the Bill, Ravi Shankar highlighted that this legislation holds that,

> "*Law will help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their FR of non-discrimination and empowerment*" ((Prasad, 2018, p. 1).

Citing the reference of *Shayara Bano* case, Prasad held that the SC has categorically mentioned that the practice of TT was arbitrary, sinful and against the constitutional principles of morality. This practice should not be viewed either from the lens of religious faith or politics but on essential ground of guaranteeing gender equality and justice under Article 15(3)[56] of the Constitution. Ravi Shankar also presented statistical records that showed growing number of cases of TT evident among the Muslim, post- *Shayara Bano* judgement. Prasad justified the locus standi of the government in the light of these glaring issues of gender injustice to bring a law to abolish the practice of TT.

The introduction of the Bill was opposed by three members citing significant reasons for their position. Dr. Shashi Tharoor opposed the Bill on the aspect of criminalisation of the practice which has already been held void by the court. He stressed on adopting a universal law applicable to all communities on the act of desertion that compels a woman to live a life of despondency and poverty. Secondly, the whole logic of invoking the 'non-discrimination rationale' of practice towards women under Article 15(3) should not be selectively and discriminately applied only on Muslim women. Thirdly, the intent of the Bill does not truly improve the condition of Muslim

[56] Article 15 (3): Nothing in this article shall prevent the State from making any special provision for women and children."

women, caught in greater evils of *Halala* and economic dependence on the punished husband to maintain her which was logically untenable from the prison (Tharoor, 2018).

N.K. Premachandran opposed the bill, under Rule 72(2) of the Rules and Conduct of Business in Lok Sabha as exceedingly the legislative powers of the Parliament to deal on matter under Item no-5 of the Concurrent List, 7th Schedule of the Constitution. Premachandran agreed with Tharoor's logic of evil intent behind the criminalisation of the civil law to be violative of principle of non-discrimination towards the Muslim community under certain FR of the Indian Constitution. What is part of the personal or civil law of marriage and divorce based on one's faith cannot be assigned a status of a criminal law that injures the individual or a person. The Bill was also opposed for forceful intervention by the State as violative of Article 13(2) of the Constitution (Prasad, 2018, p. 6).

Asaduddin Owaisi invoking Rule 372 of sub-section 2 of the House argued that whenever the government is intending to make a discriminatory law, it should be done on satisfying two principle of intelligible differentia and rational nexus. In this case, the court had declared the practice of TT to be void and upheld the sanctity of marriage contract. In the wake of this logic and rational nexus, how can the State make a law to punish the husband when the condition of divorce does not sustain? Owaisi was also critical of the non-discriminatory attitude towards Muslim husband in violation of his right to equality under Article 14 and Non-discrimination under Article 15 of the FR. Moreover, the burden of proof lies on the Muslim women, which the government claims to rescue, to manage her affairs while her husband rots in the jail for three years. Lastly, he spoke about the biases of the government towards a particular section of women while being silent on the process of social reform from Hindu women in the famous *Sabarimala* case (Prasad, Combined discussion of Statutory Resolution regarding Disapproval of Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 and Muslim Women (Protection of Rights on Marriage) Bill, 2019(Resolution Negatived and Passed), 2018, p. 8).

The government enjoying absolute majority in this Lower House, despite the strong and meaningful opposition on the introduction of the Bill, was supported by 185 Members to send the Bill for discussion. The Bill was, however, opposed by 74 members with 06 members abstaining from voting in the Lok Sabha.

Position in the Lok Sabha:

Ravi Shankar threw light on the judgment of the learned judges in *Shayara Bano* case declaring the practice *talaq-e-biddat* as unconstitutional and void. He cited the minority opinion of Chief

Justice Khehar and Justice Nazir considering TT as an integral part of the *Shari'a* but at the same time implored the political parties to abolish the practice by legislation as followed in other countries like Pakistan, Afghanistan, Malaysia, Indonesia, Jordan, and other countries (Prasad, 2018, p. 3).

Meenakshi Lekhi supporting the Bill cited the trouble faced by the first Prime Minister Jawaharlal Nehru in enacting a secular law known as the Hindu Code Bill in a religious society. Citing similar constraints faced by the present government, she highlighted on the attempt by the AIMPLB to thwart similar reform measures to be adopted for the Muslim community. She challenged the mindset of the religious people who felt that religious laws are immutable to change. She referred to the visions of Ambedkar, Nehru, and Muslim judge Chagla of reposing greater supremacy on following the egalitarian law of the land than the religious faith. Further, she stressed that Article 44 cannot be left as a dead letter even after 70 odd years of the making of the Constitution. History has been a witness to prevalence of evils of polygamy, absence of recourse to divorce for the Hindu women and anti-egalitarian right of women but they were fought for strongly by the Congress party. This lesson should be replicated in today's times as well without thinking of fear of the opposition. Lekhi was also critical of the role of *Shari'a* Courts functional as parallel system of judiciary which interferes with the working of the Indian judiciary. The Minister appraised the pro-active role of the Narendra Modi in working for the welfare of women in contrast to Rajiv Gandhi's conciliatory policy of wooing Muslim men by passing the 1986 Divorce Act. Lekhi made a case to muster enough political courage which the government can use to bring codification in the lives of Muslim community on similar lines like the Hindu Reforms on caste system and education for girl child. She proposed to bring an amendment to the Right to Equality so that people do not misuse the mechanism of religion to thwart secular laws. It was not imperative on the government to win the support of the minority community to frame laws for them but should do so as its public duty of bringing social welfare. Lekhi made a strong case to follow the example of Pakistan which being a Muslim nation has codified and reformed its religious laws and the logic of non-interference does not hold true in Indian case (p.21).

Anubhav Mohanty supported the Bill on behalf of Biju Janata Dal on ground of women empowerment. The member boasted of nominating 33% women candidates from his party for the Lok Sabha election and sent the same for the 17th term. The Minster lauded the efforts of the government to introduce the Bill on abolishing *TT* on the guidelines of the court's judgment in *Shayara Bano* case. Mohanty was critical of the aspect criminalization of the act to deter the husband from pronouncing *TT*. This Act criminalising a civil wrong is unjust to the poor man who

cannot maintain his wife from the jail. He offered his recommendation of giving an option to the victimised wife to opt either to maintain the marriage or annul it for claiming maintenance.

Mukhtar Abbas Naqvi spoke in favour of the Bill citing reservation on its opposition on religious ground. He harped on the principle of gender equality that was being realized by the present Modi government by bringing a law on social reform in Muslim community. he made references to the effort of Muslim leaders like Saifuddin Chowdhury who favoured a UCC to bring reform in the community. Naqvi also supported his stance with laws on abolition of *TT* in other Muslim countries viewing it as an evil practice like that of Sati and child marriage. Naqvi's larger logic on supporting the Bill was to be rectifying the historical wrong ,i.e. in the passing of MWPRDA, 1986 which stifled the women's right to equality and dignity (p.56-57).

Aparajita Sarangi proposed a feminist position of supporting the Bill on grounds of offering natural justice premised on basic principles of human rights. This Bill was also liberating the Muslim women from capricious method of divorce and promising women empowerment. She also marked her disappointment with the passing of the 1986 *Divorce Act* that subdued the rights of women offered under the *Shah Bano* case. Sarangi challenged the chains of patriarchy that treat women in an undignified manner. She even supported the principle of non-bailability of offence as it offered compoundable offence that is the choice to the contending parties to settle the dispute outside the court. Sarangi quoted the date from Business Standard issue that more than 477 cases of TT were registered even after the passing of the judgement on 22nd August 2017(p.123). Thus, the logic of the Bill gains more teeth in the light of its continued violation in the society(p.123).

Locket Chatterjee supported the Bill for guaranteeing Muslim women equality and dignified life. She Mrs. Chatterjee challenged the opposition of the Bill on criminalization of the offence of pronouncing *TT* citing similar enactments made for Hindu women to protect them from evils of dowry and cruelty of husband. Both the Dowry Prohibition Act, 1961 and 498A of IPC speaks of punishment for 05 and 03 years with fine respectively to deter the person from committing the Act. She pleaded that the same model can be applied on the Muslim men to prohibit them from committing the sin of TT. She also gave reference to the Ishrat Jahan case in Bengal where rights of Muslim women are suppressed in the name of religion (Russell, 2002)(p.139)

Those who opposed the Bill on TT in the proceedings of the Lower House premised it on four primary reasons, namely, the criminalisation of the practice of TT, discriminatory and hateful attitude towards the Muslim community, severing the marital ties between the Muslim husband

and wife and acting in contravention to provisions mentioned in Article 14,15, 21, 25 and 26 spelt out as FR.

Premachandran criticised the government for premising their action to legislate based on dissenting opinion of the minority while falsely claiming it to be the majority opinion. He again invoked the issue of *Sabarimala* case and questioned the silence of government on not taking a position on gender injustice meted out at Hindu women. Premachandran also brought forth the issue of mob lynching wherein the SC had asked the government to legislate a law to deter the crime of mob lynching of the Muslim minority. The ignorance and silence of the government on the issue was perplexing for the people of the country. The consecutive promulgation of Ordinances on TT on 19th September 2018,12th January 2019 and 21st February 2019 respectively lacks bona fide effort, thereby, exposing the political manoeuvre by the BJP to target and disturb the Muslims from within. (p.11) Citing the case of (*Krishna Kumar v State of Bihar*, 2017), he questioned the repeated issuance of Ordinance as a parallel law making effort by the President that went against the spirit of the Constitution. Finally, Premachandran challenged the criminal intent of the Bill to punish the Muslim husband for dissolving his marriage which stands quashed in the eyes of the law. Herein, invoking the maxim of *nullum crimen sine injuria,* he argued that the husband could only be punished for an attack if it truly harms his wife, which cannot be satisfied in the case here. He can, however, be tried for the criminal offence if he refuses to perform his marital duties under the Indian Penal Code, 1860, (IPC) s.498A and the Protection of Women from Domestic Violence Act, 2005, (PWDA) (p.12).

P.K. Kunhalikutty opposed the bill on ground of discriminatory biases of the government towards the Muslim community. Citing the statistical records of the Census of 2011, he challenged Ravi Shankar's facts of higher number of reported cases of divorce among the Muslims. The double standard of the government vis-a-vis the Sabarimala issue was emphasized upon by this Kerala Minister as well (p.16).

Kanimozhi of the Dravida Munnetra Kazhagam party spoke against the Bill on grounds of female inequality in terms of representation in the House. She opposed the debate on the Bill in the absence of voices of women representatives who were the real victims of the practice of *TT*. Kanimozhi doubted the intention of the government as the champion of woman's cause due to its silence and inability to pass a bill on 33 percent reservation of seats for women in the Parliament. She further questioned the communal hate politics of the Modi government in the name of honour killings of women on grounds of caste and religion. The Minister from Tamil Nadu spoke

eulogised the efforts of stalwarts like T.Periyar and Dr. Kalaignar for introducing laws on property rights to women (p.37). Kanimozhi was in tandem with the voices of opposition on the content of criminality and divisiveness of the Bill. Kanimozhi also spoke on inherent contradiction in the statutes of the Bill wherein Section 3 declares that *Talaq-e-biddat* is void and Section 5,6 talks of issues of maintenance and custody of children as per post-divorce situation. The clause on granting of bail to the husband at the behest of his wife by the Magistrate can be misused by the relatives and was considered unjust on the husband Finally, Kanimozhi talked about targeting of the Muslim community by the BJP government, without rectifying the real condition of distress of Indian women in conditions like marital rape which remains non-penalised on ground of lack of education, economic deprivation, religious beliefs, social norms viewing marriage as a sacrament(p.37)

Sudip Bandyopadhyay from Kolkata raised objection to the content of criminalisation of the Bill while supporting abolition of TT. The Minister spoke on behalf of the Muslim members of his constituency who opposed the practice of TT per se. The Minster's arguments were in support of the rationale provided by Asaduddin Owaisi on the absence of rational nexus in the punishment meted out for the crime non-committed by the person(p.41)

Rajiv Ranjan of the Janata Dal (United) reminded the House of his party's stand on supporting the National Democratic Alliance since 1960 as definite but parted ways on debatable issues. Minster Ranjan spoke of the National Agenda of Governance wherein it was settled between the BJP and its coalition parties to not interfere with Article 370 of the Constitution, Common Civil Code, and acceptance of settlement of Ayodhya dispute through the Court's verdict. Therefore, the current Bill was also an eyewash and a breach of trust with coalition parties. This Bill acts against the institution of the marriage and severs the marital ties of the couple. Ranjan favoured the reform from within approach to bring social welfare on the laws of the community and the State should only endeavour to provide for social awareness on the issue. Ranjan's arguments rested primarily on respecting the plural cultural and religious ethos and norms of different communities and the State should not interfere in these in the name of implementing the law of the land(p.61).

Asaduddin Owaisi challenged the Bill on violation of constitutional principles under FR of the citizen. Owaisi was critical of intent of the government to criminalize the act of TT in the face of de-criminalisation of homosexuality and adultery. The Member of Parliament brough to the notice of the House that the burden of proof lying on women is inimical to her rights to equality and respect. The Bill should make provisions for creating a choice for women to decide whether to

remain in marriage with the concerned husband or not (p.105). The penalisation of the act is only going to sever the marital ties of the couple and ruin any future chance of re-conciliation. The punishment of 03 years goes against the basics of criminal Jurisprudence. Owaisi proposed to add a condition in the model *Nikahnama* wherein anyone dissolving his marriage on ground of TT will be convicted and pay 500 times of the maintenance amount. He was critical of the comparison drawn with cases of Islamic countries to introduce ban on the TT as it cannot be applied to the Indian case wherein the Muslims are not a homogenous entity and different sects exist following different Schools of Jurisprudence. Thus, the Bill was antagonising and hurting the religious sentiments of the Muslim community while being silent on issues of gender inequality faced by Hindu women (p.113).

Jayadev Galla of Telugu Desam Party opposed the Bill on TT as targeting the Muslim community. Though Galla was in favour of banning TT premised on model of reforms followed in other Islamic countries but was critical of the criminal content of the Bill. The Minister cited statistical data from the Census Report of 2011, on marital status of women of religious community. There are 2.3 million women in this country, according to the 2011 Census, who are either separated or abandoned, more than two times the number of divorced women. Out of 2.3 million women, 2 million women are Hindu women; 2.8 lakhs are Muslim women; 0.9 lakhs are Christian women; and 0.8 lakhs are other women (Prasad, 2018, p. 124). He proposed a law to deal with the problem of abandonment of women in other communities as well than targeting a particular community. The Minister concluded by proposing a new Bill on *TT* that does not criminalize the civil act(p.124).

M.Selvaraj of the Communist Party of India (CPI) opposed the Bill on targeting the Muslim community. He argued for the implementation of a UCC as espoused by the BJP than piece meal reforms for one community of Muslim women. Selvaraj also demanded the government to draw legislations on the Sabarimala issue and provide for equal access to the temple, for both men and women, and abolition of honour killing which oppose inter-caste marriages(p.131)

The Law Minster Ravi Shankar Prasad responded to the criticisms levelled at the provisions of the Bill stating that without going into the details of the Act of TT being banned and criminalised in other countries, he focused on the prime rationale governing the formulation of a law on the said practice. Quoting a distinguished member of the Privy Council, namely, Amir Ali who in his book on the Muhammadan Law, first published in 1908, spoke on *talaq-e- biddat,* that,

> *"As a matter of fact, the capricious and irregular exercise of the power of divorce which was in the beginning left to the husbands was firmly disapproved by the Prophet. It is reported that when once news was brought to him that one of his disciples had divorced his wife pronouncing talaq thrice at the same time, the Prophet stood up in anger on his chapel and declared that the man was making a play thing of the words of God and made him take back his wife"* (Ali A. , 1986).

Prasad gave reference of the Prophet Muhammad who abhorred the practice of TT as a detestable act and is an example enough to legislate an Act abolishing the same (p.149) .

The Minster gave illustrations of different acts passed in the Parliament in the past to reform the Hindu laws and other social evils like dowry, child marriage, cruelty of husband or wife as applicable on all communities. If such an attempt is being made in case of TT as well then, the criticisms placed by members were misplaced and unscrupulous. Ravi Shankar questioned the motive of the Rajiv Gandhi government in softening its earlier position of reforming the society by passing a mandate against the Shah Bano judgement which throttled Muslim women's right to maintenance.

Prasad was critical of the role-played by the AIMPLB who did not implement its Affidavit on issuing a provision in the *Nikahnama* nor made any strident effort to stop the practice of TT. Ravi Shankar reminded the other Members of the House by stating that the Parliament gives the government powers to make laws without judiciary's intervention or directive. On the issue of targeting only the Muslim community, he cited provisions of the Christian and Parsi marriage act wherein similar provisions for bigamy and false oath and declaration have been criminalised. This Bill was justified as an act of deterrent. He raised objection on the involvement of the AIMPLB for consultation on the provisions of the Bill. However, the real stakeholders were the women whose voices were being adhered to and hence the formulation of the Bill. On the issue of mob lynching, he cited relevant sections of the IPC 302, 120 and 149 that punish the culprit involved in the Act. On the issue of how the jailed husband will pay for maintenance, the Minister made clarification of the term 'subsistence' than maintenance as an allowance to be paid to his existing wife.

After these detailed discussions and rebuttals on the argument, the Bill was put to vote under Rule 367AA of the House. It was supported by 303 members and opposed by 83 members with 02 abstentions in the Lok Sabha. Thus, this Bill got a safe passage in the Lok Sabha but to the dismal performance at the Rajya Sabha wherein the House decided to send it to the Select Committee.

The government vehemently sticking to its position to abolish the practice of TT re-promulgated the Ordinance on 10th January 2019 to be approved by the President Ram Nath Kovind. Finally, when the Modi government gained absolute majority in the Seventeenth Lok Sabha elections of 2019 and full support in the Rajya Sabha, the Bill titled, The Muslim Women (Protection of Rights on Marriage) 2019, was finally passed on 26th July 2019 that made TT an illegal practice and a recognizable punishable criminal offence.

Fallacies in the Act:

The term "*subsistence allowance*" used in the provisions of the Act aggravates the feeling of insult to the injured husband. Thus, as per the Law,

> "*a married woman is entitled to an equal share in the family resources and has a right to reside in the dwelling house (matrimonial residence) free of violence or even the threat of it"* (Raju, 2019).

The provision granting custody right over her children is being hailed as a positive move since MPL denies the women custody right over their children beyond a certain age (Mustafa, 2017). However, this argument is a fallacy as even the Muslims are governed by the Guardians and Wards Act, 1890. During custody battles, the courts are bound by the best interest of the child. In fact, the presence of terms like **'subsistence allowance'** and '**child custody'** approves the utterance of TT as dissolving the marriage, thereby, stifling the whole purpose of promulgating such a Bill.

Even if a policy decision was to be taken to create a deterrent, the logic of 'criminal culpability' does not act on a reasonable ground as the aim of the Bill is to thwart the effort of dissolution of marriage and criminalising it will only create friction and impediments in the marital relations of the contending parties. The proposed Act creates a communal principle of inequality wherein under the similar circumstances meted by a Hindu husband, the law provided criminalisation for only one year. Thus, the present Act, does not provide gender justice but is a clear step towards the majoritarian agenda of a (Un)informed Civil Code

It also needs to be reiterated that the attempt to bring a law to help save a victimized woman from the arbitrary powers of the husband to divorce instantly is a stereotypical and superfluous understanding of the concerns of gender equality as the real problem of victimisation due to domestic violence is not exclusive to muslim men.

Substantiating the argument with the recent Census Report of 2011 on the marital status of Indians reveals that,

> *"among all divorced women, 68 percent are Hindus and 23.3 percent Muslims. Further, around 5.5 in 1,000 Hindu couples tend to get separated, including cases of wives being abandoned by husbands. Thus, both legal divorces plus separation among Hindu's amount to 7.3 per thousand women. This brings to light the fact that Hindu divorce and separation rate are much higher than that among Muslims, which is just 5.63 per thousand women in 2011 census, wherein separation or abandonment is not a significant factor due to easy divorce and notorious use of TT"* (Saldanha, 2016)

The Act was celebrated among the Muslim women fraternity by all the women activists, namely, Shayara Bano, Ishrat Jahan, Aafreen, Farah Faiz, Zakia Soman and Noorjehan of BMMA. Among these, Ishrat Jahan joined the BJP for the party's stand on *TT* and Farah Faiz became a member of Rashtriya Muslim Mahila Sangha. They have become the icons of the ruling party and were criticised for co-opting the gender struggle of Muslim women as identity politics for vested personal gains (Agnes, 2016) (Mustafa, 2017). The entire issue of gender justice of Muslim women is caught in the conundrum between the clerics of the AIMPLB who want to protect the patriarchy and control over an illiterate Muslim population and the Right- wing ideologist maligning Islam by demonizing Muslim men as tormentors, while negating tales of oppression on the Hindu women.

The government could, through a proposed legislation on reforms of the MPL, have enhanced the benefit and protection granted by the MWPRDA, 1986 by helping women to live a life of dignity and equality in the family. The banning of the act of TT is a welcome move but not a complete form of redressal of her grievances (Kimberle, 1991, p. 1251) .

Divorce is an area in pressing need of reforms across the communities. The law on divorce have highlighted two arenas of reforms especially on matter of TT, and the resultant remedy to undo TT, i.e. *Nikah halala.* Both are premised on a retrogressive principle of unilateral repudiation of wives by the husbands in any part of the world. One requires the adaptation of the principle of justification of the *Qur'an* and the Maliki law that guides the court to compel the male to offer financial compensation (known as *Mut'at al-talaq*) in addition to maintenance due to her. Further, any settlement of dispute of divorce should involve two arbitrators to be appointed from the contending parties to try at reconciliation at all cost, only to pronounce divorce as the last resort.

The very idea of unilateral divorce is both confusing and militating against the true principles of Islam in the *Qur'an*[57].

There are other relevant areas in pressing need of the reform in the MPL. The most controversial argument has been in context of a son getting twice the share of a daughter and a brother of the full or consanguine blood twice of that of the sister (Ali A. , 1986). To change this involves upsetting the finely balanced and tuned system of Islamic Inheritance derived straight from the injunctions of the *Qur'an*. They are pitted against the fundamental right to equality. However, the clerics have distinctly argued that the laws do not discriminate on ground of sex (Rehmani, 2012). It is a fundamental principle of Islam that the husband must provide his wife with a dower, while the provision of dowry on the part of the father is absent in Islamic system. Moreover, it is incumbent on the husband to pay maintenance to his wife and housing, as poor or affluent he may be on her own circumstance and the duty to support the child rests on the husband even if he/she enjoys the custody of mother (Mahmood, Personal Laws in Crisis, 1986, p. 25).

A case of paradox comes up in comparison of Sunni laws with Shia laws in which a right to inheritance under the Sunni law passes beyond the immediate family to agnates only, in complete exclusion to any extended relative-both female and male. However, the same case does not apply to Shia laws wherein both agnates and cognates are treated equally, thereby allowing the female the equal and fair share as well (Mahmood, 1972).

Another point of reference could be in case of Sunni law where there is no agnatic heir closely related to the deceased. The "*Quranic shares*" take prescribed share of the agnate and give it to the nearest agnate, however, remote he may be. This leaves the daughter of the deceased with her prescribed half of the share and the rest going to the distant agnate whom he might have never met or maybe disliked. The logic of the nuclear family in today's time demands that the daughter be allowed to enjoy the share of her deceased's property and complete negation of share of the distant agnate. An enabling provision could be that the man may be voluntarily allowed to bequeath one-third of their estate to whom they choose, heir or no-heir, to the help of daughter or the widow or someone in need of financial assistance like the orphan or a poor child.

[57] As Anderson rightly says, that, "*it is the Islamic law of divorce (commonly misunderstood) not polygamy which is the major cause of suffering to the Muslim women…. the Muslim wife has always lived, so far as the law in concerned, under the ever-present shadow of divorce, a shadow mitigated only in comparatively rare cases by certain precautionary devices*" See Anderson, J. N. (1963). *Changing Law in Developing Countries.* London: George Allen and Unwin

The SC gave recognition to religious adjudication units, like the *Qaza* courts, *Mahila Adalats*, *Panchayat Adalat* as effective arbitrator, mediator, negotiator, and conciliator in matters of family and civil disputes (*Vishwa Lochan Madan v Union of India,* 2014) . However, the question remains that whether sheer declaration of the practice of TT as unconstitutional would serve to redress the inequalities meted on women.

The enforcement of the TT Act would only serve to pit the Muslim woman against her immediate family and society. It is highly improbable that the Muslim woman can battle her life under subservient existence (Mustafa, 2017). Therefore, the woman cannot be extricated from her religious moorings and can operate freely only when socially and economically empowered.

The only beacon of hope in the entire debate is the rise of Muslim women activist, catapulted to mainstream politics, on issues of gender justice, pioneering the silent voice of minorities within minorities, who now refuse to be shackled by the traditional clerical dominance of male chauvinism and bigotry.

5.2. Practice of Polygamy and Nikah Halala among Muslims and issues of Gender Justice

Polygamy means,

> "a system of marriage whereby a person has more than one spouse. Polygamy can be of two types – one is polygyny where a man marries more than one woman, and the other is polyandry, where a woman marries more than one man" (Ahmad, 2003).

Polygamy is an ancient practice in India exercised out of personal choice, to maintain a high social status symbol and at times out of religious and moral obligation of kingship structure.

Rationale behind the acceptance of Polygyny in Islam:

The pre-Arabic custom saw widescale prevalence of practice of loose union and promiscuity, increased frequency of divorce, slavery and concubinage. Thus, the transitional phase in Arab kinship system saw the emergence of Islam as supporting multiple sexual union in the form of matrilineal marriage called '*Sadiqa*' and patrilineal system called *Ba'al* or dominion marriage. In the former system, it was a union in which all the off-springs were the progenitors of the women's tribe and the women had to right to divorce the husband after mutual consent on dissolution of marriage. Contrarily, in the latter, the lineage was traced to the husband's side and the right to divorce was only available with the man. However, due to the growth of mercantile economy, the

pre-existing tribal communalism came to an end and women lost the protection of men (Robertson, 1885, pp. 92-94).

It eventually led to a creation of polygynous system of marriage wherein a man would protect the women not as a kinsman but as husband. This also ended the system of transitory or loose sexual unions thereby creating a social solidarity premised on the idea of *Ummah* that is an individual communion of self-serving tendencies who legitimated the paternity of child for smooth transfer of property and inheritance. However, this transition has been criticised by Islamic feminist scholars like Leila Ahmed who felt that women enjoyed greater sexual freedom and choice in pre-Arabic period and were suppressed with the spread of Islam. But it is to clarify again that Islam did not introduce polygamy but was regulated to suit a pressing historical need of loss of lives of men in war (Ahmed, 1992, p. 64).

Islam has witnessed numerous mass struggles due to the process of conversion across Arabia, the initial most being the battle of Uhud fought between the early Muslims and Qurayshi Meccan enemies in 624 CE (3rd A.H) in which 70 Companions of the Prophet attained martyrdom in a religious battle. It was at the loss of lives of men, at this juncture, that *Surah Nisa* was revealed to the Prophet that contained commands on war, distribution of inheritance safeguarding orphans' belongings, marriage of orphan girls and insistence on payment of dowers and remarriage of widows of martyred soldiers so that they could sustain themselves. It was in the wake of this revelation that the practice of holding multiple wives, restricted to four, was held to be valid and permissible with a caveat to ensure justice and equality in terms of financial help to all. The Prophet had forbidden his son-in-law Ali from marrying a second time till Fatima was alive (Armstrong, 2000, p. 50).

The choice of Polygamy exercised in the form of polygyny (plurality of wives) by men should be regulated, as directed by the *Qur'an*. In fact, both the verses on polygamy,

> *"And if you fear that you will not deal justly with the orphan girls, then marry those that please you, two or three or four. But if you fear that you will not be just, then [marry only] one or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice"* (Ali A. Y., The QURAN: The Meaning of the Glorious Quran Text, Translation and Commentry, 1934, p. Verse4:3).

Thus, Islam has allowed polygamy as per the religious scriptures with a caveat to act justly with all and support women in financial needs and maintenance of the child.

The Hanafi and the Maliki School permit limited polygamy amongst men. However, the Hanbali and the Shafi School, opting the method of *Ijtihad* (independent legal reasoning), deemed it preferable to marry one wife, even if he may act equitably with more than one. Imam Shafi warned on the fear to be committing injustice as one may be refrained from financially strain due to numerous children.

In the Muslim world, a three-fold categorization has been done on the family law system.

a) countries like Saudi Arabia, Northern Yemen and Nigeria that have jurisdiction based on classical law system that are not amenable to change.

b) countries like Turkey and Tunisia that have completely abolished the classical system and practices that contradict with norms of social justice. polygamy was illegalized due to its non-accommodative status with contemporary legal system that advocate gender equality based on human rights.

c) countries like Egypt, Algeria, Syria, Morocco, Sudan, and Malaysia that have completely reformed or abolished the family law system based on the doctrine of public interest policy (*maslahah al-mursalah)* and maintained the legality of polygamy under certain regulations.

Many modern countries today like Indonesia (muslim-secular nation) is witness to an exceedingly rare occurrence of practice of polygyny. Israel banned polygamy by 1978. Other countries like Egypt (1929 later amended in 1985[58]), Sudan (1929), Jordan (1951), Syria (Article 17 of *Law of Personal Status,*1953), Morocco (1958) and Iraq (Article 3, *Law of Personal Status* 1959) have restricted the practice of polygamy by introducing a clause in their marriage contract (Hosseini, 2000, pp. 122-125). In Pakistan, the Arbitration Council is entrusted with the responsibility give permission to the man to take a second wife, after furnishing proof of consent from the first wife (Fyzee A. A., Cases in the Muhammadan Law of India, Pakistan and Bangladesh, 2005, p. 35). Similarly, in Malaysia the law asks both the wives to consent to stay in marriage with the same man in front of the government religious authority. (Louis & Keddie, 1974, p. 40) Thus, most of the countries have adopted a more liberal and positive reading of the *Qur'an* or located these

[58] The wife who wishes to seek a divorce from her husband on ground of financial or moral harm can do so put a restraint on exercise of polygyny, but this principle should be invoked within a year of his husband's re-marriage. The grounds are of non-payment of maintenance, desertion by husband beyond a year or imprisonment for three years but only after one year has lapsed.

injunctions to the vicissitudes of contextual societies to bring a progressive change in the personal laws.

It is only to the exception of Iran, which is governed by Shia population, that polygyny is allowed in the form of temporary marriage (*Mut'ah*) of a man and a woman based on mutual consent for a specified time (Rehman, 2007, p. 110).

Prevalence of Polygamy among Muslims In India:

Islam entered India around 6th Century A.D., through the Arab travellers and traders along the south west coast (Malabar) . The military expeditions lead to the annexation of local areas with the intention of the foreigners to settle in the country. Alongwith their administrative set-up, the Muslim rulers established their own system of civil laws that permitted early marriage, dowry from the Hindu counterparts, polygamy to support conquest and conversion among kings and relegation of imperial women into 'seclusion', popularly known as purdah/veiling (Mujeeb, Indian Muslims, 1967, p. 224).

Though scriptures and texts provided scope for diverse interpretation to adapt to the vicissitudes of time, yet Islam in India has got caught in the web of influence of pre-conversion of religious tradition to be oscillating between "*Great Traditions*" and "*Little Traditions*". Through different timeline of history, Islam in India has produced strong reactions to these local traditions that eventually lead to the misuse of rights of husband in matters of familial status. Modesty, decorum, and chastity held to be of sacred relevance in all religion was also celebrated in Islam to justify veiling and seclusion of women especially among the upper and middle strata of the society in the urban areas. However, with the dream of upwards social mobility of the lower class, *Burqa* or veiling has come to gain prominence in common, only to the exception of the 'progressive elites' shunning it due to modernised education and economic independence (Mujeeb, Indian Muslims, 1967, p. 40).

The survey conducted by Ministry of Education and Social Welfare, in this regard, showed that purdah was observed in front of the father-in-law and husband's elder brother among the Sikhs(44.04%), followed by the Muslims (40%), Jains (39.1%) and the Hindus (32%) concentrated in areas like Haryana, Rajasthan, Delhi, Himachal Pradesh, U.P., Madhya Pradesh and so on (Mazumdar, 2011, p. 76). Thus, the structures of family system determine the status of women in enjoying the freedom of choice to live her life on own terms as compared to patrilocal systems of village and middle-class urban life.

Polygamy in India has been primarily (mis)understood as a customary practice to promote the growth of population and a legalised form of adultery available to men. The government had conducted a survey in this regard, submitting a Report on *Status of Women in India* (1974) which revealed that polygamy in the form of polygyny (plurality of wives') was not prevalent in Muslims alone but was practiced across religion in India. The Buddhist community held maximum record of practicing polygamy at 7.9%, followed by the Jains at 6.7%, Hindus at 5.8% and surprisingly the least among Muslims at 5.7%. This numerical representation is a problematic yardstick to deal with the question of gender inequality with reference to polygamy, as statistically speaking the male-female sex ration stood low at 940 (Hasan, et al., 1974, p. 67).

A recent study conducted by the **National Family Health Survey** data of 2006 showed that the incidents of polygamy has reduced drastically among different sections of society namely the Buddhist (3.2%), Muslims(2.55 %), Christians (2.35%) and Hindus at (1.77%).The National data made interesting observations on the debate of polygamy which broke several stereotypical notions about the law acting as deterrent on polygamous marriages (Welfare, 2017). The data on marital relation between men and women highlight, that,

a) In India, only 2% of the women reported that their husbands had wives besides herself. Urban-Rural differentials are marginal at 1.5% and 2% respectively.

b) Husband's older to women and women with less education are more likely to have polygamous husbands than younger counterparts. Spouse of women age less than 30 have 1.35 partners while husbands of women aged 30 and above have 2.22 to 2.51 partners.

c) Women across religions appended to the fact that polygamous marriages are more common in lower castes and class than other caste/tribe groups.

d) Polygamy is more prevalent in Eastern regions (2.11 partners), North-Eastern (3.20 partners) and Southern (3.02 partners) regions. The northern and central region have least incidents of polygamous marriage and the occurrence of the practice is owed to the reason of progeny i.e., to have children primarily son to continue the lineage, lack of education and economic and social empowerment of women and low fertility rates of women in present times.

e) The data clearly showed that husband with no children have maximum multiple wives (2.51 partners) than woman with at least one child (1.80 partners) (Sciences, 2007).

To substantiate these statistical results, the **NFHS Fact Sheet 4 for 2015-16** highlights that despite anti child-marriage laws, 47.4% of the female population (age group 20-24 years) got married before they were 18 years (with 17.5 % in urban and 31.5% in rural areas) and among them, 5% of urban and 9.2% of the rural women with the total tally at 16% were already mothers or pregnant at a young age group of 15-19 years. Further, the anaemic ratio of female in age group of 15-49 years stands across urban and rural area at 55.3% of national average This bearing implication on their health and maternity has lowered their fertility rates (children per women) at 1.8% among urban women and 2.4% of rural women and 2.7% of the national average (Welfare, 2017, p. 91).

Another cause of low fertility can be owed to increased adoption of anti-family planning measures like female sterilisation which stands at 37.3% of the national average (35.7% in urban and 36.1 among rural women). The male sterilization rates stand abysmally at 1% of the national average (.3% in urban and rural areas).[59]

Thus, the burden of controlling population is on the females and the male enjoy greater access to fecundity that allows them to enter polygamous union to justify higher progeny. The real position of a woman in any group or society can be best assessed by understanding the roles women play at different stratification of the social order and the structural rights and opportunities made available both by the State and the socio-cultural institutions. The prime factors governing the prevalence of polygamy in India, premised on the understanding of the cultural and regional correlates, are progeny and preference for a male child. In the current scenario of declining sex ratios and gender inequality given to spousal discrimination and abuse, the study opens new debates on larger concerns of health and education of women to fight the evils of the traditional society in the covert private realm.

PRACTICE OF NIKAH HALALA:

'*Halala'* originating from the term '*Halal'* that which is permissible. Indian Islamic philosopher Maulana Ashraf Ali Thanwi in his Beheshti Zewar opined that,

[59] The national fertility rates (children per woman) have decreased over the years of survey, NFHS-1 (3.4%), NFHS-2 (2.9%, NFHS -3 (2.7% AND NFHS-4 (2.2%)

> *"A person pronounces a revocable (Raja'i) talaq. He then reconciles and resumes cohabitation. Two or four years later, under provocation he once again pronounces a revocable talaq. On recovering from provocation, he again resumes cohabitation. Now two talaqs are over. Hereafter, whenever he pronounces a talaq, it will be counted as the third talaq, which will dissolve the marriage forthwith, and should a remarriage be desired by the parties necessitate halala (inter-mediatory marriage)"* (Thanwi, Beheshti Zewar, 2010, p. 265).

After the pronouncement of *talaq*, the woman becomes unlawful for the husband. However, if the husband and wife wanted to re-marry, then, it could be done only on one condition, i.e., the woman had to marry another man and cohabit with him. Now, if the second husband dies or divorces her after consummation, then after completing the *Iddah* period, she can re-marry the first husband. If the second husband died or divorced her before consummation, then it will be of no account and she cannot marry the first husband in such condition (Mahmood T. , Muslim Law in India and Abroad, 2016, p. 212).

In situation of exercise of right to divorce, there is a pre-condition that needs to be invoked by the husband known as the rule of irrevocability. This rule was introduced to maintain strict discipline and avoid mockery of the institution of marriage. It is said that this rule was established by the Prophet himself (Thanwi, 2010).

The principle of '*Halala*' is invoked in Islamic Jurisprudence as a caveat to the different forms of dissolution of marriages. The rationale behind the religious injunction was to dissuade the people from divorcing their partners as divorce was the most detestable yet permissible act in the eyes of the Almighty.

The religious text speaks of umpteen occasions of invoking divorce as a serious condition, thereby, revealing the practice of *Halala* as a prohibitive measure to discourage the decision of divorce. Islamic Law allows a husband to divorce his wife through pronouncement of *Talaq* in three sittings after which it stands unrevoked. However, once the divorce is final, the law allows the provision of re-marriage by going through the process of *Halala.* The Prophet had warned that,

> "Allah *curses the one who marries to make a woman halal (permissible) for her husband, and the one for whom this is done (i.e. the first husband and the woman*)" (Aisha Abdarahman, 2004, p. 28:7.18).

The practice of *Halala* is being mis-appropriated by the males to redress their grievance of instant *Talaq* or frequent divorces. In a case from Rudrapur (Uttarakhand) reported in October 2016, a Muslim woman complained against her husband (Ateeq Ahmed),of divorcing her by giving TT, on questioning of hiding his identity as a widower before marriage. When she opposed the divorce, he forced her to perform *Nikah Halala*. The matter was reported to the police and Ateeq was arrested on November 2nd, 2016 (Ahuja, 2018) .

In an alarming sting operation conducted by the BBC exposed the perils of such unjust practices that completely debilitate the condition of woman as an object of sex slave. A site named *Halal Nikah* offers muslims to perform paid *Halala* services through Facebook or twitter. A woman paid £2,500 to have sex with a man to get divorce from him inorder to reunite with her husband. Later, the man refused to give her divorce after consummation of marriage. They claim to rescue repenting parties to reunite by after going through the process of *Halala* marriage but fail to comprehend the inherent dangers of financial exploitation by these companies, blackmailing and sexual abuse of the woman (Ahmad, 2017).

The most disdainful and surprising element in this Sinful business was that the Imams offered the use of the mosque where in a designated room, such services were performed. In India, Imam Nadeem of the Madina Masjid in Moradabad's Lal Bagh locality, is charging between Rs. 20, 000 and 1.5 lakh for the services. The former poses himself to be the relative of divorced muslim woman, who himself is married man and does not care to apprise his own wife on this shameful act. Similarly, a qualified Maulana Zubair Qasmi having two wives in Delhi's Jamia Nagar presents himself as a prospect for *Nikah Halala* charging the same amount of *mahr* as set by the divorced husband. The list is endless, and the web is seamless. The blame for these practices is often shouldered by some on repressive laws and on criminal offence of rape by men by other clerics to rescue their position vis a vis these exposed misogynists (Pathak, 2017).

A recent barbaric case of rape in the name of *nikah halala* was witnessed in Bareilly wherein the husband forced his wife to have sex with her father-in-law. The case came to light in a maintenance suit filed by woman who was divorced by her husband the second time in 2017, forcing her to undergo *halala* with his brother. However, the victim's sister filed a case in Sessions Court elucidating the tortuous condition of her sister after two years of marriage in 2009. The victim was first divorced in 2011 but requested her husband to reconsider the plea on performing *Halala* with his father. After refusal, she was forcibly put on sedatives and was raped by her father-in-law for ten days. The father-in-law now gave divorce to her to allow re-marriage with his son. The

same situation recurred in January 2017 this time husband asking for *Halala* with his brother to take her back after divorce. Finally, a FIR was lodged under different provisions of I.PC., namely, s. 498 A(dowry), s. 377 (unnatural sex), s. 376 (rape), s. 323(punishment for voluntarily causing hurt) to punish the whole family involved in this heinous crime (TNN, 2019).

This incident is a saga of heinous crime perpetrated on women for lack of knowledge of both religion and the world and the sheer sense of deprivation and dependence on man for her sustenance. It is pertinent to point out that the *Qur'an* explicitly forbids the wife of the father as valid relation to the marriage of his son, but the people continue to misinterpret and manipulate the principles of text for misogynistic interest. In the wake of innumerable incident of sexual exploitation, the practice needs to be criminalised and banned forthwith.

Herein both cases highlight that gender injustice, in popular parlance, is usually identified solely with misinterpretation of personal law and complete denial of gender-related disparity in education and employment that Muslim women face on a continuing basis. What alarms the current plight of the Muslim Woman in India is that despite Judiciary's attempt to initiate the debate on reforms of the personal laws concerning women, the role of the AIMPLB is stuck to status-quoist stance of acting as supporters of obsolete and irrational laws that have been misinterpreted by their 'self-appointed' caucus.

The doors of the Judiciary were first knocked to adjudicate on the practice of polygamy and *Nikah Halala* in the (*Ahmedabad Women Action Group &Ors v Union of India*, 1997) case. The Court had refrained from entertaining a plea on the same in respect of its position on non-interference in the ambit of religious freedom. Post the *Shayara Bano's* judgement which deferred the matter on polygamy and *Halala* on state legislation, a fresh P.I.L. was filed on March 2nd, 2018 to declare both the practices as illegal and unconstitutional.

This PIL, further, urged the SC to declare *'Nikah Halala'* as rape under Indian Penal Code (IPC), s.375 and declare polygamy an offence under IPC s.494 and TT, an offence under IPC s.498. The AIMPLB pleaded that the case practice cannot be challenged based on the position of the court in the past. the organisation condemned the misuse of the practice of *Halala* but considered it be Islamic (Purkayastha, 2018).

The glaring concerns of gender injustices caught the political eye of the ruling party who has prepared its ground for the introduction of a Bill on the UCC that could codify and unify the civil laws of country under one rubric. A nationwide consultation on the implementation of the UCC by the 21st LCI helped draw series of recommendations on the model. It was submitted to the Modi

government in August 2018. The AIMPLB was quick in remarking its resistance to the drawing of a UCC arguing for a more pro-active internalised corrective measure for its heterogenous minority. It tried to conduct special awareness and educational drives for its oppressed women by releasing a new *Nikahnama* model of 2005 that spelt out conditions forbidding polygamy and TT (Khan M. A., 2016).

The AIMWPLB and the BMMA have also come up with alternate models of *Nikahnama*, thus, offering choices to women to decide the terms of their marriage contract. It was only after the *Shayara Bano's* judgement and in the current looming of majoritarian polity has the AIMPLB softened its stand for inclusion of reform of personal laws based on Islamic tenets.

The courts have come to show a more rationale position on the interpretation of the personal laws than the community heads and organisations thwarting women's growth and freedom to practice their religion on egalitarian terms. Any interference in the agenda of reform of condition of women has been happening both from internal as well as external agents and the real drive must come from the women as a collective to fight for their rights both at private and public realm.

5.3. Uniform Civil Code vs Autonomy of Personal laws and its bearing on Secularism

CAD: UCC vs Personal Laws

The task of Constitution-making in India is historically contingent wherein forces of partition have hampered the recognition of 'minority status' such that even the members construed the position of unequal communities as a settled arrangement. The efforts of the CA(CA) members in establishing a framework for secular citizenship giving primacy to individual rights had paradoxically reified ascriptive-religious identities, re-asserting them as permanent minorities in new democratic dispensation. The ambiguous position adopted by the CA members in defining the relation between the state and religion has led to multiple submissions on Indian Secularism, which was later co-opted by Hindu nationalists to appropriate the language of a secular state for self-interests.

During the proceedings of the House, the question of Minority Rights in India formulated in the language of granting of separate electorates, proportional representation in terms of reservation of seats and autonomy of personal affairs as a fundamental religious freedom was looked upon as forging communal politics. Some liberals, though, supported their claims on ground of giving them equal opportunity to come at par with the majority.

The response of the Minority was encouraging as they agreed to give up their claim for reservation of seats that would have permanently casted them into a position of inequality and backwardness. But they were categorical in their demand for freedom in religious affairs defined best as personal autonomy in managing and administering the community from within. The State agreed to promise integration of minorities by containing differences within its own sphere (Tejani, 2007).

At the outset, the elections to CA were held on provincial election of 1946 wherein all the Congress members were put into the 'General Category' without adequate representation to minuscule minority, owing to the Partition in 1947. The League members had left the country in hands of 28 representatives pressurised to prove their unflinching loyalty to the new nation. Thus, the CA was controlled by upper caste and class leaders, to the exception of Ambedkar, who suspected the claims of Minorities as part of their secessionist politics. (S.K.Chaube, 1973, p. 152) The whole table on demand of Minority Representation was, thus, turned towards the Scheduled caste than the Muslims. They contested the category of 'minority' to be defined on ascriptive or caste lines per se as many in the majority would be discriminated from within (Rao, 1966, p. 259). It was replaced with the larger category of "class" to include across the religions.

It is pertinent to point out that the way the CA handled the issues of minority in a distinct secular-communal binary has further deepened the forces of inequality and problematised the discourse on equal and uniform citizenship. It has challenged the very essence of Secularism in India as the State has often oscillated from their position from 'non-interference' to 'active funding and intervention in religious institutions and affairs (Copland, 2010, pp. 131-3). Thus, the CA debates on recognition of minority groups was caught in overlapping domain of internal democracy, social justice and national unity. Similar fate has been reflected upon by scholars dealing on Issue of UCC versus Personal Laws in the CA debates.

The draft proceeding on Article 35 (now included in the Article 44 of Constitution) entailing provisions for setting up a UCC met resistance from the Muslim representatives like Mohd. Ismail Sahib, Mr. Naziruddin Ahmad, Mehboob Ali Baig Sahib Bahadur, B. Pocker Sahib bahadur and Mr. Hussain Imam (Rao S. , 1966). Branding it as a domineering move, the members contended that personal laws of the Muslims especially about marriage, inheritance and divorce cannot be stripped off their religious significance due to its premisses on the *Shari'a* as a way of life (CAD, VOL. VII, p.545). M.A. Baig dispelled the position of those stiving for uniformity in the name of secularism, arguing for exception of matters of 'personal law' while interpreting the word 'civil code.' Pocker Sahib cautioned against the interpretation of the term 'civil code' and the standard

yardstick to be given prominence in the light of diverse and distinct laws of the different communities.

Naziruddin Ahmad presented his case for gradual introduction of a UCC based on the consent of the concerned community. While cautioning against the limitation imposed by the State in the enjoyment of freedom of religion, in the name of regulating secular acts of religious practice and larger concerns of social order and public health, he showed his scepticism on the unobtrusive powers of the State as undue interference. The stress on guaranteeing autonomy of laws especially considering marriage and cases of inheritance led its logic on sacred religious injunctions, that are both unalterable and infallible (CAD, VOL VII, 23.11.1948). Ahmad proposed that any changes to MPL by the Legislature should be done, on the approval of the Muslims, as illustrated by the Britishers (Para 116).

Mohammad Ismail extended the argument to talk of inclusion of all the communities within the ambit of free exercise of personal laws including the Hindu majority inorder to provide a free atmosphere to exercise their religious right. He moved the following proviso to be added to Article 35[60], stating that,

> "*"Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law"* (CAD, Vol. VII, para 106).

The attempt to adopt legal uniformity through a UCC stood challenged due to its inherent mechanism of regimentation of distinct civil laws which could cause conflict and discontent among the groups.

Those who supported the proposal of a UCC included stalwarts like Ambedkar, K.M. Munshi, A.K. Ayyar, Hansa Mehta and Rajkumari Amrit Kaur. Both Ambedkar and Alladi k Ayyar, making a case for UCC argued, that the country can transition smoothly into the foray to draw a civil code on marriage and succession, in tandem with erstwhile existing uniform and codified laws of penal, property relations and civil law on minimum age of marriage and laws of Evidence. Ambedkar also challenged the position of Muslims about 'immutability of laws, as different laws existed in provinces from North Western Frontier State to United Provinces, to customary local laws of Marumakkathayam in North Malabar, till it was codified under the Shariat Act of 1937 by the legislature. However, acknowledging the fear of forceful application of civil code, he advised

[60] *"The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India."* See Bakshi, P.M.. (2020). *The Constitution of India* (17 ed.). Delhi: Lexis Nexis

the future Parliament to apply the laws voluntarily, in the initial phase, like the Shariat Act and hence, the parties concerned should declare their choice to be governed by the common code.

Citing the position of Englishmen which Muslim members invoked to defend their argument of non-interference of personal law, Ayyar pointed out to the silence of Muslims in cases of anglicizing of criminal, contract, and property laws. It was argued that any attempt to unify the nation, especially India due to its painful history of communalised political atmosphere, should aim at separating religion from politics. It's not a matter of choice but a compulsion on State to enact a UCC whenever conditions are ripe, irrespective of opposition from any community. Ayyar also criticised the position of Muslim members who were open and appreciative of a foreign rule than the indigenous government and thus, causing hindrance in bringing about national unity.

K.M. Munshi appended that religious freedom cannot be enjoyed in totality and should be subjected to restriction from the State in cases of secular acts of practices and in the implementation of policies of social reform and welfare. Munshi was also critical of free exercise of religious autonomy that leads to the infringement of FR and causing tyranny to the internal minority. Munshi cited the example of Khojas and Cutchi Memons who were forced to forego their customary laws and practices in lieu of a codified Shariat Act and similar fate met by minorities in Muslim countries like Turkey and Egypt who have codified their religious laws assimilating the culture of the minorities. His attempt to unify the personal laws into a common civil code led strong emphasis on separating religion from personal law to secure a modern secular nation.

Munshi fails to accept the fact that all the advanced Muslim nations who have codified their personal law cannot be considered role models in handling of matters of rights of minority in a majoritarian state. Their method of assimilation of minority culture is premised on forced and blind imitation of western secularism to further the economic interest of the Colonialist. Secondly, the case of Khojas and Cutchi Memons do not hold much weight as the heterogeneity of sects and Schools of Jurisprudence give them necessary autonomy to follow their customs as per their tradition. Munshi's position that MPL are not essential tenets of religion and should be regulated as a secular activity is a flawed and misconstrued one.

Hansal Mehta and Rajkumari Amrit Kaur took a feminist position to argue for invalidation of all religious customs that were anti-social like polygamy, child marriage and untouchability. Citing cases of advanced Muslim countries who have reformed and codified their personal laws, she challenged the sacrosanctity of laws claimed by religious heads of the community. They were

dissatisfied with the treatment of UCC as a DPSP arguing that the reluctance to enact one will hinder national integration.

Nehru stood in defence of Muslims and Sikh minorities to argue for inclusion of UCC as a directive goal of the State. Eventually, Article 44 aimed to secure a UCC throughout the Indian territory under the aegis of the State (Austin, 2001, p. 16). Nehru was cautious to silence the critics on the position of 'tyranny of the majority' in a democracy to accommodate the sensitive religious sentiments of different communities.

Women activists have criticised the agenda of UCC put forth by the State due to its over emphasis on national integration rather than on gender justice. They had no faith in the system or its lawmakers, as witnessed from debates of the CA and the subsequent reform introduced in the Hindu Code Bill. The whole project of UCC was appropriated by the leaders for their political motives and none had the vision to create an egalitarian set-up for women due to their patriarchal attitude. The feminists in india made apposition for reform from within, despite the awareness of limitations of this process (Chachi, 1996, p. 21).

Liberal Secularists have criticised the demand for a UCC in lieu of 'reform from within' approach to restore the tolerant fabric of the society. However, this support to freedom of personal laws comes with two caveats, namely, to decide on interpretation of laws based on internal democracy within the community and to adopt those practices that are gender sensitive and equal (Chatterjee, 1994, p. 1769) (Bhargava, 1998, p. 91). Extending their arguments further were the Liberal multiculturalists who espoused the caveat of 'limits of permissible diversity' wherein special rights of minority groups will only be acknowledged as long as they acknowledge the rules of internal liberalism (Parekh, 1995, p. 432). There are certain given human conditions of moral equality which cannot be compromised and is the internal cost for exercise of external right (Carens, 2000, p. 107) (Kymlicka, 1995, p. 31).

Many post-colonialist theorists have challenged the contemporary conceptualisation of Indian Secularism which tends to homogenise the nation-state due to vehemence on national unity thwarting the space of multicultural rights. The thriving of illiberal nationalism which casts Muslim minority as a threat, due to the historical pain of partition and contemporary global war on terror, has painted a bleak future for a minority who are forced to a majoritarian dominance (Modood, 2007, p. 40). Political developments of 1980's which witnessed courting of conservative Muslim opinion and the subsequent rise of Hindu Nationalism with the opening of gates of Ayodhya under Rajiv Gandhi have drawn limitations on Indian democracy, particularly

seen as the crisis of Indian Secularism and multicultural liberal state (Rajan, 2007, p. 13). The position of the BJP to consider all the 'good and positive aspects' of all personal laws in the UCC is untenable as the good practices of *Mehr* (dower price) or converting sacramental marriage of Hindu into a contract cannot be infused with either religious law (Menon, 2014, p. 481).

The Indian State is caught in the 'paradox of multicultural vulnerability' as the state's effort to accommodate cultural minorities have caused gross discrimination of rights of women. These conflicts can only be resolved through a deliberative democratic model wherein either party are ready to compromise and surrender their authority over family law in larger interest of the body politic (Shachar, Multicultural Jurisdictions:Cultural Differences and Women's Rights, 2001, p. 58).

The language of women's movement which was articulated by the AIWC conference in 1937 spoke of desirability of adopting a UCC till 1980's. In the 1990's with the transformation of Indian politics at the mainstream level, this thinking underwent change with the outright support to reforms from within approach in personal laws. The campaign for gender-just laws was now premised on a deliberative negotiation with community in reforming the personal laws, supporting State's intervention only to implement secular laws relating to domestic violence and marital rape and setting up public domain of work promising equal pay for both sexes, maternity& paternity benefits, and day care for all citizens. The drop of the term 'uniform' from their agenda of a 'gender just and egalitarian code' was a significant marker defining shift from a homogenized polity to accommodating plurality of laws. Further, they focused on bringing in new laws on non-heteronormative relationships and protect all women in polygamous and bigamous relations.

5.4. *Ram Janmabhoomi- Babri Masjid* Title Dispute: Religious Right and Historical Injustice

The Ram Janmabhoomi-*Babri Masjid* dispute was a title case of property which holds its antecedents to timeline spanning 500 odd decades. The magnanimity of the timeline boasts of a complex historical narrative that has come to define the moorings of Indian tradition and culture. The contemporary times have unleashed a contested debate between ancient indigenous traditions vis-a-vis a foreign culture. The 'us' versus 'them' dichotomy has reasserted communal politics on the mainstream defining new contours of Hindutva nationalist politics and the challenges to accommodative diversity in India.

The Ayodhya dispute is a landmark case which witnessed a sharp sense of alienation of culture and primordial identities cross the world. It took a form of a more deep-rooted loyalty that transgressed the principles of an institutionalized nationalism, thereby, challenging the unity of

the State. The resultant emerging tide of communalism in India became a symptomatic new order that was left uncontrolled by the new state in the 1980s. Both the Hindus and the Muslims held a lasting grudge of the painful struggle of the partition and the curious animosity between India and Pakistan since then. Though the Congress system tried to limit the pace of local power struggles based on religious overtones, the system succumbed to the larger panacea of corruption and ego trip by the mid 1980's(Kohli, 1991, p. 19).

The mid 1980's and early 1990's was caught in struggle for power bargaining on lines of a new communal or popularly called a right wing majoritarian order that negotiated for the legitimacy of the state in terms of re-distribution of state resources, reinterpretation of national loyalty and bashing of the Congress system of dominance premised on wooing the minority, especially the Muslims. The new political order was consolidated by means of political violence in the wake of the demolition of the *Babri Masjid* at Ayodhya by lakhs of *kar sewaks* (Sangh volunteer workers) in December 1992. This single motivated act of communal violence signalled the collapse of the Congress hegemonic system of rules and its replacement by the Hindutva politics of the RSS and the BJP on the mainstream political front.

This majoritarian activism is woven into the structural change of the new economic order of a liberalized polity of the 1990's. Sarkar argued that these new social movements arose from a shifting power alliance that evoked its passionate struggles from the historical past of collective identity. The rise of a Hindutva ideology is a response to the opposition put forth by a consolidated group of liberal and left seculars who despite their differences in their ideological dispensation were cautious to tie a leash on the communal forces in lieu of a stable plural order. (Sarkar, 1998, p. 1727) The *Babri Masjid*-Ayodhya title dispute is a telling tale of such a vision in which a matter of property suit blew out of proportion to redefine religions as a central tenet of Indian politics, thereby, annihilating the secular ethos of our constitution.

The legal suit has itself passed through stages of historical evolution from the local to the national level. The quest has been for truth between contending parties who complained about the impingement of their freedom as a form of violation of the law of the land. The events in the case span three eras of the Mughal rule, the colonial rule, and the present constitutional system. Keeping in view of three judgements of the Allahabad High Court spanning over 4304 pages, and, after 41

days of hearing in the SC, the five-judge bench[61] was able to impart its judgement, to say the least, in an innocuous manner.

The Context:

The legal dispute in question was of ownership of land over 1500 square yards, in village of Kot Rama Chandra in Ayodhya in Pargana Haveli Avadh in district of Faizabad, U.P.. This defined piece of land became significant due to the presence of the Babri mosque, built by the Mughal Emperor Babur in 1528 A.D., until its destruction in 1992. The Hindus, thus, refer to the site as *Ram Janmabhoomi* (birth spot of Sri Ram).

The disputed claim of the Hindu parties is that the site was witness to a temple dedicated to lord Rama, demolished on conquest by the Mughal invader and ruler Babur's chief Army commandant Mir Baqi. Contrarily, the Muslims believe that Mir Baqi, on the instruction of the king Babur, built a mosque on the vacant land and that there has been no evidence of a destruction of a temple. Thus, it is the claim of the Muslims that there exists no proprietary claim of the Hindus over the disputed property (Aishwarya Iyer, 2020).

The case travels a chequered history of litigation between 1950-1989 with witness to a bitter communal conflagration between the Hindus and the Muslims in 1856-57. The colonial government had raised a buffer by constructing a grilled brick wall of six to seven feet in height, which alienated the structure between inner portions used for praying by muslims and an outer courtyard called *Ramchabutra* and a *Sita Rasoi* used by Hindus for their religious purpose.

The initial ignition to the constrained relation between the two communities followed a suit[62] instituted by Mahant Raghubar Das claiming to be the religious head of the Ram *Janmasthan* before the sub-Judge, Faizabad in January 1885. The relief sought by him was to construct a temple on the *Ramchabutra* situated in the outer courtyard. On 24 December 1885, the trial judge dismissed the suit noting the possibility of a riot breaking out between the communities. However, the court did acknowledge the possession and ownership of Hindus over the outer courtyard (*M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors,* 2019).

The whole controversy over the disputed piece of land reached its heightened peak on the night of 22nd-23rd December 1949 when the mosque was desecrated by 50 odd Hindu pupils who broke its

[61] A five-judge bench comprising CJI Ranjan Gogoi, Sharad Bobde, D.Y. Chandrachud, Ashok Bhushan and Abdul Nazeer delivered its judgement.
[62] *Mahanta Raghubar Das v Secretary of State of India and others* OS NO. 61/280 OF 1885

locks and placed the idol of Rama under the central dome. The Muslims had last offered prayers in the mosque till 21st December 1949.

The legal dispute, thus, took its inception in the court order of Faizabad in 1949. Following the 1949 order, three key title suits were filed challenging the said order:

a) In 1959, the *Nirmohi Akhara*[63] filed a title suit (suit no. 3 of 1989). The *Nirmohi Akhara* claims it is the rightful manager of the Ram Janmabhoomi.
b) In 1961, the U.P. Sunni Central Board of *Waqfs*[64] (hereafter Sunni *Waqf* Board) also filed a suit (suit no. 4 of 1989). The Board claims possession of the mosque.
c) In 1989, senior advocate Deoki N Agarwal filed a suit (suit no. 5 of 1989) on behalf of Lord Ram[65] in the Allahabad High Court. All prior suits were moved to the High Court (M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors, 2019, p. 5).

These suits were transferred to the Allahabad High Court from the civil court at Faizabad on 10th July 1989. Meanwhile, the High Court passed an interim order on 14 August 1989 directing the parties to maintain status quo with respect to the title suit.

The High Court rendered its final judgment in original proceedings by a full three judge bench[66] on 30 September 2010. It divided the title into three parts between Sunni Waqf Board, Nirmohi Akhara and Lord Ram (represented by Triloki Nath Pandey of VHP, who replaced Agarwal after his death).

The **majority opinion** given by Justice Sudhir Agarwal and Justice D.V. Sharma held that,

> "the place of birth was the area surrounding the central dome of the inner courtyard at the disputed site and birthplace of Lord Rama as per faith and beliefs of Hindus. The *Nirmohis* are a religious denomination as per their faith and would take care of the premises of the outer courtyard" (Agarwal, 2010, para 4566)

[63] The *Nirmohi Akhara* represents a religious denomination of Hindus known as the *Ramachandra Bairagis*. They claim that they were at all times materially incharge of the management of the structure at the disputed site which was a temple until 29th December 1949. In effect, they claim themselves as Shebaits, in service of the deity, managing its affairs and receiving offerings from the devotees.
[64] The Sunni *Waqf* Board argued that the prayers were being offered in the mosque until 23rd December 1949 when a group of Hindus desecrated it by placing idols within the precincts of its three-domed structure with the intent to destroy , damage and defile the Islamic structure.
[65] The suit was founded on the claim that the law recognizes both the idol and birthplace as legal entities. Thus, both are legal persons and a declaration of title to the disputed site coupled with injunctive relief is sought.
[66] Justice S U Khan, Justice Sudhir Agarwal and Justice D.V. Sharma

The judges acknowledged the fact that the idols were placed under the central dome on 22-23 December 1949, but they also existed in the outer courtyard. They also believed that the construction of the mosque by Babur failed to stand to evaluate of circumstantial evidence.

> "Neither of the plaintiffs have discharged the burden of establishing that they were owners of the property in dispute nor have the defendants established that the plaintiffs remain dispossessed for over 12 years and that the defendants have fulfilled the requirements of adverse possession. Thus, the title possession was transferred in favour of the all three contending parties in which the possession of the area governed by *Ramchabutra, Sita Rasoi and Bhandar* in the outer courtyard is declared to be the share of *Nirmohi Akhara* in the absence of any claim for better title along with other representatives of the Hindu parties (para 4566 (iii)). The Sunni *Waqf* Board would also be given possession of one-third of the land (para 4566 (iv-a)). The land acquired by the Government under Ayodhya Act of 1993 will be made available to all three parties in accordance with the directions contained in Ismail Farooqui case (Para 4566(v)" (Agarwal, 2010).

The **minority opinion of Justice S.U. Khan**, agreeing to the majority opinion on the basic suits of validity of notice under Section 80 of Cr.P.C., question of Limitation, dismissal of claim of Nirmohis as *Shebaits* taking care of idols under the central dome since time immemorial, differed in his opinion on the fact that the construction of the mosque has been done by Babur without destructing any temple at the disputed site. The debate on the architect of the mosque was infructuous and immaterial. Further, the Muslims have continued to worship at the mosque until 1934, after which until 22 December 1949, only Friday prayers were offered. The idols have been placed at the pulpit of the central dome on 22/23 December 1949 for the first time. The only evidence that can be proved was about the claim of *Ramchabutra* was that it existed before the visit of Tiefenthaler but after the construction of the mosque, both parties enjoyed joint title of possession (Khan J. S., 2010).

An attempt at acquisition of 2.77 acres of land by the U.P. government was set aside in wake of the sub judice matter of the disputed site. However, a substantial change took place in the position at the site on 6 December 1992 when the mosque was desecrated by *kar sevaks* affiliated with the Vishwa Hindu Parishad and other organisations (Aishwarya Iyer, 2020).

The Central Government under Narasimha Rao appointed the justice Liberhan Commission to inspect the case of demolition of the mosque. The committee submitted its report to the

government in 2009, blaming several leaders from the BJP, especially its top leadership and the UP government led by Kalyan Singh.

> "The report held 68 people culpable Uma Bharti, Govindacharya, Kalyan Singh and Shanker Singh Vaghela, all of whom were members of the BJP then, are held primarily responsible for the destruction of the mosque and the report says that they could have prevented the assault. The report even accused the RSS to lead a planned attack on the mosque under the aegis of leadership from the BJP and the Vishwa Hindu Parishad" (Affairs, 2009).

Subsequently, the Central Government acquired an area of about 68 acres, including the premises in dispute, by a legislation called the Acquisition of Certain Area at Ayodhya Act, 1993. Sections 3 and 4 of the Act envisaged the abatement of all suits which were pending before the High Court. Several Writ petitions challenged the validity of the 1993 Act. The decision of a constitutional bench of the SC held Section 4(3), which provided for the abatement of all pending suits as unconstitutional. The rest of the Act of 1993 was held to be valid. The Constitution Bench declined to answer the Presidential reference and, as a result, all pending suits, and proceedings in relation to the disputed premises stood revived *(Dr. M Ismail Faruqui (Dr.) & Ors vs Union of India*, 1994).

Summary of the case before the SC:

The facts and arguments of the case have travelled the arena of history, archaeology, religion, and law, with the purpose to construct law on the edifice of multicultural polity balancing religious freedom of different groups. The Court herein takes on an adjudicatory role of deciding on ownership and possession of immovable party, not on basis of faith but on evidence (*M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors, 2019*, pp. para 795-796).

A five judge bench comprising Chief Justice of India Ranjan Gogoi, Justice S.A. Bobde, Justice Dr. Dhananjaya Chandrachud, Justice Ashok Bhushan and Justice S.Abdul Nazeer was constituted to settle multiple appeals filed against Allahabad Court's decision. It was an extensive forty-one day hearing of the matter of title dispute[67], the SC re-visited the details of the judgement and concluded that,

[67] Civil Appeal Nos. 10866-10867 of 2010

"The three-way bifurcation of land, as done by the High Court, was legally untenable as it will affect lasting peace between the disputed parties" (Para 799).

The Court categorised the issues raised in the case as:

a) Maintainability of suits raised by different parties over the rights of management on the disputed site.
b) Determination of the title whether the disputed site was a juristic person, the question of a temple beneath the disputed structure, whether dedication of disputed site was made by Babur as inalienable land or was it a waqf property of the Muslims and the possessory rights over the inner and outer courtyard (SCO, 2019).

The SC in a majority opinion held on the 9th of November 2019 observed that,

> "the area of the composite site admeasures about 1500 square yards which shall be divided in such a fashion that does not harm the tolerant spirit of the constitution, while acknowledging the equal rights of the majority. It awarded the title to the deity, *Shri Ram Virajman* and directed the State to grant the Sunni *Waqf* Board an alternate site at Ayodhya for the construction of a mosque. The right of the plaintiff in Suit 1 to worship at the disputed property is affirmed subject to any restrictions imposed by the relevant authorities with respect to the maintenance of peace and order and the performance of orderly worship" *(M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors*, 2019, p. para 801).

> "The Central Government was to frame a scheme in exercise of the powers conferred upon it by Sections 6 and 7 of the Acquisition of Certain Area at Ayodhya Act 1993 to set up a trust or any other appropriate mechanism to whom the land would be handed over in terms of the decree in Suit 5. The scheme shall incorporate all provisions necessary to vest power and authority in relation to the management of the trust. The management of the Trust allotted to a team primarily including members of the *Nirmohi Akhara*, shall be supervised by the government" (Para 802).

Suit 3 filed by *Nirmohi Akhara* has been held to be barred by limitation. *Nirmohi Akhara*'s claim to be a *Shebait* stood rejected. However, acknowledging its historical presence at the disputed site, the SC decided to impart an appropriate role in the management of the disputed site to the concerned party (Para 804).

On the central concern of whether Ram Janmabhoomi was a juristic person with legal rights, the SC defined juristic person,

> " as one recognised by law as a subject that embodies rights, entitlements, and duties" (para 160).

The legal rights of the juristic personality are based on the purpose for which the court granted it rights in the first place. In this case, earlier Hindu juristic entities have been granted to Hindu idols to protect it against mismanagement of endowed property (para 802). It concluded that the Hindus have been able to establish the legal rights vested in the Idol in (Suit 5- Shri Ram Virajman) contrary to the recognition of immovable property of Ram Janmabhoomi itself (para 800).

The uncertainty of pre-existing temple beneath the disputed structure stood unestablished, based on ASI's report. The SC further argued that the claim on disputed site as a *Waqf* property dedicated by Babur and its continuous hold as a user stands vindicated (para 793). After careful assessment of the evidence on the worship of different parties in the inner and outer courtyard, the SC concluded that,

> "*the evidence in respect of the possessory claim of the Hindus to the composite whole of the disputed property stands on a better footing than the evidence adduced by the Muslims*"(para 800).

The judgement was sent for review on behalf of the AIMPLB by Advocate Ejaz Maqbool on 2nd December 2019 requesting for stay of the application decided by the majority bench. He filed it under Article 137 of the Constitution arguing that by the impugned judgement, the court has granted a mandamus to destroy the mosque and construct a temple on the said place. The petitioner pointed out to illegalities accepted by the learned court on damaging of the dome of the mosque in 1939, followed by desecration in 1949 and subsequent demolition of the mosque in 1992. Yet it awarded the disputed site to the very party who had abetted the acts of destruction. The judgement is criticized on records of facts and error in passing the possessory title to the Hindu parties in the larger interest of a 'belief and faith of a particular religion'. It also erred on not recognizing the disputed land to be part of the *Waqf* property and laid uneven appreciation of the evidence of the oral testimonies to Hindu parties in contrast to written documentary record of the Muslim parties (*Review Petition(M Siddiq Thr.Lrs vs Mahant Suresh Das)*, 2019).

Conclusion:

The clash of roles between the AIMPLB and the Indian State is primarily guided by larger concerns of gender equality vis-à-vis Group Rights of the Minorities. A more contemporary and modern placing of the issues governing study of politics of Indian Muslims revolves around three

primary markers, namely, issue of TT, Polygamy and *Nikah Halala* webbed in larger historical fight between UCC versus Autonomy of MPL. Beyond these, the AIMPLB has expanded its jurisdiction as the legal representative of the community in matters like the Ayodhya dispute. These issues have come to acquire new connotation in the backdrop of rise of Hindutva politics of the late 1980s.

The newly emerged idea of a nation premised on majoritarian lines supporting acculturation of minorities to foster national integration has diluted the noble values of Secularism and true gender equality. This conspicuous attempt at beleaguering of ethos of Secularism has only sharpened the process of 'Minoritisation' wherein the leaders of the minority group clinch harder to religious manifestation of identity as seen in reification of MPL as sacred and non-amenable to change (Gupta, 1999, p. 2206).

The struggles of Muslim women have been consumed by the images of socio-economic deprivation of the community writ large and the stereotyping of Islam as fostering fundamentalism and terror. The women are caught in this flux with the appropriation of the issue of gender inequality by right-wing State involved in the rhetoric of heroic bantering of saving Muslim women from the clutched of demonised Muslim men (Jamil, 2017). The voice of the Muslim women is silenced and subsumed by the Muslim male leaders, detouring the discourse on gender equality, in concerns on communal violence, poverty and negation of rights of minorities. The articulation of concerns on gender inequality directly by Muslim women has significantly contributed to reframing of the agenda of reforms of MPL, that are placing their solutions on issues of TT or polygamy, in reviving a more gendered reading of the *Qur'an*.

The feminist movement in India, adhering to any religion across the spectrum, has often been co-opted by the upper caste and upper class of Hindu and Muslim women as challenging the dominant narratives of patriarchy and dominance. This discourse is challenged when the struggles of marginalized women, tattered by structural violence of the system, witness increased incidents of emotional and mental breakdown of male counterparts succumbing to the evil practices of giving TT mostly in state of anger and seeking economic support in polygamous relationships. Therefore, while locating the struggle for Muslim women's identity especially in the Indian context, one must start from bifurcating the issues arising from socio-economic indices of class deprivation and the deep entrenchment of caste and *maslaki* hierarchies defining the social symbol and status of women.

Conclusion

India's political landscape is canvassed on the edifice of unity through diversity wherein religious protection proffered to different groups legitimized patriarchal control of men over women. The autonomy offered to religious personal law system has not only heightened the tension between the Hindus and the Muslims but also compromised gender equality, passionately envisioned in the constitutional document. Evidently, in the name of protecting group diversity, the Indian State, thus far, has skirted its responsibilities to protect individual rights of the vulnerable within these groups, primarily the women. The myth of state neutrality at the expense of discriminatory rights towards women, by freezing reforms of law has intensified the nexus between identity and family laws. It is significant to reiterate that piece-meal reforms introduced by the Judiciary cannot materialize on society writ large. The mistrust in the current pro-Hindutva government rejects the viable alternative of a UCC. What can then be offered as a solution is the gradual introduction of goals of gender equality by religious groups to the legislators, without unsettling the power arrangement. This much required transition from religious codes to a secular one can only be realised with close deliberations and participation of actors, both male and female, involved equally in framing a UCC.

This work, at the outset, investigated the discourses on religious laws developed on two primary markers i.e., exposition and execution of MPL in a multicultural and a secularised Indian polity. Contributing to the mainstream study of the personal laws (herein Muslim law) as an arena of legal proclivity, this work has quintessentially grappled with the political overtones camouflaging the agenda of reforms of the MPL.

The Indian narrative is replete with umpteen instances wherein both the Mughal rulers and the Colonialist interpreted the MPL under the aegis of traditional clerics and religious scholars aiding the process of codification of laws. Post-Independence, the nation building project of a liberal democratic state witnessed effective power-sharing arrangement between the Hindus and the Muslims, treading cautiously in the atmosphere of a painful partition and communal violence. This historiography offers India as a unique experiment in settling the competing binaries of Islamic law and secular governance (Redding J. , 2020). The complementing of task of State by non-state actors adds to the vibrancy of a pluralist system wherein alternative dispute-resolution forums dispels monopolization of state forces especially on matters of family law.

One of the pivotal roles undertaken by the members of the CA was to deliberate on the three-pronged demands of the Muslim minority namely, proportionate representation, recognition of Urdu as the official language and autonomy in the personal affairs of the community (Rao S. , 1966). The Muslim voice was divided on these issues between the members within the CA, the liberal nationalists within the Congress and the traditional clerical establishment. Most of the Muslim coterie within the CA was vociferous in demanding equal respect and status for the Muslims, like their Hindu counterparts, on matters like proportionate representation and patronisation of Urdu by the State. However, there was difference of opinion between members like Pocker Sahib and Mehboob Ali Baig supporting autonomy of personal laws in contrast to Naziruddin Ahmad who talked about gradual inclusion of UCC based on consent of the community. The Liberal Muslims of the Congress namely Abul Kalam Azad, Kunwar Muhammad Ashraf, Rafi Ahmed Kidwai etcetera were cautious in dispelling these demands to win the trust of the Congress associates especially due to the partition of the country partly caused by Mohammad Ali Jinnah. The coterie of traditional clerics belonging to the Deoband School and Jamiat-e-Ulema Hind under Husain Ahmad Madani, Hifzur Rahman and other members also supported the Congress plan to consolidate the community by dismissing the agenda of proportionate representation but favoured the recognition of Urdu and the autonomy of personal laws to be guarded by the members of the community (Hasan, 1986). The absence of a consolidated voice and a strong charismatic leadership, to the likes of B.R. Ambedkar for Dalits and Jaipal Singh Munda for the tribal community, led to the rejection of their demands in the CA. Moreover, the same CA played a distasteful role in quick shelving of demands of minority rights (Bajpai, 2000, p. 1839)

The idea of a nascent nation-state was premised on the values of liberal nationalism reflected in the celebration of majoritarian culture by giving due recognition to Hindi as state's official language, cultural holidays, and symbols. It was a triumph of multiculturalism that built up sensitivity towards the site of exclusion even after guaranteeing universal rights of citizenship (Kymlicka, 1995).There were criticisms levelled at the Indian liberal State which expected a sense of loyalty from an unencumbered universal citizen without giving due recognition to their cultural locatedness in the community (Sandel, 1984). The 'no-concern ' and 'equal respect' for all religion position taken by the nationalist leaders impacted the decision of the CA leading to acceptance of social rights and dismissing of political and economic rights of the religious minorities (Jha, 2002).

Eventually, the State offered consolation to the Muslim minority groups in the form of continuation of codified personal laws of the community and freedom of religion in managing their affairs as defined under Article 25, 29 and 372 of the Indian Constitution. It acceded to the demands of accommodation of group-differentiated rights of the community inorder to uphold the secular ethos of the Indian Constitution. The State governed by the dynastic rule of the Congress has mostly upheld the position of separation of religion from politics doctrine but sometimes compromised in favour of protecting the rights of the religious communities. As noticed in the passing of the MWPRDA of 1986, the State has abdicated its responsibility towards women by allowing the Muslim male leadership to coerce its control over them, as exercising its function of collective communal existence than democratic citizenship. Moreover, the debate on the UCC remained silent in the mainstream debates, except on certain occasions, in lieu of vote bank politics supporting the Muslims.

The advocators of the community rights for the Muslims made claims in favour of 'reform from within approach' by passing the beacon of leadership in the hands of a religious non-governmental organisation called the AIMPLB. This organisation shouldered the primary responsibility to negotiate with the State and its agencies in furthering the demand of autonomy in governance of the affairs of the community and the protection of the personal laws of the community.

The dilemma that emerged due to the recognition of the AIMPLB as the representative body of the Muslims has exposed certain members of the community to in-group rights violations and the politics of exclusion. The official position of the AIMPLB upholding the sanctity of personal laws as a form of divine revelation, immutable to any form of change, mars the prospect of reform of these laws to the pressing needs of contemporary times. This paradox has best defined the fate of the Muslim women in India caught in the turmoil of a deeply embedded inter-communal conflict which eventually threatened their individual FR of equality and non-discrimination. The institutionalization of MPL in India has strengthened the position of a the AIMPLB. They have been successful in consolidation and strengthening of Hanafi law. In vexed situations the appeal to other Schools such as the Maliki has been done with some success. However, the stubborn and status-quoist opposition of AIMPLB on interpretation of MPL has been questioned by other Schools and sect within the community.

The study revealed that the community is strongly divided along caste, sect, and gender lines as witnessed with the rise of parallel boards for the Muslim women, the Barelvi sect , the Shia group, *the Ahl-e-Hadith* sect and the Dawoodi sect. They have unequivocally challenged the status of the

AIMPLB as the de facto voice sole voice of the Muslim community. However, the research revealed that the AIMPLB boasts of earning the legitimate authority both from the government and the judiciary to represent the Muslims at the mainstream level. This collapsing of the internal diversity and alternative voices of different groups and sects by the AIMPLB is contributing to the false narrative constructed on the monolithic identity of the Muslims. Secondly, the defence of the AIMPLB arguing for fairer representation to all the groups and sects in the composition of the organisation stands negated as the interested applicant is elected by the internal members of the Board after passing the litmus test of nomination from within. Thirdly, the Board has yet not held its ground in many states in the far eastern region of the country like Assam holding a sizeable Muslim population. Finally, the top echelons of the Board are controlled by the traditional elites belonging to the Deobandi Hanafi sect functioning discreetly on matters governing the Indian Muslims.

The biggest achievement of the AIMPLB, though fraught with the limitations of a narrow reading of MPL, lay in the functioning of the ADR mechanism instituted through the *Darul Qaza (Shari 'a* Courts). The data received on the functioning of this extra-judicial system revealed that these courts command respect and enjoy trust of the community especially the lower classes who are both economically and educationally marginalized at all levels. Case studies, extending Redding's work, revealed that women who have accessed the *Qaza* courts for *Faskh* divorce petition have received conciliatory treatment from local *Qazis*, in the face of obliteration of secular state's role to orchestrate egalitarian MPL (Redding J. , 2020). Thus, the functioning of *Darul Qaza* open vistas of offering social justice within the Islamic frame in contrast to fear of its misappropriation and abandonment by the Judiciary, as threatened by the language of the ruling in the (*Sarla Mudgal v Union of India,* 1995)case.

The blind trust in these local courts, to grant them justice in matters of family dispute in accordance with Islamic norms, is the sole cause of their growing expansion across the different states in India. Undoubtedly, *Qaza* Courts have eased the burden on judicial courts due to the constraint of time and cost but are sometimes in effect glaring examples of sites subverting the rights of women due to arbitration of cases by inexperienced, biased, and uneducated local *Qaz*i. This judicial unit plays a juggling role in dispensing justice as per the needs of the community manoeuvring their level of economic and educational disadvantage.

The heightened reliance on *fatwas* issued by the individual clerics have caused closure of gates of *Ijtihad* in matters of interpretation of personal laws. The AIMPLB has tried to deal with these

complexities by opening training centres in different states with two among them focusing on the training of women as female jurists. This is a positive approach but will take time to reap its fruits. Meanwhile, the AIMPLB has been controlling its base of support through the *Qaza* courts among the majority sections of the community. The *Qaza* courts have come under scathing attack from different sections, as witnessed in the *Vishwa Lochan* case, as contributing to lawlessness and erosion of state's institution but its resilience to offer *faislahs* (decisions) has led to its deep entrenchment in the imagination of the Muslim society.

The simmering tensions brewing within the Muslim entity is exacerbated and manipulated by different political parties across the spectrum in different states. The rise of Hindutva politics in the late 1980's to early 1990's has redefined the political landscape of Indian politics wherein the rise of internal dissension and absence of organised leadership within the Muslims is usurped by the majoritarian State to make claims of championing the cause of gender equality for the women. The famous *Shayara Bano* case , the subsequent passing of the *TT* Act and the recent Ayodhya case judgment are telling tales of clash of political interest between the Muslim religious groups vis-a-vis the Modi government. The much awaited agenda of the rightist-Hindu party in power at present i.e., the BJP, advocating a return to the Hindu identity (ghar wapasi) throttles a fair attempt to construct a gender-sensitive and religious-neutral UCC. The biggest loss in this political conundrum at both the community and national level is incurred by the Muslim women, caught in the fray of a communalised polity.

While debating on the dichotomous positions of reforms in the MPL and the UCC, the Indian State has diluted these binary categories by acting as a silent spectator to remark its loyalty to the secular ethos of the Indian Constitution. There has been a surge in contemporary writings from both approaches but a dismal display of reluctance on the part of the State to either initiate reforms to ensure gender equality nor any clear blueprint or the process to initiate a drawing of a model on the UCC. The study has challenged the misconception developed on the issue of polygamy, as being practiced among the Muslims only, with the help of national statistical data. The other pressing issue of *Nikah Halala* is dealt in a nuanced way to contribute to the discourse on agendas of reforms of the MPL. Any notion floated on the conception of *Shari 'a* in matters of MPL are far too caught in the customary practices that at times misread the positions of the *Qur'an* and *Sunnah* in totality.

This research work, thus, puts forth that the term 'reform (*islah)* should be viewed in Islam's own credo wherein the idea of reform is integral to Islamic history and tradition. Islam in South Asia

followed its own distinct trajectory of discursive tradition which in all its diversity and criticality contributed to the intellectual and socio-cultural landscape of personal laws. Eaton best described it as,

> *" a world system, but one radically different from that modelled on homo economicus". It was, rather, a world system linking men and women through informal [and formal] networks of scholars and saints, [traders and artists, desert and city], built on shared understandings of how to see the world and structure one's relationship to it"* (Eaton, 1993, p. 31)

Reform is a corrective process which aims at restoring the original message of Islam addressing the concerns of the public and private realm. Herein the call for return to the authentic Islam does not mean return to medievalism as the secularists allege but a call to create a just society on egalitarian Islamic principles and spirit. The key findings developed on the study of the methodological arrays on Islamic text and tradition offers exploring the unchartered terrain of the principle of 'Moderation' in understanding the *Shari'a* by different Schools of Jurisprudence (Kamali, 2015). One can harmonize the fluidity of laws as floated by the advocators of legal eclecticism detailed out in opting for *Takhayyur* (eclectic choice) as an alternative to the codification of static laws of the Hanafi School as established by the AIMPLB.

The different models of *Nikahnama* and untraversed path of the *Kabinnama* are effective mechanisms to check the unilateral processes of divorce, misuse of conditions to enter a polygamous relationship at the community level. The rights of *Khula* that could be exercised by the women are oblivious in the debates on the setting of the MPL in India. This study contributes to enriching the literature with field examples of practices of *Khula* or *talaq e-tafweez* exercised by women to check misuse of the rights of divorce on the part of the husband.

The study argues that the subject of MPL is a complex one holding multiple arrangement within the Indian State. Any substantial and informed study would make a case for a more participatory and deliberative model of transitioning to a UCC that promises to satisfy the plural voices of the community across diverse religions and ethnic groups. Any attempt to introduce vibrancy and resilience in MPL requires a shift from foundational basis of Minority rights under Secularism to social justice. Once the Muslim community starts focusing on its socio-economic needs than religious identity that will reduce assertions of community's identity on faith and matters of personal law (Hasan M. , Indian Muslims since Independence: In Search of Integration and Identity, 1988). The transition towards liberal and gendered reading of family law, premised on

principle of social justice, can help create a sustainable environment for introduction of a UCC, best to be construed as Common Code of egalitarian practices of all the communities. The real problem lies not in the concept per se but in the roots of process and who shall control the process to draw a model. Inorder to be successful, UCC needs to truly reflect a deliberative model of diversity with its commitment to equality and social justice.

APPENDICES:

LIST OF THE CASES TAKEN FOR THE STUDY from *IMARAT-E-SHARIA*, PATNA, BIHAR.

- Tuhrun Nisa v. Manzoor Alam 19-4276-1384 AH
- Rafeya Khatoon v. AbdusSami 56-4519-1385 AH
- Mahmood v. Aziza Khatoon 1-24-1388 AH
- Rehana v. Saleem 251-6259-1388AH
- Batulan v, Yusuf Khan 24-261-1347AH
- Nazumuddin v. Firoza Bano 236-12009-1406AH
- Safina v. Israil 129-7205-1392AH
- Alima Khatoon v. Mohd. Idress 78-3729-1383AH
- Raisa Khatoon v. Mohd. Mumtaz 216-11962-1406AH
- Khursheeda V. Mohd. Annan 242-15007-1414AH
- Shahina Parveen v. Javed Nihal 240-15609-1415AH
- Shahzadi v. Shahid Khan 92-16222-1414AH
- Nuzhat Jahan v. Mohibbul Hasan 85-14373-1415AH
- Mumtaz v. Naushad 101-15370-1415AH 422
- Shahin v. Abdul Majid Iftekhar 252-15521-1415AH
- Khairun Nisa v. Asghar Ali 156-14007-1414AH
- Haflzan v. Mohd. Farooq 118-13615-1418AH
- .Safia v. Mohd. Tayyab 151-11521-1405AH
- Ruqayya v. Mujid Alam 391-15156-1414AH
- Serajuddin v.Nikhat Sultana 72-16202-1417AH
- Mohd. Qamruddin v. Majida Khatoon 272-10203-1401AH
- Fatima v. Khuda Bakhsh 273-10204-1401AH
- Zahra V. Khuda Bakhsh 274-10205-1401AH
- Parveen v. Mirza Tahir Bagi 152-11522-1405AH
- Seema Faizi v. Khursheed Alam 173-16303-1417AH
- Fahimul Haque v. Maryam Khatoon 55-16185-1417AH
- Sohrab Quresh v. Nashaba 51-16181-1417AH
- Mohd. Saleem v. Hasina 319-14170-1417AH
- Rafat Parveen v. Mumta Alias Raju 377-14228-1412AH
- Shaibul Nisa v.Shahadat Hussain 237-13642-141 lAH
- Suraiya v. Dr.Akram 145-13642-1411 AH
- Shamshad Ara v. Nizamuddin 242-13495-1410AH 423
- Mehrun Nisa v. Akhler 73-13226-1410AH
- Zeenat Parveen v.Irfan 232-12676-1408AH
- Mohd. Nazim v. Firozah Bano 263-12009-1406AH
- Zareena v.Mohd. Siddique 148-n894-1406AH
- Jawad Ahmad v. Gulshan 242-11612-1405AH

- Syed Sarajv. Shahidah 16-10295-1402AH
- Zahid Ali v. Shamshad Begum 73-9408-1399AH
- Zubaida v. Abdus Sattar 64-6922-1391AH
- Naseem Ahmad v. Naseem Haider 113-16788-1419AH
- .Kariman v. Mohd. Mahboob 248-15931-1416AH
- Siijabeen v. Ahsan Ahmad 104-16534-1418AH
- Hamida v. Niyazul Haque 353-15622-1415AH
- Syed Afqar Hussain v. Shanaz Bano 90-16765-1419AH
- Husan Ara v. Abdur Razzaq 135-16810-1419AH
- Tabarab Khatoon v. Mohd. Shibli 24-8395-1396AH
- Falma v.Salamat Mia 282-14133-1412AH
- Rehana v. Saleem 251-6259-1388AH
- Samirul Nisa v. Siddique Mia 5-6864-1399AH
- Asma V. Liaqat 18-6877-1391 AH 424
- Yasmin v. Munna 372-15641-1415AH
- Razia v. Fazlu Mazloom 374-15643-1415AH
- Rukhsana v. Zubair 49-15732-1416AH
- Rousban v. Abbas 95-15778-1416AH
- Shahjahan v. Shamsul Haque 16-16446-1418AH
- Husan Ara v. Mahtab 68-16743-1419AH
- Mohd. Mussain v. Nazneen 88-1666-1391AH
- Jamila v. Jalaluddin 7-6866-1391AH
- Hafizan v. Kamaluddin 126-6980-1391AH
- Noor Fatia v. Anwar Hussain 317-14605-1413AH
- Rasheedav. Suleman 141-700-1391AH
- Khadiza v. Habibur Rahman 144-7003-1391 AH 426
- Najmav. Saleem 154-7013-1391AH
- Shahjahan v. Sharafiiddin 206-7065-1391AH
- Shahnaz v. Kamal 48-14336-1413AH
- Farzana v. Rafi Ahmd 461-16075-1416AH
- Anjum Ara v. Haider Ali 392-16075-1416AH
- Shahjaban v. Murtuza 100-15883-1416AH
- Rabiya v. Tasleem 229-15912-1416AH
- Akhtariv.Akhtar 293-7142-1391AH 1
- Bibi Hussaini v. Shafique 161-7020-1391AH
- Asma Khatoon v. Shakil 82-16370-1413AH
- .Nasima v. Manzoor 8-6867-1391AH
- Hamida v. Nizammuddin 280-7139-1391AH
- Hadisa v. Saleem 137-6994-1391 AH
- Zulaikha v. Abdul Salam 294-7153-1391 AH
- Bibi Safia Bi v. Qasim 243-7102-1391AH

- Mohd. Qamaniddin v. Farhat Nasreen 285-16415-1417AH
- Shama Parveen v. Anwar Hussain 35-12806-1409 AH
- Akhtari Bano v. Haji Mohd. Siddique 166-15849-1416AH
- Mohd. Jalaluddin v.Sanjeeda 300-15569-1415AH 427
- Mohd. Jaleel V. Mohd. Hassan 30-8401-1396AH
- Qamrul Huda V. Imteyaz Hussain 23-9954-1401AH
- Zubaida V. Abdul Ghafoor 184.14949-1414AH
- M.Syed Tahsheen V. Syed Shakeel 278-12024-1406AH
- Shaikh Bikari V. Shaikh Alam 113-10044-1401 AH
- Bashiruddin V. Noor Mohd. 177-15446-1415AH
- Nasrah Khatoon V. Naimatullah 193-8564-1396AH
- Raqeebun Nisa V. Faizur Rahman 136-10416-1402AH
- Sabra Khatoon V. Mohd. Asgjiar 175-10254-1402AH
- .Sakina V. Suleman 176-10255-1402AH
- Zarina Khatoon V. Mohd. Manzar 36-1088-1402AH
- Md. Suleman V. Shabnam Bano 28-14316-1413AH
- Bibi Khairun Nisa V. Md. Azmatullah Ansari 226-14077-1412AH
- S.Sabiral Bibi V. Md. Ashfaq Ansari 8-1-1408AH
- Mohd. Khaleed V. Mohd. Ahsan 316-12062-1406AH
- Khoosnuda Khatoon V. Azizul Haque 248-15013-1414AH
- Shahmina Khatoon V. Mohd. Hasan 89-6948-1391 AH

TRANSLATION OF THE FATWA:

Question:

In Charthawal town of Muzaffarnagar district, a married woman was raped by her real father-in-law. When this incident was made public by this woman, the village panchayat decided that under such condition the woman has got divorced and now this the woman, who was the wife of rapist's son, has now become the wife of the father-in-law; that she has become forbidden (haram) for her husband. The village panchayat has sent the woman to her parents' house (maika). This woman has five children from her husband.

Now the question arises: if a married woman is raped by her real father-in-law, will her wifehood be changed, i.e., will she no longer remain the wife of her husband or will she be considered as divorced and will she become haram for her husband? If it is so, will she be married anew to her rapist father-in-law? And whose children will those five existing children be considered? Will these children be considered brothers and sisters of their father?

Such types of questions are making rounds and are being discussed in that area. In the absence of any clear Shari'a command or explanation, a great sense of uncertainly is prevailing in the locality. There are also a lot of misunderstandings and misreporting in the media. Ulama and Muftis are therefore requested to give their opinions and clarifications in this matter.

MohammadAshrafUsmani
Rashtriya Sahara (Urdu)

The answer with the help of Allah. If someone has committed adultery with the wife of his son, and if this has been proved by the depositions of witnesses or if his son confirms it or if the woman herself admits and confirms it, the wife of the son becomes haram forever for the son. If the father copulates with a woman either legally after marriage, or illegally without marriage, in both cases it becomes haram for a man [son] to keep her in his marriage.

If is mentioned in the Qur'an '*wa la tankihoo ma nakaha aaba-o-kum'* ["And marry not women whom your fathers married" -- Qur'an, 4:22], i.e., the son should separate himself from his wife and never go to her. The contention of the panchayat people that the wife of the son has now become wife of the father and her wifehood has changed is not correct, or to say that the wife of the son is divorced is also not correct. Neither she can be married to her father-in-law. All the five children are legitimate children of their real parents. They will be considered grandsons and granddaughters of their father's father and not brothers and sisters of their father. The people of the village, because of their ignorance, have wrongly interpreted Quranic injunctions and have given a wrong judgment. It is probably because of wrong interpretation and judgement that various types of controversial questions are being raised which are disturbing people's minds.

Allah Knows the best...!

Habibur Rahman, Mufti, Darul Uloom, Deoband

The answer is correct: [Muftis] Kafilur Rahman and Muhammad Zafiruddin

COURT AND IMARAT-E-SHARIA

TABLE – CASES OF IMARAT-E-SHARIA :

SR.	CASE NO.	NAME	MATTERS	STARTED	DISPOSED	DAYS
1	16431	Aama V. W.A	Dismissed	2.1.18	6.5.18	124
2	16432	Hasin V.A.J	Diss	3.1.18	1.9.18	238
3	16433	Reyazuddin V.N.	R.C.R	3.1.18	23.10.18	290
4	16434	Perveen Ara. V.M.R.	Diss	5.1.18	2.8.18	207
5	16435	Amir A.A.V.M.A. & Others	COMP.	6.1.18	1.7.18	204
6	16436	Amina V.S.A.	COMP.	7.1.18	5.11.18	328
7	16437	Shabnam Perveen V.A.G.F.	R.C. / Dismissed	7.1.18	25.7.18	198
8	16438	Chand,S.V.R.	R.C. / Dismissed	7.1.18	11.1.18	4
9	16439	Roshan A.V.A.R.	Diss. / Dismissed	11.1.18	24.1.18	373
10	16440	Mussarat. V.I.	Diss	13.1.18	11.718	178
11	16441	Amina B.V. I.G. & Other	Diss./R.C.R	13.1.18	30.3.19	437
12	16442	Anisa V.A.	Diss	16.1.18	9.2.18	23
13	16443	Kalam V.S.	R.C.R. / Dismissed	16.1.18	9.4.18	83
14	16444	Kauaar V.S.	R.C.R. / Dismissed	17.1.18	19.1.18	362
15	16445	Abdul K.V.F.B.	R.C.R. / Dismissed	17.1.18	10.6.18	143
16	16446	Shah J. V.S.	Diss	18.1.18	16.11.18	328
17	16447	Ramzan V.T.	R.C.R. / Dismissed	17.1.18	3.4.18	436
18	16448	Zafar V.B.	R.C.R.	19.1.18	7.8.18	198
19	16449	Ghazala F. V.A.H.	Divorce/Not Proved	21.1.18	3.3.18	77
20	16450	Ashrafi B.V. Z.H.	Diss	24.1.18	21.9.18	237
21	16451	Bilqis J.V. R.R.	Diss/R.C.R	24.1.18	12.7.18	168
22	16452	Afsari B.V.S.	Dower Diss/Dismissed	25.1.18	22.5.18	177
23	16453	Md. A.V.S.	Good Conduct	28.1.18	25.2.18	27
24	16454	Salim V.K. N.	R.C.R./Comp.	28.1.18	22.6.18	144
25	16455	Ghaffar V.N.B.	R.C.R.	28.1.18	4.2.19	366
26	16456	Zalbun N.V.A.	Diss	28.1.18	10.6.18	132
27	16457	Khursheeda V.A.	Diss	4.2.18	27.5.18	111
28	16458	Hadisa V.N.M.	Diss	4.2.18	27.3.19	413
29	16459	Allmuddin V. Husna & Others	Diss/Dismissed	6.2.18	25.7.18	169
30	16460	Sanjida V.A.	Diss	9.2.18	10.6.18	121
31	16461	Saleema V.K.	Diss/Dismissed	10.2.18	25.7.18	165
32	16462	Kausar Bano V.A.A.	Diss/Khula	10.2.18	6.4.18	56
33	16463	Shahida V.N.	Diss	11.2.18	22.7.18	161
34	16464	Nikhat P.V. Ahsan	N.C.Order/Diss	12.2.18	16.6.18	124

35	16465	Sabila V.S.H.	Diss/Dismissed	13.2.18	10.6.18	117
36	16466	Salra V.A.K.	Diss	13.2.18	3.8.18	170
37	16467	Yasmin V.R.A	Diss/Rukhsati	14.2.18	7.7.18	203
38	16468	Wasila V.M.	Diss	16.2.18	6.9.18	200
39	16469	Tayyiba V.M.A	Diss/Dismissed	17.2.18	10.6.18	113
40	16470	Amin V.Rehana	Rukhsati/Divorce	18.2.18	20.4.18	62
41	16471	Rafi V. Abisa	R.C.R./Dismissed	18.2.18	6.9.18	198
42	16472	Rukhsana V.S.H.	Diss/Dismissed	19.2.18	4.11.18	255
43	16473	Rumana W.V.I.A	Diss/Dismissed	24.2.18	31.3.18	6
44	16474	Abbas V.Shabina	R.C.R./ Maintainance	25.2.18	2.10.18	215
45	16475	R.Tara V.A.	Diss/Divorced	1.3.18	15.5.18	74
46	16476	Farzana V.G.S.	Good Conduct	1.3.18	2.5.18	61
47	16477	Shiba T.B.H. V.A.A	Khula	1.3.18	1.3.18	0
48	16478	Nasreen B.V. AH.	Diss	1.3.18	4.11.18	243
49	16479	Naseem V.S.	R.C.R./Diss	13.3.18	21.2.19	308
50	16480	Qamisa V.M.A.	Diss/Dismissed	13.3.18	14.10.18	211
51	16481	Tahira V.F.A.	Diss/Compromise	15.3.18	17.8.18	148
52	16482	Sanjida B.V.M.	Diss/Compromise	15.3.18	15.4.18	30
53	16483	Sajida V.T.	Diss/Dismissed	17.3.18	3.5.18	46
54	16484	Sanohar P.V.JA	Diss/Khula	20.3.18	22.7.18	122
55	16485	Shakila V.A.	Diss/Dismissed	21.3.18	6.9.18	165
56	16486	Nibiyya V. Chhedl	Diss/Dismissed	21.3.18	5.11.18	226
57	16487	Khadija V. Masood	Diss	24.3.18	4.4.19	370
58	16488	Gule Arzan V.T.	Diss/Dismissed	24.3.18	12.7.18	144
59	16489	Warsila V.F.	Dec. of Death	24.3.18	10.7.18	134
60	16490	Noorun N.V.S.	Diss	24.3.18	4.11.18	220
61	16491	Atiq A.V. Sadab P.	R.C.R.	25.3.18	17.9.18	172
62	16492	Alyeaha V.J.	Diss	25.3.18	7.9.18	158
63	16493	Agrawal V.S.	Diss	27.3.18	2.7.18	95
64	16494	Sahab A.V. Mahjabin P	R.C.R	27.3.18	2.7.18	95
65	16495	Committee Jamia Madinatual Ulum	Perm.	29.3.18	6.4.18	7
66	16496	Roshan Ara V.R.	Diss	30.3.18	15.4.18	375
67	16497	Musarrat V.N.A.	Diss/Desmissed	30.3.18	21.10.18	201
68	16498	Mehmood A.V. lashrat P	R.C.R	2.4.18	10.8.18	128
69	16499	Nirmala S.V.J.	Dower/Dismissed	2.4.18	4.12.18	342
70	16500	Ajmeri V.S.	Diss	4.4.18	7.9.18	153
71	16501	Sanaullah V. Shahnaz	Confir Div.	5.4.18	18.7.18	86
72	16502	Munm V. MA	Diss	5.4.18	7.9.18	152
73	16503	Mumtaz V. Naghma	R.C.R./Dismissed	6.4.18	6.9.18	90
74	16504	Salra V.SA	Diss	6.4.18	30.10.18	204
75	16505	Committee	Permission	8.4.18	26.4.18	18
76	16506	Naznin V.I.	Diss/RCR	9.4.18	29.7.18	18
77	16507	Mumtaz V. Amina	RCR/Comp	9.4.18	14.5.18	35

78	16508	Mahjabin N.V. A.A	Diss	9.4.18	10.8.18	121
79	16509	Shabnam V.I.	Diss/Dismissed	11.4.18	12.8.18	121
80	16510	Shakir V. Safia	RCR/Diss	11.4.18	21.10.18	200
81	16511	Naz P.V.N.	Diss/Dismissed	13.4.18	17.11.18	214
82	16512	Rizwana V.S.	Diss	13.4.18	23.1.19	280
83	16513	Shahida V.M	Diss/Khula	14.4.18	3.2.19	289
84	16514	Shakila V.M.A.	Diss/Khula	14.4.18	9.11.18	205
85	16515	Zinal Kausar V.W.	Diss/Khula	16.4.18	23.5.19	503
86	16516	Gulnaz V.Q.	Diss	16.4.18	3.1.19	257
87	16517	Qamar Jahan B.V.A.A	Diss	18.4.18	17.8.18	119
88	16518	Qadira V.M.	Diss/Dismissed	18.4.18	17.1.19	269
89	16519	Zulkha V.A.S.	Good Beh	19.4.18	28.5.18	39
90	16520	Habiba V.R.A.	Diss/Dismissed	19.4.18	6.9.18	137
91	16521	Abida V.S.	Diss	20.4.18	24.1.19	274
92	16522	Husna B.V.A.J.	Diss/Dismissed	20.4.18	21.10.18	181
93	16523	Javed A.V. Shereen	RCR/Comp	22.4.18	24.11.18	212
94	16524	Lshrat J.V.M.	Diss/Comp	22.4.18	12.7.18	80
95	16525	Bilgis V.G.	Diss/Dismissed	25.4.18	5.1.19	250
96	16526	Mahjabin V.S.	Diss/R.C.R.	25.4.18	17.9.18	142
97	16527	Farooq A.V. Noor J.B.	Fix Dower	26.4.18	1.2.19	275
98	16528	Shaheen S.V.H.R.	Diss	26.4.18	29.12.18	243
99	16529	Naseema V.B.	Diss	24.4.18	7.10.18	163
100	16530	Mahrun V.Y.	Diss	21.5.18	7.10.18	165
101	16531	Islam V. Noor Jahan	RCR/Diss	3.5.18	3.9.18	120
102	16532	Sami Ara V.S.H.	Diss	4.5.18	24.1.19	260
103	16533	Sahena P.V.A.Z.	Diss/Diss	5.5.18	17.11.18	192
104	16534	Mahabin V.A.A.	Dower	8.5.18	4.2.19	266
105	16535	Shabana V.Q.	Diss/Khula	10.5.18	21.11.18	190
106	16536	Rehana V.A.S.	Diss	11.3.18	20.9.18	129
107	16537	Shahana V.Q.	Diss	11.5.18	20.9.18	129
108	16538	Sanjida V.A.A	Diss/Maint	13.5.18	17.1.19	244
109	16539	Rais V. Fauzia B.	Poss of Child	14.5.18	1.2.19	270
110	16540	Najma V.M.	Diss	18.5.18	30.10.18	162
111	16541	Zubaida V.A.	Diss	15.5.18	19.2.19	274
112	16542	Zahida V. Naim	Diss	17.5.18	23.4.19	336
113	16543	Noor Jahan V.A.H.	Diss/Khula	17.5.18	17.8.18	70
114	16544	Sanjida V.S.P.	Diss/Khula	20.5.18	14.11.18	174
115	16545	Khushbun N.V.N.	Diss	22.5.18	29.1.19	240
116	16546	Sakina V.S.	Diss/Dismissed	27.4.18	1.2.19	274
117	16547	Husna B.V.F.I.	Diss	28.5.18	3.12.19	695
118	16548	Nasima V.Y.	Diss/Dismissed	28.5.18	1.12.18	183
119	16549	Muiz V. Perveen	RCR/Mainte	4.6.18	28.8.18	84
120	16550	Shamima V.A.A.	Diss/RCR	4.6.18	2.1.19	208
121	16551	Rashida V.K.	Diss/RCR	8.6.18	24.10.18	138
122	16552	Ansar N.V. Nasimus Sehar	RCR/Comp	18.6.18	20.8.18	74

123	16553	Zazina V.M.	Diss/Divorce	12.6.18	12.10.19	480
124	16554	Shahina H.V.T.N.	Conf. Marriage	13.6.18	12.10.19	489
125	16555	Sakina V.T.	Diss	16.6.18	2.7.19	374
126	16556	Hasan Jabin V.K.A.	Diss/Maint	17.6.18	20.7.19	393
127	16557	Sajida V.A.H.	Diss	18.6.18	24.1.19	216
128	16558	Shahid A.V. Masiha	RCR/Dismissed	18.6.18	14.3.19	266
129	16559	Qadir H.V. Afsana	Poss of Child	20.6.18	4.12.18	164
130	16560	Nalm V. Chand Tara	RCR/Dismissed	22.6.18	22.1.19	210
131	16561	Farida V.A.	RCR/Dismissed	22.6.18	27.1.19	215
132	16562	Masarrat J.V.M	Diss	26.6.18	2.4.19	276
133	16563	Shamshad A.V. Shakila	RCR	27.6.18	10.12.18	171
134	16564	Ainul H.D.V. Noorjahan	RCR/Sep. Res.	29.6.18	26.6.19	357
135	16565	Akbar A.V. Noor Jahan	RCR/Dismissed	1.7.18	25.11.18	144
136	16566	Infat A.V. Ismat Ara	RCR	2.7.18	23.6.19	351
137	16567	D. Fatima V.N.A.	Diss	4.7.18	26.8.19	412
138	16568	Nasreen V.A.	Diss/RCR	4.7.18	28.5.19	324
139	16569	Jahan Ara V.K.	Maint	5.7.18	24.12.18	169
140	16570	S.A.V. Rashida	RCR	5.7.18	26.3.19	261
141	16571	Ashraf A.V. Fahmida	RCR	8.7.18	26.1.19	198
142	16572	Sharfuddin A.A.Ara	RCR/Dismissed	8.7.18	30.3.19	262
143	16573	Chand Tara V.N.	Diss	10.7.18	28.4.19	288
144	16574	Samun V.A.M.	Diss/Dismissed	11.7.18	3.1.19	173
145	16575	Reshma V.C.	Diss/Dismissed	11.7.18	8.4.19	267
146	16576	Zeenat P.V. M.A.	Conf. of Div.	12.7.18	22.1.19	190
147	16577	Raisa V.S.A.	Diss	14.7.18	22.5.19	308
148	16578	Anwari V. Yunus	Diss/Dismissed	17.7.18	24.12.18	157
149	16579	Ashghari V.A.	FMO/Dismissed	17.7.18	12.2.19	205
150	16580	Javed A.V. Naghma J.	RCR/Comp.	17.7.18	1.9.18	44
151	16581	Saira V.N.S.	Diss/Div.	18.7.18	4.4.19	256
152	16582	Tariq Z.V. Naaz P.	RCR/Dismissed	21.7.18	15.9.19	630
153	16583	Saleem V. Zarina	RCR/Dismissed	24.7.18	4.11.18	100
154	16584	Zeba P.V. P.A.	F.M.Q./Dismissed	24.7.18	13.11.19	679
155	16585	Subhan A.V. Hashim N.	RCR	25.7.18	30.6.19	335
156	16586	Khairun N.V. M.A.	Diss/Dismissed	26.7.18	13.6.19	317
157	16587	Rashida V.U.	Diss/Dismissed	29.7.18	15.6.19	316
158	16588	Fatima V.S.	Diss	29.7.18	5.10.19	426
159	16589	Saghir V. Zarina	RCR/Khula	30.7.18	28.1.19	178
160	16590	Gulshan A.V.S.	Diss/Khula	30.7.18	28.2.19	208
161	16591	Naznin P.V.M.	Khula	1.8.18	1.9.18	30
162	16592	Naushad V. Yasmin	RCR	2.8.18	13.5.19	281
163	16593	Guddu V. Ishrat J.	RCR	5.8.18	12.2.19	187
164	16594	Tara V.W.	FMO/Comp	7.8.18	2.12.18	115
165	16595	Qamrun N.V.A.	Diss	10.8.18	14.7.19	334
166	16596	Afsana V.S.A.	Diss/Dismissed	16.8.18	11.2.19	175
167	16597	Azima V.R.M.	Diss/T.Maint	20.8.18	4.2.19	164

168	16598	Roshan B.V. H.A.	Diss/3 Month	20.8.18	27.2.19	187
169	16599	Mumtaz V. Mumtaz B.	RCR/ Khula	22.8.18	24.4.19	242
170	16600	Juratunisa V.M.	Diss/Dismissed	22.8.18	17.1.19	145
171	16601	Anwari V.M.	Good Beh.	22.8.18	29.1.19	159
172	16602	Nooru Sehar V.Z.A.	Diss/Dismissed	26.8.18	1.2.19	155
173	16603	Anjum V.F.A.	Khula/Dismissed	28.8.18	21.5.19	263
174	16604	Shahnaz V.Z.	FMO/T. Maint	28.8.18	8.5.19	250
175	16605	Roshan A.V.S.A.	RCV. Maint	30.8.18	4.5.19	244
176	16606	Ekramuddin V.K.B.	RCR/Dismissed	1.9.18	13.3.19	192
177	16607	Shamin A.V.M.A.	RCR/Khula	4.9.18	20.10.18	46
178	16608	Sajida V.M.I.	Diss/Dismissed	14.9.18	29.2.19	165
179	16609	Khalida V.S.	Diss	14.9.18	29.1.19	135
180	16610	Jamal Akbar V.S.A.	Sale	15.9.18	17.6.19	265
181	16611	Hayyar V.M.N.	Appeal/Dismissed	22.9.18	17.6.19	265
182	16612	Hena A.V.I.A.	Khula	10.10.18	12.10.18	362
183	16613	Sajida V.S.	Diss	12.10.18	3.5.19	201
184	16614	Sharika B.V.M.A.	Diss	12.10.18	24.3.19	162
185	16615	Dehzadi V.A.	Diss/Dismissed	16.10.18	12.2.19	116
186	16616	Rukhsana B.V.NA.	Diss/Khula	17.10.18	19.3.19	152
187	16617	Tara V. Ruma	Good Beh/Warned	17.10.18	27.3.19	160
188	16618	Jamaratan V. Maqsood	Diss	20.10.18	22.5.19	212
189	16619	Sajida V.A.H.	Dower/Dismissed	20.10.18	01.2.19	101
190	16620	Khursheed A.V.A.B.	Obed./Comp.	25.10.18	28.2.19	123
191	16621	Sifan V.N.	Diss/Dismissed	26.10.18	28.3.19	253
192	16622	Wali A.V.G.	RCR/Comp.	26.10.18	26.1.19	90
193	16623	Adil V.N.	RCR/Dismissed	20.10.18	15.11.19	370
194	16624	Rashida V.A.M.	Diss/T. Maint	30.10.18	13.2.19	103
195	16625	Naushaba V.I.	Diss/RCR	1.11.18	22.2.19	141
196	16626	Shamima V.U.	Diss	1.11.18	3.4.19	152
197	16627	Afsana V. Maqsad	Diss	2.11.18	23.10.19	351
198	16628	Samina V.G.	Diss	2.11.18	15.4.19	163
199	16629	Shahnaz B.V. Abrar	Diss	3.11.18	20.8.19	267
200	16630	Keli V.W.	Diss/Div.	3.11.18	20.8.19	267
201	16631	Husn B.V. Zakaullah	Diss	4.11.18	3.5.19	176
202	16632	Shaista P.V. A.A.	Diss/Dismissed	5.11.18	19.7.19	235
203	16633	Bilquis V.A.M.	Diss	5.11.18	27.3.19	140
204	16634	Mehrun Nisa V.M.	Diss/Dismissed	8.11.18	15.7.19	247
205	16635	Tseif B.S.	Diss	8.11.18	26.8.19	288
206	16636	Rehana V.R.	Diss	9.11.18	3.5.19	172
207	16637	Afsana V.M.	Diss	9.11.18	5.4.19	146
208	16638	Farzana V.I.A.	Diss/Div.	10.11.18	3.7.19	130
209	16639	Rubi V.S.	Diss	15.11.18	30.3.19	135
210	16640	Jamila V.A.A.	Diss/Dismissed	16.11.18	6.3.19	109
211	16641	Tayyabun N.V.A.	Diss	18.11.18	28.4.19	160
212	16642	Murtaza V.S.	RCR	21.11.18	9.4.19	148

213	16643	Nabila V.N.	Diss	22.11.18	6.5.19	164
214	16644	Wasi Alam V.S.N.	RCR/Diss	23.11.18	11.3.20	468
215	16645	Sayeeda V.S.	Good Behave/Comp	22.11.18	25.7.19	243
216	16646	Tanzim A.I.V.N.B.	RCR/Condition	25.11.18	2.5.19	157
217	16647	Kulsum V.M.	Diss/Dismissed	25.11.18	14.4.19	139
218	16648	Bilquis J.V.R.R.	Diss	26.11.18	17.6.19	201
219	16649	Neyaz A.V.N.	RCR/T.Maint	28.11.18	21.7.19	233
220	16650	Sabina B.V.S.A.	Diss	29.11.18	14.4.19	135
221	16651	Noor A.V.N.	RCR	29.11.18	7.7.19	218
222	16652	Amina V.T.H.	Diss	1.12.18	22.6.19	201
223	16653	Naznin V.J.	Diss	1.12.18	14.4.19	133
224	16654	Samina V.A.	Good Behave	2.12.18	3.11.19	328
225	16655	Mehmood A.V. G.R.	Appeal	2.12.18	23.9.19	291
226	16656	Serun N.V.M.	Diss/Dismissed	2.12.18	18.5.19	166
227	16657	Shamlm V. Asma	RCR/Dismissed	2.12.18	14.4.19	132
228	16658	Saghirun V.A.K.	Diss/Dismissed	4.12.18	14.3.19	100
229	16659	Qaisar J.V.M.	Diss	6.12.18	18.5.19	152
230	16660	Shakeba V.R.A	Diss/Khula	21.12.18	6.5.19	135
231	16661	Anwari V.Q.A.	Diss	21.12.18	13.3.20	352
232	16662	Najmna V.S.	Diss	24.12.18	30.6.19	186
233	16663	Safun N.V.I.	Diss	24.12.18	18.7.19	204
234	16664	Sherun N.V.M.J.	Diss/Dismissed	25.12.18	29.4.19	124
235	16665	Saifun N.V.K.	Diss/Khula	27.12.18	16.8.19	229
236	16666	Public V. Mad. Comm.	Good Admin	27.12.18	29.4.19	122
237	16667	Noor Jahan V.A.H.	Diss	27.12.18	4.5.19	127
238	16668	Rukhsana V. Sabbar	Diss/Dismissed	27.12.18	30.6.19	183
239	16669	Murshid A.V.T.B.	RCR/Comp	27.12.18	3.7.19	183
240	16670	Nazreen V.J.	Diss	29.12.18	3.5.19	124
241	16671	Asfahani V.A.M.	Dist. or Prop	29.12.18	12.2.19	43
242	16672	Zarina V.R.	Diss	29.12.18	4.5.19	125
243	16673	Sharfuddin V.K.N.	RCR	29.12.18	19.8.19	230
244	16674	Zahana V.M.A.	Diss	29.12.18	5.10.19	276
245	16675	Abdul V.H.R.	Prop. Rig/Dismissed	29.12.18	5.10.19	276
				GRAND TOTAL		**54779**

Source: Imarat-e-Sharia, Patna, Bihar.

ALL INDIA MUSLIM PERSONAL LAW BOARD
AT A GALANCE

President

Initiation of Movement	December 27-28, 1972
Establishment	April 7-8, 1973
Total Members	251
Executive Members	46
General Members	149
Founder Members	102
Women Members	30
Number of Meetings of the Executive Committee	80
Number of Meetings of the General Body	20
Number of Committees	7
Social Reforms Committee	Convenor- Maulana Wali Rahmani
Darul Qaza Committee	Convenor- Maulana Ateeq Ahmad Bastvi
Nikahnama Committee	Convenor- Maulana Khalid Saifullah Rahmani
Rabita Madaris	Convenor- Maulana Syed Salman
Committee	Hussaini Nadwi
Babri Masjid Committee	Convenor- Dr. Syed Qasim Rasool Ilyas
Tafheem-e-Shariat	Convenor- Maulana Khalid Saifullah Rehmani
Committee	Convenor- Jb.Yusuf Hatim Muchala
Legal Cell	29
Number of publications	Convenor- Dr. Syed Qasim Rasool Ilyas
E-Mail Central Office	aimplboard@gmail.com / aimplboardvsnl.net
President's Office	E-mail: rabeynadwi@hotmail.com nadwa@sancharnet.in

President
(Maulana Syed Md. Rabe Hasani Nadvi)

Vice Presidents (5)

(**Maulana Syed Shah Fakhruddin Ashraf)**

General Secretary
(Maulana Khalid Saifullah Rahmani)

Secretaries (3)
(Maulana Mohammed Fazlur Rahim Mujaddidi)

Treasurer
(Prof. Riaz Umar)

Executive Com (46) | Founder Members (102) | General Members (149)

Committee (9)

President's Office | Central Office | G. S. Office

Nadwatul Ulama, Post Box No.93 Lucknow-226007 (U.P.)	76 A/1, Main Market, Okhla Vill. Jamia Nagar New Delhi-2	Imarat-e-Sharia, Phulwari Sharif Patna-801505 (Bihar)

GENERAL BODY MEETINGS

GLIMPSES OF GENERAL BODY MEETINGS OF THE BOARD

S. No.	Date of the Meeting	Place
1.	December 27-28, 1972 First Convention	Mumbai
2.	April 7-8,1973	Hyderabad
3.	February 22, 1975	Bangalore
4.	October 15-16,1977	Ranchi
5.	June 10-11,1978	Pune
6.	May 2, 1981	Hyderabad
7.	December 28-29, 1983	Chennai (madras)
8.	April 6-7, 1985	Kolkata (Calcutta)
9.	December 15-16, 1986	Mumbai
10.	March 4 4-5, 1989	Kanpur
11.	November 23-24, 1991	Delhi
12.	October 9-10, 1993	Jaipur
13.	October 7-8, 1995	Ahmedabad
14.	October 28-30, 1999	Mumbai
15.	April 23, 2000	Lucknow
16.	October 28-29, 2000	Bangalore
17.	June 21-23, 2002	Hyderabad
18.	March 1-2, 2003	Munger
19.	29-30 March & 1 April 2005	Bhopal
20.	10-12 January 2007	Madras (Chennai)
21.	29 February & 1-2 March 2008	Kolkata
22.	19-21 March 2010	Lucknow
23.	20-22 April 2012	Mumbai
24.	22-24 March 2013	Ujjain
24.	21-22 March 2015	Jaipur
25.	18-20 November 2016	Kolkata
26.	March 2018	Hyderabad

MEETINGS OF THE EXECUTIVE COMMITTEE

S. No.	Date	Place
1.	April 8, 1972	Oriental Palace, Hyderabad
2.	July 4-5, 1973	Purshottam Das Tandon Road, Allahabad
3.	August 11, 1974	Near Moti Masjid, Bhopal
4.	February 21, 1975	Hotel Hindustan, Gandhi Nagar (meeting was adjourned due to lack of quorum. The adjourned meeting was held on February 23 on same venue.
5.	November 30, 1975	Maharashtra College, Bilacity Road, Mumbai
6.	April 17-18, 1976	Masjid Dargah Hazrat Shah Waliullah Muhaddis Dehlvi, Mehdian, Khwaja Meer Dard Road, Delhi
7.	July 10, 1977	Western Court, New Delhi
8.	May 6-7, 1978	Muslim Musafirkhana, Charbagh, Lucknow
9.	December17, 1978	Western Court, New Delhi
10.	March 18, 1980	Bachchaon Ka Ghar, Daryaganj, Delhi
11.	November 20, 1980	Western Court, New Delhi
12.	December 6, 1981	82, Western Court, New Delhi
13.	November 6, 1982	Bachchaon Ka Ghar, Daryaganj, Delhi
14.	August 19, 1983	Western Court, New Delhi
15.	March 1, 1984	Darul Uloom Nadwatul Ulama, Lucknow
16.	August 24, 1984	Western Court, New Delhi
17.	May 14, 1985	Bachchaon Ka Ghar, Daryaganj, Delhi
18.	August 18, 1985	Bachchaon Ka Ghar, Daryaganj, Delhi
19.	December1-4 1985	Bachchaon Ka Ghar, Daryaganj, Delhi
20.	February 2, 1986	Bachchaon Ka Ghar, Daryaganj, Delhi
21.	February 23, 1986	Bachchaon Ka Ghar, Daryaganj, Delhi
22.	July 13, 1986	Bachchaon Ka Ghar, Daryaganj, Delhi
23.	November 4, 1986	Bachchaon Ka Ghar, Daryaganj, Delhi
24.	December 14, 1986	Saboo Siddiq Musafirkhana, Mumbai
25.	March 1, 1987	Jamia Raheemia, Meer Dard Road, Delhi
26.	April 25, 1987	Jamia Raheemia, Meer Dard Road, Delhi
27.	September 20, 1987	Nadwatul Ulama, Lucknow
28.	April 14, 1988	Jamia Raheemia, Meer Dard Road, Delhi
29.	September 18, 1988	Nadwatul Ulama, Lucknow
30.	March 4, 1989	Haleem Muslim Degree College, Kanpur
31.	August 20, 1990	Nadwatul Ulama, Lucknow

32.	December 3, 1990	Bachchaon Ka Ghar, Daryaganj, Delhi
33.	May 8, 1991	Nadwatul Ulama, Lucknow
34.	September 14, 1991	Bachchaon Ka Ghar, Daryaganj, Delhi
35.	November 24, 1991	Ansari Auditorium, Jamia Mafia Islamia, Delhi
36.	August 11, 1992	Gulmarg Hotel, Ameenabad, Lucknow
37	January 9, 1993	New Horizon School, Basti Hazrat Nizamuddin, New Delhi
38	May 15, 1993	Darul Uloom Nadwatul Ulama, Lucknow
39	October 9-10	Jamia Hidayat, Jaipur
40	December 5, 1993	Gulf Guest House, Basti Hazrat Nizamuddin, New Delhi
41	May 1, 1994	Nadwatu Ulama, Lucknow
42	November 30,1994	Central office of the Board, Delhi
43	June 18, 1995	Central office of the Board, Delhi
44	September 17, 1995	Nadwatul Ulama, Lucknow
45	October 6, 1995	Al Fazl Nagar (Gujarat)
46	January 16, 1996	Nadwatul Ulama, Lucknow
47	July 7, 1996	Bachchaon Ka Ghar, Daryaganj, Delhi
48	March 28, 1997	Central office of the Board, Delhi
49	November 23, 1997	Hall Suleimania Hostel, Darul Uloom Nadwatul Ulama, Lucknow
50	April 25, 1998	Central office of the Board, Delhi
51	September 20, 1998	Hall Suleimania Hostel, Lucknow
52	December 9, 1998	Arif Hotel
53	July 18, 1999	Nadwatul Ulama, Lucknow
54	February 8, 2000	Nadwatul Ulama, Lucknow
55	May 28, 2000	Central office of the Board, New Delhi
56	October 27, 2000	Darul Uloom Sabeelur Rashad
57	January 21, 2001	Central office of the Board, New Delhi
58	August 18, 2001	Central office of the Board, New Delhi
59	November 3, 2001	Jamia Hamdard
60	March 10, 2002	Hall Suleimania Hostel, Lucknow
61	April 25, 2002	Central office of the board, Delhi
62	June 21. 2002	Darul Uloom, Hyderabad
63	Sep. 22, 2002	Nadwatul Ulama, Lucknow
64	April 5-6, 2003	Nadwatul Ulama, Lucknow
65	July 6, 2003	Nadwatul Ulama Lucknow
66	October 18, 2003	Imarart Sharia Phulwari. Sharif Patna

67	4 July 2004	Darbi Hall Kanpur
68	December 25, 2004	Nadwatul Ulama, Lucknow
69	June 21. 2002	Darul Uloom, Hyderabad
70	Sep. 22, 2002	Nadwatul Ulama, Lucknow
71	April 5-6, 2003	Nadwatul Ulama, Lucknow
72	July 6, 2003	Nadwatul Ulama Lucknow
73	October 18, 2003	Imarart Sharia Phulwari. Sharif Patna
74	4 July 2004	Darbi Hall Kanpur
75	December 25, 2004	Nadwatul Ulama, Lucknow
76	April 29, 2005	Darul Uloom Tajul Masajid, Bhopal
77	August 28, 2005	Central Office Board, New Delhi
78	March 8, 2006	Darul Uloom Sabiturrashad,Bangalore
79	April 23, 2006	Jamia Hamdard, New Delhi
80	November 26,2006	Board's Central office, New Delhi
81	22 April 2007	Board's Central office, New Delhi
82	14 July 2007	Board's Central Office, New Delhi
83	25 November 2005	Board's Central office, New Delhi
84	29 February 2008	Jamuna Banquet Hall, Kolkata
85	6 July 2008	Board's Central office, New Delhi
86	7 February 2009	Jamia Islamia Bhatkal, Karnataka
87	12 July 2009	Malabar Hotel, Calicut, Kerala
88	20 December 2009	Darul Uloom Nadwa, Lucknow
89	6June 2010	Jamia Islamia Aurangabad
90	16 October 2010	Darul Uloom Nadwa Lucknow
91	23-24 October 2011	Darul Uloom Hyderabad
92	19 June 2011	New Horizon School New Delhi
93	26 November 2011	New Horizon School Delhi
94	20 April 2012	Haj House Mumbai
95	15 July 2012	Darul Uloom Nadwa, Lucknow
96	3 February 2013	Darul Uloom Nadwa Lucknow
97	22 June 2013	New Horizon School New Delhi
98	22 September 2013	New Horizon School New Delhi
99	31 May, 1 July 2014	Jalgaon, Maharashtra

100	20 March 2015	Jamia tul Hidaya, Jaipur
101	7 June 2015	Darul Uloom Nadwa Lucknow
102	9 December 2015	M Public School Amroha U.P.
103	16 April 2016	Darul Uloom Nadwa Lucknow
104	19 November 2016	Kolkata
105	15-16 April 2017	Darul Uloom Nadwa Lucknow
106	10 September 2017	Indira Priyadarshini College Bhopal M.P.
107	24 December 2017	Darul Uloom Nadwa Lucknow
108	9 February 2018	Owaisi Hospital Hyderabad
109	15 July 2018	New Horizon School, New Delhi

RESOLUTIONS UNDERTAKEN AT GENERAL BODY MEETINGS

Sl. No	Date	Place	Title of The Resolutions
1	December 27-28, 1972	First Historic Convention at Mumbai	Uniform Civil Code, Adoption Bill-1972, Protection of Shariah, and Decision to establish All India Muslim Personal Law Board.
2	April 7-8, 1973	Hyderabad	Formal establishment of the Board, Adoption of its Constitution, etc.
3	February 22-23, 1975	Bangalore	Sections 125 and 127 of the Code of Criminal Procedure, Children Bill, 1972 Organization of Personal Law Day
4	October 15-16, 1977	Ranchi	Uniform Civil Code, Emergency, Adoption Law, Law of maintenance contained in the Code of Criminal Procedure -1973, Expression of regrets over Shia-Sunni riots at Lucknow and Kanpur, Opposition to establishment of Tarkunde Commission to enquire into the internal affairs of Dawoodi Bohra community, Reduction of the quorum of Executive Committee from 15 to 11, Social reformation of Muslim community.
5	June 11-12, 1978	Pune	Preparation of literature and lecture for enforcement of Muslim Personal Law in Goa, Popularization of guidance of Islamic Shariah relating to various social issues, Social reforms, Relating to interference into the internal affairs of the Muslim community and Uniform Civil Code, Land Ceiling Act, For waiver of court fee in case of women.
6	May 2, 1981	Shalimar Bagh, Hyderabad	Section 125, 127 of the Code of Criminal Procedure, Section 13 (5) of the Income Tax Act, Article 44 of the Constitution of India
7	December 28-29, 1983	New College, Madras	Deliberation of non-application of Shariat Act-1937 in Goa and other such areas, Registration of Nikah.
8	April 6-7, 1985	Islamia High School, Kolkata	Central Waqf Act (1984 Amendment), Article 44 of the Constitution of India, In respect of Advancement of Legal Analysis, Social Reforms, Family Courts Act, 1984, Darul Qaza, Deliberation on application of Muslim Personal Law in the place of Portuguese Code.
9	December 15-16, 1986	Saboo Siddique Musafir Khana, Mumbai	Uniform Civil Code, Awqaf
10	March 4-5, 1989	Kanpur	Deliberation and Decision on the policy of the government on the implementation of Uniform Civil code
11	November	Delhi	Publication of Compendium of Islamic Law and other related literature, Darul Qaza, Acquisition of land with reference to Babri Masjid and Babri Masjid.
12	October 9-10, 1993	Jamia Hidayat, Jaipur	Social Reforms, Women, Interaction with mass media, Legal Evaluation Committee, Awqaf, relating to payment of government salaries to

			Imams of mosques, Establishment of Darul Qaza, Babri Masjid issue, sympathy with victims of earthquake in Maharashtra.
13	October 7-8, 1995	Al Faz1 Ahmadabad	Babri Masjid issue and Viewpoint of the Board, Observance of Protection of Sharia Week with reference to Uniform Civil Code, Social Reforms.
14	October 28-30, 1999	Hajj House	Uniform Civil Code, Freedom of Religion and Conscience, Social Reforms, Standard Nikahnama, Establishment of Darul Qaza
15	April 23, 2000	Mumbai	Election of new President
16	October 28-29, 2000	Lucknow	
17	June 21-23, 2002	Darul Uloom Sabeelur Rashad, Bangalore	Genocide of Muslims in Gujarat, Campaign against Islamic Institutions of Learning, Legal Proceedings Relating to Babri Masjid at Lucknow, Social Reforms, Darul Qaza
18	March 1-2,2003	Jamia Kahmani, Munger	Social Reforms, Islamic Institutions of Learning, Darul Uloom, Babri Masjid
19	29-30 March & 1 April 2005	Bhopal	Nomination of members on the vacant seats, to consider addition of new members, social reform, Hafta Tahaffuz-e-Shariat (Save Shariah Week), Campaign for Shariah Awareness, Presentation of Accounts and approval of budget, approval of Nikahnama, constitution of Tafheem-e-Shariat Commi-ttee (Committee for Explaining Shariah), Babri Masjid issue, Deeni Madaris
20	10-12 January 2007	Madras (Chennai)	Election of office-bearers, and members of the Executive Committee for the new term, social reform, Darul Qaza case, Tahaffia-e-Shariat, the case of Babri Masjid, Babri Masjid Committee, amendment in the Constitution regarding increase of members by 50, obligatory marriage Registration, presentation of accounts and approval of budget, Suryanamaskar and Vande Mataram, Legal Cell
21	29 February &1-2 March 2008		Awqaf, selection of 50 new members, nomination of Founder Members on vacant seats, Legal Cell, social reform, the case of Babri Masjid, obligatory marriage registration, Tahaffic-e-Shariat,, Babri Masjid Committee, • Darul Qaza, Islamic position on Babri Masjid, turning of Babri Masjid premises into a bullet proof structure, presentation of accounts and approval of budget

RESOLUTIONS TAKEN AT EXECUTIVE COMMITTEE MEETINGS

S. No	Date	Place	Title of the Proposal & Resolutions
1	April 8, 1972	Oriental Palace	Formal establishment of the Board, Adoption of its Constitution, etc.
2	July 4-5 1973	Residence of Janab Basheer Ahmad, Advocate, 33/A, Purushottam Das Tendon Road, Allahbad	Deliberation on the Assessment of entire Mohammadan Law in the light of Islamic Shariah, Deliberation on Preparation and Publication of Literature on Personal Law, Adoption of Children Bill (Bill 27 of 1972), New Code of Criminal Procedure-1973, Financial Act (New)
3	August 11, 1974	Residence of Col. Abdul Qayyum, Near Moti Masjid, Bhopal	Sections 125, 127 of the Criminal Procedure Code, Adoption of Children Bill-1972, Non-exemption of the Death Duty, Maintenance & Indian Majority Act
4	February 23, 1975	Hotel Hindustan, Gandhi Nagar (The meeting was adjourned due to lack of quorum. The adjourned meeting was held on February 23 on the same venue.)	Evaluation of Anglo-Mohammadan Law applicable in India in the light of Islamic Law
5	November 30, 1975	Maharashtra College, Bilacity Road, Mumbai.	Section 47 of the Maharashtra Land Ceiling Act, 1961 (as amended in 1972), Waqf Act, 1954
6	April 17-18, 1976	Masjid Dargah Hazrat Shah Waliullah Muhaddis Delhivi, Mehdin, Khawaja Meer Dard Road, Delhi	Family Planning, Issue of Population Crisis and forced vasectomy.
7	July 10, 1977	Western Court, New Delhi	Forced Vasectomy, Adoption Bill, Maintenance of Divorced Women, Sections 125 & 127 of Code of Criminal Procedure-Amended, Social Reforms
8	May 6-7, 1978	Muslim Musafirkhana, Charbagh, Lucknow	Sections 125 of Code of Criminal Procedure, Adoption Bill-1973, Article 44 of Directive Principles of the Constitution, Social Reforms.
9	December 17, 1978	Western Court, New Delhi	Issue of Protection of Masajid, Maqabir and Ma'abid, Awqaf, Article 13 of the Constitution, Land Acquisition
10	March 18, 1980	Bachchaon Ka Ghar, Daryaganj, New Delhi	Sections 125 & 126 of the Code of Criminal Procedure-1973, Land Acquisition Act, Popularisation of Muslim Personal Law movement, Shariat Application Act-1937, Article 44 of Directive 13. Principles of the Constitution, Adoption Bill, Maintenance of Divorced Women, Amendment in Muslim Personal Law and Uniform Civil Code, Awqaf, Deliberation on Establishment of a Muslim cell under the Ministry of Law.

11	November 20,1980	Western Court, New Delhi	Bill 1980-81, Calcutta Contract Tenancy (Acquisition and Regulation), Social Reforms, Awqaf, Agricultural Land, Land Ceiling Act of Gujarat, Maintenance of Divorced Women, Issue of Protection of Masajid, Maqabir, etc.
12	December 6, 1981	82, Western Court, New Delhi	Discussion on intervening in the writ no. 2365 of 1980 pending in the Supreme Court in respect of Sections 125 & 127 of Code of Criminal Procedure-1973, Income Tax laws, Maintenance of Divorced Women, Awqaf, Registration of Nikah, Amendment in the Section 9 of the Board's Constitution, Deliberation on Section 169 to 175 of the U.P.Zamindari Act-1950
13	November 6, 1982	Bachchaon Ka Ghar, Daryaganj, New Delhi	Maintenance of Divorced Women, Maharashtra Public Trust Act, Income Tax on Awqaf properties, Registration of Nikah, U.P. Zamindari Abolition Act-1951, Ceiling Act, Animal Protection Law of Maharashtra.
14	August 19, 1983	Western Court New Delhi	Condolence on the death of the founder President of the Board, Maintenance of Divorced Women, Regist-ration of Nikah, U.P. Zamindari Act-1950, Cent-ral Waqf Act, Adoption law, Article 44 of the Indian Constitution.
15	March 1, 1984	Darul Uloom Nadwatul Ulama	Case of Shahnaz Shaikh, Maintenance of Divorced Women.
16	August 24, 1984	Western Court New Delhi	Discussion on hostile attitude of the national press in respect of Muslim Personal Law, Case of Shahnaz Shaikh, Waqf Act, Right to Divorce to Whom
17	May 14, 1985	Bachchaon Ka Ghar, Daryaganj, New Delhi	Uniform Civil Code, Section 127 of the Cr.P.C. and Mohammad Ahmad Khan Vs Shah Bano, Sections 125 & 127 (b) of the Criminal Procedure Code-1973, Article 44 of the Constitution and Shariat Application Act-1937, Uniform Civil Code, Deliberations on Shariah Protection Day, Waqf law, Maintenance of Divorced Women.
18	august 18, 1985	Bachchaon Ka Ghar, Daryaganj, New Delhi	Shariah Protection Day
19	December 1-4 1985	Bachchaon Ka Ghar, Daryaganj, New Delhi	Expression of sorrow and anguish on the unprovoked firing on the procession at Patna on Shariah Protection Day, State Action Committees, Social Reforms, Shah Bano Case.
20	February 2, 1986	Bachchaon Ka Ghar, Daryaganj, New Delhi	Meeting with the Prime Minister on Section 125 of the Code of Criminal Procedure-1973, Shariah Protection Day, Memoran-dum and discussion with Union Law Minister and Members of the Parliament. on the issues of

			Mehr (Dower), maintenance of divorced women, etc.
21	February 23, 1986	Bachchaon Ka Ghar, Daryaganj, New Delhi	Babri Masjid issue, Rights of Muslim women, Social Reforms
22	July 13, 1986	Bachchaon Ka Ghar, Daryaganj, New Delhi	Maintenance of Divorced Muslim Women Bill, Social Reforms, Codification of Islamic Shariah.
23	November 4, 1986	Bachchaon Ka Ghar, Daryganj, New Delhi	Uniform Civil Code, Writs Pending in the Supreme Court, Shariat Protection Week with reference to Uniform Civil Code.
24	December 14, 1986	Saboo Siddiq Musafirkhana, Mumbai	Shariat Protection Week with reference to Uniform Civil Code, Maintenance of Divorced Muslim, Uniform Civil Code.
25	March 1, 1987	Jamia Raheemia Meer Dard Road, Delhi	Uniform Civil Code, Consideration on formulating a Nikahnama on behalf of the Board.
26	April 25, 1987	Jamia Raheemia Meer Dard Road, Delhi	Legal proceedings relating to Maintenance of Divorced Muslim, Uniform Civil Code, Waqf Act.
27	September 20, 1987	Darul Uloom Nadwatul Ulama Lucknow	Deliberation on The Muslim Women (Protection on Divorce) Act-1986, Definition of Divorced woman.
28	April 16, 1988	Jamia Raheemia Meer Dard Road, Delhi	Awqaf, The Muslim Women (Protection on Divorce) Act-1986.
29	September 18, 1988	Darul Uloom Nadwatul Ulama	The Muslim Women (Protection on Divorce) Act-1986, Supreme Court Decision on Divorced women, Shariah vis-à-vis national laws.
30	March 4, 1989	Haleem Muslim Degree College, Kanpur	The Muslim Women (Protection on Divorce) Act-1986, Standard Nikahnama, Fiqh Academy, Social Reforms.
31	August 20, 1990	Darul Uloom Nadwatul Ulama, Lucknow	Uniform Civil Code and meeting with and memorandum to the Prime Minister on the issue, The Muslim Women (Protection on Divorce) Act-1986, Compulsory Registration of Marriage Bill of the West Bengal, Deliberation on the issue of taking decisions of the Darul Qaza to the courts of law.
32	December 3, 1990	Bachchaon Ka Ghar, Daryaganj New Delhi	Shariah Position of the Babri Masjid and Board's viewpoint, Deliberation on Babri Masjid.
33	May 8, 1991	Darul Uloom Nadwatul Ulama, Lucknow	Condolence on the death of founder General Secretary, Appointment of part-time General Secretary, Uniform Civil Code.
34	September 14, 1991	Bachchaon Ka Ghar, Daryaganj New Delhi	Waqf act, the muslim women (protection on divorce) act-1986, contact with muslim and secular non-Muslim Members of Parliament, Invitation to Muslim and non-Muslim leaders and intellectuals in seminars and symposia, Social Reforms.
35	November 24, 1991	Ansari Auditorium, Jamia Millia Islamia, Delhi	Deliberation on the issue of acquisition of Qabaristan around Babri Masjid and issues

			relating to Masajid and Maqabir throughout the country, Publication of Compendium of Islamic law, Social Reforms.
36	August 11, 1992	Gulamarg Hotel, Ameenabad, Lucknow	Laws relating to land acquisition, Babri Masjid, Social Reforms, Awqaf, Darul Qaza and Shariah Panchayat, Cases under The Muslim Women (Protection on Divorce) Act-1986, Waqf Boards, Publication of Compendium of Islamic Law, Shariah position on Babri Masjid.
37	January 9, 1993	New Horizon School, Basti Hazrat Nizamuddin, New Delhi	Expression of sorrow and anguish over demolition of babri masjid and consideration of future strategy, Shariah position of a mosque and awqaf, condemnation of demolition of Babri Masjid.
38	May 15, 1993	Darul Uloom Nadwatul Ulama, Lucknow	Meeting with the Prime Minister regarding Mumbai riots, and apprise him of the Board's viewpoint on Babri Masjid, to demand reconstruction of Babri Masjid on the same spot, withdrawal of acquisition of Babri Masjid and adjoining land, withdrawal of single point reference under Article 143 of the Constitution and transfer of title suit under Article 138 of the Supreme Court, and not to construct Babri Masjid at some other spot through some government trust, Deliberation and adoption of resolution on the meeting with the Prime Minister on above points, Social Reforms, Publication of Compendium of Islamic Law.
39	October 9-10, 1993	Jamia Hidayat, Jaipur	Establishment of central media watch, women's cell, committee for legal evaluation, social reforms, new waqf bill, establishment of darul qazas, planning of programmed on December 6, 1993, issue of Babri Masjid.
40	December 5, 1993	Gulf Guest House, Basti Hazrat Nizamuddin, New Delhi	Matters relating to Babri Masjid
41		Darul Uloom Nadwatul Ulama, Lucknow	Triple Divorce, Babri Masjid Issue.
42		Central office of the Board, New Delhi	On the Judgement of the Supreme Court on Babri Masjid, Social Reforms, Publication of Compendium of Islamic Law. Condemn-ation of the police raid on the night of November 21-22 on Darul Uloom Nadwatul Ulama, Lucknow and deliberation on strategy.
43		Central office of the Board, New Delhi	Uniform Civil Code , publication of compendium of Islamic Law, Imams of the Masajid and government-paid Imams, Criticism of Supreme Court judgement in Sarla Mudgal Vs Union of India, Message to all Muslim organisations to raise their voice against Uniform Civil Code.

44		Darul Uloom Nadwatul Ulama, Lucknow	Maharashtra Province Marriage Act-1995, Legal Committee, Meeting with the President of India.
45		Al Fazl Ahmad Nagar (Guj arat)	Darul Qaza, Social Reforms, Issue of salaries to Imams, Attempt to implement Uniform Civil Code in Maharashtra, Second Nikah and two or more offspring.
46		Darul Uloom Nadwatul. Ulama, Lucknow	Shariah Protection Week to protest against Maharashtra's Adoption Bill, Social Reforms, Darul Qaza, Publication of Compendium of Islamic Law, Suits relating to Babri Masjid, Formation of Central Legal Committee.
47	July 7, 1996	Bachchaon Ka Ghar, Daryaganj New Delhi	Triple Talaq, Section 4 of The Muslim Women (Protection on Divorce) Act-1986, Babri Masjid, Publication of Compendium of Islamic Law, Social Reforms, Waqf Act.
48	Mach 28, 1997	Central office of the Board, New Delhi	Babri Masjid, Waqf Act, Social Reforms, Establishment of Darul Qaza, Publication of Compendium of Islamic Law.
49	November 23, 1997	Hall Suleimania Hostel, Darul Uloom Nadwatul Ulama, Lucknow	Rights of Divorced Muslim women, Babri Masjid, Waqf Act-1995, Social Reforms, Darul Qaza, Publication of Compendium of Islamic Law.
50	April 25, 1998	Central office of the Board. New Delhi	Darul Qaza, Publication of Compendium of Islamic Law, Modification in Muslim Personal Law, Babri Masjid Issue, Uniform Civil Code, • Protection of Shariah and Social Reforms.
51	September 20, 1998	Hall Suleimania Hostel, Darul Uloom Nadwatul Ulama, Lucknow	Protection of Muslim Personal Law, Protection of Islamic Shariah and Social Reforms, Cases in the Supreme Court, Liberahan Commission, Waqf Act-1995.
52	December 9, 1998	Arif Hotel, Shah Najaf Road, Lucknow	Babri Masjid, Enforcement of singing of Vande Mataram in the government schools in Uttar Pradesh, Protection of Muslim Personal Law, On the issue of trespass in the house of Maulana Ali Mian's House by anti-social elements, Publication of Compendium of Islamic Law, Social Reforms.
53	July 18, 1999	Darul Uloom Nadwatul Ulama, Lucknow	Law of maintenance of divorced Muslim women, Darul Qaza, Liberahan Commission, Suits relating Babri Masjid, Waqf Act-1995, On Press Council of India on the issue of baseless propaganda against Maulana Ali Mian, Media Watch Cell, Publication of Compendium of Islamic Law,
54	February 8, 2000	Hall Suleimania Hostel, Darul Uloom Nadwatul Llama, Lucknow	Condolences on the death of the Board's President Maulana Ali Mian, Uttar Pradesh Regulation of Public Religious Building and Place Bill-2000
55	May 28, 2000	Central office of the Board, New Delhi	Uttar Pradesh Regulation of Public Religious Building and Place Bill-2000, Friday Sermons, Media Cell, Lecture Series on Social

			Problems, Letters to the President of India, Prime Minister, Chief Ministers of Rajasthan. Madhya Pradesh, and West Bengal besides meeting with the political and religious leaders, Deliberation on holding a convention of Madaris and Imams of the Masajid of Uttar Pradesh, Social Reforms.
56	October 27, 2000	Darul Uloom Sabeelur Rashad, Bangalore	Social Reforms, Uttar Pradesh Regulation of Public Religious Building and Place Bill-2000, Nikahnatna.
57	January 21, 2001	India International Centre, New New Delhi	Babri Masjid Issue, Reconstitution of Babri Masjid Committee, Preser-vation of communal harmony and Basic Structure of the Constitution of India.
58	August 18, 2001	Central office of the Board, New Delhi	Expression of satisfaction over publication of Compen-dium of Islamic Law and deliberations on holding release ceremony for the same, Social Reforms, Establishment of Darul Qaza, Establishment of Madrasa Coordination Committee and discussion on its area of work, Group of Ministers on Education, Title of Babri Masjid, Liberahans Commi-ssion.
59	November 3, 2001	Central office of the Board, New Delhi	Maintenance of divorced Muslim women, Expression on regret, sympathy and condolences on loss of lives in Malegaon riots, and Afghanistan Babri Masjid.
60	March 10, 2002	Jamia Hamdard, New Delhi	Mediation efforts by Shankaracharya regarding Babri Masjid, Issue of Babri Masjid and the Board's viewpoint, Gruesome riots in Gujarat.
61	April 25, 2002	Central office of the Board, New Delhi	Condolences on the death of the Board's third President Qazi IVIuj ahidul Islam Qasmi, Deliberations on holding session for election of the new President, Deliberations on demolition of Masajid, Maqabir and Dargahs, and the massacre in Gujarat.
62	June 21, 2002	Darul Uloom, Hyderabad	Election of a new President of the Board.
63	September 22, 2002	Hall Suleimania Hostel, Darul Uloom Nadwatul Ulama, Lucknow	Board's delegation meets the President and Prime Minister 69. regarding demolition of masajid and maqabir, Protest campaign against madaris and demands from the Karnataka government to withdraw Madarsa Board Bill, Social Reforms, Establishment of Darul Qaza, Suit relating to Babri Masjid, Nikahnama.
64	April 5-6, 2003	Hall Suleimania Hostel, Darul Uloom Nadwatul Ulama, Lucknow	Social Reforms, Babri Masjid, Nikahnama, Reli-gious institutions, Darul Qaza, Condemnation of U.S. attack on Iraq.
65	July 6, 2003	Kutubkhana Ailama Shibli Naumani, Darul Uloom Nadwatul Ulama, Lucknow	Consideration of mediation efforts by Shankaracharya and Board's viewpoint on Babri Masjid.

66	October, 18, 2003	Imarat Shariah Phulwari Sharif Patna	
67	4, July 2004	Darby Hall Kanpur	
68	December 25, 2004	Darul Uloom Nadvwatul Ulama	Nikahnama, To found Reception Committee for Bhopal General Body Meeting, Babri Mosque
69	December 25, 2004	Darul Uloom Tajul Masaj id Bhopal	Islamic way of Nikah, Rights of wife and relatives, How and when to give divorce? Kuhla and Annulment of Nikah, and Distrbution of Inheritance properties, etc.
70	29, April 2005		About Tafheem Shariat Committee, Babri Mosque, About prohibition of feudal System in UP.
71	8, March 2006		Babri Mosque Committee Report,
72	23, April 2006		Babri Mosque
73	26, November 2006	Central Office Board New Delhi	Reformation of Society, Darul Qaza Committee
74	22, April 2007	Central Office Board New Delhi	for the inclusion of ahle Hadith, Shawafe and Isna Ashria Jurisprudence in the Body of Laws by Board, Consideration about the election of fifty members, issue of acquiring Muslims property in Ayudhya, Waqf Act 1995, The right of women to inheritance in agricultural land in UP. Reviewing the Wishwalochan Case, Adoption, Babri Mosque, Maintenance of Divorced Women, Islamic Madrasa.
75	14, July 2007	Central Office Board New Delhi	Of occurring Talaq, issue of divorced women, Committee on Reformation of society, for the establishment of Darul Qaza, Waqf Act 1995, Amendments to the Waqf Act 1995, in the regard of Board's Delegates' trips in different parts of the country.
76	25, November 2007	Central Office Board New Delhi	Compulsory Marriage Registration, Delhi High Court Decision about Talaq, Babri Mosque Case, Darul Qaza Committee, about the appointment of new convener of Tafheem-e-Shariah Committee, Committee on Reformation of Society, Consideration about the election of fifty members, review of the preparation for 20th General Body Meeting in Kolkata, Solidarity of finance, Adoption.
77	29, February 2008	Jamuna Banquet Kolkata	Consideration about the election of fifty members, Establishment of Committee, Compulsory Marriage Registration, Reformation of Society, Narineketan, Babri Mosque, Adoption, Consideration upon dismissing the role of Islamic Madrasas by

			Government and Intelligence Services, Madrasa Board.
78	6, July 2008	Central Office Board New Delhi	Darul Qaza Case, Adoption, English Translation of Majmua Qawanin, Babri Mosque, to bring Nikahnama of the Board to Masses, Committee on Darul Qaza, Tafheem-e-Shariat Committee, Compulsory Marriage Registration, Nari Niketan, Accounts, the marriage of two sisters, Consideration upon the suggestion of Tahir Mahmood for the Law Commission.
79	07, Feb. 2008	Jamia Islamia Bhatkal (Karnatak)	Babri Masjid, Tafheem-e-Shariat, obligatory marriage registration, social reform, Legal Cell, the case of Darul Qaza, English translation of Compendium of Islamic Laws, fixing the venue of 21st session of the Board, abolition of Uttar Pradesh Zamindari Act, central madrasa board, Islamic position of beard.

PUBLICATIONS OF AIMPLB

S. No	Name of Books	Writers/Editors/Compliers	Language
1.	Compendium of Islamic Board Laws (Majmua-e-Qawaneen islami)	Board	English
2.	Majuma-E-Yawaneen Islam	Board	Urdu
3.	The Establishment of Qaza System	Ml. Qari Mohammad Tyyeb	Urdu
4.	Qanoon Shariat ke Masadir aur Nay Masail Ka Hal (Sources of Shariah and Solution of New Issues)	Ml. Syed Minnatullah Rehmani	Urdu
5.	Uniform Civil Code	Ml. Syed Minnatullah Rehmani	Urdu
6.	Uniform Civil Code	Ml. Syed Minnatullah Rehmani	Urdu
7.	Nikah aur Talaq	Ml. Syed Minnatullah Rehmani	Urdu
8.	Nikah aur Talaq	Ml. Syed Minnatullah Rehmani	Urdu
9.	Muslim Personal Law	Ml. Syed Minnatullah Rehmani	Urdu
10.	Khandani Mansoobabandi (Family Planning)	Ml. Syed Minnatullah Rehmani	Urdu
11.	Muslim Personal Law ki Sahih Nauiyat o Ahmiat (True Nature of Muslim Personal Law and its Importance)	Ml. Syed Abul Hasan Ali Nadvi	Urdu
12.	Muslim Personal Law ka Taruf o Tajzia (Introduction of Muslim Personal Law and its analysis)	Qazi Mujahidul Urdu Qazmi	Urdu
13.	Do	Do	English
14.	Do	Do	Hindi
15.	Do	Do	Bangla
16.	Do	Do	Tamil
17.	Do	Do	Kannad
18.	Do	Do	Telugu
19.	Dastoor-e-Hind aur Uniform Civil Code (The Quraishi Constitution of India and the Uniform Civil Code)	Md. Abdul Rehim	Urdu
20.	AIMPLB Sargarmiyon ka Khaka	Md. Abdul Rehim Quraishi	Urdu
21.	Islah-e-Muashra (Reformation of Society)		
22.	Uniform Civil Code, Muslim Personal Law and the Women's Rights	Ml. Burhanuddin Sanbhali	Urdu
23.	Khawateen ke Mali Huquq Islam ki Raushani men (Women's Financial Rights in the Light of Shariah)	Ml. Khalid Saifullah Rehmani	Urdu
24.	Talaq ke Istemal ka Tariqa (The proper way of giving divorce)	Ml. Sagheer Rehmani	Urdu
25.	Do	Do	Hindi
26.	Warasat men Pote ka Hissa (The Share of Grandson in Inheritance)	Ml. Zubair Ahmad Qasmi	Urdu

27.	Islam ka Nizam-e-Miras (Inheritance System in Islam)	Ml. Ateeq Ahmad Bastawi	Urdu
28.	Hindustan aur Nizam-e-Qaza (India and Qaza Bastawi System)	Ml. Ateeq Ahmad Bastawi	Urdu
29.	Nizam-e-Qaza ka Qeyam, Ahmiat-o-Zaroorat (Establishment of Darul Qaza; Importance and Necessity)	Ml. Ateeq Ahmad Bastawi	Urdu
30.	Islami Parda Kiya aur Kaiyon (Islamic Parda: Nadvi What and Why?)	Dr. Raziul Islam	Urdu
31.	Rehnuma-e-Darul Qaza (A Guide to Darul Qaza)	Ml. Abdussamad	Urdu
32.	Taqreebat Ka Len-Den Aur Uske Mafasid (Transactions In Ceremonies And Their Adverse Bearings)	Ml. Obaidullah Asadi	Urdu
33.	Talaq Kiyon aur Kaise (Talaq Why and How)	Dr. Mufti Urdu Faheem Akhtar Nadvi	Urdu
34.	Khawateen ki Azamt aur Unke Huquq Islam Ki Hussain Nimwi Nazar men (The Glory of Women and their Rights in Islam)	Mfuti Md. Khalid Hussain Nimwi	Urdu
35.	Masail-e-Nikah (The Issues of Nikah)	Ml. Sirajuddin Qasmi	Urdu
36.	All India Muslim Personal Board Khidamat aur Sargarmiyan (AIMPLB: Services and Activities)	Board	Urdu
37.	Khutabat-e-Juma (Friday Sermons)	Board	Urdu
38.	Muslim Personal Law se Motalliq Parliament se Manzoor Shuda Mutafarriq Act (Different Acts concerning Muslim Personal Law that were recognized by the Parliament)	Board	Urdu
39.	Muslim Personal Law aur Adalaton ke Faisle (Muslim Personal Law and Judgements of Courts)	Board	Urdu
40.	Muslim. Personal Law Naye Marhale Mein (Muslim Personal Law in the New Phase)	Ml. Syed Minnatullah Rehmani	Urdu
41.	Muslim Personal Law Bahas-o-Nazar ke Chand Goshe (A Few Points of Debate and Discussion on Muslim Personal Law)	Ml. Syed Minnatullah Rehmani	Urdu
42.	Tahaffuz-e-Deen ka Mansooba (Scheme to Protect the Religion)	Ml. Syed Minnatullah Rehmani	Urdu

Appendix I: Model-*Nikahnama* of the AIMPLB

This version of the contract was translated from Urdu into English.

Nikahnama

1. Place of *Nikah* ..... post ..... Block / mandal district ..... State .... date ..... time ..... name of the nikah performer ..... full address of the place ..... — Signature

2. Name of the groom ..... father's name ..... mother's name ..... age ..... nationality occupation ..... Rank in occupation..... full address ..... — Signature of groom

3. Name of the bride ..... father's name ..... mothers name .... age ..... nationality full address ..... — Signature of bride

4. Gaurdian of bride ..... father's name ..... age ..... occupation ..... Relation of bride ..... full address..... — Signature of guardian

5. Name of *waakeel* ..... father's name ... . age ..... occupation ..... relation to bride ..... full address ..... — Signature of *waakeel*

6. Name of the withness (1) ..... fathers' name ..... age ..... occupation ..... full address .... Signature of witness

7. Name of witness (2) ..... father's name ..... age ..... occupation ..... full address .... Signature of witness

8. Amount of the Mehr ..... in words .... in numbers .... given at the time of Nikah .... given after Nikaah ..... Signature of the *nikah* performer with date

Signature of bride Signature of groom

Igrarnama

The person performing the *nikah* has to ensure that the following criteria are met by the groom and the bride:

1. The man and woman agreeing to the marriage should not be related by direct blood relationship (sibling), nor should they be foster siblings or a close relative from the paternal or maternal side
2. The woman agreeing to the marriage must not be the sister, aunt (maternal or paternal), niece or a direct relative of the earlier divorcee of the man.
3. The woman cannot be married to another man at the time of this marriage.
4. The woman must not be in *iddat* either after a divorce or after death of the earlier husband at the tome of the *nikah*.
5. The woman must not be an earlier divorcee of the same man she is giving her consent to marry now.
6. The *Shariat* allows more than one spouse for the man given that all his wives are given equal rights and justice.
7. No demand for dowry can be made at the time of *nikah*.
8. The *mehar* should be paid at the time of the *nikah*.

I have been and have affirmed that there is no infringement on the *Shariat* laws and hence all the pre-marriage investigation/affirmation given above have been completed.

Hidayatnama

Marriage is a gif of God. It is mentioned in a *Hadith* that Rasulullah *sallallahu alayhi wa sallam* said: "Marry so that I can be proud of you." So, the one who is able to (fulfil the rights of a wife) should marry. By the grace of God, we are Muslims and we testify that we will follow the rules of *Shariat* as a service to God.

1. It is mentioned in a *Hadith* that when the husband and wife look at each other (with love), *Allah Taala* looks at both of them with mercy.
2. It is mentioned in a *Hadith* that Allah Taala has taken it upon Himself (i.e. out of His mercy, He as taken the responsibility) of helping the person who gets married in order to attain purity from that which Allah has made *haram*. In other words, the person who marries in order to save himself from adultery with the intention of obeying Allah Taala, Allah will help and assist him in his expenses and other affairs.
3. *Allah Taala* has given great rights to the husband and has attached a lot of virtue to him. Pleasing the husband and keeping him happy is a great act of *ibadat* and displeasing him or keeping him unhappy is a major sin. Rasulullah sallallahu alayhi wa sallam said: "Were I to command anyone to prostrate to anyone other than *Allah*, I would have commanded the woman to prostrate to her husband. If the husband orders his wife to carry the boulders of one mountain to the next mountain, and the boulders of the next mountain to a third mountain, she will have to do this."
4. Rasulullah sallallahu alayhi wa sallam said: "When the husband calls his wife, she should go immediately to him even if she is busy at her stove." In other words, no matter how important a task she may be busy with, she should leave it and go to him.
5. A person asked: "Who is the best woman?" Rasulullah sallallahu alayhi wa sallam replied: "The best woman is one who pleases her husband when he looks at her, when he asks her to do something she obeys him, and she does not do anything that may displease him with regard to his wealth and honour."
6. Among the rights of the husband is that the wife should not remain in an untidy, dishevelled state. Instead, she should always remain clean and beautiful for her husband. In fact, if she remains untidy and dishevelled despite her husband ordering her to remain clean, he has the right of beating her (lightly) in order that she may obey him.

7. Another right of the husband is that she should not leave the house without his permission irrespective of whether it be the house of a friend, relative or anyone else.
8. It is mentioned in a *Hadith* that it is a major sin for a husband to be neglectful towards his wife and to have shortcomings in fulfilling her right to shelter and food.

We will fulfill the responsibilities we have towards each other. We will give our full efforts to make this a happy marriage. But, God forbid if any difference arise between us then the *Darul Qaza Nadwatul* – Ulama, Lucknow will be our mediator. We will follow the decision made by them.

Signature of Groom

Signature of Bride

Signature of Witness 1

Signature of Witness 2

Appendix III: *Shariat Nikahnama*: Model-*Nikahnama* of the AIMWPLB

This contract was translated from Hindi into English.

Promote goodness and bring an end to bad habits

Brothers and sisters! Our aim is not to prove us or prove others wrong, but to provide the correct information about Islamic *Shariat* to families.

For this purpose, I make the following requirements:

1. I request my brothers and sisters to read the translation of *Quran*.
2. I request parents to make their sons/daughters read the translations before their children's marriage so as to make them aware of the rights and regulations and to prevent problems in future. If the spouses are not aware about the dos/don'ts they may unknowingly commit some mistake, which might disperse their families forever. Every person dreams about his/her prosperous and loving marriage and in case the spouses are not aware of their rights written in the holy *Quran*, their dream would remain a dream.
3. I deeply believe that once every one is aware of their duties and rights bestowed upon them by God the almighty there will be no mistrust between family members. This will save the families from the tragedy of a marital break-up.
4. You all are aware that every Muslim's soul lies in the *Shariat* because the *Shariat* makes every Muslim a complete believer. On the basis of *Shariat* a Muslim checks his attitude and behaviour and decides whether he is going right or wrong. If a believer always keeps these *Shariat* in mind than there is no way that he can go wrong in his behaviour, conduct and working. It will always stop him from taking any wrong step. If every Muslim properly follows the *Shariat* than I can vouch and say that there would be no dispute between husband or wife, or family or in the society. Even in case of some dispute the people would come together peacefully and talk together to find a solution.

Therefore, we recommend that every Muslim must be aware of the *Shariat*. The All India Muslim Women Personnel Law Board has created this *Shariat Nikahamah*, which will hopefully be useful for creating a happy married life.

Iqrarnama

1. Whoever listened and obeyed prophet they have in fact obeyed Allah, the almighty God. And the person who doesn't obey you then you are not responsible for them – From the *Quran.*

Surah Nisa – Verse 80

2. The life and actions of Prophet Muhammad (P.B.U.H.) is a very good example for the people.
3. O believers! You have no right to take the right and property of women without their agreement.

Surah Nisa – Verse 19

4. Pay your wives *mehr* to the best of your abilities.

Surah Nisa – Verse 4

5. If you cannot do justice to all then marry only one (in respect to marriages).

Surah Nisa – Verse 3

6. If differences arise between the husband and wife then bring just and honest family members of both the sides, sit together and solve the problem, verily Allah is aware of everything.

Surah Nisa – Verse 35

7. The women whom you agree to give divorce must be treated nicely and fairly.

Surah Nisa – Verse 24

8. Do not throw out the women from you homes while they are in their period of *iddat.* Woman too must not leave her house.

Surah Nisa – Verse 1

Shaista Amber
President
All India Muslim Women's Personal Law Board

Nikahnama

For the Marriage Bureau
Place of Marriage ..... & Country

1. Post Office ..... Address .....
   City / Town ..... Date .....
   Acc. to Islamic Calendar ..... Day .....
   Time .....
   Name of Groom .....
   Name of father (Groom) .....
   Name of mother (Groom) .....
   Date of Birth ..... Nationality .....
   Occupation .....
   Permanent & Registered Address .....

Signature of Groom

If marriage done in court by lawyer then name of lawyer .....
.....
Age ..... post ..... Address
.....

Signature of Lawyer

2. Name of bride .....
   Name of father (Bride) .....
   Name of mother (Bride) .....
   Date of Birth ..... Nationality .....
   Occupation .....
   Permanent & Registered Address .....
   Signature of Bride
   Name of bride's guardian .....
   Age ..... Occupation .....
   Relation to the bride ..... Address .....
   .....

Signature of the guardian

If there is no witness from the bride's side at the time of the ceremony, two people present at that time have to sign the contract as witnesses to the marriage.

Witness to the marriage

3. Name of witness (1) .....
   Age ..... Occupation .....
   Address. .....
   Name of Witness (2) .....
   Age ..... Occupation .....
   Address. .....

Signature of *Mullah*

Signature of Bride

Signature of Groom

With *Allah*, the almighty, as our witness we agree to be married to each other. We will try our best to remain happily married to each other. I pledge that to the best of my ability I will support my husband through the good and the bad, and will follow the *Shariat*. I too, pledge that I will follow the *Shariat* and will support my wife through good and bad times to the best of my ability. We will follow the *Shariat* in case of any problem and god forbid in case of divorce too we will seek the guidance of the holy *Quran*. We will keep faithful to each other.

Prayer

O the giver of sustenance! Bestow your blessings, love, prosperity and patience on them and give them beautiful children and your blessing.

Shariat-e-Islam is a pure and established set of rules. The marriage ceremony is not only considered as an event but also as a service to God.

Hidayatnama

The bride and groom are expected to lead a happy and peaceful life. The marital bond cannot be broken without a valid reason.

1. The person reading out the *nikahnama* should be an adult, having a sound mind. He must be Muslim by faith and should have the complete knowledge of the *Shariat*.
2. He / she should clearly tell the rights and duties obligatory on the husband and wife.
3. The name of the bride and groom to be registered should be properly written without any mistake. Either of them cannot be forced to marry the other as such a marriage would be considered void. The guardians of both the side should take care that they must not marry their children if they are still in the juvenile ages. It is best for the sides, that the bride and groom should on their own free will agree to merry each other.
4. Forcing the bride's family to pay dowry is against Allah's wishes and contrary prophet Muhammad (P.B.U.H.) *dunnah*. We must follow our prophet's *sunnah*. Hazrat Ali at the time of his marriage to Fatima (RTA) gave her *mehr*, which were to the best of his abilities at the time.
5. If the wife decides to forego her *mehr* then it should be checked that she did it on her own decision and not under pressure.
6. *Mehr* is a compulsory obligation on the husband, which he must give to his wife at the time of marriage. If due to circumstances he isn't able give it at the time of marriage, then he must do so whenever it becomes possible for him and be attains the means.
7. Husband and wife are supposed to respect and support each other. The husband cannot take his wife as a housekeeper because, she like him, is also the master of the house and thus he must not overburden her with work. She too deserves respect. Likewise, the wife must also give respect and honour to her husband. Both should be loyal to each other and must not cheat the other partner.
8. It is duty of the husband to look after the welfare of his wife. He is to provide for her shelter, food, clothes etc. He is to do so to the best of his abilities.
9. Both of then must treat each other well and happily. It is not right that when wife goes out she dresses to her best but when the husband returns she meets him in her dirty cloths.
10. The women who loves her husband, and is more ready to solve problems rather than creating them and can apologies when she commits some mistake is surely someone who deserves paradise.
11. The wife must not demand more than the husband can afford.
12. The couple should take care that the close relatives of their spouse must not interfere or cause a rift between them.

13. The relatives of the spouses must be given equal respect as they give their own parents.
14. The Holy Prophet Mohammad (PBUH) has strictly forbidden the husbands from hurting their wives in any way either physical or mental.
15. It is better for the in-laws to consider their daughter-in-law as their own daughter. Both the sides must give respect to the family members of their son's/daughter's spouse.
17. All the intelligent and balanced people follow the straight path and never confuse the right with the wrong.

Talaq when followed as according to the _Shartat_ irrevocably ends a marriage

1. _Talaq_ is not something to be said in anger or retaliation, but instead, _talaq_ is only given in dire need or when no other way is left.
2. From all the things Allah despises, he despises _talaq_ most.
3. Despite His strong dislike, _Allah_ legalised _talaq_ for Muslims.
4. The husband must treat the woman who was earlier his wife properly. He should not throw her out of the house, but instead give her means that she can live her life in peace.
5. At the time of giving _talaq_ to his wife the husband must follow all the _Shariat_ and should take this step after seeking guidance from a religious scholar. It may be that after sometime both, the husband and wife, are able to bury the hatchet and come to an understanding. In case the decision is final there should be a mullah or scholar who would read out the _talaq_ and there should also be two witnesses who should be firm in their faith and would not waver in what they witnessed.
6. All the gifts which the wife received in the time between the marriage and _talaq_ from her husband's family, or his relations or his friends are now hers and must not be taken back from her.
7. According to _sunnah talaq_ can only be given when the woman is not menstruating. This way she can count her period of _iddat_.
8. Neither the husband should nor should the wife leave her husband's house, before the period of _iddat_ is complete because it may be that they both come to an understanding.
9. _Talaq_ is not considered when the husband is drunk, asleep, ailing from some disease in which when he cannot think straight. It is also not considered via e-mail, S.M.S. or via phone. Sometimes the husband doesn't give his wife _talaq_ but tortures her endlessly. In such a case she herself can take _khul_ from her husband.

10. Whatever the husband and wife decide in *khul'* is acceptable but the wife cannot demand more than the *mehr* she received.

The marriage is naturally ended if the husband

1. is missing from four years or more.
2. refuses to give the wife her right.
3. behaves in a cruel manner to his wife.
   These are:
   (a) If the husband has an illicit relationship with other wife.
   (b) Makes her life miserable.
   (c) The husband hides that he carries the HI virus even before they were married. This is valid because hiding such a serious condition is equal to cheating.

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