Journal of Islamic Law Review, Vol. 14, No. 2, December 2018, pp. 315-337

DEVELOPMENT OF MUSLIM LAW IN INDIA: A RETROSPECT

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*The present article succinctly traces the development of Muslim law in India through the ages. Muslim law in India has evolved over the years along with changes in the law, politics and the society. During British rule, Muslim law in India developed under the shadow of the English law. Subsequently, it was shaped by way of codifications such as Muslim Personal Law (*Shariat*) Application Act, 1937 and Dissolution of Muslim Marriage Act, 1939. Post independence, judicial decisions contributed substantially to the existing corpus of Muslim law. As and when courts had to decide critical questions requiring interpretation of the basic tenets of Muslim law, courts, especially the apex court, added to the evolving jurisprudence of Muslim law. There are scores of such decisions that have been instrumental in shaping the contour that Muslim law in India has today, though occasionally there have also been controversies owing to judicial pronouncements. Moreover, the Indian Constitution eloquently recognises and protects the aspirated ideals of religious freedom and secularism.*

I. Introduction

Having the basis of the original sources of Islamic law, the Qur'an and *Sunnah* (Prophetic traditions), Muslim law in India has developed over the years deriving its some contents from time to time from the experiences, including *ijma* (consensus among 'Ulama), *ijtihad* (analogy), *istihsan* (juristic discretion/interpretation), *fatwa* (a ruling on a point of Islamic law given by a recognised authority), that have been instrumental in shaping its corpus. It is also reflective of the *facts* and *facets* that are essential to understanding the moorings and

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flourishing of Muslim law in India. During the course of its development over the years, it has been through a process of adaptations. Though Muslim law in India is not majorly uncodified, there have been some notable legislation touching upon the selected but important aspects of Muslim law. Moreover, there are judicial decisions which now form part of Muslim law. However, all of this needs to be seen in view of the constitutional provisions that guarantee freedom of religion and put in place a firm basis for secularism to flourish respecting the tenets and practices of different religious people living in India, though the Constitution does talk about endeavouring for a uniform civil code.[1] Moreover, in India, Muslim law is part of civil law, and is administered by the State courts, that is, there are no religious courts to administer Muslim law, though there is a system of *Shariat* courts (*Dar-ul-Qazas*) which settle disputes relating to family law. Supreme Court of India, however, has clearly held that *Shariat* courts do not have any legal sanctity.[2] There are two classes of Muslim in India: the *Sunnis* and the *Shias*. The Sunnis are in majority in India, especially those belonging to Hanafi School of Thought.[3]

All said, it is important to note, as Tahir Mahmood remarks, although it is his isolated opinion, that, "It is wrong to equate the Muslim personal law as applicable in India with either the *Quran* or the *Hadith*. In the principles of this law, there is undoubtedly more human element than divine. Not all of these laws are written in the *Quran* or in the *Sahaih Sitta* (the six authentic collections of Traditions). Since only some of the various schools of Islamic law are prevalent in India, it may be said that most principles of the Muslim personal law as applicable here are based on the particular gloss put on the revealed or inspired texts by the ancient jurist-theologians of these schools. Certain provisions of the Indian 'Muslim personal law' were even given their present form by the Indian legislatures and courts. So, it is a historical fact that the Muslim personal law today applicable in India is not (at least not wholly) a divine law."[4]

It is true to say that in India Sunni Islamic law (Muslim Law) is combination of revealed law (the Qur'sn and *Sunnah*) and interpreted

law (*fiqh*) mainly of Hanafi School of Thought. It may be noted here that Mohammadan law in India developed during British rule does not truely reflect the Muslim law. Likewise, certain orientalist critics of Islamic law, who held negative views of Islam until the middle of the 20th century',[5] perhaps, did so either due to ignorance of actual laws or out of vengeance.

The present paper, therefore, is an effort to trace the development of Muslim law in India with the above mentioned caution, it also takes into account both the settled as well as the controversial aspects of the subject matter. The paper is divided into five parts.

A Brief Historical Backdrop

As it has been rightly observed, "The nucleus of Muslim law had come into existence along with Islam… [and] as Islam grew with the pace of time, so did Muslim law, eventually culminating into a magnificent system of jurisprudence covering all branches of law and all legal subjects."[6] The jurisprudence so developed covered both public and private laws. It is divine in its origin. It all started in Arabia. The Islamic legal system has imprints of Arabia's social history. Though it had divine origins, it was in the years to come developed by Arab jurists. Abdur Rahim says, "…the groundwork of the Muhammadan legal system…is to be found in the customs and usages of the people among whom it grew and developed."[7] The pre-Islamic customs are an integral aspect of Islamic legal system. When Islam came into existence, it did not replace the already existing custom and practice *in toto*. Many of them continued to be relevant.[8] There is no denying the fact that Islamic law has Qura'nic foundations. However, these *foundations* included "much of the customary law of the Arabs"[9].

According to Abdur Rahim, the history of Muhammadan law, after the promulgation of Islam, is divisible into four periods.[10] The period covers the time lag between Prophets retirement to Madina (622 A.D.) and his death in 632. The second period starts with the death of the prophet and ends with the time of the Companions of the Prophet and their successors. During the third period, the four Sunni Schools were established. The fourth period is "yet to come to

an end"[11]. With the passage of time emerged different schools having noticeable distinctiveness and identity rooted *in* and reflective *of* historical happenings. Also noticeable is the categorisation of different sources of Muslim law over a long period. As Muslim law grew, different sources of it became well established giving *coherence* and *clarity* to the understanding of Muslim law.

Quran is the foremost source of Muslim law followed by *Sunnah* or *Hadis*. Quran is the sacred book of Islam and is believed to be of divine origin. It contains the revelations made to Prophet Mahommed by Gabriel. Pearl and Menski describe Quran as "a contemporary document which reflects the life and aspirations of Mohammad and his followers in their efforts to create a new community in Mecca and Medina."[12] Besides, there are two other sources: *Ijma* and *Qiyas*. *Sunna* represents the actions and sayings of Prophet Mahommed. *Ijma* is consensus of opinion while *Qiyas* stands for analogical deductions.[13]

II. Muslim law during British period

The story of English Law in India begins in 1661, a time when the politically dominant law of the sub-continent was Muslim law while the majority of the people remained governed by the Hindu personal law.[14] As Rautenbach recounts, "Before British rule, Hindu, Muslim, and Jewish personal laws were applied in India and during their rule the British implemented a policy of non-interference in the personal laws of the local population. The current Indian government follows much the same policy notwithstanding considerable legislation involving certain of the personal laws."[15] During British period, for example, Warren Hastings mandated by Regulation of 1772 that: "In all suits regarding marriage, caste, and other religious usages and institutions the law of the *Koran* with respect to the Mohammedans and of the *Shaster* with respect to the *Gentoos* shall be adhered to."[16]

In 1935 the local legislature of the North West Frontier Province passed an Act. It provided that a large number of matters as to which custom had been the rule of decision primarily applicable by the Courts should in the future be decided in accordance with the Muslim Personal Law (Shariat) where the parties are Muslim.[17] Provincial

Act of 1935 was followed in 1937 by an all-India Act passed by the Central Legislature. It was to be known as the Muslim Personal Law (*Shariat*) Application Act, 1937. Section 2 of the Act clearly provided that "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)." Commenting upon the legislative enactments, Sir Rankin observed that:[18]

> *These legislative changes were made in accordance with Muslim opinion: indeed by the force of sentiments prevailing widely among Muslims and strongly represented in the Indian Legislative Assembly. Much of the care taken by the Legislature (since 1872 at least) to respect the customs of the people has, it would seem, been misguided. We are now witnessing a revolt against custom and in favour of the law-that is, the personal or religious law of the parties. It is, I think, a new phenomenon in the relations between law and custom.*

In 1939, Dissolution of Muslim Marriage Act was passed. Under the Act, a women married under Muslim law is entitled to obtain a decree for dissolution of her marriage on any of the grounds mentioned in the Act.[1919] The grounds mentioned under section 2 of the Act are:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;

The Act was an effort to reform Muslim law as regards women's right to dissolution of marriage, and it is applicable to all Muslim in India. According to Tahir Mahmood:[20]

> *The Dissolution of Muslim Marriages Act, 1939 was enacted, in fulfilment of a desire of the whole Muslim community, voiced by [some] organizations … and leaders… in order to check the growing tendency among certain sections of Muslim women. to renounce Islam with the sole purpose of repudiating their husband. The Act comprises two main provisions. First, it abolishes the traditional principle under which apostacy by a Muslim woman would ipso facto dissolve her marriage. Secondly, it specifies and illustrates a large number of grounds, basically derived from the Maliki school of Islamic law, on which a Muslim wife can seek dissolution of her marriage by the court.*

III. Muslim Law and Post-Constitutional Developments: Uniform Civil Code

The apprehensions and question raised in the Constituent Assembly have over the years engaged many a legal mind, and arguments both in favour of a Uniform Civil Code, and opposite it, have remained relevant. And therefore, the voices of wisdom heard in the Assembly need to be revisited in order to understand and appreciate what founding fathers thought about it, and how they wished it to be. Such an important provision of the constitution having socio-political implication cannot be debated about without revisiting the *foundational moments* that shaped the contours and content of article 44 of the constitution.

In constituent assembly, apprehensions were raised as to the impact and need of such a Civil Code. The apprehensions were primarily expressed by the members belonging to the minority communities. Many questions were put forth in the Assembly. One such question was "whether it was possible and desirable to have a

uniform Code of laws for a country so vast as this is."Ambedkar, to quote him *in extenso,* replied thus:[21]

> *…we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are the Negotiable Instruments Acts: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 [article 44 under the constitution of India] as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it.*

In order to assuage the apprehension and fear of the members belonging to the minority community, Ambedkar observed that:[22]

> *[Article 44] merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method.*

As regards the question of uniform civil code *vis-à-vis* personal laws, Mahboob Ali Baig speaking on the issue in the Assembly observed that:[23]

> *…the words "Civil Code" do not cover the strictly personal law of a citizen. The Civil Code covers laws of this kind: laws of property, transfer of property, law of contract, law of evidence etc. The law as observed by a particular religious community is not covered by article 35.....if for any reason the*

> *framers of this article have got in their minds that the personal law of the citizen is also covered by the expression "Civil Code", I wish to submit that they are overlooking the very important fact of the personal law being so much dear and near to certain religious communities.*

Mr. Mohamad Ismail Sahib speaking on the draft article 35, which later was to be article 44 under the Constitution of India, said: "…the right to follow personal law is part of the way of life of those people who are following such laws; *it is part of their religion and part of their culture*. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. *This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people.* The matter of retaining personal law is nothing new; we have precedents in European countries."[24] Therefore, he suggested a proviso to be added to the article which read thus: "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."[25] Ismail Sahib while acknowledging the fact that the idea behind a uniform civil code was to secure harmony through uniformity, observed that bringing such uniformity did not require regimentation of the civil law of the people including the personal laws. He believed that "Such regimentation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law, there will be no discontent or disaffection. Every section of the people, being free to follow his own personal law will not come in conflict with others."[26]

Be that as it may, as Mohammad Ghouse concludes,"…the Constituent Assembly refused to make the Muslim law immutable and inviolable and that in its opinion the state could enact laws to reform or replace the personal laws by a common civil code, under article 25(2), as a measure of social welfare and reform."[27]

Religion and Personal Laws[28]

Personal laws and their undeniable religious moorings brings to fore one of the important facets of debate surrounding uniform civil code. As it was argued by many in the Constituent Assembly, and thereafter

as well, it is important to look into the feasibility of such a Code affecting the religious freedom earmarked under the constitution, especially in the domain of personal laws. One line of argument in this context is based on the premise that personal laws cannot be seen as segregated and distinct from religion, and personal laws are parts of religion, which gives a distinct identity to different systems of personal laws. For example, Hindu law and Muslim law draw their distinct colour and content from respective religions. In India, the applicability of personal laws depends solely on religion.[29] Personal laws are covered by Article 25 which deals with freedom of religion.[30] Inclusion of personal laws under Article 25(1) was reiterated by Ambedkar during the Parliamentary Debates introducing the Hindu Code Bill. He believed that by giving the freedom to practice and profess religion, "we are practically giving him the right to practise his personal law."[31]

However, Kuldip Singh, J in *Sarla Mudgal* v *Union of India*[32]observed that "Article 44 is based on the concept that *there is no necessary connection between religion and personal law in a civilised society*. Article 25 guarantees religious freedom whereas *Article 44 seeks to divest religion from social relations and personal law*. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27."[33] He further observed that "…the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - *not religion* - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India."[34]

However, Justice Sahai observed that "*Article 25 is very widely worded*…The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. *Religion is more than mere matter of faith*….*Marriage, inheritance, divorce, conversion are*

as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before *Qazi* are as much matter of faith and conscience as the worship itself. When a Hindu becomes convert by reciting *Kalma* or a Mulsim becomes Hindu by reciting certain *Mantras* it is a matter of belief and conscience."[35] In the celebrated case of *Narasu Appa Mali* v. *State of Bombay*[36], Justice Gajendragadkar observed 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."[37]

However, this line of argument has not been well received as it has been argued *contra* that "Such an understanding is at odds with the evolution of personal laws in India. What eventually came to be known as "Hindu and Mahomedan laws" were creations of the colonial state following a complex process of rationalisation, rather than a simple codification of religious commands….Efforts to transform social life through the state is particularly visible in the legal developments of the late colonial period, where both Hindu and Muslim law were *shaped by the economic and political imperatives* of the male elites of each religious community using the state….In the case of Hindu law, each time a change was introduced, *the reformers relied on the state's lawmaking authority precisely because no support for the innovation could be found in the religious scriptures*."[38]

IV. From *Shah Bano* to *Shayara Bano*

The judgement of the Supreme Court of India in the celebrated case of *Shah Bano*[39] proved to be a turning point epochal in many ways. It had repercussions which continued to be felt for many years in legal and political life of the nation. Even today, its shadow looms large over Muslim law jurisprudence in India. In many ways, it was a *cause célèbre* that generated a debate that continues to be revisited by courts and jurists alike even today. "The circumstances of the case, the manner in which the court formulated its verdict and the publicity that it received altered the communal climate in India for all time to come."[40] The facts of the case, to put it very briefly, were thus:[41]

The appellant, was married to the respondent in 1932 and had three sons and two daughters born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code of the Criminal Procedure, 1973 in the Court of the learned Judicial Magistrate (First Class) asking for maintenance at the rate of Rs 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. *His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, that he was therefore under no obligation to provide maintenance for her, that he had already paid maintenance to her at the rate of Rs 200 per month for about two years and that, he had deposited a sum of Rs 3000 in the court by way of dower during the period of* Iddat. *In August 1979, the learned Magistrate directed the appellant to pay a princely sum of Rs 25 per month to the respondent by way of maintenance. In July 1980, in a revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs 179.20 per month, prompting the husband to approach the Supreme Court of India.*

Prior to *Shah Bano* judgment, it had been settled by the Supreme Court in two previous cases that the divorced Muslim wife is entitled to apply for maintenance under Section 125.[42] However, section 127(3)(b) of the Code provides that where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or *personal law* applicable to the parties, was payable on such divorce, cancel such order. Therefore, it was felt necessary to "reconsider"[43] the previous two cases in view of the fact that "they are not only in direct contravention of the plain and unambiguous language of Section 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the *dower* specified has been paid and the period of *Iddat* has been observed."[44] Moreover, Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, it was argued, was not noticed by

the aforesaid two decisions.[45] So, the conundrum to be resolved by the court was: whether section 125 of the Code prevails over Muslim Personal Law, and this was to be resolved in view of section 2 of the Shariat Act, 1937 which provided that in such a case dealing with maintenance the law applicable would be Muslim personal Law. The Supreme Court after a prolonged discussion came to the conclusion that the judgments of the Court in the previous two cases which had upheld the applicability of section 125 of the Code to a Muslim wife were correct.

The decision of the Court was protested by many Muslim leaders as an infringement of Muslim personal law. There were many who saw it as 'Supreme Court versus Shariat'.[46] It was argued that "It is not correct that [section 125 of the Code] is intended to cut across accepted principles of personal laws of society predominantly believing in religion."[47] One of the main arguments raised against the judgment was that:[48]

> *The Court fell into grave error in giving a new and enlarged meaning to the term 'wife' beyond Clause-(b) of Explanation to Section 125(1) and also in holding that it transcended the personal law. In that the Court ignored totally Section 125(3) and 127(3)(b) of Cr. P.C. 1973 which categorically provided against casting obligation of maintenance on children, and the grant of maintenance to the divorced wife, if her dues under the personal law had been settled. The Court also ignored Section 2 of Muslim Personal Law (Shariat) Application Act 1937.*

The judgment of the Court in *Shah Bano* was "upturned" by enacting Muslim Women (Protection of Rights on Divorce) Act, 1986.[49] The Act was enacted "to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto." Be that as it may, there were many scholars and jurists who supported the judgment.[50] Madhavi Sunder described the *Shah Bano* decision as " a watershed decision" which "touched off activism worldwide; reformers used the case to highlight the problem of state deference to oppressive religious practices, and more importantly, the state's refusal to take into account the varying religious perspectives within India's minority Muslim community."[51] Menski is of the view that

"When *Shah Bano's* husband engineered his case to get around the social welfare argument by the Supreme Court, the judges of the Supreme Court, incidentally five Hindu judges, struck back and held, quite rightly, that even under certain *Qur'anic* provisions, there was an obligation on a divorcing Muslim husband to be considerate and generous to his former wife."[52]

The above Act came to be interpreted in *Daniel Latifi* v. *Union of India*[53], and the Court came to "the conclusion that the Act [of 1986] actually and in reality codifies what was stated in *Shah Bano* case."[54] The Court concluded that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the *Iddat* period must be made by the husband within the *Iddat* period in terms of Section 3(1) (a) of the Act. The Court also held that liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the *Iddat* period.[55] Subsequently, the court in *Shabana Bano* v. *Imran Khan*[56] observed that:[57]

> *Cumulative reading of the relevant portions of the judgments of this Court in* Danial Latifi[58] *and* Iqbal Bano[59] *would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.*

Post-*Daniel Latifi*, the emerging jurisprudence in view of the *Shah Bano's* judgement may be summed up thus:[60]

> Shah Bano's *case highlights the tensions that arise when the pursuit of gender equality comes into conflict with the religious claims of minority group. These tensions coupled with the communalisation of politics and the marginalisation of religious minorities, have proven a constant obstacle to the pursuit of gender equality in India, particularly in the field of family law. The …Supreme Court ruling in the* Daniel Latifi *case represents yet another attempt to resolve these tensions. In a judgment that recognised the diversity of traditions within Islam, the Supreme Court concluded that the duty to make provisions for divorced women, as provided for under the*

> *Code of Criminal Procedure, applied equally to the Muslim community. The Court's ruling ran contrary to the apparent intentions of the 1986 Act, and followed a series of conflicting judgements given by the High Courts in India in the aftermath of the* Shah Bano *case.*

Werner Menski commenting upon the *Daniel Latifi* decision, interestingly said: "In fact, as we now know from the Indian Supreme Court's verdict in *Danial Latifi* in 2001, Indian Muslim wives have all along been protected by the *Shah Bano* precedent (which was confirmed as good law in 2001), as well as by the provisions of the 1986 Act itself, which were firmly defended as constitutionally valid."[61]

The "pro-women approach" in *Daniel Latifi* is a welcome step towards protecting the rights of women. There are many aspects of Muslim personal that have been controversial as well as legally demanding. One such controversial issue is the question pertaining to the constitutionality of triple *talaq* under Muslim law. In *Shayara Bano* v. *Union of India*[62], Kurien Joseph, J writing the majority opinion with Nariman and Lalit, JJ. concurring observed that"[Supreme] Court in *Shamim Ara* v. *State of U.P.*[63] has held, though not in so many words, that Triple Talaq lacks legal sanctity. Therefore, in terms of Article 141… *Shamim Ara* is the law that is applicable in India."[64] Nariman, J observed that:[65]

> *Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands from pronouncing "Talaq-e-Biddat" as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months and a positive decision emerges towards redefining "Talaq-e-Biddat" (three pronouncements of "talaq" at one and the same time), as one, or alternatively, if it is decided that the practice of "Talaq-e-Biddat" be done away with altogether, the injunction would continue till legislation is finally enacted.*

In pursuance with judgment, the Muslim Women (Protection of rights on Marriage) Bill, 2017 has been introduced in the Parliament. It makes triple talaq (Talaq-e-biddat) a punishable offence and declares it to be "void" and illegal.[66] The Bill seeks "to protect the

rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto." It is necessary to quote *in extenso* the *Statement of Objects and Reasons* of the Act which lays down that:

> *In order to prevent the continued harassment being meted out to the hapless married Muslim women due to talaq-e-biddat, urgent suitable legislation is necessary to give some relief to them. The Bill proposes to declare pronouncement of talaq-e-biddat by Muslim husbands void and illegal in view of the Supreme Court verdict. Further, the illegal act of pronouncing talaq-e-biddat shall be a punishable offence. This is essential to prevent this form of divorce, wherein the wife does not have any say in severing the marital relationship. It is also proposed to provide for matters such as subsistence allowance from the husband for the livelihood and daily supporting needs of the wife, in the event of husband pronouncing talaq-e-biddat, and, also of the dependent children. The wife would also be entitled to custody of minor children.*

Already passed by the Lok Sabha, this controversial Bill is slated to be placed in the Rajya Sabha for approval in the current Monsoon Session of Parliament. Given the penal nature of the legislation and some of its controversial provisions this Bill has already triggered a high pitch debate in the country, and if it becomes a law, it is likely to be opposed and protested by the Muslim community in the country. According to perceptive observers, this Bill has potential to destroy the family of the divorced woman for whose benefit the *triple talaq* law is being enacted by the right wing government at the centre.

Conclusion

The Constitutional safeguards as regards freedom of religion have ensured that tenets of Muslim law are protected and safeguarded against any attempt to tinker with them. There have been occasions when the courts have played a prominent role to effectuate the constitutional mandate of protecting the religious freedom and the interest of millions of people who belong to different religions and sects. However, over the years, it has been recognised that there is a need to bring about reform in the personal laws, especially such

reformation that aims at preserving and protecting the rights of women. In this respect, it is necessary to ensure that though reformation is required, it should not be at the cost of sacrificing the freedom and rights, espcially the rights associated with freedom of religion, that have been recognised and protected under the constitution for every section of the society. The interests of every religious group should be protected. The recent Supreme Court decision is a step towards women empowerment. It liberates them from the shackles that deprived them of some of their basic rights. The authors are of the opinion that no amendments should be entertained which directly or indirectly infringe the basic tenets of any religion, as enshrined in the religious books. Same goes with the idea of making a uniform civil code. We have lived over more than 70 years within the present secular set up – a set up of peace, amity and religious tolerance - and we can continue to live many more years to come like this.

Notes

1. See, Articles 25, 26, 44, Constitution of India.
2. In *Vishwa Lochan Madan* v. *Union of India*, (2014) 7 SCC 707, the Supreme Court observed that "The object of establishment of such a court may be laudable but we have no doubt in our mind that it has no legal status. It is bereft of any legal pedigree and has no sanction in laws of the land. They are not part of the corpus juris of the State." *Id.* at 714.
3. Among the Sunnis, there are four sub-schools, namely, *Hanafi, Maliki, Shafei and Hanbali.* Likewise the Shias are divided in several groups, the major ones being *Athna Asharias*, *Ismailyas* and *Zaidyas*. *Athna Asharias* are further divided into *Usuli* and *Ikhbari* and *Ismailyas* are further divided into *Khojas* and *Bohras.* Zaidyas are non-existent in India. For details, see, Ameer Ali, *Mahommedan Law*, 6-44(Allahabad, Hind Publishing House, 2007). Also see, Tahir Mahmood and Saif Mahmood, *Muslim Law in India and Abroad*, 10-14(New Delhi, Universal Publishing House, 2012).
4. Tahir Mahmood, "Progressive Codification of Muslim Personal Law", available at http://14.139.60.114:8080/jspui/bitstream/123456789/736/18/Progressive%20Codification%20of%20Muslim%20Personal%20Law.pdf (last accessed on 12.07.2017).

5. See Daniel Martin Varisco, *Orientalism and Islam, at: http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0058.xml* (accessed on 12 January 2018).
6. Tahir Mahmood and Saif Mahmood, *Muslim Law in India and Abroad*, 6 (New Delhi, Universal Law Publishing, 2012)
7. Abdur Rahim, *Principles of Muhammadan Jurisprudence and Muhammadan Law*, 2(Kolkata, Kamal Law House, 2016)
8. "Under established principles of *Ijtihad*, if the *Quran* and *Sunnah* are silent on a matter, it is permissible (among other things) to resort to local custom, so long as that custom is consistent with the *Quran* and *sunnah*. In the legal arena, this meant that it was permissible to supplement religiously-based law with customary law." Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights", 12 *American University International Law Review*1,6 (1997). Also see, Habibur Rahman, "The Role of Pre-Islamic Customs in the Islamic Law of Succession", *Islamic and Comparative Law Quarterly*, 8 (1988).
9. Davis Pearl and Werner Menski, *Muslim Family Law*, 3(London, Sweet and Maxwell, 2015)
10. Abdur Rahim *op. cit.* at 15.
11. *Ibid.*
12. Pearl and Menski *op.cit.* at 3.
13. For a detailed discussion, see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Clarendon, Oxford University Press, 1979). Also See, Werner Menski, "Developments in Muslim Law: The South Asian Context", (2000) 3SCC (Jour) 9.
14. Davis Pearl and Werner Menski, *Muslim Family Law*, 36 (London, Sweet and Maxwell, 2015)
15. Christa Rautenbach, "Phenomenon of personal laws in India: some lessons for South Africa", 39 *The Comparative and International Law Journal of Southern Africa* 241-264 (2006) at 242.
16. See, Ruma Pal, *A M Bhattacharya: Matrimonial Laws and the Constitution*, 1(Kolkata, Eastern Book Company, 2017). However, it is noteworthy that "…although in the area of penal law the British unified the laws with the Indian Penal Code in 1862, a similar step towards the unification of civil laws *with regard to the family was not taken*. What happened, though, was that the colonisers modified the

personal laws through the interpretation by British judges, which made them a "curious amalgam of religious rules and English legal concepts" and created what used to be called Anglo-Hindu law and Anglo-Muhammadan law". (Emphasis added). Tanja Herklotz, "Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court", *Verfassung und Recht in Übersee VRÜ* 152 (2016).

17. Sir George Rankin, "Custom and the Muslim Law in British India", 25 *Transactions of the Grotius Society*(1939) at 89.

18. *Id*. at 90.

19. The grounds mentioned under section 2 of the Act are:

    (i) that the whereabouts of the husband have not been known for a period of four years;

    (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

    (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

    (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

    (v) that the husband was impotent at the time of the marriage and continues to be so;

    (vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;

    (vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

    (viii) that the husband treats her with cruelty, that is to say,—

    (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

    (b) associates with women of evil repute or leads an infamous life, or

    (c) attempts to force her to lead an immoral life, or

    (d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

20. Tahir Mahmood, *Islamic Law in Modern India*, 85 (New Delhi, Indian Law Institute, 1972)

21. Constituent Assembly Debates, Tuesday, the 23rd November, 1948

22. *Ibid*.

23. *Ibid*

24. Constituent Assembly Debates, Vol. VII, Tuesday, the 23rd November, 1948. Emphasis added.

25. *Ibid*.

26. *Ibid*. Narayan Agarwal who wrote *Gandhian Constitution for Free India* in 1946 for a free India observed that "The Fundamental Rights shall guarantee to all the communities full protection of their cultures, languages, scripts, education, profession and practice of religion, social customs and *personal laws*." (Emphasis added). See, Shriman Narayan Agarwal, *Gandhian Constitution for Free India* (1945), available at http://cadindia.clpr.org.in (last accessed on 08.07.2017).

27. Mohammad Ghouse, "Personal Laws and the Constitution", available at http://14.139.60.114:8080/jspui/bitstream/123456789/736/15/Personal%20Laws%20and%20the%20Constitution%20in%20India%20.pdf (last visited on 08.07.2017).

28. See generally, Farrah Ahmed, *Religious Freedom Under the Personal Law System* (New Delhi, Oxford University Press, 2016)

29. See, Ruma Pal, *A M Bhattacharjee: Matrimonial Laws and the Constitution*, 5(2017)

30. *Id*., at 7.

31. *Ibid*.

32. AIR 1995 SC 635.

33. *Id*., para 26.

34. *Id*., para.27. Justice Kuldip Singh in *Sarla Mudgal* traced the historical antecedents thus: "Political history of India shows that during the Muslim regime, justice was administered by the *Qazis* who would obviously apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system, more or less, continued during the time of the East India Company, until 1772 when Warren Hastings made Regulations for the administration of civil justice for the native population, without discrimination between Hindus and Mahomedans. The 1772 Regulations followed by the Regulations of 1781 where under it was prescribed that either *community was to be governed by its "personal" law in matters relating to inheritance, marriage, religious usage and institutions.* So far as the criminal justice was concerned the British gradually superseded the Muslim law in 1832 and criminal justice was governed by the English common law. Finally the Indian Penal Code was enacted in 1860. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion." *Ibid*. Emphasis added. Also see, Ruma Pal, *A M Bhattacharjee: Matrimonial Laws and the Constitution*, 1-7(2017).
35. AIR 1995 SC 635, paras. 32, 33. Emphasis added.
36. AIR 1952 Bom
37. *Id*., para. 20. Also see, Vikramjit Banerjee, Suhaan Mukerji and Aymen Mohammed, "The Case for Legislating Equality in the Private Sphere", (2016) 8 SCC J-1.
38. Saptarshi Mandal, "Do Personal Laws Get their Authority from Religion or the State—Revisiting Constitutional Status", 51 EPW (10 December 2016).
39. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556.
40. Zia Modi, *Ten Judgments that Changed India*,49 (New Delhi, Penguin Books India, 2013)
41. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556 at 559. Section 125 of the Code of Criminal Procedure, 1973 *inter alia* provides for the maintenance of wife by the husband. For the purpose of section 125 of the Code, 'wife' includes divorced wife as well who has not remarried. See, Clause (b), Explanation to section 125 of the Code. Also see, Zakia Pathak and Rajeswari Sunder Rajan, "Shah Bano", 14 *Signs* 3, 558-582 (1989).

42. *Bai Tahira* v. *Ali Hussain Fidaalli Chothia* , (1979) 2 SCC 316 : 1979 SCC (Cri) 473 : AIR 1979 SC 362 : (1979) 2 SCR 75; *Fuzlunbi* v. *K. Khader Vali*, (1980) 4 SCC 125 : 1980 SCC (Cri) 916 : AIR 1980 SC 1730 : (1980) 3 SCR 1127.

43. Murtaza Fazal Ali and A. Varadarajan, JJ, holding that those two cases are not correctly decided referred this appeal to a larger Bench on 03.02.1981.

44. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556 at 560.

45. *Ibid.* Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 provides that notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).

46. Mohammad Farogh Aseem, "Maintenance of Divorced Wife: Indian Supreme Court vs *Shariat*", 27 *Islamic Studies* 3(1988).

47. *Id*. at 243.

48. *Ibid*. As regards the issue of *Mahr*, it was argued that "The court was correct in holding that the "*Mahr*" was a 'mark of respect' for the wife meant to take care of the ordinary requirements of wife during marriage and after. This, however, did not entitle the court to hold that the husband was liable to maintenance beyond the period of *lddah*". *Id*. at 244. Also see, Asghar Ali Engineer, "Muslim Women and Maintenance", 34 *Economic and Political Weekly* 24 (1999).

49. See generally, Gautam Navlakha, "Muslim Maintenance Bill: A Postscript", 21 Political and Economic Weekly 38/39(1986). "A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the "divorced woman" has been defined as "Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law". But the Act does not apply to a

Muslim woman whose marriage is solemnised either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the *Iddat* period and this obligation does not extend beyond the period of *Iddat*. Once the relationship with the husband has come to an end with the expiry of the *Iddat* period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the court can order the State Wakf Boards to pay the maintenance." See, *Daniel Latifi* v. *Union of India*, (2001)7SCC 740 at759.

50. See, Tahir Mahmood, *Amid Gods and Lords*, 250-256 (New Delhi, Universal Law Publishing Co, 2017)
51. Madhavi Sunder, "Piercing the Veil", 112 *The Yale Law Journal* 6, 1399, 1428(2003).
52. Werner Menski, "Recent Developments in the Uniform Civil Code debates in India", 9 *German Law Journal* 211, 237(2008).
53. (2001)7 SCC 740
54. (1985) 2 SCC 556
55. (2001)7 SCC 740 at 765.
56. (2010) 1 SCC 666
57. *Id*. at 672.
58. (2001) 7 SCC 740
59. (2007) 6 SCC 785
60. Siobhan Mullally, "Feminism and Multicultural Dilemma in India: Revisiting the Shah Bano Case", 24 *Oxford Journal of Legal Studies* 4(2004) at 672. Also see, Nawaz B. Mody, "The Press in India: The Shah Bano's Judgment and its Aftermath", 27 *Asian Survey* 8, 935-953 (1987).
61. *Supra* note 51 at 239.
62. (2017) 9 SCC 1

63. (2002) 7 SCC 518

64. *Shayara Bano v. Union of India*, (2017) 9 SCC 1 at 39

65. *Id*. at 298.

66. Clause 3 of the Bill provides: "Any pronouncement of *talaq* by a person upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal." Clause 4 of the Bill provides that "Whoever pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years and fine."