

Shariat Courts and Women's Rights in India

Sabiha Hussain

Context

India's 65 million Muslim women, often called a minority within a minority their double handicap of gender and faith, are challenging medieval religious laws that have oppressed them for centuries. In recent years, Muslim women have fought fundamentalist interpretations of Islamic law (Sharia), which have long allowed men in India to divorce their wives for trivial matters and deny them financial support, asking the courts to take into consideration basic human rights. This is very much evident from the reaction of Muslim women against the release of model nikahnama and the clauses mentioned in this regarding marital issues.

The recent release of model Nikahnama by the All India Muslim Personal Law Board (AIMPLB) and its campaign over establishing and strengthening Shariat Courts/Darul Qazas in order to dispense quick justice to women according to the Quran has created confusion and debate within and outside the community. In presidential address of AIMPLB Bhopal convention in 2005, the president of AIMPLB, Sayyed Muhammad Rabe Hasani Nadvi, made the statement once again claiming that Darul Qazas were a necessity because there was little hope for getting decisions based on the Shariah from judges in state court'. He further insisted upon the need for Darul Qazas throughout the country and opposed Muslims taking their disputes to non-Muslim judges, a practice that he argues is 'not in

* This paper was presented in a National seminar 'Womens Movement's engagement with law: existing contradictions and emerging challenges' organised by Centre for Women's Development Studies, New Delhi, March 2006.

keeping with the mentality and the spirit of the Shariah of Islam'. He stated that setting up separate Darul Qazas is a means to ensure that 'the Shariah is applied by those most knowledgeable of it' (Sikand 2005).

This move has made the matrimonial issues and problems faced by women, more complicated and stirred a debate about the legality and sanctity of these courts under Indian legal system. For instance, the last section of the model Nikahnama on Iqarnama says: '... agar khuda-nakhwasta kisi wajah se hamare dermian koyee nazaa paida ho jaye to darul kaza...sharyeee panchayat, mustanad alimdeen hamare dermian salis hoga aur wo job bhi faisla karega ham dono uske paband rahenge'(God forbidden for some reasons if some misunderstanding is created between us, in that case Darul Qaza, Sharyee Panchayat, Ulema would take the decision and whatever judgment he gives would be binding on us). This clause apparently closes the option for women to approach the secular courts.

The indifferent approach of the AIMPLB clearly indicates the deep-seated patriarchal attitude of conservative Islam, which undermines women's rights in contradiction to the Holy Quran. The subjugation of women is often justified as being under the doctrines of the Shari'ah. However, the Islamic Shari'ah encompass not only religious doctrines, but also human reasoning and consensus shaped by social and cultural values of society. That is the reason Shari'ah is not implemented uniformly across Islamic world. Unfortunately AIMPLB seem to be least bothered about the diversity and heterogeneity of Muslim community in India.

In response to the establishment of Shariat Courts/Darul Qazas and the stand of All India Muslim Personal Law Board, advocate Vishwa Lochan Madan filed a Public Interest Litigation seeking immediate dissolution of all Islamic and Shariat Courts in India, and requested the Court to direct the Centre and the States to take effective steps to dissolve all Darul Qazas and Shariat Courts. It had sought a direction from the Court to restrain these organisations from interfering with the marital status of Indian Muslim citizens, and passing any judgment, remarks or fatwas (decrees) as well as deciding matrimonial disputes amongst Muslims. Further, the petitioner sought a direction from the Court to AIMPLB and Darul Ulooms in the country 'not to train or appoint qazis, naib-qazis or muftis for rendering any judicial service of any kind'. On 17 August 2005, the Indian Supreme

Court has ordered the Darul-ul-Uloom of Deoband and AIMPLB, (the two most important Muslim bodies in India), to reply to a petition filed against them. The petition charge the two organisation with interfering with the country's legal system and introducing parallel Islamic laws in violation of the Constitution, and sought directions to restrain the board from establishing a parallel Muslim judicial system or Nizam-e-Qaza (http://www.outlookindia.com/pti_news.asp?id=373114).

In the light of the above debates and discussions about giving rights to Muslim women and dispensing of quick justice according to Islamic provision, and the argument in favour or against the establishment and strengthening of Shariat Courts by AIMPLB, the main issue is how far the AIMPLB's insistence on Shariat Courts is justified in a secular democratic state. Further, why do they want to deprive women of their citizenship rights? Why they are not taking initiative to make divorce laws in accordance with the Quran, despite women's organization continuous demand for making personal law gender-just? This paper deals with the some of these issues.

Statement of the Problem

The All India Muslim Personal Law Board justify its stand for Shariat Courts by emphasising that all family disputes need to resolved among themselves, through Shariah Courts manned by traditionalist 'ulama, rather than the State Courts, which the 'ulama look upon with considerable suspicion and distaste even though the latter apply Muslim Personal Law in such matters, as being an 'Islamic duty'. In order to protect Islamic identity in India, they insist that the state must arm Shariah Courts set up by ulema organisations with legal authority extending to all Muslim Indians in matters related to civil disputes in which both parties are Muslims. The decrees issued by these courts in such disputes, it is suggested, should be recognised by the state as final and binding (Sikand 2005).

Further, they argue that non-Muslim judges are not capable of judging such disputes in accordance with Shariah. They also claimed that state courts might deliberately seek to 'misinterpret' the Shariah, which they see as part of an alleged 'conspiracy' to destroy Muslim identity and

absorb Muslims into the 'national mainstream'. At the same time it is also claimed that Shariah Courts might be a cheaper and faster mechanism for dispensing justice. However, these arguments seem to strengthen the authority and powers of the Ulema, who possess a very conservative view towards women's rights. Their advocacy of Shariah courts probably has a gender bias behind it, as they realise that state courts might interpret the Shariah, in the form of Muslim Personal Law, in a manner that departs from traditional fiqh, and thereby grant more rights to women than the Ulema are prepared to concede.

To my mind these ongoing debates either in favour or against these courts to a large extent, diverts the main issue of women's rights in matrimonial matters. While on the one hand, as stated earlier, the Muslim Personal law board declared its intention to set up these courts seemingly in order to dispense quick justice to women according to the Quran, on the other hand, the conservative element from the majority community saw this as an opportunity to raise the issue for a uniform civil code (UCC). The political leaders, for their part, take this opportunity to appease Muslims and safeguard their vote bank. Surprisingly, none of them seems really concerned about the genuine problems of Muslim women, which the latter have been facing in matters related to marriage and divorce, and the pathetic condition of the victims of instant triple divorce who are left with no support. For instance, the MPLB, despite knowing too well that current triple talaq does not follow true Islamic guidance, is opposing the reform of a system that is oppressive when it comes to women. They never tried to transform the pronouncement of triple divorce in accordance with to which that is stated in the Quran, which is a long due demand of Muslim women's organisations (in 2001, the AIMPLB organised a two-day meeting with women's organisations, in which there was a demand from all women's organisations to change the triple talaq system according to the Quran. However, no action was taken. The model nikhanama does not say a word about banning triple talaq, which reflects the gender insensitivity of the members of MPLB), but started advocating for establishing and strengthening Shariat Courts in its model Nikahnama, which was released in 2005.

In this context, the campaign to establish and strengthen Shariah Courts may be seen as diverting the attention of various Muslim women's organisations, which have started to mount an effective critique of the mullahs, accusing them of preaching male supremacy in the name of Islam. These women argue that Islam stands for gender equality and justice, and hence seem to be fiercely denouncing the patriarchal laws that the conservative mullahs seek to pass off in the name of the Shariah. For instance, in a conference organised by the MPLB in 2001 (7-8 April) with 40 women's organisations, the declaration stressed upon the plea to the Government of India for the establishment of Darul Qaza (Islamic judicial panchayats) as well as Shariah benches within the Family Court system, which was not supported by women's organisations. . Hence, the appeal by certain Ulema associations to Muslims to set up Shariah Courts and abide by their dictates could be seen as a means to silence the voices of women such as those associated with the newly-formed Muslim Women's Personal Law Boards, and different Muslim women's organisations

Main Objectives

The main thrust of this paper is: Why should women go to these courts to settle matrimonial disputes while there are provisions for them in secular courts? Do women face less harassment and get quick justice according to Islamic law by approaching these courts? Who are the women who approach these courts? Should the mode of justice not it be left to the women to decide? Who would guarantee the efficacy of Darul Qazas, the quality of the presiding judges, the efficiency of the proceedings? Can the Board be allowed to take away the right of Indian Muslim women to knock on the doors of Indian courts? Does the Board have the authority to restrict Indian women's access to the courts for justice? The paper is based on the experiences of 20 women who went to these courts for Khula, fask-e-nikah, and the settlement of maintenance, mehr, and the articles given at the time of marriage.

The study was conducted in the towns of Darbhanga, Madhubani, Sakri and Jale of the Darbhanga Commissionary of Bihar. The information was collected through in-depth case studies of each woman by the researcher

herself. During the survey for a major project entitled 'Intergenerational mobility of Muslim women in India' under the Indian Council of Social Science Research, New Delhi, the divorced women were identified. From that sample, the women who initiated divorce were chosen for case studies. The cases were from the central Shariat Court at Phulwari Sharif, Patna and the district Shariat Court, Muzafferpur.

Shariat courts (Darul Qaza) and the All India Muslim Personal Law Board (AIMPLB)

Shariat court/Darul Qaza is an Arabic term, which means the house of Qazi or an Islamic scholar, who is authorised to give his views which, however, are not binding on the person going to this house. It is wrong to describe a Darul Qaza as an Islamic court. Shariat Courts are arbitration councils which have no real or claimed judicial powers or authority whatsoever. Hence, these councils cannot be termed as a 'parallel system' by any stretch of the imagination, unlike what is (mis)understood by many within and outside the community. Their verdicts are nothing more than recommendations and advice. It is entirely up to the two parties to accept the verdict or reject it. In case of rejection, the so-called 'Shariat Courts' are powerless, and the Muslim community at large enjoys no authority to coerce the rejecting party or enforce the verdict (Zafarul-Islam Khan 2005).

It is to be mentioned here that only the AIMPLB and Imarat-e Shar'iyah Bihar and Orissa have a few dozen of such 'Shariah Courts' in some cities and towns. The system has been functional in Bihar since 1917 (which I am going to elaborate further), where Shariat Courts have decided 18,000 cases. The decisions have also been upheld by law courts. The fact is, of the 22 shariah courts established by the AIMPLB in the country from 1973 onwards, only 6,433 cases have been disposed of and a negligible 461 cases are still under trial. Further, only 31,775 cases have been decided so far in the 26 Shariah Courts functioning under the Deobandi Imarat-e Shariah in Bihar, which has been in existence, as stated earlier, since 1917. These figures are enough to show that not many Muslims are enthusiastic about the Shariah Courts, otherwise the number of cases handled would have been significantly higher, considering the fact that Indian Muslims

number a staggering 150 million (Sikand 2005). A similar initiative is that of the Imarat-i Shariah of northeast India, which has 88 Darul Qazas under its supervision. For its part, the AIMPLB has a number of similar Shariah Courts affiliated to it, including one in Tamil Nadu, two in Delhi, three in Madhya Pradesh, four in Andhra Pradesh, five each in Uttar Pradesh and Karnataka, and eleven in Maharashtra. A Shariat Court has been functioning in Bhopal since the time of nawabi rule. It is the only Shariat Court in India which gets a government grant of Rs 60 lakh per annum. In Bhatkal, in coastal Karnataka, a Shariat court has been dispensing justice since the 18th century, and has dealt with about 18,000 cases so far (*The Hindu* 2006). Other 'Darul Qazas' are local and autonomous bodies established by people in various towns and villages. In any case, these so-called 'courts' deal only with personal law issues like marriage, divorce and inheritance, where both parties are Muslim.

The Board's assistant general secretary, Abdul Rahim Qureishi, said that 'Darool Khazas' were formed to decide cases according to the Muslim Shariat law. These courts are not a parallel system of justice; rather, they form a system of alternate dispute resolution (ADR) that is prevalent the world over. He further said that Darul Qazas do not infringe on the law of the land as they were provided for under Articles 25 and 26 of the Indian Constitution. It was on this account that the Shariat Application Act of 1937 was enacted. They are far from interfering with the judicial system of the land. Darul Qazas come in handy in reducing the burden on courts by disposing of matters related to family disputes, marriage, and inheritance of Muslims (Pradhan 2005).

Thus, the Shariat Court operates within the Indian constitution and deals with cases pertaining to marriage, inheritance and succession. As an ADR mechanism, the Shariat law ensures speedy justice in hundreds of cases filed by ordinary people.

It would be worth mentioning that since its inception in 1973, the Board has been consistently demanding the setting up of Darul Qazas in order to administer what it describes as 'Islamic justice'. This effort has gained considerable momentum in recent years. The logic they provide is that secular courts do not have the authority to either interpret or apply the Shariat, which is based on the Quran and the Hadith. Hence, that right

belongs to the 'Sharia Courts' alone. This was stated at the AIMPLB's conference in Bhopal in 2005, when the members encouraged Muslims to take their differences to 'Shariat Courts' — as against going to the local ulema or alim as had been the practice. Mufti Ahmed Devalvi of Jamia Uloomul Quran, Jambusar, expressed the opinion that being believers of the faith, Muslims must accept the sharia tenets in resolving their disputes without thinking much about the outcome of the disputes.

The Board's recent publication of two-part Urdu booklet, 'Nizam-e Qaza Ka Qayyam' ('The Establishment for a System of Islamic Justice') describes the need to establish a separate system of 'Islamic courts' in the country. The booklet describes the need for such courts as an Islamic necessity, and argues that Muslims are bound to govern their lives in accordance with the laws of the shariah if they are to remain true to the dictates of their faith. True justice can only be had by following God's laws, which the booklet equates with the traditional understanding of the shariah upheld by the 'ulama. Not following these laws is described as a 'great crime', which the Qur'an is said to condemn as 'infidelity' (kufr) and 'oppression' (zulm). The booklet restricts its advocacy of Shariah laws to the personal sphere, covering family matters such as marriage, divorce, adoption and inheritance. Notwithstanding the fact that the Indian Constitution recognises Muslim Personal Law and Indian courts are empowered to deal with cases under this law, the booklet demands that Muslims set up their own courts headed by trained 'Ulema to solve their own disputes instead of taking them to the state courts.

Tayyebji, the rector of the Deoband madrasa who served as the first president of the AIMPLB, insisted on the need for Muslims to have their personal disputes judged by Muslim Qazis in separate Darul Qazas, and not in secular courts even if the latter recognise and apply the Muslim Personal Law. In the words of Sikand (2005),

Although, for obvious reasons, Tayyeb does not explicitly say this, he seems to argue that ideally Muslims must follow only Islamic laws in all spheres of life. However, recognizing the impossibility of this as long as Muslims remain a minority in India, he stresses that they must do so at least in their personal affairs, in matters presently governed under Muslim Personal Law, the only aspect of the Shariah that has legal sanction in India

today. Despite the fact that Muslim Personal Law is recognized by the Indian state, Tayyeb, echoing the views of the 'ulama associated with the AIMPLB, insisted on the need for Muslims to have their own parallel system of courts to judge their personal affairs. He even suggested the need for Muslims to elect, unanimously or by majority vote, their own leader (amir) at the all-India level, whom all Muslims must obey. Through this, he quotes a noted fellow Deobandi 'alim as declaring, 'All the problems that Muslims are today confronted with would be solved'.

Muslim personal Law and Women's rights: Debates for Reform

Reform in Muslim Personal Law is a hotly debated issue in India today. Many traditional 'Ulemas are averse to any change in the law as it exists. They see it as divinely revealed, as an integral part of the Shari'ah. Hence, they consider changes in the law as tantamount to interfering with the Shari'ah. On the other hand, some Muslim modernists have been consistently critiquing aspects of the Muslim Personal Law as it exists in India today, particularly those that are seen as militating against gender justice. They argue that they do not actually represent the spirit of the Shari'ah, but, rather, is a deviation from it. However, there has hardly been any dialogue between the two as to how to go about the reform.

Muhammad Mujib, a noted Islamic scholar and historian, had described the Shariah as a human approach to the divine will. It is quite an apt description of the evolution of the Shariah laws. And, besides new creative interpretations, there is tremendous scope for what is called borrowing from another school if one's own school is creating a problem. This practice was followed in Turkey during the Ottoman period in as early as the nineteenth century. This method was also followed while drafting the Dissolution of Muslim Marriages Act 1939. When Muslim women found it problematic to wait for 90 years if their husbands were missing as stated in the dictates of the Hanafi School, the Ulema, in order to overcome this difficulty, borrowed a rule from the Maliki School, which allows the woman to wait only for a period of four years.

There is a strong argument amongst the orthodox groups in India against abolishing the practice of triple talaq in one sitting, which they

think is based on the Shariat or the Divine Law. While on the one hand the orthodoxy's strongest argument against abolishing this practice has always been that it is based on the Shariat, liberals push for a more contemporary understanding of the genesis of these Divine Laws. The original message in the Quran was in its intent and design both radical and humanitarian. The corpus of rules articulated centuries after the death of Prophet Mohammad by the Muslim establishment in the light of the dominant patriarchal ethos of the emerging society were incorporated as the Shariat. Liberals point out that the rules characterised by the Ulemas as Sharia, despite being entirely the creation of a human agency, became vested with the sanctity of being either revealed or divine. In addition, in India, the Anglo-Mohammedan law evolved by colonial courts in their effort to apply the laws of the Quran (in cases where the parties were Muslim) also began to be construed as part of the Shariat. These laws, the handiwork of those who were not even nominally Muslim, were justified through the legal fiction that the courts were not interpreting the Shariat, but merely applying it (Wadhwa 2004).

During the Indian struggle for independence, one of the compromises forged between the leadership of the Indian National Congress led by Gandhi and Nehru and the Jami'at ul-Ulama-i-Hind was that Islamic laws would not be abolished after independence. Even though the ideal of a Uniform Civil Code is written into the directive principles of the nation, Muslims in India continue to be governed by the Muslim Personal Law. Interestingly, what is called Muslim Personal Law today was termed Anglo-Mohammedan law until 1947, and was an invention of British magistrates, judges, and the Privy Council. It is certainly not the Shariat.

However, when the Constitution was adopted in 1950, laws relating to marriage and divorce, infants, minors, adoption, etc. (in short, 'personal laws'), came under the concurrent list, that is, became a subject on which both the Parliament and the state legislatures can create laws.

The post-colonial government passed the Hindu Code Bill and enacted it, banning polygamy and transforming a number of traditional Hindu family laws, but the Muslim leadership never made any attempt to bring about reforms in the Muslim Personal Law.

Thus, while the personal laws of Hindus were substantially codified under the various Acts in the 1950s (the Hindu Marriage Act, Family Act, Hindu Adoptions and Maintenance Act, etc.), which were also extended to the Buddhists, Jains and Sikhs, the Muslims continued to be governed by the Muslim Personal Law (Shariat) Application Act, 1937 (*the only exception to this is the Muslim Women (Protection of Rights on Divorce) Act, 1986, which was done more out of political necessity and expediency than to benefit Muslim women.*

In the early 1960s, the Union cabinet received some suggestions for reforms in Muslim Personal Law on the plea of changes that have taken place in Muslim countries like Tunisia, Egypt, Pakistan, Morocco, Iran and Turkey. In 1963, the government appointed a committee comprising Muslim leaders like Humayun Kabir, Hafiz Muhammad Ibrahim, Muzaffar Hussain, and Jamia Vice-Chancellor Mohammad Mujib. This move opened the way for debates on this issue. Tahir Mahmood, the then Associate Professor at the Indian Law Institute, carried out a survey on the state of the Muslim Personal Law in 20 countries, and found that the Shariat was not applied uniformly in all of them. 'Turkey, Cyprus, Tunisia, Algeria, Iraq and Iran do not give a Muslim husband right to divorce his wife unilaterally. It says that a Muslim husband seeking divorce from his wife must apply to the court of Law' (Gani 1978: 25-27). This showed that flexibility is possible. This issue also figured at the International Congress of Orientalists, held in Delhi in 1964, which stirred up a countrywide debate on the subject.

Contrary to the changes in Islamic rules that occurred in various Muslim countries, the Muslim leadership in India, with the support of some Islamic institutions, are stating that changes in the Muslim Personal Law are tantamount to an infringement of the religious rights of the followers of Islam. They have gone to the extent of declaring that any change would amount to an attempt to Hinduise Muslims. To put an end to the endless debate on the issue of the Muslim Personal Law, they organised a wide range of seminars and conventions in the early 1970s which were all aggressively opposed the move, and thus forced the government and the committee constituted in 1963 to place the issue in cold storage.

Hence, 'the Muslims consider the personal law to be an essential part of their religion and stand therefore for status quo' (ibid.). Any *move to reform the Muslim Personal Law is viewed as destroying the community identity and secular character of the state*. On the one hand, there exists a basic contradiction in 'secular' laws that include religious provisions. On the other hand, there exists a Muslim community resistant to change, which claims that any change to its coveted personal law will result in the destruction of Muslim 'culture and identity' in India. Mushirul Hasan (2000: 10) writes: "The demand for reforms is interpreted as an attempt to destroy "Muslim identity"". Since the British, as noted above, were not interested in a direct confrontation with the Muslim community with regard to the Personal Law and since the Personal Laws left to Muslims under the Shariat Act had mostly to do with women's issues such as marriage, divorce, and maintenance, it was logical that a women's movement would challenge these issues. The modern interpretation of British rule is that it actually resulted in an 'erosion' of women's rights. It has been proved that when the British arrived in India, Muslim women actually possessed more rights than their Hindu counterparts. This is due in part to regulations in the Quran regarding mehr, divorce and maintenance. Till date, the personal law contains the same issues that are directly related to the rights of women, and any reform in this sphere is viewed as interfering with religious freedom.

Fyzee, in a small booklet (1971), pointed out that there was an urgent need for reform in the MPL in order to address the question of gender justice. Given the inequities inherent in some rules of the traditional fiqh, and in certain provisions in the MPL that impinge on Muslim women's rights, Fyzee proposed a radical legal reform, which he saw would guarantee gender, while at the same time retaining the MPL. In his book he suggested that the Indian Parliament pass a new law, which he termed 'The Muslim Personal Law [Miscellaneous Provisions] Act', which would modify the existing MPL. In order to ensure that Muslims accept the proposed legislation, he suggested measures for legal reform based on rules accepted by one or the other school of Islamic law (mazhab) in order to uphold the principles of justice and equity. This measure would also help open up each school to the possibility of borrowing from other Muslim schools, and would in this way help promote a measure of intra-Muslim ecumenism.

Thus, he suggested that the proposed act lay down that 'where a Muslim is governed by a particular school of law and a decision according to that school would be against justice, equity and good conscience, the Court shall have the discretion to apply a rule drawn from any of the other schools of Islamic law, Sunnite as well as Shi'ite' (Upadhyay 2003).

Fyzee viewed that legal reform in personal law through inter-mazhab eclecticism would address the crucial and genuine concerns of Muslim women, while at the same time fulfilling the need for such reform to be seen as Islamically acceptable, particularly in the procedure for divorce. For instance, three talaqs uttered by a husband in one sitting, even under compulsion or under the influence of alcohol, are considered a binding divorce according to most Hanafi Sunnis, who form the vast majority of Muslims in India. However, this rule is not accepted by several other mazhabs (other schools of jurisprudence), such as the Shafi'is and the Ahl-i Hadith among the Sunnis, and the Ithna Asharis and Musta'lian Isma'ilis or Bohras among the Shi'as. And hence, he suggested that the courts apply the more liberal rule drawn from the Shafi'i, Ahl-i Hadith or Shi'a schools in a case involving triple talaq in one sitting, even if the parties to the dispute were both Hanafi Sunnis.

Henceforth, he argues that justice is the underlying principle of the Shari'a, and if any laws that claimed to be Islamic failed to provide justice, they could be considered to be in contravention of the Shari'a and, therefore, of God's will as well. He also stressed that certain laws that form part of the MPL indeed violate this principle, particularly on some matters related to women. Hence, in order to uphold the principle of justice, they needed to be changed.

Anticipating that this proposal would be opposed by large sections of the conservative Ulema, he claimed that legal reform in this sphere would not be tantamount to changing the Shari'a, nor would it violate the principle of freedom of religion guaranteed by the Indian Constitution. This is so because the Shari'a and fiqh were two distinct, but related, entities, although most Ulema tended to take them as synonymous (Fyzee 1971).

To stress on his suggestion for change, he further pointed out that the MPL as it exists today cannot be regarded as the pure Shari'a. In his words, the MPL in India is 'a discrete body of law and custom, varying

considerably from the rules of the Shari'a as expounded in the classical texts' (Sikand 2005: 93). Hence, reforms in the MPL need not necessarily be seen as interfering with or modifying the Shari'a. To strengthen his argument, he pointed out that the MPL was itself a product of the interaction between traditional Islamic jurisprudence and the British colonial legal system, and was, therefore, not equivalent to the Shari'a itself. In preparing the principles and details of Anglo-Mohammedan Law, colonial jurists drew heavily on British notions of equity and justice, in the process modifying the traditional fiqh in several important respects. Thereby, the British did away with Islamic criminal law and even with certain traditional laws relating to personal affairs. For instance, the traditional fiqh rule that required that the judge adjudicating a case between two Muslims himself be a Muslim was scrapped, slavery upheld by the traditional jurists was abolished; the law laying down death for adultery and apostasy was replaced; drinking alcohol and eating pork were no longer recognised as cognisable offences; and so on.

Thus, any reforms in the MPL would not be tantamount to tampering with the Shari'a as the MPL was not to be regarded as synonymous with the Shari'a in all respects. To quote Fyzee, 'In every age and in every country, the Shari'a has been the subject of constant study, examination, and exposition, and these expositions being human and imperfect, and relate to time and circumstance, vary from country to country and age to age.' Hence, he added, 'it is submitted that it is futile to argue that where a certain rule of law, as applied by the Courts in India, needs a change, we are interfering with an immutable rule of divine law' (1971).

Nevertheless, it is very clear that much of the ongoing debate on the MPL centres on the appropriate method for divorce and the rights of divorced women. While the Board continues to insist on the legitimacy of pronouncing the word talaq thrice in one sitting (although it has been forced to admit that this method is not the most appropriate) and limits maintenance rights for divorced women to just three months, Niaz in her article 'Maintenance After Divorce: A Major Concern of Muslim Women' points out that women should read the Qur'an to come up with startlingly different conclusions.

Thus the single-minded focus on personal law that has marked public debates is an insufficient, even skewed, approach. If women are empowered as individuals, with access to education and employment, they would themselves be better equipped to fight for their rights and promote reform.

Hasan and Menon recognise that this 'disproportionate emphasis' on the gender bias of personal law has led to the neglect of the secular discourse of development. They argue that to understand Muslim women better, it is important to locate them within the broader context of economic, political and other interests, and recognise that their 'disadvantage, discrimination and disempowerment are experienced at specific and particular intersections of class, caste, gender and community' (Philipose 2004).

There is no doubt that all the intricacies of the *Sharia* are quite fascinating. The main point, though, is not what the Sharia prescribes and proscribes – the real issue is, why and on what basis can it allow a community to dictate its own parallel judicial system? Whether the Shariah or the Quran should decide the legal arrangements of modern nation-states or the constitutions need to be decided democratically in order to serve the interests of all citizens. Why should women approach these courts in matrimonial matters when there is a provision for civil courts?

Empirical Findings

First, I would like to discuss some of the facts about Shariat Courts (darul Qazas), their aims and objectives, functioning, and so on, and second, discuss the experience of divorced women who approached these courts, the problems they faced, and the justice that was meted out to them. An interview with the naib Qazi of Imart-e Sharia Phulwari sahrif, Bihar (which covers the regions of Bihar, Orissa and West Bengal) and Darul Qaza, Muzafferpur (Muzafferpur, Stamarhi and Vaisahali districts) was also taken to highlight the courts' claim that they provide justice to women, and the existing reality. The women went to these courts for faskh (filed a petition for divorce by 'faskh' or by the action of a Shari'a [Islamic law] court), khula and maintenance.

Imarate-Sharia was established in 1921 with these objectives:

- ❖ Ensure applications of Islamic laws, as far as possible, particularly laws relating to marriage, divorce, inheritance, Khula, etc., in their original Islamic form.
- ❖ Establish the Islamic system of life on the lines laid down by the prophet so that Muslims may live within the framework of Islamic laws.
- ❖ Safeguard and look after Muslim interests and rights.
- ❖ Unite all Muslims strictly on the basis of the Kalima, even if they adhered to different schools of law.

Here we are concerned mainly with the first two objectives of the court, which to my mind are directly related to the rights of women under Islam and the existing reality on the one hand, and regulating the lives of Muslims within the framework of Islamic laws in a secular democratic state on the other. We would like to elaborate more on this. For instance, take the first objective of the Shariat Court, where it says 'ensure application of original Islamic laws'. In a democratic secular state, only the personal laws of different communities are applied, not the Islamic laws. As far as Muslims are concerned, they are governed by the Muslim Personal Law Shariat Act 1937, which is not the original Islamic law as far as matrimony and inheritance are concerned. For instance, the pronouncement and validity of triple talaq at one go is certainly not the Islamic/quranic way of pronouncing divorce, but is considered so in practice. Another example is the 1937 Act related to inheritance, in which it excluded a critical form of property - agricultural land and women's entitlement to it - which is certainly not what the Quran says about inheritance (Chapter 2, Ai-Baqarah and Chapter 4, An-Nissaa; a total of 14 verses), but is the interpretation of various schools of jurisprudence that relate to inheritance in the Quran, and not from the Quran itself. This is evident from the fact that Indian Muslims from southern states extended the 1937 Act to include agricultural land by deleting the phrase 'save questions relating to agricultural land'. For instance, Tamil Nadu, Karnataka and Andhra Pradesh did so in 1949, and Kerala followed in 1963. However, in many other states like Delhi, Haryana, Himachal Pradesh, Punjab, Uttar Pradesh and Jammu and Kashmir,

highly discriminatory tenurial laws and customs, which are at considerable variance with the Shariat, continue. These virtually exclude women from rights in agricultural land. More specifically, in UP, which has one-sixth of India's population, Muslim women's land rights are still subject to the UP Zamindari Abolition and Land Reforms Act 1950. Section 171 of the Act, which defines succession to a man's land, gives primacy to male lineal descendants in the male line of descent. Only in their absence can a widow qualify. Daughters come lower in the hierarchy. These tenurial laws in Delhi, Punjab, Haryana, HP and J&K are contrary to the rights promised to Muslim women by Islamic law.

Hence, our argument is that Shariat courts, as they claim, cannot ensure the application of Islamic laws in India mainly for two reasons: first, the Shariat Application Act is not totally in accordance with the Quran, as is evident from the changes other states have carried out in the laws on inheritance, and second, in a democratic state Islamic law cannot be applied.

Now we would like mention the Darul Qazas (here onwards DQ). There are 33 branches of DQs all over Bihar, West Bengal and Orissa, of which 28 operate in Bihar, except for the main Shariat court at Phulwari sharif. There are 24 objectives of DQs, but here I am restricting myself to those that are directly related to women. The reason for highlighting its objective is to see how far they are met in the event of a woman approaching it. And if these are not met, what are the reasons for it? The objectives are: Settling claims for separation on the grounds of non-payment of maintenance and other violations of women's rights.

- ❖ Settling claims for separation on the grounds of non-compliance of the order of DQ for the maintenance of the wife.
- ❖ Settling claims for Khula.
- ❖ Settling claims for Haqq-e-hazanat (the right of the mother to rear her children).
- ❖ Settling claims for mehr, alimony and maintenance.
- ❖ Settling claims for the return of articles given in jahez (dowry).
- ❖ Settling disputes relating to the protection of the interests of minors.
- ❖ Confirmation of the validity of a Nikah and certificates of marriage.
- ❖ Authorisation of Nikah.

Looking at the data obtained from the central Shariat (Imarat-e-sharia) court, Patna, with regard to the cases it had dealt with from 1993-2000, we find that the cases of khula were much less than those of fask, that is, there were 33 cases of khula and 1,004 cases of fask. Out of 1,004 cases only 94 women filed a case for non-payment of maintenance, mehr, and return of jahez/dowry. The data for how many women received their claim was not available with the court (IMS, Patna 2000). The qazi stated that the women who went for khula did not claim any maintenance and mehr because they did not want to live with their husbands, and compromised on the conditions of their husbands. Data obtained from Darul Qaza, madarsa Islamia Jamia-uloom, Muzafferpur, Bihar (which covers three districts) for the year 2004 and 2005 also reveals that the cases of khula are less than those of Fask. The total number of khula was four, while those for Fask was 40. When asked about the reasons for a decrease in khula and an increase in fask, the Qazi said that women are becoming aware of their rights and are not ready to forgo or compromise their rights on mehr and maintenance. He also pointed out that if women are not receive their rights despite the several notices issued to the husbands by the Shariat Court, they come to the court to ask for the papers to file a case for maintenance in the civil court. Thus, awareness about their rights at both the shariat and civil levels could be one of the reasons for an increase in the cases of fask.

During the interview with the naib qazi of the court, it was also revealed that when a woman who has been deserted by the husband files a case for maintenance, and when a notice is issued to them, they would immediately come and ask for Rukhsati. The data shows that out of 1,037 cases of divorce registered in Shariat Courts, 248 men were ready to take their wives back (Rukhsati) to avoid paying maintenance and mehr. It needs to be mentioned here that these women were deserted by their husbands on various pretexts like less dowry, not being up to the expectations of their husbands, for not getting on well with their in-laws, suspicion where the wives were concerned, the fact that some wives were more educated, the wives' jobs, and so on.

Socio-Economic Background of Women

Out of the 20 women who were either divorced or sought khula and fask, 11 were from Ashraf families and nine from non-Ashraf families. Three women were illiterate, nine had completed secondary education, and seven were graduates and later completed either teacher's training or Masters with the help of their parents and took to teaching, and one was a post-graduate. Almost all the women were from a lower economic class, and their fathers either had petty businesses or were in government service.

Four of these women sought khula from the district shariat court, on the terms and conditions laid down by their husbands. Since they did not want to live with them, they accepted the terms. I would like to reproduce a copy of a judgement of DQ to show how the process of khula is institutionalised, and how the qazi never tried to put pressure on the husband to follow the true path of Islamic teaching and give women their due, particularly the mehr, which is her right. When we asked the Qazi why he had never asked the women why she was condoning her mehr or why he did not pay the mehr at the time of the nikah, he said it was not his responsibility because the khula is initiated by women with mutual consent. Dated 9 safar, 20 Hijri, the complaint Waheeda Khatoon D?/O md. Shoab has condoned her mehr, maintenance for iddaat and all her claims of matrimonial rights. And defendant Md. Arzoo S/O md. Akhater Hussain has no responsibility against her wife. Now the complaint is no longer wife of the defendant. After completing her iddat she is free to remarry and the defendant owes no responsibility of her Mehr and maintenance for iddat period.

The condition laid by the husband includes: the wife would not demand her mehr and maintenance either for herself or for her children, even if the children are minor, and the non-refund of her jahez. The reasons stated by women for seeking khula were: husband's suspicious attitude, less dowry, mother-in-law's intolerant behaviour, unnecessary restrictions imposed on them, and so on. These women were married for five to 10 years. Some of them had two to three minor children, and the responsibility was not borne by the husband at the time of khula.

Ten women sought fask from the central Shariat Court at Patna. Out of these 10 women, six were educated up to secondary school, three were graduates, and one was a post-graduate. The reasons were more or less the same as those stated by the women who sought khula, but the difference was that these women were more assertive and did not allow their husbands to escape their liabilities. They approached these courts, expecting justice (experience discussed later). Among the women who went to Shariat courts, six were victims of physical torture because of their good looks, which created suspicion about their character, their high level of education, for not asking articles/jahez from their parents, and for asserting themselves and their social and reproductive rights within the Islamic framework. Their husbands and husbands' families disapproved of their educated status and desire for independence, and curbed them by stating that since they were well-off, there was no need for the women to work and meet men at the workplace (the experience will be discussed later). They were repeatedly told by their husbands and mothers-in-law that the only responsibilities of the wife are to produce progeny, keep her husband happy, and behave as per the desire of her husband. However, these women never received the money to fulfil their desires as the husband's desires were prioritised. Unmet demands for dowry even after 10 years of marriage was another reason, as some of these women were not ready to ask their parents for more. As a result, they were subjected to mental torture by not being provided with essential services and proper food, being made to do hard labour related to agricultural activities despite labourers being available, by being shut up inside the house without food and water, and finally by not being allowed to meet their closest relatives. Through the intervention of neighbours, these women got a chance to leave their in-laws' houses and decided not to return. Two of them filed cases on the grounds of non-maintenance, while one did so on the ground of the husband's impotency, which was very difficult to prove (discussion below). Six women were divorced by their husbands in one sitting without any genuine reason, and in the absence of any witness. The main reasons were: not having brought enough dowry, or because the demands for the same were not met even after 10 years of marriage, not being up to the expectations of their husband (with regard to beauty and education) and in-laws, despite their effort to adjust.

When I asked the Qazi about the increase in the cases of fask, I was told that this was because first, women are becoming aware of their rights, particularly matrimonial rights related to divorce and maintenance, and hence do not want their husband to shirk their matrimonial responsibilities. Second, with the spread of education and exposure to the outer world through the visual media, they are in touch with the development and debates taking place around the issue of divorce and maintenance.

However, despite their continuous and repeated appeals to the jury to get back their mehr, maintenance and jahez, none of the women who went to the Shariat Courts for faske-nikah got it. After the final judgment, which took almost two years (the case was with the district DQ for a year and a half, but due to the non-appearance of the husband on the due dates, the case was transferred to the central shariat court), and despite filing the women filing several petitions for the return of mehr, maintenance and jahez, the court was unable to pressurise husbands to comply.

The women who were divorced by their husbands did not get their jahez and maintenance even for the iddat period, and only two of them got their mehr. Since there was no nikahnama and no witness at the time of the pronouncement of divorce, they were deprived of their matrimonial rights. They did approach the DQ, but in the absence of any proof/witness of their divorce and, moreover, the absence of their husbands on the dates fixed by the court for the hearing, the case was dismissed.

As far as the custody and maintenance of children were concerned, in 18 cases, the husband neither claimed the child nor provided any maintenance for bringing up the minor. The sole responsibility for the women and the children lay with the women's parents, some of whom were retired or had petty businesses. Interestingly, none of these women remarried, while all the men did so after their divorce with handsome dowries. Six of the divorced women were working and looking after their children, while the rest of them were dependent on their parents.

Hence, we strongly feel that it is high time that the AIMPLB, instead of focusing on DQ, pay attention to reformulating the nikahnama to make it more gender-just, and incorporate the suggestions given by women's organisations, which have been working on the issue of divorce and

maintenance of Muslim women and the practical difficulties they have been facing in the society with regard to their survival and status.

Experiences of women and the claim of AIMPLB for Darul Qaza

In this section I will elaborate on the claim of the AIMPLB for establishing and strengthening Darul Qazas for providing quick justice to women as per the Islamic provision. I would also like to mention the various objectives of darul qazas functioning in various parts of Bihar, particularly Muzafferpur and Patna, where women went for justice.

The women who filed the cases of fask had various reasons for doing so, as stated earlier. While talking to women who sought fask-nikah about their experience in these courts, they stated that they were under the impression that when it came to seeking divorce and settling maintenance/mehr and other matrimonial rights, the proceedings would be less time-consuming, less expensive, and, above all, the judgment would be more in line with quranic prescriptions. However, their expectations were wrong. Salma (name changed) explained that it was very difficult to face the Qazi, not because she was wrong and did not have any proof for seeking fask, but because of the way the maulana spoke to her. He was very harsh, and biased against her. Further, the way they asked questions and pressurise only the women to adjust was one-sided. Despite Salma telling him that her husband ill-treats her and does not give her any money or fulfil her day-to-day requirements, he kept on insisting, 'Wo Tumhara Shauher hai uski khidmat kerna, uska hokum manna thumara furz hai (he is your husband, to serve him and obey him is your duty)'. Her father and relatives also supported her allegations, but it was of no use. While the Qazi set new dates so that Salma could change her mind, he did not say a word to her husband about his furz (duty). In 90 per cent of the cases, the women said that they could not express themselves or explain their problems to the Qazi as they had no female member who would understand their problems.

This experience was shared by other women as well, who also said that the Qazi was not convinced about the grievances they had vis-à-vis non-maintenance, disrespectful treatment, doubts about their character, and their not being allowed to meet their relatives, particularly male cousins,

and not being allowed to visit their natal family and relatives. It was also very hard for the women to make the Qazi believe their tales of the physical abuse/torture they had faced on occasions when they had refuted their husbands' false allegations and argued with them. The husbands had behaved in a very decent manner before the Qazi, even requesting the women to not break up their families, but turned threatening the moment they emerged from the court. They also pointed out that in the absence of a female jury, they were unable to show the marks on their bodies as proof of the cruelty they had endured, on the basis of which they had filed the case for fask. Shahana stated that upon complaining about her husband's physical abuse for not having brought enough dowry (specifically a scooter), the qazi, instead of warning her husband, actually instructed her father to provide his son-in-law with a scooter in an attempt to make his daughter's life smoother. Despite her reluctance, her father complied. However, even this did not work as the abuse continued, with her husband demanding other things, which she refused to provide. One day, on the pretext of visiting a doctor (for which her husband never gave her money, but always dropped her at her father's house when it came to paying the bill), she decided to not leave. After listening to her woes, her father filed a First Information Report at the local police station about the safety of her daughter, which he did not like and insisted her to go. She decided not to, and filed a case of fask-e-nikah with the Darul Qaza, as going the civil court would bring dishonour on her family, and make it difficult for her two sisters to get married. Her father also advised her to file a case with the Darul Qaza in the hope of speedy justice as per the rule of Islamic prescription. However, her husband, instead of appearing in court on the due dates, went separately to the Qazi and cleared his position by refuting all the allegations levelled against him. The Qazi, finding the case controversial, transferred it to the central Shariat court.

Shabana said that she had been under the impression that the procedure of seeking fask would be easier as compared to civil courts, which take at least two to three years, and she had been confident of getting her matrimonial rights as per Islamic rule. But to her surprise, the process to fask the nikah took three years. The judgment was in favour of protecting her matrimonial rights, including maintenance and mehr, which her

husband promised to give within three months. However, till the time of this case study, she had not received any maintenance either for herself even during the iddat period, or for her children (two daughters, who opted to live with her).

The women who approached these courts also claimed that the absence of the other party on the due dates, non-perusal tendency of the court to the recovery of maintenance; mehr and dowry were not in accordance with Islam. After the final judgment, despite the Qazi's notice asking for a return of the mehr, provision of maintenance for the iddat period and for children in case of minors, or who the ones opted to live with their mother, the women have received nothing till date. When they approached the Qazi, he admitted his helplessness by saying that since he did not have any force or agency to recover mehr/maintenance, they would have to take recourse to the civil court. Women approached these courts thinking that there would be less hassle and quick justice in accordance with quranic injunctions, but the reality was different. They pointed out that to recover their matrimonial rights, they had to file a case with the civil courts since the Shariat Courts have no power or civil force to implement their judgment. In this process of shuttling for justice between the shariat courts and the civil courts, the women had to suffer physically, mentally, financially, and socially. Hence, despite the easy process of dissolving their marriage, the right given to women in Islam becomes the most difficult, which may discourage many women to start the process yet to live a miserable life.

Women, particularly those whose children were minors, added that on every hearing they had to take two male witnesses who were present at the time of their marriage along with their father or brother, which they found very difficult. First, it was difficult for the persons concerned to take out the time and second, it was equally difficult to convince the persons to do so. As the act of seeking divorce on the part of women in our society is generally perceived as playing with the honour of the family, nobody wants to get involved.

The experiences of women and relevant issues around it

Thus, the experiences of the women tell a separate story, which to my mind does not accord with the AIMPLB's claims for their campaign of establishing and strengthening Shariat Courts. I would like to again highlight some of the objectives of these Shariat Courts in the light of these experiences. The very first objective, that is, settling claims for separation on the grounds of non-payment of maintenance and other violations of women's rights, was not fulfilled in these cases. The women, despite filing several petitions to the shariat courts for settling their matrimonial rights after fask or khula, did not receive any of their rights, and had to approach the civil courts, which resulted in harassment for the women and her family. As far as Haqq-e-hazanat or the right of the mother to rear her children is concerned, in the majority of cases the men did not claim the custody of children, particularly in case of minors. The women who were not earning enough to rear their children did file petitions in this court to settle the matter of maintenance for their children, but when the matter was not settled by the court, they finally they had to seek justice in the civil courts. As far as the return of articles given at the time of marriage, and the settling of mehr and maintenance are concerned, the court was unable to settle these rights, violation of which is un-Islamic as well as against human rights. Despite the Darul Qaza's claims of their ability to settle disputes surrounding mehr, alimony and maintenance, women hardly got their rights. The court simply professed itself helpless by stating that it did not have any machinery to force the husband to comply.

Now the relevant issue before us is: despite the failure of these shariat courts to meet the matrimonial rights of women, why is the AIMPLB insisting on establishing them? Are women ready to accept this demand as mentioned in its model nikahnama? How are these courts going to provide more relief to women as far as matrimonial disputes are concerned?

To my mind, there could be two probable reasons for this:

First, maintaining and strengthening of community identity through the Muslim Personal Law, and second, to counter the growing feeling of

insecurity arising out of frequent communal riots, which result in the loss of life, property and dignity of women.

However, the relevant point is that in both situations it is the women whose rights and interests are sacrificed in the name of religion and politics of identity. As we have seen in the Shah Bano case, where she was denied her right to maintenance, a new law was enacted. The AIMPLB's move will further deprive women of their citizenship rights.

As far as the AIMPLB's stand is concerned, for the average Muslim women, a Board like the AIMPLB makes no difference to their daily existence and their day-to-day problems of livelihood. Also, the Board's version of the nikahnama has very little meaning as in the majority of cases, there is no nikahnama (Hussain 2001). Muslim women feel that the Board is not a law-making body whose words are final, with all Muslims being compelled to abide by those laws. In fact, it is just a coalition of around 400 representatives from different sects, which came into existence as recently as 1972. At most, it can suggest a course for the community to follow, and it is up to the community whether they follow it or not. However, it is the impression of the common masses, particularly the illiterate strata of Indian Muslims, that it is a statutory body of Muslims which has control over the entire community, irrespective of their sectorial divisions.

At the same time, we do feel strongly that to understand these issues concerning Indian Muslims, and their desire to cling to their community identity through personal law, we have to look at the country's history and legal system. Nehru initiated a number of reforms, modernising and democratising the Hindu marriage and inheritance laws. These reforms were also applicable to Sikhs, Buddhists and Jains. The reforms forbade Hindu men to take more than one wife, prohibited child marriages, and gave daughters and sons equal inheritance rights. However, the Muslim community was exempted from these reforms.

An exception was made for Muslims because the Congress Party had promised the ulema of the Jamiat-e-ulema-e-Hind, who had supported the party's freedom struggle, that the Indian state would not interfere in Muslim personal law. Instead, the party and the state would wait for the Muslims to voluntarily assimilate into mainstream political life, and thus participate in the democratic nation-building project.

Successive governments continued to make changes in family law, but it was never clear if they applied to Muslims. For example, it was laid down that if a man divorced his wife and she had no source of income, the husband was obliged to provide for her in accordance with his income. The Shah Bano case made it clear that the progressive reforms carried out to protect the interests of women did not apply to Muslims.

Further, a nation ripped apart with communal riots provided sufficient justification to the state for permitting contradictory claims. That the constitution is ambiguous about the nature of religious personal laws is indicated by the fact that the arguments both in favour of and against any reform in personal law are based on its principles. This ambiguity permits the state to act discrepantly with respect to the essentially similar claims of different communities.

Thus, the necessity for national consolidation and ensuring security to minorities outweighed the demands of personal law reforms for the legal equality of women. Unfortunately, five decades later, the same arguments have been forwarded by the state for not initiating any reforms.

It is also very clear that while the continued existence of various religious personal laws do not serve any specific purpose for the state, the political cost of reform will certainly be too high for the government to make such an attempt. Most important is the fact that apparently, women as a class or a group do not pose enough of a threat to any government to undertake sufficient measures to improve their position, so no concrete legal step has been taken by the government to improve the status of women, with the exception of the Muslim Women Act 1986. Thus, on the one hand the state has perpetuated patriarchy and added to the oppression of women through its ambiguous policies, and on the other hand, the clergy, in the name of community identity, has doubly oppressed them.

Thus, the exemption Nehru's government gave to the Muslims was based on the good faith that Muslim community leaders would prepare their members to voluntarily join the mainstream. However, these expectations bore no fruit. Instead, the ulema promoted the politics of identity and isolation among Muslims rather than focusing on an improvement in their social and economic status by pressurising the government, despite the available facts and figures highlighting the

community's backwardness. As a result, the Indian Muslim community is poor, and lags behind other communities in education and other socio-economic indicators. As far as Muslim women are concerned, they are the most vulnerable because traditional Islamic law on marriage, divorce and inheritance is outmoded and inadequate, and does not protect their rights. The recent order of the Supreme Court directed at the Centre and states to frame rules for the compulsory registration of marriages within three months was disapproved of by the MPLB. Basically, this was intended to protect women's rights over property, and in cases of desertion. Another recent court ruling stating that a triple talaq uttered by an inebriated husband shall be deemed invalid on voluntary retraction was taken as interference with personal law. This move by the court was no doubt in the interest of women, but seems to be untimely, particularly in a charged communal atmosphere following the Gujarat genocide and the recent move of the Gujarat government to demolish Durgahs/shrines in the name of cleaning and beautification of the city. In this atmosphere, the Muslim clergy or the conservative element of the community are bound to cling to their community identity, which is maintained largely by the womenfolk. And in this process of maintaining community identity, the community interest has been overriding the gender interest.

Hence, there is a need to create a conducive atmosphere in which the minority feels secure. Also, women's organisations should be consulted along with progressive community leaders before bringing about changes to make personal law more gender-just.

Challenges Ahead

The challenge before women lies at two levels: first, at the community level and second, at the state level. Thus, the foremost task before women is to launch a strong countrywide women's movement from within the community to debate the issue of women's rights, and after a consensus, a strategy of reform should be evolved. It is very encouraging to note that the process has already begun. For instance, in nikahnama, which was prepared by women's organisations, it was suggested that an advocate has to be present during the nikah (marriage). However, the (Board's) draft has

only mentioned this as an option, which defeats the very purpose of this suggestion. Since the Shariat courts have failed to safeguard the interests of women, the option/decision has to be left with the women.

As far as the Qur'anic text and women's rights are concerned, while the former cannot be taken as decisive, how it is understood by the jurist or theologian is equally important. As pointed out earlier, cultural mediation plays an important role. Some translations of the Qur'an seems to indicate that women are secondary to men. For instance, the word qawwam in the verse 4:34 has been translated in 30 different ways, for instance as ruler, manager, protector, supporter, in charge, etc.

In this key verse men have been described as qawwamun by the Qur'an, and conservative translators took this to mean 'men are rulers over women', thereby proving the superiority of men over women. However, liberal translators do not accept this, taking it to mean 'in-charge', or 'protectors', or 'managers', and so on.

The Qur'anic text cannot be understood in the same way today as it was centuries ago in a feudal cultural ethos. Thus, one great impediment in bringing about change even today is the absence of a democratic ethos in the Muslim world. The women still continue to play a subordinate role in these countries, as in these societies the jurists and theologians tend to be authoritarian, and lack a democratic perspective.

A great struggle is going on in even Muslim countries for the rights of women. An increasing number of women are receiving education and becoming aware of their rights, Islamic or otherwise, and demanding changes in the law. In some Muslim countries, women theologians have emerged, who have a thorough knowledge of the Qur'an, Islamic theology and the shariah, for instance, Fatima Mernissi from Morocco, and Amina Wadood and Riffat Hassam from the USA. Also, there are women's organisations like 'Sisters in Islam' in Malaysia. These theologians and organisations are questioning the traditional interpretations of the Qur'an with respect to women's rights, and are developing a new female-oriented theology that ensures equal rights for men and women.

In India, too, Muslim women are increasingly becoming aware of their rights and are demanding legal reforms in matrimonial matters. The establishment of the Muslim Women Personal Law Board and the efforts

of various Muslim women's organisations to read, understand and interpret the laws from a gender perspective through the provision of ijihad is a positive step towards women's awareness and assertion of their rights. Groups like COVA, Majlis and Awaz-e-Niswaan, and more recently, Bhartiya Muslim Mahila Andolan (2007) among others, have time and again used various fora to claim that the vast majority of Muslim women want a change in the laws that violate the rights given to them by the Qur'an, and work for gender-just interpretations of Quranic verses in the chapter on women's rights. However, at the same time they want the change to originate from within the community and from women, who have never been considered as far as their rights are concerned.

At a public hearing organised by the Institute of Islamic Studies and the Centre for the Study of Society and Secularism held in Mumbai in 1998, the overwhelming opinion was for the community to stop treating its personal law as immutable. The resolution passed at the end of this meeting told its own story: 'It is resolved to open a dialogue with the Muslim Personal Law Board in connection with necessary reforms in personal law as it operated today in India.' The resolution pointed out that these laws were enacted by the British, and cannot be called Shariat law in the strict sense of the term. It also pointed to the fact that there have been instances when progressive changes had been introduced in the law. For instance, the ulema led by Maulana Ashraf Thanvi had drafted the Dissolution of Muslim Marriages Act, 1939, which had provided much-needed relief to women whose husbands were missing. The resolution also noted the need for such initiatives on the part of the Muslim Personal Law Board even today,, which is apparently not an issue of priority.

The women's groups are challenging the Board for its lack of courage to take strong decisions. They hold that if the Board recognises the practice of triple talak in one sitting to be a reprehensible innovation, how can the same practice then be considered part of the Shariat? How can the Shariat include or sanctify reprehensible innovations? Many women from different Muslim organisations feel that maulanas or Imams of various Sunni schools of jurisprudence were products of their times, but now times have changed. It is the time we, the women of the community, reflect on the Qur'an and Prophetic traditions, and develop new ways of understanding our laws.

They stated that it is time the Board and the Ulema wake up to the needs of the community and start discussing important issues like the empowerment of the community, how to improve the socio-economic status of Muslim women, and their plight during and after riots, rather than focusing on the establishment of shariat courts.

Conclusion

It is, of course, not easy to challenge traditional sources of Islamic jurisprudence. It would require not only great Islamic scholarship, but also sustained effort in that direction in a conducive atmosphere free of communal tension. We have to re-codify the Shari'ah laws pertaining to women on the basis of the liberal, modern interpretation of the Qur'an, and some ahadith that are in conformity with the Qura'nic spirit. Such an approach, it is hoped, will be an instrument in the struggle for women's rights for practising Muslim women. This requires a great deal of research among the authentic Islamic sources, which will require great Islamic scholarship on the part of Muslim women activists in India. This process has started, and needs to be strengthened and supported. Initially they may have to face opposition from the conservative 'Ulama, but there is no other way they can demand change.

Second, the most important task before all of us is to de-politicise all Muslim issues, which are detrimental to national integration. Muslims should not be seen only as a vote bank. There has to be a sincere effort on the part of the community and the state to improve the overall condition of Indian Muslims. And if the overall conditions of Muslims improve, and they are well-represented in all social sectors, the conservative element would not get a chance to campaign for strengthening and maintaining a communal identity. For this, an aggressive but meaningful campaign as part of a larger project aiming at creating a critical class within the Muslim society has to be evolved by Muslim intellectuals through a scientific and modern interpretation of Islamic scriptures.

It has to be kept in mind, though, that reforming personal law in India is not a simple issue. It has to be seen in the overall social, economic and political climate of the country, and the insecurity arising out of frequent

riots. However, given the external communalisation of society, it becomes much more difficult for the forces of reform to triumph. But given the manner in which women within the community are mobilising for change, as is evident from the widespread reaction of Muslim women after the release of the model nikahnama, the clergy has to agree on a gender-just interpretation of laws, provided a conducive atmosphere is created in the country.

Undoubtedly, the community leaders' claim regarding the rights of minorities and religious personal laws are based on the constitutional guarantees of fundamental rights. They argue that the freedom of religion has been guaranteed by Article 25 of the Constitution, and any change amounts to curtailing this freedom. Even the Supreme Court judges are not unanimous on the question of whether enforcing a Uniform Civil Code as per Article 44 of the Constitution would violate rights under Article 25. The Muslims feel that Articles 25 and 44 contradict each other, and there is no question of enforcing Article 44, which is anyway only prescriptive and not obligatory.

Thus, minorities in general and Muslims in particular refuse to allow any change in their personal laws. Due to this, it is women who suffer. At the same time, the irony is that even if women from minority communities demand legal equality in personal matters, aided by the constitutional guarantees, the minority leaders as well as the state remain unreceptive because of the contradiction between the two Articles. Thus, it is not wrong to assert that when minority groups demand special rights by virtue of their minority status, it is not necessary that the claim of men are the interests of the entire group irrespective of sect and regional variations. Moreover, the demand must not silence women's voices and marginalise them further, preventing them from claiming their rights as citizens of India. A state must take the responsibility for welfare of the minority within the minority, and must not overlook the fact that these minorities are composed of women, too.

Muslims must understand that Shariat laws have incorporated human reasoning as much as divine injunctions, and that human reasoning is greatly influenced by one's own social and cultural ethos. A medieval social and cultural ethos prevailed over Qur'anic injunctions and Qur'anic

ethos. The status of Muslim women, which was fairly high, has come hurtling down. And it is the high time that Muslims seriously reflect on this, and bring about the desired changes in Muslim personal law in India rather than talking about establishing shariat courts to resolve marital disputes.

Further, the Muslim Personal Law Board, especially when it comes to its rigid stand on issues related to family and gender, must keep in mind that what is known as Muslim personal law was enacted by the British government in the 19th century and was based, apart from Shari'ah law, on British procedural law and on various preceding judgments. It was not even properly codified. The judgments of those days delivered by British courts were influenced by the social ethos of the Victorian period, which moulded the opinion of British judges, as did the prevailing and proven customs and traditions.

Today, women's rights have acquired an importance, particularly in this era of globalisation, and this changing scenario at the global level has to be taken into account while deciding cases pertaining to marriage, divorce, maintenance and property. The irony is that it is at the sub-class level that changes have occurred, and while people are taking advantage of modern developments, at the sub-cultural level our social traditions continue to deny women their rights. As far as the Muslim personal law is concerned, in the absence of any codification it is the judge's opinion that takes precedence. Also, one has to remember that whatever the personal law, the judge is bound to be influenced by the social movements for women's rights. No judge can ignore the rights of women in the changing dynamics of today's world. This is evident from the fact that despite the Supreme Court judgment in Shah Bano's case in 1985, the subsequent law (Muslim Women's Act, 1986) overturning the Supreme Court judgment did not influence judges' minds. That is why most of the high courts pronounce progressive judgments in favour of Muslim women. For instance, the latest judgment was delivered by the Aurangabad Bench of the Bombay High Court in respect of the divorce of a Muslim woman.¹

To conclude, Muslim women are now making their desire for change public, and are coming forward for a debate about reform/change in personal law. They have begun raising their voices against the teachings of any clergy

of religious board that contradict the teachings of Islam and gender equality. However, the women's organisations working for the rights of Muslim women, especially in the area of marriage, divorce and maintenance, have a different approach to and understanding of the functioning and interpretation of these religious bodies. They are not ready to accept their hegemony, as is reflected in the disapproval/reaction of women's organisations after the release of the model nikhanama and the establishment of the Muslim women personal law board. Thus, the present situation is different from 1986 when, with the consultation of this Board, the Act was brought in. In the 1960s and 1970s, and even up to the 1980s, there were no Muslim women NGOs, but now several of them are functioning and campaigning for a change in the Muslim personal law as it exists today. Now Muslim women have even formed their own boards and one of them, led by Shaista Khan, has even declared that since the Bhopal declaration was unsatisfactory, they will frame their own nikahnama and make it enforceable.

The Muslim women's organisations are neither ready nor in favour of the establishment of shariat courts.

Further, with the spread of education and awareness among Muslim women, pressure began to be built up for necessary changes in the Muslim personal law, particularly with regard to triple talaq and polygamy, in keeping with the demands of time. There has been continuous pressure levied by women's organisations to change the personal law in accordance with the Qur'an (Engineer 2005). The women, through various fora and seminars/meetings, have been questioning the Board for its lack of courage to take strong decisions about the various issues mentioned in the nikahnama, particularly those related to triple talaq and the establishment of shariat courts. The women's organisations have also voiced their concern about the Imams of the four schools of Sunni jurisprudence, as in their opinion these Imams are the products of their times, but now times have changed. It is important to note that more Muslim women are increasingly opting for modern education, which in turn makes them aware of their rights and leads them to campaign for the same.

Nevertheless, by omitting secular options like the judicial system, naari adalats, nyaya panchyats and lok adalats when addressing marital disputes, the nikahnama promoted the concept of Darul Qaza, Shariah Panchayat, or religious scholars to act as arbitrators. This, to my mind, is not going to help women, but will deprive women further of their rights as citizen of India.

Endnote:

1) Fahimbi from Latur was married to Dagdu Chote and three children were born from this wedlock. Fahimbi filed a case under Section 125 of Cr.P.C. for maintenance for herself and for her three children. Dagdu Chote married another woman, Kamrunbee, and had more children with her. He neglected the first wife Fahimbi and her children, and did not pay any maintenance.

On receipt of summons from the Court, Dagdu Chote appeared before the court and filed a reply saying he did not owe any maintenance as he divorced her (Fahimbi) on 24 February 1995. He also claimed that he divorced his wife in the presence of a Qazi and two witnesses, one of whom was Muslim and the other Hindu. He, therefore, prayed before the case that the application for maintenance under Section 125 of Cr.P.C. by Fahimbi be dismissed. This petition was dismissed by the 2nd joint Judicial Magistrate First Class at Latur on 21 November 1998. And the maintenance application filed by Fahimbi and her three children was allowed. The Magistrate maintained that the fact of talaq must be proved, as it cannot be accepted merely on grounds of pleading.

The respondent No I, i.e., Fahimbi, maintained that she was unaware that talaq had been given to her as it had not been communicated to her by registered post, which was returned. However, a presumption was made by Dagdu that pronouncement of talaq was communicated to the wife on 30 November 1992. The reason stated in the talaqnama executed was that the wife had filed a case for maintenance, and that she had insulted the husband and mother-in-law. Also, there were differences of opinion, as a result of which they cannot run a family.

The husband had pleaded orally that he had divorced his wife as per Mohammadan Law by pronouncing talaq in presence of two witnesses, though there he gave no reasons. The learned Judges maintained that as per the Holy Qur'an, there should

be 1) a reasonable cause, 2) it should be preceded by an attempt at reconciliation, and 3) the talaq should be effected only if the attempt at reconciliation failed.

This view was taken by the Single Judge, and the learned judge had agreed with the Gauhati High Court in the case of Zeenath Fatima Rashid and the Calcutta High Court in the case of Chandbi.

The Aurangabad Bench formulated the issues as follows: 1) whether a Muslim husband has a right to divorce his wife without any reason and merely at his whim; 2) whether the Muslim law mandates pre-divorce reconciliation and whether any pleading by the husband in the court that he divorced his wife would amount to divorce according to Muslim law; and 3) whether the husband has to prove in court that talaq was duly effected. The talaq must be preceded by an attempt at reconciliation. The Muslim law also recognises distinction between effective or proper talaq and ineffective or improper talaq. Thus, the Aurangabad Bench of the Bombay High Court concluded it is necessary that a talaq, even if it is oral, be proved before the Court if it is contested by the wife by leading evidence. (**Engineer 2000**).

References:

Ahmad Barkat, Ahmad. 1986.; 'The Millat and the Reformer'. *Hinduatan Hindustan Times*, (New Delhi).

'Behind Closed Doors: How Faith-based Arbitration Shuts Out Women's Rights in Canada and Abroad', 29 September 29, 2005, Rights and Democracy, http://www.dd-rd.ca/site/publications/index.php?lang=en&subsection=catalogue&id=1431&page=2&tag=&keyword=&show_all= Accessed on 19th April, 2006).

Bhargawa, Rajeev, 1999.; 'Should We Abandon the Majority-Minority Framework?' pp.169-205 in D.L. Sheth and Gurpreet Mahajan (eds), *Minority Identity and the Nation-state*, pp.169-205 edited by D.L. Sheth and Gurpreet Mahajan. New Delhi: Oxford University Press.

Bilimoria, Puroshottam. 'Muslim Personal Law in India: Colonial Legacy and Current Debates.', <http://www.law.emory.edu/IFL/cases/India.htm>. Accessed 18th April, 2006).

Chowdhary, Fatima., 2005. 'The other Side of Indian Muslim Identity', *Free India*, 14 March, 2005.

Daniel W. Brown, Daniel W. (1996). *Rethinking traditions in modern Islamic thought*. Cambridge University Press.

Doi, Abdur Rahman I. 1984. *Shariah: The Islamic Law*.: London: Ta-Ha Publishers, London.

- Engineer, A.A., 2000. 'The need for codification and reform in Muslim Personal Law in India', *Dossier*, 22, January, 2000, Women Living Under Muslim Law.
- Engineer, Asghar Ali A.A. (ed.). (1987). *The Shah Bano Controversy*. Hyderabad: Orient Longman.
- Engineer, Asghar Ali A.A. 2005. 'Model Nikahnama - A Hope Or A Disappointment?' *Secular Perspective*, May 16-31 May, 2005
- Fariddi, F.R., 1972. 'Islamic personal law in India: Scope and Methodology of Reform', IN in Tahir Mahmood (ed.), *Islamic Law in Modern India*, pp. 123-27. Bombay;; N.M. Tripathy, 1972. pp123-27.
- Fazlur Rahman, Fazlur. 1980. 'Survey of Modernization of Muslim Family Law', *International Journal of Middle East Studies*, 11 (4): , Jul 1980, 451-65.
- Furqan Ahmad, Furqan. 1984. 'Indian Judicial Ruling of 1983 on Muslim law.', *Muslim India*, 2 (24):, Dec 1984, 562.
- Fyzee, A.A.A 1971. *Reform of Muslim Personal Law in India*. Bombay: Nachiketa, 1971.
- Fyzee, A.A.A. 1981. *A Modern Approach to Islam.*, New Delhi;; Oxford University Press. 1981.
- Gani, H.A. 1982. 'Muslim Politics and National Integration', *Radical Humanst*, 46 (7): Oct 1982 25-27).
- Ghosh, S.K. 1987., *Muslim Politics in India.* , New Delhi: Aashis Publishers, New Delhi page 46.
- Hallaq, Wael B. Hallaq (2001). *Authority, Continuity and Change in Islamic Law*. Cambridge University Press.

- Kanchan Gupta, Kanchan., 2005. 'Secular ? That's a law', *News*, 9 May, 2005.
- Krishna Iyer, V.K. 1972. 'Reform of the Muslim Personal Law', IN in Tahir Mahmood (ed.), *Islamic law in Modern India*, pp. 17-33. Bombay; N.M. Tripathy, 1972.pp17-33.
- L. Ali Khan, L. Ali. 2003. *A Theory of Universal Democracy: Beyond the End of History*, The Hague;, Kluwer Law International, 2003.
- Mahmood Tahir, Mahmood. 1975., *Family law and social change*. Bombay;; N.M. Tripathy. Mahmood., 1995. "India'," in *Statutes of Personal Law in Islamic countries*, 2nd ed., New Delhi, 1995.
- 'Mullahs propose Sharia Courts in India', www.Outlookindia.com, Web, 26 May, 2005.
- Noorani, A.G. 1985. 'Judgment in Shah Bano's case'., *Indian Express (New Delhi) Muslim India*, 3 (35): ,Nov 1985,515-516.
- Omid Safi, Omid. (2003). *Progressive Muslims: On Justice, Gender, and Pluralism*. Oneworld Publications.
- Philipose Pamela—a 2000. 'Change in the air', *The Indian Express*, 19 April, 2000.
- Philipose, P. 2004. 'Women Invisible', *The Indian Express*, 26 July, 2004.
- Reza, Aslan. (2006). *No God but God: The Origins, Evolution, and Future of Islam*. Random House Publishing Group.
- Saumya, Uma., 2005. 'Muslim Women's Rights to Maintenance in India', *Law & Rights*, Issue No. 175, 30 January, 2005.

- Shams, Peerzada. 1972. *Muslim personal law and uniform civil code*. Delhi; Markazi Maktaba-e-Islamia. 1972.
- Sikand, Y. 2005. 'Gender Justice and Muslim Personal Law: Voices of Change', *Islam and Inter Faith Relations in South Asia*, <http://www.islaminterfaith.org/march2005/article2.htm> Accessed on 1st May, 2006.
- Sikand, Y. 2005. 'The Muslim Personal Law Board's Shariah court campaign', *Qalandar*, September, 2005.
- Sikand, Y. 2005., 'Dangerous Portents: Shariah Court Campaign In India', *Cobrapost News Feature*.
- Sikand, Y., 2005. 'Reforming Muslim Personal Law in India: The Fyze Formula', *Dossier*, 27, December, 2005, p 93.
- 'Supreme Court notice on religious courts draws flak', Sharat Pradhan, *Indo-Asian News Service*, 17- 8 August, 2005.
- Tariq Ramadan, Tariq. (2005). *Western Muslims and the Future of Islam*. Oxford University Press, USA.
- The Hindu: Karnataka, Thursday, Mar 09, 2006 'Petition against Shariat courts to be contested', *staff Reporter The Hindu*, 9 March, 2006.
- Upadhyay, R. 2003. 'Muslim Personal Law: Should it be politicised?', South Asia Analysis Group, 2003).
- Wadhwa, Soma., 2004. 'Personal Law in India: Triple Talaq, Mehr, and why it doesn't matter anyways', *Outlook*, Monday 12 July, 2004.
- Zafarul-Islam Khan, Zafarul-Islam. 2005. 'Petition against "Shariat courts" is misguided', *The Milli Gazette*, Tuesday 19, August 2005.