

# Muslim Women's Rights Discourse in the Pre independence Period

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**T**he present paper deals with the discourse of the rights of Muslim women in the pre- independence period with particular reference to the Shariat Act 1937 and the Muslim Marriage Dissolution Act 1939. We try to raise a few questions which would provide a comprehensive idea of the intentions behind these enactments. What is meant by the Shariat? What was the position of women before these Acts were passed? Why was a need for these enactments felt by the community, national leaders, reformers, as well as the British rulers? Was issue of gender justice the focus for the demanding these enactments by the community leaders and the political parties? What were the overall political circumstances in which these enactments were brought? This paper attempts to explore the socio-historical and political situation in which these Acts were passed. To this end, we have tried to capture various debates that took place among the legislators in the assembly, social reformers, writers, community leaders and so on. The role of political parties, women's organizations and the women's movement is also taken into account in dealing with the above issue. The paper is based on information collected from primary and secondary sources, and analysis is socio-historical in nature.

## **Origin of Muslim Law**

Before discussing the Muslim personal law, we would like to define the term law. There are two different conceptions of law: as divine and as man-made. The latter notion is the guiding principle of all modern legislation. Law, according to a modern Jurist, is the 'distilled essence of the civilization of a people, it reflects the people's soul more clearly than of any other organism. As far as the literal meaning of Shariat goes, it is considered as 'the road to the watering place, the path to be followed. However, the technical meaning of Shariat is the Canon law of Islam, the totality of Allah's commandments, and is the central core of Islam, while jurisprudential law is called Fiqh. Therefore, fundamentally, Shariat is a Doctrine of Duties, a code of obligations in which legal considerations and individual rights

are given a secondary place. In other words, as pointed out by Mr Justice Mahmood, 'It is to be remembered that Mohammadan law is so intimately connected with religion that they can not readily be dissevered from it'(Fyzee 1974:15).

Mohammadan law came into existence through the working of Muhammedan jurisprudence on the raw material which consisted of the popular and the administrative practice of late Umayyad time and was endorsed, modified or rejected by the earliest lawyers. These lawyers and their successors were guided by a double aim namely by the effort to systematize and by the tendency to 'Islamize', to impregnate the sphere of law with religious and ethical ideas, to subject it to Islamic norms, and to incorporate it in the body of duties incumbent on every Muslim (ibid.30).

Right from the days of the East India Company, the English courts assumed the authority to decide disputes between natives. For this purpose, several scriptures from their original Sanskrit and Arabic were translated into English by the Company officials, and were used while adjudicating over matters of personal laws of the native communities. Charles Hamilton's translation of the Arabic text, al-Hidaya (the Guide), which was translated in the eighteenth century, and Neil Baillie's 'Digest of Mohammedan Law' based on Fatwa Alamgiri served as the guidelines of the courts for well over two centuries. After the Mutiny of 1857, the administration of India shifted from the Company to the British Crown, and the British felt an urgent need to introduce its own legal system. This led the enactment of various Acts in a codified form from 1858-1910. For instance, the Government of India Act 1858 brought in major changes in the legal structures. The Supreme Courts were replaced by integrated High Courts with the Privy Council as the final Court of Appeal.(Mahmood 1995). By the end of the 19<sup>th</sup> century, almost every aspect of the personal laws of all Indian communities had become part of 'case law'. However, the British were very cautious about introducing any law closely connected to religion, especially ones whose enactment could put the British rulers' political interests in jeopardy. Hence, the Indians were left to be governed by their religion-based laws, or personal laws (ibid.12).

During British rule in India, the conduct of Muslim law had been mediated through the appointment of a Kazi. However, in 1864 the British government abolished this post. Although, the Shariat was not fully in force during the British rule, the official Kazis, who were paid by the government, did dispense legal absolution in cases of marriage, divorce, dower, and so on. But once official the post of kazi was abolished, the community was left to those Kazis who had no official authority and were perhaps less well-trained, and, therefore, had far less influence on the community when it came to enforcing compliance with some of the

injunctions. In this situation women became more vulnerable with regard to the customs and usages which deprived them of their Islamic rights (Lateef 1990:62).

As the legal system developed during British rule in India, the prevailing Islamic law was superseded to a great extent by customary laws, whereby a number of customs, practices and usages relating to family life, which were alien to Islam, became part of the law. In due course of time these customs and usages were embedded in Muslim homes and social structures. Apart from the fact that Customary Laws were being applied during British rule in India, the courts took decisions on Muslim Law where applicable. These decisions interpreting Muslim law resulted in the body of laws, which, as stated earlier, were known as the Anglo-Muhammedan Law. Many of these so-called interpretations of Muslim Law were contrary to the spirit and content of Islamic Law, and adversely affected the legal status of Muslim women in India. In fact, as pointed out by Patel (1979): 'the law that was applied by the British Indian courts was not Muslim Law in strict sense but was what may be called as, a cross-breed, a hybrid, resulting from the interaction of the Principles of Muslim Law with the rules of Muslim Law as these were adopted and applied by the British Indian courts pursuant to the powers conferred on them by several legislative enactments defining their powers and jurisdiction to apply Muslim law in the determination of controversies before them' (p.8).

### **Women's movement and the Question of Women's Rights**

The link between the women's movement, the proximity of several of its leaders to the Indian political leadership and the recognition of the importance of women's issues by the national leadership, all contributed towards strengthening the women's movement as a whole. The women's movement in India emerged during the 1920s. The political and economic changes that had taken place in the 19<sup>th</sup> century forced the reformers to reassess the status of women and bring about some changes by advocating women's education and rising the age of marriage. The Indian women's movement sought to develop a broad political, social and economic agenda in which legislative changes have been the cutting edge of induced social change. The linkage between social reform, the status of women and the national movement was a major source of numerical strength for the national movement, and political support for the women's movement. This linkage further strengthened the struggle against colonialism. The Women's Indian Association Report of 1933 reveals that the Simon Commission viewed the Indian women's movement as the possible 'key of progress' for an India free of communalism (Lateef, 1990:87).

The movement's success in bringing about social and legal reform facilitated the struggle for the enfranchisement of Indian women. By 1921, women had won the right to be elected to central and state legislatures, although women's status as voters depended upon their husband's property. From the early 19th century, the status of women became an issue of concern for male upper-caste and upper-class Hindu reformers. Their early efforts were directed against certain customs such as sati and the sanctions against widow re-marriage which were detrimental to the status of women. Later, they tried to educate women and bring them into public life. In south India the campaign was on to suppress the *devdasi* (temple prostitution) system. However, Indian men who encouraged female education and the formation of social organization did not relish hearing women speak about the evils of patriarchy. Franchise and civil rights were ideal issues for women to pursue since these discussions amongst them could take place without reference to sensitive social or cultural matters (Forbes 1998:93).

By the second decade of the 20th century, reform efforts were not exclusively confined to men, several all-India level women's organisations run by women also emerged to champion women's rights. The reformers stepped up the pressure on the Government to introduce a legislation that would strengthen the forces of social change. The basic arguments revolved around the need to get rid of age-old traditions, customary practices and social taboos, which were sapping the vitality of women's role in national life.

The kind of reforms they advocated was female education, the franchise, and changes in the Hindu Personal Law affecting marriage, family and property rights. Following 1930 and 32, when women made a tremendous impression through their involvement in national politics, all petitions requesting legislative changes or other moves design to improve the status of women were prefaced with reference to what women had done in the nationalist movement (Everett 1978). Thus, improving the status of women in India was a major social issue during the 19th century. The issues that women specified for consideration were inheritance, marriage and guardianship of children. The ultimate goal was to have a new law (Renuka Ray, AIWC Files no. 84). Renuka Ray argued in favour of new laws for all women, irrespective of caste or religion. She wrote that 'the legal position of Indian women was 'one of the most inequitable in the world today. Legal change would both remove the suffering of individual women, and allow India to join the modern and progressive states of the world' (Forbes1998:113). She advocated for a new personal and family law that would make women independent and fully equipped to participate in public life.

The two organisations namely Women's Indian Organization formed in 1917 and the All India Women's Conference (led by the Indian National Congress), formed in 1927, and mainly formed to discuss issues specific to women and their

social and legal disabilities. The main concern of Indian women's organisations was to make reforms in the legal status of women. The child marriage controversy caused them to view women's legal status as an especially serious problem, and from it grew demands for improvements in women's rights to divorce inherit, and control property. All through the 1930s, in order to press their demands, women's organisations formed committees on legal status, undertook studies of the laws, talked to lawyers, published pamphlets on women's position and encouraged various pieces of legislation to enhance women's status. However, they saw all Assembly bills that were introduced in the 1930s, like the Hindu Woman's Right to Property Bill, an amendment to the Child Marriage Restraint Act, a bill to allow inter-caste marriage, the Hindu Woman's Right to Divorce Act, the Muslim Personal Law Bill, the Prevention of Polygamy Bill, and the Muslim women's Right to Divorce Bill, as a piecemeal approach to improving women's status. Women like Muthulakshmi, Renuka, Mrs. Damle and Hamid Ali were not satisfied with these piecemeal acts but wanted comprehensive legislation accompanied by social and economic change instead (Forbes1998).

However, when these bills were discussed it became apparent that male reformers and women's organisations had differing concepts of women's legal needs.

'For Muslim reformers, as for their Hindu counterparts, women were symbolic not only of all that was wrong with their culture and religious life, but also of all that was worth preserving. If women personified the plight of their community: its backwardness, its ignorance of the faith, its perilous cultural and historical viability, they were also at the core of family life, the potential purveyors of ethical values and religious ideals. For Muslim reformers, considerations of women's position in the family and plans for women's education included discussions of household customs and rituals, of purdah, and of Islamic law as it pertained to women' (Minault,1998:6).

The women's organisations though were more in favour of setting a women's agenda which dealt only with the rights and protection of women without being affected by other considerations. Women levied pressure on both the British government and the Congress party to incorporate their demands as policy matter.

However, there had been a struggle amongst reformers, conservatives, community leaders, the government and women leaders as to who would set the agenda for women. The Indian National Congress proved a difficult ally. Only a few members agreed that women's legal rights deserved the highest priority. The members of the Muslim League, on a resolution moved by Jinaraja Hedge to set up a committee on the legal disabilities of women, openly said that they had no objection to setting up a committee as long as the committee confined its enquiry to Hindu law. Jinnah, however, firmly supported Bhupendranath Basu's Special Marriage

Amendment Bill (1912), which provided legal cover for marriages falling outside the Hindu and Muslim laws, although it caused dismay among Muslims.

Despite all these emerging political differences between the male members of the Congress Party and the Muslim League, the Indian women's movement, specifically the Congress led AIWC, remained united on the issues relating to women. Begum Shahnawaz appealed to Hindu and Muslim women to work together for the benefit of all Indian women. The All India Women's Conference, the Indian Women's Association and the National Council for Women opposed the idea of separate electorates, which divided women along communal lines. These three organisations subsequently dispatched a telegram to the British Prime Minister condemning separate electorates. In 1931, Begum Shahnawaz reiterated the need for women's unity.

Begum Jehan Ara Shahnawaz, (who later became a member of the Anjuman Himayat-i-Islam), devoted all her efforts towards the cause of women. She passed a resolution against polygamy in the session held at Lahore in 1918. She pointed out that Indian unity was only possible through its women, and in a message to south Indian women, she made an appeal that all women work together for the upliftment of Indian women. In words of Kamaldevi Chittopadhaya '...the women's movement is essentially a social movement and part of the process of enabling a constituent part of society to adjust itself to the constantly changing social and economic conditions and trying to influence these changes and conditions with a view to (merely) minimizing irritations and conflicts.... Women power is basic and the woman must be recognized as a social and economic factor on her own and not as assistant to man...' (Roshini, February 1946 No1 p4).

Rajkumari Amrit Kaur wrote

'...the proper status of women in modern society should, therefore, be settled not in the light of history but of ethics. It must accord not with the past, but with the general moral ideal which is current at the present time. The treatment of women must be on a level with the general conception of conduct and behaviour which each society seeks to realize... therefore, when we women of India today desire a change in outlook as far as our status is concerned, we can not be criticized, because in every age we have to make the appropriate social venture....' (Meherally1947: 90-92)

The passing of the Child Marriage Restraint Act (1929) was an outcome of the struggle of the women's movement. Bringing a legislation to raise the age of consent of marriage of a girl and a boy was another effort these organizations made with the support of both the Congress Party and the Muslim League despite their differences when it came to political power sharing in India. The Begum of Bhopal,

in her second annual meeting of the All-India Women's Conference in Delhi in 1928, called on all the women present to avoid the religious divisions and bickering which had affected Indian political life. She asked the women to work in solidarity to improve the quality of women's education, and gain greater rights for women. She particularly supported the Sarda bill, then in the legislature. Despite Muslim leaders opposing the amendment of this Act (to exclude Muslims from this Act), the women's organisations tried to remain united on this issue. Muslim women members of the AIWC presented a memorial in support of the Sarda Act and told the Viceroy:

'We, speaking also on behalf of the Muslim women of India, assert that it is only a small section of Mussalman men who have been approaching your Excellency and demanding exemption from the Act. This Act affects girls and women far more than it affects men, and we deny their right to speak on our behalf' (Forbes 1998:89).

In 1929 Abru Begam urged women to support the campaign to raise the age of consent for marriage. The Women's Indian Association emphasised the need for women to secure their civil rights through legislation. Mrs. Hamid Ali, in her presidential address to the AIWC held in Lucknow in 1932 demanded a solution for the disabilities of Hindu women, and urged the removal of customary law of the Muslims, particularly in the North-West province, which had denied Muslim women of their Islamic rights. She urged for the implementation of the Shariat law, since the Shariat gave certain rights of inheritance to Muslim women, which the customary laws did not. Commenting on a debate in the Central Legislative Assembly on women's legal disabilities in 1940, she asked,

'When will men of India realize that it is of no use asking a third party to play fair when they themselves are willing to close their eyes to all the wrongs the women suffer and have mental reservations when freedom is proposed for woman-hood? ... Indians would not gain Swaraj until they had set their own house in order and granted women legal equality'. (Geraldine 1981p: 63).

In 1934, the AIWC asked the government to appoint an all-India commission to consider the legal disabilities of women. Renuka Ray, legal secretary of AIWC, argued in favour of new laws for all women, regardless of which community they belonged to. She opined that legal change would both alleviate the suffering of individual women and allow India to join the modern and progressive states of the world.

Thus the women's movement was concerned more about the legal disabilities of women irrespective of religious boundaries and worked together to remove these disabilities despite the political differences that were amongst the men of the two communities.

The Begum and a number of other Muslim women were becoming aware of an all India sisterhood in which Muslim women could support Hindu women in their campaign to raise the age of marriage, while calling upon Hindu women to support their efforts to lessen the restriction of Purdah. However, the desire for the recognition of the Shariat as Muslim personal law was an issue which separated Muslim women from their Hindu sisters. If the Shariat were in force instead of customary law, Muslim women felt, then their rights to property, inheritance, and choice in marriage would be affirmed. Hence, in the matter of legal reform, Muslim women's sense of separate community identity was articulated and recognition of the shariat as the operative Muslim personal law became a matter of concern for both Muslim men and women' (Minault 1998:295).

Hajra Begum, a leading member of the AIWC blamed the Muslim League for fomenting communalism by insisting that Muslim women leave the AIWC, a demand the communal electorates made almost impossible to ignore.

However, assertions linking feminist and nationalist priorities were more common than these statements: first that women's status could not be changed as long as India remained under foreign domination, and second, that the nationalist movement was aiding the development of the women's movement. Nevertheless, while women's organizations found it easy to take a firm and consistent stand as patriots, they were a bit uncomfortable when it came to accepting the priorities and tactics dictated by male-dominated political parties and the emerging political differences amongst the men of two major political parties i.e. the Indian National Congress and the All India Muslim League.

At the beginning of the emancipation struggle among Muslim women of the Indian subcontinent access to education and the campaign against *pardah* were the main points. The late 19th and first half of the 20th century were characterized by considerable debate around these issues in the Muslim community throughout India. The reform efforts by men on behalf of women were sparked by the notable progress made by other communities in India, and inspired by the changes taking place in Muslim countries of the Middle East. Nevertheless, the emergence of national sentiments among Muslim women was hampered by religious restrictions, social restraints, educational backwardness and economic limitations. The period between 1911 and 1924 was a momentous time in Indian Muslim politics encompassing as it did the Balkan wars, the revocation of the partition of Bengal- a blow to those who had seen eastern Bengal as a source of Muslim administrative jobs and political influence, the refusal of the government to approve the plan of some Muslim leaders for a university in Aligarh, the Khilafat movement, the non-



cooperation and Swadeshi movements and so on. In all these political efforts women had a role to play.

In the post-World War I era, changes were occurring throughout the Muslim Middle East. The pressure of many forces, such as the rapidly extending network of communication, expansion of world knowledge through the press, Western material goods, new forms of amusement, Western impact on secularism and nationalism, etc. loosened the control of Islam as an iron-clad system of rules and traditions gave way to a more individual interpretation of Islam. The most debated point throughout the Muslim Middle eastern countries was the orthodox Islam its social system which was based on the seventh century Islamic set up. Since the central fact of this social system was the position assigned to women, the re-interpretation of religion sought to harmonize the emancipation of women with the spirit of Islam. Education, veiling, polygamy, divorce, age of marriage, etc, were topics of intense debate. The problem resolved itself along two lines, one exemplified by the case of Turkey, which chose to repudiate the inviolable authority of religion over the state and society and engaged in the pursuit of progress as a single goal. The rest of the Muslim world followed the second course set by Egypt, which attempted to keep all social reforms within the spirit of the law. This new spirit of liberalism deeply affected the lives of women, and a small minority began to question the relationship between the accepted teachings of Islam and the demands of the modern world (Woodsmall 1986).

The dismemberment of the Ottoman (Turkish) empire during World War I opened the floodgates of Muslim agitation. The Muslims of India regarded the Turkish Sultan as their Caliph and reacted passionately to the demand for the territorial integrity of Turkey. The agitation aroused religious sentiments, which created a deep hatred against the British government among the Muslim masses. The support of the Congress party further intensified the agitation.

Although the Muslim orthodox influence was dominant in India, two movements in the north represented a liberalizing influence through a re-interpretation of the Koran - the Aligarh and the Ahmadiyah movements. The educational influence of the Aligarh movement radically changed the Muslim outlook. The Ahmadiyah movement, on the other hand, was concerned primarily with the social teachings of Islam with regard to modern progress. Both had an effect on the gradual emancipation of Muslim women (Ghadially1996).

A more spirited advocate of women's rights in Islam was Sayyid Mumtaz Ali. In 1898 he published his book *Huquq al Niswan* (women's rights). Women also organized various Anjuma-e-Khawateen-e-islam (Muslim Women's Organisation) in different parts of the country. Attiya Begum established a Muslim women's conference at Aligarh in 1905. The All India Muslim Ladies Conference, claiming to represent the interests of all Muslim women, was established in Lahore in 1907.

The latter's session in Lahore in 1917 attracted 400 Muslim women participants from across the country. The Anjuman-e-Khwateen-Deccan was formed in 1919. At the meetings of these organisations, resolutions were regularly passed in favour of women's education, and against polygamy and the veil.

The All India Muslim Ladies Association, an offshoot of the Mohammadan Educational Conference was founded in 1914 and controlled primarily by north Indian Sunni Muslims. In its meetings between 1914 and 1920 it passed resolutions centered around the promotion of women's education, relaxing *purdah* rules and abolishing polygamy. The emergence of the women's movement in the 1920s was also viewed as a movement against *purdah* and prepared society and women for greater participation in social activities. However, in 1930 the Educational Conference noted that economic pressures were working against the system of *purdah* (Caton, 1930). The All India Women's Conference session of 1932 which was held in Lucknow, passed a resolution favouring girls' (particularly Muslim girls) education. Resolutions were also passed against communal electorates for women, untouchability, the prevalence of unilateral (i.e., Muslim men's) right to divorce, and on communal unity.

Certainly, since the turn of the century, women have found themselves confronting the conservative religious sections in their struggle for their rights. However, at the same time, women also used the Sharia in the first half of the 19th century to press their claim to property that was being denied to them under customary law, their quarrel with Islam, or rather, the official and ultra-right use of Islam-- came later.

This struggle on the part of the Muslim women was joined by women from other communities as well, and this joint struggle made a strong impact in the fight for rights. It was in 1903 that a Muslim woman, Bi Amaa, was heard speaking in public for the first time on the conditions of Muslim women, their lack of education and general backwardness. Anjuman Khwateen-e-Islam, Haqooq-e-Niswan (Women's Rights), Rahbar-e-Niswaan (Women's Guardian) and the Khilafat movement were some of the movements women participated actively in even if they were not initiated by women themselves (Quyum 2003).

Other organisations were the Tahzeeb-e-Niswan, Lahore, Anjuman Muslim Ladies, Amraoti, Muslim women's Society, Lahore, Anjuman Muslim Khwateen, Muslim Women Rights Association Punjab, Anjuman Darul Khawateen Agra and Sahranpur, and Anjuman Muslim Khawateen Karachi. The Anjuman in Lahore was organized by the women of the family of Mian Muhammad Shafi along with their close friends. They met periodically in one another's homes to discuss and formulate proposals for the spread of education and social reform, and to securing the rights given to women by Islam. Records of their proceedings were kept. A similar Anjuman was formed in Lucknow with some of the same purposes in mind,

but the active Muslim political life of Lucknow seems to have infected their proceedings. During the Kanpur Mosque incident in 1913, the Anjuman-e-Khawateen called a special women's meeting to protest the destruction of a portion of the mosque. The information available on these Anjumans suggests that the women were beginning to organize to further women's education, secure women's property and inheritance rights, and engage in social service. The Anjumans also addressed themselves to political questions related to their reverence for Islam, and in response to the perceived threats to Muslim shrines and other Muslim land in the years 1911 and 1913 (Minault 1981: 87-88).

Within a short time, Muslim women established their political importance and contributed significantly to the freedom movement. While the educated Muslim men remained occupied with their professional engagements, the women utilized the time to propagate the national objectives. Muslim women leaders were more concerned with the issues like education, polygamy, and even the economic independence of women. They were trying to convince women to exercise control over their own condition. In this regard the Princess Durrenagar of Hyderabad suggested that women should '...Let your ambitions strive to remove the legal and social disabilities that stand in your way. Let your ability prove the supreme justification of that removal' (Lateef 1990:83).

A comparative study of Muslim women with the women of other communities in India indicates that while the Indian National Congress patronized the political participation of women, Muslim leaders like Sir Syed Ahmad Khan and Allama Muhammad Iqbal, who advocated the modernization of Muslim life and thought, were hesitant to support the women's freedom as practised and projected in the Western world. They propagated the idea that Muslim society needs to develop and flourish on the Islamic traditions by the educated Muslim women. However, the political awakening brought about by the Indian National Congress among non-Muslim educated Indians interacted with Muslim thought and led to revision of their orthodox behaviour regarding the role of Muslim women in the modern age.

The 1930s witnessed a change in the political situation. The struggle movement for the freedom was accelerated. On 4 March, 1934, at a combined meeting, various factions of the Muslim League, Delhi, decided to unite to one Muslim League, of which Jinnah was elected the president. Mohammad Ali Jinnah, a prominent leader of the Congress, did not join the Muslim League till 1913, although he supported the League movement for separate electorate for Muslims. He even contested successfully against the League candidate for the election of the Viceroy's Legislative Council. Within the Congress, he however, always tried to bargain for one-third reservation for his community. The formation of the All India Muslim League (AIML) was a major landmark in the history of modern India, and was the first formal entry of a centrally organized political party meant exclusively

for Muslims. This was the start of a new era in India's struggle for independence, and stemmed from the Muslims perception that there is a poor participation of Muslims in Congress -- Of the seventy-two delegates attending the first session of the Congress only two were Muslims. Further, the Muslims felt that the All India Congress was unwilling to acknowledge the Muslim cause, and insisted on portraying only two parties in this regard, namely the Congress and the British. However, Jinnah emphasized the fact that the Congress could not win the battle for freedom until it gained the support of all communities, and assurance was given to the minorities about their rights and protection of interest in an independent India.

On 5 February, 1935, at a meeting of the Muslim Union at Aligarh, Jinnah said, *"I am convinced and you will agree with me that the Congress policy is to divide the Muslims among themselves. It is the same old tactics of the British Government. They follow the policy of their masters. Don't fall into the trap. ...the Muslim League is determined to win freedom, but it should be a freedom not only for the strong and the dominant but equally for the weak and the suppressed."*

(Indian History: Modern India: Formation of Muslim League, <http://www.indhistory.com/muslim-league.html>)

In 1935, the British introduced the Government of India Act. With the introduction of this Act, the political process for community identity of the respective religious groups in India accelerated. Indians, both Muslims and Hindus, without realizing the latent impact the Act had on the overall situation of the country, used the opportunity it provided to modify some aspects of their religious personal law, a modification that would apparently give some relief to the community in general and women, who were the victims of various customary laws in particular. As far as Muslims were concerned, during this period the Ulemas and the Muslim League were the two most prominent groups articulating the interests of the Muslim community. These Ulemas, being conservatives, claimed themselves, the custodian of the Shariat by providing the Muslim community with religious and political guidance according to Islamic principles and commandments (Farooqi 1963). The communalization of female political identity began after the act of 1935, and the growing rift between two communities the - the Hindus and the Muslims- created an entirely different environment. In words of Shaista Ikramulla,

*'I faced this tension directly, as I was dropped by my Hindu friends with whom I worked for the cause of women. In this situation Muslim women thought to go with Muslim League for the consolidation and interest of the community' (Begum Shaista Ikramulla, 1963: 87).*

On the one hand, when the Federal Legislature started functioning after the elections under the Act of 1935, the Ulema of the Jamiat introduced the Shariat Application bill into the Federal Assembly to change Muslim personal law. On the other hand the Muslim League was concerned with the political and economic demands of the Muslim bourgeoisie vis-à-vis its Hindu counterpart (Prashar 1992). The middle class and rich landlords were the main supporters of the Muslim League. However, the AI M L, which claimed to represent Indian Muslims, took a long time to induce and impress upon Muslim women to come forward and assist the male members in the realization of national aspirations. Thus, the emancipation of Muslim women came only in the mid-1930s when Jinnah began to reorganize and revitalize the moribund AIML, the most authoritative Muslim political organization since its inception in 1906. After 1935, the Muslim League took up the task of mobilizing Muslim women. Begum Mohammad Ali was nominated to the Working Committee of the AIML by Jinnah, and represented the Muslim women in the Working Committee. While sitting on a chair of the Working Committee of All India Muslim League, she addressed the gathering of the party members and appealed to the Muslims to have patience and maintain unity with their ranks. She appreciated that Muslim women had been given an opportunity in the political field.

Realizing the women participation in the freedom movement, the League adopted the following resolution regarding the formation of a Women Sub-Committee at the Annual Session held at Patna from 26-29th March 1938.

Whereas it is necessary to afford adequate opportunities to women for their development and growth in order to participate in the struggle for social, economic and political emancipation of the Muslim nation in India, this Session of the All India Muslim League resolves that an All India Muslim Women's Sub-Committee be formed. (Azra 2000:198-99).

With this objective in view, the Sub-Committee was given the power to organize provincial and district women's Sub-Committees under the Provincial and District Muslim Leagues, enlist larger numbers of women to the membership of the Muslim League, carry on an intensive propaganda amongst Muslim women throughout India in order to instill in them a sense of greater political consciousness and finally, to advise and guide them in all such matters that rested on them for the upliftment of the Muslim society.

The prominent members of this Sub-Committee, some of whom served with the National Congress, were: Lady Abdullah Haroon, Begum Shah Nawaz, Mrs. Rashida Latif, Begum Shahabuddin, Mrs. M.M. Ispahani, Miss. F. Jinnah, Mrs. Faiz Tyabji, Begum Habib-ul-lah, Begum Aizaz Rasul, Begum Nawab Siddique Ali Khan, Lady Imam, Mrs. Hussain Malik, and Mrs. Ayisha Kulhamoro Haji (proceedings of the All India Muslim League vol.11: 318).

Lady Abdullah entered the political arena in 1919 and worked as an ardent supporter of the Khilafat Movement in her province. She took a keen interest in women's education and started a school at her home. She also founded a women's organization known as Anjuman-i-Khawateen to improve the social and economic condition of the women of Sindh. In 1938 she was nominated to the Women's Central Sub-Committee of the AIML, and was also elected President of the Sindh Provincial Women's Sub-Committee. This organization actually owes its existence to Lady Haroon, who through her untiring efforts was able to bring Muslim women under the banner of the Muslim League. She also made commendable contributions during the 1946 elections to the Muslim League. Lady Ghulam Hussain Hidayatullah began her political life in 1938 as a worker of the AIML, and was inducted in the Women's Central Sub-Committee. It was because of her efforts that various branches of the Provincial Sub-Committee were formed in different districts of Sindh such as Hyderabad, Nawabshah and Dadu. With the emergence of the All India Muslim Women's Conference, Begum Shahnawaz devoted all her efforts towards its cause. She was successful in moving the organization to pass a resolution against polygamy in its session held at Lahore in 1918. She was also associated with the education and orphanage committees of the Anjuman Himayat-i-Islam, Lahore, an active member of and remained president of the All India Muslim Women's Conferences of provincial branch for seven years. She was vice-president of the Central Committee of the All India Muslim Women's Conference and a member of the Lahore Municipal Committee. However, as the identity became a key element in power politics and when the AIML realized that for the assertion of identity and power politics mobilizing Muslim women was necessary and, moreover, when she realized that the Muslim women member of AIWC were marginalized with regard to the wording and substance of memorials and petitions, she left the organization. She organized a separate political league for Muslim women called the Punjab Provincial Muslim Women's League in 1936 with a goal to stimulate the political consciousness of Muslim women. In 1937 she was elected as a member of the Punjab Legislative Assembly as a unionist. In 1938 she joined the Women's Central Sub-Committee of the AIML. Similarly dissatisfied with the functioning of AIWC, Begum Aizaz Rasul, a member of the legislative council who demonstrated the spirit of oneness, said 'I feel that it is in the interest of minorities to try to merge themselves into the majority community and advised them to give up separatist tendencies and throw their full weight in building up a truly secular state' joined the Muslim league.

The Council of the AIML described by the Muslim press as 'The parliament of Muslim India' was represented by elected women from various provinces. The women councilors strengthened the organization, performing socio-humanitarian

work, besides rendering the political assistance on numerous occasions. During 1937-47, several women served on the Council of AIML, prominent among whom were Miss Fatima Jinnah, Mrs. Shafi Tyebji, Begum Waseem, Begum Rehman, Begum abibullah, Rohila Khatoon, Begum Mian Ferozuddin, Begum Bashir Ahmed, Mrs. Kh. Nooruddin, Mrs. Hasina Murshed, and Mrs. K Shahabuddin. Muslim women were provided the opportunity to share national responsibilities at the Annual Sessions, Councils and the Working Committees of the Provincial Leagues.

Stressing the importance of the Women Sub-Committee, Jinnah in his presidential speech at Lahore Session stated:

*'You may remember that we appointed a committee of ladies at the Patna Session. It is of very great importance to us, because I believe that it is absolutely essential for us to give every opportunity to our women to participate in our struggle of life and death. Women can do a great deal within their homes even under PURDAH. We appointed this committee with a view to enable them to participate in the work of the League'. (Azra 2000:33)*

Despite Jinnah being a supporter of women's cause, he was not in favour of setting up of the Punjab Muslim Women's League. This is evident from the fact that when Begum Shah Nawaz told the AIML Council at Lucknow in October 1937 that she had set up a Punjab Muslim Women's League, Jinnah stood up and said that he did not believe in separate organizations for men and women.

The Women's Sub-Committee was a preliminary plan to encourage women to associate with the national movement. The task before the League was tremendous and necessitated establishing a broad-based organization to groom and guide Muslim women to compete for the advancement of political and public life. At an All India Muslim Women's Conference presided over by Lady Fazli Hussain in Lahore, there was a demand from 500 women to abolish the customary law and accord women their rights according to Muslim Personal Law.

(<http://www.jang.com.pk/thenews/spedition/23%20march%202005>).

## **Women and the debate on legislation**

The reform in Muslim law, particularly related to women, has been the subject of debate both within and outside the community. It is to be noted that despite the many centuries of Muslim rule, the community did not adopt the Shariat as a basis of law, and women's rights in the Shariat were almost never compiled or enforced. Even their right to divorce and remarriage suffered (Andrews 1939). As stated earlier, the conduct of Muslim law during Muslim rule in India had been mediated through the appointment of a kazi. However, after the abolition of the post by the

British government in 1864, the organization of Muslim law and the restrictions within it was left to individuals. This had an adverse impact on women. On the one hand it made women vulnerable to the whims of men in the family, and on the other, hand, it encouraged an increased dependency on the kazis, who had no official authority and were perhaps less well trained, and therefore carried less clout with the community to enforce compliance with some of the injunctions.

Urdu writings of the late nineteenth century show that Muslim reformers like Sir Syed Ahmad Khan of Aligrah, Maulana Ashraf Ali Thanvi of Deoband, and Syed Mumtaz Ali of Lahore evolved a critique of contemporary Muslim life and culture in response to the pressures of colonial rule. The theme of this critique revolves around three main issues: a consciousness about the loss of political power to foreign rule, the analysis of the causes of that decline and the loss of religious and cultural vitality; and, finally, the evolution of a programme of reform that would remedy that decline. However, there was one common point on which all reformers agreed- the fact that the status of Muslim women required amelioration. Mumtaz Ali pointed out that the position of women in Islamic law was theoretically higher than the actual status accorded to them. The cause of this discrepancy in his opinion was adherence to false customs, and hence, he felt that changing Muslim practice had to be the highest priority and women's adherence to false custom had to be combated. He also felt that there was a need to change the views of those men who felt that keeping women in ignorance and isolation was part of their religion.

However, at the turn of the century with a growing strong urge for maintaining the ethnic/ group differentiation and identities by the political parties for vested political interest and power politics, the question of the enactment of **Shariat law** evolved. Besides, the discourse of Muslim reformers deprecated useless custom- particularly as observed by women, and placed high priority on the need to observe the **Shariat** in everyday life. In some cases reformers advocated legislative enactments in order to bring the Muslim Personal Law closer to the spirit of the scriptures, as well as to improve women's rights in the context of family relations. Reformers were also concerned about British legal actions invalidating certain types of **Waqf** (pious endowments), which had been used in the past to support the donor's surviving family members-who were frequently women. Hence, the demand for Shariat law was seen both as a tool to maintain the ethnic/group identity as well as a resentment for the British rule.

Women's groups felt that Muslim women did have rights under the **Shariat** and hence strongly urged the community to support the application of these laws to improve the status of women. The Shariat bill, which was debated during the heyday of the Indian women's movement, aroused considerable public interest. The Muslim community thought that it would serve two purposes by supporting the bill, that is, further their interests in women's rights, and unify the community.



The **Ulemas** also showed a deep concern about the fact that various Islamic legal principles were adhered to by several communities amongst the Muslims, as a result of which women were not being given any share in inheritance. The reformers and community leaders came to a consensus: that Muslim women's interests would be best served with the restoration of rights under the **Shariat** or Muslim Personal Law, which over the period of time, had been superseded by custom and tradition.

This realization which took place gradually at the various levels of the leadership hierarchy, eventually led to the launching of an organized movement for a mandatory application of Muslim law to Muslims in the state courts, called *Tahrik-e-Nifaz-e-Shariat*. The Movement was first launched locally in different parts of the country. Various local and central enactments abrogating non-Islamic customs followed by many Muslims in India were brought in the Indian statute book, example being the Mapilla Succession Act of 1918 and the Cutch Memon Act 1920.

Thus, by and large there was general acceptance from all concerned about the need for change and for removing the legal disabilities of women. However, due to the politicization of group solidarity and the need to maintain identity, the debate on reform was divided into two groups of people: one the one hand were those people who opted for covert change without any open rejection of past customs and practices, which would make community solidarity more difficult in political and economic terms. On the other were those who felt social change was a necessary prerequisite for the desired political and economic changes in the community (Lateef,1990:17). However, one can not help feeling that this division overlooks the basic question of improving the status of women, something earlier reformers and the women's movement had advocated. Thus, there was in general a difference of opinion (community-wise) regarding the process through which social change should be implemented in India rather than an emphasis on the question of women's rights. As Robinson observed that Muslim communities had to deal with the reality of a new and powerful adversary who not only introduced changes that fundamentally affected their economic position (in case of Bengali Muslims) constantly and successively, but also eroded the inscriptive rules by which success and status were determined (Robinson, 1974).

Nonetheless, Muslims felt a need to evolve a common political and economic strategy to minimize differences between these two groups of reformers, and this process had some positive impact on women. At the same time however, a strong need to protect community interest and the importance of group cohesion proved detrimental to the interests of Muslim women, which were consciously subjugated to the perceived interests of the community. Therefore, on the one hand one group

was in favour of changes, but within individual communities, making community interest and group cohesion a priority, while on the other the social reformers fought for legislatively enforced secular changes. For instance, the enforcement of Muslim Personal Law and the realization of women's right to divorce may be cited as examples of the process of reconstruction of community identity (Azra Asghar Ali 2000). The basis for these enactments was derived from the eclectic approach adopted in Turkey and later in Egypt, which compounded the different schools of jurisprudence to favour women (Anderson 1959).

It is important to note that there was an argument amongst the reformers as to how the interests and rights given to women in Islam which were being superseded by the customs and traditions would be restored. Muslim felt, especially after the Montague-Chelmsford Reforms of 1919, that they were in a position to do so because of the non-interfering stance the government took in socio-religious matters. It is also to be noted that in that period the subsequent constitutional discourse also became a means to express the numerical strength of the Muslim community along with the issues of Muslim women's rights. 'The whole agenda of the restoration of women's social rights revolved around the numerical strength of the community, the attitude of reformers, the governments' approach towards the issue of reform and the magnitude of political support' (Azra A Ali, 2000:124).

However, communities already struggling to cope with the political and economic changes tended to resist social legislation. They felt they could do so without political or economic loss, and that the community could only profit from such changes through a display of numerical strength and organization, which required ethnic differentiation and solidarity based on traditions and customs antithetical to the exercise of women's rights. While the Muslim communities initially supported legislations changing customs prejudicial to women, they soon came around to the view that Muslim women's interests would be best served with the restoration of rights under the Shariat or Muslim Personal Law. Their view was that customs and traditions had superseded the Law.

Women's groups pointed out that Muslim women did have rights under the Shariat and urged the community to support the application of those laws to improve the status of women. It is to be noted that women's realization of their miserable status added a new dimension to the reform process. Despite the fact that the number of such women was very small, they were able to shape the reformists' legislation in a way that would be beneficial to their counterparts (Report of The Age of Consent Committee 1928-29, Government of India, Central Publication Branch 1929:12).

Thus, it seems that during this period Muslims were facing a peculiar problem as to what position to adopt vis-a-vis legislation that was apparently interfering with their own personal laws. Some of the secular laws were accepted

but others were strongly opposed on the grounds that the Shariat had already prescribed rules for these matters. This is what happened with the Married Women's Property Act 1876, the Indian Succession Act 1885, and the Guardian and the Wards Act of 1890. Most probably the Kazi Act, passed in 1880 and providing for the appointment of the Kazi, was meant to advise the court on matters related to the Shariat.

### **Historical Background of the Muslim Personal Law (Shariat) Act 1937**

One of the most important aspects of the Shariat Application Act of 1937 was that it addressed economic conditions created by British rule, particularly in the Punjab. In that important agrarian province, British authority rested firmly upon the recognition and codification of 'tribal' custom, wherein women were deprived of the right to inherit immovable property. The Ulemas became concerned with the fact that Muslims in these regions were not following the rules of succession and inheritance enjoined by the Shariat. The prevalent customs allowed rich landowners to leave their entire property to male heirs, and thus avoid giving all the heirs their due shares as specified by Islamic law. Customary law tended to keep landholdings intact, or at least more intact than would be the case if daughters could inherit land along with sons. It is to be noted that recognition of custom, by tying the interests of landholders to that of the British administration, was a cornerstone of British policy in the Punjab. But this policy of British administration to save the interest of the landlords contravened the Shariat in which daughters have a share of half of the son in their father's property. As a result, British rule in the Punjab came under increasing challenge from various sides. For instance, the main challengers were urban Punjabi Muslims whose criticism was directed not just at the presence of the British as alien colonial rulers, but more fundamentally at the rural, tribal structure of authority that supported the British regime.

Muslim reformers who were critical of the structure of tribal authority under the British considered nothing as more central to the definition of a collective Muslim identity than an increasing adherence to the Shariat, which in their opinion was symbolic of a primary commitment to the Muslim community. The issue of female inheritance was seen at two levels- ideological and political. For those attacking the colonial regime from an Islamic perspective, the question of female inheritance became an ideological issue of prime importance. As a political issue, the question of women's share in inheritance was for many reformers central to the formation of Muslim solidarity. Thus, the question of improving the status of women by giving them a share in inheritance became more an issue of ideology and group solidarity/identity than a real concern with giving women rights under the Shariat

Hence support for the Shariat was symbolically important for Muslims in Punjab as a call for a new political order, a new foundation for the state to replace the colonial ideology of the British. For women, the importance of the Shariat lay less in the specific provisions of Muslim law than in the rejection of the normative order based on tribal solidarity (Gilmartin David 1981). Thus one could say that for Muslim women, support for the Shariat had definite, but limited, advantages.

In such a situation, support for the Shariat denoted ties not only to the Islamic moral order, but also implied support for nationalist aspirations. In the 1930s in Punjab, support for customary law was found in the Unionist Party, which was composed of large rural landholders of various religious communities who were generally in favour of the British, supporters of the Land Alienation Act, and inheritors of the British administrative tradition. It was not only Hindus and Sikhs who were opposed to Muslim domination, but, and more important by Muslim supporters of the Shariat as well. These Muslims wanted to free India from British domination, and also transform the indigenous political system to establish a moral political order based on Islam. The conflict between these two groups over the foundations of law, the question of the legal status of women, became a significant symbolic issue.

It is to be noted that by the 1920s some urban, well-educated Muslim women had already begun to agitate for improvements in female inheritance law. The Begum of Bhopal along with other women associated with the Anjuman, felt that if the Shariat were in force instead of customary law, Muslim women's right to property, inheritance and choice of marriage would be assured. The support for the Shariat emerged among the Muslim League, which was urban and more nationalistic in their approach. Jamiat-ul-Ulama-e-Hind, the political party said to represent many Indian ulema, the Anjuman-e-Ittehad-e-Islam, Madras, Anjuman-i-Islam, Guahati, and the Anjuman-i-Islamic, Jorhat, as well as women's organizations and several individuals supported legislation to validate the Shariat for both religious and nationalistic reasons. These organizations spoke out strongly against those Muslims who chose to follow the Shariat in matters of marriage and divorce, but conveniently ignored it when it came to the distribution of inheritance and family property (Azra 2000). Such practices were widely prevalent among Muslims belonging to the agricultural classes, particularly in the Punjab. Under Punjab Law act IV of 1872, Muslim women had been deprived of their share in agricultural lands on account of the fact that many Indian Muslims were originally converts to Islam and still wanted to be governed by the laws which they had followed before they converted to Islam.

In 1925 the Ulema of the Jamiat had initially passed a resolution to disapprove the practice of certain Muslims adhering to customs contrary to the Shariat. Similar resolutions were passed in the following years. A bill was prepared with the help of Mufti Kifaytullah, the then president of the Jamiat. In 1927 the Jamiat-ul-Ulam-e-Hind passed a resolution demanding the enforcement of Muslim Personal law at the annual meeting at Peshawar. This was followed by the introduction of the Muslim Shariat Bill in the council in 1934. The bill was introduced into the legislature of the North West Frontier Province, and later enacted as the North West Frontier Province Personal Law (Shariat) Application Act, 1935. Thereafter the Jamiat decided to have a central law enacted that would apply to the Muslim community of the whole of India.

However, the bill to apply the Shariat in the Punjab, which specifically sought to improve women's rights to land inheritance, was blocked by the Unionists in the provincial Legislative Council in the mid-1930s. In the early 1930s Malik Muhammad Din, a member of the Punjab Legislative Council from Lahore introduced a bill in the Council that called explicitly for the supercession of custom by Muslim personal law. Though Malik pointed to the need for improved female inheritance rights as a major justification for the bill, the specific circumstances of the bill's introduction indicated the political conflicts underlying the issue. He proposed the bill largely in response to the passage in 1931 of a Unionist-backed bill giving legislative sanction to the local inheritance customs of the powerful, pro-Unionist Tiwana family of Kalra, in spite of the conflict between those customs and the Shariat.

However, the political nature of the conflict between custom and Shariat, and the central place of female inheritance within this conflict were subsequently analyzed in the Punjab government's discussion of the bill. During the discussion, the British circulated the bill for opinions in the district, and many rural Punjabi Muslims felt that granting women a share in inheritance under the Shariat was a threat to the entire structure of rural tribal authority. The Muslim tehsildar of Kharian Tehsil declared that implementation of the Shariat would completely disintegrate the homogeneity of the agricultural tribe (Punjab Legislative Council Debates, Vol 19 1931, pp. 788-792; Vol. 20, pp. 61-78, 120-133, 183-205).

Thus, the Unionist party opposed the bill on the grounds of maintaining the tribal system underlying their authority. The provincial government also reflected the same concern when it said, 'The Governor in Council considers that the bill is dangerous to the general economic structure of the province as a whole, and to the interests of the rural Muslim community in particular' (Gilmartin 1981:167). In spite of this reluctant approach and opposition from the Unionist party, educated women of Anjuman and other women's groups remained active in the fight for inheritance rights at the all-India level, with the central issue in the fight for the

Shariat revolving around the challenge to the structure of political authority. Justice Din Muhammad of Lahore High Court observed that many rural leaders in Punjab were against the Shariat because they feared that in allowing daughters a share in inheritance, the Shariat would... 'cut at the root of the system under which they were living...' (ibid).

Despite the opposition, the Bill was moved by Khan Habibullah Khan, a non-official Member of the Council. Its objects and reasons were highlighted by Khuda Baksh, a member of the legislative Council, as follows:

For several years past it has been the cherished desire of the Muslims of the N.W.F.P. that customary law should in no case take the place of the Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform (of the jamiat). The Jamiat-ul-Ulama-i-Hind has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure in the Council to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and can not be expected to attain any time in future the certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called customary law is simply disgraceful. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled.

(The N.W.F.P. Muslim Personal Law Shariat Application bill 1934. Introduced in the Legislative Council of N.W.F.P., See Notification No.732 L.C. dated 29 March 1934, L/P&J/7/667, pp1-2, IOL).

During the same year the bill was referred to a select Committee which submitted its report to the Legislative Council of the N.W.F.P. on 20 July 1935. In the meantime the Nawab of Hoti published a booklet referring to the status of Muslim women, and how the customary laws were adversely affecting their status. Under this customary law, after the death of a father the whole of his property went to his son, while the daughter would get nothing. In this particular situation the enforcement of Muslim Personal law was considered advantageous to Muslim women as it granted them inheritance rights. As a result of all these efforts, the Bill succeeded in securing favour in and outside the Legislative Council, and the Act was passed in November 1935. This effort of the N.W.F.P. Legislative Council was highly appreciated by Muslims in other parts of India and considered one of the most important efforts ever made in the best interests of Muslim women (Azra 2000).

The overwhelming support extended to this Act led to the introduction of a similar Shariat bill in the Central Legislative Assembly in the same year by M.H.M. Abdullah, MLA from West-Central Punjab. A motion was introduced by the Government of India's Home Member, Sir Craik, to circulate the bill to elicit public

opinion, and was published along with the Statement of Objects and Reasons by the Government of India. While explaining the importance of this Bill, Craik stated, 'It would secure uniformity of law among Muslims throughout British India in all their social and personal relations. By doing so, the claims to family inheritance rights of women, who, under customary law, were debarred from succeeding to the same, would automatically be secured'. The main provision in the bill was

Notwithstanding any custom or usage to the contrary, in all questions regarding adoption, wills, women's legacies, rights of inheritance, 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, ihar, lian, khul, mubaraa), maintenance, dower, guardianship, gifts, trusts, trusts properties and wakfs, the rule of decision in cases where the parties to a case are Muslims, shall be the Muslim personal law (Shariat). (Legislative Assembly Debates 1939:2528).

Various reasons were stated during the introduction of the bill including the assertion that it denounces customary law as a misnomer 'in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be characteristics of all laws'. The other major reason for introducing the bill was said to be the improvement of the status of women. Customary law gave women lesser rights than the Shariat, and so the introduction of Muslim Personal law would raise their status to the level to which they were entitled. In the Federal Assembly of Punjab it was also stated that the Muslim women of Punjab condemned customary law as it adversely affected their rights, and demanded instead the application of Muslim Shariat law (Legislative Assembly Debates, III:p2530-2532).

During the legislative debates, it was repeatedly stressed that this Bill, representing a consensus of Muslims throughout India stating that they wished to have their personal lives guided by the Shariat, would grant women greater rights. Speakers as diverse as Sir Mohammad Yaqub from Moradabad, Dr. Ziauddin Ahmad from Alighrah, the poet and journalist Zafar Ali Khan from Lahore, the former Khilafat leader Maulana Shaukat Ali, the urbane Congress lawyer Asaf Ali from Delhi, the even more urbane M.A Jinnah from Bombay and regional leaders such as Maulvi Syed Murtaza of Madras, Maulvi Mohammad Abdul Ghani from East Bengal and Abdul Qayyum from the North-West Frontier province all voiced their sympathy for downtrodden Muslim women and their desire to see their lot bettered.

However, H.M. Abdullah Khan Bahadur Sheikh Fazl-i-Haq Piracha pointed out that the opinions sent by the local governments to the federal legislature did not contain any opinions from women's organizations. When the Federal Assembly considered the report of the Select Committee, supporters of the bill repeatedly

asserted that it was designed to bring justice to women. It was also made clear that Muslim women had expressed their strong support for the measure. While debating the Bill, Mr Abdul Qaiyum (North –West Frontier Province: General) added,

There is a great awakening among the Muslim masses and they are terribly conscious of the wretched condition socially, politically and economically.

This feeling is not merely confined to males but it has spread to the females also, and for the first time the Muslim women in India have given expression to their strong feeling against the dead hand of customary law which has reduced them into the position of chattels. People have no idea of what terrible conditions the Muslim women have had to endure in my own province: I can say that whenever a Muslim died, at least before the Frontier Shariat Law was enacted in the North-West Frontier Province, his daughter, his sister and his wife all used to be thrown into the street, and the reversioner in the tenth degree would come round and collar all his property. I think that the conscience of all those who believe in progress, social, political and economic will revolt against such practice and once people realise that this Bill is primarily intended to improve the status of women and to confer upon them benefits which are lawfully their due under the Muhammadan law, then will gladly support this measure. By endorsing the principles of this Bill we would be doing justice to millions of Indian women who profess Muslim faith. The day is not far off when other communities will also bring similar measures and when Indian women and men will be treated equally in the eyes of law in the matter of property, political rights, social rights and in all other respects. I have, therefore, great pleasure in supporting the principles of this Bill. While supporting the Bill, he also expressed that the bill does not go at least in one Province, namely, the North-West Frontier Province. (Legislative Assembly Debates 1937:1427-287)

Muhammad Ahmad Kazmi claimed that the bill was necessary primarily because Muslim women were being denied their rights in matters of succession. He also accepted that the bill was extremely limited in its scope as it did not apply to agricultural land, which constituted about 99.5 per cent of all property available in India. He further pointed out that the idea behind seeking the sanction of the House was that in addition to giving a little relief to the women of the country, it would enable the 'representative House for the whole of India' to accept the principle that Muslim personal law should be applied to Muslims (Legislative Assembly Debates V:9 p1443-44).

The bill was endorsed by the Muslim women's groups, a fact noted by Sir Muhammad Yamin Khan (Agra Division) in the course of the Assembly debate when he said:

– the point pressed by Muslim women of Punjab is that being Muslim why should they not get the benefit of Islamic law. In Islam a woman is fully entitled to share, she becomes the full owner of the property. I hope that this legislation will



come in her way simply because a particular custom prevailed which was made by men and not by women—no—person who wants that human society must live on the right principles of equity should accept those principles is so against the very root of the principle which gave the weaker sex a genuine and specific—. It would have been different if Muhammdan women did not want to have any change.’ (Legislative Assembly Debates 1939:2530)

In support of the Bill, he further said,

– Customary law is the outcome of accustom made by men who looked to their own self-interest and they were not safeguarding the rights of women. Therefore the party really affected had no voice up till now and the women in the Punjab have been suffering, because the men who owned certain kind of property did not like that the property should pass from their family through the women to the other family. But that is against the Muslim idea. The Muslim idea is not that a woman of the family becomes a different person on her marriage because Islam does not recognise different families in this manner—. –Thus this Bill does not seek to give woman anything which is not her due; it only seeks to do away with the injustice done to her for along time by people who do not want to part with their property. And in that view I have my full support to this Bill’. (Legislative Assembly Debates 1937:1430)

However, in response to this Bill Mr. George Joseph, a member of Legislative council said

– I strongly feel that the that as far as succession at least is concerned it should be a matter of territorial law in which it should be possible for anybody who wants to know the law to look up some Code and really have the succession maintained in terms of that Code. I submit that the time has long gone past and I can only regard it as a misfortune that in the year 1937 there should be any section of the community which really wants to maintain a personal law on for Muslims, one for Hindus and another for the rest. It would have been very much better and more fortunate it is certainly necessary that some day or other this House should take up the responsibility of codifying the law of succession in India, not with reference to the religion of the persons concerned, but with reference to the territory that they inhabit: that the only basis on which we can settle this question of succession.

He further said, ‘But a suggestion that has been put, especially among Members of my party, was that one consequence of the passing of this Bill would be that the position of the women members of the community would certainly be improved’ (Legislative Assembly Debates 1939: 18219-21).

In support of the bill, another member of the Assembly, Maulana Zafar Ali Khan, East Central Punjab, said that 'the personal law refers to such questions as divorce, separation, succession and the like. This is a sort of domestic law for us and unless we come under this law there is a great danger of the Moslem losing their solidarity and national unity. This bill is intended to do away with those customs that are related to the law of succession' (Legislative Assembly Debates 1939: 1823-24).

Members of other communities were also conscious of the significance of the bill. Dr G.V. Deshmukh, a non-Muhammdan member from Bombay city, took part in the debate and said,

– passing of the bill is not the question of one of this political party or that political party for which our Maulana Zafar Ali Khan was worried rather the question is one which affects forty million of Indian women and therefore, all these outside considerations of either party or politics are absolutely irrelevant and verge on the vulgar– I have always maintained that when one half of the body is paralysed, then the body can not function, and what applies to human body equally applies to society. When one half of the society is paralysed by its not recognising the economic status of women, then, I say that that society will not and can not progress. And in the 20<sup>th</sup> century it is up to us who have any pretensions to call ourselves educated or civilized to see that the other half of the society has an equal status to the male half of the society–. – On account of custom, and more even than custom the British Courts' customs, the customs have crystallised into law, and thus the chilling hand of customs has barred all progress of society of womenfolk so far as India is concerned. Therefore, I say that this bill which in principle gives economical status to one half of the society has my whole-hearted support (Legislative Assembly Debates 1939:1826).

The bill was enthusiastically supported by K. Radhabai Subbaroyan, the only woman member of the legislature, who felt that this passage would further the cause of women and provide an example for other communities to follow. While supportive of the desire of Muslim legislators to enact laws for women, Bhai Parmanand and some other orthodox Hindu legislators were not in favour of an imposition of similar notions on Hindu women. Hence they urged Muslim legislators to not participate in debates on the divorce and inheritance rights of Hindu women. M.S. Aney (Berar, non-Mohammdan), while not supporting the bill, pointed out that enactment of the personal law would create a barrier between Hindus and Muslims, who interacted at many levels.

On the question of introducing a uniform law versus a law for Muslims, M A Jinnah, a prominent Muslim legislator, put forward his argument in support of the bill: 'I entirely agree that these customs which exclude female heirs are to my mind unjust and not only unjust but that are keeping down the economic position of women which is the foundation of their development and rise, and their proper and

equal share along with men in all walks of life' (Legislative Assembly Debates 1939:1832). While Mr Jinnah supported the bill, he proposed an amendment to one clause under which the Shariat alone would apply to men and women 'notwithstanding custom, usage and law'. He wanted to change the wording to 'custom and usage' only, implying that prior legislation would be upheld, even when it clashed with the rights of women. It was an important amendment because a number of Muslim trading communities had already legislated the inheritance rights of women away. (For example, the U.P. Land Holders Act, the Cutchi Memon Act 1920), and without this amendment the Cutchi Memons, the Khojas, the Moplahs and the Baluchis would have had to divide their financial holding. Referring to the Cutchi Memon Act, under which the Memon community was given an option between Muslim law and the customary law of inheritance, he suggested incorporating similar provisions in the proposed bill. Since he was a moderate politician, his main intention was to save the future of the Muslim League by securing the interests of landlords and nawabs.

However, this demand did not find favour with some of the legislators as it restricted women's rights of inheritance under the Shariat. The major opposition came from the Jamiat, who pointed out that there was no such provision in the N.W.F.P. Shariat Bill, the basic starting point of this Bill. However, the bill was finally carried in a modified form. The final bill as enacted allowed individuals an option— to be governed either by the Shariat, or by their customary law only with regard to matters of adoption, wills and legacies (section— 3). The president of the Legislative Assembly, Sir Abdur Rahim, declared:

— The object of this amendment is quite clear. In the provinces of Bihar, Bengal, and Orissa, there is no custom or law standing in the way of Muslims regarding the application of their personal law—. —if you look at the opinions received on the bill— sir, I fail to understand what remains after various amendment of my learned friend, Mr. Jinnah: the words or law? Wills, legacies, adoption have already been taken away from the bill to suit the purposes of a few people. The Select Committee exempted agricultural lands from the operations of this bill. In Bihar, Bengal and Orissa and also parts of other provinces, women are enjoying advantages of Muslim personal law and getting their full shares according to Shariat laws in all their ancestral property—. — I say, Sir, the mover of the bill as well as a few of my Muslim friends— will have the only consolation that they have got the Shariat bill passed by this house...I don't like to be party to such a crippled measure which gives nothing but name—. — I know the amended bill restricts the rights of Muslims in provinces where they are already enjoying full advantages of Muslim Personal Law. (Legislative Assembly Debates 1939:1854)

However, along with these favourable responses, the Bill was strongly opposed by several provincial governments, Associations and certain individuals. The main argument presented by this opposition was that some customs and usages of law were so old and well-established that replacing them with the Shariat would seriously disrupt the whole fabric of society, since most Muslims were governed by local customs that deprived women of property rights. The opponents of the legislation demanded that the implementation of Muslim Personal law should be left to provincial governments to decide. Among these opponents was Justice Niamatullah from Lucknow, who said that if an omnibus bill of this description passed into law, the result would be endless confusion for the large number of ancient zamindar families who had been following certain rules of succession for generations. The Chief Commissioner of Ajmer and Marwara was of similar opinion and stated that as in other areas, the people of that region would not like any change in their customary practices, and that female inheritance would not be accepted at any cost. Strengthening the argument further the DSP of Madras, Mr K.M.Akram, said that the situation was particularly complicated in the case of inter-marriage between two families following different codes and that the courts would perhaps find it difficult to remove a dispute under such circumstances (Azra 2000:151).

The Bill was eventually enacted on 16 September and was given the name of Muslim Personal Law (Shariat)–Application Act 1937. It provided a ray of hope to those seeking changes in the social, economic and political status of Muslim women in India. Thus the 19<sup>th</sup> century movement for the restoration of Muslim law to Muslims was, not merely a religious, but also a strong feminist movement for social reform (Mahmood 1995). Organizations of Muslim women in the country supported the movement whole-heartedly. Since Muslim law gave them, at least in theory, a better legal status and property rights than that found in the usage of the country. While this Act undoubtedly provided more relief to the women as far as the right to inheritance was concerned, it is important to note that the advantages gained by women after the enactment of this law tilted more towards their symbolic value than towards making Islamic law uniform for the Muslim community of the country as a whole. However, it was realized that the restoration of Muslim law was not only limited to property rights, but also to some other matters. As this reform was meant for the entire Muslim community, another Act the Muslim Marriage Dissolution Act was passed in 1939, enacted to give more relief to Muslim women in the marital sphere.

### **The Dissolution of Muslim Marriage Act 1939**

The legal reform with the most significant impact on Muslim women's rights was

the Muslim Dissolution of Marriage Act of 1939. Modelled on the English Matrimonial Causes Acts, this allowed a Hanafi wife to obtain a judicial divorce on the standard grounds of cruelty, desertion, failure to maintain, etc. Despite the act, however, there was little improvement in the plight of Muslim women. Within 18 months of the passing of the Muslim Personal Law Shariat Application Act 1937, the Dissolution of Muslim Marriage Act 1939 was passed. While passing the act, it was noted that the Hanafi code of Muslim law did not allow a Muslim woman to obtain a decree from the court dissolving her marriage in case the husband failed to maintain her, deserted her, maltreated her, or left her unprovided for. The act sought to bring together and consolidate all laws relating to the dissolution of marriage in order to help Muslim women.

The introduction of this bill represented another attempt on the part of the Ulema to utilise the legislature to rectify the prevailing situation with regard to the rights of Muslim women when it came to dissolving their marriages. This concerned was for two reasons: first the Quran expressly permits the dissolution of a marriage by women in case of necessity (Mahmood, 1988), and second, the danger of losing numerical strength that was emerging from the women's apostatising from Islam. These two factors led them to take action to rectify the situation so that the conversion could be stopped and women could get the right to dissolve their marriages not through the act of apostasy, but through the legal procedure.

Major credit goes to Maulana Ashraf Thanavi, who wrote extensively about the rights of Muslim women. His writings were an important force in assembling the coalition that backed the legislation. To elaborate this, in 1913 Maulana Thanavi had issued a **fatwa** in a case involving a Muslim husband who had applied to a British court in India for restitution of conjugal rights. The wife's family refused on the grounds that she had renounced Islam, and therefore, her marriage no longer remained valid. The judge asked the claimant to secure a fatwa clarifying this point in Islamic law, and Maulana Thanavi ruled that the marriage was indeed annulled as a result of the wife's apostasy (Aasud et al. 1996; Thanavi nd).

### **A brief note on the background of the Legislation**

A majority of Muslims in the subcontinent follow the Hanafi School of Islamic jurisprudence, which is the strictest in matters of divorce, and gives the wife almost no grounds for initiating the dissolution of her marriage. During this period, when Muslim women were converting to other religions, some Muslim jurists laid down the principle that the marriage would not be dissolved and the woman would be imprisoned till she returned to Islam. In British India, however, it was not possible to enforce this ruling: various rulings of the courts were based on the notion that if a Muslim woman refused to return to her faith, it would result in the dissolution of

her marriage. The situation became alarming during the early decades of the 20<sup>th</sup> century when the number of Muslim women who renounced Islam in order to secure judicial divorces increased exponentially. The latent impact of this act of apostasy, as visualised by political parties and community leaders, was the upcoming numerical imbalance. As stated earlier a show of numerical strength was to emphasize the importance of the community, and this trend was seen as a danger to group identity and cohesion. Growing apostasy was also said to be the result of the selfishness of Muslim men who denied their women the rights given to them by Islam, as Rashid-ul-Khairi pointed out.

As a social reformer I tried my best to convince the Indian Muslims for the necessity of *Khulah*. But I never succeeded in my efforts. At last, when the time of decision of the suit of divorce of Qaisar (a daughter of one of my close friends) came, I went to the *Kazi* at the request of Qaisar's father. The *Kazi* was my class fellow at school. By giving the reference of that friendship I requested the *kazi* to give Qaisar her Islamic right of *Khulah*. He (the *Kazi*) said to me that though 'you are very right in your point of view but if I would give this right to Muslim women, the decision will destroy the whole Muslim society in India and thousands of married women will run away from their husband's house. The obstinacy of the *Kazi* led Qaisar to change her religion. Her apostasy was declared in the supplement of Curzon Gazette which was published from Delhi at that time. ( Saimuddin and Khanam 2002)

This increase in apostasy was due to two reasons: first because many Muslim women found no other way to come out of cruel and abusive marriages, and second, to some extent, it was an impact of missionary activity. Muslim organizations and social reformers started thinking of ways and means to curb the tendency of renouncing Islam simply because religious law did not allow them to get rid of their husbands lawfully. This alarming situation was noticed by community leaders, scholars and ulemas. The famous poet Iqbal made an appeal to Muslim scholars to reform Hanafi law in order to find a solution within Islam for this problem, so that Muslim women would not have to take recourse to this desperate mode of dissolving their marriages (Masud1995:155-78).

In 1913 Maulana Thanavi had consulted a number of other ulemas on the subject of his fatwa, including various Maliki ulemas in Arabia. In 1931 he issued a lengthy revision of his earlier fatwa: *Al-hilat un-Najiza li'l-Halitat al-'Ajiza* ('A Successful Legal Device for the Helpless Wife') (<http://dex1.tsd.unifi.it/juragentium/en/surveys/rol/minault.htm>). He ruled that apostasy did not annul a Muslim marriage, but a wife might obtain a judicial divorce based on grounds permitted by the Maliki school of Muslim jurisprudence. This device of eclecticism (*takhayyur*) in jurisprudence recognized by some legal scholars and commentators, opened the way to a reform of Muslim divorce law. Maulana's

opinion was seconded by the Jamat-e-Ulma-Hind. The issue of conversion was a challenge for the ulemas as well as the Jamiat-ul-Ulam-e-Hind. It is to be noted that in 1935 several bills were drafted by the Jamiat based on a book written by Maulana Ashraf Ali Thanavi with the help of other Maulanas. On the basis of the recommendation of the book, a Bill was introduced in the central legislature of 1936 by Muhammad Ahmad Kazmi, a member of the central legislative assembly and the Jamiat, apart from being a lawyer from Merrut, which later on became the Muslim Dissolution of Marriage Act.

The statement of Objects and Reasons (Gazette of India, Part V, 1936, p.154) attached to the bill gave several reasons for its introduction. The main reason was that the existing law had caused 'unspeakable misery to innumerable Muslim women in British India'. In the Federal Assembly, the bill was described as being constituted of three parts: it gave grounds for the dissolution of marriage, described the effect of apostasy on the marriage tie, and provided for the authorised court personnel to dissolve a Muslim marriage. The bill clearly enlisted the grounds on which Muslim women could seek a divorce.

The Muslim Marriage Bill was debated and enacted in 1939. It was specifically directed to benefit Muslim women and was compiled as an amalgam of the four schools of jurisprudence, picking the most liberal features from each of them.

This bill was first referred to a Select Committee of which Muslims formed a majority, debated thoroughly in the assembly, and finally passed in 1939. The statement of objects of the bill was announced by Hussain Imam, M.L.A. from Bihar and Orissa. He pointed out:

– There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her, or absconds, leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provision of the Maliki, Shafi or Hanbali law. Acting on this principle, the Ulama had issued fatwa to the effect that in cases enumerated in clause 3, part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage. As the courts are sure to hesitate to apply the Maliki law to the case of Muslim women, legislation recognising and enforcing the above-mentioned principle is called for in order to relieve the suffering of countless Muslim women.

The courts in British India had held in a number of cases that the apostasy of married Muslim woman dissolves her marriage. This view has been repeatedly

(expressed) at the bar, but the courts continue to stick to precedents created by rulings based on an erroneous view of the Muslim law. The Ulama have issued fatawa supporting non-dissolution of marriage by reason of wife's apostasy. The Muslim community has, again and again, given expression to its supreme dissatisfaction with the view held by the courts. Thus, by this bill the whole law relating to the dissolution of marriage is brought at one place and consolidated in the hope that it would supply a very long-felt desire of the Muslim community in India. (Government of India, Legal Department Record, 1938, L/p & J/7/1839).

In proposing the Bill, Ahmad Kazmi said,

– The reason for proceeding with the bill is the great trouble in which I find women in India today. Their condition is really heartrending, and to stay any longer without the provisions of the bill and allow the males to continue to exercise their rights and to deprive women of their rights given to them by religion would not be justifiable– the rights of women should not be jeopardized simply because they are not represented in this house. I am sure if we had a single properly educated Muslim woman here in this house, then absolutely different ideas would have been expressed on the floor of this house. I know, sir that the demand from educated Muslim women is becoming more and more insistent, that their rights be conceded to them according to Islamic law–. – I think a Muslim woman must be given full liberty, full right to exercise her choice in matrimonial matters. (Legislative Assembly Debates 1939:616).

The Act permitted the wife to seek a judicial divorce on grounds permitted by the Malikis, including the husbands' cruelty, insanity, impotence, disappearance or imprisonment, and his failure to perform his marital obligations or provide maintenance for specified periods of time, ranging from two to seven years. The Act also provided for divorce based on the 'option of puberty', that is, if a woman had been married off by her elders before puberty and the marriage had not been consummated, she could ask for its dissolution. Sir Zaffarullah Khan stated that the outstanding merit of this Bill was that it provided various grounds on which divorce could be obtained by a woman under Muslim law in very definite, clear and precise terms, and any judge, whether Muslim or non-Muslim, would not have much room left for doubt with regard to them.

### **Debates on the Dissolution of Muslim Marriage Act VIII of 1939**

Before 1939, the law was that apostasy of a male or a female married under the Muslim law *ipso facto* dissolved the marriage, with the result that if a married Muslim woman changed her religion, she was free to marry a person professing her new religion. This was the rule of law enforced by the courts, throughout India at



any rate, for the last 60 years.

This law was annulled by Act VIII of 1939, Section 4 of which reads as follows:

– The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation or conversion the woman shall be entitled to obtain a decree for the dissolution of marriage on any of the grounds mentioned in section 2:

Provided further that the provision of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

According to this Act, Muslim woman's marriage is not dissolved by her conversion to another religion. All that she gets is a right of divorce. It is very interesting to find that Section 2 does not refer to conversion or apostasy as grounds for divorce. The effect of the law is that a married Muslim woman has no liberty of conscience, and is tied for ever to her husband whose religious faith may be quite abhorrent to her.

The grounds urged in support of this change are worth noting. The mover of the Bill, Quazi Kazmi, M.L.A. adopted a very ingenious line of argument in support of the change. In his speech on the motion to refer the Bill he said:

– Apostasy was considered by Islam, as by any other religion, as a great crime, almost amounting to a crime against the State. It is not novel for the religion of Islam to have that provision. If we look up the older Acts of any nation, we will find that similar provision also exists in other Codes as well. For the male a severer punishment was awarded, that of death, and for females, only the punishment of imprisonment was awarded. This main provision was that because it was a sin, it was a crime, it was to be punished, and the woman was to be deprived of her status as wife. It was not only this status that she lost, but she lost all her suit as in society; she was deprived of her property and civil rights as well. But we find that as early as 1850 an Act was passed here, called the Caste Disabilities Removal Act of 1850, Act XXI of 1850–.

– by this Act, the forfeiture of civil rights that could be imposed on a woman on her apostasy has been taken away. She can no longer be subjected to any forfeiture of property or her right of inheritance or anything of the kind. The only question is that the Legislature has come to her help, it has given her a certain amount of liberty of thought, some kind of liberty of religion to adopt any faith she likes, and has removed the forfeiture clause from which she could suffer, and which was a restraint upon her changing the faith. The question is how far we are entitled after that to continue placing the restriction on her status as a wife. Her status as a wife is of some importance in society. She belongs to some family, she has got children, she has got other connections too. If she has got a liberal mind, she may

not like to continue the same old religion. If she changes her religion, why should we, according to our modern ideas, inflict upon her a further penalty that she will cease to be the wife of her husband. I submit, in these days when we are advocating freedom of thought and freedom of religion, when we are advocating inter-marriages between different communities, it would be inconsistent for us to support a provision that a mere change of faith or change of religion would entail forfeiture of her rights as the wife of her husband. So, from a modern point of view, I have got no hesitation in saying that we cannot, in any way, support the contrary proposition that apostasy must be allowed to finish her relationship with her husband. But that is only one part of the argument.

Section 32 of the Parsi Marriage and Divorce Act, 1936, is to the effect that a married woman may sue for divorce on the grounds 'that the defendant has ceased to be a Parsi...'

There are two things apparent from this. the first is, that it is a ground for dissolution, not from any religious idea or religious sentiment, because, if two years have passed after the conversion and if plaintiff does not object, then either the male or female has no right to sue for dissolution of marriage. The second thing is that it is the plaintiff who has got the complaint that the other party has changed the religion, who has got the right of getting the marriage dissolved-. In addition to this Act, as regards other communities we can have an idea of the effect of conversion on marriage tie from the Native Converts' Marriage Dissolution Act, Act XXI of 1886- It applies to all the communities of India, and this legislation recognises the fact that mere conversion of an Indian to Christianity would not dissolve the marriage but he will have the right of going to a law court and saying that the other party, who is not converted, must perform the marital duties in respect of him- then they are given a year's time and the judge directs that they shall have an interview with each other in the presence of certain other persons to induce them to resume their conjugal relationship, and if they do not agree, then on the ground of desecration the marriage is dissolved. The marriage is dissolved no doubt, but not on the ground of change of faith- So, every community in India has got this accepted principle that conversion to another religion cannot amount to dissolution of marriage. (Legislative Assembly Debates, 1938, Vol. V, pp. 1098-1101).

Syed Gulam Bikh Nairang, another Muslim member of the Assembly and a protagonist of the Bill, was brutally frank. In support of the principle of the Bill he said:

- For a very long lime the courts in British India have held without reservation and qualification that under all circumstances apostasy automatically and immediately puts an end to the married state without any judicial proceedings, any decree of court, or any other ceremony. That has been the position which was taken up by the Courts. Now, there are three distinct views of *Hanafi jurists* on the

point. One view which is attributed to the Bokhara jurists was adopted and even that not in its entirety but in what I may call a mutilated and maimed condition. What that Bokhara view is has been already stated by Mr. Kazmi and some other speakers. The Bokhara jurists say that marriage is dissolved by apostasy. In fact, I should be more accurate in saying—I have got authority for that—that it is, according to the Bokhara view, not dissolved but suspended. The marriage is suspended but the wife is then kept in custody or confinement till she repents and embraces Islam again, and then she is induced to marry the husband, whose marriage was only suspended and not put an end to or cancelled. The second view is that on apostasy a married Muslim woman ceases to be the wife of her husband but becomes his bond woman. One view, which is a sort of corollary to this view, is that she is not necessarily the bond woman of her ex-husband but she becomes the bond woman of the entire Muslim community and anybody can employ her as a bond woman. The third view that is of the Ulema of Samarkand and Baikh, is that the marriage tie is not affected by such apostasy and that the woman still continues to be the wife of the husband. These are the three views. A portion of the first view, the Bokhara view, was taken hold of by the Courts and rulings after rulings were based on that portion.

This House is well aware that it is not only in this solitary instance that judicial error is sought to be corrected by legislation, but in many other cases, too, there have been judicial errors or conflicts of judicial opinion or uncertainties and vagueness of law. Errors of judicial view are being constantly corrected by legislation. In this particular matter there has been an error after error and a tragedy of errors. To show me those rulings is begging the question. Surely, it should be realized that it is no answer to my Bill that because the High Courts have decided against me, I have no business to come to this House and ask it to legislate this way or that way. (Legislative Assembly Debates, 1938, Vol. V, pp. 1953-55)

During the course of debate, Mr. M.S. Aney, a member from Berar, pointed out that by using the legislature to reform Muslim law, the law was being secularised and government courts should therefore be allowed to judge cases; there was thus no need for a special Kazi, as had been proposed (Legislative Assembly Debates 1939: 868).

The only woman member of the Assembly, Mrs. Radhabai Subaroyan, in her support of the bill pointed out,

— Mr. Deputy President, I rise with pleasure to support the motion moved by my honourable friend, Mr. Kazmi. I feel this bill recognizes the principles of equality between men and women. It has been stated here and outside that though Islamic law lays down this principle, in actual practice in several parts of our country, it is ignored to the disadvantage of women. It is heartening...to hear my Muslim colleagues condemn this state of affairs and advocate that justice should be

done to women and that women should have the rights to claim divorce on the same terms as men— it definitely raises the status of women and recognizes their individuality and—human personality’. (Legislative Assembly Debates 1939:881)

However, the ulemas were not comfortable with the proposed Bill, particularly Clause VI which says:

– that suits of the dissolution of marriage on the part of Muslim women should be held in proper courts under the supervision of Muslim judges and, when the presiding officer was not Muslim, the suit should be passed from one place to another until it could find a Muslim official. After the decision, the suit would then be referred back to the original court. In the case of appeals against the decision of the trial court, people would have to look to the high court and their cases should be heard and decided again by a Muslim judge.

They felt that the Act differed in several respects from the recommendations of the Ulema. Most important was not reserving jurisdiction in cases of Muslim divorce to Muslim judges alone. It was also made to apply to all Muslims—not only Sunnis, but Shias as well. Consequently, Maulana Thanavi and the other divines who had originally urged for the reform of the divorce law were displeased with the Act in its final form, and condemned the Muslim Dissolution of Marriage Act as un-Islamic (Masud1971:251-97). They were afraid of religious freedom and the imposition of artificial arrangements from a foreign government. This feeling arose after the ruling of various courts in British India, which in turn strengthened the idea that the enforcement of Muslim Family Law could not be accomplished without the appointment of Muslim authorities in such institutions. They, particularly the *jamait-ul-Ulama-i-Hind* blamed the member of Muslim League legislature for the enactment of such ‘Un-Islamic measures on Muslim. However, it seems that the basic reason for blaming the Muslim League was political rivalry, mainly the leadership of Jinnah, who had a progressive outlook on the matter of legal reforms (Mahmood, 1995:58). Besides this, many fatwas were issued during the period, arguing that if a non-Muslim could not perform the ceremony of Muslim *Nikah*, there was simply no way in which he could be justified in dissolving a Muslim marriage.

Nevertheless, some of the members of legislature reacted to the objection and gave their views on the difficulty in implementing the clause in the Bill. Mr. J.A. Thorne (Nominated Member of the Government of India) pointed out that ‘the difficulty of implementation of this clause will arise in those provinces where the number of Muslim judges in particular and Muslims in general was small. In such circumstances the enforcement of the Act would not be advantageous (Legislative Assembly Debates, Seventh Session of the Fifth Legislative Assembly, 31 January to 22 February 1938:319).

Sardar Sant Singh, M.L.A. from west Punjab, while giving his reaction to this bill stated,

– The proposal for such communal tribunals would only show distrust of judges of communities other than one's own in the matter of administration of personal laws introduce a narrow mentality that should be avoided at all costs' (ibid. 626). He further criticised those members of assembly who demanded that the matter be removed from civil courts and handled over to courts that were presided over by one community, on the grounds that it was akin to introducing the principle of *imperium in imperio*<sup>1</sup> (ibid).

M.S.Aney, M.L.A. from Berar, was of the same opinion and said that 'since it was a matter of the administration of justice, it could be accomplished by relying upon men, irrespective of religious background, who had been recruited according to the true spirit of law and in the best interests of people' (ibid:320). The Law member, Sir Nirpendra Sircar, enumerated the administrative difficulties that were likely to arise if it was accepted that only a Muslim could dissolve a Muslim marriage. He further objected to the clause in principle, as it amounted to casting aspersions on the judicial honesty of the judges (Legislative Assembly Debates, V.9.No.ix, p. 1954).

From evaluation of all debates that took place in support of the bill it can be concluded that all legal arguments put forth by supporters of the bill, particularly the two parties the unionist party and the Jamat-ul- e-Hind had little to do with improving the status of Muslim women. Rather the intention to support the bill had more to do with putting a stop to the illicit conversion of women to alien faiths, which were usually followed by immediate and hurried marriages with someone from the faith she happened to have joined, with a view to locking her in the new community and preventing her from returning to the one to which she originally belonged. The conversion of a Muslim woman to Hinduism and of a Hindu woman to Islam was not only looked at from social and political points of view, but also from the point of view of the long term consequences this conversion would have on the numerical strength of the communities. In other words, it was feared that this could create a disturbance in the numerical balance between the two communities, which is what they were more concerned about. The abduction of women had created disturbances that could not be overlooked. These conversions and the women's subsequent marriages were therefore rightly regarded as a series of depredations practised by Hindus against Muslims and vice-versa.

The above observation is made on the basis of the two provisions to Section 4 of this Act. In proviso I the Hindus concede to the Musalmans that if they convert a woman who was originally a Muslim, she will remain bound to her former Muslim

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<sup>1</sup>The term refers to sovereignty to issue commands as an uncontested imperial command which is externally unconstrained, and binding on people who constitute community.

husband, notwithstanding her conversion. Through proviso 2 the Muslims concede to the Hindus that if they convert a Hindu married woman and she is married to a Musalman, her marriage will be deemed to be dissolved if she renounces Islam and she will be free to return to her Hindu fold. Thus, what underlies the change in law is the desire to retain the numerical balance, and it is for this purpose that the rights of women were sacrificed.

## **Conclusion**

Looking at the overall situation in which these Acts were passed and the whole social process that was involved, no doubt, that legislation was considered an urgent necessity to protect women from the existing social and customary practices that had made women's lives miserable. But if we see the whole debate for the demand of these laws by the Muslim leaders, however, we find that the question of community/religious identity overrode the question of gender identity.

As far as the framework of Islamic doctrine is concerned, religious symbolism was interpreted to a large extent to match existing perceptions about the status of women, while legislation was used as a means to help women regain the rights that the Shariat had given them. Although the community supported the legislation, it realised that Muslim women's interests would be best served by the restoration of rights under the Shariat. However, efforts to restore these rights were played out between the government, ulemas, representatives of both community-based political groups and women's organizations, and in all this the pressure of community politics had always been an important factor.

The ulemas were afraid of religious freedom and the imposition of artificial arrangements from a foreign government, and considered themselves the sole custodians of the Shariat and advocates of women's rights (this trend is still found. For instance, the role and interference of the members of All India Muslim Personal Law Board on the issues related to women's Islamic rights and its claim as being the custodian of Muslim Personal law as well as the Muslim community).

The role of reformers has very much been a part of community-based politics irrespective of religion, since the reform movement tended to focus on specific aspects of the community's regional customs and traditions vis-a-vis women.

The legislators seemed more concerned about the dangers of the Muslims losing their solidarity and national unity, and with them showing numerical strength for political purposes. Jinnah, for instance, demanded amendment during the assembly debate on Shariat Bill wanted to change the wording to 'custom and usage' only, implying that prior legislation would be upheld even when it clashed with the rights of women.

Reformers also used women's issues to challenge the existing social structure, and claimed the colonial government's support by organizing a show of numerical strength to buttress their claims. The political parties provided a platform for both proponents and opponents of reform, so that henceforth debates for and against it were conducted more or less within party confines. Women were encouraged to participate in party activities, thus further internalising the debate. For instance, for those attacking the colonial regime from an Islamic perspective, the question of female inheritance was an ideological issue of prime importance. As a political issue, this question was for many reformers central to the formation of Muslim solidarity.

Thus the question of improving the status of women and making the laws more gender just by giving them a share in inheritance, the issue was concerned more with the ideology and group solidarity/ identity. Moreover, the focus shifted and women's interests were squarely placed in the political arena, subject to debate and political manoeuvring, which exists even today.

As far as women's organizations and women leaders were concerned, they did formulate an agenda and lobbied the government and political parties without reference to community or caste politics and the best result one could find the commencement of Child Marriage Restraint Act in which gender identity overrode the community identity. But the divisiveness of Indian politics and its polarisation on religious lines meant that legislative changes were loaded with claims and counter-claims made by competing community interests, which all but submerged the real problems confronting women.

It would be worth mentioning at this point that in Ataturk's Turkey and the Shah's Iran it was women who put in motion the strategy through which the society was altered. The liberal laws concerning women in Turkey date from 1926, and the Kemalist strategies for women's advancement are well-known and form the cornerstone of Turkish Westernization, while symbolizing its separation from Islamic culture. Here, in undivided India, we also find the theme of unveiling of women, not as the result of their own struggle for emancipation, but as a sign of apostasy and community identity. And this strategy is inextricably tied to that of the construction of a new political order and a new state.

Thus legal reforms were in a sense a logical extension of men's concerns to improve women's status and adherence to the faith of Islam. Women were symbolic of what men wanted their community to be. Women, when consulted, were expected to agree. Concerns for Muslim women's rights as individuals were another matter. The main concern of the reformers, whether in India or elsewhere, was 'with establishing norms for community behaviour, and in the process, establishing an irreducible Muslim identity within the political process' (Minault,1981:11). In fact, the quest for identity is not an ideological creation of fundamentalists: its origins—

and its legitimacy— lie in national and communal demands for independence, liberty or equality, hijacked by states and political powers, whether in colonial situations (Algeria), under the weight of imperialism (Iran), or among national minorities (India, Sri Lanka and numerous African countries).

Though both the Acts were apparently in the interests of women, they retained male privilege in matters like divorce or inheritance. The scene has remained unchanged as is evident from the case of Shah Bano and the subsequent passing of Muslim Women Act of 1986. The only difference is that women's movements in pre-independence India were about removing legal disabilities and bringing in social reforms, and were initiated by men who, under the influence of Western liberal ideas, worked against repressive social norms like child marriage, widow remarriage, sati and purdah, and demanded new legislation to remove legal disabilities faced by women irrespective of religion. The main concern of pre-independence women's movements was with eradicating illiteracy among women and bringing them out of the house to participate in the national movement. They did not question patriarchy or the gender-based division of labour. This period of the women's movement was marked by the convergence of women's issues across the boundaries of religion and focused more on similarities than on differences, while the post-independence women's movement demanded gender equality, questioned the gender-based division of labour, and highlighted the oppressive nature of the existing patriarchal structure irrespective of religious boundaries. However, with the passing of the Muslim Women Act of 1986, due to the vested interests of various political parties and the so-called community leaders, the question of minority identities overrode the real concerns of women (which aspect I am not going to discuss here). Muslim women were, to a large extent, affected by this divisive environment. While the religious fundamentalists/ Ulemas tried to place the onus of preserving religio-cultural identity on women, the political parties played the politics of proving numerical strength for gaining political power. In this process maintaining community identity and political power the real concern of women and social justice somehow took back seat. This position of the reformers, Ulemas and the political leaders, diverted their main concern of improving women status and giving proper attention to the grim realities, problems of Muslim women and the deviations from the actual Islamic position. More or less same position is existing today as far as the rights of Muslim women in India are concerned. The ulemas are more concerned for strengthening the community identity by depriving women from their Islamic rights in matrimonial matters. For instance, the Muslim women of Uttar Pradesh, a northern province in India are still guided by the UP Zamindari Act of 1952 in which they are not entitled to inherit agricultural land but neither the member of All India Personal Law Board nor any political leader from that area ever rose this issue that it is against the Islamic Shariah. Further, the



enactment of the Muslim women Act 1986 with the vested political interest of the ruling party and the role of All India Personal law Board went against the secular rights of Muslim women in matter. Despite the efforts made by various secular women's organizations, the act was passed and Muslim women were debarred from claiming maintenance under the 125 Cr pc, which was their right as citizen of the country. These two examples clearly shows the concerns which the so-called custodian of Muslim community and the political parties have for Muslim women in India after 58 years of Independence.

And to me, this seems to be the biggest challenge as well as dilemma for women's movement, which being a secular movement, is in a-fix as to 'how to assimilate Muslim women's issues into broader issues of women's movement and, at the same time, safeguard their religious and cultural identity. This has been most obvious in the case of Muslim Personal Law/uniform civil code. Placing Muslim women's issues within the confines of religion has further marginalised them, and created hesitancy among the secular feminists in addressing their problems for fear of hurting religious sentiments' (Bhatty2003). However, the reality that women's rights within the family were subjected to public debates in both the pre and post independence periods consolidated the position of Muslim women and their participation in the women's movement for gender equality and justice.

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**THE MUSLIM PERSONAL LAW (SHARIAT)  
APPLICATION ACT, 1937**

[Act No. 26 of 1937 dated 7th. October, 1937]<sup>1</sup>

An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims<sup>2</sup>[\*\*\*]

WHEREAS it is expedient to make provision for the application of the Muslim Personal Law (Shariat) to Muslims<sup>2</sup>[\*\*\*];

It is hereby enacted as follows:

**1. Short title and extent**

(1) This Act may be called the Muslim Personal Law (Shariat) Application Act, 1937.

(2) It extends to<sup>3</sup>[the whole of India<sup>4</sup>[except the State of Jammu and Kashmir]]<sup>5</sup>[\*\*\*]<sup>6</sup>

**2. Application of Personal Law to Muslims**

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).

**3. Power to make a declaration**

(1) Any person who satisfies the prescribed authority-

(a)that he is a Muslim, and

(b)that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and

(c)that he is a resident of<sup>6</sup>[the territories to which this Act extends]

may by declaration in the prescribed form and filed before the prescribed

authority declare that he desires to obtain the benefit of<sup>7</sup>[the provisions of this section], and thereafter the provisions of

section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

- (2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the <sup>8</sup>[State] Government may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

#### **4. Rule-making power**

- (1) The <sup>8</sup>[State] Government may make rules to carry into effect the purposes of this Act.
- (2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-
- (a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;
- (b) for prescribing the fees to be paid for the filing of declaration and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied
- (3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

[5. Dissolution of marriage by Court in certain circumstances- Repealed by the Dissolution of Muslim Marriages Act, 1939]

#### **6. Repeals**

<sup>9</sup>[The under mentioned provisions] of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:-

- (1) Section 26 of the Bombay Regulation IV of 1827;
- (2) Section 16 of the Madras Civil Courts Act, 1873;
- <sup>10</sup>[\*\*\*]
- (4) Section 3 of the Oudh Laws Act, 1876;
- (5) Section 5 of the Punjab Laws Act, 1872;
- (6) Section 5 of the Central Provinces Laws Act, 1875; and
- (7) Section 4 of the Ajmer Laws Regulation, 1877.

#### **Foot Notes**

1. This Act has been amended in Madras by Madras Act 18 of 1949.
2. The words "in the Provinces of India" omitted by the A.O. 1950.

3. Substituted by the A.O. 1950, for the words "all the Provinces of India".
4. Substituted by the Miscellaneous Personal Laws, (Extension) Act, 1959, w.e.f. 1st. February, 1960.
5. The words "excluding the North-West Frontier Province" omitted by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.  
In its application to Pondicherry, in section 1, after sub-section (2), the following shall be inserted-  
Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry."-(Vide Act 26 of 1968).
6. Substituted by the Adaptation of Laws (No.3) Order, 1956, for the words "a Part A State or a Part C State".
7. Substituted by the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943 (16 of 1943), for the words "this Act".
8. Substituted by the Adaptation of Laws Order 1950, for the words "Provincial".
9. Substituted by the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943, for the words "Provisions".
10. The brackets, figures and words "(3) Section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887" omitted by the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943. This omission has the effect of reviving the operation of section 37 of that Act.

\* \* \*