Chapter - 8

Reforms in Minority Personal Laws
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In this chapter attempt is made to trace the legislative history of Personal Law in India as well as the legislative history of the religious personal laws of the Parsis and the Christians. Under the religious Personal laws of the minorities, women had fewer rights than men, except in the case of Parsi law, there was also a considerable amount of diversity in the laws governing Christians and Muslims; yet the state has not sought to reform these laws on the very same grounds that it claimed to reform Hindu Personal Law. State's actions illustrate how the reform of religious personal laws is bound by considerations of ‘national integration’ and the political stability of the state. The effect of non-reform of religious personal laws of any community on women is a secondary consideration in reaching a final decision about law reform. However in view of the constitutional guarantee of the sex equality and the state’s proclaimed adherence to the principles of the Constitution, the state has to justify preserving legal rules that discriminate against women. It, therefore, relies on the argument that the minority communities need special consideration. The result of his consideration is that their personal laws are not reformed at the initiative of the state. The policy of the state appears that the state would reform them if the demand to do so
came from the relevant communities. Thus, the decision whether to reform religious personal laws is linked to the minority status of these communities rather than to considerations about the position of women. Moreover, in a democratic country like India the state is unlikely to be able to disregard the claims of the minority communities for special protection and this results in questioning the personal laws to ensure legal equality for women by the minorities, if the state tries to reform them. Due to the fact that these communities are unlikely to cease being minorities, women belonging to such communities face the prospect of continuing legal inequality perpetuated by religion and upheld by state. In the following pages it has been tried to trace the activities of the state with regard to the reform of minority religious personal laws. Since there has been very little legislative activity with regard to minority religious personal laws, I the researcher has relied on legislative debates where ever available, and supplement them with the debate carried on outside the Legislature to analyse the arguments about the nature of religious personal laws and the authority of the state to modify them. There has been only a little activity directed towards reform of the Christian and Parsi religious personal laws. This will be taken up at the end of the Muslim Personal Law section.

A. Legislative Activity with Regard to Muslim Personal Law

Muslims, like the Hindus, used the opportunities provided by the Government of India Act, 1935 to modify some aspects of
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their religious personal laws. Before detailing their activity in the Federal Legislative Assembly, a brief account of the political activities of Muslim political leaders will be useful. At this stage the Ulema, i.e., the religious clerics, and the Muslim League were the two prominent groups articulating the interests of the Muslim community.¹ These two groups represented the one section Ulema who claimed responsibility for safeguarding the Islamic Shariah and giving the Muslim community religious and political guidance according to Islamic principles and commandments.² The Jamiat-ul-Ulema-i-Hind was of the view that the Shariat should be correctly understood and interpreted only by the Ulema who were its rightful custodians. They believed that the correct leadership for Muslims could only come from them. The Muslim League, on the other hand, was concerned with the political and economic demands of the Muslims bourgeois vis-a-vis its Hindu counterpart. It relied on the support from the middle class and rich land owners. After the elections under the Act of 1935, the initiative to change the Muslim Personal law was taken by the Ulema. One of the most important activities taken by the Jamiat-ul-Ulema-i-Hind was the introduction of the Shariat Application Bill into the Federal Assembly.³

The Muslim Personal Law (Shariat) Application Act, 1937 is by far the most important legislation in the closing years of the British rule in India. The Act almost abolished the legal authority of customs among the Muslims of British India. Unlike most of

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India, the populations in Punjab, the North West Frontier Province and the Central Provinces were governed by these respective customary laws. The Muslim leaders and religious scholars became concerned with the fact that the Muslims in these areas were not following the rules of succession and inheritance enjoined by the *Shariat*. They were influenced by local customs and usages that allowed the Muslims to bequeath their entire property to their male heirs and thus avoid giving all the heirs their due shares as specified by Islamic law. Because they were influenced by local customs and usages.

In 1925 the Jamiat-ul-Ulema-i-Hind passed a resolution disapproving the practice of certain Muslims adhering to customs contrary to *Shariat*. A bill was prepared by the ‘Jamiat’ and was introduced in the Legislature of the North-West Frontier Province and later enacted as the North-West Frontier Province Muslim Personal Law (*Shariat*) Application Act, 1935. Later on it was desired by the Jamiat-ul-Ulema-i-Hind to get a law passed having a countrywide application over the whole Muslim population. A bill was prepared in consultation with the executive committee of the Jamiat and introduced by H.M. Abdullah in the Federal Legislative Assembly in 1935. A motion was introduced by the Government of India’s Home member, Sir Henry Craik to circulate the bill to elicit public opinion. It was published along with the statement of objects and reasons, by the Government of India to gather public opinion.
Objects and Reasons

The statement of Object and Reasons presented various causes for the introduction of the Bill, which run as follows:

"For several years past it has been the cherished desire of the Muslims of India that customary law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Muslim religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing the measure 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 cannot be expected to attain at 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. As the Muslim women organisation have condemned the customary law, as it adversely affects their rights, they demand that the Muslim personal law (Shariat) should be made applicable to them. The introduction of the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this, the present
measure, it enacted would have very salutary effect on society, because it would ensure certainty and definitness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or entail any great labour in the shape of research which is the chief feature of customary law.”

The position of Muslim women, in few cases, was seriously undermined by the then prevailing customs. Inheritance in particular continued to be ruled by customs, often excluding women, among numerous communities of Muslims. The Shariat Bill aimed at correcting such defect. The bill was introduced as an aid to ensure certainty and definitness in mutual rights and obligation by the application of Shariat. The mover of the bill supported it on the ground that it would secure uniformity of law among Muslims throughout British India.

In the Federal Assembly it was also mentioned that the Muslim women of Punjab condemned customary law as it adversely affected their rights and demanded the application of Muslim Shariat Law.

Further reason for introducing the bill was that the Muslim Community was bound in conscience to follow its Personal Laws and so ‘The existence of the legal state of things which allowed
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not only deep evasions but defiance of that law is a matter which is deeply resented by the community."9 The Federal Legislative Assembly sent the bill to a select committee and considered the Select Committee’s Report and the bill in September 1937.10 During the discussion in the Federal Assembly prior to sending the bill to the select committee, most of the speakers who favoured the enactment of the Shariat Bill mentioned the advantages to be gained by Muslim women. The point was made, however, that the opinion sent by the local governments to the federal legislature did not contain any opinion by women’s organisations.11 The Home member of the Government of India made it explicit that the Shariat Bill if enacted would not affect agricultural properties as the Federal legislature was not competent to make laws concerning such property. He also mentioned that it would be wise to consider carefully whether individuals should be given the option to decide whether they wanted to be governed by the Shariat.12

When the Federal Assembly considered the report of the Select Committee, supporters of the Bill repeatedly asserted that it was designed to do justice for women. It was also made clear that Muslim women had expressed their strong support for the measure.13 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% of all property available in India. According to him the idea behind seeking the sanction of the House was that in addition to giving some little relief to the females of the country, the 'representative House for the whole of India' should accept the principle that Muslim Personal law should be applied to Musim.\textsuperscript{14}

However, at this stage some members sought two important modifications to the Bill. An objection was raised against invalidating the existing laws which gave protection to the Zamindars (big land holders) and ensured that their property could not be divided. It was argued that since protection has been given to a certain class of people, i.e. the land holders, to ensure that their property was safeguarded against division, this right should not be taken away only from Muslim land holders. Mohammad Yamin Khan claimed that these laws have been made with the full concurrence and common consent of the Musalmans for protection of their interests.\textsuperscript{15} In response, the government explained at it intended to modify the bill so that laws which it had passed on various aspects of usage and custom would remain valid. This action was described by the supporters of the Bill as denying justice to women and he cautioned that 'To take shelter under the laws which have been passed by the various legislatures in India where they (women) had no hand would not be a good thing.'\textsuperscript{16}
Jinnah supported the Bill on the ground that it would enable women to own property and "the economic position of women is the foundation of her being recognised as equal of men and share the life of men to the fullest extent." He proposed an amendment that individual Muslims should be given option to decide whether they wanted to be governed by Shariat or by customary law. In support of his argument he said that Cutchi Memons Act, 1920, gave a similar option to individuals, and more than half of that community had elected to be bound by the Act. The reason for the support of Jinnah was that he was not a traditionalist himself and also he was trying to protect the rights of rich landowners. Although this amendment was strongly opposed by the Jamiat but it was finally carried in a modified form. The final Bill which was enacted later on gave individuals an option to be governed either by the Shariat or by their customary law only with regard to adoption, wills and legacies. Except these three matters Muslims were to be governed by Islamic Shariat Law in all other matters mentioned in Muslim Personal Law (Shariat) Application Act.

The object of Section 2 is firstly, to abrogate custom and usage which may be contrary to the principles of Islamic law and, secondly, to grant certain exceptions. Fyzee says that the words 'intestate succession' clearly show that the power of testamentary succession enjoyed by certain communities is not taken away. These communities are Khojas and Memons. Thus, they may allow a custom which allows the disposition of even whole of
property by way of will, and which is clearly unIslamic. On the other hand, if a female receives property and by customary law the property is to revert to heirs of the last male owner, such custom being contrary to Islamic law, is abolished and she holds it in all respects as an heir under Muslim law.20

In conclusion, the enactment of Shariat Act resulted in the express acceptance by the state legal system of the principle (with some exceptions) that Muslim ought, in personal matters, to be governed by the Shariat and not by custom. The state, in this way, contributed to enhancing the Islamization of the Muslim Community. Islamization is here used to describe the increased tendency of the Muslim community to create a distinct identity separate from majority Hindu community.21 In the words of Archana Parashar:

"The political situation at the time was conducive to heightening the distinction between the Hindus and Muslim. The Government of India Act, 1935 has accepted the principle of communal representation and the Muslim League was specifically representing Muslim's interest. However, a homogeneous Muslim population did not exist as the Muslim community and groups and the Ulema relied on the Shariat, or the orthodox Islamic principles, to forge a common identity. The customary practices of various Muslim
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groups, in addition to deviating from orthodox Islamic law, were invariably the pre-conversion customs retained by the Hindu convert to Islam. It was, therefore, to be expected that the Ulema considered it crucial that all custom be denied judicial recognition.”

Due to the difference of attitude between the Muslim League and Jamiat the government was able to retain certain custom which were clearly against the Islamic Law (Shariat). Muslim League which was representing the interest of wealthy land owners helped the government to retain certain customs of Khojas and Memons against the wishes of the Ulema of the Jamiat.

Thus, uniformity in Islamic law was not achieved except in a very limited way, and the advantages gained by women were important more for their symbolic value. The enactment was important because it set the pattern for the Muslim leaders’ subsequent legislative activities in post independence India. The government at this stage was neutral, in the sense that it allowed (within bound) individual communities to enhance or diminish the scope of their religious personal law.

B. The Dissolution of Muslim Marriages Act, 1939

The Dissolution of Muslim Marriages Act, 1939 is another milestone in the Legislative history of Muslim Personal Law. The Dissolution of Muslim Marriages Act, 1939 may be said to be
another attempt by the Ulema to utilise the legislature to 'rectify' the prevailing situation in regard to the Muslim women to dissolve their marriages. Although, the Qur'an explicitly permits the dissolution of marriage by women in case of necessity, there are various school of thoughts about the conditions under which this permission can be used and there is no agreement about the procedure to be followed. Under Hanafi Law a women's marriage would stand dissolved on her apostatising from Islam. In India the majority of the Muslims follow the Hanafi law. In the absence of any other alternative for release from a difficult marriage, many Muslim women who wanted to get release from marriage got converted to another religion, hence getting their marriage dissolved. The judicial attitude in India was that this was a valid dissolution of marriage. The classical Hanafi law of divorce was causing hardships as it consisted no provision where by a Hanafi wife could seek divorce on such grounds as disappearance of the husband his long imprisonment, his neglect of matrimonial obligations etc. Finding no other way to get rid off undesired marital bounds, many Muslim women felt compelled by their circumstances to renounce their faith. This was causing great trouble to the Ulema that the Muslim women were apostatizing from Islam. They decided to take action to rectify the situation. The 'Jamiat' decided to have a law enacted empowering Muslim judges to dissolve a Muslim marriage on the application of a woman in those circumstances in which it was causing hardship
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to them. Mohammad Ahmad Kazmi introduced a bill in the Federal Legislative Assembly in 1936. The Bill was prepared by the leading Ulema of the Jamiat which was based on Al-Hilat Al-Najizalil Halilat Al-Ajza (a lawful devise) - A book written by Maulana Ashraf Ali Thanvi. This book was published in 1932 and the compiles of the book recommended that Muslim members of the Federal Legislature should introduce a bill based on the book. The compiler of the book belonged to the world famous Deoband School and during the preparation of the book he had gathered opinions from other religious scholars in India and Hejaz.

The main feature of the bill was that for the purpose of dissolving the marriage at the instance of a Muslim women, it accepted that the principles of Maliki Law be applicable to all Muslims. In preparing the bill the principle of ‘Takhayyur’ or eclectic choice was adopted which permits the replacement of the school of Islamic law with another in certain circumstances. The bill was sent to a ‘Select Committee’ and the Federal Legislative Assembly considered it in 1939.

The statements of Objects and Reasons attached to the bill several reasons for introducing the bill. The main reason was said to be that the existing law had caused ‘unspeakable misery to innumerable Muslim women in British India’. The statement of the Reasons and Objects of this Act indicates the circumstances in which the Act was passed:
"There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently ill treating her on 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, Shafei and Hanbali law. Acting on this principle the Ulema have issued the fatwas to the effect that in castes enumerated in clause 3, part A of this Bill, a married Muslim women can obtain a decree dissolving her marriage.

As the courts are sure to hesitate to apply the Maliki Law to the case of a Muslim women, legislation recognising and enforcing the above mentioned principle is called for in order to relieve the suffering of countless Muslim Women."

In the Federal Assembly, the Bill was described as constituted of three parts. It gave grounds for dissolution of marriage, described the effect of apostasy on the marriage tie, and
provided for the authorized court personnel to dissolve a Muslim marriage. The Bill clearly enumerated the grounds on which the Muslim women could seek a divorce.\textsuperscript{27}

During the debate in the Legislature it was repeatedly mentioned that legislation was necessary because the courts continued to follow precedents set by themselves on an incorrect understanding of Islam, despite the fact that the Muslim community had expressed its dissatisfaction over their view.

The mover of the Bill explained that there are three schools of apostacy. The only school that held that apostasy dissolved marriage was the Bokhara school. But the view also contemplated imprisonment or detention of a woman until she returned to Islam. The \textit{Ulema} were of the opinion that to adopt the first part and leave out the other, as was being done by the British courts, was not proper. Furthermore, since the enactment of the Caste Disabilities Removal Act, 1850, the forfeiture of civil rights that could have been imposed on a woman at apostasy had been removed. In Kazmi’s view now that inter-marriages between different communities were encouraged and freedom of religion was advocated, the Muslim community could not support the contrary position that apostasy by a woman should put an end to her relations with her husband.

Moreover, he argued that what had been prescribed as a punishment by Islam should not be allowed to be turned into a
right by the legislature or the courts. Kazmi sought further support from the fact that the consequences of apostates in other religions were similar to those being prescribed in the present Bill, i.e., no community gave the apostate the right to automatically dissolve the marriage by her (or his) unilateral act. It was claimed that public opinion also supported the view that mere apostasy from Islam would not dissolve a Muslim woman’s marriage. Syed Gulam Bhik Nairang disclosed that he had sent questionnaire to 89 Ulema, 65 of whom have replied. Except for one or two the rest were of the opinion that the true doctrine of Muslim law was that marriage was not dissolved on apostasy. When the Bill was under discussion, prior to being sent to Select Committee, the government had pointed out that it should be made clear that the bill was not applicable to ‘Shias’ whose law was different from that of the ‘Sunnis’. But later on the ‘Shias’ were also included into the Act because the government did not raise any objection. As far as the clause that only a Muslim judge would have authority to dissolve a Muslim marriage was not accepted by the government.

The government had already made it clear that if the Muslims insisted for the inclusion of clause relating to the Muslim judges the government would oppose the Bill as a whole. The main reasons enumerated by the government was that if the clause is included in the Bill it would amount to casting aspersions on the judicial honesty of the judges. It was denied by the Muslim
members that they did not mean casting aspersions on the judges or they doubted the integrity of the judges but they said that under *Shariat* a non-Muslim judge could not be appointed for such purpose. But when the government showed no signs of accepting these claims the Muslim members acquiesced and explained that ‘*It is better to have a measure at the present stage as it is, rather than insist on a thing which does not appeal to the country at the present time.*’ This was an important admission as it indicated that if there was no possibility of their demand being met, the Muslim religio-political leaders would make compromises and accept Legislative provisions that went against the *Shariat.*

When the *Ulema* found that the final shape of the Act was not in consonance with *Shariat* they tried to stop the law coming into effect by sending a petition to the viceroy to withhold his assent. But they could not succeed. The reason for not getting success was that the Muslim League did not support them in their effort to retain the provision that only Muslim judges should have the competence to dissolve Muslim marriages. The importance of this Act cannot be undermined in the sense that this Act, for the first time, gave the Muslim women of India the right, although limited, to ask for the judicial dissolution of the marriage. The Act also helped Muslim women from taking the extreme step of renouncing Islam to get their marriages dissolved. The role played by the *Ulema* in introducing the *Shariat* Bill and the Divorce Bill in the Federal Legislative Assembly illustrates clearly that when
political representation first became available to Indians under the Act of 1935, the Muslim religio-political leaders were willing to use the Legislative process to modify existing personal law practices. The *Ulema* efforts to have all Muslims governed by the *Shariat* and to provide as limited right of divorce to women so that they do not apostatise from Islam are all illustrations of the use of the political process to confirm the hold of religion on the lives of the people.\(^{32}\)

In view of the above reasons, the Dissolution of the Muslim Marriage Act, 1939 was passed. It is applicable to all Muslims in India who may otherwise adhere to Hanafi, Shafii, Ithna Ashri or Ismaili law. The Act is enforced throughout India except in the state of Jammu and Kashmir, where a parallel enactment by the name of Jammu and Kashmir State Dissolution of Mulsim Marriages Act, 1942 is enforce. The words used by section 2 of the act as follows:

‘Women married under Muslim Law’ and not ‘a Muslim women’. This protects women who have already abjured Islam in the hope of getting their marriage dissolved and are thus no longer Muslims; they also can get their marriage dissolved on any of the grounds given in the Act. The Act consolidates and clarifies the Muslim law relating to suits for dissolution of marriage by women.

It is applicable to all Muslims but the provisions of the Act have to be applied by taking recourse to ordinary process of the
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civil courts of the country. An appeal against order of the subordinate court is competent under section 96 of the Code of Civil Procedure.

C. The Special Marriage Act, 1954

After the partition of India the Muslim leaders who had identified with Indian nationalism joined the process of nation building, but the bulk of community, neither trusting nor trusted remained aloof and "it continued to cower, rejected, mistrusted and afraid." The greater proportion of those Muslims who remained in India were in the unenviable position of being identified with Pakistan while being citizens of India. They were, in the eyes of the majority community voted for the creation of Pakistan, hence not entitled to any special status in independent India. Due to this problem the Muslims started thinking about group solidarity and this group solidarity in turn raised suspicion about their bonafides and their loyalty to nation. In such changed circumstances in post partition independent India the religious identity of the Muslims became very important and a common religious Personal Law constituted an important component of that group solidarity and identity. It is against this background that the response of the national politician to the issue of reforming Muslim Personal Law has to be understood. The state wanted to reform Hindu Law and give women legal equality and to make Hindu Law in conformity with the Constitution. It was also
expected from the state that Muslim Personal Law, i.e. Shariat which gave lesser rights to women than man in corresponding situation should also be modified on the lines of Hindu law. But it was very difficult for the state to integrate into one nation. Population bitterly divided along religious lines. The government was not in a position to introduce changes in Muslim Personal law as it might be interpreted as persecution of minorities, especially the Muslims. The policy adopted by the state in the post partition India was to ‘encourage’ the minorities to integrate and become part of the Indian nation voluntarily and not by coercion. The statements and the speeches of the national leaders of that time bear testimony to the above assertion. At that time, any attempt to reform or replace Muslim Personal Law would have been counter productive thus, harming national unity and integrity. Although, the government always asserted that under the Indian Constitution it had every right to change religious Personal Laws but in practice it did nothing to alter or change the Muslim Personal Law as it did with Hindu personal Law.

In the following pages the government’s activities and the statements of national leaders with regard to Muslim Personal law will demonstrate that the government gave utmost priority to integrate the minorities especially the Muslims into the national mainstream rather than to provide equality for women. The government attitude was that the Shariat is immutable and the government would interfere in the matter for change only when a demand is made by the community itself.
This vexed question of changes in Personal laws again came up for discussion during the debate on the Special Marriage Act, 1954. During the debate in the Lok Sabha Kazi Ahmad Hussain argued that Muslims were a large minority in the country and the views of their representative must be heard and accepted on any change that might be made to their Personal Law. He expressed the fear that the Bill would result in the curtailments of the rights of property and divorce which Muslim women then enjoyed. Another objection that was raised during the debate was that, if enacted, this law would encourage to circumvent their religious laws and obligations.

Pandit Jawaharlal Nehru, the then, Prime Minister of India explained that:

(1) He did not wish to hurt any one’s religious feelings but it appear to him that the extra ordinary reverance shown to what was called Personal Law seemed to be completely misplaced, whether it be a Hindu Personal Law, Muslim or any other,

(2) It was admitted that society has changed (which was undeniable) then it was not wise to bind with a certain social organisation which might have been good at one time but did not suit a later stage.

Finally, the Government of India did not make any exceptions for the Muslims and the Act was passed. After passing of the Act
all Muslim orthodox parties severely criticised the passage of the Act and demanded that no Muslim should be allowed to marry under its provision. The main argument, in the words of Mohd. Ismail, was that –

"Muslims hold religion as the most valuable thing in life and their whole life is governed by their religion and they cannot conceive of the possibilities of the abrogation of Shariat law on any account."\(^37\)

The Muslim League passed another\(^38\) resolution in March 1955 expressing grave concern over the enactment of Special Marriage Act and the government’s refusal to exempt the Muslims from the perview of the Act. The Muslim league warned Muslims that this Act was only a beginning in the move to introduce a Uniform Civil Code in the country. The resolution added that:

"This meeting reiterates that the Personal (Shariat) Law of Muslims is a vital part of their religion and the substitution of it by any other law is a direct negation of the religious freedom guaranteed to them in the Constitution."\(^39\)

Thus, not only were the Muslim leaders asserting that the Parliament could not interfere with the Shariat they were also asserting that Parliament should not do anything to ‘encourage’ Muslims to leave their religion. The implication of this argument, although not specifically articulated, was that the government was
expected to facilitate the control of religion over individuals. The state at this stage declined to accept the Special Marriage Act claims about the sanctity of all religions were ignored, helped to discount the Muslim members’ claims but at the same time the state did not unequivocally declare its right to modify the religious Personal law of any community; instead it publicised the Special Marriage Act as a secular law which had nothing to do with the religious law of various communities.

D. Hindu Law Reform Acts

At the time of the debate on Hindu Law reform bills in the Parliament and before that when the Hindu Code Bill was debated in the Constituent Assembly the government was repeatedly faced with the argument that a secular state should not legislate for only one religious community i.e. Hindu Community. Another argument vehemently put forward that if Hindu law was being reformed because it discriminated against women why not Islamic Law. Islamic law should also be reformed as it also discriminated against women. During the debate in the Constituent Assembly some members argued that if it is admitted that everyone has equal citizenship rights irrespective of their religion then the government should have introduced a bill that applied to every citizen and not to Hindus only. After the adoption of the Constitution it was again pointed out by the opponents of the Hindu code Bill if monogamy was a desirable principle it should be made the rule
for every community including the Muslims. Similarly it was also argued that the benefits being bestowed on Hindu community should be extended to all the communities living in India.

One Muslim member Khwaja Inaitullah said that secularism did not mean that the same Personal laws should be framed for all communities. He suggested that Hindu law was being modified only because it had been undergoing changes but Muslim law had not changed for the last 1350 years, nor was it likely to be changed in the days to come, since Muslims believed that their laws for marriage and division of property was made by God.  

The government’s stands response was of a changing nature. The government claimed, after the first election that the government could not shirk the task of bringing in a law that would be applicable to everyone irrespective of religion. Later on the government also assured the Muslim community that it could not change or reform Islamic community at the moment because the Muslim community was not taken into confidence on the subject and it would be undesirable to initiate the process without consulting the people concerned. If we go through the attitude of Dr. B.R. Ambedkar in the Constituent Assembly and later on as the Union Law Minister we find a change in his opinion. In the Constituent Assembly, Ambedkar had emphatically stated that being a secular state did not mean that the state had to draw back from regulating the lives of various communities governed by their
own special laws. But when, after the enactment the Indian Constitution the government’s emphasis on consulting with the Muslim community as a crucial factor the Union Law Minister changed his views and explained that a secular state did not apply that the sentiments of the people should not be taken into consideration. Dr. Ambedkar said:

“We are not here to flout the sentiments of the people.”

This answer of Ambedkar met with the response from Syama Nandan Sahaya that while the Law Minister had shown concerned for non-Hindus, he did not seem to have any regard for the feelings of Hindus.

However, the government did not indicate whether it was going to initiate the process of consultation within a specified time. The significance of the government statements regarding the state’s competence or authority to modify Muslim Personal Law, is that the community was to be given the option to decide when or if they would agree to have there religious Personal laws confirm to the Constitution.

As we have already seen that during the debate on Hindu Code Bill and later the Hindu Law Reform Bills in the Constituent Assembly and the Parliament the opponents of the Bill had raised the point that a secular state should legislate for all religious communities and not only for the Hindu community which is the majority community.
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On all such objections the answer of the government was that this was the first step for bringing uniformity and finally the government would try to enact a Uniform Civil code. But we will see later that the government’s stand underwent a major change when the Criminal Procedure Code was discussed in the Lok Sabha in 1973. It reflects that either the government did not want to enact a Uniform Civil Code or it was not in a position to enact such a code due to several factors including the religious sentiments of the Muslim community and the political expediency both.

E. The Code of Criminal Procedure, 1973 (Controversy Relating to the Definition of ‘Wife’) Section 125(1) Explanation (b)

In 1973 the government introduced a new Criminal Procedure Code Bill in Parliament to replace the old Criminal Procedure Code of 1898 mainly to provide a uniform law of maintenance. Under section 488 of the code of 1898 a wife could obtain maintenance from her husband in summary proceedings, but due to the meaning of the word ‘wife’ the proceedings were dropped when a husband divorced his wife. In this situation the divorced wife was not entitled to get any maintenance from her former husband. This state of affairs was very common in cases of Muslim wives. Whenever the magistrate ordered maintenance allowance in favour of wife the husband was at liberty to defeat the provision of law and the order of the court by pronouncing
divorce. That’s why one of the matters dealt within the Criminal Procedure Code Bill was the maintenance of divorced wife. Thus when the Cr.P.C. bill was introduced in the Lok Sabha the government took cognizance of this difficulty faced by Muslim wives and provided an explanation to the section 125(1) that under the maintenance provision the word ‘wife’ would include within its meaning a divorced wife.

The definition of the ‘wife’ as given in Explanation (b) of Section 125 (1) of the Cr.P.C. is noteworthy for the purpose of the analysis.

“Wife includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried.”

The definition of the wife is objectionable to the scholars of Islamic jurisprudence as the same is foreign to Islamic concept of wife. The definition of the wife given in earlier code, thus, have been replaced by a new definition. On the basis of legal fiction, the two strangers being of opposite sex are treated to be husband and wife under section 125 of the Cr.P.C. for the purposes of maintenance even after divorce. When the bill was being debated in the Parliament it was objected to tooth and nail by Muslim members in the legislative house viz., Ibrahim Sulaiman Seth, G.M. Banatwala, C.H. Koya and others. They objected the explanatory clause defining the term ‘wife’ and they advanced
potent advocacy that Muslims must be exempted from the ambit of the definition of the wife.

Ibrahim Sulaiman Sait of the Muslim League objected to Section 125 of the Cr.P.C. Bill which was to replace Section 4, of the older Cr.P.C. He claimed that the provision erodes the rule of Muslim Personal Law under which the term ‘wife’ does not include a divorced wife. Furthermore, under Islamic Law maintenance is payable to a divorced woman only for three months or three menstrual periods after the divorce (to determine whether or not she is pregnant to the husband or if she is pregnant at the time of divorce, then she is to be supported by the husband while the pregnancy lasts. The member said that since Muslims are governed by their personal law they have to follow it, and if the provision is not deleted from the Cr.P.C. then atleast Muslims should be exempted from its perview. In the opinion of Sait Muslim Personal Law includes specific procedures with regard to all matters concerning the life of a Muslim and these directives have been laid down by God himself in the Qur'an. Hence, he could not support the proposed explanation to the section, as it was opposed to Muslim Personal Law. This was a significant claim with respect to the relationship between Religious Personal Laws and the Constitution which almost went unchallenged in the Lok Sabha.

Sait also reminded the Prime Minister and the Congress Parliamentary party which had given repeated assurances that
there would be no interference with Muslim Personal Law. With Sait, another member of Muslim League, Mohd. Koya, tried unsuccessfully to introduce an amendment to the effect that the explanation to section 125 that ‘Wife includes a divorced wife’ be deleted. Koya asserted that he thought it was against common sense that he could be asked to maintain a divorced wife until she married again and it was not his duty to find her another husband.

The Law Minister pointed out that the explanation in section 125, Cr.P.C. did not affect the civil status of the husband and wife in any manner and besides this made the following observation: "We have received a lot of representations which show that after divorce, women are generally in a very bad plight and it is a very difficult social and humanitarian problem...; I do not think that Muslim Personal Law comes into the problem."

He explained the reason for introducing the explanation to section 125, thus:

"The Government had received information (the post-divorced circumstances of woman were economically stringent and therefore) after divorce women were in bad economic circumstances and on humanitarian grounds, they should have some help."
He explained that ‘A helpless lady (along with some other categories of people) is given relief’ no one could really say it was against the Muslim Personal Law. Infact it was consistent with the humanitarian traditions of Muslim Personal law.\textsuperscript{56} The government did not directly address the claim made by Sait that Muslim Personal Law had laid down directives for all matters and being divinely ordained these could not be altered. It had the opportunity to articulate its stand \textit{vis-a-vis} its capacity to reform Muslim Personal Law, but it chose to treat the subject as not concerned with Personal law.

Rejecting all the pleas and amendments the section on maintenance was adopted by the Lok Sabha on 30th August, 1973. However, the Muslim religious and political leaders exerted sufficient pressure on the government to reconsider the Cr.P.C. Bill, Press media especially urdu was adopted as potent tool to oppose the proposed amendment of Section 488, Clause 3 of the then existing Cr.P.C. During that political situation, the resentment of Muslims was duly recognised. Meanwhile, various religious-political organisation sent letters to the then Prime Minister, Mrs. Gandhi protesting inclusion of the explanation to Section 125 in the Cr.P.C. Bill.\textsuperscript{57} As a rare instance “In the legislative history of India, discussion on the draft of the (new) Criminal Procedure Code was reopened at the instance of the then Prime Minister Mrs. Indira Gandhi in Parliament at a very unusual stage.”\textsuperscript{58}
The Cr.P.C. bill was again taken up for discussion in the Lok Sabha on 11th Dec. 1973 and the decision of 30th August, 1973 was rescinded by the government. The effect of such recision was that the clause and all the amendments concerning it were reopened for discussion.59

During the debate in the Lok Sabha Jyotirmoy Basu described the importance and significance of section 125 for Muslim women. In support of his contention he cited certain verses of the Holy Qur'an and claimed that the Qur'an provides maintenance to the divorced women on a reasonable scale. He also criticised the Privy Council decision in Agha Mohamed Jafar vs. Koolsum Bibi.60

The government finally succumbed to the pressure of the Muslim community and the law minister himself moved an amendment to section 127 and explained its purpose thus:

"Under the customary or personal law of certain communities certain sums are due to a divorced women. Once such a sum was paid, the magistrate's order giving maintenance (under section 125) could be cancelled."61

The law minister was making a reference to Muslim Personal Law, under which the prospective husband promises to pay a specified sum to the wife at the time of the marriage. The sum is called dower or Mehr and the usual practise is that the sum is
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paid to the wife at the time of divorce. Mr. Jyotirmoy Basu asserted that by this political move in the shape of the amendment the spirit of section 125 has been fully negatived. However, the amendment was accepted by the Lok Sabha.62

Thus, in the form of section 127 clause 3(b) exception was added during the debate. It is abundantly clear by the perusal of the legislative history that section 127 clause 3(b) was brought to safeguard to Muslims and their Personal laws. In the words of Tahir Mahmood:

"In the wake of mounting opposition by the Muslims, Mrs. Gandhi (the then Prime Minister) rather created history by ordering reopening of discussion of the disputed position of the Bill at a very unusual stage. Finally, a saving clause (Section 127 clause iii(b) in effect protecting the Muslim Personal Law was inserted in that position.63"

He further observed:

"The position as finally enacted laid down that though the courts could grant maintenance to a divorced wife, at the time of so doing, they should give due consideration as to whether she had already realised from the husband her post-divorce entitlement under the personal Law of the parties."64

This was obviously meant to protect Muslim Personal
Law on the point as traditionally interpreted. The way in which the amendment as originally proposed, was modified, seemingly satisfied the orthodox Muslims.65

Archana Parashar comments on the whole exercise in the following words:

"The consequences of this decision were far more significant for women than for men as provisions of religious personal laws more often discriminate against women. The government did not give any explanation for the decision to abandon its pursuit of a humanitarian goal, that is, to prevent undue hardship to divorced Muslim women. When the initial proposal for modifying the Cr.P.C. was made, it was recognised that Muslim women were in a particularly vulnerable position because of the case with which a Muslim man could divorce his wife. When the modified Sections 125-27 Cr.P.C. were accepted there was no change in the right of the Muslim husband to divorce his wife extrajudicially or of the right of the wife to receive dower or Mehr and the particular difficulty faced by Muslim women remained unchanged. The only outcome of the exercise was that the government was seen to subordinate the interest of women in the face of opposition from the male
reлиgio-political leaders of the Muslim community. From now on the Muslim leaders seem to have Carte blanche with regard to matters claim to be governed by their personal law. Not only did they object to mandatory provisions but also to purely enabling provisions like those in the adoption bill. F. The Adoption Bill, 1972

The legislative history of Adoption bill dates back to 1956 when an attempt was made by Mrs. Jayshree Raiji to introduce the adoption of children bill into the Lok Sabha in 1956. But she could not persue the bill as she was persuaded to withdraw the bill when the Union Law Minister promised that the government would introduce a bill shortly. Acting on this promise, though after about 10 years, in 1965 the Indian Council For Social Welfare, in collaboration with the Indian Council of Child Welfare and other welfare organisations, prepared the Adoption of Children Bill. The Draft of the bill was sent to the Union Law Minister and members of Parliament. The following years Mrs. Tara R. Sathe introduced the adoption of Children Bill into the Upper House. But this bill could not be enacted as law. Again a new bill was introduced into the Rajya Sabha in 1972. The 1972 bill was referred to a joint committee in order to decide whether, among other things, it should apply to all sections of Indian society.
The report of the joint committee recommended that the bill should be made applicable to all Indians except ‘scheduled tribes’. The three Muslim members of the joint committee were not in agreement with the recommendation of the joint committee as they were of the view that Muslims should also be excluded from the perview of the proposed law. Due to the dissolution of Lok Sabha in 1977 no discussion or debate took place on the adoption bill. The Janata Government introduced a new adoption Bill but withdraw it from following opposition from the Muslim community. The term of the new Janata Government was very short and it could not complete its full five years term. Hence, no new bill could be introduced by the Janata Party government. The Congress government regained office in 1980 and reintroduced the adoption bill in the modified version which excluded Muslims from its perview. This exclusion of Muslims from the perview of adoption bill was condemned widely. To ascertain the views of Muslims community and other minorities the bill was referred to the Minority Commission for its view. The adoption bill was designed to give every individual the right to adopt a child. A necessary condition for adopting a child was that the consent of other spouse was necessary, if the person adopting was married. The procedure for adoption was provided and the effects of adoption enumerated.

The main reason for the opposition to the bill by the Muslim religious scholars and political leaders was on the ground that the
provisions of the proposed law conflicted with the tenets of Islam. There were three specific objections against the adoption bill:

1. That under the adoption bill one of the legal consequences of the adoption was that the adopted child took the name of the adopting family. The Muslim leaders objected that the Qur'an prohibits such a change of name and this prohibition is not a mere recommendation but is mandatory.

2. The second legal consequence of adoption under the bill was that under it, the adopted child could not make specified matrimonial alliances. This amounted to declaring some relations as haram (Prohibited) but under Islamic principles Allah alone has the prerogative of declaring things and acts as halaal (Permitted) and haram (Prohibited). According to Muslim leaders by prohibiting relationships which Allah has permitted the Legislature was claiming authority which under Islamic law is possessed only by Almighty Allah which is not permitted under Islam.

3. Since the adoption bill provided that the adopted child would become heir to the property of the adopting parents, this would naturally alter the shares of the heirs hence would amount to an interference with the scheme of succession provided by the Shariat. According to these Muslim religious-political leaders would be totally against Islamic Law as the scheme of shares to the heirs has been expressly provided
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for in the holy Qur'an. They also cited an incident relating to the Prophet Mohammad (SAW). The Prophet Mohammad (SAW) had adopted his slave as his son and named him after himself. It was to annul this act that the later verses were said to be revealed. There is a tradition, reported by Saad-Bin-Abi-Waqas and recorded by Bukhari to the same effect.

The above opposition of the adoption bill did not mean that the Muslim community was unanimous in its opposition to the bill. In 1978, when the government withdraw the bill, the Indian Council of Social Welfare organised a public meeting in Bombay which was attended, among others by Justice Chagla, former Chief Justice of Bombay High Court and later Minister for Education, Govt. of India. The meeting was presided over by Justice Hidayatullah, a retired Chief Justice of the Supreme Court. Justice Chagla said that the bill was of a purely optional nature and it was not forcing any Muslims to deny their faith. Asaf A. Fyzee, a prominent Muslim jurist said that the Muslim opposition failed to appreciate that the Qur’an had provided full direction on what should be done for orphans and the opposition to the adoption bill by the Muslims was in a sense denial of protection to the neediest children on purely obscurantist ground.

Some Muslim lawyers suggested that the government could modify the bill slightly and leave no ground for Muslim leaders to oppose it. The Chairman of the Minority Commission, Justice
Hamidullah Beg, Chief Justice of the Supreme Court, suggested that the government should not exclude the Muslims from the perview of the adoption bill. Instead everyone should be given the option to declare that adoption is not contrary to their religious beliefs.\textsuperscript{73} A common thread running through all these suggestions however, is that they give credence to the claims that the religious personal law cannot be modified and in effect they accept that religions have supremacy over the authority of the state and the Constitution.\textsuperscript{74} The objection of the Muslim religio-political leaders rested primarily on the ground that Islamic law is immutable. \textit{Allah} alone is the law giver and he has communicated these laws through the \textit{Qur'an} and \textit{Hadith}. It is, therefore, beyond any human agency's power to alter these laws and Parliament cannot assume the authority to do so. By agreeing to exempt the Muslim community from the perview of the Adoption Bill, the government gave tacit ascent to this ground. This stand of the government bears comparison to its conduct when enacting the Special Marriage Act, of 1954. Just like the Special Marriage Law, the Adoption Law was to be an enabling law, i.e., anyone who choose could take advantage of it. There was no compulsion for anyone who felt that it conflicted with their religion to exercise the legal rights given under the adoption bill. In 1954 the government had not accepted the claim made by some Muslim members that the Special Marriage Act would encourage Muslim to leave the fold of Islam, but in regard to Adoption bill the
government in effect took over the responsibility of ensuring that no Muslim had the opportunity to reject Islamic law. This was, as yet, the greatest concession made to the claims of the Muslims religio-political leaders regarding the operative sphere of religious personal laws and the competence of the state to modify them. An editorial entitled 'A crying shame' described the reluctance of the government to provide a universal adoption law as a criminal abdication of responsibility.

From the above, it is clear that the government made a departure from its past commitment when it reformed the Hindu Personal Law. The states conduct was not dependent upon the particular nature of Islamic and Hindu laws, because the state had initially made clear that it had the right to reform any religious personal law. But the state during the course of time changed its earlier position and said that the state would make reforms in Muslim Personal law i.e. Shariat only after taking into confidence the Muslim community. Later on even this position was given up and the attitude of the state established that the state would not make any civil laws that ‘allowed Muslims to go outside the control of their religious law. In doing so, the state seems to have accepted the claim that the Shariat is immutable and parliament is not competent to modify it. The position of the government is, from the point of view of Muslim community, is in consonance with the Muslim Personal law, (Shariat) Application Act, 1937 which allows Muslims to be governed by their Islamic law in
certain specified matters. But from the women's point of view the stand taken by the state is to perpetuate the legal inequality created by religion based personal laws. It is significant for women because by accepting the religio-political leaders as the spokesmen for the entire community, the state has virtually ensured that women continue to suffer legal inequality for the religio-political leaders are not even suggesting that some aspects of the *Shariat* may be in need of change. Mr. Hamidullah Beg opined:

"The Constitution gives every individual his or her religious freedom. It does not give any group the right to thrust its views on even one individual. It is imperative that members of all minority groups even within the minority receive equal treatment with those of the majority."  

From the above discussion it is clear that the state's attitude towards the reform of minority Personal laws is to some extent consistent. The state after reforming the Hindu Religious Laws did not reform the minority personal laws. Sometimes the state declared that it cannot force the minority community to accept the reform in their personal laws and at another time declared that the voice or the demand in the change of Personal law should come from the community itself. It may be called as the government's realisation that any change in the minority personal laws would not be beneficial for the state. It may also be termed as political
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expediency of the ruling party not to touch a very sensitive issue of the minority community. It may also be termed as the government thinks that the Shariat Act, 1937 and Article 372 of the Constitution of India does not permit it to change the minority personal laws.

G. The Muslim Women (Protection of Rights on Divorce) Act, 1986

In 1986 it was the aftermath of Shah Bano’s case when the parliamentarians had to mend not only to renovate the maintenance provision but to pass a full fledged Act relating to the maintenance for Muslim divorcee in accordance with ‘Shariat’. When the Shah Bano case was decided by the apex judiciary, a great controversy in Muslim circle detonated and the Muslims depreciated and depreciated to accept the judgement there off and further demonstrated that the time of reasoning adopted by judiciary was wholly unjustifiable and untenable and could not stand the test of logical and cogitative deduction as same is contrary to the Shariat. Hence, they joined and envigorated the hands of Muslim leadership and came under the banner of All India Muslim Personal Law Board, and started a countrywide demonstration and protestation and same germinated the consensus of the majority of the Muslims of India in favour of the move to demand statutory protection of their personal law relating to maintenance.78
The process of mobilising Muslim public opinion by referring to their religion based personal law and the immutability of the *Shariat* was again repeated most forcefully in 1985, in response to the Supreme Court judgement in what became known as *Shah Bano’s case*. The Muslim Personal Law Board was an intervener in the Shah Bano Case. The Muslim Personal Law Board strongly criticized the Supreme Court judgement as a gross interference with Muslim Personal Law and decided to organise the Muslim Community to stop this ‘interference’. The Muslim Personal Law Board started a countrywide protest on the last Friday of *Ramadan*, a day on which Muslims gather in large numbers to offer prayer at the Mosque. The month of *Ramadan* is very important in Islamic calendar year and the last Friday of the *Ramadan* is the most important day of the month. By choosing the last Friday of *Ramadan* the Muslim Personal Law Board started continuously the protest against this judgement. Muslims responded in great numbers and from then a wide spectrum of Muslim leaders took up the task of mobilising Muslim masses to protest against the Supreme Court judgement. Wherever the Muslim leaders went they were able to organise big rallies. In *Bombay*, for instance, more than 300,000 Muslims joined a protest march in November 1985. In *Siwan*, Bihar more than 400,000 Muslims joined a conference convened by the Muslim Personal Law conference conveners. The pattern was repeated all over the country. The demand for recession of the
judgement in Shah Bano's case (as well as the earlier cases) was primarily based on the reason advanced on all previous occasions namely that Muslim personal law is divine and hence not susceptible to modification by any human agency. Most Muslim leaders claimed that the decision that Section 125 of CrPC was applicable to Muslims amounted to a direct contravention of 'Shariat'. They maintained that the husband's liability to pay maintenance came to an end with 'Iddat', and some went to the extent of saying that it was actually a sin to give maintenance after this period.83 The most important reason advanced by the agitationists was the interpretation of the Qur'an by the Supreme Court. They were of the opinion that by interpreting the holy Qur'an the Supreme Court was guilty of injuring the sentiments of the Muslims and by deciding to interpret the holy Qur'an it had taken the role of social reformer and violated the basic rules of Shariat. Some religio-political leaders claimed that the inaction and the ambigous stand of the government with regard to demands of Muslims had endangered the future of Islam in India.

The following two statements are representatives of the arguments used by Muslim leaders who sustained the movement to rescind the Supreme Court judgement. Maulana Abul Hasan Ali Nadvi, a member of Muslim Personal Law Board, thought that:

"The problem of the protection of Shariat today is the most important problem for the Muslims of
India... The Muslim feelings have been deeply hurt by the aggressive attack from all sides on the Muslim Personal Law. The government’s wake and doubtful approach and the Supreme Court’s judgement have made the future of Islam in this country dishonourable.\(^8^4\)

Maulana Asad Madni issued a Threat that

"Muslims cannot tolerate any interference in Shariat which is divined law. If they are compelled in this respect it can lead to undesirable consequences and the integrity of the country can be affected."\(^8^5\)

(i) **The Response of the Union Government**

Mr. G.M. Banatwala, the General Secretary of the Indian Muslim League, introduced a private members bill in the Lok Sabha designed to overturn the Supreme Court decision in the two earlier cases of *Bai Tahira* and *Fazlun Bi*.\(^8^6\) Mr. Banatwala’s bill proposed the exemption of Muslims from the pronounced by the Supreme Court focussed the attention of the entire nation on this issue and on Banatwala’s bill. The initial response of the Union Government was to oppose the bill introduced by Banatwala and its response was informed by the considered opinion of various advisors.\(^8^7\) The legal advisors note, dated 25 May 1985, said that the Supreme Court had correctly interpreted the law. In the words of the Law Secretary:
"The decision of the court cannot be regarded as an encroachment on Muslim Personal Law, which is of civil nature whereas, Section 125 is a provision contained in the Criminal Procedure. In view of the foregoing, the bill to amend Sections 125 and 127 of the Cr.P.C. should be opposed. This view was supposed by the Union Law Minister Ashok Sen and the Minister of State for Law on June 2 and June 1, 1985. The Ministry of Home Affairs prepared a note, dated 24th July 1985 opposing the Banatwala bill even in the Lok Sabha, Arif Mohammad Khan, Minister of State for Home Affairs, argued forcefully against any move to exempt Muslim men from the perview of Section 125 Cr.P.C."

When Muslim including Muslim Parliamentarians, Muslim leaders of different organisations and prominent Ulema of different schools of Islamic jurisprudence showed their resentments and mounted the pressure through all legitimate forums, the then Congress Government headed by Rajiv Gandhi Changed its response. The intensity of the agitation against the Supreme Court judgement compelled the government to reverse its initial stand. Mr. Z.R. Ansari another Union Minister argued forcefully against the Shah Bano judgement for three hours in the Lok Sabha. He said that the Shah Bano judgement was contrary to Islam. Later on Mr. Ansari requested Banatwala withdraw his bill so that the government could find a wayout which would be proper for all minorities.
The Bill, entitled the Muslim Women (Protection of Rights on Divorce) Bill, was introduced into the Lok Sabha in February 1986. The statement of objects and Reasons accompanying the bill explains that since the Supreme Court’s decision in Shah Bano case has led to some controversy regarding the obligation of a Muslim husband to pay maintenance to his divorced wife,

"opportunity has therefore been taken to specify the rights which a divorced Muslim women is entitled to at the time of divorce and to protect her interest".

Introduction of the ‘Muslim Women (Protection of Rights and Divorce) Bill in the Parliament gave a shock to the ‘Pseudo-Secularist hailers of the Shah Bano judgement for its so understood anti Shariat bias. Their ego was badly hurt and they came out to misrepresent the newly proposed law to the ignorant layman as a frightful national calamity. Passing of the Bill would in their opinion herald India’s doomsday. Loud criticism was made without even caring to read its provisions and dispassionately understand the political will and legislative intention in the back ground. The bill was described as a ‘fraud’ on the Constitution’, ‘a slap on the face of secularism’ and an lawfully unwise step that would provoke the majority community to ‘communal frenzy’. Its supporters were freely called, ‘anti nationals, orthodox and lunatic’. 
The pendency of the bill before the parliament for about three months and in this duration same assumed the majority-minority conflict divorcing the realities of secular India as enshrined in the Constitution of India, but on communal basis. Intellectuals and public men of both the communities defended their contention barring few exceptions in both the communities. The spokesmen of the Muslim community advocated that the bill is constitutionally justified and entitled to enjoy the protection guaranteed to the minorities in Part III of the Indian Constitution, while the spokesmen of the majority community contended it as anti human more violating the principle of equality guaranteed under articles 14, 15 and 16 of the Constitution and found it discriminatory too.

(ii) The Lok Sabha Debate on Muslim Women Bill

The government did not take much notice of the opposition generated by this bill and on 6 May, 1986 the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed. An account of the Lok Sabha debate enables us to ascertain the position of the government and the main issues that were discussed during the debate. When initiating the discussion, the Law Minister traced the stand of the government since independence on the matter of reform on Muslim Personal Law. He explained that it had been accepted from the start that Muslim Personal Law would not be altered without the community's
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consent. He relied on a statement made by Ambedkar in the Constituent Assembly\(^{96}\) to prove that, even at that stage it was acknowledged that the state may not impose uniform laws on minorities.\(^{97}\)

The Law Minister explained that the Cr.P.C. provisions (Sections 125-127) had made specific mentions of the Muslim community's practise and had exempted Muslim men from paying maintenance to their divorced wife if they had paid the full amount payable on divorce. He emphasized that the provision of Cr.P.C. was made so that no Muslim persons should be offended. In his view, the Supreme Court in delivering the Shah Bano judgement had, among other things, forgotten that a Uniform Civil Code, even if enacted, may be optional in its application. This reference to the Uniform Civil Code as well as other parts of the judgement had created great apprehension in the minds of Muslims that their religious laws were being tampered with. The Law Minister said that the government could not possibly be blind to this anxiety among the 'largest' minority community in India.\(^{98}\) Therefore, the government has correctly decided to accept the view held by Muslims about their personal law rather than that of those who thought secularism demanded that everybody must be 'tarred with the same brush'.\(^{99}\) Accordingly the government came to the conclusion that since Muslims have a particular understanding of their personal law, the government is duty bound to pay attention to it. The Law Minister emphatically denied that the government
has succumbed to the forces of communalism or fundamentalism because they had merely listened to the 'just' demands of the community.\textsuperscript{100}

From the above it is clear that the government defended its action for introducing the bill on the basis of safeguarding the 'wishes' of the minority community. The government felt its duty in safeguarding the protection given to the minorities in the Constitution of India. But the stand of the Law Minister is criticised by Archana Parashar in the following words:

"In order to legitimise this stand, the Law Minister misrepresented the meaning of Ambedkar's statement, which was made during the debate on the constitutional article dealing with the Uniform Civil Code. What the Law Minister failed to point out was that the statement was made in response to the demand that Muslim Personal Law should be exempted from the purview of the Uniform Civil Code article. Ambedkar, at that time, had refuted the claim that Islamic law had not been modified by the legislature and had admitted only that the Uniform Civil Code may be initially optional. On another occasion Ambedkar had unequivocally stated that no community should expect that its personal law could remain outside the control of the Constitution."\textsuperscript{101} Thus
Ambedkar had made the statement, quoted by A.K. Sen, to suggest only that ‘in the initial stages’ the Uniform Civil Code could be optional and I argue that A.K. Sen misrepresented the actual meaning of the statement.”

The Muslim women bill was vehemently opposed in the Lok Sabha. The main reason put forward by the opponents of the bill was that the bill contravened Articles 14, 15(1), 15(A) (e) and 44 of the Constitution. The main objection was that this bill denied Muslim women their constitutional right to equality. The bill was opposed mainly by Madhu Dandwate, Saifuddin Chaudhary, K.P. Unnikrishnan etc. K.P. Unnikrishnan charged the government with surrendering to those ‘dark forces’ which insist on an expensive jurisdiction of religion and said that the medieval religion and social practises were opposed to the social region enshrined in the Constitution. He further said that the bill contravened the constitutional principles that religious freedom should be subject to public order by asserting that the constitution allows reasonable classification to be made and a law made only for the community is a perfectly valid classification.

The government further defended its action that the bill was to promote the interest of Muslim women and this bill was designed to safeguard their interest. Furthermore, the government tried to show that the bill was designed to give Muslim Women
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than were available to them under the provisions of Cr.P.C. The law minister and many other member of parliament asserted in the parliament that the present bill puts no limit on the amount of maintenance that could be paid and the wife would have the option to claim maintenance from a number of people. But there was no explanation of why the government was singling out the women of one community to give them better rights than those enjoyed by the rest of the Indian women. If there was any defect or inadequacy in the provision of the Cr.P.C. dealing with the maintenance, the remedy was to reform the Cr.P.C. rather than to single out the women of one community for preferential treatment. It was also pointed out that the Waqf Boards, which are ultimately charged with providing help to indigent divorced Muslim women, are themselves financially mismanaged, and so giving them eventual responsibility to provide maintenance for Muslim women was merely a cosmetic measure.\textsuperscript{102}

The debate in the Lok Sabha on the bill was supported by the members of various political parties including Congress, Janata Party, Muslim League etc. The bill was mainly supported on the ground that consideration of national integrity demanded that the bill be enacted. It was said in the Lok Sabha that due to the activities of the press the atmosphere in the country was emotionally charged and the communal background of the controversy made it to enact the bill in order to save the nation fro disintegration.\textsuperscript{103} Another member of Parliament K.C. Pant
explained that:

"There is need for unity and integration at this time, the need to bring communities together at a time when fundamentalism is growing all around us."

Begum Abida Ahmad, a Muslim women member of Parliament, argued that the bill maintained the self respect of women and even enhanced it, and she asked why any self respecting woman would beg maintenance from someone who had divorced her and thrown her out of his house. It was also asserted by many member of Parliament in the Lok Sabha that it can conduct its own affairs, have its own way of life, preserve its own cultural and religious identity and have the complete freedom to practise its own religion. A considerable number of ruling party members were also of the view that 'if Muslims are satisfied then no one else may have a say in the matter'. Sheila Dixit took the view that if the vast majority of a community believed that their women already had enough protection there beliefs and sentiments had to be honoured. Another member of Parliament Saifuddin Ahmad was of the view that such an attitude was bound to separate the Muslims from the mainstream of the community. But his stand was not shared by most Muslim members and many of them applauded the efforts of the government to secure national unity and integration. Syed Shahabuddin described the measure as:
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"a symbol of the continuing struggle in our country between the forces of coexistence and national integration on the one side and the forces of assimilation and absorption on the other." 107

Ibrahim Sulaiman Sait, a leading member of the Muslim league said that ‘In this country which is multi-religious, multilingual and multi cultural, the idea of achieving national integration through a Common Civil Code is a .... delusion.’

From the above account it becomes evident that during consideration of the bill the main issue of debate the fact became obscured that the whole process of protest, communal polarisation and the eventual decision of the government to overrule the decision of the Supreme Court has been started by the issue of a divorced Muslim women’s entitlement to maintenance. Instead of centring on the issue of disadvantage to women, or the relationship between the religious personal laws and the state, the debate became focussed on national integration.

Thus, Rajeev Gandhi, the Prime Minister of India satisfying the essence of the democratic norms, honouring the sentiments of the Muslim community, paying respect for the religious rights of the Indian minority and realising the truth within the framework of the Indian constitution that different personal laws of different communities, religious and cultures are entitled to coexist and continue, passed ‘the Muslim Women (Protection of Rights on
Divorce) Act, 1986’ with the view to satisfy the spirit of ‘Shariah’ regarding the maintenance. The contents of the Act nullify the evil aspects of legislation and judicial pronouncements in the area of maintenance of Muslim divorcee which constitutes one of the segments of the Muslim Personal Laws in India.\textsuperscript{108}

By enacting it government of India has, according to the Muslim viewpoint, demonstrated its respect for the equality of all religions on Indian soil and its regards for the religious rights of the minorities guaranteed in part III obviously, felt otherwise.\textsuperscript{109}

It is easy to understand why the government decided to accept the religio-political leaders as the sole spokesmen for the entire community. These leaders had demonstrated their capacity to mobilise large numbers of Muslim masses. Moreover, they had succeeded in articulating the idea that members of the Muslim community were feeling threatened and alienated from the rest of the society and the state because the community perceives that their religious personal law was in danger of being obliterated. The Supreme Court judgement was depicted as an effort by the state to supercede the principles of Islamic Personal Law with state law. The support given to the Shah Bano judgement by the intelligentia, mostly Hindus but some prominent Muslims, too, was portrayed as an effort by the majority to threaten the survival and sanctity of Islamic Law. The Muslim leaders argued that the sense of persecution suffered by the Muslim community was
threatening the integrity of the nation, and that Muslims would feel secure only when the government reversed the Supreme Court judgment. The Lok Sabha debate on the Muslim Women bill makes it clear that the government accepted this claim. The enactment of the Muslim Women (Protection of Rights on Divorce) Act was probably meant to reassure Muslims that their religious Personal law, (and through that their religion and culture) was not in danger of being wiped out.\(^\text{110}\)

(iii) Reforms in other minority religious Personal Laws

In the preceding pages we have seen that the state has been reluctant to make changes in the religious Personal laws of Muslims. The same is the case with other minority religious personal laws i.e. The Christians and the Parsi communities. As there has been virtually no discussion about the religious or secular nature of these laws, it cannot be said that the non-interference of the state is due to the immutable nature of these Personal laws. Rather, the reason for the state’s non-interference in the Personal Laws of these communities is their ‘minority status’. Their minority status is an important factor in the state’s decision to leave these Personal laws unreformed. The state’s conduct with regard to the reform of Muslim Personal law has been repeated with regard to the Personal Laws of other minority communities. In the following pages the researcher will discuss the attempted reforms in Christian Personal Law and Parsi Personal Law.
H. Reforms in Christian Personal Law

Like other Personal Laws Christian Personal law also discriminates against women. Although Christians all over India have a uniform law of marriage and divorce extreme diversity exists with regard to their succession laws. Christian women, like women of other communities, have less rights than men in personal matters. Unlike other communities, Christian Personal Law consist mainly of state made law. The former British government was more confident about legislating for Christians than Muslims or Hindus and perhaps the reason for this was that they were also having the Christian faith. The promulgation of the Government of India Act, 1935, did not result in any legislative activity to reform Christian Personal Law. After independence the government although prepared two reports but did not straight away reform Christian Personal Law. The government introduced the Christian Marriage and Matrimonial Causes Bill in the Lok Sabha in 1962. The Lok Sabha debate show no record of any discussion on this bill which lapsed in 1971 but it is generally believed that the Christian Bishops were opposed to the contemplated reforms and the government acceded to their wishes. Since then no legislative activity or any effort by the state has been noticed to reform Christian Personal law.

In 1983 the Law Commission prepared another report on the grounds of divorce for Christians but the government has yet to
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...act upon its recommendations. There is no direct information available about the government’s view on the matter of Christian Personal Law reform although the government has been made aware of the demand at least by certain sections of the community, for changing their Personal Law. The Joint Women’s Programme (a branch of the Bangalore based Christian Institute for the Study of Religion and Society) sent a memorandum signed by nearly ten thousand people, to the Union Law Minister asking for the removal of laws discriminating against women.

Subsequently, the Joint Women Programme, along with a representative section of Christian women belonging to different women. Fellowships of the Churches in Delhi, presented a memorandum to the Prime Minister of India in February 1986 (4.ii.86). The memorandum claimed to represent the opinions of very wide sections of Christian community since the changes it listed had been demanded during various meetings held by the joint women’s programme. 

The Supreme Court delivered a landmark judgement in Mary Roy’s case in 1986 and declared that the Indian Succession Act, 1925 supersedes the Travancore Christian Succession Act, 1916. The result of this decision is that Syrian Christian Women now share equally with their brother’s in the property of their father. Under the Travancore Christian Succession Act the share of the daughter was only one quarter of...
the share of the son subject to a maximum of Rs. five thousand.\footnote{16}

The Supreme Court further held that the Travancore Act became inopertive following the enforcement of the part B State Laws Act, 1951 and thus the succession to property left by intestate Christian males during the last thirty five years now open to dispute. In other words, the judgement had retrospective effect.

The Kerala Government filed a review petition, seeking the elimination of the retrospective effect of the judgment, but it was rejected. The reactions of the Christians was the same as the reaction of the Muslim in the Shah Bano Case. The Church establishment in Kerala also launched a concerted campaign against the Supreme Court judgement Priest belonging to the Roman Catholic, Jacobite, Church of South India and Kananya Churches criticised the judgment in pulpit pronouncements. Pamphlets were distributed by churchmen and the meetings were organised to mobilise Christian opinion against the judgement. The Church of South India priests on two consecutive Sundays assured young Christian men that they would continue to get what they had been getting all along and the law did not change anything. \textit{A new Personal law for Christians was demanded by Bishop Abraham Marclemis of Kananya Church}. He said that the Supreme Court judgement has created an economic impasse for the Christian community and this judgment was likely to destroy
the whole Christian Community of India. He was very critical of the judgement where no property could be transferred without the consent of female. The Jacobite Church similarly demanded a new personal law for Christians. The Church’s opposition to the application of the Indian Succession Act instead of the Travancore Succession Act has no obvious religious basis. Apparently one of the reasons why the Churches so vociferously opposed the judgement was that a portion of ‘Stridhanam’ traditionally goes to the Church and if the practise was suspended the Churches stood to loose materially.117

Meanwhile, a private members Bill118 ws introduced in the parliament by Professor P.J. Kurien, a senior Christian Congress (I) members of Kerala. Significantly, the M.P. who move this bill represented a constituency where rich Christian land owners are powerful.119 The Bill sought to modify the Supreme Court judgment so that it is not given retrospective effect.

The religious functionaries’ solidarity with men rather than women in this instance is a clear illustration of how the power of religion is used to perpetuate male privilege. Neither the Succession law nor the Christian Divorce law is a strict application of Canon Law. The Indian Divorce Act, based on an outdated English enactment, is still prevented by the religious leaders from being modified. No justification is forthcoming either from them or the government for this situation.120 In view of the
government's stand in response to the Muslim community's demand that the Shah Bano judgment be overturned by legislation, it is not impossible that the state may enact the Kurient Bill into law if there is sufficient agitation on the part of the Christian religions leaders. The significance of the state's agreement to treat religio-political leaders as the sole spokesmen of the community and to give religious Personal law a status higher than non-religious civil law can not be understated. The state may in future be compelled to accede to similar demands by other communities, at the risk of being made to appear inconsistent.

I. Reform in Parsi Personal Law

As far as the Parsi Personal Law is concerned a move to reform it was taken up by Parsi Central Association in 1923. A sub-committee was appointed to suggest suitable changes. The sub-committee known as the Parsi Law Revision Sub-committee submitted its report in 1927. The Parsi Central Association sent five hundred copies of this report to all the Parsi Associations, Anjumans, delegates of the Parsi Chief Matrimonial Court, to Parsi Jurists and Publicists all over India and even to Parsi Associations in China and Persia also. This report was also published in the press and certain modifications were also circulated for public opinion. A conference was arranged under the auspices of the Parsi Panchayat with twenty five Parsi Associations taking part. These modifications were approved by
twenty one associations and four of them did not support the modifications as they were ‘ultra conservative’ in their views and do not as a rule approve of any changes in keeping with the changing times.\textsuperscript{121} Thus, a bill to amend the Parsi Marriage and Divorce Act, 1865 was considered by the Federal Assembly in 1936. This bill was first introduced in the Council of state in 1934 by Sir Phiroze Sethna. It was circulated for opinion and a joint Select Committee was appointed to consider the bill in 1935. The Select Committee reported to the Council of State in 1935 and it passed the bill on 13.iii.36. The Federal Assembly considered the bill in April 1936.\textsuperscript{122}

As far as the applicability of Parsi Personal Law is considered it applies to Zoroastrian Children born to Zoroastrian parents; and children of a Parsi father and a non-Parsi mother who have been admitted to the Zoroastrian religion. If a Parsi woman marries to a non-Parsi the child born to her are not admitted as Parsis. The difference in rules governing children of non-Parsi mothers and fathers is apparently based on a Bombay High Court decision.\textsuperscript{123} It was held in that case that in a marriage between a Parsi woman and a non-Parsi man the presumption is that the wife will have to accept the religious faith of her husband. It means that the children will be brought up according to the religion of the father. Thus, this discriminatory definition of who is a Parsi is not based on the religious tenets of Zoroastrianism but is due to the judgement of Bombay High Court in \textit{Sir Dinshaw Case}. 

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However, one of the priests of the community is reported to have said that a Parsi woman marrying a non-Parsi was guilty of adultery and the children if the Union would be illegitimate.

Similarly, the rules embodied in the Parsi Marriage and Divorce Act, 1936 and the Indian Succession Act 1925 applicable to Parsis are not even claimed to be based on the tenets of Zoroastrianism. As explained above the modifications into the Parsi Personal law were brought about by consulting members of the community and not merely the religious leaders.\textsuperscript{124} Anklesaria believes that Parsi Personal law is based on Hindu customs and the rules of English Common Law. Parsi immigrants arrived in India in the seventh century and there is little documentation of the legal system which governed them when they first arrived. They took on Hindu customs and institutions like the Panchayat for administration of their affairs and priests had the final say in all religious matters. However, Parsi Personal Law like all other Personal law has been assumed to be a religious law and the community has not been forthcoming with suggestions for change until recently. If it is accepted that rules of Parsi Personal law are not religious rules. Then there remains no justification for continuing with rules that discriminate against women. A plausible explanation that can be put forward for this state of affairs is that Parsis are a religious minority and the state is reluctant to interfere with their personal matters.\textsuperscript{125}
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The Government of India has not made much effort to modify the Parsi laws, rules that discriminate against women. It was, in 1986, for the first time that a Parsi Marriage and Divorce Amendment Bill was introduced in the Rajya Sabha (on 24 November, 1986) and passed by the Lok Sabha and then the Rajya Sabha on 3.vii.87. It received the assent of the President on 25.iii.88, and came into force on 15.iv.88. The process of amending the Parsi Marriage and Divorce Act, 1936 was initiated by the Board of Trustees of the Bombay Parsi Panchayat. It submitted recommendations to the government which introduced the bill to amend the Act and enacted it in March 1988. However, the provisions discriminating against women continue to exist and most of the amendments have been described by Phiroze Vatul, a Parsi lawyer, as of ‘cosmetic nature’.

From the above discussion it is clear that the attitude of the state towards reform in Personal Laws of majority and minority communities is not same. As far as the Hindu majority is concerned the state reformed their Personal Law although still the Hindu Personal Law does not treat women at par with men. The reform in Hindu Personal Law was an urgent need of the hour and that's why the state, to some extent reformed Hindu Personal Laws. But as far as the minority religions Personal laws are concerned the state just after the partition did not try to interfere in that area on the assumption that this endeavour will hurt the religious minorities and alienate them from the majority. One more
reason for not interfering in minority religious Personal laws was that the state did not want to give the impression of coercion in the matter of religious laws and whenever the state tried to interfere in the personal laws of the minorities that was vehemently opposed by the minorities. Upon this attitude of the state Archna Parashar comments:

"The national leader's special consideration for the Muslim minority in post partition period was thus not based on any constitutional principle. The national leaders were not constitutionally bound to treat minorities any differently from the Hindu majority. In the context of the religious personal laws if the state assumed the authority to reform Hindu Personal Law, it could have done the same with regard to Muslim and other religious personal laws. The decision not to reform the minorities’ religious personal laws was most likely based on the assumption that being a minority, it was easy to alienate them by giving the impression of coercion in the matter of religious laws. As explained above the advantage of giving special status to the religious personal laws of Muslims, and other minorities, was that the government was more likely to get the cooperation of the Muslim religious-political leaders in its task of nation building."
Summary

Historically, personal laws of the minorities were discriminatory to women except Parsi law. While Hindu laws were reformed by the State, the same could not be done, as the policy was to reform them on the demands of the community concerned. Hence, clearly the reform process is based on the minority status of the community and not as per the position of women. Some efforts have been made in regard to Parsi and Christian laws.

Legislative Activity with Regard to Muslim Personal Law

Apart from the general impression Muslims too, like Hindus, tried to reform their laws time to time. The Jamiat-ul-Ulema Hind was of the opinion that only Ulema can interpret Shariat. While the political elites represented by Muslim League considered all such questions of reform in comparison to their Hindu counterpart. Introduction of Shariat Application Bill in Federal Assembly in 1935 was first such an attempt by Jamiat-ul-Ulema-i-Hind. Debates in Assembly brought several contradictions in open. Ulema and Muslim League differed on certain points. Bill was sent to Select Committee. The result was that some un-Islamic customs were accepted under the Bill. Khojas and Memons were allowed to carry on their customs despite objections by Ulema. Although it failed to a Uniform Islamic Law but the enactment set the pattern for the future.
Dissolution of Muslim Marriages Act 1939

Dissolution of Muslim Marriages Act, 1939 was a constructive attempt by the Ulema to enhance the position of women. There were diverse procedure for dissolution of marriage by women according to school of thoughts. Hanafi law permitted dissolution on the conversion of women. To stop the practice of conversion, Ulema decided to streamline the procedure. In 1936 Muhammad Ahmad Kazmi introduced a Bill in Federal Legislative Assembly which was based on the Al-Hilal-Al Najizalil halilal-Al Ajza of Maulana Ashraf Ali Thanvi. After the consideration of Select Committee, the Assembly adopted it in 1939. Final enactment of the Act dissatisfied Ulema and they tried to get it stalled but failed. Finally it passed and is enforced irrespective of school of thoughts. This attempt proves that political and religious leaders used legislative opportunities for the betterment of their women-folk.

The Special Marriage Act 1954

In post-independence India, the policy of government was to cover all communities under one law. When the Special Marriage Act, 1954 was introduced in the Lok Sabha, Muslim members felt some apprehensions and Kazi Ahmad Hussain said in House that minorities must heard and their pleas be incorporated for any change. In last the Bill did not excluded any community and covered all. A heated debate took place and Muslim League
expressed grave concern over Special Marriage Act. Despite passing out the Bill, it was made clear that Parliament should not interfere in Shariat and the Acts of Parliament must not encourage Muslims to leave their religion. Special Marriage Act, was portrayed as a secular law.

Hindu Law Reforms Act

During the debates on the Hindu Code Bill, the government often faced the charge of interfering with Hindu Laws. Government stand was that this is the first step towards Uniform Civil Code. But the later developments show that either the government was shying away from enacting Uniform Civil Code or their position did not permit them to embark upon such a mission.

The Criminal Procedure Code 1973

In 1973, Criminal Procedure Code, 1898 was replaced by Criminal Procedure Code, 1973. It enabled women's particularly Muslim women, to obtain maintenance after divorce under sec. 125 CrPC. It also defined the word "wife" which includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried. Objections were raised by Muslim scholars on this definition. Ibrahim Sulaiman Sait opined that Muslim Personal Law does not include a "divorced wife". After much controversy, the bill was passed with modifications and satisfied the Muslims at large.
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The Adoption Bill, 1972

Since 1956, efforts were made to have a perfect Adoption Bill. This effort has opposed by Muslim Ulema due to conflict with tenets of Islam. In last nothing concrete could be achieved as the government accepted that the Shariat Act, 1937 and Article 372 of the Constitution of India does not allow to change Muslim Personal law.

The Muslim Women (Protection of Rights on Divorce) Act 1986

A bitter socio-politico controversy took place after the judgement of Supreme Court in Shahbano case. Muslim masses were mobilised to oppose the judgement and Parliament had to intervene to alter the judgement by enacting above titled Act. Lok Sabha debates show that opponents of the Bill took refuge behind the plea that it will violate Articles 14, 15(1), 15(A) (e) and 44 of the Constitution. The supporters were of the opinion that Supreme Court misinterpreted Qur'an and the judgement was an interference. To rectify the mistake done by the Supreme Court the Act should be passed. The Bill was passed because socio-religio leaders managed the public outcry and government wanted to respect the views of the Muslims.

Reforms in Other Minority Religious Personal Laws

Some reforms were also carried on Parsi and Christian laws. Among Christians Succession laws were diverse although their
marriage and divorce laws were Uniform. In future government may reform Christian laws, if public pressure built because Supreme Court judgement in Mary Roy’s case in 1986 became controversial like Shahbano case. Reform of Parsi laws was taken up by Parsis themselves since 1923.

In short state is trying to achieve equality of men and women but its attitude differs for Hindus and minorities due to several reasons.
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References


2. M. Hasan (1986, pp. 1074-79), who says that the communitarian concerns of the Jamiat’s Ulema were not limited to the religious domain and to specific issues relating to the Shariat, and that they intervened in politics not as spokesmen of Muslim alone but of other groups as well. Their religious idiom and the use of Islamic symbols was intended to serve the secular objective of rallying the populace around the Indian national movement.

3. The Shariat application bill later on became the Muslim Personal Law (Shariat) Application Act, 1937 which is the most important legislation as far as Muslim Personal Law in India is concerned.

4. Legislative Assembly Debates, Vol. 17, pp. 4157
5. (See the bill in the gazette of India, part V, 1985, p. 136).
10. Id. at 2528-44.
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13. Abdul Qaiyum, Legislative Assembly Debates, V, 9 IX. 37, p. 1427.
14. *Id.* at 1433-44.
15. *Id.* at 1431-32.
17. *Id.*, p. 1445, for Jinnah’s views on personal law reform see Mahmood 1976, pp. 111-45.
18. Sec. 3 of *Shariat* Application Act runs as follows.

(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 resident of the territories to which this act extends may, by declaration in the prescribed form and filed before the prescribed authority, declare that be desires to obtain the benefit of the provisions of this section, and thereafter the provisions of the section 2 shall apply to the declarant and all his minor children and wills and legacies were also specified.

(2) Where the prescribed authority refuse to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

19. Sec. 2 of the Act runs as follows:

"Notwithstanding any custom or usage to the contrary, all questions (save question 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 Mubara’t, 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).”


Yogendra Singh describes the changing nature of Islamisation thus: ‘It began as a process of external impact and conversion of low caste Hindus to the Muslim great tradition, then it emerged as a process of status mobility within the Islamic social structure very much like sanskritisation, and finally it regained its earlier orthodoxy; sub-cultural frills which are outside the tradition of Islam are purposely renounced with the view that Muslims must consolidate themselves into an organic whole irrespective of divergent little traditions.” (1973, p. 201).

23. *Ibid*.
25. Present day Saudi Arabia.
27. It gave certain women the option of puberty, i.e. the right to repudiate a marriage if it was performed while the women was still a minor and if the union had not been consummated. Discussion on the exact parameters of the
right show the concern of the Muslim religio-political leaders to maintain the authority of the father and the grand father rather than to safeguard the rights of women who was married during her minority (LAD, I, 9. ii, 39, pp. 615-53).


31. Supra note at 154.

32. Supra note at 155.


35. The Times of India, Nov. 17, 1953


38. The Indian Muslim League, the remaining component of the pre-independence Muslim league, passed resolution in Feb. 1949 that ‘this meeting views with alarm and grave concern the failure of the Constituent Assembly provide for the continued preservation and protection of the Personal laws of the Muslims and other religious communities.


40. Supra note at 162.


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44. Ambedkar, Constituent Assembly Debates, April 9, 1948, pp. 3651-52.

45. Parliamentary Debates, Feb. 6, 1951, col. 2466.


47. Supra note at 164.


49. In the intervening years since the reform of Hindu Personal Law until 1973, Personal law reform had dropped out of focus as an issue of ongoing public debate. As pointed out in Hindu law chapter, the state was nevertheless redefining the inheritance rights by enacting Land Ceiling Laws. The extent of change, and how it was introduced, however, form a subject for further research which cannot be taken up here. The other significant event was that the government of India on 22 sept. 1971, appointed a committee to make 'Comprehensive examination of all the questions relating to the rights and status of the women in this country' which would provide the necessary guidelines for formulating social policy. The committee submitted its report on 31st Dec. 1974 (Toward equality, 1974).

50. Section 488 of the Criminal Procedure Code, 1898.


52. Supra note at 165.

53. See Hindustan Times, Oct. 10, 1972, where it was reported that the Prime Minister, Mrs. Gandhi has asked the Muslims in India to start the process of reform along the same lines as had been adopted in the Arab countries. At the same time she also gave the assurance that her government would not agree to impose any reforms unless the Muslims themselves wanted them.


57. It is on record on Lok Sabha debate that letters had been sent to the Prime Minister by the religious heads of various institutions, including Maulana Mohd. Yusuf, Amir of Jamaat-e-Islami, protesting inclusion of the explanation to section 125 in the Cr.P.C. Bill. Muslim leaders led by Maulana Mufti Ateequr Rahman, President of Muslim Majlis-i-Mushawarat met Mrs. Gandhi personally.


60. Indian Law Reports, 25, 1897, col. 9.


64. See Sec. 127 clause 3(b), Cr.P.C., 1973.

65. *Supra note* 63 at 117

66. *Supra note* 22 at 168


69. Clause 13 provides that after adoption the adopted child shall be considered to be born to the adopting parent(s). The rights of the adopted child are specified are specified as excluding the right to marry he/she could not have
married in the natural family. Also the adopted child will not be divested if any property and will not divest anyone else of property that had vested before the date of adoption.

70. Surah 33, Ayat 4, 5.


72. Sahih Bukhari.


74. Supra note 22 at 171.


76. Supra note 22 at 172.


80. The Muslim Personal Law Board was established in 1973 as an organisation to study matters regarding the Shariat. Mohd. Shafi Moins describes the creation of this board as significant because before its creation the govt. had never expressed any opinion about the feelings of Muslims. But immediately after the creation of the board, the govt. declared that no changes in Muslim Personal law shall be made until Mulsims themselves desire them. See Defence of Sharit, difficulties and solutions (N.D.) an Urdu Publication of Jamaat-e-Islami, Delhi.

81. India Today, Nov. 11, 1985


83. Id. at 10.

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85. Ibid.

86. The Code of Criminal Procedure (Amendment) Bill to amend Sections 125-127; Lok Sabha Debates, May 10, 1985, cols. 406-408.

87. For further detail see Shouri, Times of India, March 4, 1986; See also Shourie, A., Religion in Politics, p. 92 (1987).

88. Lok Sabha Debates, August 23, 1985, Cols. 419-55.

89. Ansari’s speech reported in Times of India Nov. 23, 1985.

90. Lok Sabha Debates, Dec. 20, 1985, cols. 404-42.


92. Supra note 78 at 288.


94. Supra note 78 at 288.

95. The Rajya Sabha passed the bill on May 9, 1986. The President gave his assent on May 19, 1986 and thereafter the Act came into operation.

96. The discussion in the Constituent Assembly concerned the enactment of a UCC and Ambedkar’s statement was to the effect that it is perfectly possibly that the future Parliament may make a provision ... so that in the initial stage the application of the Code may be purely voluntary (Constituement Assembly Debates, Nov. 23, 1948, p. 551).

97. Supra note 22 at 179.

98. Lok Sabha Debates, May 5, 1986, Col. 313.

99. Id.

100. Supra note 22 at 180

101. Parliamentary Debates Sept. 20, 1951, Col. 2950
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108. *Supra note* 78 at 287.

109. *Id* at 289.

110. *Supra note* 22 at 188.


114. *Supra note* 22 at 190.


116. The daughter had a right to inherit the father's property if there was no son. In the presence of the sons of intestate, the daughter did not inherit anything. The provision for giving the daughter one quarter share or Rs. five thousand whichever is less, by way of stridhanam, which may be loosely translated into dowry.


120. A further difficulty faced by some Christians is that the state legal system does not recognise an annulment of marriage by the Church and vice versa. However, the Church refuses to marry a person who had obtained a
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Church dissolution of previous marriage but does not have a dissolution decree from the court.


124. Another instance where the priest and community members made an argument about rules is described by paymaster (1954, pp. 104-5) where he says, “The mobeds (priests) and Behdins of Navasari held a meeting on 3rd of June this year to fix the rule of ‘adoption’. It was decided as follows: The adopted son is the legal heir of the person adopting him, and should receive all the property of his ‘patron’ in the event of the later’s death. If any person other than the adopted son puts forward a claim on the dead man’s property, he is guilty of an offence against the Anjuman. A man may lawfully adopt any person as his heir during his lifetime. It is not lawful, however, for his wife to adopt anyone after his death. If it is necessary to adopt an heir after death, such adoption must have the sanction of the Anjuman. The adopted son incurs the liabilities of his father and must pay all his debts. He must also perform all his necessary ceremonies for his ‘dead’ patron, and the wife of the dead man may if she like, live in the house of the husband till death. A fine of Rs. 101 was fixed as penalty for any breach of these regulations.

125. Supra note 22 at 193.


128. Supra note 22 at 96.